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Nunavut Information and Privacy Commissioner

Nunavunmi Tuhaqtauyukhaliqinirmun Kanngunaqtuliqinirmun Kamisina
Commissaire à l'information et à la protection de la vie privée du Nunavut

Commissioner's Interim Report

Report Number:	22-230-RR
CanLII Citation:	Nunavut Municipal Training Organization (Re), 2022 NUIPC 21
NUIPC File Number:	22-147
GN File Number:	1029-20-CGS0340
Date:	August 22, 2022

Summary

[1] The Applicant requested records from the Department of Community and Government Services. The request covered records held by the Nunavut Municipal Training Organization. The NMTO does not consider itself to be a “public body” subject to the ATIPPA, but complied with CGS’s request to search for records. The NMTO informed CGS it had no responsive records. CGS then informed the Applicant there were no responsive records. The Applicant requested review. The Applicant and the NMTO asked the Commissioner to decide if the NMTO is a public body subject to the ATIPPA. The Commissioner finds the NMTO is not a public body.

Nature of Review

[2] The Applicant has requested a review of a disclosure decision by the Department of Community and Government Services (CGS). This is an interim decision on a question of jurisdiction. The jurisdictional question is whether the Nunavut Municipal Training Organization (NMTO) is a “public body” whose records are subject to search and disclosure under the *Access to Information and Protection of Privacy Act* (ATIPPA).

[3] The Applicant’s request for review includes, but is broader than, the question of jurisdiction concerning the NMTO. This is therefore an interim decision. Later, after I have completed my review, I will issue a final decision on the merits.

Issues

- [4]** The issues in this review are:
- a. Is the NMTO a “public body”, or part of another public body, for ATIPPA purposes?
 - b. If not, are NMTO’s records nevertheless “in the custody or under the control of” a public body?

Facts

[5] On June 18, 2022, the Applicant filed a request for records under section 6 of the ATIPPA.

[6] The request was directed to “G-N HR/NMTO/CGS/Community Development”. The acronyms stand for, respectively, the Government of Nunavut (Department of) Human Resources, Nunavut Municipal Training Organization, and (Department of) Community and Government Services. Community Development is a division of CGS.

[7] The request, with names of individuals taken out, reads as follows:

Effective January 2022 all documents, email, correspondence, downloads, files of any kind related to [the Applicant] AND [two named individuals] to present date or any other NMTO/GN employee as well.

The first named individual is an employee of the NMTO. The second named individual is a GN employee who is assigned to work at the NMTO. (I will discuss this GN-NMTO employment relationship more fully in the Analysis section below.)

[8] The ATIPP request was handled by CGS. CGS did not transfer, or attempt to transfer, the ATIPP request to the NMTO under section 12 of the ATIPPA. Instead, CGS simply asked the NMTO to search its records in accordance with the request.

The NMTO did search its records and informed CGS that it found no responsive records.

[9] On July 27, 2022, CGS responded to the Applicant, stating that no responsive records had been found. This response covered both the NMTO and non-NMTO portions of the request.

[10] On July 27, 2022, the Applicant requested that this office review CGS's response.

Law

[11] The ATIPPA applies to all records "in the custody or under the control of a public body": ATIPPA, section 3(1).

[12] A public body has a duty to undertake 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.

[13] A preliminary issue in some cases is whether the entity being asked to search for records is a "public body" for ATIPPA purposes: see, for example, *Nunavut Court of Justice (Re)*, 2022 NUIPC 3 (CanLII); *Canadian Energy Centre Ltd. (Re)*, 2022 CanLII 20312 (AB OIPC).

[14] Section 2 includes a definition of "public body". The relevant portions read as follows:

"public body" means

- (a) a department, branch or office of the Government of Nunavut, or
- (b) an agency, board, commission, corporation, office, municipality or other body designated in the regulations,

I note that this definition uses the word "means" (rather than "includes") so paragraphs (a) and (b) of the definition are exhaustive. If an entity does not fit within one paragraph or the other, it is not a "public body" for ATIPP purposes.

