

NUNAVUT INFORMATION AND PRIVACY COMMISSIONER

Review Decision 03-10
March 31, 2003
Review File: 02-263-5

A. BACKGROUND

By letter dated March 15, 2002, the Applicant requested from the Department of Sustainable Development access to specific information relating to complaints made to the Department against Leelie Enterprises Ltd. and against a specified individual residing in the small community of Qikiqtarjuaq. Specifically, the Applicant was seeking

- a) the nature and specifics of the complaints;
- b) the evidence supporting the complaints; and
- c) the names of the complainants;

On April 10th, the Department responded to the Applicant's request, advising them that there would be a delay in responding to the request because Third Parties affected by the request were being informed of the request for information pursuant to section 26 of the *Access to Information and Protection of Privacy Act*. On May 13, 2003, the Department further responded to the Applicant indicating that 45 items responsive to the request for information had been identified. Some information within the identified records was withheld or edited. Where information was edited, an explanation for the editing was provided. The letter also indicated that they were still waiting for responses from some of the Third Parties involved and that they were not providing any of the information relating to the Third Parties until they had the opportunity to respond. On July 22nd, the Department wrote yet another letter to the Applicant indicating that the consultation had been completed and that three of the five individual Third Parties had responded to the request for their input with respect to the disclosure of the information in question and all three clearly indicated that they wished to have their privacy protected. In light of this, the Department indicated, they had decided to protect the identity of all five of the Third Parties involved, based partly on the unanimity of the

responses that they did receive and partly on the fact that the community of Qikiqtarjuaq is a small community where the release of the records requested could spark significant inter-community conflict.

On October 23rd, 2002, the Applicant requested that I review the decision of the Department to withhold some of the records identified as being responsive to the Request for Information. In the Request for Review, the only issue which the Applicant requested me to review was the Department's refusal to provide the names of the complainants.

The Department was asked for their explanation, which was provided and shared with the Applicant. The Applicant provided a detailed response which raised some new issues and the Department was asked to address these issues. The Department's response was, once again, shared with the Applicant.

B. ISSUES AND THE PARTIES' POSITIONS

The only issue that I have been asked to review is whether the Applicant is entitled to receive the names of the Third Parties who made complaints against a corporate entity (Leelie Enterprises Ltd) and an individual living in the small community of Qikiqtarjuaq.

I have had the benefit of reviewing unedited version of all of the records identified as being responsive to the Request for Information so that I can assess the application of the exemptions.

The Department takes the position that the disclosure of the names of the Third Parties who made the complaints in question would be presumed to be an unreasonable invasion of the personal privacy of the individual Third Parties pursuant to section 23(2)(h) and (i) of the Act and that the information cannot, therefore, be disclosed. Section 23 (1) and the relevant parts of section 23(2) read as follows:

- 23.(1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.
- (2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where
- (h) the personal information consists of the third party's name where
 - (i) it appears with other personal information about the third party, or
 - (ii) the disclosure of the name itself would reveal personal information about the third party;
 - (i) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation;

The Department further takes the position that, even if the release of the Third Parties names does not fall under one of the presumptions outlined in section 23(2), they have determined that the release of the names would still be an unreasonable invasion of the personal privacy of the Third Parties, keeping in mind the guidelines set out in section 23(3) of the Act. The relevant parts of that section read as follows:

- (3) In determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of the Northwest Territories or a public body to public scrutiny
 - (c) the personal information is relevant to a fair determination of the applicant's rights;
 - (e) the third party will be exposed unfairly to financial or other harm;
 - (f) the personal information has been supplied in confidence;

- (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

The Applicant, on the other hand, argues that in order for a presumption of unreasonable invasion of a Third Party's privacy to arise, the name has to appear in conjunction with other personal information about the individual in order to meet the presumption set out in section 23(2)(h). It is their submission that the names of the Third Parties who filed the complaints is not information that falls under any of the presumptions of unreasonable disclosure. They also point to the definition of personal information set out in section 2 of the Act which specifically excludes from the definition a person's personal opinion about someone else.

"personal information" means information about an identifiable individual, including

- (a) the individual's name, home or business address or home or business telephone number,
- (b) the individual's race, colour, national or ethnic origin or religious or political beliefs or associations,
- (c) the individual's age, sex, sexual orientation, marital status or family status,
- (d) an identifying number, symbol or other particular assigned to the individual,
- (e) the individual's fingerprints, blood type or inheritable characteristics,
- (f) information about the individual's health and health care history, including information about a physical or mental disability,
- (g) information about the individual's educational, financial, criminal or employment history,
- (h) anyone else's opinions about the individual,
 - (i) the individual's personal opinions, except where they are about someone else;

Their position is that the complaint is nothing more than an opinion expressed about the corporate entity and the individual by the Third Parties and that by definition, the names of the individuals who made the complaints in this context is not personal information.

With respect to section 23(2)(i) of the Act, they take the position that this section does not apply to this case as the complaints cannot be classified as a “personal recommendation or evaluation, character reference or personnel evaluation”. In any event, they say, the content of the complaints has already been disclosed.

Finally, the Applicant takes the position that section 23(3)(c) favours the disclosure of the names of the complainants in that fairness cannot exist where the party complained against is denied knowledge of the identity of his accuser.

C. DISCUSSION

1. Section 23(2)(h)

The Department of Sustainable Development in this case found itself walking a very difficult line in trying to balance the two competing objects of the *Access to Information and Protection of Privacy Act*. One of the stated objectives of the Act, of course, is to foster open and accountable government by giving the public the right to access governmental records. On the other hand, the Act also provides for the protection of personal privacy and provides rules and guidelines to prevent the unreasonable invasion of individual privacy.

