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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 Final Report

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Summary

[1] The Applicant filed a fifteen-part request for records relating to certain government contracts. The contracts had been awarded by the Department of Community and Government Services to a specific company. CGS disclosed some records, with redactions for personal information (section 23) and confidential commercial information (section 24). CGS said it had no responsive records for seven of the fifteen parts, and declined to create new records. For two parts, CGS said it was still engaged in third-party consultation. The Applicant sought review. The Commissioner finds that CGS was correct to give third-party notice to the company. The Commissioner also finds CGS correctly applied section 23, with one minor exception, but did not correctly apply section 24. There is insufficient evidence that disclosing some of the redacted information could reasonably be expected to prejudice the Company's competitive position. The Commissioner finds that CGS conducted a diligent search for responsive records, and that CGS does not, in these circumstances, have a duty to create new records.

Nature of Review and Jurisdiction

[2] This is a review of disclosure by the Department of Community and Government Services (CGS). The request for review was filed under section 28(1) of the *Access to Information and Protection of Privacy Act* (ATIPPA). I conducted my review under section 31(1).

[3] The Commissioner has jurisdiction over the Department of Community and Government Services: ATIPPA, section 2, definition of "public body".

Issues

[4] The issues in this review are:

a. Did CGS correctly invoke the third-party notification procedure?
b. Did CGS correctly apply the exemption for personal information in section 23?
c. Did CGS correctly apply the exemption for confidential commercial information in section 24?
d. Did CGS perform a diligent search for responsive records?
e. In those instances where CGS found no responsive records, did CGS have a duty to create new records?

Facts

[5] On March 24, 2022, the Applicant sent a request for records to the Department of Community and Government Services (CGS). The request had fifteen parts.

[6] The focus of the request was a series of contracts awarded by CGS to a specific company. (In this decision, I will refer to that company simply as "the Company", since its identity is not germane to the analysis.) The contracts were for the supply of personnel (sometimes called "resources") to complete short-term information technology (IT) needs for CGS.

[7] The first batch of questions concerned how the contracts were awarded to the Company. The second batch of questions concerned how the contracts were

performed by the Company. At the end there were two general questions about staffing services for the GN.

[8] On May 4, 2022, CGS gave itself an extension of 25 business days, which produced a new deadline of June 7, 2022. On June 7, 2022, CGS gave itself another extension of 25 business days, taking the deadline to July 12, 2022. In neither case did the Applicant apply for review of the time extension.

[9] On July 14, 2022, CGS sent a disclosure package to the Applicant. It was described as a partial disclosure pending third-party consultation. The disclosure package included 293 pages of records, with some redactions. The disclosure package also included a document that summarized the justification for the redactions. I will call this document "the first Exemption Rationale".

[10] On July 15, 2022, the Applicant filed a request for review with this office. Of the fifteen parts of the original request, the following parts were in issue:

a. Part 2. "Copy of contract awarded to [the Company]…". CGS said the third-party notification procedure was not yet complete.

b. Part 5. "Names of agencies which have been awarded contracts to provide manpower/staffing services to GN without RFP [request for proposals] or due procurement/contract process from 1 Jan 2020 to 24 March 2022." CGS said it had no responsive records.

c. Part 6. Details of "all contracts awarded for providing manpower/staffing services to GN between 1 Jan 2020 and 24 March 2022". CGS said it had no responsive records.

d. Part 8. "Provide records of all requisition/request for new manpower resource, replacement resource, termination of resource, standing down of resource, or extension of contract request sent from GN to [the Company] along with date and timestamp". CGS said it had no responsive records.

e. Part 9. “Provide copies of all GN contracts awarded to [the Company] between 1 Jan 2020 to 24 March 2022…”. CGS said the third-party notification procedure was not yet complete.

f. Part 11. “Provide copy of Nunavut Business Registration/NNI for [the Company]”. (NNI stands for Nunavummi Nangminiqaqtunik Ikajuuti and refers to a set of rules providing for preferential treatment in public procurement of Inuit firms, Nunavut businesses and contractors employing Inuit, local or Nunavut labour.) CGS said it had no responsive records.

g. Part 12. “Provide copy of business insurance certificate of [the Company] for 2020, 2021, 2022 specifically mentioning GN name on the certificate”. CGS said it had no responsive records.

h. Part 13. “Of all the contracts of [the Company], please provide the contract numbers … which has given employment to Inuit/locals”. CGS said it had no responsive records.

i. Part 14. “Provide documented procedure to register and provide manpower staffing services/manpower to GN”. CGS said it had no responsive records.

[11] On August 14, 2022, CGS wrote to the Applicant to say that, following third-party consultation, there would be no further disclosure in response to Parts 2 and 9. The proposals sent by the Company in response to the RFPs have been withheld in their entirety.

[12] On August 16, 2022, I received from CGS a 30-page “narrative” of its search for responsive records. This narrative was forwarded the next day to the Applicant for their response. On August 31, 2022, I received the Applicant’s response. This response was forwarded the next day to CGS, and I invited a final reply from CGS. On September 12, 2022, I received CGS’s final reply. The reply included a revised Exemption Rationale, which I will refer to in this decision as “the second Exemption Rationale”.

[13] During the review process, I realized that the records withheld by CGS for Parts 2 and 9 were not included in the package of unredacted records that CGS had delivered to me in August. I asked for and received these records on October 5, 2022.

[14] There was also some correspondence between the Applicant and senior officials in the GN about procurement generally, but that correspondence is not relevant to this review, and I have not taken it into consideration.

Law and Analysis

[15] The Applicant filed a complex, multi-part request. CGS's response was correspondingly complex. There was a considerable amount of internal and external correspondence. It has taken me some time to unravel the threads of what happened.

[16] Although the request for review is not phrased exactly this way, the Applicant is raising five legal issues:

a. whether CGS was correct to notify a third party;

b. whether CGS correctly applied redactions for personal information under section 23;

c. whether CGS correctly applied redactions for confidential commercial information under section 24;

d. whether CGS conducted a diligent search for responsive records;

e. where there were no responsive records, whether CGS was required to create new records.

[17] Before I turn to these five issues, I will mention two preliminary points.

[18] First, the package of disclosed records includes 293 pages in Portable Document Format (PDF). The pages are not, unfortunately, numbered sequentially. The page numbers to which CGS refers in its submissions do not match the page numbers of the PDF package. For the sake of consistency, the

page numbers used in this decision are the page numbers of the PDF package, not the page numbers to which CGS refers.

[19] Second, the premise of many parts of the Applicant's request was that the Company's contracts were for "manpower/staffing". There followed a debate between CGS and the Applicant about how to characterize the contracts. This debate was, in my view, largely unnecessary. Especially in technical areas, the GN uses a lot of jargon, and ATIPP applicants cannot be expected to know and replicate the GN's jargon. The duty to assist in section 7(1) includes a duty to understand, in a common-sense way, what applicants are looking for. Requests should not be rejected, narrowed, or delayed only because an applicant has failed to use the GN's jargon. Since the services required by CGS and supplied by the Company could only be performed by individuals, it was reasonable for the Applicant to think of the contracts as being for "manpower/staffing", even if the GN did not categorize them that way.

[20] I now turn to the five legal issues raised by the Applicant.

First issue: Third party notification

[21] CGS notified the Company, under section 26 of the ATIPPA, that a request for records had been filed which might affect the Company's interests. The relevant portions of section 26(1) read as follows:

> 26. (1) Where the head of a public body is considering giving access to a record that may contain information
>
> …
>
> (b) that affects the interests of a third party under section 24,
>
> the head shall, where reasonably possible, give written notice without delay to the third party in accordance with subsection (2).

[22] The Applicant objects that notification should not have been given to the Company. The Applicant argues that the details of a contract with the GN is or should be public, so no purpose is served by notifying the Company.

[23] In the circumstances, where the Applicant was seeking detailed information about the administration of the contract, and not just the contract itself, I find it was reasonable for CGS to conclude that section 26(1)(b) applied. The phrase "affects the interests of a third party" is broad. CGS was right to notify the Company.

[24] Having said that, CGS did not correctly follow the third-party procedure laid out in the ATIPPA.

[25] In *Department of Health (Re)*, 2021 NUIPC 12 (CanLII) at paragraphs 25 to 29, I explained how the third-party notification procedure is supposed to work. "The intervention process makes logical and procedural sense when read carefully," I wrote, "but it is somewhat intricate and there are a couple of places where it is easy to get tripped up."

[26] Under section 27(2), CGS should have given formal notice of its decision under section 24 to both the Applicant and the Company. That would have given both the Company and the Applicant an opportunity to seek review under section 27(3) and (4), respectively. It also would have allowed me to hear from the Company directly.

[27] CGS may have given notice of its decision to the Company informally, as part of its overall back-and-forth with the Company, but that does not meet the requirements of the ATIPPA.

[28] Nevertheless, I do not think the Applicant has been disadvantaged by CGS's failure to follow the correct third-party notification procedure. In fact the overall process may have been shortened, since the third-party notification procedure comes with its own appeal periods and extended deadlines. At this point in the review process, when the third-party notification issue is moot, I am merely flagging the issue for ATIPP Coordinators across the GN: the third-party notification procedure requires careful attention to detail.

Second issue: Redaction of personal information

[29] The second issue concerns the redaction of personal information under section 23.

[30] Pages 226-243 and 284-293 of the disclosure package are summary lists of contract payments to the Company. I will refer to all these pages as "the Payment Summary records".

[31] There are many hundreds of line items in the Payment Summary Records. Only a few contain a name. The occurrences are random – there is no pattern to which line items contain a name and which do not. When a name occurs, it is the name of the sub-contractor on whose account a payment was made to the Company. Each time a name occurs, it is redacted. There are redactions scattered around pages 226, 227, 237-239, 284-287, 290 and 293 of the Payment Summary records.

[32] There is only one page where the redaction is something other than a name. It is on page 287. I assume this was an error. I cannot see any reason for this redaction, and when I asked CGS about it, they could not offer one. The redacted information appears to me to be of little or no significance, but it should be disclosed.

[33] In its first Exemption Rationale, CGS wrote that the names in the Payment Summary records were redacted under section 23. Section 23(1) reads as follows:

> 23. (1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.

The rest of section 23 provides guidance on how section 23(1) should be interpreted.

[34] I have previously written that section 23 is probably the most difficult section in the entire ATIPPA. I have also outlined the correct interpretive approach to section 23, in numerous Review Reports starting with *Department of Human Resources (Re)*, 2021 NUIPC 4 (CanLII). The key is to weigh all the relevant

circumstances, as required by section 23(3), and keeping in mind the rebuttable presumptions in section 23(2). Unless section 23(4) applies – and in this case, it does not – no single factor is decisive.

[35] In its second Exemption Rationale, CGS cites section 23(3)(g), which reads as follows:

> (3) In determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> …
>
> (g) the personal information is likely to be inaccurate or unreliable; ….

[36] CGS's reliance on section 23(3)(g) is incorrect for two reasons. First, the clauses of section 23(3) are not standalone exemptions. They are circumstances that must be weighed with all the other relevant circumstances. Second, CGS's argument for inaccuracy or unreliability is based on the idea that the Applicant (or any other reader of the Payment Summary records) is liable to misunderstand what the figures represent. That is not, of course, what section 23(3)(g) is about. The payment figures are, in themselves, an accurate and reliable record of payments made by the GN to the Company. Section 23(3)(g) does not apply.

[37] That still leaves us to consider the original exemption rationale, which is section 23(1).

[38] Generally, disclosing personal information about GN employees going about their work is not an unreasonable invasion of their personal privacy: *Department of Health (Re)*, 2021 NUIPC 12 (CanLII) at paragraph 78; *Nunavut Arctic College (Re)*, 2021 NUIPC 17 (CanLII) at paragraph 31. This is not an ironclad rule. It depends on all the circumstances: ATIPPA, section 23(3); *Department of Justice (Re)*, 2021 NUIPC 23 (CanLII) at paragraph 73.

[39] Contractors and sub-contractors are providing services to the GN, and they are paid from the GN budget. The fact that the GN has contracted out a particular service should not make a difference in the way that ATIPP disclosure is handled:

see *Department of Health (Re),* 2021 NUIPC 7 (CanLII) at paragraphs 42 and 43; *Department of Health (Re)*, 2021 NUIPC 12 (CanLII) at paragraphs 77 to 84.

[40] This conclusion is reinforced by the definition of "employee" in section 2 of the ATIPPA, which "includes a person retained under contract to perform services for the public body". This definition is not a substantive rule, but it is an indication that the Legislative Assembly intends that GN employees and GN contractors be treated the same way under the ATIPPA: *Department of Health (Re)*, 2021 NUIPC 12 (CanLII) at paragraph 82.

[41] On the other hand, there is nothing in the ATIPPA that requires disclosure of specific payments to named GN employees. Section 23(4)(e) refers to disclosure of a "salary range" for GN employees, rather than a specific salary or payment. In 2017, section 73 was amended to add the following regulation-making authority:

> (l.1) prescribing procedures for the disclosure of part or all of the remuneration of an employee of a public body, an employee as defined in the Public Service Act, or a member of the staff of a member of the Executive Council;
> (l.2) defining remuneration for the purposes of this Act; ….

No regulation has yet been adopted under this provision.

[42] I also note that, when dealing with personal information, the onus is on the Applicant, not CGS, to establish that disclosure of the information would not be contrary to the access law: ATIPP, section 33(2).

[43] Considering all the relevant circumstances, as required by section 23(3), I find that CGS was correct to redact the names of individuals in the Payment Summary records. In any event, for the reasons given in the next section, the names can also be withheld under section 24.

Third issue: Redaction of commercial information

[44] The third issue concerns the redaction of confidential commercial information under section 24.

[45] Pages 244 to 283 of the disclosure package are lists of payment details under the contracts. I will refer to them as "the Payment Detail records".

[46] Each Payment Detail record is in spreadsheet format, with nineteen columns, and each is redacted in the same way. Columns 1, 2, 3 and 19 are unredacted. These columns show, respectively, the Company's contract number, the GN service contract number, the GN master supply agreement number, and the total paid for that line item.

[47] Columns 4-18 are redacted in their entirety. The headings for each column are also redacted, so it is difficult for me to describe what is in them without revealing redacted information. However section 56(3)(b) of the ATIPPA says I can, in a report like this one, disclose any matter I consider necessary to establish grounds for my findings and recommendations. I will therefore say that Column 4 contains the name of the individual on whose account the payment to the Company is made, and Columns 5-18 show the details of how the total in Column 19 was calculated.

[48] In its first Exemption Rationale, CGS cites section 24(1)(c)(ii) in support of its redactions to the Payment Detail records:

> 24. (1) Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant
> …
> (c) information the disclosure of which could reasonably be expected to
> …
> (ii) prejudice the competitive position of a third party, ….

[49] In its second Exemption Rationale, CGS cites section 24(1)(e) in support of its redactions:

> 24. (1) Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant

> …
> (e) a statement of a financial account relating to a third party with respect to the provision of routine services by a public body; ….

[50] CGS is misreading section 24(1)(e). It applies only to situations in which the public body is providing routine services to a third party. It has no application to this case. That still leaves us to consider the original exemption rationale, which is section 24(1)(c)(ii).

