NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER
Review Report 19-199

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BACKGROUND

The Applicant made a request to the Department of Health and Social Services for information about complaints made about licensed and/or unlicensed psychologists in the Northwest Territories between January 1, 2012 and March 20, 2018. The Department identified three such complaints but disclosed no records. In their submissions to this office in relation to the review, they clarified that, at the time of the request, the Department had "care and control" of the records pertaining to only one complaint (which had been investigated and was deemed resolved). They indicated that the other two complaints were open and ongoing files and that, as a result, they had been handed over to the Complaints Officer who was located in Alberta (presumably either under contract or other arrangement with the Department of Health to conduct investigations into complaints on behalf of the Department). They advised that once the Complaints Officer finishes an investigation, their report is sent to the Professional Licence Registrar in the Department.

For the file that they had custody and control of, the Department denied access to all records on two grounds:

a) Section 23 (unreasonable invasion of privacy) and
b) the *Psychologists Act* allows for the Minister, on the advice of the Registrar of Professional Licensing Office, to order the removal or suspension or cancellation of a license but does not include provisions

respecting a complaints registry. They note that in other jurisdictions, there are legislatively mandated registries which set out what information can be made publicly available.

They refused access to documents in the possession of the Complaints Officer on the basis that the records were not in the “custody or control” of the Department and were, therefore, outside of the scope of the Act.

DISCUSSION

It is always useful to begin a review with reference to the relevant provisions of the *Access to Information and Protection of Privacy Act*.

For context, we begin with Section 1 which sets out the purposes of the legislation. For our purposes, subsections 1(a) and (c) are relevant:

> 1. The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
>
> (a) giving the public a right of access to records held by public bodies;
>
> ...
>
> (c) specifying limited exceptions to the rights of access;

The section clearly sets out a “right” to access to information. Courts in Canada, including the Supreme Court of Canada, have determined that the right of access to information held by government bodies is a right which is “quasi-constitutional” in nature. Access to government records can only be denied where they fit squarely and clearly within the specified “limited” exceptions set out in the legislation.

Section 3(1) outlines the scope of the Act, indicating that it “applies to all records in the custody or under the control of a public body” subject to a number of listed exceptions some of which may be applicable in this case:

(b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi-judicial capacity;
(c) a record relating to a prosecution where all proceedings in respect of the prosecution have not yet been completed;

Section 4 of the Act provides that the ATIPP Act is paramount to any other legislation in the event of a conflict or inconsistency, unless the other legislation contains a “notwithstanding” clause.

Section 5(2) provides that when a record contains information subject to one of the limited exceptions to disclosure, where that information can reasonably be severed from the record “an applicant has a right to access to the remainder of the record”.

Section 23 of the Act deals with the protection of information where a disclosure would amount to an unreasonable invasion of an individual’s privacy. It is a fairly complex section of the Act.

It begins at subsection one with the general statement that public bodies “shall refuse” to disclose personal information where the disclosure would “be an unreasonable invasion of a third party’s personal privacy”. This is a mandatory exception which means that if the information meets the criteria for the exception, it cannot be disclosed.
This does not, however, mean that any time a record contains the personal information of any person it is protected from disclosure. The disclosure must amount to an unreasonable invasion of privacy. To determine this, an analysis of the information must be done.

Subsection 23(2) sets out a number of circumstances in which the disclosure of such information will be presumed to amount to an unreasonable invasion of privacy. Among those are the following:

- the personal information relates to a medical, psychiatric or psychological history, diagnosis, treatment or evaluation;
- the personal information relates to employment, occupational or educational history;
- the personal information consists of personal recommendations or evaluations about the third party, character references or personnel evaluations;
- the personal information consists of the third party's name where
  - it appears with other personal information about the third party, or
  - the disclosure of the name itself would reveal personal information about the third party

A presumption is rebuttable. This means that all of the circumstances of the matter, including the public interest, must be considered and the presumption may be set aside in some circumstances.

Section 23(4), on the other hand, sets out circumstances in which the disclosure of personal information will **not** amount to an unreasonable invasion of privacy. It does not appear that any of these circumstances exist in this case.

Issues

There are a number of issues arising out of this file:

1. Were the records with respect to the two complaints still under investigation “in the custody or control” of the Department?
2. Does the absence of a legislatively mandated “complaints registry” limit the ability of the Department to disclose the kind of information requested?
3. Does section 23 apply to justify the refusal to disclose all of the responsive records in their entirety?

Issue 1. Custody and Control

The Department in this case argues that the records with respect to two of the complaints received are not in the “custody and control” of the public body. For these two complaints, still under investigation, all records have been handed over to the “Complaints Officer” to review and, presumably, adjudicate on.

