NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER
Review Report 19-206

Citation: 2019 NTIPC 23

File: 18-181-4
November 5, 2019

Background

The Applicant made a request for records from the Department of Health and Social Services (DHSS). He requested the following information:

> All briefing notes prepared for the Minister, Deputy Minister and Assistant Deputy Minister from January 1, 2017 to February 1, 2018 in relation to an agreement between the Pan-Canadian Pharmaceutical Alliance (pCPA) and the Canadian Generic Pharmaceutical Alliance (CGPA) announced January 29, 2018.

The Department refused to provide the requested information, relying on three exceptions to disclosure provisions of the *Access to Information and Protection of Privacy Act* (ATIPPA): sections 14(1)(a), 16(1)(a) and 17(1)(c).

The Applicant sought a review of the Department's refusal to provide the requested information.

Relevant Sections of the Act

9.(1) Subject to subsection (2), the applicant must be told, in a response under subsection 8(1),...

(c) if access to the record or to part of the record is refused

(i) the reasons for the refusal and the provision of this Act on which the refusal is based,

(ii) the name, title, office address and office telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and

(iii) that the applicant may ask for a review under subsection 28(1).

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;

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

(a) impair relations between the Government of the Northwest Territories and any of the following or their agencies:

(i) the Government of Canada or the government of a province or territory,

(ii) an aboriginal organization exercising governmental functions, including, but not limited to

(A) a band council, and

(B) an organization established to negotiate or implement, on behalf of aboriginal people, a treaty or land claim agreement or treaty with the Government of Canada,

(iii) a municipal council or other local authority,

(iv) the government of a foreign state,

(v) an international organization of states;

Issues

1. Did the Department of Health and Social Services comply with ATIPPA in terms of the content of its response to the Applicant and its submissions to the Information and Privacy Commissioner?

2. Did the DHSS appropriately refuse to disclose the requested information to the Applicant pursuant to sections 14(1)(a), 16(1)(a) and 17(1)(c) of ATIPPA?

Discussion / Recommendations

1. The contents of the Department's response and the adequacy of its submissions

On July 5, 2018, the Applicant made a request for briefing notes from the Department of Health and Social Services in relation to an agreement between the Pan-Canadian Pharmaceutical Alliance (pCPA) and the Canadian Generic Pharmaceutical Alliance (CGPA) announced January 29, 2018. In its response, DHSS first noted that consultation was required with other another government before they could process the access to information request. Their response went on to conclude that "After considering all relevant factors, including representation received from the other government, we are refusing access to all of the requested documents." The DHSS stated that through representations with the other government, they had determined that they would not disclose the requested information per sections 14(1)(a), 16(1)(a) and 17(1)(c) of ATIPPA. In its response, the Department did not further elaborate on how these sections of the Act applied in this case.

In circumstances where the public body is refusing to provide disclosure to an Applicant, section 9(1)(c) of the Act requires the Department to not only set out the provisions of the Act on which the refusal is based, but also give reasons for the refusal. In its response to the Applicant, the DHSS listed the sections of the Act that it was relying on

to refuse to disclosure but it provided absolutely no reasons for the refusal to the Applicant as required by section 9(1)(c) of the Act, aside from saying that they had considered all relevant factors, including representation received from the other government. To give reasons, the Department is required to provide information on how the sections of the Act apply to the facts in the current review. This was not done. I find that the Department's response to the Applicant was insufficient and that the DHSS did not meet its obligations under section 9(1)(c) of the Act.

Moreover, when this review was commenced, I requested submissions from the Department of Health and Social Services about the reasons they refused to disclose the requested information. Specifically, as is routine practice by this office, I asked for a detailed statement outlining DHSS's reasoning for the decision to refuse disclosure of any of the responsive records. DHSS responded that they had consulted with the Ministry of Health and Long-term Care of the Government of Ontario. They provided the Ministry's response to me. The Department noted that the Ministry requested that the documents not be disclosed as the disclosure would be prejudicial to inter-governmental affairs, reveal advice to officials and harm the economic interests of their province. The Department stated that the common briefing notes contained advice, analysis or policy considerations intended only for discussion amongst the Federal/Provincial/Territorial Ministers of Health. The DHSS said they agreed with the Ministry's submissions and determined that the requested information would not be disclosed per sections 14(1)(a), 16(1)(a) and 17(1)(c) of ATIPPA. The Department simply listed the sections relied upon for refusal with no further explanation or reasoning for their application. Finally, the DHSS elaborated that the Ontario Ministry had received the same request for information from the Applicant and had denied the Applicant access to the records. They did not indicate whether that decision had been referred to the Ontario Information and Privacy Commissioner's Office for review. The DHSS argued that release of the records would thus further cause harm to intergovernmental relations under section 16 of the Act and could jeopardize future dealings with the Government of Ontario.

Section 32(2) of the Act sets out that the public body must be given an opportunity to make representations to the Information and Privacy Commissioner. That was done by this office through the process of the review. Section 33(1) of the Act sets out that on a review of a decision to refuse an applicant access to all or part of a record, the onus is on the head of the public body to establish that the applicant has no right of access to the record. To meet its onus, the public body has a positive duty to explain its rationale for refusing to disclose a record. It cannot simply list sections of ATIPPA and have that be enough. It must provide reasoning and rationales for why the sections of the Act apply to the current facts. There are multiple resources available to the Government to do so, such as access to legal research websites and even to legal counsel. My website is kept up to date with all the reviews this office has published. One can easily search for previous reviews that have discussed specific provisions of the Act. **I find** that the Department's submissions to this office on review were insufficient and that the Department did not meet its obligations under section 33(1) of the Act.

2. **Did the DHSS appropriately refuse to disclose the requested information to the Applicant pursuant to sections 14(1)(a), 16(1)(a) and 17(1)(c) of ATIPPA?**

Could the disclosure of the records in question be reasonably expected to reveal advice, proposals, recommendations, analyses or policy options developed by or for a public body (section 14(1)(a)?

The DHSS stated that it relied on section 14(1)(a) of the Act in refusing to disclose the documents in question to the Applicant. The Department provided absolutely no submissions to meet its onus pursuant to section 33(1) of ATIPPA to establish that the Applicant had no right of access to the record under section 14(1)(a).

In *Review Report 18-186* (2006), I was referred to and accepted the approach taken to interpret section 14(1)(a) in *Review Report 051-2015* (2015 CanLII 39326 (SK IPC))

from the office of the Saskatchewan Information and Privacy Commissioner. In that case, the public body relied on a section of the Saskatchewan *Freedom of Information and Protection of Privacy Act* which is similar to our section 14(1)(a). The analysis of section 14(1)(a) is set out at paragraph 19 of that decision:

> [19] My office has considered this exemption many times in the past. The exemption is meant to allow for candor during the policy-making process, rather than providing for the non-disclosure of all forms of advice. The established test that my office uses to determine the applicability of this exemption is as follows:
>
> 1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?
> 2. The advice, recommendations, proposals, analyses and/or policy options must:
>
> a. be either sought, expected, or be part of the responsibility of the person who prepared the record; and
> b. be prepared for the purpose of doing something, for example, taking an action or making a decision; and
> c. involve or be intended for someone who can take or implement the action.
>
> 3. Was the advice, recommendations, analyses and/or policy options developed by or for a government institution or a member of the Executive Council?

The Saskatchewan case notes that the following definitions have been established to assist in determining when the criteria above apply:

> [20] My office has established the following definitions:
> ***Advice*** includes the analysis of a situation or issue that may require action and the presentation of options for future action, **but**

> **not the presentation of facts**. Advice has a broader meaning than recommendations. (my emphasis)
> ***Recommendations*** relate to a suggested course of action as well as the rationale for a suggested course of action.
> Recommendations are generally more explicit and pointed than advice.
> ***Proposals, analyses and policy options*** are closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of action.

