

**NORTHWEST TERRITORIES  
INFORMATION AND PRIVACY COMMISSIONER**

Review Recommendation 98-07

July 6, 1998

Review File: PC8115

**BACKGROUND**

The Applicant applied on November 8<sup>th</sup>, 1997 for:

Documents or electronic information listing recipients of funds generated through the two funds called: "Canada's Northwest Territories Government Aurora Fund (1996)" and "Canada's Northwest Territories Government Aurora Fund II"

On December 10, 1997, the Financial Management Board (FMB) wrote to the Applicant in response to his Request for Information with their reply as follows:

The Aurora Funds are not public bodies pursuant to the Act. As a result your request is being returned.

On January 22<sup>nd</sup>, the Information and Privacy Commissioner's Office received a Request for Review from the Applicant, asking that I review the Financial Management Board's refusal to release the information requested.

It should be noted that according to the Financial Management Board, the information requested by the Applicant has been provided by the Government both to the press and tabled in the Legislative Assembly and, as a result, is publicly available. It is clear in these circumstances, that the information should be provided to the Applicant without question and, if it has not already done so, the FMB should ensure that the Applicant receives this information. As far as the Request for Information is concerned, therefore, the matter is easily resolved.

However, the Applicant has requested that I address the question as to whether or not the Aurora Funds are "public bodies" as defined in the Act and therefore subject to the

act or, alternatively, whether the information in question is a record **in the custody of or under the control of a public body**, as outlined in section 3 of the Act.

### **THE LEGISLATION:**

There are two relevant sections of the Act. Section 2 states:

In this Act

"public body" means

- (a) a department, branch or office of the Government of the Northwest Territories, or
- (b) an agency, board, commission, corporation, office or other body designated in the regulations, but does not include
- (c) the Office of the Legislative Assembly or the office of a member of the Legislative Assembly or a member of the Executive Council

Section 3 states:

- (1) This Act applies to all records in the custody of or under the control of a public body, including court administration records, but does not apply to the following.....

### **THE POSITION OF THE PARTIES:**

Firstly, it should be noted that the onus in this case would be on the Financial Management Board to establish that the applicant has no right of access to a document (Section 33(1)). In its submissions, the FMB takes the simple position that the Aurora Funds are not "public bodies" as defined in the Act. Although they were invited to do so, they did not provide any further explanation or argument to support their position. It should be that the Aurora Funds are each registered as societies under the Societies Act of the Northwest Territories.

The Applicant argues that if one looks at the structure and makeup of the Aurora Funds, they are clearly a "branch" of the Government of the Northwest Territories. He points to the name of the Funds (Canada's Northwest Territories **Government** Aurora Fund (1996) and Canada's Northwest Territories **Government** Aurora Fund II).

He further points to the By-Laws of the Fund which state that:

1. The only members of the society shall be:
  - (a) the Minister of Finance of the Government of the Northwest Territories;
  - (b) the Minister of Resources, Wildlife and Economic Development of the Government of the Northwest Territories;
  - (c) the Deputy Minister of Justice of the Government of the Northwest Territories;
  - (d) the Comptroller General of the Government of the Northwest Territories;
  - (e) the Deputy Minister of Resources, Wildlife and Economic Development of the Government of the Northwest Territories.
6. (a) The Board of Directors shall consist of the 5 members of the Society and up to 7 additional directors. The additional directors shall be appointed by the Minister of Finance and may only be removed by the Minister of Finance. The term of any director appointed by the Minister of Finance shall last such period of time as may be designated by the Minister at the time of appointment of the director.
7. (b) Directors who are employed by or officers of the Government of the Northwest Territories shall not be entitled to any remuneration (other than their normal pay and benefits from the Government of the Northwest Territories) for attending directors meetings or otherwise performing their duties as directors of the Society.
8. (a) The Minister of Finance shall be the Chairman of the Board of the Directors of the Society and shall preside at all meetings of the Society.

- (b) The Minister of Resources, Wildlife and Economic Development (RWED) be the Vice Chairman of the Board of Directors of the Society and in the absence of the Chairman, shall preside at all meetings of the members and of the directors;
- (c) The Comptroller General of the Government of the Northwest Territories shall be the President of the Society

(These are excerpts from the "Aurora Fund II By-Laws". The provisions of the Aurora Fund (1996) are virtually identical).

Other documentation that the Applicant has provided to support his position are as follows:

- a) An excerpt from an Information Bulletin produced by Roland C. Bailey & Associates, a company contracted to assist the members of the two funds in certain aspects of the administration of the fund, which calls the fund a "Government Administered Venture Capital Fund"
- b) A document dated October 15, 1997 from the Government of the Northwest Territories, Comptroller General entitled "Immigrant Investment Program" which points out that "RWED Regional Offices are first point of contact for potential clients" and "RWED Regional Superintendents have been briefed and identify potential clients"
- c) A press release issued by the Office of the Press Secretary of the Government of the Northwest Territories on April 27, 1997 outlining the success of Premier Don Morin's "recent trip to three cities in Asia to promote the \$30-million Aurora Investment Fund"
- d) Excerpts from Hansard for January 27, 1998 in which the Honourable John Todd, Minister of Finance reports to the Legislative Assembly on the status of the Aurora Funds, in which he refers to the Fund as "the GNWT's two Immigration Investor Funds" and states that "The two Aurora Funds are government-administered venture capital funds. Therefore the federal government requires a certain amount of supervision of these funds by our government."

