NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER
Review Report 20-227
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BACKGROUND

On May 24, 2019 the Applicant made a request to the Department of Executive and Indigenous Affairs for "any correspondence between Premier McLeod and Carolyn Bennet, Minister of Crown-Indigenous Relations and Northern Affairs Canada ... regarding the Athabasca Denesuline Agreement and/or the Ghotelnene K'odtineh Dene Agreement". The Department identified one record responsive to the request, a three-page letter dated May 8th, 2019. On June 19, the Department advised the Applicant that access to the entire record was being denied pursuant to section 16(1)(a)(i) of the *Access to Information and Protection of Privacy Act* on the basis that disclosure of the record "may impair relations, ongoing and future, between the Government of the Northwest Territories and external government entities". On June 26th, 2019, the Applicant asked the Office of the Information and Privacy Commissioner to review the Department's decision pursuant to section 28 of the Act.

THE APPLICABLE SECTIONS OF THE ACT

The starting point in any access to information review is the stated purposes of the *Access to Information and Protection of Privacy Act* as set out in section 1. For the purposes of this review, the relevant part of section 1 reads as follows:

> 1. The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
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> (a) giving the public a right of access to records held by public bodies;...
>
> (c) specifying limited exceptions to the rights of access;

Also of relevance in this review is section 33 of the Act which puts the onus of establishing that an exception to disclosure applies on the public body seeking to withhold disclosure:

> 33.(1) 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 or part.

The Department relied on Section 16(1)(a)(i) to refuse access to the record. Section 16(1)(a)(i) provides 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
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> (a) impair relations between the Government of the Northwest Territories and any of the following or their agencies:
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> (i) the Government of Canada or the government of a province or territory.

It should be noted that, while it was not mentioned in the public body's response to the Applicant, in its initial submissions to my office the Department also made reference to section 16(1)(a)(ii) which allows a public body to withhold access where the disclosure could be reasonably expected to impair relations between the GNWT and:

> (ii) an aboriginal organization exercising governmental functions, including, but not limited to
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> (A) a band council, and
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> (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.

THE DEPARTMENT'S INITIAL SUBMISSIONS

In its first submissions to this office, the public body provided only very high level reasoning for their decision to withhold the letter. In particular, they argued:

> Specifically, the document that has been denied is correspondence between Premier McLeod and the Minister of Crown-Indigenous Relations and Northern Affairs, Ms. Carolyn Bennett. This is clearly information shared between the GNWT and the Government of Canada and fits the exception provided for in the legislation....
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> This correspondence relates to a current matter being dealt with by the GNWT and the Government of Canada, in relation to a land claim agreement. The Department of Executive and Indigenous Affairs has determined the application of this discretionary exception is warranted as it is intended to protect the frank exchanges of views on sensitive topics to seek solutions that meet multiple interests.
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> The letter responsive to the request shares frank views on a sensitive topic and disclosure of this letter would not only damage current relations, but could impact the ability of Ministers in the future to have similar frank discussions...
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> ...upon review, it was determined that disclosure of the responsive record might severely damage the GNWT's relationship with other orders of government.

THE APPLICANT'S SUBMISSIONS

The Applicant, legal counsel acting on behalf of a client, generally took the position that the public body had failed to provide any evidence demonstrating how the disclosure

could reasonably be expected to impair the intergovernmental relations of the GNWT and another government – in other words they argued that the department did not meet the onus of establishing that the exception applied as required pursuant to section 33.

The Applicant raised a preliminary issue as to whether the public body could now seek to rely on section 16(1)(a)(ii), having referred only to section 16(1)(a)(i) in their response letter. They took the position that the department should not be able to rely on a section of the Act not referred to in the original response letter.

The Applicant began its submissions by referencing section 1 and the purposes of the Act noting that the Supreme Court of Canada has held that access to information legislation holds quasi-constitutional status. As such, exceptions to the right of access must, they argue, be narrowly interpreted. The Applicant argued that the department's initial submissions to this office fell far short of establishing that section 16(1)(a)(i) or section 16(1)(a)(ii)(B) applied to the record in question.

The Applicant argued that for section 16(1)(a) to apply, the Department had to be able to establish that there is a "reasonable" expectation of harm to relations between the GNWT and another government. They referred to a number of legal precedents for this assertion including a Review Report by the Nunavut Information and Privacy Commissioner (IPC) in *Review Report 17-131* (2017 NUIPC 18) in which the Commissioner commented on when this section is applicable:

> The section will not apply just because the record discusses another government or how the public body intends to deal with another government. There must be some objective and realistic possibility of harm.

