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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 two requests for records from the Department of Family Services. DFS refused disclosure under sections 71 and 72 of the *Child and Family Services Act*, which deems personal information in child protection records to be confidential, notwithstanding the ATIPPA. The Applicant requested review. The Commissioner finds that he does not have jurisdiction to review a refusal made under the confidentiality provisions of the CFSA.

Nature of Review and Jurisdiction

[2] This is a decision about jurisdiction on an access file. The Applicant’s request for records under the *Access to Information and Protection of Privacy* Act (ATIPPA) was denied under sections 71 and 72 of the *Child and Family Services Act*, C.S.Nu., c. C-50 (CFSA). The Applicant requested that I review the denial of access.

Issues

[3] The only issue in this review is whether I have jurisdiction to review a refusal of disclosure when the refusal is made under the CFSA rather than under the ATIPPA.

Facts

[4] On August 4, 2023, the Applicant filed two requests for records with the Department of Family Services. The requests were filed under the ATIPPA.

[5] The exact wording of the requests is relevant to this decision. They were as follows:

> Please provide minutes from the PPRC (placement planning committee) related to any child/youth, aged 18 and under, who was already placed by DFS in a residential setting in Ontario, but for whom the PPRC met to consider a new placement or repatriation. Please only include meetings relating to children/youth whose placement at the time of the meeting was a group home or staff model homes (not foster) operated by [Company 1, Company 2, or Company 3]. Timeframe: [date range].
>
> Please provide all incident reports – related to children/youth – 18 and under – who were placed by Nunavut (OOT placements) at either [Company 1, Company 2, or Company 3]. Please only include records related to youth residing at group homes/staff model homes – and not foster homes. Timeline for records is [date range]. If this results in too many responsive records, please contact me to narrow the time frame.

[6] These two requests were at the tail end of a series of requests filed by the Applicant. There had, over a period of many months, been much back-and-forth between the Applicant and DFS about the previous requests. In the end, the Applicant and DFS were able to agree on the information that would be disclosed. The last two requests were follow-ups to the earlier requests.

[7] This time, however, DFS's response was different. On August 16, 2023, DFS's acting ATIPP Coordinator wrote to the Applicant, saying "Under section 71 and 72 of the CFSA, I am unable to disclose the information in your two latest requests". The Applicant therefore received no records at all.

[8] The Applicant requested that I review DFS's response. I asked for and received a written submission, on the question of jurisdiction only, from the Applicant and DFS.

Law

[9] The legal issue is whether I have jurisdiction to review DFS's response. This jurisdictional issue arises because DFS's refusal was under the CFSA, not the ATIPPA.

[10] If this matter were being decided solely under the ATIPPA, I would obviously have jurisdiction to review DFS's response: section 2, definition of "public body"; section 31(1).

[11] But section 71 of the CFSA modifies the usual ATIPPA regime. Section 71(1) deems certain records to be "confidential":

> 71. (1) Any information or record of information relating to a child or his or her parent is confidential where it is received, obtained or retained by any person
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> (a) under this Act or the regulations;
>
> (b) in the exercise of his or her powers or in the performance of his or her duties under this Act or the regulations;
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> (c) who operates a child care facility or foster home respecting a child in the care of the child care facility or foster home; or
>
> (d) who is employed by or retained on contract to provide services to a child care facility or foster home respecting a child in the care of the child care facility or foster home.

This provision creates the potential for conflict with the access provisions of the ATIPPA. (I note that DFS also cites section 72 in its refusal decision, but it is not relevant and so I will say no more about it.)

[12] The basic rule for dealing with a conflict between the ATIPPA and another law is in section 4(2) of the ATIPPA:

> (2) If a provision of this Act is inconsistent with or in conflict with a provision of any other enactment, the provision of this Act prevails unless the other enactment is an Act, or is made under an Act, that expressly provides that the Act, a provision of the Act or a regulation or order made under the Act prevails despite this Act.

[13] Section 71(2) of the CFSA reads as follows:

> (2) Notwithstanding the provisions in the *Access to Information and Protection of Privacy Act* allowing disclosure of personal information as defined in that Act, no person referred to in subsection (1) shall disclose or communicate any information or record of information described in subsection (1) to any person except
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> (a) where necessary or appropriate in the exercise of his or her powers or in the performance of his or her duties under this Act or the regulations;
> (b) with the written consent of the person to whom the information or record relates;
> (c) where giving evidence in court;
> (d) on the order of a court;
> (e) to a person appointed to conduct an investigation under section 64 or 65;
> (f) to the Minister, the Director, an assistant Director, a Child Protection Worker or an authorized person, at their request;
> (g) to a peace officer, if the person believes on reasonable grounds that
>
> (i) failure to disclose the information or record of information is likely to cause physical or emotional harm to a person or serious damage to property, and
> (ii) the need for disclosure is urgent;
>
> (h) where a disclosure or communication is required for the purposes of this Act or to protect a child;
> (i) where necessary for the provision of care, counselling or education to the child;
> (j) where, in the opinion of the Minister, the benefit of the release of the information would clearly outweigh any invasion of privacy that could result from the release; or
> (k) where it is required for the purposes of this Act.

