

Issues

[4] The only issue in this review is whether the Society, in its operation of the Facility, is a “public body” within the meaning of the ATIPPA.

Facts

[5] The Applicant was employed by a subcontractor at a social-services facility in Nunavut. The Facility is operated by a Nunavut-registered non-profit society. The name and location of the Facility and the name of the Society are not relevant to my decision, so I leave them out.

[6] The Applicant had an employment-related dispute with a manager at the Facility. The manager was an employee of the Society. As I understand it, the Applicant then contacted the Department of Community and Government Services (CGS), seeking records about the Society, the manager, and the dispute.

[7] CGS forwarded the request to the Department of Family Services (DFS). DFS provided one record to the Applicant, namely security-camera video footage for a time specified by the Applicant. (I note in passing that the footage showed only the Applicant, so no privacy issues were raised by release of the footage.) DFS said it had no other responsive records, and advised the Applicant that the Society was not a “public body” under the ATIPPA.

[8] DFS also declined to formally transfer the ATIPP request to the Society under section 12(1) of the ATIPPA. DFS did, however, informally bring the request to the Society’s attention. The Society declined to provide any records to the Applicant.

[9] The Applicant requested review of DFS’s decision. During my review, I have heard from the Applicant, DFS, and the Society. I thank them for their submissions.

Law

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

[11] 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, *Ethics Officer (Re)*, 2024 NUIPC 16 (CanLII); *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).

[12] 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.

[13] 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 Society is not one of them. Therefore the Society does not fit under paragraph (b) of the definition.

[14] The question before me, then, is whether the Society fits under paragraph (a) of the definition. Is the Society “a department, branch or office of the Government of Nunavut”? It is not a department, so we can narrow the question further: Is the Society, at least in relation to its operation of the Facility, a “branch or office” of the GN?

[15] 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 Society. I explained that test in *Nunavut Municipal Training Organization (Re)*, 2022 NUIPC 21 (CanLII)

at paragraphs 17 to 24. I will not repeat that explanation here, but I adopt it for purposes of this decision.

Analysis

[16] Although the Applicant did not put it this way, the Applicant is arguing that the Society's records, in relation to operation of the Facility, are "in the custody or under the control of" DFS. DFS says they are not.

[17] The best way for me to illustrate the jurisdictional issue is with the following two cases:

- a. In *Nunavut Municipal Training Organization (Re)*, 2022 NUIPC 21 (CanLII), the issue was whether the Nunavut Municipal Training Organization (NMTO) was a public body. I looked in detail at the relationship between CGS and NMTO. I considered all the ways that CGS interacted with NMTO, including organizational structure, funding, and staffing. I concluded that NMTO was not a public body and so the ATIPPA did not apply to it.
- b. In *Department of Health (Re)*, 2024 NUIPC 17 (CanLII), the issue was whether there had been a privacy breach at a health-care facility. A private contractor managed the facility, but Health conceded that it functionally controlled the facility so the ATIPPA did apply to what happened there.

[18] What I am trying to decide in the present case is whether the Society's operation of the Facility is closer to the first case or the second case. For the reasons that follow, I conclude that it is much closer to the first case.

[19] The indicia of GN control over the Society are weak – indeed, weaker than in the NMTO case. The Society is created under the *Societies Act*, not by statute. The Society has a history and existence going well beyond the Facility where the Applicant worked. It has a board of directors that is independent of the GN.

[20] Unlike the NMTO case, there are no GN employees at the Facility. The Society's staff at the Facility are hired, paid and managed by the Society, without any GN involvement. Subcontractors, such as the company for which the Applicant worked, are hired by the Society, again without any GN involvement.

[21] The Society receives financial contributions from the GN. There is, for the Facility, a contribution agreement with DFS. At my request, DFS provided a copy of the agreement to me. The financial contribution covers all or most of the operating costs of the Facility. But that is not enough, in itself, to turn the Society into a "branch or office" of the GN. As I noted in the NMTO case, in a small, government-reliant jurisdiction like Nunavut, it is inevitable that social-service organizations will receive a substantial amount of their funding from one level of government or another.

[22] There are three aspects of the contribution agreement I wish to highlight. The first is Article 10:

10.0 Confidentiality Access to Information

10.1 The Recipient and the GN acknowledge that the *Access to Information and Protection of Privacy Act*, S.N.W.T. 1994, c. 20, as amended and duplicated for Nunavut, applies to all aspects of the content, financial management, and general performance of this Agreement.

This clause is a standard part of the GN's contribution agreement template. I take it as applying to the contribution agreement itself. For example, if an applicant requested a copy of the agreement, it would (probably) be subject to disclosure by DFS. Article 10 does not have the effect of turning the Society into a "public body" for purposes of the ATIPPA.

[23] The second aspect of the contribution agreement I wish to highlight is Article 20:

20.0 Agency/Employment Relationship

20.1 For greater certainty and notwithstanding the *Financial Administration Act*, the Parties agree that the Recipient is and shall remain fully independent of the

GN. Neither Party has the authority to bind the other to any third person, nor otherwise to act in any way as the representative of the other.

20.2 Nothing in this Agreement shall be construed to create the relationship of principal and agent, or employer and employee as between the GN and the Recipient.

Again, this clause is a standard part of the GN's contribution agreement template. It is routine legal language, but it does underline the parties' intention to stay legally independent of each other.

[24] The third aspect of the contribution agreement I wish to highlight is something that is not in the agreement. There are some reporting requirements incorporated into the agreement, such as the number of Nunavummiut using the Facility, but there is no provision for the Society to open all its records to the GN at the GN's request. Even less so, then, is there any sense that the Society's records in relation to the Facility are "in the custody or under the control of" the GN. This may be contrasted, for example, with my finding in *Department of Health (Re)*, 2021 NUIPC 7 (CanLII), that an external investigator's notes were still within the control of the GN, even though they were not in the custody of the GN.

[25] I would be concerned if I thought a public body were trying to contract its way out of its ATIPP responsibilities. To maintain the integrity of the ATIPPA, we must be on guard against such a manoeuvre. But that is not at all what is happening in this case. There is a social need in the community; the need is being filled by the Society at the Facility; the operation of the Facility is funded by DFS. It is all quite straightforward.

[26] When all the relevant circumstances are considered, the only reasonable conclusion is that the GN does not control the Society's operation of the Facility. The Society is therefore not, in its operation of the Facility, a "branch or office" of the GN. It is not a "public body". Its records are not subject to disclosure under the ATIPPA.

Conclusion

[27] The Society, in relation to its operation of the Facility, is not a “public body” within the meaning of the ATIPPA.

[28] Since any responsive records other than the video footage were not in the custody or control of DFS, DFS was correct to decline further action on the Applicant’s request for records.

[29] I have no jurisdiction over the Society in relation to its operation of the Facility.

Recommendations

[30] Because this is a jurisdictional decision, I make no recommendation to the Minister of Family Services.

Graham Steele

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