The Nunavut IPC reviewed and accepted the discussion of this concept in the Supreme Court of Canada case of *Ontario (Community Safety and Correctional Services) v.*

Ontario (Information and Privacy Commissioner), 2014 SCC 31 (CanLII) in which the court said:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.

The Applicant was of the opinion that the department's position that “the letter shares frank views on a sensitive topic" did not qualify as evidence well beyond or considerably above a mere possibility of harm. They argue that the existence of disagreements between governments alone is not enough to bring the information within the protection of section 16(1)(a). It was their view that, rather than creating harm the disclosure of correspondence outlining such disagreements "only serves to better inform the process".

With respect to the Department's assertion that the disclosure of the letter could impact on the ability of Ministers in the future to have similar frank discussions, the Applicant referred to *Review Report 12-108* from this office in which I stated:

> There is absolutely nothing in the Act that would allow a public body to refuse disclosure of a record because they were afraid it might create

> controversy, draw criticism or invite inquiries. In fact, as noted, one of the primary purposes of the Act is to keep governments open and accountable by allowing access to records that public bodies might otherwise not want to disclose.

They argue that "public bodies must be accountable for the statements they make and positions they take and cannot hide by the claimed exemption in fear of criticism or controversy".

The Applicant asserts that the fact that the letter which is the subject of this review was copied to Michael McLeod, the Northwest Territories' only Member of Parliament brings it out of the realm of a "frank and private exchange between Ministers" and somehow changes the efficacy of the Department's argument that disclosure would be reasonably likely to harm intergovernmental relations. They do not elaborate on this argument.

The Applicant also referred me to the case of *Ministry of Northern Development and Mines, Re*, 2016 Carswell Ont 21913, *[Ministry of Northern Affairs]*, a decision of the Ontario Information and Privacy Commissioner's Office. They argue that the fact situation in that case was very similar to the facts at hand in this case. There, the Ontario Information and Privacy Commissioner was reviewing a refusal to disclose records relating to a mineral resource area in Ontario. The Ministry in that case argued that the section of their *Freedom of Information and Protection of Privacy Act* analogous to our section 16(1)(a) applied because federal governmental agencies who participated in the meetings that led to the documents requested did so on the understanding that the discussions would be confidential. The Ministry argued that disclosure of the records in question would not only harm the working relationship between the two levels of government, but would diminish the federal government's willingness to participate in an open and frank manner in the future. The Ontario Information and Privacy Commissioner commented as follows:

> 88 …Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. Section 15(a) recognizes the value of intergovernmental contacts and its purpose is to protect these working relationships…
>
> 89 For this exemption to apply, the institution must demonstrate that disclosure of the record could reasonably be expected to lead to the specified result. To meet this test, the institution must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.
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> 90 If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to reveal the information received.
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> 91 In order for a record to qualify for exemption under section 15(a), the ministry must establish that:
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> 1. the records relate to intergovernmental relations, that is relations between an institution and another government or its agencies; and
> 2. disclosure of the records could reasonably be expected to prejudice the conduct of intergovernmental relationships.

The Ontario Information and Privacy Commissioner in that case ultimately found that though the information withheld related to intergovernmental relations, the Ministry had not provided sufficient evidence to demonstrate that the disclosure could be reasonably expected to result in prejudice to relations between the ministry and the federal government:

> While the ministry submits that the disclosure of these records "could" reduce the federal government's future willingness to participate in an open and frank manner and therefore negatively impact future negotiations, it does not offer any evidence or further detail with regard to this claim. Similarly, the ministry submits that parties to the discussions that were the subject of the records withheld under section 15(a) would become circumspect in future interactions with the province, but does not provide any further explanation or details with regard to the harms that could reasonably be expected to result from the disclosure of this information. While I appreciate that the Ring of Fire project is complex and requires coordinated participation of different levels of government, the ministry has not provided me with sufficient evidence to demonstrate that the harm contemplated in section 15(a) could reasonably be expected to result from the disclosure of the portions withheld in Records 25, 38-41, 62, 95 and 175.

The Applicant asserts that the facts of that case and this one are strikingly similar and that the Department in this case has failed to provide adequate explanation or evidence demonstrating that the harm of disclosure is more than “a mere possibility or speculation”.

