

**NORTHWEST TERRITORIES  
INFORMATION AND PRIVACY COMMISSIONER  
Review Report 19-203  
Citation: 2019 NTIPC 20**

File: 18-182-4  
October 4, 2019

## **Background**

The Applicant made a request for records from the Government of the Northwest Territories (GNWT) Department of Health and Social Services (DHSS) and the Northwest Territories Health and Social Services Authority (NTHSSA). The specific information requested was as follows:

1. Internal communications about racism, cultural bias/racial bias in the healthcare system June 2018 to present.
2. Results and findings of external investigation into a specific individual's death.

In response to the Applicant's request, NTHSSA identified that the external investigation was a critical incident investigation done in accordance with s. 25.3 of the *Hospital Insurance and Health and Social Services Act* (HIHSSA). NTHSSA refused to disclose the critical incident report, arguing that HIHSSA and the *Access to Information and Protection of Privacy Act* (ATIPPA) exclude critical incident reports from the scope of ATIPPA and therefore need not be disclosed. Further, NTHSSA refused to provide the critical incident report to the Information and Privacy Commissioner for review. The Applicant sought a review of the Applicant's position.

## Relevant Sections of the Legislation

### *Access to Information and Protection of Privacy Act*

- 3.(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
- ...
- (b.1) personal health information, as defined in subsection 1(1) of the Health Information Act, in a record to which that Act applies that is in the custody or under the control of a public body that is a public custodian as defined in subsection 1(1) of that Act;
4. If a provision of this Act is inconsistent with or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, prevails notwithstanding this Act.
- 34.(1) Notwithstanding any other Act or any privilege available at law, the Information and Privacy Commissioner may, in conducting a review under this Division, require the production of and examine any record to which this Act applies that is in the custody or under the control of the public body concerned.
- (2) In conducting a review under this Division, the Information and Privacy Commissioner
- (a) may summon any person as a witness;
  - (b) may require any person to give evidence on oath or affirmation; and
  - (c) has the same power as is vested in a court of record in civil cases

- (i) to administer oaths and affirmations,
- (ii) to enforce the attendance of any person as a witness,
- (iii) to compel any person to give evidence, and
- (iv) to compel any person to produce any record to which this Act applies that is in the custody or under the control of the public body concerned.

49.4. Notwithstanding any other Act or any privilege available at law, the Information and Privacy Commissioner may, after receiving a request for a review under this Division, require the production of and examine any record to which this Act applies that is in the custody or under the control of the public body concerned.

### ***Hospital Insurance and Health and Social Services Act***

1. "critical incident" means an unintended event that occurs when health services or social services provided to a patient or client result in a consequence to him or her that
  - a) is serious or undesired, such as
    - (i) death, disability, injury or harm,
    - (ii) an unplanned admission to a health facility or an unusual extension of a stay in a health facility, or
    - (iii) a significant risk of substantial or serious harm to the safety, well-being or health of the patient or client, and
  - (b) does not result from an underlying health condition of the patient or client or from a risk inherent in providing the health services or social services to him or her;

25.4(1) Subject to the regulations, an investigator appointed or assigned under subsection 25.3(2) or (3) to investigate a critical incident shall not provide a notification or report referred to in section 25.3, any information in a notification or report referred to in that section, or any information gathered, or record produced, by or for the investigator in the course of, or for the purpose of, the investigation to any person except

- (a) the person or body that, under subsection 25.3(2) or (3), appointed or assigned the investigator to investigate the critical incident, or a person designated by the person or body;
- (b) the chief executive officer of a person or body referred to in paragraph (a), in the case of an investigator appointed or assigned under subsection 25.3(2) to investigate the critical incident;
- (c) the Minister, in the case of an investigator appointed or assigned under subsection 25.3(2) or (3) to investigate the critical incident, or a person designated by the Minister;
- (d) the Deputy Minister, in the case of an investigator appointed or assigned under subsection 25.3(2) or (3) to investigate the critical incident, or a person designated by the Deputy Minister;
- (e) the Chief Public Health Officer under the Public Health Act or a person authorized under that Act to make an inspection, investigation or inquiry for the Chief Public Health Officer;
- (f) the Director of Child and Family Services under the Child and Family Services Act, or a person to whom, under section 8 of that Act, information must be provided in respect of a child in need of protection;

- (g) a person or body on order of a court; or
  - (h) a prescribed person or body.
- (2) Notwithstanding the *Access to Information and Protection of Privacy Act* and the *Health Information Act*, and subject to subsection (3), no person is entitled under those Acts to access to
- (a) a notification or report referred to in section 25.3; or
  - (b) any record produced in the course of, or for the purpose of, preparing a notification or report referred to in section 25.3.
- (3) Subsection (2) does not apply in respect of recommendations set out in a critical incident investigation report.

## **Issue**

The issue in this review is whether the DHSS is required to release the critical incident report to the Information and Privacy Commissioner for review as to whether it was properly withheld from the Applicant pursuant to ATIPPA.

## **Discussion / Recommendations**

### ***The Applicant's Submissions***

The Applicant submitted that DHSS should release the report on the basis that the public interest outweighs any invasion of privacy.

### ***The Custodian's Submissions***

The DHSS submitted that when read together, the relevant sections of HIHSSA confirm that, with the exception of any recommendations set out in the critical incident report, no person is entitled to have access to a notification to the Minister of Health and Social

Services of a critical incident; a critical incident report that results from the investigation; or a record produced in relation to the critical incident under ATIPPA or the *Health Information Act* (HIA). The Department argued that the wording that “no person” is entitled to this information includes the Information and Privacy Commissioner.

The DHSS argued that s. 3(1)(b.1) of ATIPPA expressly excludes the personal information that is the fundamental component of any critical investigation report from the application of ATIPPA. They said that s. 4 of ATIPPA further affirms that the notwithstanding clause in s. 25.4(2) of HIHSSA prevails over any inconsistent or conflicting provisions in ATIPPA, including s. 34(1) and (2) of ATIPPA.

DHSS noted that the Legislative Assembly of the Northwest Territories enacted the s. 25.4(2) notwithstanding clause of HIHSSA in 2015. Given that this occurred after the enactment of ATIPPA, they argued that s. 25.4(2) was meant to take precedence over s. 34(1) and (2) of ATIPPA because these sections were brought into force prior to the enactment of s. 25.4(2) of HIHSSA.

DHSS provided two cases to support their position: *British Columbia (Information and Privacy Commissioner) v. British Columbia (Police Complaint Commissioner)*, 2015 BSCS 1538, 81 BCLR (5th) 373, and *West Vancouver Police Department v. British Columbia (Information and Privacy Commissioner)*, 2016 BSCS 934, 2016 Carswell BC 1394. The Department argued that these cases found that a clause similar to s. 25.4(2) of HIHSSA excluded a record from British Columbia’s privacy legislation, and, consequently, from the jurisdiction of the Information and Privacy Commissioner. Overall, the Department submitted that given the provisions of ATIPPA and HIHSSA, s. 25.4(2) of HIHSSA signalled a clear legislative intention to exclude critical incident reports from the scope of ATIPPA, meaning that DHSS is not required to provide the critical incident report to the Information and Privacy Commissioner for review.

