

Issues

- [4] The issues in this review are:
- a. Did Justice conclude correctly that the first part of the Applicant's request was outside the scope of the Act?
 - b. Did Justice conclude correctly that it had already responded to the second part of the Applicant's request?
 - c. Did Justice do a diligent search for records responsive to the third part of the Applicant's request?
 - d. Did Justice conclude correctly that the fourth part of the Applicant's request was outside the scope of the Act?
 - e. Did the Department of Justice staff person who responded to the Applicant have appropriate delegated authority?

Facts

[5] On April 26, 2022, the Applicant mailed an ATIPP application to the Department of Justice, along with the required fee.

[6] The application was centered on events associated with the passage through the Nunavut Legislative Assembly of Bill 16 (S.Nu. 2010, c. 10) which amended the *Judicature Act*, C.S.Nu. c. J-10. The amendments added sections 51.1 to 51.5 to the *Judicature Act* and addressed the subject of vexatious litigants. The amendments came into force on June 10, 2010.

[7] The application, edited by me so that it is not in all-capitals and to remove the names of individuals, reads as follows:

I request copies of any all records relating to

1. Meeting and communications between the Nunavut Department of Justice and the Nunavut Court of Justice, namely, [four named judges], and court staff, concerning vexatious litigants before, during and after the enactment of section 51 (subsection 1 through 5) of the *Judicature Act*, SNWT (Nu) 1998 c 34 s 1.
2. Discussion and meetings within the Nunavut Department of Justice, concerning vexatious litigants before, during and after the enactment of section 51 of the *Judicature Act*, SNWT (Nu) 1998 c 34 s 1.

3. Payments made to [a named individual] for the work she carried out to develop a legislative proposal on the issue of vexatious litigants on behalf of the Nunavut Department of Justice.
4. I request copies of any and all reports of the Standing Committee of the Nunavut Legislative Assembly regarding the *Judicature Act*, 2010, Bill 16, An Act to amend the *Judicature Act*.

[8] There was some delay in Justice's receiving and processing of the application. On June 2, 2022, this office received a request for review from the Applicant, who said they had received no response from Justice. I closed my review of the delay when Justice did send a substantive response to the Applicant. At that point, review of the delay was moot.

[9] On June 21, 2022, the Department of Justice sent to the Applicant a release letter, signed by one of the department's ATIPP Coordinators. The substantive portion of the letter reads as follows:

Please find below your request details:

1. The information regarding the Nunavut Court of Justice, is outside the scope of the ATIPP Act according to sections 2 and 3(1).
2. The Department of Justice has no further information to provide, that has not already been provided to you in regards to Vexatious Litigants.
3. The Department of Justice did not make any payments to [the individual named in the Applicant's application].
4. This is public information that can be obtained through the Legislative Assembly Library, or online at www.assembly.nu.ca/.

There was no information for this request.

[10] On July 20, 2022, the Applicant filed a request for review with this office.

Law and Analysis

[11] The Applicant's ATIPP application has four parts. Justice's response, saying that it has no records to disclose, raises a different legal issue for each of the four parts. The Applicant adds a fifth legal issue, namely whether the ATIPP Coordinator who responded to the application had the proper delegated authority.

First issue: Nunavut Court of Justice

[12] The first part of the Applicant's request concerns records of meetings between the Department of Justice and the Nunavut Court of Justice. Justice responded by saying that the Nunavut Court of Justice is outside the scope of the ATIPPA, and therefore there are no responsive records.

[13] The Nunavut Court of Justice is not a "public body" within the meaning of the ATIPPA: *Nunavut Court of Justice (Re)*, 2022 NUIPC 3 (CanLII), which I note is a decision involving the same Applicant. Records of meetings between judges, or between judges and court staff, are outside the scope of the ATIPPA: section 3(1)(a). In any event, Justice would not have custody or control of records of meetings between judges, or between judges and court staff.

[14] There remains the question of whether there were records of meetings between judges or court staff and the Department of Justice. Any such records would be within the scope of the ATIPPA.

[15] In response to my questions, Justice informs me that any such records have already been disclosed to the Applicant.

[16] There is nothing in the ATIPPA specifically addressing this point, but it is common sense that a public body's obligation to disclose records is fulfilled when it has, in fact, disclosed records. If an applicant files repetitive or overlapping applications, the public body is not required to keep on producing the same records to the same applicant.

[17] This Applicant has apparently filed a large number of overlapping requests touching on the 2010 amendments to the *Judicature Act*. Justice has provided me

with copies of these previous applications, at least those that were filed within the last relatively short period. I have reviewed these applications and am satisfied that several of them cover the same ground as the first part of the Applicant's request in this case. I will not recommend that Justice keep searching for and producing the same records.