Finally, the Applicant argues that the goal and objective of reconciliation is central to all dealings with government and First Nations and the negotiation of land claims is key to the advancement of this process of reconciliation and it is, therefore, in the public interest to disclose the record requested. Disclosure of the record would provide a “meaningful opportunity to understand and address the issues or concerns raised in the Correspondence” and, they argue, the letter must be disclosed.

THE PUBLIC BODY'S REPLY

The Department, having received the Applicant’s submissions, submitted a far more

detailed argument to support their position that section 16(1)(a) applied so as to justify the non-disclosure of the letter in question. They explained that the Applicant's client was an indigenous group currently negotiating a Land Claims Agreement with the Government of Canada and that the GNWT is a party to the negotiations because any final agreement between Canada and the indigenous group will recognize rights of the group within the Northwest Territories.

The Department conceded that the *Access to Information and Protection of Privacy Act* has disclosure of GNWT records as the default. They also argued, however, that the Act does contain exceptions to disclosure which have purpose. They refer to *Review Report 12-108* issued by this office, in which section 16(1)(a) was considered and the following statement made by the Information and Privacy Commissioner:

> Section 16(1)(a) protects the public interest insuring 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.

They agree with the Applicant that the phrase "reasonably expected to" in section 16(1)(a) should be read to mean that there exists a "reasonable expectation of probable harm" and that the public body must provide evidence that is "well beyond" or "considerably above" a mere possibility.

The department asserts that the letter in question outlines "significant tensions" between the GNWT and the Government of Canada. In fact, they describe the relationship in relation to this file as "tenuous". The letter, they say, delineates fundamental disagreements between the GNWT and the Government of Canada on Canada's handling of the negotiations and outlines concerns about negative impacts to the indigenous people of the NWT as a result.

The Department also points out that the negotiations in question are being supervised by the Federal Court and that these negotiations are being undertaken in an attempt to reach an out of court settlement in a law suit in which both the GNWT and the Government have been named as co-defendants.

The Department argues that this letter is a “confidential communication between the highest level of government about an extremely important and sensitive issue” which reveals significant disagreement between the Governments of Canada and the NWT. The Department asserts that if these sensitive disagreements are disclosed to the public it

> will erode both
>
> a) public confidence in the treaty negotiation process; and
> b) the trust that must exist between governments in order to frankly and honestly exchange viewpoints, and share required information on issues that will have significant impacts on the rights and lives of Indigenous peoples both inside and outside the NWT.
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> To have such frank and fundamental disagreements between levels of government become public would undoubtedly cause Canada to be less forthcoming in its communications with the GNWT. The need for candour at the most senior levels of dialogue is most critical. The GNWT understands that disclosing the Letter will cause Canada to be less transparent and open in discussing matters that have a direct and significant impact on the NWT and its citizens.

Given the nature of the disagreement, they say, the risk of harm if the letter is disclosed is “beyond merely possible”.

The Department has also outlined some of the considerations that went into the exercise of their discretion to refuse access, including:

a) the right of the Applicant to have access to public records;
b) the tenuous relationship between the GNWT and the Government of Canada;
c) the importance of the treaty making process in Canada;
d) the fact that the Government of Canada and the GNWT work together on numerous initiatives and the need for trust between them is paramount;
e) the Applicant has, through direct, confidential discussions been apprised of the concerns raised in the letter and, given the real likelihood of harm to its intergovernmental relationship with Canada, the GNWT cannot compromise an already strained relationship by publicly disclosing a letter of such significant sensitivity.

DISCUSSION

Both the public body and the Applicant have identified the basic application of the law for section 16(1)(a) to apply to justify an exception to disclosure. Breaking it down, information meets the criteria for an exception to disclosure under this section where

- the disclosure could reasonably be expected to
- impair relations between the GNWT and another government

I am satisfied, based on the content of the letter (which I have had the benefit of reviewing as part of the review process) that it is both frank and sensitive and relates directly to intergovernmental relations. The crux of the issue, however, is whether the disclosure could “reasonably be expected” to impair the relationship between the two governments.

As noted above, in *Ministry of Northern Development and Mines, Re*, 2016 Carswell Ont 21913, *[Ministry of Northern Affairs]*, the Ontario Information and Privacy Commissioner held that the "institution must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm." The decision further states that "How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences."

The question for me is what kind of evidence might the public body be able to provide in this regard – in the circumstances of this case, what would amount to "evidence" sufficient to establish the real possibility of harm?

There is nothing in the text of the letter itself which overtly claims that it is intended to be "confidential". This might have provided some evidence of an intention that the letter would not be made available to the public.

The public body has not provided any contract or agreement between the GNWT and the Government of Canada that defines the relationship between the parties negotiating this land claims agreement. This too, might have given the claim of potential harm to the intergovernmental relationship some substantive underpinning.

Nor is there any evidence provided of any similar disclosure causing an impairment in the relationship between the parties in the past which would give credence to the claim here.

The GNWT did, however, point out that this particular negotiation was being undertaken under the supervision of the Federal Court of Canada as an effort to reach an out of court settlement where both the GNWT and the federal government are defendants. This, I think, is an important element of the case that provides both context and some evidence that disclosure would have the potential of irreparable harm. Here, two

defendants tasked with coming to an agreement with a plaintiff have differing views on how best to reach that agreement. There must be room for them to work out those differences in private without the plaintiff becoming privy to the details of the discussions.

The general context of the situation, as described by both the Applicant and the Department, also provides some evidence to support the Department's contention that disclosure of the letter is reasonably likely to degrade relationships with significant impacts on the ability of all parties to reach valid and stated business objectives. This is supported by the content of the letter itself, which is the most telling evidence presented.

All considered, I am satisfied that the Department has provided evidence to support its assertion that the disclosure of this letter to the public would reasonably be expected to impair the relationship between the GNWT and the Government of Canada on this issue and that the letter, as a whole meets the criteria for an exception to disclosure pursuant to section 16(1)(a)(i).

A finding that the letter meets the criteria for an exception under section 16(1)(a) does not decide the matter. The exception outlined in section 16(1)(a) is discretionary and the public body must therefore exercise discretion and make a decision as to whether to disclose the record notwithstanding the exception. In this case, the Department provided a list of the considerations, both for and against disclosure, that informed their decision. I am satisfied that the Department has considered the relevant and necessary factors in exercising its discretion.

In light of my finding with respect to the applicability of section 16(1)(a)(i) I do not feel that it is necessary to comment on whether it is appropriate for the public body to rely on section 16(1)(i)(B) which was raised only at the review stage.

The Applicant argued that because Michael McLeod, Member of Parliament for the Northwest Territories, was copied on the letter, this somehow negated the argument that disclosure of the record would be reasonably expected to impair relations between the GNWT and the Government of Canada. In fact, I believe that this fact supports the suggestion that disclosure would be reasonably expected to harm the intergovernmental relationship. The Northwest Territories has only one Member of Parliament. It makes complete sense for the Premier to share a letter involving important dealings between Canada and the Northwest Territories so as to keep the MP, as the only representative of the NWT at that level, advised on steps taken which might negatively impact on the relationship between the governments.

Finally, the Applicant has argued that there is a public interest in disclosure of the record in question and that this public interest, in fact, trumps any exception to disclosure that might apply. The public interest, they say, is in reaching the goal of reconciliation and that disclosure of the record would provide a “meaningful opportunity to understand and address the issues or concerns raised in the Correspondence”.

While there may be a public interest in disclosure, there is nothing in the *Access to Information and Protection of Privacy Act* that addresses disclosure of this kind of information in the public interest. The only public interest override in our legislation is limited to the disclosure of personal information, which is not the kind of information in play in this review. While I believe that the public interest in disclosure should always be an important factor in the exercise of discretion, the Act does not specifically outline a public interest override when considering the disclosure of general information. Access to information legislation in other some other Canadian jurisdictions have specific provisions relating to the disclosure of information in the public interest. Recent amendments to our own legislation which have not yet taken effect do contain a broader public interest over-ride which provides that:

5.1.(1) Notwithstanding anything in this Act and whether or not a request for access is made, the head of a public body shall, without delay, disclose to the public, to an affected group of people or to an applicant, information

(a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people; or

(b) the disclosure of which is, for any other reason, clearly in the public interest.

Whether or not subsection 5.1(1)(b) would apply in this case is a matter for another day, however, as this provision is not yet in effect. So, while I acknowledge the Applicant's argument, there is nothing in the Act that currently creates a public interest consideration which over-rides other provisions in the Act.

RECOMMENDATIONS

In view of the above, I make no recommendations in relation to the disclosure of the record in question.

Elaine Keenan Bengts
Information and Privacy Commissioner