The Department takes the position that the names of the persons who made the complaints about the company and the individual cannot be released because they constitute “personal information”. The Applicant, on the other hand, argues that names of individuals can only be personal information if that information appears in conjunction with other personal information and that is not the case here.

In fact, section 23(2)(h) provides that there will be a presumption of unreasonable disclosure of personal information where it appears with other personal information about the third party, **or** the disclosure of the name itself would reveal personal information about the third party. I am of the opinion that the disclosure of the individuals names in this case would, in itself, reveal other personal information about the Third Party, that is, the fact that they made a complaint to an authority. I am supported in this opinion by the Ontario Information and Privacy Commissioner's Office. In its Order 171 (Appeal 890023) concerning the Ministry of Municipal Affairs, the issue was whether the names of the persons who signed a petition by themselves could be considered to be personal information. The Inquiry Officer made the following comments:

The petitioners' names are personal information under clause (h) of the definition of personal information in s.2 of the Act because disclosure of the names would reveal other personal information about the petitioners.

Specifically, the record requested is the names only, without other personal information relating to the petitioners. In this case, however, the names do not appear alone but in the context of having signed a petition requesting a review of municipal practices. Disclosure of the names would reveal the fact that identifiable individuals signed the petition, which is other personal information about the petitioners.

I am persuaded by the argument put forward by the institution to the effect that the names of the petitioners qualify as "personal information" under subparagraph (h) of the definition of "personal information" set out in section 2(1) of the Act. The disclosure of the names of the petitioners in this instance would "reveal other personal information" about them, that being, that they signed a petition requesting the Minister of Municipal Affairs to establish a formal inquiry to investigate certain activities of the Belleville Municipal Council.

The situation is the same in this case where the disclosure of the names of the individuals involved will reveal other personal information about them, that being that they filed complaints with the Department. It is my opinion, therefore, that the disclosure of the individual Third Party's names in this case would be an unreasonable invasion of their personal privacy. In those circumstances, the *Access to Information and Protection of Privacy Act* provides that the Department **MUST** refuse to disclose

the information. It's refusal to provide the names, therefore, is justified pursuant to section 23(2)(h) of the Act.

Section 23(2)(i)

Although this is sufficient to decide the matter, other arguments have been put forward by both sides and I propose to address those arguments as well.

Section 23(2)(i) provides that the disclosure of personal information is to be presumed to be an unreasonable invasion of privacy where the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation. I agree with the Applicant in this case that the making of a complaint against either another individual or a corporate entity is not in the same category as a personal recommendation or evaluation. In my opinion, section 23(2)(i) appears to contemplate an employment situation or a formal evaluation process rather than the situation involved in this case. It is my opinion that section 23(2)(i) does not apply in this case to create a presumption of unreasonable invasion of privacy.

Section 23(3)

Even where there is no presumption of unreasonable invasion of Third Party privacy, the Act recognizes that there will be other circumstances in which the disclosure of information would constitute an unreasonable invasion of privacy. Section 23(3) provides that the public body must consider all of the circumstances surrounding the information and make a determination based on those circumstances as to whether or not the disclosure of the information would constitute an unreasonable invasion of the Third Party's privacy. The section goes on to list a number of considerations which might be taken into account in making this determination. Both parties have relied on this section in support of their positions, pointing to one or two of the enumerated considerations. In particular, the Applicant points to subsection (c) which suggests that

one of the considerations that must be taken account of is whether the personal information is relevant to a fair determination of the applicant's rights. The applicant in this case says that they cannot address the complaints made against them unless they know the source of the complaints. Having reviewed the documents in question, it is my opinion that it is not necessary for the Applicant to know who made the complaints in order to answer them, as the complaints are specific and fairly well defined. However, even if that were not the case, no one consideration enumerated in subsection 23(3) will be determinative of the issue. Rather, the section requires the public body to look at ALL of the circumstances. In this case, the public body took into account a number of aspects of the matter. The very small size of the community and concerns that the disclosure of the names of the individuals might have significant repercussions in the community as a whole and to the individuals who made the complaints are appropriate and relevant considerations. One of the primary objectives of the *Access to Information and Protection of Privacy Act* is to ensure accountability of the government. It is important that individuals who provide information in confidence can rely on the public body to maintain their confidence or the risk is that the inappropriate use of public funds or public position will go unreported. In considering the facts of this case, I am of the opinion that the public body weighed all of the circumstances. Had there been no presumption of unreasonable invasion of privacy in the release of the names of the complainants, I am persuaded that the public body properly balanced their decision in this case by providing the Applicant with all of the specifics of the allegations made but in declining to disclose the names of the individuals who made the complaints.

Definition of "personal information"

The Applicant argues that the complaints made constitute opinions about another person and, because of the definition of "personal information" do not, therefore fall under the definition which specifically excludes an individual's personal opinions about someone else.

I am prepared to accept, for the purposes of this discussion, the argument that the complaints themselves do not constitute the personal information of the Third Parties

who made them. However, in this case, the complaints have not been withheld. The Applicant has received the complaints made by the Third Parties. The only thing that the Applicant has not received is the names of the individuals who made the complaints. The names of those individuals who made the complaints remains personal information as defined. Only the opinion itself does not fall under the definition of personal information. I am not persuaded by the Applicant's argument that simply by virtue of voicing an opinion an individual gives up the privacy protections of the Act.

D. RECOMMENDATION

Having reviewed the positions of all of the parties in this case, I agree with the position taken by the Department in this case in refusing to disclose the names of the individuals who made complaints against Leelie Enterprises. The Public Body in this case has properly balanced the public's right to access with the individual's right to privacy. I recommend that no further action be taken by the Department in connection with this Request for Information

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner