

**NORTHWEST TERRITORIES
SPECIAL INFORMATION AND PRIVACY COMMISSIONER**

**REPORT
Review Recommendation 00-015**

March 16, 2000

YELLOWKNIFE HEALTH AND SOCIAL SERVICES BOARD
File PC 9222

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I. BACKGROUND

[para 1.] The Applicant applied under the *Access to Information and Protection of Privacy Act* (the "ATIPP Act") for information and documents relating to his minor child, in the custody or control of the Yellowknife Health and Social Services Board (referred to as the "Public Body").

[para 2.] The Public Body denied access pursuant to section 52(1)(d) of the ATIPP Act.

[para 3.] The Applicant requested a review of the decision of the Public Body by the Information and Privacy Commissioner. However, the Information and Privacy Commissioner found she had a conflict of interest in this matter. As a result, I was appointed Special Information and Privacy Commissioner to deal with this review.

[para 4.] On February 21, 2000, I reviewed this matter. A submission was received from the Public Body. The Applicant declined to make a submission but affirmed the Applicant's interest in the matter.

II. PRELIMINARY ISSUE

[para 5.] The Public Body is subject to the ATIPP Act by virtue of section 2 and the Regulations to the Act, wherein the Public Body is named as a public body .

III. RECORDS AT ISSUE

[para 6.] The Public Body denied access to all records in its custody or under its control pertaining to the Applicant's minor child.

IV. ISSUES

[para 7.] In its original response to the Applicant's request for access, the Public Body refused all access to any records it had on the basis of section 52(1)(d) of the ATIPP Act. That section reads:

52. (1) *Any right or power conferred on an individual by this Act may be exercised*

(d) *Where the individual is a minor, by a guardian of the minor in circumstances where, in the opinion of the head of the public body concerned, the exercise of the right or power by the guardian would not constitute an unreasonable invasion of the privacy of the minor; or*

The Public Body found that the Applicant was not a "guardian" of the minor. I will call this Issue B.

[para 8.] However, in its submission to this review, the Public Body raised the issue of whether the ATIPP Act applies to child protection records held by the Public Body pursuant to the *Child and Family Services Act*, due to the operation of section 4 of the ATIPP Act and section 71 (2) of the *Child and Family Services Act*. Those sections read, in part:

4. (1) *The head of a public body shall refuse to disclose information to an applicant where the disclosure is prohibited or restricted by another Act or a regulation under another Act.*

(2) If a provision of this Act is inconsistent with or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, prevails notwithstanding this Act.

(3) Two years after the day on which section 5 comes into force, subsection (1) is repealed and subsection (2) comes into force.

71. *(1) Any information or record of information relating to a child or his or her parent is confidential where it is received, obtained or retained by any person*

(a) under this Act or the regulations;

(2) Notwithstanding the provisions in the Access to Information and Protection of Privacy Act, allowing disclosure of personal information as defined in that Act, no person referred to in subsection (1) shall disclose or communicate any information or record of information described in subsection (1) to any person except. ..

Section 4(2) is in force now.

[para 9.] The issue is whether the Information and Privacy Commissioner has jurisdiction over access to the records. This is a jurisdictional issue and, as such, should be dealt with first. I will call this Issue A.

v. DISCUSSION OF THE ISSUES

ISSUE A: Jurisdiction

[para 10.] Section 3 delineates the ATIPP Act's application. Section 4 permits another

"enactment" (a statute or regulation), or a provision of the enactment, to prevail over the ATIPP Act. Section 4 can be referred to as the "paramountcy provision". Section 4 is a jurisdictional provision because, if another enactment or a provision of it "prevails" over the ATIPP Act, I am unable to use my jurisdiction to apply the ATIPP Act.

[para 11.] Section 4(2) of the ATIPP Act reads:

4(2) If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless the other Act expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.

[para 12.] The terms "inconsistent" or "in conflict with" refer to a situation where two legislative enactments cannot stand together, that is, compliance with one law involves breach of the other: see *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992), 88 D.L.R. (4th) 1 (S.C.C.); *Imperial Investments Ltd. v. Saint John (City)* (1993), 106 D.L.R. (4th) 585 (N.B. C.A.)