The Department has not provided a description of the disciplinary process under the *Psychologists Act*. A review of that legislation is not terribly helpful. It provides for the establishment of a “Registrar”, to be appointed by the Minister. The Registrar is mandated to maintain a Psychologists Register and an Interns Register. Applications for registration as a psychologist in the Northwest Territories are made to the Registrar who is tasked with making a recommendation to the Minister as to the eligibility of the applicant. With respect to discipline, there is only one section of the Act on this subject. It says that the Minister on the advice of the Registrar (or the Psychologists Association) may order the removal of the name of a person from a register or the suspension or cancellation of a licence if

a) the person registered/licensed has been guilty of gross misconduct, incompetence or improper conduct; and
b) the Minister is of the opinion that it is in the public interest to do so.

Presumably, complaints against psychologists are received and administered by the Registrar who is (again presumably) a Departmental employee. The Registrar has (presumably) contracted with or made other arrangements for a Complaints Officer in Alberta to investigate complaints. Records in relation to the complaint are (presumably) sent to the Complaints Officer. Once the Complaints Officer reviews the matter, he sends a report back to the Registrar who then makes his/her recommendation to the Minister.

A public body will have “custody” of a record if it has physical possession of it. It appears that at the time of the Request for Information, the records about the two current complaints were not in the “custody” of the Department.

In Order F2002-014, the Information and Privacy Commissioner of Alberta considered the meaning of the term “control” and concluded that the word refers to the authority of a public body to manage, even partially, what is done with a record. A public body’s ability to demand possession of a record or to authorize or forbid access points to a public body having control of the record. Apparent ownership of a record would also indicate control. The Alberta Information and Privacy Commissioner has also identified a number of non-exhaustive criteria to establish whether the public body has “control” of a record (Order F2006-028). These include:

a) was the record created by an officer or employee of the public body?

This criteria is partially fulfilled. While the original complaint received by the Department would not have been “created” by an officer or employee of the Department acting in that capacity, any additional documents created between the time the complaint is received and passed on to the Complaints Officer would be “created” by the Registrar. The Complaints Officer has the records as an agent of the public body and any records

created by the Complaints Officer would be created in the context of that role as the Department's agent or contractor.

b) what use did the creator intend to make of the record

The complaint itself would have been intended by the creator of it to be used by the Department to conduct an investigation and discipline the individual the complaint was about. Any records created by the Department would be intended for the same purpose - a purpose legislatively assigned to them. Any records created by the Complaints Officer would have been created with a view to resolving the complaint as agent of the Department.

c) does the public body have possession of the record either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?

This criteria is fulfilled. The public body had possession of the complaint because it was submitted by the creator in order to have the Department investigate the complaint. All other records were created either by the public body or its agent.

d) if the public body does not have possession of the record, is it being held by an officer or employee or agent of the public body for the purpose of his or her duties as an officer or employee?

This criteria is fulfilled. The Complaints Officer has all of the records as agent of the Department for the purpose of conducting an investigation on behalf of the Department.

e) does the public body have a right to possess the record?

This criteria is also fulfilled. In order to fulfill this criterion, a public body must have some legal authority to exercise a degree of control over the records (Alberta Order 2000-021). The apparent relationship between the Department and the Complaints Officer suggests that the Complaints Officer is working as an agent and at the behest of the Department. The report prepared by the Complaints Officer is provided to the Registrar. I see no evidence that suggests that the public body does not have the right to possess the records in question.

f) does the content of the record relate to the public body's mandate and functions?

This criteria is also fulfilled. The Department appears to have a legislated mandate to administer and regulate psychologists.

g) does the public body have the authority to regulate the records' use?

I would say that this criteria is also fulfilled. As the party responsible to regulate psychologists, the Department would also have the authority to regulate the records used for that purpose.

With all things considered, though with limited information about the specific nature of the relationship between the Complaints Officer and the Department, I find that the public body had control of the records in the hands of the Complaints Officer at the time of the request.

We must also consider, however, the exceptions under Section 3. As set out above, Section 3 outlines the scope of the Act so as to include all records in the custody or control of a public body, but excepts certain kinds of records, including:

(a) a personal note, communication or draft decision of a person who is acting in a judicial or quasi-judicial capacity; and

(b) a record relating to a prosecution where all proceedings in respect of the prosecution have not yet been completed.

The Department did not argue that the records in question were of this nature. However, this must still be considered. Was the Complaints Officer acting in a judicial or quasi-judicial capacity? Without all the necessary information before me, I would tend to answer this question in the affirmative. While it is the Minister who is legislatively mandated to make discipline decisions under the *Psychology Act*, it is the Complaints Officer who does the investigation and assesses the evidence and makes the recommendations. To the extent, therefore that the records in question are the notes and working papers of the Complaints Officer, created by him/her for his/her purposes only, they are beyond the scope of the Act and not, therefore, subject to a request under the ATIPP Act. Records received by the Complaints Officer and correspondence outlining findings and recommendations and/or the final product of an investigative process, however, remain within the scope of the Act.

Were the records "relating to a prosecution" that was not yet complete? I am not satisfied that any of the records would meet this description. The matter was before the Complaints Office for the purpose of an investigation, not a prosecution. I am satisfied that these records do not relate to a prosecution and are not, therefore taken outside of the scope of the ATIPP Act.

I am satisfied that the Department has "control" of the records in question and, therefore the records are within the scope of the Act.

Issue #2 - Does the absence of a legislatively mandated "complaints registry" limit the ability of the Department to disclose the kind of information requested?

The public body argues that because there is no legislatively mandated complaints registry, the information requested should not be disclosed. I disagree. The *Access to Information and Protection of Privacy Act* provides for the **right** of the public to have access to records unless another Act contains a notwithstanding clause. There is no "notwithstanding" clause in the *Psychologists Act*. The ATIPP Act, therefore, is the sole legislative authority with respect to the use and/or disclosure of records created under the *Psychologists Act*. The absence of provisions with respect to a complaints or discipline registry does not prohibit the disclosure of information in relation to such activities. A request for information must be dealt with considering only the provisions of the ATIPP Act, which means that they must be disclosed unless they meet the criteria for one or more of the exceptions set out in the ATIPP Act.

Issue #3 - Does section 23 apply to justify the refusal to disclose all of the responsive records in their entirety?

I have only the records in relation to the completed investigation to refer to. The records that were in the possession of the Complaints Officer have not been provided for my review. I presume, however, for the purpose of this review that the content of all the records is similar.

The records which have been provided to me for the purpose of this review clearly contain personal information about the psychologist against whom the complaint was made and about the complainant and other third parties. Much of the information about the third parties involved in the complaint clearly fall within one or more of the presumptions set out in section 23(2), including:

- medical, psychiatric or psychological history, diagnosis, treatment or evaluation;
- personal recommendations or evaluations about the third party, character references or personnel evaluations;

- educational and employment history

I have no problems whatsoever in concluding that the disclosure of this information would amount to an unreasonable invasion of privacy. However, Section 5(2) provides that when a record contains information subject to any of the exceptions to disclosure, where that information can reasonably be severed from the record "an applicant has a right to access to the remainder of the record". In this case, I find that the records can be redacted so as to protect the identity of the person who filed the complaint as well as other third parties involved, while still disclosing parts of the records. I have, with this report, provided the Department with a copy of the responsive records edited in such a way as to protect the identity and other personal information of third parties while still disclosing at least some of the information requested.

One issue that does merit further discussion, however, is whether the disclosure of the name of the psychologist involved should be disclosed. Section 23(3) requires public bodies to consider "all the relevant circumstances" in determining whether a disclosure of personal information would amount to an unreasonable invasion of privacy. The Act lists some of the considerations that might be relevant to such an analysis, including:

- whether the disclosure is desirable for the purpose of subjecting the activities of the Government of the Northwest Territories or a public body to public scrutiny;
- whether the disclosure is likely to promote public health and safety
- whether the third party will be exposed unfairly to financial or other harm
- whether the disclosure may unfairly damage the reputation of any person referred to in the record

I would add to this, whether the disclosure would clearly be in the public interest. I would suggest that there is a clear public interest in providing the public with information about complaints against medical professionals, whether or not these complaints are

determined to be well founded. I would suggest that the Department should at least be considering the disclosure of information that would identify the professional involved in the complaint. That, however, would require a consultation with the third party pursuant to section 26 of the Act. No such consultation was done in this case.

RECOMMENDATIONS

Based on the above analysis, I recommend the following:

a) that the Department disclose the records in relation to the first complaint with redactions in accordance with my suggestions;

b) assuming that the two complaints that were “active” at the time of the request for information have now been completed, that these records be reviewed and disclosed in accordance with the Act and the above analysis;

c) in the event that these complaints remain unresolved, that the Department obtain copies of the relevant records from the Complaints Officer and review and disclose them in accordance with the Act and the above analysis;

d) that the Department consider disclosing the identity of the psychologists involved in each of these complaints, taking into account the public interest in disclosure as well as the other factors outlined in section 23(3). If the Department then contemplates the disclosure, notice to each of the affected individuals should be given pursuant to section 26 of the *Access to Information and Protection of Privacy Act*.

To be clear, I am recommending that the records be disclosed immediately with the identities of the psychologists redacted with the consultation pursuant to section 26 taking place for the purpose of disclosing this information once the process is complete. I am aware that the process contemplated by section 26 can be a lengthy one, which includes the possibility that any one (or all) of the affected individuals might object to the disclosure and may result in additional reviews by this office. It is for this reason that I am recommending the immediate disclosure of the records with the identities of the psychologists involved protected, but subject to further consideration.

e) that the Department consider amending the *Psychologists Act* to provide for clarity with respect to the discipline process and what information should be disclosed in the public interest.

Elaine Keenan Bengts
Information and Privacy Commissioner