

**NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER**

Review Recommendation 15-089

March 5, 2015

Review File: 14-200-5

BACKGROUND

The Applicant in this case made a request of the Department of Finance (Human Resources) for access to certain records associated with the proposed direct appointment of a specific employee. The public body identified 52 pages of responsive records but denied the Applicant access to any of them, relying on Section 13(1) of the Act, saying that the file identified as being responsive would reveal a confidence of the Executive Council. The department took the position that the package was prepared for Cabinet submission and consideration. The Applicant asked my office to review that decision.

THE DEPARTMENT'S SUBMISSIONS

The Department of Finance provided me with copies of all 52 pages of the responsive records. There are a number of "records" included in the package as follows:

- "Direct Appointment of [A.B.]".¹ (This is marked "Confidential Advice to Cabinet)
- "Direct Appointment of A.B. as [position] (This is headed "Executive Council Government of Nunavut Request for Decision and has the words "Confidential and Privileged" at the bottom of each page)

^{1.} In this case, the initials "A.B." will be used to refer to the individual who is the third party subject of the direct appointment is being sought. These initials are not the individual's actual initials.

- Several apparently identical pages entitled “Job Action Request”
- A.B.’s Resume (two copies)
- Page entitled “Job Evaluation Results”
- Job Description
- Performance Review Form for A.B.
- A Criminal Record check for A.B.
- Government of Nunavut Position Description (two copies)
- Memorandum entitled “Recommend Direct Appointment of [Position]”

These records made up the package that was prepared with the intention of submitting it to Cabinet in the form of a Request for Decision (RFD) for the purpose of seeking approval for a direct appointment of A.B. to a particular management position. This is not a document that was requested by Cabinet. The department indicates that these kinds of documents (RFD’s) are produced by departments to ensure key positions within the Public Service are filled.

Section 13(1)(a) of the *Access to Information and Protection of Privacy Act* provides as follows:

- 13.(1) The head of a public body shall refuse to disclose to an applicant information that would reveal a confidence of the Executive Council, including
- (a) advice, proposals, **requests for directions**, recommendations, analyses or policy options prepared for presentation to the Executive Council or the Financial Management Board

The Department emphasized the phrase “requests for directions” in this section. The public body pointed out that the RFD was signed off by the Minister and the Deputy Minister of the Department involved and contained a request for a direct appointment to a particular position within the GN and, therefore, constituted a “request for direction” as provided for in section 13.

According to the public body, however, although the RFD was prepared, the hiring department changed its mind before submitting it to Cabinet and chose to fill the position, instead, with an open competition. None of the responsive records, therefore, were received by Cabinet and no decision was made based on those records. The job was eventually awarded following a competitive staffing action following the normal practices and procedures of the Government of Nunavut to ensure a fair hiring process.

THE APPLICANT'S POSITION

The Applicant argues that “by definition, Cabinet confidences are ministerial secrets, proffered either collectively or severally, which, when revealed could adversely undermine territorial governance.” He goes on to say that:

This is because our form of government works best when Cabinet members, charged with the overall direction, policy and decision-making in Nunavut, can caucus without any hesitations; knowing that their deliberations are protected. The RFD documents I seek were not solicited by Cabinet. Furthermore, [the] assertion that the RFD was ‘never submitted for Cabinet review’ is a clear signal that the RFD documents cannot be classified as sensitive Cabinet Confidence material. This RFD document was produced at the discretion of certain GN employees asking for Cabinet approval to appoint [A.B.] as [position] without resorting to a job competition.

While he acknowledged that there may be parts of the RFD to which he would be denied access, other sections should be disclosed, including the name and title of the person who sponsored or prepared the RFD document on behalf of the hiring department, the name and title of the employee in the Department of Finance who reviewed and signed the RFD on behalf of Human Resources, the rationale used to justify a direct appointment, the job description of the position included in the RFD document and the Job Action Request/Job Evaluation form included in the RFD document.

The Applicant also argues that section 14(2)(1)(b) of the Act supports his position. This subsection, he argues, provides that the head of a public body cannot refuse access to a record that is “a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function”. He argues that the decision to prepare and submit the RFD is an “exercise of a discretionary power”.

DISCUSSION

One of the purposes of the Act, as outlined in Section 1, is to provide a right of access to information under the control of public bodies in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Furthermore, section 33 of the Act provides that the burden of proof that a record, or a part thereof, falls within one of the specified exemptions in the Act lies with the head of the public body.

In this case, the public body relies on section 13(1), set out above, as its justification for refusing to disclose the records in question. It is to be noted that this is a mandatory exception to disclosure. If the record “would reveal a confidence of the Executive Council”, it cannot be disclosed. In this case, however, the records in question were never submitted to the Cabinet and, therefore, did not form the basis of any cabinet discussion or decision. The question, then, becomes whether the disclosure of the records in this case, which were never submitted to the Cabinet for discussion or decision, would be likely to reveal a “confidence of the Executive Council”

The first step, therefore, is to define what constitutes a “confidence of the Executive Council”. For this, we can start with the definition which appears in the *Canada Evidence Act* insofar as it relates to the federal government:

39(2) For the purpose of subsection (1), “a confidence of the Queen’s Privy Council for Canada” includes, without restricting the generality thereof, information contained in

- (a) a memorandum the purpose of which is to present proposals or recommendations to Council;
- (b) a discussion paper the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;
- (c) an agenda of Council or a record recording deliberations or decisions of Council;
- (d) a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
- (e) a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d); and
- (f) draft legislation.

Under this definition, it is clear that the package of records in question was prepared “to present proposals or recommendations to [the Executive] Council”. But while it was prepared for the purpose of presenting a proposal or recommendation to the Executive Council, in the end, it was not used. It never reached Cabinet.

The next question, then, is whether the disclosure of these records could disclose a “confidence of Cabinet” when they never reached the Cabinet and were never considered by Cabinet.

In Order P-226, the Ontario Information and Privacy Commissioner made the following comments:

In order for a record which has never been placed before an Executive Council or its committees to qualify for exemption under subsection 12(1), the institution must establish that disclosure of the record would "reveal the substance of deliberations of an Executive Council or its committees". In the context of the subsection 17(1) exemption, I have stated that the disclosure of information contained in a record would reveal information supplied by another party if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution [See Order 203 (Appeal 890131), dated November 5, 1990 at p.13].

The Ontario legislation is, however, a little different than ours. While in Ontario (and many other Canadian jurisdictions) the legislation provides for a mandatory exception from disclosure where the disclosure would reveal "the substance of deliberations" of the Executive Council, our legislation provides for an exemption where the disclosure would reveal "a confidence" of the Executive Council. The disclosure of a document prepared for cabinet, but never deliberated can still fall under the mandatory exclusion from disclosure provided for in section 13(1). In my opinion, if a record falls within the definition of "cabinet confidence", then it is protected from disclosure whether or not it ever came before cabinet or became the subject of a cabinet discussion and/or decision. At least some of the records in the package of 52 pages identified in this matter as being responsive, therefore, will be protected from disclosure.

This, however, does not end the discussion. Some of the records included in the package of records prepared for submission to cabinet are not and have never been confidential. They constitute background information, at least some of which are public documents. For example the following records would already be public records or contain only background information and material that is not confidential in any way.

These records should be disclosed:

- Job Description
- Government of Nunavut Position Description
- Job Action Request

Other records would be subject to a mandatory exemption pursuant to section 23 in that the disclosure would constitute an unreasonable invasion of the privacy of a third party. Specifically, the following records would be exempt from disclosure pursuant to section 23, whether or not they were exempt pursuant to section 13:

- A.B.'s Resume
- Performance Review Form for A.B.
- A Criminal Record check for A.B.

The remaining records in the package, namely:

- "Direct Appointment of [A.B.]"
- "Direct Appointment of A.B. as [position]"
- Memorandum entitled "Recommend Direct Appointment of [Position]"

fall properly under the definition of a confidence of the Cabinet and these have been properly withheld.

CONCLUSIONS AND RECOMMENDATIONS

I recommend that the following records be disclosed:

- Job Description
- Government of Nunavut Position Description
- Job Action Request

The balance of the records forming the 52 page package prepared for presentation to the Cabinet for the purpose of obtaining a direct appointment are exempt from disclosure, either pursuant to section 13(1)(a) or 23(1) and 23(2)(d).

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner