NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER
Review Recommendation 15-088
January 29, 2015

Review File: 14-151-5

BACKGROUND

In April, 2014, the Applicant requested the following records from the Department of Finance:

> "...copies of the draft audit of the Qulliq Energy Corporation. I would also like copies of any emails or other correspondence between the director of Internal Audit Services, Manager of Internal Audit Services and Senior Auditors from the Department of Finance regarding the audit of the Qulliq Energy Corporation."

The Department refused access to all responsive records pursuant to section 20(1)(a) of the *Access to Information and Protection of Privacy Act* which provides that the head of a public body may refuse to disclose information to an applicant where there is a "reasonable possibility the disclosure could prejudice a law enforcement matter". In its letter to the Applicant, the Department noted that the law enforcement exemption contained in section 20 includes investigations which "lead or could lead to a penalty or sanction being imposed or proceedings that lead or could lead to a penalty or sanctions being imposed".

The Applicant asked for a review of that decision.

THE DEPARTMENT'S SUBMISSIONS

In its submissions to me, the Department of Finance provided some helpful background information. It noted that an audit was conducted by the Department's Internal Audit

Services. The Internal Audit Services (IAS) is a division within the department which "supports the departments and public agencies of the Government of Nunavut by providing independent assurance and consulting activities in a manner designed to add value and improve controls over operations". This is done not only by means of systemic reviews of operations, but also by flagging "sanctionable or punishable actions" as outlined in the *Financial Administration Act*, Sections 105 and 106. The IAS may also inform the RCMP or other law enforcement agencies in cases where their reviews suggest the possibility of criminal behaviour. While the department's submissions are not entirely clear in this regard, it appears that the Qulliq Energy Corporation (QEC) asked IAS to undertake audits with respect to various aspects of the administration of QEC.

The department's submissions also noted that:

> Due to the sensitive nature of many audits the IAS undertakes, documents and drafts of any audit are considered confidential and are not openly shared or distributed throughout the organization.

It is noted that in processing the Request for Information, the Department's ATIPP Co-Ordinator "did not acquire copies of the draft audits or email between IAS and their client QEC, as these are deemed confidential information and part of an ongoing investigation".

They did, however, have access to and reviewed the emails between the auditors themselves. They indicated that these documents were procedural and had little or no sensitive information and could easily have been disclosed in response to the ATIPP request but they felt that the release of these records "would have been fairly meaningless without the context of the audit, and would serve no other function than to record progress on the file and at what stages the audit was on the date of the emails".

THE APPLICANT'S RESPONSE

The Applicant points out, firstly, that it was completely inappropriate for the Department to refuse access to any record without, at the very least, first having reviewed those records. They argue that there was no indication in the submissions received from the Applicant that the audit was the subject of a law enforcement matter, only that audits generally may result in matters being turned over to law enforcement.

> While there may have been rumours and questions concerning the appropriateness of certain payments made to particular employees, it is our understanding that the Qulliq Energy Corporation must be audited on an annual basis by virtue of section 35 of its incorporating statute, and that the audit in question was being conducted under that authority.

They argue that the audit reports are merely a product of "a routine examination of the company's finances as opposed to a forensic audit conducted on suspicion of criminality" and that they should, therefore, be disclosed.

Further, they argue that the Department has provided no evidence or reasoning for the application of the law enforcement exemption they rely on to deny access. Rather, the Department argues that the reason for the refusal to disclose is to:

a) protect the personal information of employees;
b) to avoid prejudice which might result to employees;
c) to avoid violating confidentiality agreements between the employees and the Territory

None of these, they point out, are relevant to the proper legal test for the law enforcement exemption.

The Applicant has referred me to a decision of the Ontario Information and Privacy Commissioner, in which the test for the law enforcement exemption has been established:

> In order for a record to qualify for exemption under section 14(1)(a), the law enforcement matter in question *must be specific and ongoing*. (Order MO -1578) [emphasis added].

They also point to section 33 of the *Access to Information and Protection of Privacy Act* which places the onus on the public body seeking to refuse access to records.

Finally, the Applicant points out that it is not the Department's role to decide what records might be of interest to the Applicant or whether it will be relevant to the Applicant's needs or not. The Department's obligation under the Act is to identify responsive records and to disclose them subject to any applicable exemptions, not to make judgments about what might or might not be useful to the Applicant.

DISCUSSION

As always when dealing with an Access to Information request, we start with the underlying principle that all government records responsive to a request for information are to be disclosed unless the record falls within one of the exceptions outlined in the Act. The Act applies to all records in the custody or under the control of a public body. Internal Audit Services is a division of the Department of Finance and is, therefore, a public body as defined.

As noted by the Applicant in this case, in situations in which a public body refuses access to a record, or part of a record, the onus is on that public body to establish that an exemption applies.

In this case, the Department relies on section 20(1)(a) of the Act to justify its refusal to disclose any of the responsive records. Section 20(1)(a) reads as follows:

20.(1) The head of a public body may refuse to disclose information to an applicant where there is a reasonable possibility that disclosure could

(a) prejudice a law enforcement matter

Section 2 contains a definition of “law enforcement matter” as follows:

"law enforcement" includes

(a) policing, including criminal intelligence operations,

(b) investigations that lead or could lead to the imposition of a penalty or sanction, or

(c) proceedings that lead or could lead to the imposition of a penalty or sanction.

It is to be noted that the section relied on by the public body in this case is a discretionary one. This means that there are two steps that the public body must take when refusing disclosure – a) establishing that the exemption applies, and b) exercising its discretion and providing an explanation as to the reasons for the exercise of discretion against disclosure.

