NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER
Review Recommendation 15-093
September 22, 2015

Review File: 15-130-5

BACKGROUND

The Applicant made a request to the Office of the Chief Coroner for Nunavut for :

> all coroner's inquest reports, findings, verdicts, recommendations or other related or supporting documents that your office is legally permitted to share with the public for all persons meeting both of the following two criteria:
>
> 1) an inquest concerning their death was held between January 1, 2004 and December 31, 2014; and
> 2) they died during the course of arrest by police or in police custody or detention in Nunavut (excluding deaths that took place within a jail or correctional facility)

The Department of Justice, on behalf of the Coroner's Office, refused to disclose any responsive records, citing section 23(1) of the *Access to Information and Protection of Privacy Act (ATIPPA)*. The department indicated that because the sample size was so small and the information requested was so narrowly specific, the disclosure of any information would result in an unreasonable invasion of the privacy of the deceased persons.

THE APPLICANT'S ARGUMENT

The Applicant has provided a number of arguments as to why the records he is seeking should be disclosed and why, in his opinion, Section 23 does not apply.

Section 3(2)(b)

The Applicant argues that section 3(2)(b) of the *ATIPPA* provides quite clearly that the *Act* is not intended to prevent access to records "normally available to the public". He argues that coroner's inquests are, by definition, public happenings. He refers to a number of sections of the *Coroner's Act* which he argues confirm this:

a) Section 36(1) which states that, subject to limited exceptions, inquests are to be held in public. This means that any member of the pubic can attend and hear all of the evidence presented;

b) Section 53(4) which provides that evidence recorded at an inquest need not be transcribed by a stenographer unless "a person requests a transcript and pays the stenographer the prescribed fee". The Applicant points out there are no qualifications in the act limiting this option only to government personnel, nor is there anything in the act which requires the transcriptionist to protect, in any way, the privacy interests of the deceased or any other party involved in the inquest.

c) Section 21(1) which lists the circumstances in which the coroner must hold an inquest. The Applicant points out that three of the four items listed specifically relate to informing the public or bringing information to the knowledge of the public regarding the deaths:
   - to inform the public of the circumstances of a death where it will serve some public purpose
   - to bring dangerous practices or conditions to the knowledge of the public and facilitate the making of recommendations to avoid preventable deaths
   - to inform the public as to dangerous practices or conditions in order to avoid preventable deaths.

He argues that preventing access to the records requested would frustrate the purposes for holding an inquest.

d) Section 21(2) which makes an inquest mandatory when a person dies while in detained or in custody

e) Section 5(2)(c) and (d) which give the Coroner the power to bring the findings of the office to the attention of "appropriate persons" and to issue public reports. He argues that "many Canadian jurisdictions publish some or all of their recent coroners reports online for public access" including the Northwest Territories. He says that he has submitted the same Access to Information request to every Canadian jurisdiction and that Nunavut is the only jurisdiction to refuse access to full, unredacted copies of the relevant coroner's reports.

The Applicant argues that the disclosure of the coroner's reports cannot be considered to be an "unreasonable invasion of a third party's personal privacy" given the public nature of the process through which public inquest reports and their recommendations are generated.

The Applicant also suggests that section 23(3)(a) and (b) of the *ATIPPA* should be applied in this case. Section 23(3) provides a list of things that may be considered when determining whether or not a disclosure would constitute an unreasonable invasion of privacy. These factors include:

a) the disclosure is desirable for purpose of subjecting the Government of Nunavut to public scrutiny;
b) the disclosure is likely to promote public health and safety

The Applicant, a university researcher, says his research concerns law and policy and mental health.

Sections 23(4)(d) and 49

Section 23(4) of the Act outlines circumstances in which the disclosure of personal information does not amount to an unreasonable invasion of the privacy of a third party. In particular, section 23(4)(d) provides that there is no unreasonable disclosure of personal information where the disclosure is for research purposes and is in accordance with section 49. Section 49 allows public bodies to disclose personal information for research purposes where:

(a) the research purpose cannot reasonably be accomplished unless that information is provided in individually identifiable form;
(b) any record linkage resulting from the disclosure is not harmful to the individuals the information is about and the benefits to be derived from the record linkage are clearly in the public interest;
(c) the head of the public body has approved conditions relating to the following:
    (i) security and confidentiality,
    (ii) the removal or destruction of individual identifiers at the earliest reasonable time,
    (iii) the prohibition of any subsequent use or disclosure of that information in individually identifiable form without the express authorization of that public body; and
(d) the person to whom the information is disclosed has signed an agreement to comply with the approved conditions, this Act and the regulations and any of the public body's policies and procedures relating to the confidentiality of personal information.

The Applicant feels that he should have been afforded the opportunity to access the documents under conditions that would protect the privacy interest of the third parties involved. It is his position that his study, which is national in scope, cannot be conducted without the participation of Nunavut.

THE PUBLIC BODY'S POSITION

The Department indicated that while there were some "publicly available" documents identified as responsive to the Applicant's request for information, namely the verdicts read in at the public inquest, there were others for which disclosure was not "legally permitted". They did not provide an explanation as to why these publicly available records were not disclosed in response to the Request for Information. They did however, say that they denied the release of the requested information generally because of the sensitive nature of the documents being requested and the potential for the documents to identify deceased persons without the consent of their surviving family. The number of cases that fit the parameters given by the Applicant was three, and the person involved in each of these cases was the subject of national media attention and speculation. The Department indicates that the release of these records would undoubtedly lead to the identification of the subjects, regardless of any severing of information which might be done. They point out that the public body is prohibited from disclosing information where that disclosure would constitute an unreasonable invasion of privacy. The prohibition applies specifically to information relating to a medical, psychiatric or psychological history, diagnosis, treatment or evaluation. They take the position that the records requested include detailed medical information about the manner and method of the individual's death. The well being and protection of the surviving family is paramount and the release of these records would constitute an unreasonable invasion of their right to privacy. The department indicated, in their submissions to me, that they were prepared to consider the disclosure of some of the records, namely the verdicts, but with some measure of severing.

The Department of Justice chose not to comment on the Applicant's submissions with respect to the *Coroner's Act* as "appeals to the Information and Privacy Commissioner pertain to the proper use and implementation of and compliance with the ATIPP Act" and that the Information and Privacy Commissioner has jurisdiction solely in regards to this legislation.

Section (3)(2)(b)

The Department of Justice takes the position that Coroner's records are not records "normally available to the public" but rather are available to the public at the discretion of the Coroner. While Coroner's Inquests are public, the reports and supporting documentation are not, and the release of these documents is at the discretion of the Chief Coroner. They argue that there is an inherent independence in the office of the Chief Coroner and, therefore, these records are not "normally available" to the public, at least no more so than any other record prepared by the Government of Nunavut which falls under the purview of the *ATIPPA.* It is worth noting, they say, that while the Chief Coroner at times releases Coroner's reports to the public, they are first edited so as to remove the name and date of birth of the subject of the report. In the context of this request for information and due to the high profile nature of these cases and the small sample size, even with the information severed, the individual's identity could still be determined.

Section 23(3)(a)

In response to the Applicant's argument that the records should be disclosed because the study being done is aimed, in part, at scrutinizing police/corrections practices, and section 23(3)(a) allows disclosure in these circumstance, the Department of Justice argues that in this case, though the goal of the Applicant's study is a noble one, it also lacks specificity. They point out that the national scope of the study, combined with the small sample size Nunavut could provide would be statistically insignificant to the overall content of the study. There is no plan to disseminate the results of the study to Nunavummiut, making the applicability of the study for public scrutiny in Nunavut less than the potential harm that the release of the information could cause to the families of the deceased. They argue that the records in question were created as a part of a public inquest, so the Government of Nunavut and the RCMP have already been subjected to public scrutiny regarding the documents requested by the applicant.

Section 23(4)(d) and 49

The Department of Justice notes that Section 49 governs the use of information shared under a research agreement with the Government of Nunavut and stipulates the necessary protections for such research agreements. As there is no such research agreement in place for this study, section 23(4)(d) and section 49 do not apply.

THE APPLICANT'S RESPONSE

The Applicant begins with an indication that he would be satisfied with copies of the inquest verdicts in response to his request, assuming that these records include a summary or description of the incident in which the death took place, and the determinations and recommendations made by the jury. He maintains, however, that these records should not be subject to any redactions as they are public documents produced as a result of a public hearing.

The Applicant further points out that everyone agrees that the cases in question garnered national public attention and that there was national press coverage in all cases. He argues:

> if much of the information requested is already in the public domain in news articles, that should diminish rather than reinforce the privacy interests of the deceased and any third party interests.

Finally, the Applicant argues that Section 48 of the *Access to Information and Protection of Privacy Act* provides that personal information may be disclosed by a public body "for the purpose for which the information was collected" or for a use consistent with that purpose. The *Coroner's Act* provides that an inquest must be held when the identity of the deceased or the circumstances of the death need to be determined. He argues that the release of the information concerning the deceased's identity would be consistent with the act which "aims to inform the public" about these deaths.

In response to the Department's argument that the small size of the sample in Nunavut would be statistically insignificant to the Applicant's study, the Applicant states that his study is not primarily a statistical study, but is rather "aimed at qualitative analysis and consideration of the legal and policy structures that shape fatal police interactions." Further, because the RCMP is the police force in Nunavut, and the RCMP is a national policing organization, information from Nunavut is significant not only for the people of Nunavut, but for all Canadians.

The Applicant notes that he is not seeking any medical documents, autopsy reports or other tertiary documentation concerning the medical history of the deceased or any information directly concerning their family members or other third parties.

THE PUBLIC BODY'S FINAL SUBMISSIONS

The Department of Justice, in its final submission to me, emphasizes that, as the results of the Applicant's study will be made available publicly including on line, it is reasonable to foresee that it will reach the families of the deceased individuals, "and with no warning or consent could be upsetting and cause relived trauma for these family members". They argue that erring on the side of caution in these circumstances is not only appropriate but necessary.

DISCUSSION

I would like to thank both the Applicant and the Department of Justice for their thorough submissions in this matter. Both make good points. This is one of those situations in which the *Access to Information and Protection of Privacy Act* is not entirely clear in its application and it is, perhaps, important to rely on a common sense approach, keeping in mind the goals and purposes of the Act.

Preliminary Matters

As a preliminary matter, I would point out to the Department of Justice that, although my mandate is drawn solely from the *Access to Information and Protection of Privacy*

Act, that mandate does not limit me to the four corners of that legislation to assess the issues raised. Indeed, the *ATIPPA* often requires that I consider other legislation. For example, section 48(u) allows a public body to disclose personal information "for any purpose in accordance with any Act that authorizes or requires the disclosure". This requires some interpretation of other pieces of legislation such as, in this case, the *Coroner's Act*.

As well, while I appreciate the Department's wish to protect the families of the deceased individuals who are the subject of the coroner's reports being requested, the *ATIPPA* does not provide an exemption for information which might upset someone who is not the subject of the record. The protections granted in the act are specific to the person the information is about.

Finally, I note that section 33 of the *ATIPPA* puts the onus of establishing that an exemption applies on the public body seeking to withhold a record. This obligation must, however, be read in conjunction with the mandatory exemptions, which prohibit the disclosure of certain information, including personal information where the disclosure of that information would constitute an unreasonable invasion of the privacy of a third party.

The Application of Section 23

Because the public body has indicated a willingness to consider disclosing a redacted version of the Verdicts issued by the Coroner's Office with respect to the deaths in question, and the Applicant has indicated that he would be satisfied with un-redacted copies of those Verdicts, I will not consider any of the other responsive records at this time. I would merely suggest, without having seen those records myself, that most of the documents filed as part of the Inquest process would very likely meet the test of section 23(1) such that the disclosure would not be permitted. But as we are now focussed only on the Verdicts, I need not consider that further.

Section 23(2) provides a list of circumstances in which there is an automatic "presumption" that the disclosure of the personal information of a third party will amount to an unreasonable invasion of privacy. This list includes information about medical, psychiatric or psychological history as well as information about the third party's race, religious beliefs, colour, gender, age, ancestry or place of origin. Much of the information included in the Verdicts would fall under these categories. It is to be noted, however, that legal presumptions are rebuttable.

It is common ground in this case that the incidents leading to the Coroner's Inquests in question have been well publicized. The identities of the individuals whose deaths were investigated by the Coroner's Office, as well as many of the facts and circumstances surrounding each case were widely reported in the national press at the time of the deaths, as were the results of the Coroner's Inquests. The Coroner's Inquest was a public proceeding. It is also to be noted that a summary of the salient facts of at least one of these cases, together with a list of some of the recommendations made have been published by the Chief Coroner in her Annual Report (although there are no names included in this publication). Also as noted by the Department, the number of deaths in the category targeted by the Applicant are very limited - there were only three such deaths during the time period in question.

