NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 12-111
12-140-1
October 22, 2012

THE REQUEST FOR REVIEW

This matter involves an application which was made to the Department of Industry, Tourism and Investment in September, 2011. The Applicant made a request to the Department in relation to duplicate or replacement certificates issued for Government Certified Canadian Diamonds during the previous five year period. In particular, his request was for:

a) How many replacement certificates were issued?
b) Who requested those replacement certificates?
c) Why they were requested?

The public body conducted third party consultations as required by section 26 of the *Access to Information and Protection of Privacy Act*. After completing the consultations, they decided to disclose:

a) the aggregate number of duplicate certificates that were issued for diamonds for which certificates had been previously issued;

b) the names of some of the businesses that requested and were issued new certificates

They refused to disclose:

a) the names of some of the businesses which had received new certificates, based on section 24(1) of the Act which prohibits the disclosure of records where the disclosure could be reasonably expected to result in undue

financial loss or gain or to prejudice the competitive position of a third party;

b) the names of individuals who had requested and received duplicate certificates, citing section 23 of the Act which prohibits the disclosure of personal information where the disclosure would constitute an unreasonable invasion of the individual's personal privacy;

c) the number of duplicate certificates issued to each company/individual under each criteria for which such certificates could be issued.

In the end, the Applicant was provided with the aggregate number of duplicate certificates issued and the short list of the reasons for which a duplicate could be requested (original certificate lost or damaged, diamond re-cut, or a discrepancy due to differences in scale of calibration). The Applicant was not given the number of requests made under each category by each company or individual. The public body did not disclose any "records" as contemplated by the Act, but disclosed only a compilation of information which they gathered from their records. That compilation took the form of a chart showing:

a) the nature of the enterprise (Manufacturers, Retailers/Wholesalers or Individuals);
b) the names of those requesting certificates, except for two businesses and two individuals;
c) the aggregate number of replacements requested by each category of requesters listed in (a);
d) the aggregate number of original certificates that were returned to the GNWT after new certificates were issued.

The Applicant was not satisfied with the response. In particular, he was unhappy that he had not been provided with information about how many replacement certificates had been requested by each company/entity, how many certificates were reissued

pursuant to each “criteria” for which a certificate could be reissued or any records at all to confirm the information compiled.

THE DEPARTMENT’S RESPONSE

In responding to the Request for Review, the public body indicated that they felt that they had provided a full response to the Applicant’s questions. They say that the first part of the question (how many certificates had been reissued) was clearly answered in that they provided the Applicant with the aggregate number of duplicate certificates issued. They also felt that they had adequately responded to the remaining questions by giving the Applicant the names of most of the recipients of the new certificates and by providing the Applicant with a list of the reasons that a replacement certificate could be requested/issued.

With respect to the non-disclosure of the names of two of the businesses and two individuals who requested the replacement certificates, the public body takes the position that they were justified in withholding that information pursuant to section 24 and 23 respectively.

In terms of the individuals, the department argues that they are prohibited from disclosing the names of the individuals because to do so would constitute an unreasonable invasion of the privacy of those people. In particular, section 23(2)(f) provides that an unreasonable invasion of privacy will be presumed where the information “describes the third party’s finances, income, assets, liabilities, net worth, bank balances, financial history or activities or credit worthiness”. Because diamonds are valuable assets, the disclosure of the names of the individuals who own them would be an unreasonable invasion of their privacy.

With respect to the two businesses whose names have not been disclosed, the public body takes the position that section 24(1)(c)(i) and (ii) prohibit disclosure of the names. These provisions provide that public bodies are prohibited from disclosing information “the disclosure of which could reasonably be expected to

(i) result in undue financial loss or gain to any person, and

(ii) prejudice the competitive position of a third party.

In this case, the public body refused to disclose the names of two of the eight businesses involved because they were unable to contact those businesses to obtain their input on whether or not the information should be disclosed. The other six companies involved were all contacted and at least some of them expressly indicated that they had no concerns with the disclosure of the information requested. The two remaining companies, however, could not be contacted and, therefore, could not provide their input. It was therefore assumed that the disclosure of their names would result in undue financial loss to them or prejudice their competitive positions.

Of the companies who were consulted, some of them indicated to the department (not in writing) that they were concerned about the effect that the disclosure would have on their business operations and the goodwill they had established in the businesses. Ultimately, however, they chose not to seek a review of the decision to disclose once they were informed by the public body that the numbers would only be released in aggregate form and would not list the number of replacements issued to each individual business.