The "notwithstanding" portion of this provision means that it does prevail over the ATIPPA, provided the requested records fall within the description in section 71(1).

[14] Records fall within section 71(1) if they are "relating to a child or his or her parent" and if they are "received, obtained or retained" under the CFSA. In the

rest of this decision, I will refer to these sorts of records as "child protection records".

[15] The list of permitted disclosures in section 71(2) is notably more restrictive than the permitted disclosures in sections 47 and 48 of the ATIPPA. None of the circumstances listed in section 71(2) applies to the Applicant. Therefore if the requested records are child protection records, DFS must refuse to disclose them to the Applicant.

[16] There are two previous decisions in Nunavut touching on the relationship between the CFSA and the ATIPPA for purposes of access to records: *Review Report 07-34 (Re)*, 2007 NUIPC 10 (CanLII); *Review Report 07-35 (Re)*, 2007 NUIPC 11 (CanLII). Both appear to involve the same Applicant. In both cases, the Commissioner found that the requested records concerned a "child welfare issue" and therefore fell under section 71 of the CFSA.

[17] In *Review Report 07-34 (Re)*, 2007 NUIPC 10 (CanLII), the Commissioner wrote:

> For such records [involving a child welfare issue], the *Child and Family Services Act* takes precedence over any access provisions outlined in the *Access to Information and Protection of Privacy Act*. The Applicant does not, in fact, have an "unfettered right" to access his own personal information in this circumstance. The public body is prohibited by legislative enactment from disclosing this information.

[18] In *Review Report 07-35 (Re)*, 2007 NUIPC 11 (CanLII), the Commissioner uses almost identical wording:

> For such records, the *Child and Family Services Act* takes precedence over any access provisions outlined in the *Access to Information and Protection of Privacy Act*. In fact, the public body is prohibited by legislative enactment from disclosing this information except in the very narrow circumstances outlined in that Act. The Applicant's request does not meet the criteria for disclosure.

[19] There is a decision from the Northwest Territories in which the issue is explicitly framed as a question of jurisdiction: *Yellowknife Health and Social Services Board (Re)*, 2000 CanLII 26935 (NWT IPC). This decision is applicable to

Nunavut because the relevant provisions of the NWT and Nunavut legislation were and are the same. I note that the case was decided by a Special Commissioner, since the NWT Information and Privacy Commissioner was in a conflict of interest.

[20] In that case, the Applicant applied under the NWT ATIPPA for records relating to their minor child. The NWT Special Commissioner examined the records and found that the records sought by the Applicant were child protection records. The records therefore fell within section 71(1) of the CFSA. The NWT Special Commissioner continued (at paragraph 18):

> Having found that the information falls within section 71(1) of the *Child and Family Services Act* and that there is a conflict between the disclosure provisions contained in section 71(2) of the *Child and Family Services Act* and section 5 of the ATIPP Act, I find that section 71 (2) prevails over section 5 of the ATIPP Act, as provided by section 4(2). Consequently, I accept the Public Body's submission on the Applicants' access request, that I have no jurisdiction over access to the information referred to in section 71 (1) of the *Child and Family Services Act*.

[21] The NWT Special Commissioner concluded that, since he did not have jurisdiction, he could not conduct a review to decide whether the Applicant should be given access to the requested records.

Analysis

[22] Like the NWT Special Commissioner in the *Yellowknife Health and Social Services Board* case, and for the same reasons, I conclude that I do not have jurisdiction to review DFS's decision to deny records to the Applicant. There are two points of my analysis that I will highlight.

Can I even look at the requested records?

[23] The NWT Special Commissioner indicated that, in order to determine if the requested records fell within section 71(1) of the CFSA, he had looked at the records. I do not believe I have even that authority.

[24] Section 48 of the ATIPPA contains a long list of circumstances in which a public body may disclose personal information. Included in that list is section 48(i):

> 48. A public body may disclose personal information
>
> …
>
> (i) to the Information and Privacy Commissioner, where the information is necessary for the performance of the duties of that officer; ….

[25] The list of allowable circumstances in section 71(2) of the CFSA is much shorter, and notably does not include any equivalent to section 48(i) of the ATIPPA. The inescapable conclusion is that the Legislative Assembly intended to put child protection records beyond the reach of the Information and Privacy Commissioner.

[26] That leads to a legal conundrum: if I cannot see the records, how can we can we be sure that section 71 has been properly applied? We do not want to set up a situation in which DFS can shield records from disclosure and shield that non-disclosure decision from scrutiny. That might create a "black hole" into which too many records could fall: *Department of Health (Re)*, 2021 NUIPC 7 (CanLII) at paragraph 42; *Department of Justice (Re)*, 2021 NUIPC 23 (CanLII) at paragraph 54; *Department of Health (Re)*, 2022 NUIPC 4 (CanLII) at paragraph 109; *Department of Health (Re)*, 2022 NUIPC 6 (CanLII) at paragraph 61; *Department of Family Services (Re)*, 2023 NUIPC 13 (CanLII) at paragraph 24.

