

NORTHWEST TERRITORIES INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 07-061

File: 06-309-4

June 18, 2007

BACKGROUND

On December 8th, 2006, my office received a Request for Review from a member of the media (the "Applicant") asking that I review the response he had received to his request for certain information from the Department of Education, Culture and Employment. The request had been made for the following document:

Fort Liard: Oil & Gas Impact Assessment 7 Year Review (1993-2001)

Recommendations and Action Plan Options Workshop

Submitted: NWT Community Mobilization Partnership - April 15, 2002

The Request for Information indicated that the document was likely in two parts, one 27 pages long and the other 15 pages long.

The public body responded to the request by denying access to the document pursuant to sections 16(a) and (c) of the *Access to Information and Protection of Privacy Act*, after consulting with a third party, the Acho Dene Koe Chief and Council. In their letter to the Applicant denying access, the public body indicated that the disclosure of the information could reasonably be expected to impair relations between the Government of the Northwest Territories and an Aboriginal organization exercising government functions. They further stated that the disclosure of the record in question could reveal information received (explicitly or implicitly) in confidence from that organization.

THE RELEVANT SECTIONS OF THE ACT

The public body relies on section 16(a) and on 16(c) of the *Access to Information and Protection of Privacy Act* in denying disclosure. Those sections of the Act are as follows:

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 or settlement council or other local authority,

(iv) the government of a foreign state,

(v) an international organization of states;

(c) reveal information received, explicitly or implicitly, in confidence from a government, local authority or organization referred to in paragraph (a) or its agency.

THE PUBLIC BODY'S POSITION

The Department of Education, Culture and Employment says that the third party involved is the Acho Dene Koe Chief and Council. They take the position that this is a "band council" as specified by s. 16(a)(ii)(A). They further advised that the Chief and Council had been consulted about the request for information and that they had responded negatively to the request, indicating that the status of the report had not changed since 2002 and that the report was still considered by them to be an incomplete and confidential document, not for distribution. It was their position that because the assessment project had not been completed, important parts of the project had not been covered by the report and the content was, therefore, not balanced. The third party also indicated that the report was not intended for distribution and that the timing of the request created difficulties for them, "given the current situation with [the] federal government". There was further concern from

the third party about how the report would be used or disclosed by the Applicant. No elaboration or detail was provided about "the current situation with the federal government".

The public body points to the fact that the report, on its cover page, indicates that it is "Confidential. Not for Distribution". They say:

We are satisfied that [the Chief and Council] are a band council and government as defined by section 16, and that their report was provided in confidence to ECE marked with explicit instructions not to distribute which fits with section 16(1)(c). It is clear to us that the report's status has not changed as far as the Chief and Council are concerned, and that they do not want the report released to this applicant at this time.....

... It is our position that acting against the wishes of the Chief and Council could cause harm to relations between the Government of the NWT and the Acho Dene Koe Council (as in s. 16(1)(a)) by undermining confidence and respect between governments.

In response to my question about the origins of the report, the public body indicated that it was prepared by the NWT Community Mobilization Partnership, a group which was no longer in operation at the time of the Request for Information. No explanation was given as to the nature or makeup of the NWT Community Mobilization Partnership or as to what their role or mandate was. It appears on the face of it that the report was prepared for the Acho Dene Koe Chief and Council, though that is not stated in the submissions received. The public body (ECE) states that it had no involvement in the development of the report or in the area of impact assessment. They also indicate that it is unclear to them why ECE is in possession of a copy of the report. Nor is there any explanation as to who they received it from.

ECE indicated that it consulted with the Department of Industry, Tourism and Investment (ITI) because it seemed likely that that department would likely be the government agency most likely to have originally received copy of the report and would be more familiar with the context and parties involved. However, ITI advised them that they did not have a copy of the report. ITI did confirm that the Department of Resources, Wildlife and Economic Development (now ITI) had contributed some of the funding to the community for the purpose of development of the report and that additional funding was also provided by

Indian and Northern Affairs Canada (INAC).

There was a suggestion from the public body that the Applicant approach the Acho Dene Koe Chief and Council directly to determine whether they would agree to disclose portions of the record.

THE APPLICANT'S POSITION

The Applicant, in responding to the submissions made by the public body makes the following arguments:

1. Section 33(1) of the *Access to Information and Protection of Privacy Act* provides that the onus is on the Department to establish that an Applicant has no right of access to a record or part of a record. The Applicant argues that the public body has not met that onus.
2. The public body did not provide detailed evidence that would support their discretionary argument that section 16(1)(a) should apply. They say that the public body's statement that the disclosure of the record to the Applicant could be reasonably expected to impair relations between the Government of the Northwest Territories and the band council is not supported by the evidence provided. Specifically, they say that the council's concern that the report is incomplete does not reasonably demonstrate that the disclosure of the report would in fact, impair relations between the two governments.
3. The public body did not provide detailed evidence to support their contention that the disclosure of the report could be reasonably expected to reveal information received, explicitly or implicitly, in confidence from a government, local authority or organization referred to in paragraph (a), or its agency. They say that despite the fact that the record is shown on its face to be "confidential" and "not for disclosure", officials working for the department and for other third parties have not treated the document in a confidential manner. The Applicant states that she had been

previously permitted to review a copy of the report and, furthermore, that the document has been thoroughly and publicly discussed at the Joint Review Panel Public Hearings for the Mackenzie Gas Project in Fort Liard.

