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**Nunavut Information and Privacy Commissioner**
**Nunavunmi Tuhaqtauyukhaliqinirmun Kanngunaqtuliqinirmun Kamisina**
**Commissaire à l'information et à la protection de la vie privée du Nunavut**

# Commissioner's Final Report

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## Summary

**[1]** A former employee applied for all records, including the external investigator's notes, related to the investigation of two harassment complaints. The department released the investigator's final report, but took the position that the investigator's notes were not "in the custody or under the control" of the department. The Commissioner finds that the investigator's notes are under the control of the department and recommends they be released.

## Nature of Review and Jurisdiction

**[2]** This is an access review under s 28(1) of the *Access to Information and Protection of Privacy Act* (ATIPPA).

**[3]** The Commissioner has jurisdiction over the Department of Health: ATIPPA, s 2, definition of "public body".

## Issues

**[4]** The issues in this review are:

a. Are the external investigator's notes "in the custody or under the control" of the department?
b. Are the external investigator's notes exempted from disclosure by s 25.1(b)?

## Facts

**[5]** The Applicant was an employee of the Department of Health in the Government of Nunavut until November 2019, when their employment was terminated.[1] Soon afterwards, the Applicant filed nine ATIPP requests, all connected to the termination.

**[6]** One of the nine ATIPP requests was for documents related to the investigation of two harassment complaints involving the Applicant. I will refer to this request as ATIPP-9. This review deals only with ATIPP-9.

**[7]** Specifically, the request in ATIPP-9 was for "Investigation report to the Deputy Minister of Health regarding" the harassment complaint "including any and all notes, reports regarding the findings and/or recommendations by the investigator. This request also includes the preliminary notes made by the investigator."

**[8]** In consultation with the ATIPP Coordinator at the Department of Health, the Health-related requests were consolidated into a single request. Other parts of the request were transferred to the Department of Human Resources. The ATIPP Coordinator inadvertently omitted ATIPP-9 from the consolidated request. When the Coordinator realized the error, they processed it separately.

[1] For the purpose of anonymization, it is the Commissioner's practice not to name applicants/complainants, GN employees, other individuals or communities unless the names are relevant to an understanding of the issues; and also to use the pronouns "they/them" even when referring to an individual.

**[9]** Eventually the department disclosed to the Applicant the final investigation report. The Applicant pointed out to the department that the original request was for more than just the final report.

**[10]** The department replied that the investigation had been conducted by an external investigator, and that any notes or other records were not "in the custody or control" of the GN. There would therefore be no further disclosure.

**[11]** The Applicant seeks review of the department's failure to disclose the investigator's notes.

**Legislation**

**[12]** The *Access to Information and Protection of Privacy Act* (ATIPPA) applies "to all records in the custody or under the control of" a public body: ATIPPA, s 3(1).

**[13]** An applicant has a right of access "to any record in the custody or under the control of a public body": ATIPPA, s 5(1). This right of access does not extend to information exempted from disclosure under Division B of Part 1: ATIPPA, s 5(2).

**[14]** In the Analysis section below, I will review more extensively the law on what "under the control of" means.

**[15]** Section 25.1, which deals with certain information about employee relations, was added to the ATIPPA in 2017 and is in Division B of Part 1. The relevant part reads as follows:

> *The head of a public body may refuse to disclose to an applicant*
>
> *…*

> *(b) information created or gathered for the purpose of a workplace investigation, regardless of whether such investigation actually took place, where the release of such information could reasonably be expected to cause harm to the applicant, a public body or a third party; …*

**Analysis**

**[16]** The legal issue in this case is fairly straightforward, but the way ATIPP-9 was handled is not. Before getting to the substance of my reasons, I need to untangle the confusion over which department is responsible for the records in question.

*Which department is responsible?*

**[17]** The Applicant originally filed nine ATIPP requests with the Department of Health connected to the termination of their employment. ATIPP-9 was for the harassment investigation report and related documents. The wording of ATIPP-9 was perhaps not ideal, but when read as a whole it is reasonably clear that the request is for more than just the final investigation report.

**[18]** The Health ATIPP Coordinator worked with the Applicant to consolidate the nine requests, since all the requests flowed from the same set of circumstances and there was overlap between them. This effort by the Coordinator was in accordance with the "duty to assist" and is to be commended: ATIPPA, s 7(1). Unfortunately, the Coordinator inadvertently left ATIPP-9 out of the consolidation.

**[19]** When the Coordinator realized they had omitted ATIPP-9, they processed the response separately from the consolidated request, and released to the Applicant the investigator's final report and a handful of other documents.

**[20]** The Applicant then pointed out to the Coordinator that the disclosure was only a partial response to ATIPP-9, and asked when there would be disclosure of the remaining records.

**[21]** The Coordinator then contacted the Department of Human Resources for investigation notes. Four additional pages of records were found and disclosed, and bundled as part of a larger disclosure related to the consolidated ATIPP request. These four additional pages were relevant to ATIPP-9 but they were not connected, except indirectly, to the external investigator. They were someone else's notes of a meeting in which the external investigator was not involved. The Applicant again contacted the Coordinator, by e-mail, to ask when there would be disclosure of the external investigator's notes.

**[22]** The Coordinator appears to have treated this e-mail from the Applicant as a new ATIPP request. (It was not really a new request, since the Applicant was merely asking again for records that fell within the scope of ATIPP-9.) The Coordinator transferred this "new" request to the Department of Human Resources. There is no indication in the file material that Human Resources responded to this request.

**[23]** On the same day as the transfer of the "new" request to Human Resources, the Coordinator wrote to the Applicant with the following explanation for why the investigator's notes had not been disclosed:

> *Please note that the interview notes and any handwritten material produced by the contractor that is not in the official report provided to you are not in the custody or control of the Department of Health and therefore fall outside of the scope of the ATIPP Act. The investigator was an impartial body hired by the Government of Nunavut to complete a workplace investigation and the product purchased by our government was the formal report. We have no claim to, and no ability to request any typed or handwritten notes taken by the contractor.*

> *As per section 3 of The ATIPP Act:*
>
> > *"Scope of the Act:*
> >
> > *3. (1) This Act applies to all records in the custody or under the control of a public body, including court administration records".*
>
> *As these notes are not in our custody, and the control of these records are outside the scope of our agreement with the contractor, we have no ability to, nor legal obligation to provide you these records.*

**[24]** Is this the position of the Department of Health or the position of the GN as a whole? It's not clear. It could be read either way.

**[25]** The external investigator was hired by the Department of Human Resources, and the final report is addressed to the Department of Human Resources. On the other hand, HR was acting solely in support of the Department of Health. The Department of Human Resources does not appear to have responded to the Applicant's ATIPP-9, even when the new request (which was not actually a new request) was transferred to it by the Health ATIPP Coordinator. On ATIPP-9, the Department of Health was taking the lead.

**[26]** In the end, I cannot hold the Applicant responsible for any confusion about which department was responsible. The original ATIPP-9 was filed over a year ago. It is time for the Applicant to get an answer about whether they should, or should not, receive the investigator's notes. That is why the following analysis asks whether the Government of Nunavut as a whole, as opposed to one department or the other, has custody or control of the records.

*Are the investigator's notes in the custody or control of the GN?*

**[27]** In order for the ATIPPA to apply at all, the requested records must be "in the custody or under the control" of a public body: ATIPPA, ss 3(1) and 5(1). Those words are not defined in the Act itself.

**[28]** The external investigator was a lawyer at a private law firm that specializes in labour and employment law. I accept as a fact that the external investigator's notes are held by the investigator, whether in paper or digital form or both, and therefore not "in the custody" of the GN.