[27] The answer to the conundrum, in my view, has two parts.

[28] First, I do (in my view) have the authority at least to consider whether DFS's invocation of section 71 has an air of reality about it. This is not a high hurdle, but it is a necessary one to avoid abuse of section 71.

[29] For example, if a request for records relating to a group-home contract or a budgetary matter or a policy decision were refused under section 71, I would likely conclude that these records were not plausibly "relating to a child or his or her parent" and that the invocation of section 71 therefore did not have an air of reality. I would then carry on with my review under the ATIPPA, as usual.

[30] But where, as in the present case, the requested records will plausibly include information "relating to a child or his or her parent", the "air of reality" test is satisfied. This analysis is based on the wording of the request, and not on an examination of the records.

[31] In this case, the exact wording of the Applicant's requests is reproduced in paragraph 5 above. The Applicant has requested (a) incident reports, and (b) placement committee minutes. These records, by their nature, are generated for purposes of the CFSA and would involve individual cases. It is entirely plausible that these records are "relating to a child or his or her parent".

[32] In this regard, I note that records falling under section 71 cannot be "saved" for disclosure through the usual process of ATIPPA redaction. If that were the case, there would be no need for section 71 at all, because personal information in child protection records could be redacted under section 24 of the ATIPPA. By enacting section 71, with its explicit overriding of the ATIPPA, the Legislative Assembly must have intended a different result.

[33] Nor can records falling under section 71 be saved because DFS may, in the past, have released the same or similar records. Perhaps staff at DFS have not always been aware of section 71, and perhaps they have not always correctly applied it. The fact that a public body may have disregarded a law in the past does not mean that it must continue to disregard it. To use a technical legal word, DFS cannot be "estopped" from applying section 71 in a proper case.

[34] The second part of the answer to the legal conundrum I identified in paragraph 26 is that an applicant dissatisfied with a refusal under section 71 of the CFSA can apply to the Nunavut Court of Justice for judicial review. Under the Rules of Court, the court would issue an order for production of the department's records, and the department would be authorized, and indeed required, to obey that order: CFSA, section 71(2)(d).

[35] This solution is not ideal. The ATIPPA review process is quick, simple, and cost-free for an applicant. Any judicial process is going to take longer, be more complex, and cost more. That is enough to defeat most applicants. But that is the

choice made by the Legislative Assembly. Child protection records are meant to be tightly held. The Legislative Assembly has put them beyond my reach, but not beyond the reach of the court.

What about accountability?

[36] The fundamental objective of the access provisions of the ATIPPA is "to make public bodies more accountable to the public": section 1; *Community and Government Services (Re)*, 2022 NUIPC 23 (CanLII) at paragraph 96; *Department of Health (Re)*, 2021 NUIPC 27 (CanLII) at paragraph 48.

[37] It is no secret that Nunavut's child protection system is in crisis. On May 30, 2023, the Auditor General of Canada tabled a report in the Legislative Assembly on child and family services in Nunavut. The report can only be described as devastating. It is the Auditor General who uses the word "crisis". The report echoes concerns raised repeatedly, over a period of years, by Nunavut's Representative for Children and Youth. DFS's "inability to meet its responsibilities" (again, the words of the Auditor General) cries out for more accountability.

[38] It is relevant to mention here that the Applicant is a journalist. I have previously written about the vital role played by journalists in promoting accountability: *Department of Health (Re)*, 2021 NUIPC 27 (CanLII) at paragraphs 47 to 54. The press is "the eyes and ears of the public": *Sherman Estate v. Donovan*, 2021 SCC 25 (CanLII) at paragraph 1. This Applicant is digging into Nunavut's child protection system, with a focus on out-of-territory placements. From the perspective of accountability, that can only be a good thing.

[39] Nevertheless, the crying need for accountability cannot clothe me with jurisdiction that I do not otherwise have. The Legislative Assembly has made a choice about how child protection records will be handled, and I must respect that choice.

[40] My worry is that section 71 of the CFSA, which has the laudable goal of protecting tightly the privacy of children in care and their parents, may have the unintended effect of protecting the department from scrutiny.

[41] The current wording of section 71 of the CFSA dates to the Northwest Territories in 1997, even before the creation of Nunavut in 1999. Perhaps it is time for the GN and the Legislative Assembly to take another look. For example, section 71(2) could be amended to add something equivalent to section 48(i) of the ATIPPA. That might be enough to give me jurisdiction to review a refusal under section 71. Or sections 70 to 74 of the CFSA could be repealed and replaced by new provisions in the ATIPPA. That would clarify the relationship of the CFSA and the ATIPPA. There are many other options to promote accountability without taking away from the confidentiality of child protection records.

Conclusion

[42] I do not have jurisdiction to review a refusal of disclosure, when the refusal is made under section 71 of the *Child and Family Services Act*.

Recommendations

[43] Because of my finding that I do not have jurisdiction, I make no recommendations.

[44] Because there are no recommendations, the Minister of Family Services is not required to issue a written decision under section 36 of the ATIPPA.

Graham Steele
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