NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER
Review Recommendation 15-090
March 30, 2015

Review File: 14-159-5

BACKGROUND

The Applicant company made a number of requests for information in relation to the awarding of the contract for air ambulance or medevac services in the Kitikmeot region. Although there were delays and some problems with the various requests, he eventually receive a large number of records. After having reviewed those records, however, he made another request to the Department of Economic Development and Tourism, with the following introduction:

> Confidential information has brought to our attention that material apparently exists but has not been produced by previous ACCESS to INFORMATION Requests that seems to be the specific information that we are seeking, in the public interest. On advice, we will for the present act on the premise that our previous requests were not sufficiently specific to elicit all the relevant material.

The request went on to request the following:

1. All hand written notes, hand written and typed memoranda, handwritten and typed telephone notes and memoranda, and all email communications between the certain named parties between May 31, 2011 and December 31, 2011 with respect to the matter of Air Ambulance services in the Kitikmeot region. Nineteen parties (some corporate) were named.

2. All material referring to any and all consultations with any representative of the Ornge Air Ambulance service regarding Air Ambulance service in Nunavut;

3. All reports, briefs, studies or memoranda in respect to NNI policy as it might affect Air Ambulance operations in Nunavut produced, delivered or presented by any representative of Ornge or the law firm of Borden Gervais *et al*

4. Any and all communications of any form relating to the termination of the Supreme court of Nunavut Action #18-11-463 CVC styled *Kivallingmiut Aviation Inc. and Medic North Nunavut Ltd. v. Commissioner of Nunavut, Government of Nunavut, as represented by Mark McCulloch in his capacity as manager, Procurement Contracts and Logistics for the Department of Community and Government Services*

The Applicant received 33 pages of responsive records. Of those, two pages contained edits. The public body relied on section 14(1)(b)(i) and section 17(1)(c)(iii) as the justification for refusing to disclose these portions of the records.

In asking me to review the response, the Applicant stated:

> It is my belief that the Department of Economic Development and Transportation has failed to reveal all pertinent background information pertaining to the awarding and subsequent legal proceedings of the 2011-21 NT Medevac Contract.

No further reasoning was provided.

THE DEPARTMENT'S SUBMISSIONS

The Department of Economic Development and Transportation noted, in its response to me, that it had limited participation in the awarding of the contract in question. It notes that while the department is involved in aviation generally through their transportation policy mandate and specifically through the operation of Nunavut's community airports, "this does not translate into any involvement by the department's Transportation branch in the procurement or administration of air ambulance contracts." It does note,

however, that the Department's NNI Secretariat had been involved in matters connected to the Applicant's request as a result of its role as secretariat to the NNI Contracting Appeals Board and that "this avenue has yielded hundreds of pages of responsive records for the applicant".

In responding to the Applicant's request, the Department indicated that, in keeping with standard practice:

> the individuals named in the request, Don Dewar and John Hawkins, were informed that an ATIPP request had been received and that their emails and other records needed to be searched for responsive records. ATIPP Co-ordinator MacKay personally guided Mr. Dewar through a search process that encompassed the relevant elements of the applicant's request. This search yielded the responsive records provided to the Applicant.
>
> John Hawkins, who was less familiar with the ATIPP process, was asked to simply provide Mr. MacKay with *all* emails that corresponded to the time frame of the request and that were addressed to, or received from, any of the other individuals named in the applicant's request. Mr. Hawkins provided 11 emails in response to these instructions; all were deemed to be unrelated to aviation in the Kitikmeot region generally - let alone the applicant's request.

With respect to those two pages which were edited, the public body relied on section 14(1)(b)(i) of the Act which provides public bodies with the discretion to refuse access to records which could be reasonably expected to reveal consultations or deliberations involving officers or employees of a public body. When they initially responded to the Applicant, they also relied on section 17(1)(c)(iii). Section 17 provides a discretionary exemption for information, the disclosure of which could reasonably be expected to harm the economic interest of the Government of Nunavut or the ability of the Government to manage the economy. Section 17(1)(c)(iii) specifically addresses

information, the disclosure of which could reasonably be expect to interfere with contractual negotiations of the Government of Nunavut or a public body. In its correspondence with me, however, the Department indicated that they had since formed the opinion that the section 17 provision was not applicable, but that section 14(1)(c) was. This subsection provides a discretionary exemption for information, the disclosure of which could reasonably be expected to reveal positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Nunavut, or considerations that relate to those negotiations.