[15] The *Access to Information and Protection of Privacy Regulations*, R-206-96, as amended, designate certain public bodies as being subject to the ATIPPA: section 1(2) and Schedule A. The NMTO is not a designated body in Schedule A.

[16] The ATIPPA was amended in 2017 to provide for the possibility of municipalities being designated as a “public body”: S.Nu. 2017, c. 26. However, no municipality has yet been designated in Schedule A of the ATIPP Regulations. Therefore, no Nunavut municipality is currently a “public body” for ATIPP purposes.

[17] The Supreme Court of Canada has, in a number of cases in different contexts, ruled on the question of whether an entity is part of the government. Although none of the cases is directly on point, the tests developed by the Supreme Court of Canada in these cases are useful, by analogy, for the purposes of this case.

[18] In *Northern Pipeline Agency v. Perehinec*, [1983] 2 SCR 513, 1983 CanLII 167 (SCC), the question was whether the Northern Pipeline Agency could be sued in the courts of Alberta, or whether the suit had to be filed in the Federal Court. One element of the case was whether the Northern Pipeline Agency was part of “the Crown”. On this point, Justice Estey for six members of the seven-member court wrote the following (at pages 517-518):

Whether a statutory entity is an agent of the Crown, for the purpose of attracting the Crown immunity doctrine, is a question governed by the extent and degree of control exercised over that entity by the Crown, through its Ministers, or other elements in the executive branch of government, including the Governor in Council.

[19] Justice Estey also quoted from the Supreme Court of Canada’s decision in *Westeel-Rosco Ltd. V. Board of Governors of South Saskatchewan Hospital Centre*, [1977] 2 SCR 238 at pages 249-50, per Justice Ritchie:

Whether or not a particular body is an agent of the Crown depends upon the nature and degree of control which the Crown exercises over it. This is made plain in a paragraph in the reasons for judgment of Mr. Justice Laidlaw, speaking on behalf of the Court of Appeal for Ontario in *R. v. Ontario Labour Relations*

Board, Ex p. Ontario Food Terminal Board (1963), 38 DLR (2d) 530, at p. 534, where he said:

It is not possible for me to formulate a comprehensive and accurate test applicable in all cases to determine with certainty whether or not an entity is a Crown agent. The answer to that question depends in part upon the nature of the functions performed and for whose benefit the service is rendered. It depends in part upon the nature and extent of the powers entrusted to it. *It depends mainly upon the nature and degree of control exercisable or retained by the Crown.*

(Emphasis added by Ritchie J.)

[20] In the *Canadian Charter of Rights and Freedoms* context, the Supreme Court of Canada has been called upon to decide whether an entity is part of the government and therefore subject to the Charter.

[21] In *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 SCR 570, 1990 CanLII 63 (SCC), for example, the court concluded Douglas College, a post-secondary institution established under the *College and Institute Act* of British Columbia, was subject to the Charter.

[22] There was a complicated split in the opinions of the court in *Douglas College*, which we do not need to get into, but the court was unanimous in concluding that Douglas College was indeed subject to the Charter. Both Justice La Forest and Justice Wilson, who wrote the main judgments, applied a test that included “control” as a key element, and concluded that Douglas College was substantially controlled by the government of British Columbia.

[23] Justice La Forest, who on this point was writing for four members of the seven-member court, dealt with the issue briefly (at page 584):

As its constituent Act makes clear, the college is a Crown agency established by the government to implement government policy. Though the government may choose to permit the college board to exercise a measure of discretion, the simple fact is that the board is not only appointed and removable at pleasure by the government; the government may at all times by law direct its operation. Briefly stated, it is simply part of the apparatus of government.

[24] Justice Wilson, who on this point was writing for three members of the seven-member court, applied the test she had laid out in *McKinney v. University of Guelph*, [1990] 3 SCR 229:

1. Does the legislative, executive or administrative branch of government exercise general control over the entity in question?
2. Does the entity perform a traditional government function or a function which in more modern times is recognized as a responsibility of the state?
3. Is the entity one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest?