THE APPLICANT'S RESPONSE

The Applicant could not understand why the response received to his request for information was in the form of a compilation of information, as opposed to "records". He felt that he should have been provided with copies of all the records which contained the answers to the questions asked, including copies of the requests for duplicate certificates and correspondence between the public body and those requesting the certificates.

In addressing the issue of whether or not the names of the individuals who requested and received duplicate certificates should be disclosed, the Applicant takes the position

that because there are only a limited number of reasons that a certificate can be replaced, and those criteria are reasonable, there is really nothing to hide in terms of the individuals who requested the information. Even if the public body did not disclose the names of the individuals, they could have, and should have, blocked the names and still provided the reasons why the original certificates were replaced.

As for the public body's refusal to provide the names of the two businesses involved, the Applicant points out that there has been no proof offered by the public body as to how each business would be harmed if the information was released. He says that, at best, the harm that might result is speculative and some kind of proof should be required to justify a refusal to disclose. In this case, there are only a finite number of reasons that a certificate can be reissued:

a) the original certificate was damaged;
b) the original certificate was lost;
c) the diamond was re-cut, reducing the weight;
d) there is a slight weight discrepancy due to difference in scale calibration.

Furthermore, the department must approve the re-issuance of a certificate and there is, apparently, a process in place. In these circumstances, the Applicant suggests that there is little, if any, chance that providing the Applicant with the names of each company and the number of certificates re-issued to each of them, and the reasons for each request would adversely affect the companies making those requests.

THE DEPARTMENT'S FURTHER RESPONSE

In response to the Applicant's submissions, the public body responded, indicating that they had consulted with the Applicant on at least two occasions about specifics of his request and that they were of the understanding that he was seeking **information** about numbers of certificates, names of retailers or agencies and the rationale for the requests, not specific documents or other records. They felt that the clarification provided by the Applicant while they were gathering the information to respond to him

had confirmed this and they responded to the Request for Information accordingly. It is their position that the Applicant did not ask for any documentation, nor did he ask for anything other than aggregate numbers. Consequently, there were no records identified as being responsive to the Applicant's request.

DISCUSSION

Because the information/records in question include information about third parties, in undertaking this review process, I contacted all of the third parties involved, advising them of the review and inviting them to provide me with any concerns they might have about the disclosure of the information requested. I did not receive responses from any of the third parties.

As a preliminary issue, there appears to be some confusion, both on the part of the Applicant and on the part of the public body with respect to what was being sought. The request for information admittedly did not request "records". The Applicant's Request for Information posed a number of questions. The public body says they confirmed with the Applicant the nature of what he was seeking and they understood that he was looking for "information", not records. The Applicant says that he assumed that "information" meant "records" and that he would be receiving the records from which he could compile his own statistics.

It may be that, if the public body can expand on the response given, the Applicant would be prepared to forego receiving the "records", but that is not something I have canvassed with him.

Notwithstanding that the name of the Act is the *Access to* ***Information*** *and Protection of Privacy Act*, what the access provisions of the Act really refer to is access to "records". Section 3, for instance, provides that "this Act applies to all records in the custody or under the control of a public body". Section 5 provides that "a person who makes a request under section 6 has a right of access to any record in the custody or under the control of a public body". Section 6(3) suggests that the Applicant may ask

for a copy of the “record” or ask to examine the “record”. That said, Section 7 does contemplate the possibility that a public body might create a ‘record’ in response to an access request. This, apparently, is what the public body chose to do in this case.

In my opinion, public bodies should start from the assumption that Applicants are seeking “records” and should provide responsive records accordingly unless the Applicant clearly states that a compilation of information is sufficient to his or her purpose. Applicants are not always well informed about how the Act works or know exactly how to make or word their requests. Public bodies, on the other hand, are required to have at least one person, the ATIPP Co-Ordinator, who knows and understands the Act thoroughly. Section 7 places an onus on public bodies to “make every reasonable effort” to respond to an Applicant “openly, accurately, completely and without delay”. If there is any question about what the Applicant is seeking, the public body has a responsibility to work with the Applicant to determine exactly what he is looking for. In this case, in my opinion, the public body should have asked a direct question - “are you seeking access to the records that contain this information or would it be sufficient to your purposes if we compile the statistics and provide you with the numbers?” If the Applicant wants the records, he’s entitled to receive those records.

A number of other issues were also raised by the public body.

The first of these is whether or not the names of the two individuals who requested and received duplicate certificates should be disclosed. On this issue, I agree with the pubic body’s refusal to disclose the names. Section 23 prohibits the disclosure of personal information where that disclosure would constitute an unreasonable invasion of the individual’s privacy. Furthermore, section 23(2) provides that there is a presumption that the disclosure would be an unreasonable invasion of privacy where it would reveal an individual’s assets - in this case a valuable diamond. I am satisfied that the names of the two individuals were properly withheld.

That said, I agree with the Applicant that this does not prevent the disclosure of the specific reasons for the requests made for duplicate certificates by these individuals or

the basis upon which the duplicates were issued. If the names of the individuals requesting the certificates are withheld, there is no personal information left, and no reason not to provide the Applicant with the specifics requested.

With respect to the disclosure of the names of the two businesses which were withheld, I see no reason to withhold those names. There is nothing in the name of a company that is confidential. Unlike the case with individuals, the fact that the companies were engaged in the buying, selling or trading of diamonds is not information that is protected under the Act. Companies are public entities. The reason that the public body gave for refusing to disclose the names of two of these public companies is because they could not find them to give them notice of their intention to disclose the information under the Act. They therefore presumed that the disclosure would harm the financial interests of the two companies and refused to disclose their names.

The public body argues that section 33(3) of the *Access to Information and Protection of Privacy Act* puts the onus of establishing that the information should be disclosed on the Applicant or on the third parties. I disagree.

Section 33(3) provides that on a review of a decision **to give an applicant access** to all or part of a record containing information that relates to a third party, the onus is on the third party to establish that the information should not be disclosed. However, in this case, there has been no decision to disclose any information. Rather, the public body has elected to refuse access to certain information. In these circumstance, section 33(1) applies. This section provides 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. Here, it was the public body who made the decision to refuse to disclose the names of these two companies. The onus, therefore, rests on the public body to provide sufficient evidence upon which I can conclude that either or both of these companies will suffer harm if their names, attached to the other information requested, is disclosed to the Applicant. They have not done so. They have simply speculated that there is a possibility that this might happen.

In Alberta, the Information and Privacy Commissioner has established a test (Order 96-003) that must be met to establish that there is a reasonable expectation of harm by the disclosure of information. The party who is asserting the claim (in this case the public body) 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 test is an objective one and it must be applied in the real world.

The Applicant seeks to be provided with the number of requests made by each of the companies involved as well as how many requests have been based on what criteria and by which company or entity. Nobody has provided me with any solid reason which would show that the disclosure of that information might negatively impact upon the business interests of the companies involved. As pointed out by the Applicant, the government's certificate program contemplated the issuance of duplicate certificates in a limited number of given circumstances. There are criteria and processes involved and each request must meet those criteria before a duplicate will be issued. For example, according to the public body, replacement certificates issued to wholesalers or individuals are usually issued in circumstances where the original certificate has been lost. In these circumstances, in order to obtain a replacement certificate a grading lab report from an independent lab that provides detailed information about the specific diamond must be submitted.

When the certification program was developed, it was contemplated that there would be instances in which it would be necessary to issue new or duplicate certificates for

certified diamonds. This is a business reality. Protocols and criteria were established to allow that to happen. With this background, the fact that one or more companies requested one or more duplicate certificates based on one or more of the allowable criteria would not, without more, impugn the company's integrity or good will. Without more, I cannot understand how a company might suffer harm because they took advantage of a contingency that was entirely reasonable and fully contemplated at the time that the program was developed.

CONCLUSIONS AND RECOMMENDATIONS

Based on the above discussion, I make the following recommendations:

a) that the public body confirm directly with the Applicant whether or not he is seeking "records" or if he would be satisfied with a compilation of information to be contained in a record to be created by the public body;

b) in the event that the Applicant indicates that he is seeking the records, I recommend that the public body start all over and provide the Applicant with all of the responsive records from which he can compile his own statistics (subject, of course, to a proper vetting of those records pursuant to the Act);

c) in the event that the Applicant indicates that he would be satisfied with the public body's compilation of the information, I recommend that the public body disclose:

    a) the names of all of the companies who requested/received duplicate certificates;

    b) the number of duplicate certificates requested/received by each company;

c) the number of duplicate certificates issued to each of the companies under each of the criteria for which duplicate certificates can be issued.

d) the number of duplicate certificates issued to individuals and the reasons for the requests for those duplicates (but not the names of the individuals involved)

Elaine Keenan Bengts
Information and Privacy Commissioner