**[29]** The question of whether the notes are "under the control" of the GN is not as simple. Fortunately the phrase "under the control" has been in Canadian access legislation for a long time, and there is a substantial amount of legal precedent about what "under the control" means.

**[30]** In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII), the Supreme Court of Canada considered whether documents in a cabinet minister's office were "under the control" of the minister's department. That is obviously a different situation than in the present case, but the test laid down by the court applies broadly to any "under the control" case.

**[31]** Justice Charron, writing for the eight-judge majority, held that there is a two-step test for determining "control" (at paragraphs 55-56):

> *Step one of the test acts as a useful screening device. It asks whether the record relates to a departmental matter. If it does not, that indeed ends the inquiry. … If the record requested relates to a departmental matter, the inquiry into control continues.*
>
> *Under step two, all relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These*

> *factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder. … The reasonable expectation test is objective. If a senior official of the government institution, based on all relevant factors, reasonably should be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is subject to any specific statutory exemption.*

**[32]** In the case before me, the first step of the test is easily met: the investigation was a departmental matter. The external investigator was hired to look into a human resources matter within the GN.

**[33]** The second step of the test requires me to look at all relevant factors. A non-exhaustive list includes the following:

a. *The substantive content of the notes:* I have not seen the investigator's notes, but it is reasonable to assume that they relate to observations made in the course of the harassment investigation undertaken at the request of the GN. The notes would then form the basis for the investigator's final report. There is no other reason for the notes to exist and they should not include any material extraneous to the investigation.

b. *The circumstances in which the notes were created:* The investigator carried out their investigation over the course of three days. The investigation appears to have consisted largely of interviewing a number of GN employees. Unless the interviews were recorded—and I have seen no indication they were—the written notes would be the only record of the interviews. The investigator also reviewed relevant documents such as GN policy. The investigator took care to ensure fairness in the process.

c. *The legal relationship between the GN and the investigator:* The investigator was hired as a contractor by the GN, and presumably was paid for their work. It was a business relationship, consisting of a one-time engagement, in which the GN needed a service and a contractor offered to provide the service.

**[34]** Considering all of the relevant factors, I conclude that the second part of the "control" test is met. To paraphrase the words of Justice Charron, a senior official of the GN reasonably should be able to obtain a copy of the investigator's notes.

**[35]** My conclusion is reinforced by a case from the British Columbia Information and Privacy Commissioner with facts similar to the present case. In *Board of School Trustees of School District No.63, Re*, 2004 CanLII 45529 (BC IPC), the applicant was the target of a harassment complaint by a co-worker. An external investigator was hired. The applicant made an access request for the investigator's notes. An adjudicator for the B.C. Information and Privacy Commissioner ruled the investigator's notes were under the control of the public body, and ordered they be disclosed.

**[36]** To the argument that a distinction should be drawn between the investigator's report and the investigator's notes, the adjudicator wrote (at paragraph 65):

> *I am also not persuaded that there is a principled reason to differentiate between control of the report, a record the investigator was explicitly required to create, and control of records of interviews or other investigative work that the investigator was implicitly required, or at the very least authorized, to create in conducting the investigation. The collection, compilation and analysis of information is, after all, the essence of investigation and these records all relate to, and flow from, the investigation that the investigator was engaged to do for the School District as part of its functions.*

**[37]** A different conclusion was reached in another case from the B.C. Information and Privacy Commissioner: *West Vancouver (District) (Re),* 2016 BCIPC 17 (CanLII). The applicant requested the notes of two arbitrators hired to look into a wide-ranging harassment complaint filed by the applicant against his former employer.

**[38]** The adjudicator cited the *School District No. 63* case in support of the proposition that "the fact that a public body retained and paid for services would ordinarily indicate that it has control over the resulting work product (and notes), absent direct evidence to the contrary" (at paragraph 22). The adjudicator went to say, however, that this proposition does not necessarily apply to a case of "arbitrators appointed to conduct an independent investigation, mediation and arbitration process." The adjudicator considered the complex, multi-party nature of the legal dispute, as well as the nature of the arbitrators' engagement. The adjudicator concluded that the arbitrators' notes were, in the circumstances, not under the control of the public bodies.

