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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

Report Number:	21-209-RR
CanLII Citation:	Department of Justice (Re), 2021 NUIPC 28
NUIPC File Number(s):	21-158
Date:	November 29, 2021

Summary of the Preliminary Issue

[1] The Complainant filed a privacy breach complaint. The Commissioner investigated. The Commissioner finds that it is not possible to make the Review Report public without repeating the privacy breach. The Commissioner reviews the circumstances in which a Review Report will not be published, and finds this is a case in which non-publication, other than to the complainant and the public body, is warranted.

Nature of Review and Jurisdiction

[2] The Complainant filed a privacy breach complaint against the Department of Justice under section 49.1(1) of the ATIPPA. I carried out my review under section 49.2(1).

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

Preliminary Issue

[4] A preliminary issue in this review is whether this Review Report should be public, or whether it should be given only to the Complainant and the Department of Justice.

Facts relevant to the Preliminary Issue

[5] The Department of Justice released to a third party certain personal information about the Complainant. The Complainant became aware of the disclosure.

[6] The Complainant filed a privacy breach complaint with this office, alleging that the disclosure of their personal information to the third party was a breach of the Complainant's privacy under Part 2 of the ATIPPA.

[7] This office's investigation is complete and a Review Report is ready for publication.

Law on the Preliminary Issue

[8] Section 49.5 of the ATIPPA states my responsibilities after completing a privacy breach review:

> 49.5. On completing a review, the Information and Privacy Commissioner shall
>
> (a) prepare a written report setting out the recommendations of the Information and Privacy Commissioner with respect to the collection, use or disclosure of the individual's personal information and the reasons for the recommendations; and
>
> (b) provide a copy of the report to the individual who asked for the review and the head of the public body concerned.

[9] Section 56 contains certain rules about what information I may or may not release. The relevant parts are as follows:

> 56. (1) The Information and Privacy Commissioner shall not disclose any information that comes to his or her knowledge in the exercise of the powers or performance of the duties or functions of the Information and Privacy Commissioner under this Act.

…

(3) Despite subsection (1), the Information and Privacy Commissioner may disclose,

…

> (b) in a report prepared under this Act, any matter that he or she considers necessary to disclose to establish grounds for the findings and recommendations in the report.

(4) When making a disclosure under subsection (3), the Information and Privacy Commissioner shall not disclose

> (a) any information or other material where the nature of the information or material could justify a refusal by the head of a public body to give access to a record or part of a record; ….

[10] The Supreme Court of Canada has recently reiterated the strong presumption in favour of open courts: *Sherman Estate v. Donovan*, 2021 SCC 25 (CanLII); see also *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 (CanLII) at paragraph 3. The open-court principle also applies to administrative tribunals. The unanimous judgment in *Sherman Estate* opens with the following statement of the law:

> [1] This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.
>
> [2] Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.

> [3] Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.

[11] In summary, there is a strong presumption in favour of openness. There is a "high bar" for any exceptions.

Analysis of the Preliminary Issue

[12] This office's Review Reports should be published, except in the rarest of cases. These Review Reports are an instance of the open-court principle. They serve as an accountability mechanism, as precedent, and as an educational tool: *Department of Community and Government Services (Re)*, 2021 NUIPC 8 (CanLII) at paragraph 20.

[13] It has been the practice of this office to publish all Review Reports on the office's website, along with all ministerial decisions in response to Review Reports. All Review Reports are also available in the Canadian Legal Information Institute (CanLII) online database. There appears to be no previous instance, going back to the creation of this office in 1999, in which a Review Report was not made public.

[14] At the same time, a Review Report about a privacy breach should be written in such a way that personal information is not revealed unnecessarily. It has been the practice of the office to anonymize Review Reports. Personal information about the parties is limited to what is necessary for an understanding of the decision: see for example, *Department of Health (Re),* 2021 NUIPC 27 (CanLII) at paragraph 9. It is

almost always possible to write a Review Report without referring to names, community, gender, or other identifying personal information.

[15] In this case, I have concluded that the "high bar" for withholding a public decision has been met. Any meaningful recitation of the facts will allow a reader to re-identify the Complainant. Re-identification risks harm to the Complainant's health or safety. I cannot say more.

[16] I have, however, included the name of the public body. There have been some previous Review Reports that did not name the public body concerned: see, for example, *Review Report 16-109 (Re)*, 2016 NUIPC 13 (CanLII); *Review Report 16-108 (Re)*, 2016 NUIPC 12 (CanLII). In this case, I have named the public body to promote accountability and to ensure there is a public record of where the privacy breach occurred.

Conclusion on the Preliminary Issue

[17] This office's Review Reports will, in all but the most exceptional cases, be published in full. The present case is a rare exception.

[18] The remainder of this Review Report, following this paragraph, will be delivered only to the Complainant and the Department of Justice.

Graham Steele
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