[51] I explained the meaning of the phrase "could reasonably be expected" in *Nunavut Housing Corporation (Re)*, 2021 NUIPC 25 (CanLII) at paragraphs 116 and 117. It occupies a middle ground between that which is probable and that which is merely possible. Speculation is not sufficient. Evidence is required, and in a case like this one, where access has been partly refused, the onus is on the public body: section 33(1). To support a redaction under section 24(1)(c)(ii), a public body must provide evidence "well beyond" a mere possibility of harm.

[52] To put it simply, then, the question is whether disclosing the information in Columns 4-18 of the Payment Detail records could reasonably be expected to prejudice the Company's competitive position.

[53] The onus is on CGS to show why the information should be withheld. It is here that we see the effect of the incorrect third-party notification procedure. I have no evidence before me directly from the Company. I have only second-hand information, in the form of e-mails from the Company to CGS's ATIPP Coordinator. Those e-mails contain a statement of the Company's position on what they consider to be confidential, but no argument or evidence to support that position.

[54] CGS's argument is that releasing Columns 4-18 would allow a competitor to "reverse engineer" such key details as the Company's billing rates for individuals and the Company's profit margins.

[55] CGS's strongest argument, in my view, relates to the names in Column 4 of the Payment Detail records. Disclosing the names in Column 4 can reasonably be expected to allow a competitor to identify, contact and perhaps poach the sub-

contractors the Company has marshalled to deliver the services required by CGS. Revealing the names goes beyond any question of unwarranted invasion of personal privacy under section 23. That is because marshalling the resources (i.e. the people) to respond to CGS's short-term needs is the very service that the Company is providing to CGS.

[56] The Applicant cites an Ontario case in support of disclosure of the contractors' names: *Ontario (Health and Long-Term Care) (Re)*, 2005 CanLII 56347 (ON IPC). In that case, the Applicant requested records relating to the province's e-Physician Project, and the adjudicator ordered disclosure, including the names of contractors. In my view, that case is helpful in places, and I will return to it later; but on this point it can be distinguished.

[57] With respect to the disclosure of contractors' names, the language of the Ontario statute differs in some important respects from the Nunavut ATIPPA. Moreover, the case involved personal services contracts directly between the public body and the contractors. The adjudicator found that the nature of the contracts took them outside of the protections for personal information; and in any event, they fell within the exception for details of contracts with the public body.

[58] In the present case, the sub-contractors have no direct relationship with the GN. The GN has a contractual relationship only with the Company. More importantly, revealing the identity of the sub-contractors would reveal the details of the very service (matching a specific individual to a short-term operational need) that the Company is providing. That factor was not present, at all, in the Ontario case.

[59] I therefore accept that the identity of the individuals in Column 4 of the Payment Detail records can properly be redacted. The same analysis applies to the names of individuals that appear in the Payment Summary records.

[60] That still leaves us to consider the information in Columns 5-18 of the Payment Detail records. Most of that information is innocuous. The more of it one has, however, the easier it is to calculate, or make an accurate inference about,

the daily rates charged on account of the individual sub-contractors. That, according to CGS's argument, is the information which, if known, could reasonably be expected to prejudice the Company's competitive position.

[61] On this point, the Ontario case I referred to in paragraph 56 is helpful. I note that it was written by adjudicator Brian Beamish, who later became Ontario's Information and Privacy Commissioner. Adjudicator Beamish's analysis at pages 8 to 11 is thorough and is applicable to the present case.

[62] In particular, the following passage from the bottom of page 10 and the top of page 11 is worth quoting in full:

> While I can accept the Ministry's and SSHA's general concerns, that is that disclosure of specific pricing information or per diem rates paid by a government institution to a consultant or other contractor, may in some rare and limited circumstances, result in the harms set out in section 17(1)(a), (b) and (c), this is not such a case. Simply put, I find that the institutions have not provided detailed and convincing evidence to establish a reasonable expectation of any of the section 17(1)(a), (b) or (c) harms, and the evidence that is before me, including the records and representations, would not support such a conclusion.
>
> I also accept that the disclosure of this information could provide the competitors of the contractors with details of contractors' financial arrangements with the government and might lead to the competitors putting in lower bids in response to future RFPs. However, in my view, a distinction can be drawn between revealing a consultant's bid while the competitive process is underway and disclosing the financial details of contracts that have been actually signed. The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

In the result, Adjudicator Beamish ordered release of the requested information, which included the per diem rates charged by the contractors.

[63] I have reached the same conclusion, for essentially the same reasons. CGS's rationale for redacting Columns 5-18 is to prevent calculation of the per diem rates in Column 5. Like the adjudicator in the Ontario case, I am not persuaded

that disclosing the information in Column 5 can reasonably be expected to prejudice the Company's competitive position for future contracts. A mere assertion of prejudice, which is what I have from CGS, does not meet the standard of proof. And if Column 5 can be disclosed, then there is no remaining reason to withhold the information in Columns 6-18.

Fourth issue: Diligent search

[64] The Applicant was taken aback at the number of times CGS said it had no responsive records. There were no responsive records for Parts 5, 6, 8, and 11-14 of the Applicant's request. The Applicant posits that CGS did not perform an adequate search. The Applicant believes that CGS, if it is properly administering the Company's contracts, must have the information somewhere.

[65] 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. I will not repeat the whole discussion here, but I adopt the analysis for purposes of this decision.

[66] 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.

[67] 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.

[68] As part of the review process, CGS provided to me, and through me to the Applicant, a narrative record of its search for responsive records. It is the most thorough narrative I have ever received. It is supported by a compilation of CGS's entire search record, including all internal correspondence. I thank CGS for taking

this open approach, and I commend it to the attention of ATIPP Coordinators across the rest of the GN.

[69] I have reviewed CGS's entire search record. I find that CGS's ATIPP Coordinator, who is experienced in ATIPP matters and knowledgeable about how CGS works, looked in the right places and questioned the right people. Where there were responsive records, the Coordinator found them. Where there were not, the Coordinator kept probing until satisfied that nothing more was to be found.

[70] I do understand the Applicant's puzzlement about the lack of responsive records. I will give two examples, from Parts 8 and 12 of the Applicant's request.

[71] Part 8 of the Applicant's request is "Provide records of all requisition/request for new manpower resource, replacement resource, termination of resource, standing down of resource, or extension of contract request sent from GN to [the Company] along with date and timestamp". CGS said it had no responsive records.

[72] This part of the Applicant's request is, on its face, quite specific about the records sought. The Applicant appears to have assumed that a well-managed contract administration process would easily produce these kinds of records. I cannot say whether that was a reasonable expectation, but I accept CGS's assertion that it did not have at hand any records already compiled under these categories or at this level of detail. Possibly CGS could have created the requested records, but that is a different question that I will get to in the next section of this decision.

[73] Part 12 of the Applicant's request is "Provide copy of business insurance certificate of [the Company] for 2020, 2021, 2022 specifically mentioning GN name on the certificate". The Applicant knew that having a business insurance certificate, mentioning the GN as an insured, is a standard condition of the GN's contracts and was mentioned in the Requests for Proposals. Yet CGS told the Applicant it had no responsive records.

[74] Although having an insurance certificate is stipulated in the RFP, it appears that the GN does not, as a matter of fact, always ask for a copy. In this case, it appears that CGS did not have insurance certificates from the Company in respect of these contracts, and so it had nothing to disclose to the Applicant.

[75] Certainly the lack of responsive records raises some good questions about CGS's contract administration. From an accountability perspective, the lack of records may itself be a significant piece of information. But this situation underlines an important point about the way the ATIPP system works: if requested records are not in the custody or under the control of a public body, the ATIPPA does not require the public body to go out and get them, nor does it give me the power to order that they do so. That remains true even if the task of getting the records would be relatively straightforward.

[76] I conclude that CGS conducted a diligent search for responsive records. For those parts of the request for which it found no responsive records, it simply did not have records of the kind or at the level of detail the Applicant expected.

Fifth issue: Duty to create records

[77] Many of the records sought by the Applicant did not exist at the time of the request. The fifth and last legal issue is whether CGS had a duty, in these instances, to create new records.

[78] Again, this issue raises an important point about the way the ATIPP system works. Part 1 of the ATIPPA is a system for the disclosure of records. It is not a system for answering an applicant's questions or otherwise providing information that is not already in a record. If an applicant has questions for which there are no responsive records, the ATIPPA no longer applies. It is then up to the public body to decide whether and how to answer those questions.

[79] There is, however, one exception. Section 7(2) imposes a limited duty on a public body to create new records:

> (2) The head of a public body shall create a record for an applicant where
> (a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise; and
> (b) creating the record would not unreasonably interfere with the operations of the public body.

[80] The only substantial consideration in Nunavut of this provision is *Department of Health (Re)*, 2022 NUIPC 7 (CanLII) at paragraphs 18 to 28 and paragraphs 63 and 64. In that decision I discussed how section 7(2) should be interpreted. I also reviewed the leading precedents from elsewhere in Canada. I will not repeat the whole discussion here, but I adopt the analysis for purposes of this decision.

[81] By way of summary, a public body is required to create a record for an applicant only if all the following six conditions are met:

a. The new record can be created by the public body from an already-existing, machine-readable record.

b. That already-existing, machine-readable record is in the custody or under the control of the public body.

c. The new record can be created by the public body using its normal computer hardware.

d. The new record can be created by the public body using its normal computer software.

e. The new record can be created by the public body using its normal information technology (IT) expertise.

f. Creating the new record would not unreasonably interfere with the operations of the public body.

[82] In *Department of Health (Re)*, 2022 NUIPC 7 (CanLII), from which this summary is derived, I concluded, for two different reasons, that Health was not required to create the records the Applicant wanted. First, producing the statistics requested by the Applicant required more than Health's normal IT expertise. Second, producing the statistics would have unreasonably interfered with the operations of the Health Protection Branch within the Department of Health.

[83] In this case, the Applicant requested detailed information from CGS, and was surprised when CGS could not produce it. The Applicant's position, in a nutshell, is that CGS should be able to produce the requested information if it is properly managing its contracts. That may or may not be the case; but it is not a reason that supports the creation of new records under section 7(2) of the ATIPPA.

[84] In this case, I have no doubt that at least some of the information sought by the Applicant resides somewhere in CGS's files. But I also have no doubt that it is not currently compiled in the form requested by the Applicant. To compile it, those other records would first have to be found and analyzed for responsive information, and that is not an IT function. The first and fifth conditions for the application of section 7(2) are not met.

[85] I am also satisfied, based on the extensive evidence I have before me of the time and effort expended by CGS's ATIPP Coordinator to pull together the records that CGS did disclose, that creating new records responsive to the Applicant's request would unreasonably interfere with CGS's operations. The sixth condition for the application of section 7(2) is also not met.

Summary

[86] Because of the complexity of the Applicant's request and the corresponding complexity of CGS's response, I provide the following summary of my findings. The references are to the parts of the Applicant's request that were in issue on this review.

[87] Part 2: "Copy of contract awarded to [the Company]…". CGS met its obligations when it disclosed the Master Supply Agreements to the Applicant.

[88] Part 5: “Names of agencies which have been awarded contracts to provide manpower/staffing services to GN without RFP or due procurement/contract process from 1 Jan 2020 to 24 March 2022.” This part of the request was based on an incorrect premise, namely that the Company had been awarded a sole-source contract. CGS met its obligations when it said it had no records responding to the description provided by the Applicant. The Applicant has not provided “some basis” for believing that responsive records exist.

[89] Part 6: Details of “all contracts awarded for providing manpower/staffing services to GN between 1 Jan 2020 and 24 March 2022”. CGS interpreted this request as being for contracts awarded by CGS, rather than the GN as a whole. In the circumstances, it was acceptable to do so. CGS met its obligations when it said it had no responsive records, other than those it had provided about contracts awarded to the Company.