The Responsive Records

There are three sets of records in issue here. The first are the audit reports referred to. The second set are emails between the auditors within IAS. The third are emails between IAS and their “client”, the Qulliq Energy Corporation. I have received copies of the audit reports for the purposes of this review. I have also received a series of emails. These are, however, not well labelled. The cover sheet identifies them as “Sample Emails QEC Audit with Attachments”. This raises two questions for me. Are these only the internal IAS emails or do they include the emails between the IAS and the QEC?

And are these all of the emails (of whatever category or categories) or is it only a "sampling"? My first **recommendation**, therefore, is that all responsive emails be clearly identified.

General Observations

It appears that the department did not even review the emails to determine whether they fell within one or more exemption under the Act. They noted simply that "these are deemed confidential information and part of an ongoing investigation".

It is impossible to determine whether a record, or a part of a record, is:

a) responsive to the Request for Information;
b) eligible for an exemption pursuant to one or more provisions of the Act

without looking at it and reading it, line by line. Furthermore, confidentiality is not an exemption recognized by the *Access to Information and Protection of Privacy Act*.

Section 20(1)(a)

In order to qualify for an exemption pursuant to section 20(1)(a), there must be a demonstrably "reasonable possibility" that disclosure could "prejudice a law enforcement matter". It is not enough simply that the record is part of a law enforcement matter. There must be some evidence that the disclosure will "prejudice" that law enforcement matter".

If section 20 is to apply, we must first determine whether the audit process is a "law enforcement matter". While it is not at all clear from the public body's correspondence to the Applicant or in its submissions to me, the records themselves make it clear that the audit involved was not a routine, annual audit. Rather, it was an "investigative audit" commissioned by special request to look into certain, specific irregularities within the organization. Among other things, it is clear from the records that there were concerns

about the handling of money by certain employees. Many of the records refer to the audit as an “investigative audit” and the records make it clear that the audit was more than the annual legislatively mandated audit. Section 2 of the Act includes, under the definition of ‘law enforcement matter’

> investigations that could lead to the imposition of a penalty or sanction

I am satisfied that the audits, and the process of completing the audits, was a “law enforcement matter”.

The public body has provided nothing from which I can conclude that the disclosure of the emails might prejudice the audit process. The audit is complete and is no longer a work in progress. There is no chance the disclosure of any of this information could possibly prejudice the outcome or the work of the audit team at this point.

The public body, however, says that the results of the audit have been submitted to the R.C.M.P. to determine whether the audit results were such as to reveal information which amounted to criminal activity. In other words the investigation is still ongoing. Clearly an ongoing investigation by the R.C.M.P. is a “law enforcement matter”. Again, however, I have been provided with nothing from which I can conclude that there is a reasonable possibility that the disclosure of these records could prejudice the investigation.

I am not convinced that section 20(1)(a) applies so as to provide the public body with an exemption from disclosure.

Section 23

While section 20(1)(a) may not apply to these records, I also have to look at section 23 of the Act. Section 23(1) prohibits the disclosure of information where that disclosure would constitute an unreasonable invasion of the privacy of a third party. I note that the public body did not rely on section 23 for its refusal to disclose. It is, however, a

mandatory exemption and if the record contains information that would, if disclosed, constitute an unreasonable invasion of privacy, the public body must not disclose it.

Section 23(1) reads as follows:

> 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.

Subsection (2) of section 23 provides for circumstances in which there will be a presumption that the disclosure will constitute an unreasonable invasion of privacy:

> (2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where...
>
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible contravention of law, except to the extent that disclosure is necessary to prosecute the contravention or continue the investigation.

Having access to at least some of the responsive records, I have absolutely no hesitation in concluding that most of the content of the audit reports would fall into this category. Most of the content of the cover letters and some of the “Background”, “Objectives”, “Audit Criteria” and “Scope and Methodology” sections of each report could be disclosed without breaching any person’s privacy as well as the sections entitled “Distribution List for the Final Report” and the “Audit Team”. The disclosure of the remaining portions of each of the reports, however, would constitute an unreasonable invasion of the privacy of the individuals involved and the refusal to disclose is, therefore, required pursuant to section 23(1). While I would prefer that the public body recognized the appropriate section of the Act when refusing access to any record, when the information involves third party personal information, the exemption is mandatory and applies whether or not the public body has met the onus placed on it to establish that an exemption applies.

The same observations hold true for many of the emails I reviewed. This said, while there would be some significant edits required to protect the privacy of the third parties involved, much of what appears in these emails can, and should, be disclosed.

CONCLUSIONS AND RECOMMENDATIONS

As noted above, I am not satisfied that section 20(1)(b) applies to any of the records involved in this case.

Furthermore, I agree with the Applicant that the public body should not be making any assumptions about what responsive records will be helpful to the Applicant and which ones will not be. If the record is responsive, it must be processed under the *Access to Information and Protection of Privacy Act* and disclosed to the greatest extent possible.

Much of what is included in the records requested, however, is subject to a mandatory exemption from disclosure pursuant to sections 23(1) and 23(2)(b).

I therefore recommend:

a) that a line by line review be done of ALL responsive emails and that the email correspondence be disclosed, subject to such redactions as might be indicated pursuant to section 23 of the Act;

b) that a review be done of the audit reports and that those portions which, if disclosed, would not constitute an unreasonable invasion of the privacy of a third party, be disclosed.

I am enclosing with the Minister's copy of this report, copies of the records which I have been provided with (which do not appear to be all of the responsive records) with my

suggested edits. It should be noted that if the Applicant is not, in the end, satisfied with the response provided by the Department, I will entertain his further request for review with respect to these records.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner