NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER
Review Recommendation 14-083
September 24, 2014

Review File: 14-128-5

BACKGROUND

This review raises questions about both an access to information matter and a privacy matter.

Access to Information

The Applicant/Complainant (referred to herein as "A.B.") in this case was a member of the Board of Directors of a volunteer run not for profit day care organization. At some point, the Department of Education, responsible for licencing day cares, received a complaint about what the department said were "health and safety issues" in the day care, and attended the premises of the centre to conduct an investigation. The staff of the day care were all interviewed as well as one of the directors, but none of the employees or directors were advised as to the nature of the complaint made or where the complaint originated. It appears that several informal requests were made of the Department of Education for details about the complaint, but no response was received. Eventually, after several months, the day home was advised that the investigation had been closed, but no further details were provided, including the nature of the original complaint. A.B. then made a formal Request for Information from the Department on behalf of the organization. Records were eventually received but some information was redacted. Most of the redacted information was said to be the personal information of a third party, the disclosure of which would constitute an unreasonable invasion of that person's privacy. This third party was the person who filed the complaint with the department. However, A.B. says that when consulted by the department, this person consented to the release of her name and the complaint in its entirety. A.B. suggests that in these circumstances, there is no reason to withhold that third party's name from any of the materials.

Breach of Privacy

On the privacy side of things, A.B. alleges that the complaint letter received by the Department of Education was extremely defamatory about individual board members and parents personally, and that the allegations made, moreover, were completely untrue. The complaint, however, was shared with a number of people within the Department of Education as well as with the Department of Justice (both legal division and legal registries). A.B. says that they have discovered as a result of the records received that the complaints made against the day home were employee/labour relations issues, not safety issues. They say that the Department had no jurisdiction to investigate those kinds of complaints. As a result, the investigation done resulted in the inappropriate collection, use and disclosure of the personal information of the individual board members, employees and members of the association. Because of the nature of the complaints made, the dissemination of the contents of the letter could have potentially affected the livelihood of those named in the letter and even if the use and disclosure of the information in the letter were authorized, it was shared far more widely than was necessary to investigate the complaints made. He says that only one of the allegations in the complaint to the Department of Education might have amounted to a health and/or safety concern (that the acceptable child to staff ratio had been exceeded) and that the Department, therefore, at most, could investigate that narrow issue. Furthermore, that issue could have been fully addressed simply by reviewing the day care's records of attendance. Instead, A.B. says that the Department "interrogated our staff about the Board and parents of the [day care facility] as well as their job security." Further, A.B. argues that:

> Despite the narrow scope of the complaint, the questions were designed to collect information about any and all Board members and parents of the [day care facility], a collection of personal information I believe to be completely inappropriate, especially given that the accusations could have been disproven through official documentation prior to entering the daycare, which was intimidating to our staff and the Board.

Finally, A.B. states that the Department continued to disclose personal information collected during the investigation with the author of the letter of complaint even after the investigation was closed. He says that the ATIPP response received indicates that ongoing discussions continued between the Department's Director of Child Day Care Services and the complainant which included conversations in which personal information about board members was disclosed after the investigation ended.

THE RELEVANT PROVISIONS OF THE ACT

With respect to the access to information matters, the public body relies on the following provisions of the *Act*.

Section 23

> 23. (1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> (2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where ...
>
> (d) the personal information relates to employment, occupational or educational history; ....
>
> (h) the personal information consists of the third party's name where
>
> (i) it appears with other personal information about the third party, or
>
> (ii) the disclosure of the name itself would reveal personal information about the third party;

Section 26

> 26. (1) Where the head of a public body is considering giving access to a record that may contain information
>
> (a) the disclosure of which would be an unreasonable invasion of a third party's personal privacy under section 23, ...

the head shall, where reasonably possible, give written notice without delay to the third party in accordance with subsection (2).

Section 27

27. (1) The head of the public body shall decide whether or not to give access to the record or to part of the record not later than 90 days after notice is given under subsection 26(1)....

Section 15

15. The head of a public body may refuse to disclose to an applicant

(a) information that is subject to any type of privilege available at law, including solicitor-client privilege; ....

With respect to the breach of privacy issue, the relevant provisions are:

40. No personal information may be collected by or for a public body unless

(a) the collection of the information is expressly authorized by an enactment;

(b) the information is collected for the purposes of law enforcement;

(c) the information relates directly to and is necessary for

(i) an existing program or activity of the public body,...

