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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 requested records from the Department of Community and Government Services. CGS informed the Applicant there were no responsive records. The Applicant requested review of CGS’s search. The Applicant also alleged bias on the part of the staff person processing the ATIPP at CGS. The Applicant believed the staff person had, on a previous ATIPP file, leaked the Applicant’s name to a third party. The Commissioner finds the CGS staff person should not be disqualified because of bias. The Commissioner also finds that CGS performed a diligent search.

Nature of Review and Jurisdiction

[2] This is a review of a disclosure decision by the Department of Community and Government Services. The request 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] I have jurisdiction over the Department of Community and Government Services: ATIPPA, section 2, definition of “public body”.

[4] On this same file, a preliminary question of jurisdiction was decided in Review Report 22-230, which is available publicly as *Nunavut Municipal Training Organization (Re)*, 2022 NUIPC 21 (CanLII).

Issues

- [5] The issues in this review are:
- a. Was there bias on the part of the staff person at CGS who processed the ATIPP request?
 - b. Did CGS perform a diligent search for responsive records?

Facts

[6] The facts of the application are the same as in *Nunavut Municipal Training Organization (Re)*, 2022 NUIPC 21 (CanLII) at paragraphs 5 to 10. I will not repeat them here. The following additional facts are not included in that decision.

[7] On February 10, 2021, I issued my decision in *Department of Community and Government Services (Re)*, 2021 NUIPC 8 (CanLII). It involves the same Applicant as the present case. The Applicant's name had been leaked by a CGS employee to a third party. I found there was a breach of the Applicant's privacy. I decided, for the reasons given at paragraphs 15 to 21, not to identify the leaker. I know who the leaker was, as does senior management at CGS.

[8] On July 25, 2022, CGS had completed its processing of the Applicant's request for records in the present case. The department's ATIPP Coordinator called the Applicant by telephone to verify contact information. The Applicant was upset by the call. The Applicant believed that the ATIPP Coordinator was the leaker from the previous case. The Applicant refused to speak with the ATIPP Coordinator.

[9] On July 27, 2022, the Applicant requested review of the search by CGS and NMTO. The Applicant also requested, and I agreed, that the review should include consideration of bias on the part of CGS's ATIPP Coordinator.

[10] On August 22, 2022, I issued a decision on the preliminary question of my jurisdiction over the NMTO: *Nunavut Municipal Training Organization (Re)*, 2022

NUIPC 21 (CanLII). I concluded I do not have jurisdiction over the NMTO, because it is not a “public body” within the meaning of the ATIPPA.

[11] Also on August 22, 2022, I invited the Applicant to make a written submission on the remaining issue, namely whether CGS had conducted a diligent search of its own records. After several missed deadlines and several reminders, the Applicant did send a written submission on October 31, 2022. It consisted almost entirely of arguments why the preliminary decision on jurisdiction was wrong. After a further invitation to make a written submission on the question of diligent search, the Applicant responded by repeating the arguments about why the preliminary decision on jurisdiction was wrong.

Law

Diligent search

[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; *Department of Education (Re)*, 2021 NUIPC 22 (CanLII); *Nunavut Housing Corporation (Re)*, 2021 NUIPC 26 (CanLII).

[13] In Ontario, the search required of a public body is described this way: “A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request”: *Municipality of Chatham-Kent (Re)*, 2019 CanLII 108986 (ON IPC) at paragraph 15; *Health Professions Appeal and Review Board (Re)*, 2018 CanLII 74224 (ON IPC) at paragraph 11.

[14] A similar but more detailed explanation is given by an adjudicator for the Alberta Information and Privacy Commissioner in *University of Lethbridge (Re)*, 2016 CanLII 92076 (AB OIPC). The adjudicator in *University of Lethbridge* quotes from an earlier Order listing the kinds of evidence that a public body should put forward to show it made reasonable efforts in its search:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced

[15] I adopt this explanation of the ATIPPA search requirement, along with the stipulation from the Ontario cases that the search should be conducted by “an experienced employee knowledgeable in the subject matter of the request”.

Bias and disqualification

[16] Section 7(1) of the ATIPPA imposes a “duty to assist” on public bodies:

7. (1) The head of a public body shall make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay.

[17] This is the first time I have had to consider the issue of when, if ever, I may recommend that an ATIPP Coordinator should be disqualified from handling an ATIPP file on the grounds of bias. This issue does not appear to have been previously considered in Nunavut. There are precedents from elsewhere in Canada.

[18] There is a presumption that an administrative decision-maker will act fairly and impartially. The onus of demonstrating a conflict of interest or bias lies on the person who alleges it, and mere suspicion is not enough: *Rainbow District School Board (Re)* 2019 CanLII 35762 (ON IPC) at paragraph 86; *Greater Sudbury (City) (Re)*, 2022 CanLII 3819 (ON IPC) at paragraphs 17 and 18.

[19] The threshold for establishing bias depends on the role of the decision-maker and the decision at issue: *Ayangma v. The French School Board*, 2002 PESCAD 5 (CanLII) at paragraphs 27 and 28, citing *Zundel v. Canada (Attorney General)*, 1999 CanLII 9357 (FC), affirmed 2000 CanLII 16731 (FCA), which in turn quotes *Canadian Broadcasting Corporation v. Canada (Human Rights Commission)*, 1993 CanLII 16517 (FC). The higher standard of “reasonable apprehension of bias” applies to judicial or quasi-judicial decision-makers. The lower standard of “an open mind” or “no closed mind” applies, for example, to investigators or policy decision-makers.

[20] I note that Ontario appears to apply the “reasonable apprehension of bias” test in the ATIPP context: see, for example, *Greater Sudbury (City) (Re)*, 2022 CanLII 3819 (ON IPC) at paragraph 19. Other jurisdictions, however, appear to lean more towards the “open mind” or “no closed mind” test.

[21] What does the “open mind” or “no closed mind” test require? To quote directly from the CBC case mentioned in the previous paragraph:

The test, therefore, is not whether bias can reasonably be apprehended, but whether, as a matter of fact, the standard of open-mindedness has been lost to a point where it can reasonably be said that the issue before the investigative body has been predetermined.

[22] To put the same test in different words, there is disqualifying bias under the closed-mind test when the applicant has established “that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile”: *Old St. Boniface Residents Association v. Winnipeg (City)*, 1990 CanLII 31 (SCC).

[23] These precedents all come from contexts other than ATIPP, but the test is, in my view, applicable by analogy to ATIPP processing: see, for example, *Transportation Infrastructure and Energy (Re)*, 2018 CanLII 54179 (PE IPC).

Analysis

[24] This case is, on the surface, about a straightforward issue: whether CGS performed a diligent search for responsive records. But the Applicant raises a

thornier sub-issue: whether the person assigned to conduct the search should be disqualified from any involvement in the file. The implication, if I accept the Applicant's argument, is that anything done by the disqualified staff member should be re-done by someone who is not biased against the Applicant.

[25] The Applicant is concerned because, on a previous file, the Applicant's name was leaked to a third party. The Applicant feels sure they know who the leaker was. The GN is a small government, and Iqaluit is a small town. There are only so many people it could have been. However, despite the Applicant's belief, the identity of the leaker has not been confirmed to the Applicant, whether by CGS or by this office or otherwise. For purposes of this decision, then, I will assume that the Applicant is correct, and that the leaker and the CGS staff person assigned to this file are the same person. To be clear: this is an assumption, not a statement of fact.

[26] The Applicant believes that it is inappropriate for the ATIPP Coordinator to have any involvement with this file, or indeed with any file involving the Applicant. The Applicant does not have faith in any processing done by the ATIPP Coordinator. To put it in legal terms, the Applicant seeks to disqualify the CGS staff person from any participation in the file because of bias.

[27] Furthermore, the Applicant believes that a former deputy minister of CGS – the one who was in place at the time of the leak, not the current deputy minister – ordered the ATIPP Coordinator to have no involvement with any ATIPP request from the Applicant.

[28] I start from the premise that it is not within my authority, as Information and Privacy Commissioner, to recommend how the head or deputy head of a public body deploys the human resources available to them. There are simply too many factors for a head or deputy head to consider, most of which are outside the scope of the ATIPPA and which would not be known to me. For similar reasons, I have previously found that it is not within my authority to recommend workplace discipline: *Department of Community and Government Services (Re)*, 2021 NUIPC 8 (CanLII) at paragraph 55.

[29] I will therefore consider making a staffing recommendation only in the narrow set of cases where the staffing in itself creates a barrier to lawful administration of the ATIPPA. An example is if a public body has not designated anyone to process ATIPP requests, as required by section 70 of the ATIPPA. Another example is where a public body has taken inadequate steps to deal with a backlog, resulting in a chronic failure to meet the processing deadlines in the ATIPPA: see, for example, *Department of Human Resources (Re)*, 2022 NUIPC 12 (CanLII). In that case, I recommended that the Department of Human Resources take whatever steps are necessary to eliminate its backlog before the end of 2022.

[30] The issue in the present case is whether I should recommend that a staff member be disqualified from handling a specific file. In the Law section above, I outlined two different approaches to this question.

[31] In my view, the appropriate test for Nunavut is the “open mind” or “no closed mind” test. The “reasonable apprehension of bias” test is more suited to a person exercising formal, legal decision-making authority – what lawyers used to call a “quasi-judicial” function. An ATIPP Coordinator gathering and analyzing records is performing an administrative function, not a quasi-judicial function.

[32] I am also mindful of the fact that the GN is a small government and Nunavut has a small population. Especially in a capital city the size of Iqaluit, with a population under 8000, it is inevitable that GN staff processing ATIPP requests will, in many cases, have had prior interactions – personal, social, or professional – with ATIPP applicants. That is particularly the case where, as in Nunavut, a substantial number of ATIPP requests come from GN employees seeking records pertaining to their own employment and workplace: *Department of Human Resources (Re)*, 2021 NUIPC 19 (CanLII) at paragraphs 30 and 31.

[33] Moreover, there is a chronic problem within the GN with the staffing of ATIPP positions. I addressed this issue in my 2021-22 Annual Report, where I wrote “For the ATIPP Coordinator positions, there are too many vacancies, too much turnover, not enough training, and little or no management support” (at page 3). Most public bodies in Nunavut are functioning with a single person with

ATIPP training. If the one trained person leaves or is otherwise unavailable, the work is either not done, or it is done by someone with little or no training.

[34] I also note that a public body's response does not have to come from the ATIPP Coordinator, even if the hands-on work is done by the ATIPP Coordinator. The ATIPPA puts responsibility on the "head" of a public body. The head can delegate their responsibilities to someone else: section 69(1). That can be to an ATIPP Coordinator, but it can also be, in appropriate cases, the public body's deputy head or another senior manager or anyone else. Flexible delegation is a good practice in any situation where there is any question about an ATIPP Coordinator's objectivity. The involvement of a more senior official serves as a check on the ATIPP Coordinator's work. It also underlines that a public body's response to an ATIPP request is an institutional response, not an individual staff member's response.

[35] For all these reasons, we should not, in my view, be over-hasty to disqualify an ATIPP Coordinator from an ATIPP file. We should reserve that remedy for cases where the ATIPP Coordinator has demonstrated an entrenched inability or unwillingness to process the ATIPP request according to law, and where the public body has not found a way to overcome that bias. That is why the appropriate test, in my view, is the "open mind" or "no closed mind" test.

[36] We now turn to the factual question of whether the Applicant has shown that CGS's ATIPP Coordinator demonstrated a closed mind. The onus of proof is on the Applicant: section 33(1).

[37] The only evidence the Applicant has brought forward is the ATIPP Coordinator's conduct on the previous file, in which the Applicant's identity was leaked to a third party. (I reiterate here that I am assuming, for purposes of this analysis, that the leaker in that case and the CGS ATIPP Coordinator in this case are the same person.) The Applicant argues that this prior conduct is irrefutable evidence that the ATIPP Coordinator is biased against them.

[38] The leaker's conduct on the previous file was a serious breach of their duties under the ATIPPA. I said as much in *Department of Community and Government Services (Re)*, 2021 NUIPC 8 (CanLII) at paragraphs 36 and 37:

[36] In this case, the breach was no accident. The leaker intended to leak the information, and did leak it. It would be difficult for me to overstate the seriousness of the leaker's actions. It strikes at the heart of the ATIPPA process.

[37] I think Nunavummiut would be surprised at how much the ATIPPA process depends on all of the participants acting in good faith. Keeping and managing proper records, assisting applicants, performing diligent searches, cooperating with ATIPP coordinators, obeying statutory timelines, claiming only necessary and limited exemptions, producing all responsive documents, and assisting the Commissioner to perform the oversight role: all depend on a commitment by GN staff to the public-policy objectives of the ATIPPA. In the absence of good faith, the access system quickly crumbles.

[39] Given the background, I can understand why the Applicant is loathe to have the leaker involved in another one of their files. But that is not the legal question in front of me. The question is whether the Applicant has demonstrated a closed mind on the part of CGS's ATIPP Coordinator. I have concluded, after careful consideration, that the answer is no.

[40] Although the ATIPP Coordinator's conduct on the previous file was serious, it should not, in my view, lead to a permanent disqualification for bias. I have spoken with the ATIPP Coordinator at some length about their approach to the present file, and they have submitted to me a written narrative of their search. I find that they approached the search in good faith and to the best of their ability. Their mind was open to what might be found.

[41] My conclusion is reinforced by the fact that CGS's disclosure letter was signed by a senior manager, not the ATIPP Coordinator. The senior manager took responsibility for the answer, thus curing any bias that might arguably exist on the part of the ATIPP Coordinator. The disclosure letter was an institutional response.

[42] I will add only this: Given the history between the ATIPP Coordinator and the Applicant, it was probably unwise for the ATIPP Coordinator to have called the

Applicant. I see that as an administrative error, not a legal error, and it is not productive for me to make recommendations to CGS on the administrative minutiae of its file-handling. But the problem could easily have been avoided.

Diligent search

[43] That still leaves us with the question of whether CGS performed a diligent search for the requested records.

[44] Part of CGS's search involved asking the NMTO if it had any responsive records. The NMTO told CGS that it did not, and this answer was relayed by CGS to the Applicant. In a preliminary decision, I ruled that the NMTO is not a "public body" within the meaning of the ATIPPA: *Nunavut Municipal Training Organization (Re)*, 2022 NUIPC 21.

[45] As noted in the Law section above, any further inquiry depends on the Applicant providing "some basis" for believing that the requested records exist. This is not a high barrier, but the Applicant has not passed it. During the period specified in the request for records, the Applicant was not actively working for CGS. There was no particular reason for CGS to have created records concerning the Applicant. The Applicant has been unable to offer "some basis" for believing that responsive records exist.

[46] In any event, the search was, in my view, appropriately planned and executed. CGS has provided to me a narrative of how the search was done. I can find no fault with it, and the Applicant was unable to provide any substantive critique of the search.

[47] I conclude that CGS conducted a diligent search for responsive records.

Conclusion

[48] There was no disqualifying bias on the part of the staff person at CGS who processed the ATIPP request.

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

Recommendations

[50] I recommend that CGS perform no further search for responsive records.

Graham Steele

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