

**NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER
Review Report 04-41**

File: 04-175-4
August 24, 2004

BACKGROUND

On April 20th, 2004, I received a request from the Applicant to review a decision of the Department of Justice not to disclose certain records requested by him. The Request for Information relates to a report commissioned by the Department of Justice with respect to personnel and hiring matters at the South Mackenzie Correctional Centre and the Dene K'onia Youth Facility which was completed in December 2001. It was prepared at the request of the Minister of Justice by an independent contractor, Shannon Gullberg, after allegations of improprieties in the hiring practices at the Correctional Centres between 1999 and 2001. For ease of reference, the report will be referred to in these recommendations as the "Gullberg Report".

The Applicant's Request for Information suggests that the request is for his own personal information contained in the Gullberg Report. It appears to me, however, that what the Applicant is really after is a copy of the full report and not just references to him.

The Applicant was provided with some documentation, including copies of some documents which were attached to the report as Appendices, where the Applicant was referred to by name. Some other third parties names were severed from those documents, but the Applicant has not asked me to review the severing of that information. However, the Applicant was denied access to the whole of the Gullberg Report proper. The Applicant was advised of this refusal by letter dated March 18th of this year. It is this refusal to disclose which the Applicant has asked me to review.

The public body was asked to provide me with a copy of all responsive documents, as well as a detailed explanation as to why they decided not to release the information in question. Their response was shared with the Applicant, and the Applicant responded to the submissions received.

ISSUES

The Department relies on section 14(1)(d) of the *Access to Information and Protection of Privacy Act* in refusing to provide the Applicant with a copy of the report. That section provides that:

14. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal

(d) plans that relate to the management of personnel or the administration of a public body that have not yet been implemented;

The first thing that should be noted is that this is a discretionary section. Should it apply to the record in question, the Department still has to show that it exercised the discretion given to it to refuse access. This would usually be shown by indicating the reasoning behind the refusal. In this case, the Department says that it refused because “the Department is continuing to review the analysis of the identified issues....in order to put forth a comprehensive plan for addressing those issues”.

In their letter to me, they argue that the management of personnel comprises all aspects of human resources of a public body, including staffing requirements, job classification, recruitment and selection, employee salary and benefits, hours and conditions of work, leave management, performance review, training, separation and layoff. They go on to say that the Gullberg Report contains twenty five recommendations, some of which have been acted upon. As noted above, however, they also say that the department continues to review the analysis with a

view to implementing a comprehensive plan.

The Applicant, for his part, says that he was interviewed several times during the course of Ms. Gullberg's investigation and that he provided her with personal information about himself and his job. He acknowledged that he spoke with Ms. Gullberg voluntarily and that he understood that she was investigating irregularities in hiring practices at the South Mackenzie Correctional Centre and the Dene K'oina Youth Facility. He also acknowledges that he was given a copy of the 25 recommendations made by Ms. Gullberg when the report was completed.

Contrary to the statement made by the Department in its submissions to me, the Applicant says that he was advised by the Director of Corrections during a staff meeting that all of the recommendations of the Gullberg Report had been implemented and it was only then that he asked for a copy of the report. He believes that the government has done all they intend to do with respect to the recommendations made and that, in light of the fact that the report is now some two and a half years old, if they haven't implemented all the changes they intended to, they should have.

I have had the benefit of reviewing the report in its entirety in order to allow me to better assess the issues raised.

DISCUSSION

Firstly, and perhaps most importantly to the Applicant, I can without hesitation say that there are no references to the Applicant in the Report. In fact, the report was purposely written by Ms. Gullberg so as to avoid identifying specific individuals who she spoke with. She addresses this issue squarely at page 2 of the report, when she says the following:

In writing this report, the writer decided not to refer to the names of the persons making specific complaints. The intent is not to be evasive. Rather, the writer took this approach to ensure that staff would feel comfortable in discussing their concerns, without any fear of possible reprisal. That is not to suggest that there would be any reprisal, but certainly the staff are bound to feel vulnerable in reporting their concerns about administration. In addition, it is the writer's opinion that specifically referring to the names of those making complaints is not productive. The complaints were all similar in nature, and the intent in writing this report is to investigate the complaints of staff and to deal with those concerns in a constructive manner. Nothing is gained by referring to individual names. What is ultimately important are the recommendations made throughout the report, which are intended to be constructive in nature and to aid the GNWT as it deals with staffing issues.