43. A public body may use personal information only

(a) for the purpose for which the information was collected or compiled, or for a use consistent with that purpose;

(b) if the individual the information is about has identified the information and consented, in the prescribed manner, to the use; or

(c) for a purpose for which the information may be disclosed to that public body under Division C of this Part.

Section 48 outlines when personal information may be disclosed:

> 48. A public body may disclose personal information
> (a) for the purpose for which the information was collected or compiled or for a use consistent with that purpose;
> (b) where the individual the information relates to has identified the information and consented, in the prescribed manner, to its disclosure;....
> (e) to a public body or a law enforcement agency for law enforcement purposes;...
> (l) for use in the provision of legal services to the Government of Nunavut or a public body;...
> (u) for any purpose in accordance with any Act that authorizes or requires the disclosure; ...

THE PUBLIC BODY'S POSITION

Access to Information

In a number of instances, the name of the person who filed the complaint against the day care with the Department has been redacted. The public body indicates that, unless another exemption applies, the name has been redacted from all of the responsive records pursuant to section 23(h)(ii) of the *Access to Information and Protection of Privacy Act* as the name would "reveal other personal information about the third party to the Applicant". Although the submissions did not specify what that "other personal information" was, I am assuming that that information is that she filed the complaint with the Department of Education.

In other spots, names have been redacted pursuant to section 23(2)(d) of the *Act* because the record is "about the third party's employment history under the supervision of the Applicant (presumably, the term "the Applicant" in this context refers to the day home facility who requested this review).

Some information has been redacted pursuant to section 27 of the *Act*. The public body argues that these records contain third party personal information that they considered to have met the test for an exemption pursuant to section 23 (the disclosure would constitute an unreasonable invasion of the privacy of a third party). For this reason, they chose to consult with the third party pursuant to section 27 of the *Act*. When consulted, the third party consented to the disclosure of her information and the records were subsequently disclosed to the Applicant with the third party information intact. The third party in this case is, in fact, the individual who filed the complaint with the Department of Education against the day care.

In some records, a third party's name has appeared with other personal information. This information, along with the name, has been redacted pursuant to section 23(h)(i). In some instances, the public body says that the information edited from the responsive records contains a third party's opinion about another person who is not A.B., "which may have been shared in confidence with the Early Childhood Development Manager in seeking advice" and that information has been removed pursuant to section 23.

Some information was redacted because it was information about third parties that was "irrelevant to any complaints or investigation involving [the day care facility] or its board". This information was redacted as it related mostly to their education and/or health.

Some records consisted of confidential discussions between the Department and legal counsel for the Government of Nunavut. These were redacted pursuant to section 15(a) of the Act, apparently on advice of counsel. Other than that, there is no explanation as to the reasons for the public body's exercise of discretion in refusing access to the records.

Breach of Privacy

On the breach of privacy issue, the Department argues that they have the authority to investigate privately run day homes pursuant to sections 7,8 and 16 of the *Child Day Care Act*. These provisions state as follows:

> 7.(1) The Director shall inspect each child day care facility at least once a year.
>
> (2) The Director may, at all reasonable times, inspect a child day care facility including the equipment, the services provided and books or records relating to the operation of the child day care facility.
>
> 8.(1) Where the director, on reasonable and probable grounds, believes that a premises is being used as a child day care facility, the Director may apply to a justice for an order to enter the premises to investigate whether the premises is being used as a child day care facility.
>
> 16.(1) Where the Director believes on reasonable and probable grounds that the health, safety or well being of a child attending a child day care facility is endangered, the Director may suspend the license of the operator of that day care facility.

The department argues that their authority to investigate "is implied since inspections are a form of investigation and you would need a way to determine whether any complaint is reasonable and probable".

In response to my question as to whether or not the department had a specific policy in place with respect to conducting such investigations, the public body referred to a document entitled "Investigating Public Complaints." This document has not been produced by the public body.

In this case, the Early Childhood Officer received the complaint and developed an investigation plan, including developing a list of questions for staff and for the board. According to the Department, Legal Registries was asked a specific question about the make-up of the Board of Directors. While the department argues that no details were provided to Legal Registries when they asked a question about board make-up, this is contradicted by the email in which the question was asked which appears to include an attachment as well as the statement “attached is a letter of complaint we received”. This suggests strongly that the complaint letter, containing allegations against and personal information about A.B. and other board members, was, in fact given to Legal Registries.