In *Review Report 18-186* (2006) it was noted that jurisdictions have consistently found that findings of fact are not protected from disclosure pursuant to section 14(1)(a). For example, in *Ontario Order 118* Information and Privacy Commissioner Sidney B. Linden made the following observations:

> In my view, advice for the purposes of section 13(1) of the Act must contain more than mere information. Generally speaking, advice pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

In Alberta, the Access and Privacy Branch of Service Alberta has created a manual entitled *AFOIP Guidelines and Practices* (2009), available at: http://foip.alberta.ca/resources/guidelinespractices which includes the following definitions:

> Advice includes the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts.
>
> Recommendations includes suggestions for a course of action as well as the rationale for a suggested course of action.

> Proposals and analyses or policy options are closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of action.

At paragraph 20 of *Ontario (Ministry Of Transportation) v. Consulting Engineers of Ontario*, 2005 CanLII 34228 (ON CA) the Ontario Court of Appeal accepted and adopted this approach to the term “advice” in accepting the decision of an adjudicator in the Office of the Ontario Information and Privacy Commissioner as follows:

> advice and recommendations, for the purposes of section 13(1) must contain more than mere information. To qualify as “advice” or “recommendations”, the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process (Orders P-94,P-118, P-883 and PO-1894).

I have reviewed the records at issue. They are a series of briefing notes totaling 13 pages about the new agreement for the PCPA initiative on generic drugs. Importantly the document is labeled as “Confidential-for Deputy/Minister of Health Only”. Further, at the bottom of each page is the following statement:

> *Confidential - This CBN may contain advice, analysis, or policy considerations and is intended solely for the use of Federal/Provincial/ Territorial Ministers of Health

I find that this shows an intention on behalf of the drafters to keep the document confidential. In terms of the contents of the briefing notes, the Applicant brought to my attention a public release dated January 28, 2019 entitled *A Joint Statement from the pan-Canadian Pharmaceutical Alliance and the Canadian Generic Pharmaceutical Association.* This statement set out that participating federal, provincial, and territorial public drug plans, the pCPA, with the CGPA had jointly developed a new five-year initiative that they said would provide significant savings for all Canadians who use

prescription generic drugs, participating public drug plans, and employee drug plans. The statement goes on to outline the cost savings achieved by this initiative. For example, by April 1, 2018, the prices of nearly 70 of the most commonly prescribed drugs in Canada would be reduced by 25-40%. The statement explained that a key component of the initiative was that tendering would not be pursued by the participating drug plans over the five-year term.

The records at issue in this review outline a much more detailed process of how the above mentioned savings have been and are in the future to be achieved. The briefing notes do set out advice, proposals, recommendations and analyses. There are analyses of issues. Courses of action are suggested. There is analysis of the facts that sets out the advantages and disadvantages of particular courses of action.

However that being said, as set out above, section 14(1)(a) does not apply to the presentation of facts. On pages 2-3 of the documents, there is a section with the header "Key Background Information". This information is a series of facts. **I find** that as this information is factual, that section 14(1)(a) does not apply and that this information should be disclosed to the Applicant. The same analysis applies to the information listed under the header "Background" on page 9 of the documents. **I find** that as this information is factual, that section 14(1)(a) does not apply. Similarly, on page 12, there are two sections, one with the header "Next Steps" and one headed "Key Background Information". **I find** that the statement under the first of these contains no advice, analysis, recommendations or any other information that would fall under section 14(1)(a) and that the statements under the second of these are a list of facts, and that section 14(1)(a) is not applicable. Finally, on page 13, there is a section with the header "Status". **I find** that most of the information under this header is factual such that section 14(1)(a) does not apply. The exception to this would be secondary bullet #3 which may reveal the substance of discussions referred to.

I **recommend** the disclosure of all of the information noted above as being factual only.

I am satisfied that the remainder of the record meets the criteria for an exception under section 14(1)(a) and that the public body has appropriately exercised its discretion with respect to same.

Could the disclosure of the records in question be reasonably expected to impair relations between the Government of the Northwest Territories and the Government of a province (section 16(1)(a))?

The Department of Health and Social Services stated that it relied on section16(1)(a) of the Act in refusing to disclose the document in question to the Applicant. The only explanation provided by the Department for the application of section 16(1)(a) in terms of meeting its onus to establish that the Applicant had no right of access to the record was that it had consulted with the Ontario Ministry who had requested that the record not be released and that the Ontario Ministry had received the same ATIPP request from the Applicant and access had been denied. While the Ministry may have refused access in the first instant, there is no indication as to whether this decision was referred to the Office of the Information and Privacy Commissioner of Ontario by way of appeal, or the outcome of any such appeal. Nonetheless, the Department decided that in light of these objections, that release of the records would further cause harm to inter-governmental relations under section 16 of the Act and could jeopardize future dealings with the Government of Ontario.

Section 16(1)(a) of ATIPPA grants the public body discretion to refuse disclosure where the disclosure could reasonably be expected to impair relations between the Government and the government of another province. As this office set out in *Review Report 18-174*, when relying on section 16(1)(a), the public body must establish:

a) a reasonable expectation

b) that the disclosure will impair the intergovernmental relationships involved

As noted in my *Review Report 12-108*,

> The purpose of exceptions is to protect a public interest that is served by withholding information. Section 16(1)(a) protects the public interest ensuring that relations between the GNWT and another government are not harmed by the disclosure of information. Harm to intergovernmental relations of the GNWT affects not only a public body and the Applicant, but the citizens of the NWT.

In *Review Report 18-174*, I noted that this office has commented in a number of Review Reports on what public bodies must do in order to justify the non-disclosure of any information where the applicable exception requires a "reasonable expectation" of some form of harm. The first part of the test that must be met is that the public body must establish that there is an expectation of harm and what that harm might be. The party who is asserting the claim must provide objective evidence of three things:

a) there must be a clear cause and effect relationship between the disclosure and the harm;
b) the disclosure must cause harm and not simply interference or inconvenience;
c) the likelihood of harm must be genuine and conceivable.

The Department's sole argument with respect to the application of section 16 was that the Ontario Ministry requested that the documents not be released and that they had refused to release them under a similar access to information request. Presumably, the DHSS is implying that publicly releasing a document that another Government has asked them to keep confidential could harm their relationship. I do not find this argument persuasive. The DHSS has an obligation to comply with its privacy legislation. Surely another Government such as Ontario would understand a Government's obligation to do so. I am not satisfied that the documents meet the criteria for an exception under section 16(1)(a) of ATIPPA.

Could the disclosure of the records in question reasonably be expected to harm the economic interest of the Government of the Northwest Territories or a public body or the ability of the Government to manage the economy (section 17(1)(c))?

Section 17(1)(c) of the Act allows the public body discretionary power to refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the economic interest of the Government of the Northwest Territories or the ability of the Government to manage the economy, including information the disclosure of which could be reasonably be expected to result in financial loss to, prejudice the competitive position of, or interfere with contractual or other negotiations of the Government. Again, I highlight that the Department gave no submissions on its rationale for how section 17(1)(c) applied in the present circumstances.

The application of section 17 of the Act was discussed by this office in *Review Report 06-057*. In that case, the application of similar provisions to section 17 in other jurisdictions were reviewed. In *Order 113-1996*, the British Columbia Information and Privacy Commissioner stated:

> it is not enough for the severed material to fall under the language of section 17(1)(c) or (d), because in the language of 17(1) itself, disclosure must also "reasonably be expected to harm the financial or economic interests" of the School Board.