That having been said, I have the clear impression that although the Applicant's initial Request for Information suggested that he wanted a copy of the report so that he could see what it said about him, he is really asking for a copy of the Report itself. For that reason, I will continue with my review on that basis.

Section 14

The only section of the act referred to by the public body in its submissions to me was section 14(1)(d). They claim that the Report constitutes "plans that relate to the management of personnel or the administration of a public body that have not yet been implemented".

With respect, I cannot agree with the department that the Gullberg Report constitutes "plans" of the public body. The term "plans" by definition, refers to something in the future. The Oxford University Press Dictionary defines "plan" as:

a detailed proposal for doing something or achieving something;
an intention or decision about what one is going to do.

The report contains a discussion of some of the existing practices, allegations of irregularities and things done during the time period which Ms. Gullberg was asked to investigate (1999 to 2001). Existing practices and past activities cannot constitute “plans” as they are things already done and completed.

As for the recommendations made in the report, those cannot said to be plans either, as they are merely recommendations. There is no indication that those recommendations have been or might be accepted such that they would become plans. Recommendations might shape plans, but do not, in and of themselves, constitute plans. Even if it could be said that the recommendations made in the report might reveal the plans of the public body, those recommendations have already been provided to the Applicant and the rest of the staff of the affected institutions. The disclosure of those recommendations, therefore, cannot be “reasonably expected to reveal” the plans of the public body because they have already been revealed.

I cannot agree with the public body that section 14(1)(d) applies to prevent the disclosure of the Gullberg Report.

I must, however, consider whether other sections of the Act might apply. In particular, I believe that other parts of section 14(1) bear consideration.

Section 14(1), in its entirety, reads as follows:

- 14.** (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal
- (a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the

- Executive Council;
- (b) consultations or deliberations involving
 - (i) officers or employees of a public body,
 - (ii) a member of the Executive Council, or
 - (iii) the staff of a member of the Executive Council;
 - (c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of the Northwest Territories or a public body, or considerations that relate to those negotiations;
 - (d) plans that relate to the management of personnel or the administration of a public body that have not yet been implemented;
 - (e) the contents of draft legislation, regulations and orders;
 - (f) the contents of agendas or minutes of meetings of an agency, board, commission, corporation, office or other body that is a public body; or
 - (g) information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.

In my opinion, 14(1)(a), and (b) require further consideration.

With respect to section 14(1)(a), there is little doubt that the Gullberg Report contains significant amounts of “analyses”, “recommendations”, “advice” and “policy options” and that it was prepared for a public body. In this case, however, the recommendations have already been disclosed to all participants. It cannot be said, therefore, that the disclosure of these details “could reasonably be expected to reveal” the “recommendations, advice and policy options” in the report because these were already in the possession of the Applicant when he made his request or information.

This leaves us only with “analysis” within the report and there is certainly some of this within the body of it. To this extent only, the public body has the discretion to deny disclosure. But much of the report relates to factual underpinnings, allegations and background material. These do not constitute analyses. In my opinion, there are parts of the Report that do fall under section 14(1)(a) but those parts can effectively be severed from the report and still leave significant information available for disclosure to the Applicant.

Section 14(1)(b) provides the discretion to refuse disclosure of a record where it relates to “consultations or deliberations” involving officers or employees of a public body. The Gullberg Report does discuss the situations of several individual employees of the Department. Does this, however, amount to “consultations or deliberations”?