The Early Childhood Officer sought “direction from policy” on whether to proceed with the investigation and “policy” gave the go-ahead to investigate and approved the questions which had been prepared for the investigation. No information was provided to me with respect to why “policy” was consulted or the authority of the Early Childhood Officer in terms of his/her job description or who within the Department had the authority or the responsibility of initiating investigations under the Act. Nor was any information provided with respect to the role of “policy” in such investigations.

The Early Childhood Officer undertook an investigation and visited the day care facility on three separate dates and interviewed the staff and one board member. After completing these interviews, the Early Childhood Officer requested legal advice on the authority of the Department to investigate the concerns raised, which were largely about personnel and internal policy within the day home. The next day, the investigation was halted on the advice of the Interim Director of Adult and Early Childhood Learning Services. Approximately a month later, the requested legal opinion was received and the following day the investigation was officially closed.

In initially determining the scope of the investigation, the public body says they looked at the items in the complaint letter that had to do with the Act and Regulations and the matter was discussed with senior staff, including the Interim Director of Adult and Early Childhood Learning Services and with the Director of Policy.

I also asked the public body to comment on what was done with any information which may have been improperly collected or disclosed, and what, if any steps, were or might be taken to address any damages that might have resulted to A.B. or others in the event that it was determined that their personal information was improperly collected, used or disclosed. The public body simply took the position that there was no improper collection, use, or disclosure. The department's position is that the investigation was suspended "prior to any meaningful decisions based on the information gathered". Since then, the records containing the information collected "have been filed according to routine records management policy."

The public body indicated that there were two issues raised in the complaint that the department felt were "health and safety" issues justifying the investigation - one was that staff/child ratios were not being met and the other was an allegation that there had been "a potential volatile incident" involving a parent where children were present.

In terms of the sharing of the information received in the complaint letter and collected during the investigation, the public body says that it was "only shared with Department staff that needed it to be able to respond to a request for advice and guidance" and to the Department of Justice, Legal Division, to obtain legal advice. No details are provided with respect to who, within the department, was given access to the information or what their specific role was, or what specific subsection of section 48 was relied on.

With respect to the allegation that the ECE Manager shared information with the complainant and/or the complainant's spouse even after the investigation was closed, the department says that, although there were discussions with those individuals, the discussions were with respect to other issues altogether and were not about the specific complaint and/or the investigation.

A.B.'S RESPONSE

Access to Information

A.B. argues that not every appearance of a name constitutes an unreasonable invasion of privacy. In particular, he argues that in many cases, the names of employees of the day care facility are known entities (it was the day care who made the Request for Information - they know who their employees are) and that it is not an unreasonable invasion of privacy to disclose the identity of a business or the work contact information for employees of the day home facility or of government employees. Finally, A.B. argues that since the complainant consented to the disclosure of her identity to the Applicant, it is unreasonable for the department to continue to withhold information relating to her.

Breach of Privacy

A.B. argues that while the Department of Education's authority to investigate a privately run day home is "implied" in the *Child Day Care Act* this does not give the department the authority to enter into a childcare facility unannounced and interrogate staff on any issue whatsoever, at any time they want to. A.B. further points out that the legal opinion received as part of the access to information request did not reach the conclusion that the right to investigate was implied. Rather, the legal opinion suggested that the department's responsibility under the Act was "ambiguous". The records received in response to the access to information request further suggest that "policy" (the division of the department cited numerous times as providing the Early Childhood Officer with advice from within the department) did not support the authority of the department to investigation employee relations within the day care facility. In fact, in the records received pursuant to the Access to Information request, the policy division of the Department concluded that there was no legislative power to conduct the investigation and that the authority given to the department to investigate day cares annually is only to ensure that licensing responsibilities are adhered to.

A.B. argues that even if the investigation was authorized under the *Child Day Care Act*, the scope of the investigation was far too wide. While there were some questions asked about child/staff ratios and parent behaviour, there were also questions about:

- behaviour of board members
- staff following the facility's policies on issues unrelated to either child/staff ratios or parent behaviour
- employment security of staff members
- decisions of the Board and whether or not these decisions were in the best interests of the facility
- whether or not board members were dishonest or guilty of misconduct and whether they had failed to carry out duties as provided in the society's by-laws
- how the day home chose to fill its available spots

A.B. further argues that while child/staff ratios might, in some instances, be considered a safety issue, in fact there is no specific allegation in the letter of complaint that suggests that the day home facility was not meeting child/staff ratio requirements. Rather, the only mention of staffing is an unsupported allegation that a director had "lied" to the department in regard to "staffing this summer in order to be able to pass the inspection". A.B. notes that all staff schedules and time sheets had been provided to the department on a monthly basis by the staff of the day care center as required by the Department and that this matter could and should have been resolved simply by reference to this paperwork.