- e) An excerpt from Hansard for January 18, 1998 in which the Honourable Don Morin answers a question in question period about conflicts of interest and the Aurora Fund in which he states:

"The Immigration Act (Canada) and Regulations require that the Aurora Fund be a (sic) governed or controlled by the Government of the Northwest Territories. The appointment of both the Minister of Finance and the Minister of Resources, Wildlife and Economic Development is consistent with the duties associated with their Ministerial positions, and with ensuring that the Aurora Funds are governed or controlled by the GNWT.

## **DISCUSSION:**

The regulations which have been issued under the ATIPP Act do not include the Aurora Funds as government agencies subject to the act. The sole question, therefore, is whether they are a "branch" of the government, as provided for in part (a) of the definition of public body.

This issue does not appear to have been considered often either at the Commissioner level or at the judicial level in Canada. I have, however, been able to find a few cases which might assist in determining whether the Aurora Funds are "branches" of the Government of the Northwest Territories, and therefore subject to the Act.

The first of these is Order P-231 made by the Ontario Privacy Commissioner. In that case, the question was whether the Mining and Lands Commissioner in Ontario was an "institution" under the Act (similar to our "public body"). After reviewing the legislation under which the Mining and Land Commissioner (M & L Commissioner) was appointed, the ATIPP Commissioner for Ontario found that the object of the provision of the various acts under which that office operated was to separate the Commissioner as much as possible from the ministries and provide an independent, impartial tribunal. Because the very function of the M & L Commissioner was to be independent of the provincial government, the ATIPP Commissioner found that the office was not an

"institution" under the Act, and therefore was not subject to an access request.

The same issue was reviewed by the Ontario Court of Appeal in June, 1997 in the case of *Walmsley v. Ontario (Attorney General)*. This was a case in which the Ontario Assistant Freedom of Information and Privacy Commissioner held that the Ministry of the Attorney General had control over the records of the Judicial Appointments Advisory Committee and ordered the Ministry to obtain copies of all documents relating to the selection of an individual to the position of judge of the Ontario Court (Provincial Division) from the Committee. The Committee in question was an *ad hoc* committee appointed by the then Attorney General to screen candidates for the judiciary and make recommendations to the Attorney General of those suitable for judicial appointment. In the course of their deliberations, the members of this committee received or acquired certain documentation, which was being sought by an Applicant by means of an Access to Information request. The Attorney General first refused the request on the basis that they did not have "possession or control" of the documents. The ATIPP Assistant Commissioner held that the members of the Committee could be said to be part of the Ministry of the Attorney General and therefore subject to the Act. The Ontario Divisional Court upheld the Commissioner's decision, holding that the individual members of the committee acquired the documents as agents of the Attorney General and that the Attorney General therefore had "control" of the documents. This decision was appealed by the Attorney General to the Court of Appeal. That Court overturned the decision of the Commissioner and the Divisional Court. It looked carefully at the makeup of the committee, as well as the nature of the work done by it and the nature of the relationship between the committee and the Attorney General's office. The Court noted that:

Individual committee members were neither employees nor officers of the Ministry. They constituted a committee that was set up to provide recommendations that were arrived at independently and at arm's length from the Ministry. The Ministry had no statutory or contractual right to dictate to the Committee or its individual members what documents they should create, use or maintain or what use to make of the documents they do possess. The Ministry had no statutory or contractual basis upon which

to assert the right to possess or dispose of these documents, nor was there any basis for finding that the Ministry had a proprietary right to them.

It seems apparent, therefore, that one must look at the nature of the body in question to determine if it is, in fact, a "branch" of the government and therefore subject to the Act. I am inclined to suggest that it is. In contrast to the two bodies discussed in the cases cited above, the Aurora Funds were not created to ensure "independent and arms length" deliberations. Quite the opposite, they were created to ensure government supervision and control over the capital investment funds. The very names of the Funds suggest that they are intended to be a branch of the Government of the Northwest Territories. The only members of the society registered to administer the funds are Ministers and senior bureaucrats with the Government. The members of the society hold membership solely by virtue of their position with the Government. Although there are three directors in addition to the members, these do not constitute a majority. The reason the society was established was to meet a federal government requirement that the fund be governed or controlled by the Government of the Northwest Territories. It is clear from the press release mentioned above, as well as the excerpts of Hansard, that the Government has assumed an "ownership" role over these funds. In light of all this, I would consider the Funds as a "branch" of the Territorial Government, and therefore subject to the Act.

## **CONCLUSION:**

In light of the fact that the information which was requested has been released to the public and, presumably, to the Applicant in this case, I make no direct recommendation other than to suggest that the Financial Management Board ensure that the Applicant has, in fact, received the information in question. My discussion with respect to whether or not the Aurora Funds are "branches" of the Government of the Northwest Territories

does not, therefore, carry with it a recommendation. I was specifically asked by the Applicant to review this question and I felt, that it would be helpful to all involved for future reference to do so.

**Elaine Keenan Bengts**  
**Information and Privacy Commissioner**