The Alberta Freedom of Information and Protection of Privacy Act contains a provision almost identical to our section 14(1)(b). In Order 1996-006, then Information and Privacy Commissioner Robert Clark made the following comments with regard to that section:

The next issue is whether section 23(1)(b)(i) (“consultations or deliberations”) apply to the Records. In the broadest sense this section could be used to withhold any discussion whatsoever between any of the parties named in the section. If this were so, there would be very little access to any information under the Act. This cannot be right given the purpose of the Act which is stated in section 2 to be “...to allow any person a right of access ... subject to limited and specific exemptions as set out in this Act,”. When I look at section 23 as a whole, I am convinced that the purpose of the section is to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions. The intent is, I believe to allow such persons to address an issue without fear of being wrong, “looking bad” or appearing foolish if their frank deliberations were to be made public.

Again, this is consistent with Ontario and British Columbia. I therefore believe that a “consultation” occurs when the views of one or more officers or employees is sought as to the appropriateness of particular

proposals or suggested actions. A "deliberation" is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. Here again, I think that the views must either be sought or be part of responsibility of the person from whom they are sought and the views must be sought for the purpose of doing something, such as taking an action, making a decision or a choice.

As I understand the background to the Gullberg Report, it was commissioned because a member of the Legislative Assembly had received a number of complaints from several residents of his constituency concerning the hiring practices at the two correctional facilities involved in the report. A meeting was held with constituents, the result of which was a request for an independent investigation of the hiring practices at the two institutions. An investigation is not, in my opinion, the same as a consultation. There were, at the time the report was commissioned, no "proposals or suggested actions" on the table. In fact, that's what the report was asked to do and did – provide a number of proposals or suggested actions. The report, therefore, cannot be said to be a "consultation". For the same reason, the report cannot be said to constitute deliberations. It is not a "discussion" or a "consideration" by officers or employees. It might be that consultations and deliberations arose as a result of the report. But the report itself will not reveal the nature of those consultations or deliberations except in a very broad way.

In summary, in my opinion, except for the analyses contained within the report, the report does not fall under any of the discretionary exceptions to disclosure set out in section 14 of the Act.

Section 23

Section 23 of the Access to Information and Protection of Privacy Act provides that there is an absolute prohibition from disclosing the personal information of an individual where that disclosure would be an unreasonable invasion of the individual's privacy.

The section goes on to provide guidance for determining when such disclosure would be unreasonable.

The Gullberg Report does contain personal information of several individual employees of the Department. The question then becomes whether it would be an unreasonable invasion of the privacy of those persons if the information were to be disclosed. The place to start would be at subsection (4) which describes when a disclosure of personal information will be deemed **not** to be an unreasonable.

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where

- (e) the personal information relates to the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council;

On the other hand, section 23(2) provides guidance as to when the disclosure of personal information is deemed to be an unreasonable invasion of the individual's privacy. In particular, the subsection provides as follows:

(2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where...

- (d) the personal information relates to employment, occupational or educational history;...
- (g) the personal information consists of personal recommendations or evaluations about the third party, character references or personnel evaluations;...

Much of the personal information contained in the Gullberg Report deals with the classification of individuals and the process by which they got their positions and remained in them. There is a good deal of information about certain individual's

employment history within the department. In fact, apart from the Analyses and Recommendations, most of the information in pages 3 through 16 constitutes information relating to the employment history of various employees. Those portions which constitute employment history cannot be disclosed, as that is a mandatory exclusion to disclosure.

Furthermore, those portions of these pages which constitute “analyses” are subject to a discretionary exemption under section 14(1)(a). The public body must use its discretion in determining whether or not to disclose those parts of the report. To the extent that they might decide to disclose the analyses, I would caution that the disclosure must be done in such a way as to protect the privacy of the individuals mentioned. These comments apply to all of the parts of the report which are headed “Analyses”.

The first part of Section V of the Report, starting on page 17, does not relate to a specific individual. In fact, it refers to concerns raised by “many” employees. None of those employees are named, nor is it possible to identify them individually until the last line of page 17. I can see no reason that this page (with the exception of the last line) should not be disclosed. The last line of page 17 and the first half of page 18 refer to specific individuals and their employment history and cannot be disclosed.

Section VI contains some personal information that is protected from disclosure as being “employment history” of certain individuals. I believe, however, that with judicious severing of parts of pages 20, 21 and the top of page 22, the personal information of the parties involved can be protected, while still allowing the Applicant sufficient information to allow him to understand the nature of the discussion.

Again, Section VII of the Report outlines general complaints. There are references to certain individuals and their job histories. This section would be a little more difficult to sever the personal information from because some of the discussion is very specific. I do believe, however, that there are parts of page 24 and the top of page 25 that can

be disclosed without revealing the names and employment history of the individuals if properly edited to sever some parts. This may not leave much information for the Applicant, but would leave some important information which he might find useful.

The "Complaint" portion of Section VIII of the Report makes no reference whatsoever to the work history of any individual and there is nothing, in my opinion, which should prevent it from being disclosed.

The "Complaint" portion of Section IX of the Report is, once again, quite specific in identifying specific individuals. Again, however, with judicious severing, the identity of those individuals might be capable of being protected while allowing access to the general discussion. Because this is a small "employment community" and it might, consequently become fairly easy to identify who the parties are in the circumstances being discussed, I am a little more concerned about whether the identity of the individuals can effectively be protected. In this case, I would leave it to the public body to determine whether or not they can effectively sever information and still release the balance of the nature of the complaint although I have made suggestions for severing of this section.

There is nothing in the "Complaint" portion of Section X which reveals any personal information about any person. There is nothing, in my view, which should prevent the disclosure of these two paragraphs.

Section XI of the report is completely non-specific in terms of reference to individuals. There is nothing, in my view, which should prevent the disclosure of the "Complaint" portion of this section which is on page 31 and the top of page 32.

In Section XII of the Report, there is a mixture of personal and non-personal information. Specifically, the first numbered paragraph (I) refers to two individuals and their employment and educational history and there is no way, in my opinion, that any of it can be disclosed without breaching the privacy of those individuals. However, the

second and third numbered paragraphs are very general and do not refer to individuals and there is nothing in these two paragraphs which, in my opinion, prevents them from being disclosed.

Section XIII of the Act refers to two specific individuals. However, these references are in relation to the way in which the two undertook their work responsibilities rather than their work history. They do, however, constitute a collective “opinions” about the way in which the two undertook their jobs. As such, therefore, I do believe that the disclosure of much of this section would be an unreasonable invasion of the privacy of those two individuals. The second and the third “bulleted “paragraphs should not, therefore, be disclosed.

There is nothing in Section XIV, the Conclusion of the Report, that, in my opinion, falls under any exemption to disclosure and I understand Section XV, the Summary of the Recommendations, has already been provided to the Applicant.

As the recommendations have all been provided to the Applicant prior to his request being made, it is my opinion that they are no longer protected from disclosure and should not, therefore, be severed from the body of the report.

There are also a number of Appendices to the Report. The list of appendices is at page 39 of the Report.

The first is the Terms of Reference for the Report. I see nothing in Appendix “A” which should stand in the way of it being disclosed.

Appendices 2 through 11 and Appendix 16 are all personal information, the disclosure of which would constitute an unreasonable invasion of the personal privacy of individuals. Reference to them should be severed from page 39 and the Appendices themselves should not be disclosed.

Appendices 12 through 15 and Appendix 17 include a statement of personnel policies with respect to transfer assignments and a series of screening materials for various positions within the public body. In my opinion, none of the information in these appendices fall under any of the exemptions to disclosure in the Act and there is nothing, therefore, preventing their disclosure.

CONCLUSION AND RECOMMENDATION

In view of the above discussion, it is my conclusion and recommendation that Gullburg Report should be disclosed to the Applicant, although with some editing so as to protect the privacy of individuals mentioned in the Report. I should say that there is no personal reference to the Applicant in the Report. Attached to the public body's copy of this recommendation, I have attached a copy of the Report with the specific editing which would suggest. I have not marked any of the "Analyses" sections of the Report. As these are discretionary exemptions, I leave it to the department to exercise their discretion in deciding whether or not to disclose those sections or any of them.

Elaine Keenan Bengts
Northwest Territories Information and Privacy Commissioner