With respect to the allegation by the complainant that a parent had become loud and abusive in the presence of children, again A.B. argues that this is not a matter that is ever handled by the Department of Education. Rather a complaint about parent behaviour is to be dealt with in accordance with the clear policies and procedures that the day home itself has in place regarding the behaviour of all adults who enter the facility and that these policies are clearly set out in the parent handbook. The department's own web site suggests, in a "frequently asked questions" section, that

concerns about licensed day homes should be brought to the attention of the facility director or to the facility's board of directors or parental committee.

A.B. also comment about the failure of the Department to provide a copy of its "Investigating Public Complaints" policy to them when they requested it or to this office as requested as part of my review process. He points to Section 71 of the *Access to Information and Protection of Privacy Act* which states:

> 71. (1) The head of a public body shall make available to the public, without a request for access under this Act,
> (a) manuals, instructions or guidelines issued to the officers or employees of the public body, and
> (b) substantive rules or policy statements adopted by the public body, for the purpose of interpreting an enactment or administering a program or activity that affects the public or a specific group of the public.

Finally, on the issue of confidentiality, A.B. says that the records received on their access to information request revealed that the complainant had had further correspondence with the department after the department closed it's investigation and in fact had filed a second complaint. In the second complaint, the complainant wrote:

> My [spouse] spoke to ...Manager of Early Childhood Development, and explained the situation. [The Manager of Early Childhood Development] was aware of the issues I was having and when told the situation by my [spouse] she explained she unfortunately could not do anything about the board's behavior (sic), specifically [A.B. and another named board member], as she only enforces the *Child Day Care Act*. My [spouse] explained to [the Manager of Early Childhood Development] [that my spouse] could not understand how [A.B.] and the board of directors were not held accountable for their actions. She agreed there seemed to be a

> conflict of interest with [the makeup of the board] but there were (sic) no legislation or act in place to control such behavior (sic).

A.B. says that there is no way that the complainant could have known the details of the investigation or the conversation he had with the department unless that information was shared with them by the department.

A.B. says that there were clearly a number of breaches of privacy as well as breaches of trust by the department and that these breaches resulted in financial costs for the day care facility for legal representation as well as leading to further accusations and harassment from the complainant.

DISCUSSION

ACCESS TO INFORMATION

I have the benefit of having access to all of the responsive records.There are some 562 pages, many of which are duplicates which came from different sources (i.e. several individuals within the GN had the same email chains on their computers). For the sake of brevity, the discussion below refers only to the first page on which the particular communication or piece of information appears. My comments, of course, apply to every duplicate copy of the same communication or piece of information within the package of records.

Section 23(2)(h)(ii)

Section 23 provides that public bodies must refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy. This is a mandatory section. If the information qualifies for an exemption, the public body is prohibited from disclosing it. Subsection (2) of this section sets out circumstances in which there is a presumption that the disclosure of the

information would constitute an unreasonable invasion of privacy. It is to be noted that a presumption is not absolute - it can be refuted. In this case, the public body chose to mask the name of the person who filed the complaint against the day home in every instance that it appeared in any of the records on the basis that the disclosure of the name itself would reveal personal information about the third party (subsection 23(2)(h)(ii)). While the public body did not specify how the disclosure of the name would reveal personal information about the complainant, I am guessing that they felt that it would reveal the identity of the complainant. This said, it was pretty clear from the outset that the Applicant in this case knew exactly who had made the complaint. Revealing her name would not have "disclosed" any information not already in the hands of the Applicant. Furthermore, and more importantly, the public body has indicated that the complainant expressly consented to the disclosure of her name to the day care facility. Section 23(4)(a) of the *Access to Information and Protection of Privacy Act* specifically states that there is no unreasonable invasion of personal privacy where the third party has consented in writing to the disclosure. In these circumstances, **I recommend** that all pages with redactions made pursuant to section 23(2)(h)(ii), where the information severed is a reference to the complainant, should be provided to the Applicant with these sections intact with the exception of those instances in which the name is part of the complainant's email address, in which case only her first name should be left intact.

There is also one email which appears first on page 11 in which the complainant's gender has been masked pursuant to section 23(2)(h)(ii). For the same reasons, **I recommend** that this word should be disclosed in all circumstances in which it has been redacted.

On pages 213 and 214 of the package, there is an email from a third party (not a board member of the Applicant or the complainant). I am satisfied that the information severed from this record were properly severed pursuant to section 23(2)(h)(ii).