Second issue: Previous disclosure

[18] The second part of the Applicant's request concerns records of meetings within the Department of Justice about the 2010 amendments to the *Judicature Act*. Justice responded by saying that it "has no further information to provide, that has not already been provided to you".

[19] My analysis of this second issue is the same as for the first issue. I have reviewed this Applicant's numerous recent requests for records related to the 2010 amendments to the *Judicature Act* and am satisfied that several of them cover the same ground as the second part of the Applicant's request in this case. I will not recommend that Justice keep searching for and producing the same records.

Third issue: Diligent search

[20] The third part of the Applicant's request concerns payment to a named individual for drafting the legislative proposal for the 2010 amendments to the *Judicature Act*. I note in passing that this specific request for records is not covered by any of the Applicant's previous requests touching on the 2010 amendments to the *Judicature Act*.

[21] Justice responded by saying that no payments were made to that individual. In response to my questions, Justice advises that their search for records was limited to Justice itself. So to be more precise in its answer, no payments were made by Justice to the named individual with respect to the 2010 amendments to the *Judicature Act*.

[22] A public body has a duty to do a “diligent search” for responsive records: *Department of Health (Re)*, 2021 NUIPC 20 (CanLII) at paragraphs 12 to 15; *Department of Education (Re)*, 2021 NUIPC 10 (CanLII) at paragraphs 24 to 27.

[23] There is a threshold question in every “diligent search” case, and that is whether there is some basis for believing that the record exists at all: *Nunavut Housing Corporation (Re)*, 2021 NUIPC 26 (CanLII) at paragraph 64; *Review Report 17-118 (Re)*, 2017 NUIPC 5 (CanLII), citing Order P2010-10 of the Alberta Information and Privacy Commissioner; *Department of Health (Re)*, 2021 NUIPC 20 (CanLII) at paragraph 19.

[24] A broader search may have been advisable, perhaps through the Department of Finance, but there must first be “some basis” for believing that payments were made to the named individual in respect of the amendments to the *Judicature Act*.

[25] I have no information before me about what role the named individual had at the time of the 2010 amendments. If they were an employee of Justice or any other GN department, they would likely have received a salary rather than payment for their work on a specific legislative proposal. If they were an employee of the Legislative Assembly, their work would be outside the scope of the ATIPPA. If they were a contractor they may have received payment identifiable as being for work on the 2010 amendments to the *Judicature Act*.

[26] The point is that there are uncertainties about where to look, or even if the records exist. The purpose of the “some basis” test is “to prevent the public body expending time and effort on searches based only on an applicant’s subjective belief that a document must exist or should exist or might exist”: *Department of Health (Re)*, 2021 NUIPC 20 (CanLII) at paragraph 19.

[27] In response to my questions, which were designed to elicit “some basis” for believing there are responsive records, the Applicant has taken the unfortunate position that I am not permitted to ask questions, and so declined to answer them.

[28] As a result, there is not “some basis” for believing that the requested records exist. I make no recommendation that Justice do more in response to the third part of the Applicant’s request.

[29] I note, however, that in the course of this review I asked the Department of Finance if it has any record of payment to the named individual relating to the 2010 amendments to the *Judicature Act*. Finance tells me, and I find as a fact, that it does not.

Fourth issue: Legislative Assembly

[30] The fourth part of the Applicant’s request concerns reports of the Standing Committee of the Legislative Assembly on the amendments to the *Judicature Act*. Justice responded by saying that these are public documents, available from the Legislative Library or from the Legislative Assembly’s website.

[31] The Legislative Assembly is not a “public body” within the meaning of the ATIPPA: section 2, definition of “public body”, paragraph (c). Justice was therefore unable to transfer this portion of the Applicant’s request under section 12 of the ATIPPA. A transfer can be made only to another public body.

[32] In any event, section 25 of the ATIPPA permits refusal of disclosure if information is otherwise available to the public:

25. (1) The head of a public body may refuse to disclose to an applicant information that is otherwise available to the public or that is required to be made available within six months after the applicant's request is received, whether or not for a fee.

(2) Where the head of a public body refuses to disclose information under subsection (1), the head shall inform the applicant where the information is or will be available.

[33] Even if reports of legislative committees were in its custody or control – and they are not – Justice was right that these reports are available to the public and therefore do not have to be included in the disclosure: section 25(1).