[para 13.] Section 4(2) of the ATIPP Act is engaged if there is an inconsistency or a conflict between a provision of the ATIPP Act and a provision of another enactment. In determining whether section 4(2) is engaged, it is necessary to find a provision of the ATIPP Act and a provision of the enactment that is inconsistent or in conflict.

[para 14.] Should there be an inconsistency or conflict, the general rule outlined by section 4(2) is that the provision of the ATIPP Act is to prevail. Therefore, section 4(2) provides a legislative solution to determine which provision governs.

[para 15.] This general rule has an exception. Other legislation may expressly provide that the other legislation or a provision of that legislation is to prevail despite the ATIPP Act.

[para 16.] Before considering whether there is a conflict, it is first necessary to decide whether what the Applicant asked for falls with the *Child and Family Services Act*. I have reviewed the records at issue, which are child protection records. I agree with the submission of the Public Body that child protection records fall within section 71 (1) of the *Child and Family Services Act*. The records sought by the Applicant's access request are child protection records.

[para 17.] There is a conflict: section 5 of the ATIPP Act says there is a right of access subject to the exceptions in the ATIPP Act. Section 71(2) of the *Child and Family Services Act* says notwithstanding the ATIPP Act, none of the information referred to in section 71(1) can be disclosed except in the circumstances set out in section 71(2) of the *Child and Family Services Act*. According to section 4(2) of the ATIPP Act and the "notwithstanding" provision of the *Child and Family Services Act*, the conflict gets resolved in favour of section 71(2) of the *Child and Family Services Act*. But the conflict is only between "... the provisions of the Access to Information and Protection of Privacy Act, allowing disclosure of personal information as defined in that Act, ..." to use the words of section 71 (2) of the *Child and Family Services Act*.

[para 18.] Having found that the information falls within section 71(1) of the *Child and Family Services Act* and that there is a conflict between the disclosure provisions contained in section 71(2) of the *Child and Family Services Act* and section 5 of the ATIPP Act, I find that section 71 (2) prevails over section 5 of the ATIPP Act, as provided by section 4(2). Consequently, I accept the Public Body's submission on the Applicants' access request, that I have no jurisdiction over access to the information referred to in section 71 (1) of the *Child and Family Services Act*.

[para 19.] I want to caution the Public Body however, and I think the Public Body is aware of this. In its submission, the Public Body states "... the effect of section 71(2) is that the ATIPP Act does not apply to information received, obtained or collected pursuant to section 71(1)." I think what the public body should have said is "... the

effect of section 71(2) is that the ATIPP Act does not apply to the disclosure or communication of information received, obtained or collected pursuant to section 71(1)" . Other provisions of the ATIPP Act, such as sections 41 through 44 (among others) may still apply (although I do not find it necessary to decide that issue here).

[para 20.] The Public Body posed the question "... whether section 52(1) of the ATIPP Act also allows a person who has lawful custody of a child to consent on the child's behalf to the release of the information."

[para 21.] I think the answer to this question is "No". Section 71 (2) of the *Child and Family Services Act* is "paramount". That being the case, it operates on its own terms, independently of the ATIPP Act. Section 71 (2) (b) says that access can be given "with the written consent of the person to whom the information or record relates". The ATIPP Act does not amend section 71(2)(b) of the *Child and Family Services Act*.

[para 22.] My authority in this case is limited to determining whether I have jurisdiction over access to the information in question. If I do not, as here, I cannot conduct a review to decide whether the Applicants should be given access to the information. Therefore, I cannot review Issue B, above.

[para 23.] I have found that the access provisions of the ATIPP Act are inconsistent or in conflict with section 71 (2) of the *Child and Family Services Act*. That means I have no jurisdiction over access to the information withheld by the Public Body.

VI. REPORT

[para 24.] I make the following Report under section 35 of the ATIPP Act.

[para 25.] I do not have jurisdiction over access to any of the information or records of information referred to in section 71 (1) of the *Child and Family Services Act*. Therefore, I do not have the authority to report on whether the Public Body properly withheld that information from the Applicants pursuant to section 52(1)(d) of the ATIPP Act.

Robert R. Clark
Special Information and Privacy Commissioner