On page 299 there is a small section of an email that has been redacted pursuant to this section which does not refer in any way to any person's personal information (paragraph 2 of the email). **I recommend** that this information should be disclosed.

Section 23(2)(h)(i)

This section raises a presumption that the disclosure of personal information will constitute an unreasonable invasion of a third party's personal privacy where the personal information consists of the third party's name and it appears with other personal information about the third party. Once again, however, these presumptions are not absolute and are rebuttable. Because this subsection is somewhat vague, in my opinion, one has to take a reasonable, objective look at each item that this section has been applied to and determine whether, based on the general structure and intention of the Act, the presumption should apply. In this case, the public body relies on this subsection to several records.

1. Page 92

This page is a page from a publication issued by the Applicant Day Care organization. It is their own record. They know what it says. Furthermore, it appears that it is a document that is widely distributed within the community. Any presumption that the disclosure of this information might constitute an unreasonable breach of the personal privacy of the individual named is rebutted since the information originated with the Applicant and is widely distributed within the community. Section 23(2)(h)(i) does not apply to this information. **I recommend** that this information be disclosed.

2. Page 236

The information redacted from the first two lines of this record refer to a conversation between a department employee and one of the board members of the Applicant. **I recommend** that this record be disclosed in accordance with my discussion of this page under "Section 23(2)(d)" below.

3. Page 509

This page is part of the record of information collected by the public body during their investigation. They have recorded the names of three individuals whose names were given in response to a particular question. I am satisfied that these names were properly redacted.

4. Page 511

This page contains a list of the board members of the Applicant Day Care Association along with their email addresses. Only the email of the director who submitted the Request for Information on behalf of the board has been disclosed. While in many cases the disclosure of a personal email address might well constitute an unreasonable invasion of privacy, in this case, the email addresses belong to the members of the organization asking for the information. They know their own email addresses. In this case, the presumption has been rebutted and there is no reason not to disclose this list. The same applies for the telephone number of one of the association's employees which appears on the same page. **I recommend** the disclosure of this information.

Section 23(2)(d)

This subsection provides that there is a presumption that disclosure of information will constitute an unreasonable invasion of a person's privacy where the personal information relates to employment, occupational or educational history. It has been applied to five separate records.

1. Page 29

The first of these emails appears first on page 29 of the package of records.

The first line of this email does not contain any information which relates to the complainant's employment history and **I recommend** it be disclosed. The rest of this

paragraph, however, does include information about her employment history and has, therefore, been appropriately withheld. Similarly, there is nothing in the first and second lines of the second paragraph, to and including the words “legal action”, which relates to the complainant’s employment history and **I recommend** that these portions of the paragraph be disclosed. I am satisfied that the disclosure of the balance of this paragraph would constitute an unreasonable invasion of the complainant’s privacy pursuant to section 23(2).

2. Page 30

The second of these emails first appears at page 30. **I recommend** that the following portions of this email be disclosed:

a) the first paragraph
b) the second paragraph except for the words between “myself” in the second line and the word “should” in the same line
c) in the third paragraph, everything from the words “it is” in the first line to the end of the paragraph
d) in the fourth paragraph, everything in the first line to the words “going to” and after the word “so” in the first line to the words “will be” in the second line and finally everything after (and including) the words “the board” in the second line.

3. Page 60

A third email which falls under this category appears first at page 60 of the responsive records. In my opinion, section 23(2)(d) does not apply to most of the masked portion of this email. Some of the content, however, constitutes the personal information of another third party and I am satisfied that the disclosure of that information would constitute an unreasonable invasion of the other third party’s privacy. **I recommend** the disclosure of the following portions of this email:

a) paragraph 2, line 5, from the beginning of the fifth line to and including the word “acussation” (sic)
b) paragraph 2, line 6 from the word “I” to the end of the line;
c) paragraph 3, with the exception of the first 8 words of the fifth line, the first five words of the sixth line, and all of the last sentence before the “and as we all know”;
d) paragraph 4, with the exception of the first three words of the last line;

4. Page 155

This record is a letter addressed to the complainant. In my opinion, the only part of this letter which might qualify for an exemption from disclosure pursuant to section 23(2)(d) are the last four words of the first paragraph. Nothing else amounts to information about the complainant’s employment history. That said, this record has been disclosed without the same edits in other versions of the record and for this reason, **I recommend** it be disclosed in full where ever it appears.