Applying this three-part test, Justice Wilson concluded that Douglas College “is a Crown agent established, funded and heavily controlled by government” and that it was “discharging a government function in the public interest” and was therefore part of government for the purposes of the Charter.

[25] Based on these decisions, the legal test I will apply in the present case is mainly “the nature and degree of control exercisable or retained by” the GN over the NMTO.

Analysis

[26] The ATIPPA applies to a “public body” that is part of the Government of Nunavut. But which specific entities are in and which are out? For departments, and for entities designated in the ATIPP regulations, the answer is easy: they are in. But the GN, like all modern governments, carries in its wake a variety of entities that are not so clearly in or out. The NMTO is one of the entities in the grey zone.

[27] Although the NMTO does not consider itself to be subject to the ATIPPA, it has previously complied with CGS’s requests to search for records, and it did so again in this case, albeit reluctantly. There is good reason to believe that this Applicant may file future ATIPP requests that also cover the NMTO. It is therefore desirable to decide, once and for all, whether the NMTO is in or out of the ATIPPA.

[28] As noted in the Law section above, the NMTO is not designated in Schedule A of the *ATIPP Regulations*. It is also not a department of the GN. That leaves us with the residual portion of paragraph (a) of the “public body” definition in the ATIPPA: Is the NMTO a “branch or office of the Government of Nunavut”?

[29] Also as noted in the Law section above, the test is whether the GN effectively controls the NMTO. We must look at all the relevant circumstances. We must look past the surface to see what is really going on.

Corporate status of the NMTO

[30] The NMTO was created in 2003 as a non-profit society under the *Societies Act*, RSNWT (Nu) 1988, c. S-11. It carries registration number SOC2015 and is currently in good standing. The members of the society are the chief administrative officers (by whatever title they may be called) of Nunavut’s 25 municipalities.

[31] The NMTO is registered as an employer with the Workers’ Safety and Compensation Commission, with the GN Department of Finance for purposes of payroll tax, and with the Canada Revenue Agency.

[32] The NMTO is not part of the GN’s reporting entity under the *Financial Administration Act*, RSNWT (Nu) 1988, c. F-4. This may be contrasted, for example, with the Qulliq Energy Corporation, the Nunavut Housing Corporation, and the Workers’ Compensation and Safety Commission, all of which are part of the reporting entity and all of which are public bodies for ATIPP purposes.

By-laws and board of the NMTO

[33] The NMTO has corporate by-laws, duly registered with the Registrar of Societies.

[34] The objectives of the NMTO, as stated in its by-laws, are as follows:

To identify, develop and implement programs to improve the performance of municipalities in Nunavut through analysis & assessment, training, education, professional development, and

To facilitate the sharing of information, skills and knowledge between municipal councils, staff and other relevant organizations, businesses, government agencies and individuals.

[35] In accordance with the by-laws, the NMTO has a board of directors. The members of the society (the municipal CAOs) elect, from amongst themselves, the members of the board. There are currently three CAOs sitting on the NMTO board.

[36] CGS may appoint a non-voting observer to the board. Other than that, CGS has no say about membership of the NMTO board.

NMTO funding

[37] According to the 2020-21 financial statements, which are the most recent available, the NMTO receives about 75 per cent of its funding from CGS. The remainder of its revenue comes from federal government entities, various Inuit beneficiary organizations, and registration fees.

[38] Part of CGS's support for the NMTO consists of two in-kind contributions: office space at Building 155 in Iqaluit, with associated utilities, valued in the financial statements at between \$50,000 and \$55,000 per year; and two full-time GN employees.

NMTO staff

[39] The NMTO has its own full-time staff, including an Executive Director, Director of Finance, and Director of Operations. A full-time Project Manager will be starting soon. Currently, the NMTO also has four project managers on contract. They are paid by the NMTO to organize training.

[40] Then there are the two embedded GN employees who are supplied by the GN as an in-kind contribution. These employees operate with a certain amount of independence from the NMTO. The NMTO does not hire them or select them, and has no authority to manage or discipline them. The embedded GN employees are required to follow some NMTO organizational policies, but not all of them. They use some NMTO equipment and some GN equipment. They report, ultimately, to CGS management and not to NMTO management.