[90] Part 8: “Provide records of all requisition/request for new manpower resource, replacement resource, termination of resource, standing down of resource, or extension of contract request sent from GN to [the Company] along with date and timestamp”. This request was for detailed records that CGS did not have, at least not in the requested format. Probably some of the details exist within other CGS records, but they were not compiled anywhere. The conditions for the application of section 7(2) were not met, so CGS did not have an obligation to create the requested records.

[91] Part 9: “Provide copies of all GN contracts awarded to [the Company] between 1 Jan 2020 to 24 March 2022…”. CGS met its obligations when it disclosed the Master Supply Agreements to the Applicant.

[92] Part 11: “Provide copy of Nunavut Business Registration/NNI for [the Company]”. CGS did not have this information in its files, and it did not have an obligation under the ATIPPA to go out and get it.

[93] Part 12: “Provide copy of business insurance certificate of [the Company] for 2020, 2021, 2022 specifically mentioning GN name on the certificate”. CGS did

not have this information in its files, and it did not have an obligation under the ATIPPA to go out and get it.

[94] Part 13: "Of all the contracts of [the Company], please provide the contract numbers … which has given employment to Inuit/locals". This request was for records that CGS did not have. The conditions for the application of section 7(2) were not met, so CGS did not have an obligation to create the requested records.

[95] Part 14: "Provide documented procedure to register and provide manpower staffing services/manpower to GN". This request was for records that CGS did not have, at least not in an already-compiled format. It was more in the nature of a request for information rather than for records. CGS met its obligations when it said it had no responsive records.

A final comment

[96] Making public bodies more accountable to the public is at the heart of the ATIPPA: section 1. This Applicant's focus is on accountability for a series of contracts between CGS and one specific company. The pursuit is commendable.

[97] The Applicant has, however, asked for a series of remedies which are not within my authority to give. For example, the Applicant's initial letter of July 15, 2022, asks for the following:

a. Part 5: "I request the necessary direction be issued to CGS to identify and release the requested records and track them going forward."

b. Part 6: "I request that Office of Information Commissioner direct CGS to add the records within a reasonable timeframe that your offices seem appropriate and provide me the requested information."

c. Part 8: "I therefore request your honorable offices to direct CGS and provide these records in a suitable timeframe."

d. Part 11: "Please direct CGS to provide record based on [the Company's contracts]."

e. Part 12: “Please direct CGS to provide insurance record based on [the Company’s contracts].”

f. Part 14: “I would request appropriate direction and audit checks to be put in place to fix this loophole. I would also request a special committee be formed under supervision of retired Judge and members of civil society to assess how much manpower/staffing and other contracts over $5000 have been awarded by GN without due RFP or audit trail.”

[98] I do not have the statutory authority to do any of these things. I cannot give orders. I cannot direct a public body to produce records it does not have, or to answer questions for which it has no records. I am not an auditor, and I do not set up committees of inquiry. Those requests are for CGS management, or for a political forum. This decision goes as far as I can, within my existing statutory authority.

Conclusion

[99] CGS was correct to notify the third party under section 26, but did not correctly follow the third-party notification procedure.

[100] CGS correctly applied the exemption in section 23 to the Payment Summary records, with the minor exception of the redaction on page 287. The same exemption could have been applied to the names in column 4 of the Payment Detail records.

[101] CGS correctly applied the exemption in section 24 to column 4 of the Payment Summary records. The same exemption could have been applied to the names in the Payment Summary records. CGS did not correctly apply the exemption in section 24 to columns 5-18 of the Payment Summary records.

[102] CGS performed a diligent search for responsive records.

[103] In all those instances where CGS’s search found no responsive records, CGS did not have a duty to create records.

Recommendations

[104] I recommend that CGS disclose the information redacted on page 287 of the disclosure package.

[105] I recommend that CGS disclose the information in Columns 5-18 of the Payment Detail records on pages 244 to 283 of the disclosure package.

[106] I recommend that CGS continue to withhold the remainder of the records that were withheld or redacted.

Graham Steele
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