**[39]** The difference between the two B.C. cases can be explained by the second part of the two-step test laid down by the Supreme Court of Canada: all relevant factors must be considered. Sometimes the factors will point one way, sometimes the other.

**[40]** In my view, the relevant factors in the present case are much closer to the *School District No. 63* case than they are to the *West Vancouver* case. I therefore reach the same conclusion as the adjudicator in the former case.

**[41]** This conclusion is in keeping with the overall purposes of Nunavut's access law: ATIPPA, s 1. Access is the starting point, and exceptions to the rights of access are to be limited.

**[42]** It is important, when assessing whether an Applicant should be denied access to records, to avoid the "black hole" problem alluded to by Justice Charron in the Supreme Court of Canada case cited above, at paragraphs 51-54. A "black hole" is created if an exception or exemption or

interpretation makes it too easy for a public body to re-arrange its affairs so as to avoid disclosure.

**[43]** In this case, if the GN had conducted its own internal investigation, using its own Human Resources staff, the investigator's notes would have to be disclosed. The fact that the investigation function was contracted outside the GN should make no difference.

*Are the notes exempt under s 25.1(b)?*

**[44]** Before concluding, I will add a few words about the possible application of the exemptions in s 25.1.

**[45]** Section 25.1 is a discretionary exemption, and the department did not cite it as a reason for non-disclosure. Normally I would not, in the course of writing a final report, raise discretionary exemptions that have not been claimed by the public body. In this case I think it is prudent to do so, if only to explain why it does not apply.

**[46]** Section 25.1 was added to the ATIPPA in 2017. It provides an exemption for certain information connected to employee relations:

> *The head of a public body may refuse to disclose to an applicant*
>
> > *(a) information relating to an ongoing workplace investigation;*
> >
> > *(b) information created or gathered for the purpose of a workplace investigation, regardless of whether such investigation actually took place, where the release of such information could reasonably be expected to cause harm to the applicant, a public body or a third party; and*

> *(c) information that contains advice given by the employee relations division of a public body for the purpose of hiring or managing an employee.*

**[47]** Paragraph (a) does not apply in this case, because the investigation is not "ongoing". It was completed when the investigation report was submitted to the GN. Paragraph (c) also does not apply in this case. The final investigator's report is not "advice", and in any event, it was not given "by the employee relations division of a public body". That leaves paragraph (b).

**[48]** The investigator's notes were created "for the purpose of a workplace investigation". That much is clear. But paragraph (b) does not stop there. There must also be a reasonable expectation of harm to the applicant, a public body or a third party.

**[49]** The onus of establishing an exemption rests on the public body: ATIPPA, s 33(1). There is simply no relevant evidence of harm in this case, whether to the Applicant, to the public body, or to a third party. An exemption under s 25.1(b) is not established. The same conclusion was reached by the former Commissioner, in Review Report 21-182, 2021 NUIPC 1, which is related to the present case.

**Conclusion**

**[50]** The investigator's notes are "under the control" of the GN.

**[51]** The investigator's notes are not exempt from disclosure under s 25.1(b).

**Recommendations**

**[52]** **I recommend** the Department of Health share this Review Report with the Department of Human Resources, and respond jointly to the following recommendations.

**[53]** **I recommend** the Department of Health or the Department of Human Resources obtain the notes from the external investigator and (after appropriate review for exemptions) release them to the Applicant.

**[54]** **I recommend** that the Department of Human Resources (or any public body that engages an external investigator into internal human resources matters) stipulate in the contract that the investigator's work product is the property of the GN and is subject to disclosure under the ATIPPA. That is already the law, but stating it explicitly may avoid needless delays in future cases.

Graham Steele
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