4. It is not reasonable to expect that a record that was created using public funds should be kept secret and denied disclosure by reliance on the discretionary exemptions in the ATIPP Act.
5. It is in the public interest to make the findings contained in the record public. With the Northwest Territories being at a critical juncture in its history, and many small communities grappling with how to deal with industrial development, the information in this record would be extremely valuable to other communities.

DISCUSSION

The public body says that the disclosure of the record would impair relations between the Government of the Northwest Territories and the Acho Dene Koe Chief and Council, which is an aboriginal organization exercising governmental functions. The status of the Chief and Council as an aboriginal organization exercising governmental functions was not contested.

The public body indicates that when they consulted with the council, the council asserted strong opposition to the disclosure of the record for a number of reasons which they articulated as follows:

- a) the assessment project was not complete so important parts of the project were not covered by the report and the report was, as a result, unbalanced;
- b) the report was not intended for distribution;
- c) the timing of the request was bad "given the current situation with the federal government"

- d) there was concern about how the report would be used or further disclosed by the applicant .

The public body did not obtain any written contribution from the third party because, they said, they were satisfied, based on their discussions with the Chief and Council that disclosure of the record would undermine the confidence and relationship between the two governments.

The analysis must begin with the acknowledgment that the section being relied on to deny disclosure (s. 16) is a discretionary one. In such a situation, the public body **may** refuse to disclose the information requested. This requires that the public body actively consider the pros and the cons of disclosure and make a decision whether or not to disclose the information in question based on a balancing of those factors, It is not for me to comment on whether or not I think the discretion was "correctly" exercised but rather to determine whether the discretion was, in fact, exercised.

In this case, it is difficult to assess the public body's position because of the lack of background information provided. This creates a problem for the public body because the onus is on them to demonstrate that the exemption applies. In particular, in order for me to properly assess whether section 16(1)(c) applies, I would need more basic information about the genesis of the report:

- who prepared the report?
- who was the report prepared for and why?
- what has been the distribution of the report?
- how did it come to be in the hands of ECE and why?
- who commissioned the report?
- what/who was the NWT Community Mobilization Partnership and what was the basis of their funding?

There are four criteria which must be met for section 16(1)(c) to apply so as to create a discretionary exemption:

- a) the information must be supplied by a government, local government body or an organization listed in clause (a) or its agencies;
- b) the information must be supplied explicitly or implicitly in confidence;
- c) the disclosure of the information must reasonably be expected to reveal the information; and
- d) the information must have been in existence in a record for less than 15 years (section 16(3))

The public body has not established the first two of these criteria.

Considering that the onus is on the public body to establish that there is no right to disclosure, the absence of basic background information is critical. They cannot tell me, for instance, why they have a copy of the report. They tell me that they had nothing to do with the preparation of the report so they therefore assume that it was "received" by them, though they don't know from whom, when or why they received it. They cannot, therefore, affirmatively say that the record was "received" from the Acho Dene Koe Chief and Council. The exemption cannot, therefore, apply.

The record is marked as "Confidential Not for Distribution". From this, and this alone, the public body assumes that it was received by them "in confidence". I would be far more willing to accept this as a given if the public body could explain the circumstances under which they received the report. If it was received because of an obligation on the third party to file a report with the public body, it would be easier for the public body to establish the confidential nature of the record than if, for instance, the Acho Dene Koe Chief and Council or any other organization or individual simply decided to share a copy of the report to the public body (perhaps several public bodies) "for their information" without providing any cover letter extolling the importance of confidentiality.

For these reasons the public body has not established that the record meets the required elements for section 16(1)(c) to apply.

I am more convinced, however, that section 16(1)(a)(A) might apply. The fact is that this record does appear to be the proprietary information of the Acho Dene Koe Chief and Council. Having read most of the report, I can say fairly confidently that it was prepared for their benefit. They have said that they do not want the report disclosed to the Applicant, or any other person. Furthermore, their opposition is fairly adamant and strongly held. They feel that the disclosure might affect ongoing discussions with other levels of government.

The council is not subject to the *Access to Information and Protection of Privacy Act*. They have no obligation to disclose their proprietary records or to agree to the disclosure of them. Nor do they have to justify their reasons for not wanting to share such records with third parties. The Applicant suggests that their reasons for not wanting to disclose the records are "unreasonable" and the fact that the report is incomplete is not sufficient. It may not be a sufficient reason for a public body to refuse disclosure of a record, but that is not the test. The test is whether the disclosure could be reasonably expected to impair the relations between the Government of the Northwest Territories and the first nations government involved. Although it would, perhaps, have been more appropriate for the public body to obtain something in writing from the chief and council outlining their concerns, they have set out the concerns received orally from the third party in some detail. The nature of the concerns are such that I am satisfied that, in the circumstances, the disclosure of the record could be reasonably expected to negatively affect the level of trust between the Government of the Northwest Territories and the First Nation Government in question and thereby impair relations between the two governments.

CONCLUSIONS AND RECOMMENDATIONS

I conclude that although section 16(1)(c) does not apply to provide the public body with a discretion to refuse disclosure of the record in question, the public body has established to my satisfaction that the section 16(1)(a) does apply. Furthermore, I am satisfied from the submissions received from the public body that they have fully exercised their discretion and have considered both the pros and the cons of disclosure.

I therefore find that the public body properly refused disclosure of the record in question and

recommend no further action be taken.

Elaine Keenan Bengts
NWT Information and Privacy Commissioner