5. Page 236

This email refers to a member of the board of the Applicant day care association by name. It contains information about unidentified third parties and the behaviour of a child in the day care facility. To the extent that this email relates to third parties (not a member of the Applicant board and not the complainant) the information in the email has been properly withheld. That would include the words in the second line of the first paragraph after the words “daycare has” to the end of that sentence as well as the other portions of the email that have been severed. **I recommend** that the balance of this email be disclosed.

Section 27

Sections 26 and 27 provide for a mechanism to consult with third parties when a public body intends to disclose records which contain information about the third party. In this case, the public body has indicated several situations in which they were going to do a consultation before disclosing certain parts of the records. The original response was provided to the Applicant with these sections masked. I understand that the complainant consented to the disclosure of these sections of the records. I am assuming, therefore, that these records have now been disclosed to the Applicant. If not, **I recommend** that they be disclosed. Again, while these sections appear more than once within the package of responsive records, for the sake of identifying them, the first appearance of each of these appears at:

a) page 59 - with the exception of the last three words of the second paragraph
b) page 84

Section 15(a)

Section 15(a) gives public bodies the discretion to refuse to disclose information that is subject to solicitor-client privilege. The first thing that should be noted is that this is a discretionary exemption, and any public body who relies on the section must be able to show that it exercised its discretion. There must be some evidence to suggest that they considered the pros and cons of disclosing the record. The head of the department must put his or her mind to the matter and cannot refuse to release the information simply because it is protected by privilege. Keeping in mind the purpose of the legislation, which is to make information held by the government more accessible to the public, I would suggest that the head of the department, in this case the Minister of Education, must consider whether the privilege might be waived in the particular circumstances of each case. Although the Minister has the ultimate discretion as to whether or not privilege can or should be waived, discretion must be exercised and be

seen to be exercised in some real way. That discretion, once exercised, may be the final word on the matter. However, discretion cannot be exercised in a vacuum and there must be some indication that the Minister has at least considered the issues and the possibility of waiving privilege before the matter is closed.

The next question is what falls under solicitor/client privilege. The concept of solicitor/client confidence is a historical one. It refers to a rule which has developed over the centuries which provides that communications between a lawyer and his or her client in the course of a professional relationship, whether or not in contemplation of litigation, are protected from disclosure outside of that relationship, except with the consent of the client. The classic definition of solicitor-client privilege is found in Wigmore on Evidence

> Where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal advisor, except the protection be waived. (*Solosky* v. *The Queen* 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821)

Not every communication with a lawyer will attract the privilege, however. In the case of *British Columbia (Minister of Environment, Lands and Parks)* v. *British Columbia (Information and Privacy Commissioner)* 1995 CanLII 634 (BC SC), [1995] B.C.J. No. 2594, Justice Thackery set out the following test for determining whether a matter was protected by solicitor/client privilege:

> To establish solicitor-client privilege three criteria must be established.
> One, the communication must be between solicitor and client.....
> Two, the parties intended the communication to be confidential.....
> Third, the communication entails the seeking or giving of legal advice. It is the purpose of the communication that is relevant. If the purpose of the communication was simply to obtain information as to a matter of fact, the

> communication would not be privileged. However, if the purpose was to obtain legal advice then the privilege attaches even if the communication entails no more than the passing of factual information.

While some of the records which have not been disclosed to the Applicant pursuant to this section do, in fact, fall within the definition outlined above, much of what has been redacted pursuant to section15 is not so protected.

a) Pages 272 to 279

These pages are very clearly a legal opinion written by counsel for the public body on the issues raised by the complainant. It is absolutely clear from the notations on the opinion itself (which is noted on every page to be protected by solicitor-client privilege and "confidential") that this was a communication between solicitor and client, that at least the lawyer intended the communication to be confidential and that it involved the provision of legal advice. **I recommend** the disclosure of the lawyer's name and contact information within the Department of Justice as this information is not protected by solicitor/client privilege. As to the rest of the information contained in these pages, it meets the test for solicitor/client privilege. What is not in any way clear is whether the public body exercised its discretion in refusing to disclose this record. In fact, it appears that the public body has simply taken every communication between the department and the solicitor and redacted everything, whether or not there is any legal advice contained in the communication and whether or not there is anything to be gained by keeping the opinion private. At this point, with the investigation of the day home having been discontinued, is there a good reason not to waive the privilege? If so, what are those reasons? **I recommend** that the public body actively exercise its discretion and consider whether or not, in the circumstances, the opinion might be disclosed.