NMTO office support

[41] The NMTO makes its own arrangements for payroll, pensions, information technology (IT), computer hardware and software, audit, cell phones, internet, insurance, and photocopier. One employee has a housing benefit, which is supplied through the NMTO and not the GN. The GN employees embedded in the NMTO, like any other GN employee, receive their pay and benefits through the GN.

[42] Hard-copy files belonging to the NMTO are held on the NMTO premises. Digital files are stored with a cloud-based service contracted by the NMTO. No NMTO files are currently stored on GN servers. This has not always been the case. Following the GN-wide ransomware attack in November 2019, the NMTO stopped storing its files on GN servers.

[43] There is a convoluted issue, addressed by the Applicant, the NMTO, and CGS, concerning ownership and use of the NMTO.ca domain name and its associated e-mail addresses, which is somehow linked to the NMTO's use of a phone number. I do not understand all the details of this issue, nor have I tried to get to the bottom of it, since I do not attach the significance to it that the parties do.

[44] I will say only that NMTO staff formerly used e-mail addresses within the NMTO.ca domain, but stopped doing so after the GN-wide ransomware attack in 2019. They currently use Gmail or Onmicrosoft addresses. The GN employees embedded in the NMTO have both an NMTO address and a GN address, and sometimes they use one and sometimes the other. In this way, it might

sometimes appear to an outsider that NMTO business is being conducted through the GN. GN e-mails would, of course, go through the GN's servers.

Applying the control test to the facts

[45] As outlined in the Law section above, the legal test for whether the NMTO is a “branch or office” of the GN is mainly a question of control. In my view, the indicia of GN control over the NMTO are weak.

[46] The NMTO is created under the *Societies Act*, not by statute. Membership of the society is limited to the CAOs of municipalities. All voting members of the NMTO board are elected from among the membership. The GN has no authority to appoint, remove, or issue directives to any voting member of the board. The GN is limited to appointing a non-voting member to the board.

[47] The objectives of the NMTO are set out in its by-laws. They are quoted above. Certainly the GN has a public-policy interest in seeing that the NMTO's objectives are successfully achieved. The GN provides a wide variety of supports to municipalities, including its contribution to the NMTO. That does not make the municipalities a “branch or office” of the GN, nor does it make the NMTO, which is controlled by the municipalities, a “branch or office” of the GN.

[48] With respect to finance, the NMTO is not covered by the *Financial Administration Act* and is not part of the GN reporting entity. It produces its own financial statements and hires its own auditor. The financial statements are approved by the NMTO board and then ratified by the society's membership. The GN is not involved in the production or approval of the financial statements.

[49] The NMTO does rely for a substantial amount of its funding – directly or indirectly, in cash or in kind – on the GN. But in a small, government-reliant jurisdiction like Nunavut, that is true of many non-GN organizations. The NMTO's financial reliance on the GN, amounting to about 75 per cent of its budget, is not in itself an indicator of control, although we can expect CGS to have the kind of informal influence that a major funder inevitably has.

[50] With respect to employment, the situation is not as clear-cut. The majority of NMTO staff are either NMTO employees or contractors. They are hired, paid, and managed by the NMTO, outside the human-resources structure of the GN.

[51] But the arrangement that, more than anything else, may create the impression that the NMTO is an alter ego of CGS is the fact that two CGS employees work full-time for NMTO. To the outside world, they appear to be NMTO staff. Internally, though, they are GN employees, and they are hired, paid, and managed by the GN. This arrangement, whatever its operational merits, does create confusing accountability relationships.

[52] Certainly if the GN were to set up a nominally external entity, and then staff it entirely or almost entirely with GN employees, that would be an indication that the entity was still under the effective control of the GN. But that is not what is happening at the NMTO. The in-kind contribution of two GN employees is not substantial enough, in the overall operations of the NMTO, to turn the NMTO into a “branch or office” of the GN.