In light of all of this, it would take very limited effort on the part of the Applicant, or any other member of the public for that matter, to identify the deceased persons by name and to attach those names to the summaries contained in the Coroner's Annual Reports or news reports issued about the deaths or the results of the Inquests. While I may question whether or not some of provisions of the *Coroner's Act* are in conflict with the *Access to Information and Protection of Privacy Act,* and whether too much information is generally being disclosed by the Coroner's Office, in this case we are dealing with the fact that these cases were well known. In these cases, it is now impossible to argue that the disclosure of information already well known to the public amounts to an unreasonable invasion of the privacy of the deceased individuals. I would say that in this case, the presumption raised in section 23(2)(b) has been rebutted. I therefore recommend that the Verdicts be disclosed to the Applicant without any redactions.

The Applicant also raises some good points about many of the provisions of the *Coroner's Act*, all of which lead to the conclusion that the Verdicts of Coroner's Inquests are public documents. Indeed, the 2011 Annual Report published by the Chief Coroner makes the following statement:

> The coroner's investigation is considered complete when the final Coroner Report has been prepared. *This report is a public document and may be obtained from the Office of the Chief Coroner upon written request.* (emphasis added)
> ...
> A Report of the Coroner and a Report of the Chief Coroner are completed (sic) all death investigations with the exception of cases where an inquest has been called. At the inquest the jury's verdict takes the place of a Coroner Report.

The *Coroner's Act* also mandates that Inquests under the Act are to be public.

Neither of the parties has referred to is Section 23(4) of the *Access to Information and Protection of Privacy Act*. Section 23(4) outlines circumstances in which the disclosure of personal information "is not" an unreasonable invasion of a third party's personal privacy. Specifically, subsection 23(4)(c) provides that it is **not** an unreasonable invasion of a third party's personal privacy where "an Act of Nunavut or Canada authorizes or requires disclosure". The question, then, is whether the *Coroner's Act* "authorizes" the disclosure of the personal information of individuals whose deaths are investigated by the Coroner's Office. And if the *Coroner's Act* does authorize the disclosure of personal information, does this put it in conflict with the privacy provisions of the *Access to Information and Protection of Privacy Act* , which takes precedence in the absence of a "notwithstanding clause". Because of my conclusions with respect to section 23(2) above, however, I will leave a detailed consideration of these questions to another day. I will, however, simply note that in my reading of the *Coroner's Act*, while the Act authorizes the Coroner to make public reports, that does not necessarily

authorize the disclosure of personal information in those reports. I simply flag these issues for the Department's consideration and, perhaps, to suggest that amendments may be needed to the *Coroner's Act* to clarify some of these questions.

I would briefly comment on the argument made by the Applicant that the records being requested by him are "ordinarily available to the public". There is some indication, as noted above, that Coroner's Reports and Verdicts of Inquiries are, indeed, made openly available to the public. That said, I'm not convinced that they should be made widely available to the public. They are, indeed, public records, but I would not classify them in the same nature as Land Titles records or court records which have public registries to facilitate public access. I would suggest that the Chief Coroner review her policy in this regard (a policy which was not followed in this case in any event).

I think that the question of whether or not the Applicant should have been afforded access to the records as a researcher also deserves comment. While researchers may be permitted access to personal information in some circumstances in which other members of the public would be denied access, this requires a research agreement between the researcher and the public body. The Applicant complains that he wasn't afforded this opportunity. If he were to review the Regulations under the *ATIPPA,* however, he would see that this requires the researcher to request such an agreement and for the researcher to satisfy the GN that his/her research is about something significant enough to the people of Nunavut that the personal privacy of Nunavummiut should be set aside. It is a discretionary matter. Furthermore, it would have been up to the researcher to request such an agreement, not for the GN to offer it.

CONCLUSIONS AND RECOMMENDATIONS

As noted above, I recommend that the Verdicts of the Coroner's Jury in each of the cases identified by the department as falling within the scope of the Applicant's request be disclosed, without any redactions.

I further recommend, however, that the Coroner's Office undertake a thorough review of their policies and procedures with a view to ensuring that those policies comply with the privacy provisions of the *Access to Information and Protection of Privacy Act*. Whether or not the Act gives the Coroner's Office the authority to report publicly on matters which come before it, I do not believe that, as drafted, the *Coroner's Act* supercedes the privacy protections in the *ATIPPA.* In light of the purposes of the *Coroner's Act*, it may be appropriate, in light of the issues raised by this case, to consider amendments to that act which would specifically allow the disclosure of personal information in certain, defined circumstances notwithstanding the privacy protections afforded by the *Access to Information and Protection of Privacy Act*.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner