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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

<b>Report Number:</b>	24-267-RR
<b>CanLII Citation:</b>	Ethics Officer (Re), 2024 NUIPC 16
<b>NUIPC File Number:</b>	24-158
<b>Date:</b>	July 30, 2024

### Summary

[1] The Applicant requested records from the Ethics Officer appointed under the *Public Service Act*. The Ethics Officer declined to disclose any records. The Applicant also filed a privacy breach complaint concerning certain actions by the Ethics Officer. The Commissioner finds the Ethics Officer is not a “public body” under the ATIPPA, and therefore the Commissioner does not have jurisdiction to conduct an access review or a privacy breach review.

### Nature of Review

[2] The Applicant has requested a review of a refusal by the Ethics Officer appointed under the *Public Service Act* to disclose records under the *Access to Information and Protection of Privacy Act* (ATIPPA). The Applicant also filed a privacy breach complaint against the Ethics Officer. This is a preliminary decision on jurisdiction.

[3] The jurisdictional question is whether the Ethics Officer is a “public body” whose records are subject to disclosure under the ATIPPA, and whose actions are subject to a privacy breach complaint under the ATIPPA.

## **Issue**

[4] The only issue in this review is whether the Ethics Officer is a “public body” within the meaning of the ATIPPA.

## **Facts**

[5] The Applicant is a former GN employee. They filed an ATIPP request with two departments concerning certain employment-related records. (The details of the request are not relevant to this jurisdictional decision.) One department suggested the Applicant could also file an ATIPP request with the Ethics Officer, which the Applicant did. The Ethics Officer declined to disclose any documents, on the basis that the Applicant had not exhausted the ATIPP process with the other departments.

[6] The Applicant then filed a request for review with my office. The Applicant’s position was that the Ethics Officer was covered by the ATIPPA, and therefore should have responded to the Applicant’s application for records.

[7] I invited the Applicant, the Ethics Officer, and the Minister responsible for the *Public Service Act* to make a written submission solely on the question of jurisdiction. They all did so. When the Applicant reviewed the written submissions of the Ethics Officer and the Minister, the Applicant conceded that I do not have jurisdiction over the Ethics Officer.

[8] Although the jurisdictional question is resolved for purposes of this case, I believe there is still value in writing a Review Report. This report will stand as a precedent should the issue arise again in future.

## **Law**

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

[10] 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 Municipal Training Organization (Re)*, 2022 NUIPC 21 (CanLII); *Nunavut*

*Court of Justice (Re)*, 2022 NUIPC 3 (CanLII); *Canadian Energy Centre Ltd. (Re)*, 2022 CanLII 20312 (AB OIPC).

**[11]** 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.

**[12]** 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 Ethics Officer is not one of them. Therefore the Ethics Officer does not fit under paragraph (b) of the definition.

**[13]** The question before me, then, is whether the Ethics Officer fits under paragraph (a) of the definition. Is the Ethics Officer “a department, branch or office of the Government of Nunavut”?

**[14]** 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 Ethics Officer: see *Nunavut Municipal Training Organization (Re)*, 2022 NUIPC 21 (CanLII) at paragraphs 17 to 24.

**[15]** Finally, section 16(1) of the *Legislation Act*, S.Nu. 2020, c. 15, provides general guidance on how to interpret an enactment:

16. (1) The words of an Act and regulations authorized under an Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature.

## Analysis

[16] The strongest argument in favour of finding that the Ethics Officer is a “public body” is the name of the position. The Ethics “Officer” self-evidently holds an “office”. The ATIPPA applies to an “office of the Government of Nunavut”.

[17] But this argument is, legally, too narrow. The argument would fail if the Ethics Officer had been given a different name, such as “Ethics Commissioner”. As directed by section 16(1) of the *Legislation Act*, we must look at the larger context: the terms of appointment; the nature of the work; and the way the ATIPPA works. As noted in the Law section above, the underlying question is the degree of control the GN exercises over the Ethics Officer.

### *Terms of appointment*

[18] The Ethics Officer is a position governed by Part 8 of the *Public Service Act*. The position is created by section 76(1):

76. (1) The Commissioner in Executive Council, on the recommendation of the Minister, shall appoint an Ethics Officer for the public service.

[19] The Ethics Officer holds office during good behaviour for a five-year term: section 76(5). “During good behaviour” is a legal term with a specific meaning. Essentially it protects an office-holder from dismissal without cause. The Ethics Officer may be removed only by the Commissioner in Executive Council (i.e. the Cabinet) on the recommendation of the Minister.

[20] The Ethics Officer thus shares many of the characteristics of the independent officers of the Legislative Assembly, namely the Chief Electoral Officer, the Representative for Children and Youth, the Languages Commissioner, and the Information and Privacy Commissioner. None of these independent officers of the Legislative Assembly is a “public body” under the ATIPPA Act.

[21] The chief difference is that the Ethics Officer is appointed by (and can be dismissed by) the Cabinet on the recommendation of the Minister. The independent officers of the Legislative Assembly are appointed by (and can be dismissed only by) the Legislative Assembly. The Ethics Officer thus has slightly

less job protection than the other independent officers, if we assume that it is easier to obtain a decision of Cabinet than it is to obtain a decision of the Legislative Assembly.

**[22]** I find that the terms of appointment show the GN exercises very limited control over the Ethics Officer. By statutory design, the Ethics Officer exercises a high degree of independence.

#### *Nature of the Ethics Officer's work*

**[23]** The Ethics Officer's principal task is to investigate allegations of wrongdoing within the GN. "Wrongdoing" is defined in section 38(1) to include any of the following conduct by a GN employee acting in their public service capacity:

- (a) contravention of an Act of the Legislature, the Parliament of Canada or the legislature of a province or territory, or of a regulation made under any such Act;
- (b) failure to comply with applicable directives made by the Minister, the Minister responsible for the *Financial Administration Act*, or the Financial Management Board with respect to management of the public service or public assets for which the employee is responsible;
- (c) misuse of public funds or public property;
- (d) gross mismanagement of public property or resources for which the employee is responsible, including an act or omission showing a reckless or willful disregard for the proper management of public property or resources;
- (e) harassment or verbal or physical abuse of any person other than an employee or violation of the human or contractual rights of any person providing services to or receiving services or information about services of any kind from a department or public body;
- (f) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, to public or private property, or to the natural environment, other than a danger that is inherent in the performance of the duties or functions of an employee;
- (g) a serious breach of the Code of Values and Ethics;
- (h) any act of reprisal against an employee or other person;
- (i) a request, direction or encouragement by a supervisor or senior manager to an employee or by an employee to any other person to commit a wrongdoing set out in paragraphs (a) to (h).

**[24]** For the Ethics Officer to credibly carry out investigations into wrongdoing, they must have operational independence from the people they could potentially be investigating. The *Public Service Act* reinforces that independence in several ways. For example:

- a. The Ethics Officer is not a member of the public service: section 76(2).
- b. The Ethics Officer may refuse any assignment requested by the Minister: section 76(4).

**[25]** As a practical matter, the Ethics Officer has their own e-mail address and their own information systems. They conduct their work on their own schedule, without direction from anyone in the GN. They do not have an office in any GN building, nor do they have access to GN network drives.

**[26]** Moreover, the *Public Service Act* provides for the Ethics Officer to operate confidentially, with limited exceptions. For example:

- a. The Ethics Officer may conduct an investigation in private or in public at their discretion: section 43(2).
- b. The Ethics Officer is not a compellable witness in respect of any information or evidence received in an investigation: section 51(1).
- c. The Ethics Officer may disclose information only in limited circumstances: section 51(2).
- d. To the extent that section 43 of the *Public Service Act* conflicts with the ATIPPA, section 43 prevails: section 43(6). The same is true of section 51: section 51(3).

**[27]** I find that the nature of the Ethics Officer's work is incompatible with the GN exercising control over how the Ethics Officer operates.

### *How the ATIPPA works*

**[28]** The ATIPPA is a statutory scheme for the disclosure of government records and protection of citizens' personal information. Fundamental to the ATIPPA is the designation of a "head" for each public body.

**[29]** The Ethics Officer is not a member of the Executive Council, nor is the Ethics Officer designated in the ATIPP Regulations. The Ethics Officer therefore cannot be a "head" for ATIPP purposes.

**[30]** There is a Minister responsible for the *Public Service Act*, but it would not work for that Minister to be the "head" for the Ethics Officer. The Ethics Officer is not part of the Department of Human Resources. As noted above, the *Public Service Act* puts the Ethics Officer outside the GN hierarchy, and indeed outside the public service itself.

**[31]** I find that, without a "head", the scheme of the ATIPPA does not work. If the legislature had intended that the ATIPPA should apply to the Ethics Officer, one would expect it to have designated a "head", either in the *Public Service Act* or in the ATIPP Regulations.

### *A final comment*

**[32]** In their original response to the Applicant, the Ethics Officer declined disclosure on the basis that the Applicant had not exhausted the processes under the ATIPPA for review of the other departments' disclosure decisions.

**[33]** The Applicant objected to the reason given by the Ethics Officer. The Applicant argued that the fact records may be obtainable from elsewhere is not a reason to refuse disclosure.

**[34]** The Applicant is correct. If two public bodies have the same records – as they would, for example, in the case of correspondence between the public bodies, or if one public body sends copies of records to another public body – the Applicant can apply to one or the other or both. There is no concept in the ATIPPA of having to exhaust one avenue before pursuing another.

**[35]** The written submissions by the Ethics Officer and the Minister responsible for the *Public Service Act* presented thorough arguments on the jurisdictional question. These arguments had not previously been made to the Applicant. When the Applicant read them, they conceded that I do not have jurisdiction. I thank the Applicant for doing so. They saved time and showed their commitment to the process.

### **Conclusion**

**[36]** The Ethics Officer is not a “public body” under the ATIPPA. I do not have jurisdiction over the Ethics Officer, either with respect to the Applicant’s access appeal or the Applicant’s privacy breach complaint.

### **Recommendation**

**[37]** Because this is a jurisdictional decision, I make no recommendation to the Minister responsible for the *Public Service Act*.

Graham Steele

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