In discussing when there might be a "reasonable expectation" of harm to the public body, decisions in other jurisdictions are consistent in finding that there must be clear and cogent evidence which points to the harm and there must be a direct link between the disclosure and the anticipated harm.

Robert Clark, the then Information and Privacy Commissioner of Alberta, made the following comments in *Order 98-020*:

> In Order 96-016, I said that, for section 24(1) to apply, there must be a direct link between the disclosure of the information and the expected harm. In other words, harm has to result directly from the release of the particular information. “Ripple-effect” harm is not sufficient. Also, there must be a reasonable expectation that the harm will occur.....

I do not believe that speculative losses, such as the loss of manpower costs, loss of expected savings, or having to continue to spend money, is harm to economic interest in this case, as contemplated by section 24(1). I have said that, to establish “harm”, there must be “damage” or “detriment”. Such speculative losses are not “damage” or “detriment” to economic interest. Furthermore, if harm to economic interest were to include every speculative loss, then section 24(1) could be used in ways not intended, to withhold a vast array of a public body’s records.

In the case of *The Workers’ Compensation v. Tom Mitchinson, Assistant Information and Privacy Commissioner,* (1998), 41 O.R. (3d) 464 (C.A.) the Ontario Court of Appeal had the opportunity to reconsider an Order made by the Ontario Assistant Information and Privacy Commissioner who found that the equivalent section of the Ontario Act required that there be “detailed and convincing” evidence of the expected harm which the disclosure of information might result in and not merely a speculation of possible harm. Justice Labrosse, for the Court, made the following comments with respect to the nature of the evidence necessary for the equivalent section of the Ontario Act to apply.

> Lastly, as to Part 3, the use of the words "detailed and convincing" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence

> required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again, it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm.

In *Review Report 06-057* I noted that the public body had provided no more than speculation and opinion that there may be some harm to the public body of a financial nature if this information is disclosed. They were found to have not provided any specifics as to the specific harm that they contemplated or how the disclosure of the records in question might act to harm the economic interests of the public body. In that case it was noted that to say simply that it was the opinion of the department that harm might occur without providing specifics was simply not sufficient to meet the onus of establishing that the exemption applies. I found that if the public body wished to rely on this section, they must provide cogent, detailed and convincing evidence that harm would be a direct result of the disclosure of the information. They were found to have simply not done so in that case.

As I mentioned, I have reviewed the briefing notes at issue. The briefing notes detail the Government’s efforts to negotiate a new generic pricing agreement with the CGPA. Government should have a right to keep its mandate confidential in contract negotiations, as to not do so could harm its negotiation powers. To do so could harm the economic interests of the Government. I find that disclosing information about the contract negotiations could interfere with the negotiations of the Government with the CGPA. That being said, as set out above, I have already determined that the factual information listed above should be disclosed. With regards to the remainder of the

information in the documents, **I find** that section 17 was appropriately applied by the Department.

Conclusion

Aside from the factual information in the documents as outlined in the Discussion / Recommendations portion of this review, I find that Department of Health and Social Serivces appropriately applied sections 14(1)(a) and 17(1)(c) of the Act and that it was compliant with ATIPPA in not releasing the remainder of requested documents to the Applicant. I do not find that section 16(1)(a) was appropriately applied.

Nevertheless I wish to emphasize my disappointment in the Department's submissions. Their submissions to this office and to the Applicant were entirely insufficient. Moreover, they were not in compliance with their obligation under ATIPPA to provide reasons to applicants when refusing disclosure and to meet their onus to establish that the Applicant had no right to access the requested information. With the pending changes to the *Access to Information and Protection of Privacy Act*, public bodies, including the Department of Health and Social Services, will have to be far more diligent in providing full explanations and supporting evidence of claims that any of the exception provisions apply. The time to start making those changes is now, so that when the new provisions come into effect, the learning curve will be much shallower.

Elaine Keenan Bengts
Information and Privacy Commissioner