## **Analysis**

I am of the opinion that the wording of the legislation in *British Columbia (Information and Privacy Commissioner) v. British Columbia (Police Complaint Commissioner)* is significantly different from the wording in HIHSSA. In that case, the relevant section was section 182 of the BC *Police Act*:

- 182 Except as provided by this Act and by section 3(3) of the *Freedom of Information and Protection of Privacy Act*, **that Act does not apply to**
- (a) any record of a complaint concerning the conduct of a member that is made, submitted, registered or processed under this Part,
  - (b) any record related to a record described in paragraph (a), including, without limitation, any record related to a public hearing or review on the record in respect of the matter,
  - (c) any information or report in respect of which an investigation is initiated under this Part, or
  - (d) any record related to information or a report described in paragraph (c), including, without limitation, any record related to a public hearing or review on the record in respect of the matter, whether that record, information or report is created on or after a complaint is made, submitted or registered or the investigation is initiated, as the case may be. (emphasis added)

This section states that the privacy legislation does not apply to s. 182 of the *Police Act*. This is in contrast to s. 25.4(2) of HIHSSA, which I will repeat here for ease of reference:

25.4(2) Notwithstanding the *Access to Information and Protection of Privacy Act* and the *Health Information Act*, and subject to subsection (3), no person is entitled under those Acts to access to

- (a) a notification or report referred to in section 25.3; or
- (b) any record produced in the course of, or for the purpose of, preparing a notification or report referred to in section 25.3.

S. 25.4(2) is a notwithstanding clause, as opposed to s. 182, which states that the privacy legislation does not apply. In *British Columbia (Information and Privacy Commissioner) v. British Columbia (Police Complaint Commissioner)*, Cullen J. noted that there is a distinction to be made between sections like s. 182 of the *Police Act*, to which the privacy legislation does not apply and sections of the privacy legislation that creates exceptions (at para. 112). The distinction is that in the case of exceptions, the application of the Act and the Commissioner is engaged. On the other hand, in the case of exemptions, neither the application of the Act nor the jurisdiction of the Commissioner is engaged. Here, HIHSSA does not state that ATIPPA does not apply. Rather, s. 25.4(2) is a notwithstanding clause. Thus, in my view, the application of ATIPPA should be engaged. While it limits what can be disclosed to an applicant under the Act, it does not oust the authority of the Information and Privacy Commissioner to request and receive copies of the records for the purpose of confirming, independently, that the records meet the criteria for the exemption.

In my view, in the absence of clear and unequivocal language barring the Information and Privacy Commissioner from reviewing the records, the records should be viewable to permit the Commissioner to fulfill her mandate.

Further, I note section 1 of ATIPPA:

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;
  - ...
  - (e) providing for an independent review of decisions made under this Act.

In my view, this provision creates a duty for the Information and Privacy Commissioner to ensure public bodies are only withholding documents as outlined in the legislation. If the Respondent were entitled to withhold the critical incident report from my review, this would diminish my role and hinder me from fulfilling the objectives of ATIPPA. It is to be noted, as well, that section 56(1) of ATIPPA prohibits the Information and Privacy Commissioner from disclosing any information “that comes to his or her knowledge in the exercise of the powers or performance of the duties of the Information and Privacy Commissioner”. This provision ensures the confidentiality of any sensitive information disclosed to the Information and Privacy Commissioner in conducting a review.

In *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34, the Saskatchewan Court of Appeal found that statutory language written as “[n]otwithstanding any other Act or any privilege available at law” – is self-evidently broad. The reference to *any* privilege available at law is clear and doubtless embraces solicitor-client privilege.” (at para. 37). This language is the same as s. 34 of ATIPPA. In that case, the Court of Appeal concluded that the privacy legislation empowers the Commissioner to require the production of records subject to, or said to be subject to, solicitor-client privilege (at para. 47). I find this case instructive to the current one. Claims of solicitor/client privilege are more sensitive than critical incident reports and accordingly I find that this decision provides an authoritative basis for finding that the critical incident report should be produced to the Privacy Commissioner in this case.

## **Conclusion**

I conclude that ATIPPA does apply to the critical incident report and that I am not barred from access to it for the purposes of this review. I recommend that DHSS release it to me for this purpose pursuant to s. 49.4 of ATIPPA.

Elaine Keenan Bengts  
**Information and Privacy Commissioner**