[53] With respect to daily operations, the NMTO has largely entered into its own contractual relationships with suppliers, such as for cell phones, insurance, and IT services. The GN does make a substantial in-kind contribution in the form of office premises and associated utilities. Again, though, this in-kind contribution is not substantial enough, in the overall operations of the NMTO, to turn the NMTO into a “branch or office” of the GN.

[54] The Applicant believes strongly that NMTO ought to be subject to the ATIPPA, and that it has recently been re-arranging its affairs to try to evade its ATIPP responsibilities. I do not find much factual support for the Applicant’s position.

[55] The Applicant’s position appears to be based largely on the convoluted issue, to which I have alluded above, associated with the NMTO.ca internet domain, e-mail addresses, and a telephone number. The Applicant, the NMTO, and CGS all addressed this issue in their submissions to me. In my view, this issue is a very minor element in the overall relationship between CGS and the NMTO.

[56] Certainly I would be concerned if I thought a public body were trying to re-organize its way out of its ATIPP responsibilities. To maintain the integrity of the ATIPPA, we have to be on guard against such a manoeuvre. But that is not what is happening with the NMTO.

[57] The NMTO has, in this case and in the past, complied with requests from CGS to search for records in response to ATIPP requests. That was a choice made by the NMTO, perhaps to maintain good relations with its major funder. It does not mean that the NMTO has turned itself into a “public body” for ATIPP purposes. Statutory jurisdiction does not work like that.

[58] When all the relevant circumstances are considered, the only reasonable conclusion is that the NMTO is not now, and never was, controlled by the GN. It is therefore not a “branch or office” of the GN, and it is not a “public body” under the ATIPPA.

Custody or control of records

[59] There is one more question that needs to be addressed. The ATIPPA applies to records “in the custody or under the control of a public body”. Even if the NMTO is not itself a public body, its records may be subject to disclosure if they are “in the custody or under the control of” another public body, such as CGS.

[60] With respect to custody, there is some indication, in the evidence I have before me, that the NMTO’s digital files were at one time stored on the GN’s servers, and that the NMTO’s e-mails passed through the GN’s servers. The GN’s servers are operated by CGS.

[61] I am not sure that such usage of GN servers is, by itself, enough to put the NMTO’s files and e-mails into the “custody” of CGS. I would prefer to wait for a case in which that question is squarely in issue. Whatever the situation may have been in the past, the NMTO’s files are no longer stored on GN servers, and the NMTO’s e-mails are no longer routed through GN servers.

[62] With respect to control, I have previously explained what the phrase “under the control” means: *Department of Health (Re)*, 2021 NUIPC 7 (CanLII) at

paragraphs 30 and 31; and see especially *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII) at paragraphs 55 and 56. Based on the evidence before me, CGS does not have control over the NMTO's records.

[63] The complicating factor in this case is the GN employees who are embedded in the NMTO. To the extent that these GN employees use GN servers to create, store and manage records for their work at the NMTO – whether that is for file storage or e-mail or otherwise – any such records are “in the custody or under the control of” CGS, and are subject to disclosure under the ATIPPA like any other public records.

A final comment

[64] For the reasons given in this decision, I conclude that the NMTO is not under the control of the GN, and is therefore not a “public body” for ATIPPA purposes. The NMTO is controlled by Nunavut's municipalities, which are not currently subject to the ATIPPA.

[65] My conclusion may change if all or most of Nunavut's municipalities are designated as public bodies under the ATIPP Regulations. It would be incongruous, I think, if public bodies subject to the ATIPPA jointly controlled an entity that is not subject to the ATIPPA. But that decision will have to wait for the day, if it ever comes, when Nunavut municipalities are channelled into the ATIPPA weir.

Conclusion

[66] The NMTO is not a “public body” for ATIPPA purposes, nor is it part of any other public body.

[67] The NMTO's records are not “in the custody or under the control of” a public body.

[68] I have no jurisdiction over the NMTO.

Recommendation

[69] I recommend that the Department of Community and Government Services carry out its ATIPP responsibilities on the basis that the Nunavut Municipal Training Organization is not a “public body” and therefore is not subject to the ATIPPA.

Graham Steele

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