[34] Public bodies do have many obligations under the ATIPPA and have a general duty to assist applicants: section 7(1). Nevertheless there are limits. A

public body is not an applicant's research department. When a requested record is outside the scope of the ATIPPA, as this one was, the public body's obligations to gather the information are at an end.

Fifth issue: Delegated authority

[35] The fifth issue raised by the Applicant is whether the ATIPP Coordinator who responded to the application had the proper delegated authority. This is an unusual issue to raise, and I can find no previous Nunavut case in which it has been considered. Nevertheless it is a legitimate issue to raise on review.

[36] Most of a public body's obligations under the ATIPPA are placed on the "head" of the public body. For a department, the "head" is "the member of the Executive Council who presides over it": ATIPPA, section 2. For the Department of Justice, that is the Minister of Justice.

[37] The assignment of statutory responsibilities to a minister is a normal drafting convention, and flows from our system of responsible government. But a minister is not expected to carry out personally all of their statutory responsibilities. The hands-on work is done by the public service.

[38] Section 69 of the ATIPPA allows the head of a public body to delegate a power or function given to the head by the ATIPPA:

69. (1) The head of a public body may authorize any person to exercise a power or perform a duty or function of the head under this Act except the power to authorize another person to exercise any of the powers or perform any of the duties or functions of the head under this Act.

(2) An authorization under subsection (1) must be in writing and may contain any limitations, restrictions, conditions or requirements that the head considers necessary.

(3) A reference to the head of a public body in this Act or the regulations includes a person authorized by a head to exercise a power or perform a duty of the head.

[39] The *Legislation Act*, S.Nu. 2020, c. 15, contains a general provision about who can act for a minister:

33. (1) Words in an enactment directing or empowering a Minister include
- (a) another member of the Executive Council acting as or for the Minister;
 - (b) the deputy head of the department or public agency that administers the enactment;
 - (c) a person employed in an appropriate capacity in the department or public agency that administers the enactment; and
 - (d) a person authorized in writing, by name or by office, to do that act or thing by the Minister.

[40] It is not necessary that an instrument of delegation be renewed each time there is a change of minister: *Putnoki v. Ontario (Public Service Grievance Board)* (1975), 56 DLR (3d) 197, 1975 CanLII 729 (Ont.Div.Ct.); *Ontario (Solicitor General) (Re)*, 1991 CanLII 4030 (ON IPC).

[41] In sum: section 69 of the ATIPPA and section 33(1) of the *Legislation Act* exist to provide for the orderly delegation of authority.

[42] With respect to section 33(1)(c) of the *Legislation Act*, the ATIPP Coordinator who responded to the Applicant's request for records assumed their responsibilities in May 2022. The duties of the position are in the title – "ATIPP Coordinator" – and a person employed in that capacity is the appropriate person to carry out those duties.

[43] With respect to the writing requirement in section 33(1)(d) of the *Legislation Act* and section 69(2) of the ATIPPA, Justice does have a formal written instrument of delegation, last renewed in December 2021. The instrument is called "Department of Justice Access to Information and Protection of Privacy Authorization". I find this instrument satisfies the requirement that a delegation of authority be in writing.

[44] I have reviewed this Authorization document, which is very detailed about who within the department has authority to do what under the ATIPPA. I find that the document authorizes the ATIPP Coordinator at Justice to deal with the Applicant's request in the way that they did.

[45] The question of proper delegation is not a mere technicality. The ATIPPA requires publication of a directory of "the appropriate person" for each public

body to whom access requests can be sent: section 70(1). Moreover, the ATIPPA was amended in 2017 to ensure that the identity of applicants is kept confidential and disclosed only to “a person authorized to receive the request” for the public body.

[46] This Review Report will, I hope, be a salutary reminder to all public bodies that their instruments of delegation should be detailed and current. Justice’s instrument of delegation sets a good standard.

Conclusion

[47] Justice concluded correctly that some of the first part of the Applicant’s request was outside the scope of the Act. As for the remainder, Justice had already responded under previous requests from the same Applicant. Justice concluded correctly that it did not have to search for and disclose the records again.

[48] Justice concluded correctly that it had already responded to the second part of the Applicant’s request, and did not have to search for and disclose the records again.

[49] Justice did a diligent search for records responsive to the third part of the Applicant’s request. The Applicant is unable to provide “some basis” for concluding that a broader search would have been appropriate.

[50] Justice concluded correctly that the fourth part of the Applicant’s request was outside the scope of the ATIPPA.

[51] The Justice staff person who responded to the Applicant had appropriate delegated authority to deal with the Applicant’s request in the way that they did.

Recommendations

[52] I recommend that Justice maintain its stated position with respect to disclosure of records to the Applicant.

Graham Steele

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