2. Page 303

The record which begins on this page is an email chain between the department and the department's lawyer. No part of the record has been disclosed. While the subject

matter of this chain is a legal opinion, not all of it is subject to an exemption pursuant to section 15. In particular:

a) while the email at the top of page 303 is written by the department's lawyer and refers to a legal opinion, there is nothing in this email that constitutes legal advice. **I recommend it be disclosed**.

b) there is nothing in the "header" (From, Sent, To, CC, Subject) in the next email that would qualify for an exemption. **I recommend** that this information be disclosed. **This applies to all headers in all emails to which section 15(a) has been applied by the public body**. The body of this email does constitute a communication between the lawyer and the client which entails the seeking of legal advice. There is nothing, however, to suggest that it was intended to be confidential. At the very least, **I recommend** that the public body look carefully at the content of this email and actively exercise its discretion with respect to disclosure.

3. Page 304

This is a continuation of the chain in the previous page. At the top of the page is the name, position and contact information of an employee within the department of education. There is nothing in this information that would qualify it for an exemption pursuant to section 15. **I recommend** it be disclosed. **This applies to all "signatures"** on all records for which the public body has claimed an exemption pursuant to section15.

The next email in the chain contains a greeting and three paragraphs. While the content of the first two paragraphs of the chain contain information which would qualify it for solicitor/client privilege, there is, again, nothing to suggest that the communication was intended to be confidential. Again, at the very least, **I recommend** that the public body look carefully at the content of this email and exercise its discretion with respect to

disclosure. The last paragraph has no content that would qualify it for solicitor/client privilege and **I recommend** that it be disclosed.

The body of the last email on this page also has content which would qualify it for solicitor/client privilege, there is, again, nothing to suggest that the communication was intended to be confidential. Again **I recommend** that the public body look carefully at the content of this email and actively exercise its discretion with respect to disclosure.

4. Page 305

This is a continuation of the chain in the previous two pages.

There is nothing in the first full email on this page that would qualify for an exemption pursuant to section 15 of the Act. **I recommend** that it be disclosed.

The first full paragraph of the last email on this page is the only part of this page which might contain information subject to solicitor/client privilege. Once again, **I recommend** that the public body look carefully at the content of this email and exercise its discretion with respect to disclosure of this paragraph. I further **recommend** that the balance of the page should be disclosed.

5. Page 306

This is, again, a continuation of the email chains in the previous pages. There is one full email on this page, consisting of six short paragraphs. Only the second, third and fourth paragraphs contain information which might be subject to solicitor/client privilege. Again, **I recommend** that the public body look carefully at the content of these two paragraphs and exercise its discretion with respect to disclosure. I further **recommend** that the balance of this page should be disclosed.

6. Page 360

This page is the beginning of another email chain involving communication between the lawyer and the department. Once again, there is nothing in the headings or the signatures in any of these emails that are subject to an exemption from disclosure and, at a minimum, those parts of all emails in the chain should be disclosed.

With respect to the first email on the page, the body of the email does constitute a communication between the lawyer and the client which entails the seeking of legal advice. There is nothing, however, to suggest that it was intended to be confidential. **I recommend** that the public body look carefully at the content of this email and exercise its discretion with respect to disclosure. The same holds true for the email at the bottom of the page.

7. Page 361

This page is a continuation of the email chain in the previous page.

The three paragraphs which make up the content of the first full email on the page once again contain information which might be subject to solicitor/client privilege if the communications were intended to be confidential. **I recommend** that the public body look carefully at the content of this email and exercise its discretion with respect to disclosure.

The first two paragraphs of the second email on this page do not contain any information that would be subject to a solicitor/client privilege. **I recommend** these two paragraphs be disclosed. The last two paragraphs once again contain information which might be subject to solicitor/client privilege if the communications were intended to be confidential. **I recommend** that the public body look carefully at the content of these paragraphs and exercise its discretion with respect to disclosure.

8. Page 380

This page starts another email chain. While the subject matter of the email chain is “Request for legal opinion”, the email at the top of the page does not appear to be correspondence which includes any lawyer. In my opinion, this email does not qualify for an exemption pursuant to section 15 of the Act. **I recommend** it be disclosed.

The body of the second email on the page is one line. The email originates from the lawyer and asks a question about the subject matter of the opinion he is preparing for the department. As such, if the content of this email was intended to be confidential, it may be subject to solicitor/client privilege. Once again, **I recommend** that the public body look carefully at the content of this one line in the email and exercise its discretion with respect to disclosure.