DISCUSSION

1. Did the public body provide all of the responsive records.

This is difficult to assess. Neither the Applicant nor the public body provided me with all of the information I would have needed to do a proper assessment of this. The Applicant hints that he has "confidential information" which suggests that there are or should be additional records in relation to his request. But when asked to elaborate, he declined to do so. The public body on the other hand hasn't provided a full explanation on all of the issues. The onus is on the public body to establish that it has fully responded to the request.

With respect to the searches conducted the following questions remain unanswered:

- what were the specifics of the searches done? What keywords were used?
- why were searches done on the records of only two of the 19 named parties (I am assuming that these are the only two named individuals who are employed by the department, but this was not specified.)
- what searches (if any) were done to respond to the second, third and fourth questions posed by the Applicant?

While the Department, on the one hand, says they were minimally involved in the procurement process which explains the paucity of records, they also say that the Department had a large number of records related to the Applicant's issues as a result of their role in the NNI Secretariat, which is a division of the public body. It is suggested, somewhat obliquely, that the Applicant has already received all of the records from this source as a result of previous requests for information.

Based on the information provided to me by the public body, I can only conclude that the department responded only to the first part of the Applicant's request for information. Parts 2, 3 and 4 of the Applicant's request were simply not addressed.

2. Were the edits to the record in accordance with the Act?

The public body relies on Section 14(1)(b)(i) and 14(1)(c) as justification for their refusal to disclose certain parts of one email chain in the responsive documents. The relevant portions of section 14 read as follows:

> 14.(1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal...
>
> (b) consultations or deliberations involving
> (i) officers or employees of a public body,....
>
> (c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Nunavut or a public body, or considerations that relate to those negotiations

In analysing whether or not section 14(1)(b) applies, it is helpful to look at how other jurisdictions have interpreted and applied it. The *Freedom of Information and Protection*

of Privacy Act of Alberta has a provision virtually identical to our section 14(1)(b). In Order 96-006, former Commissioner Clark considered the meaning of "consultations and deliberations" within the terms of that section. He said:

> When I look at section 23 [now section 24] as a whole, I am convinced that the purpose of the section is to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions. The intent is, I believe to allow such persons to address an issue without fear of being wrong, "looking bad" or appearing foolish if their frank deliberations were to be made public. Again, this is consistent with Ontario and British Columbia. I therefore believe a "consultation" occurs when the views of one or more officers or employees is sought as to the appropriateness of particular proposals or suggested actions. A "deliberation" is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. Here again, I think that the views must either be sought or be part of the responsibility of the person from whom they are sought and the views must be sought for the purpose of doing something, such as taking an action, making a decision or a choice.

In Order F2012-10, adjudicator Teresa Cunningham with the Alberta Information and Privacy Commissioner's Office commented further:

> A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b)

> does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision.

Based on these interpretations, I accept that the edited portions on pages 11 and 12 of the responsive records meet the criteria for an exemption pursuant to section 14(1)(b). This, however, does not end the matter. Section 14(1) is a discretionary exemption, which means that the public body must exercise that discretion.

In *Ontario (Public Safety and Security)* v. *Criminal Lawyers' Association*, 2010 SCC 23, the Supreme Court of Canada explained the process for applying discretionary exceptions in freedom of information legislation and the considerations that are involved.

> A discretion conferred by statute must be exercised consistently with the purposes underlying its grant: *Baker v. Canada (Minister of Citizenship and Immigration)* , [1999] 2 S.C.R. 817, at paras. 53, 56 and 65. It follows that to properly exercise this discretion, the head must weigh the considerations for and against disclosure, including the public interest in disclosure.

The Department notes that they chose not to disclose the information in question because they feel that officials who are involved in the awarding of a large contract such as the one in question, particularly where the decision might be controversial or where there is an expectation that the decision might lead to an appeal or litigation must be free to offer (and receive) frank and forthright advice. I accept, based on the content of the deleted portions, and this explanation, that the public body has, in fact, exercised it's discretion in this case.

CONCLUSIONS AND RECOMMENDATIONS

Based on the foregoing, I recommend that the public body specifically respond to the last three points in the Applicant's request for information, keeping in mind that these

three requests have not been restricted in scope to the list of parties listed in the first part of the request. All responsive records should be identified and disclosed in accordance with the Act within 30 days of the Minister's decision with respect to these recommendations. I would encourage the public body to consult with the Applicant (ideally by telephone for the sake of efficiency) so as to attempt to focus the disclosure on the records he is specifically interested in, as it does seem that there is some expectation of the existence of a particular record on the part of the Applicant. By discussing the matter directly with the Applicant, the public body may be able to narrow the request and assist the Applicant to get what he really seeks.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner