

**NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER**

SECTION 53 REQUEST

Decision 02-26

File: 01-226-4

BACKGROUND

On December 12th, 2001, I received a request from the Department of Education, Culture and Employment pursuant to section 53 of the *Access to Information and Protection of Privacy Act*, to authorize them to disregard an application by the Applicant for access to certain information in relation to a particular day care which the Department licenced. It is the Department's position that the request is being made "in bad faith". In making that assertion, they rely on a set of background facts which they say amounts to harassment of the owner of the day care facility in question.

The essential facts of the matter are the following. The Applicant and his wife have a young child and they engaged the services of a family day home, licenced through the Department of Education, Culture and Employment, to care for the child during the work week. A dispute arose between the Applicant and the day home provider over a certain incident. The Applicant made an oral complaint to the Department about the day home and removed his child from the day home as a result of the incident without giving the required 30 day notice. The Applicant refused to pay the month's day care fees and the day home operator ended up suing the Applicant in small claims court and won a judgment for the unpaid fees. In preparing for the small debt hearing, the Applicant made a Request for Information under the ATIPP Act, seeking "all information relating to the family day home or the operator in her capacity as a proprietor of this day home" with the indication that the information "may be necessary for a matter being litigated". The day home operator was given notice as required under the Act that information about her had been requested. The day home operator responded, indicating that she did not want the information disclosed to the Applicant under any circumstances because she was concerned about retaliatory measures the Applicant and his wife might take.

THE ISSUE

The issue for me to determine is whether the request for information has been made in bad faith. The relevant section of the Act is section 53, which reads as follows:

The Information and Privacy Commissioner may, at the request of the head of a public body, authorize the public body to disregard a request under section 6 that

- (a) is frivolous or vexatious;
- (b) is not made in good faith;
- (c) concerns a trivial matter;
- (d) amounts to an abuse of the right to access; or
- (e) would unreasonably interfere with the operations of the public body because of its repetitious or systematic nature.

As a preliminary issue, the Applicant raised the issue as to whether the ATIPP Co-Ordinator for the Department of Education, Culture and Employment had the authority under the Act to make a request under section 53, as that section specifically says that the “head” of the public body may request the Commissioner for authorization to disregard the application. I am satisfied, having reviewed the “delegation of authority tables” that the necessary authority has been delegated to the ATIPP Co-Ordinator by the Minister.

DISCUSSION

Section 33(1) of the *Access to Information and Protection of Privacy Act* places the burden of showing that access to a document should be denied is on the Public Body seeking to avoid disclosure. Furthermore, as has been pointed out in previous recommendations, any exceptions to the general right of access to information under the Act should be narrowly and strictly construed. This general approach is the starting point of any request by a public body to disregard a request for information under Section 53. The provision should be sparingly used as any other approach would have

serious implications on the ability of a requester to obtain information under the Act. In this regard, I agree with Ontario Information and Privacy Commissioner, Tom Wright when, in considering an analogous provision in the Ontario legislation, he expressed his view in Order M-850 that the power to disregard an application for information should not be exercised lightly.

The Department bases its request on its assertion that the application for information is being made in bad faith. The bad faith they allege is not “bad faith” against the Department, but bad faith *vis a vis* the day home operator (the Third Party). To support this assertion, they cite the fact that there appears to be an ongoing dispute between the Applicant and the Third Party. Relying on the statements made by the Third Party, they have come to the conclusion that the Applicant’s request demonstrates bad faith. They say that the litigation between the third party and the Applicant has been successfully completed in favour of the Third Party and that, consequently, there can be no other legitimate reason for the Applicant to continue to want the information requested except to use to “disparage the reputation of the third party.” Specifically, they say:

This belief is based, in part by representations from the third party, who feels that the applicant is attempting to single her out and potentially threaten her.

Some of the other reasons they rely on for their request are:

- a) The Applicant delayed two months after receiving the form for making an ATIPP request before actually making the request;
- b) The Applicant has not provided a written complaint against the Third Party
- c) The Applicant is a lawyer
- d) The Applicant retained legal counsel
- e) The ATIPP process is not the appropriate process for one individual to seek restitution against another.

I could find no decision anywhere in the country where the “bad faith” provision has been applied where the allegation was bad faith against a Third Party. In every case I could find, the alleged “bad faith” had been exhibited against the government agency. In virtually every case I could find, the request came in the face of evidence that the Applicant had engaged in a course of conduct which made it clear that his/her motives in making numerous applications for information was to derail the workings of Government. I am not convinced that the legislation was intended to apply where the alleged bad faith is directed elsewhere than at the government agency holding the information.

Be that as it may, I am prepared to analyze the request from the point of view suggested. Firstly, I must say that I find the Department’s position troubling. They have clearly “taken sides” in a dispute that is really none of their concern. They complain that they have been put in the middle of the dispute between the two parties but, in fact, they have put themselves in the middle by asking me to disregard this request for information rather than just dealing with it in the normal course of the matter.

The Department’s job, as I understand it, is to licence and regulate day homes and to ensure that the laws applicable to day homes are followed. There is a “watchdog” function to their role. Day homes who seek to be licenced know this. They also know that complaints may be made against them. This is, in fact, one of the “selling points” for a licenced day home. The home is regulated and subject to scrutiny. In seeking a licence, they are knowingly putting themselves in the position of having questions asked of and about them. The question here is whether this particular request from a member of the public is being made in bad faith.

Black’s Law Dictionary, 6th Edition, defines “bad faith” as follows:

The opposite of "good faith", generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or other contractual obligation, not prompted by an honest mistake as to one's rights, but by some interested or sinister motive. ...**"bad faith" is not simply bad judgement or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.** [emphasis added]

Is there a "wrong" or "dishonest" purpose in the Applicant's request? Is there something morally wrong with his alleged motives in making the request? What indications are there that the request might be being made in bad faith? As noted, the Department points to the following indications:

- a) The information might be used to disparage the reputation of the Third Party.

With respect, although this may be a possibility, there is nothing in the materials before me to suggest that this is, in fact, the intention of the Applicant. What I see is an individual who is/was angry about something done by the Third Party in respect of his child, and who wants answers. He is pursuing his rights to find that information aggressively, perhaps too aggressively and with some poor judgement. But there is nothing in the facts as presented to me to suggest that there has been any threat or promise to "expose" or harass the Third Party. On the facts as presented to me, all I see is someone asking for information. Even if there was a threat or a promise to expose or harass the Third Party, in a democracy, everyone has the right to an opinion and to express that opinion. There is nothing "wrong" or "dishonest" in expressing an opinion, even if it is a negative opinion about someone. If, in fact, the disclosure of the information requested results in harassment, the Third Party has the civil and criminal court system to address the problem. I am not satisfied that the mere possibility that the release of the information may lead to further quarrels, either legal or otherwise, between the two parties involved is a sufficient ground to find bad faith on the part of the Applicant.

- b) The Applicant delayed two months after receiving the form for making an ATIPP request before actually making the request;

A request for a form to file an Access to Information Request does not start a clock running. Any person may make a request for information at any time. There could well be a host of reasons for a delay between requesting the form and filing an application, but in the end it really does not matter. The Applicant could have saved the application form for a year or two years before requesting the information. There can be no implication of improper motives or bad faith that can be drawn from the delay.

- c) The Applicant has not provided a written complaint against the Third Party

Again, this is irrelevant to the issue of bad faith. It may be that the Applicant has no intention of filing a written complaint at all and never did have. Perhaps he just wants the information to satisfy himself of certain facts. It may be that he needs the information requested before he can make an intelligent decision about whether or not he has any real grounds for complaint. It may be that he needs the information before he can formulate his complaint. There is no requirement under the ATIPP Act which says there must be a complaint filed before information is provided. I cannot attribute "wrong" or "dishonest" motives to the Applicant simply because he hasn't filed a formal complaint against the Third Party.

- d) The Applicant is a lawyer

I have no idea how this fact suggests that the Applicant is acting in bad faith, any more than if he were an engineer or administrative assistant, unless the Department is suggesting that lawyers, by definition, never act in good faith. I do not accept that the Applicant's profession has any bearing on the issue of whether or not he is acting in good faith in making his application for information.

- e) The Applicant retained legal counsel

The fact that the Applicant retained legal counsel to reply to the Department's request to ignore his request for information is not in any way an indication that he is acting in bad faith. Anybody is free to solicit the assistance of trained expertise to assist them in making a Request for Information or any other process under the Act. Does the fact that the Department of Social Services has access to its own legal counsel suggest that it is acting in bad faith in trying to deal with this issue? No. What the Applicants actions in retaining counsel indicates is that he felt the need for legal advice either because he did not feel he had the expertise to address it himself or because he felt he was too close to it to analyze the matter objectively. There is nothing inherently "wrong" or "dishonest" about retaining a lawyer and it is certainly not an indication of "bad faith".

- f) The ATIPP process is not the appropriate process for one individual to seek restitution against another.

The purposes of the ATIPP Act and the processes under the Act are set out in Section 1 of the Act. That section says:

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;
 - (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves held by public bodies;
 - (c) specifying limited exceptions to the rights of access;
 - (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and

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

By making a legitimate application for information from the Department, the Applicant is not seeking restitution. He is seeking information. Furthermore, what the Applicant intends to do with the information is rarely, if ever, relevant. I certainly do not consider it relevant to this case, particularly in light of the fact that there is no real evidence which shows what the Applicant's intentions are once he receives the information requested. All the Department can point me to is suppositions and unsupported presumptions. The Department has clear responsibilities under the ATIPP Act and under the Child Day Care Act. Their responsibility under the Child Day Care Act is to regulate and set rules for day home operators. Their responsibility under the ATIPP Act is to respond to requests for information. There is nothing in either of these two pieces of legislation which says that the Department's role is to in any way "protect" day home licencees from controversy or complaint. Nor should it be involving itself in disagreements between the day home business and its customers, unless that disagreement arises out of a breach of the provisions of the Child Day Care Act or its regulations. There is certainly nothing in the Access to Information and Protection of Privacy Act which suggests that access to information can be refused because the public body does not like the Applicant or what they think he is going to do with the information, which appears to be the reason the Department is asking me for permission to disregard the request for information in this case.

CONCLUSION

In light of the above discussion, I am not prepared to authorize the Department of Education, Culture and Employment to disregard the Applicant's request for information and I direct the Department to deal with the request forthwith, subject to any exemptions that are provided for in the Act unless the Applicant withdraws his application for information within seven days following the receipt of this decision. As the Department has already received the Third Party's objections to the disclosure of the information in question, the Department must now decide, pursuant to section 27 of

Decision 02-026

April 29, 2002

Page 9

the Act, whether or not to release the information and what “editing” is necessary under the exemption provisions of the Act . The Applicant and the Third Party will then have 30 days after receiving notice of the department’s intention to release information (or not to release information, as the case may be), to request this office to review the department’s decision if they are not happy with the decision made or the editing done.

Elaine Keenan Bengts
Northwest Territories
Information and Privacy Commissioner