9. Page 385

This page begins another email chain. The first email on the page is from legal counsel. The first three paragraphs of this email contain subject matter which might be protected by solicitor/client privilege if it were intended to be confidential. As noted above, in this circumstance it is necessary for the public body to actively exercise its discretion and **I recommend** that this be done. I further **recommend** that the balance of the email should be disclosed.

Access to Information - Conclusion

In my opinion, most of the material edited from the records provided to the applicant did not qualify for an exemption from disclosure. My individual recommendations are outlined above. I note, once again for clarity, that I have referred only to the first appearance of every record involved. The recommendations, however, apply to all the records and every version of each record.

BREACH OF PRIVACY

Under section 40 of the *Access to Information and Protection of Privacy Act*, public bodies are prohibited from collecting personal information unless the collection of the information is expressly authorized by legislation, it is collected for the purposes of law enforcement or it relates directly to and is necessary for an existing program or activity of the public body. In this case, the department undertook an investigation of the day home under the auspices of the *Child Day Care Act* as a result of a complaint received about the day care's internal personnel issues. It is fairly clear from the records disclosed to the Applicant that, after a significant amount of information had already been collected, much of it about the behaviour of individual employees and board members of the day home, the department concluded that it had no jurisdiction to investigate a day home with respect to the issues raised in the complaint letter which they received. My reading of the legislation suggests that the Department only has authority to monitor day homes to ensure compliance with the Act and conduct annual "inspections". There is nothing in the *Child Day Care Act* which addressed complaints that might be received about day homes or, if such complaints are received, what jurisdiction the department has to investigate. I read the legislation as limiting the department's role to issues surrounding the health or safety of the children attending the centre. It is clear in this case that the complaint really had nothing to do with any health or safety issues. While the public body has tried to justify the investigation on the basis of one off handed remark in the complaint suggesting that a board member had lied about child to caregiver ratios, this was really a very secondary allegation which could have been addressed by reference to the paperwork which the day home was required to submit to the department on a monthly basis. The complaint was focussed clearly on personnel issues. Even if the public body had the jurisdiction under the *Child Day Care Act* to investigate the "health and safety" issue, the investigation conducted and the questions asked of both employees and board members went well beyond that very narrow issue. As a result, any information collected about individual employees or directors or members of the day home association was improperly collected by the Department. This constitutes a breach of privacy under the Act. Whether or not the

public body made any decisions based on the collected information does not change the fact that it was improperly collected and is being improperly retained.

The sharing of this wrongfully collected information, whether within or outside of the department, also therefore constitutes a breach of privacy. Section 48(l) of the *Access to Information and Protection of Privacy Act* allows the use/disclosure of personal information for use in the provision of legal services to a public body. Therefore, the sharing of the complaint and other information for the purpose of obtaining the legal opinion was authorized. All other disclosures were contrary to the Act and constitute a breach of privacy. In particular, it was inappropriate for the public body to share the complaint with Legal Registries (although the public body says it merely asked a generic question of Legal Registries, the records show that a copy of the complaint was provided with the question) and with anyone else not directly related to the administration of the *Child Day Care Act*. The allegations made in the complaint are serious, but untested. Any distribution of those unproven allegations beyond this narrow circle could potentially have had significant impact on those whose personal information was included in the complaint letter.

In the circumstances, with respect to the breach of privacy issues, I would recommend

a) that all personal information collected in the course of the unauthorized investigation be destroyed;
b) that a formal apology be made to the staff, directors and members of the day home organization affected;
c) that the public body consult with the board of directors of the day home organization to determine what, if any, additional steps they would like to see taken in order to address any harm done as a result of the unauthorized investigation;
d) that the Department of Education develop clear policies and procedures with respect to the investigation of public complaints received against privately run day homes, including direction with respect to the specific kinds of complaints that the department has jurisdiction to undertake and the suggested steps for such investigations

CONCLUSIONS AND RECOMMENDATIONS

In the circumstances, the public body in this case improperly collected and disclosed the personal information of several individuals involved as volunteers, as employees and as members of a privately run licenced day home facility. While it is, of course, important for the Department to react quickly to genuine health and safety issues raised about a licenced day home, the complaint in this case was clearly about internal matters that had nothing to do with health or safety. There is nothing in the *Child Day Care Act* which would in any way justify the department becoming involved in the investigation of personnel issues or internal policies unless the issues raised health or safety issues for the children in care. The department overstepped it's jurisdiction in this case and in conducting an investigation and collecting personal information, breached the provisions of the *Access to Information and Protection of Privacy Act.*

My specific recommendations are contained in the discussion portion of this report.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner