NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 09-048
March 4, 2009

Review File: 08-222-5

BACKGROUND

On December 14th, 2008, I received a request from the Applicant to review a decision made by the Department of Economic Development and Transportation to refuse access to certain information requested by the Applicant. The Applicant had requested

> All e-mails from Rosemary Keenainak containing information on political election campaign activities, political election predictions, and political election results for the period January 1, 2008 to October 16, ,2008.

The public body took the position that certain of the contents of the responsive records contained personal information of a third party, and that they were therefore prohibited, pursuant to section 23 of the *Access to Information and Protection of Privacy Act*, from disclosing that information. Specifically, they said, that the e-mails in question contained Ms. Keenainak's "personal opinions communicated in confidence to friends and were not written or sent as part of her professional duties or using her authority as Deputy Minister".

The contested records consist of two emails sent on September 29th, 2008 to three other Deputy Ministers, one Assistant Deputy Minister and two directors. The emails were sent from Ms. Keenainak's government email address over the Nunavut email system, apparently during government business hours. Both emails contained electronic signatures identifying the sender as Rosemary Keenainak, the Deputy Minister of Economic Development and Transportation. Both of the emails contained Ms. Keenainak's predictions as to the outcome of Nunavut's Territorial election. All of this information was apparent from those parts of the records which the Applicant did receive from the public body in response to his Request for Information.

THE DEPARTMENT'S POSITION

The Department provided me copies of the records which were provided to the Applicant, both in their original form and in the format in which they were provided to the Applicant, with certain parts of the email severed.

The public body takes the position that the information which has been severed from the emails is the personal information of a "third party" (Ms. Keenainak) as defined in the *Act* and that section 23 of the *Act*, therefore, prohibits the disclosure of the information. They also suggest that, because the information in question is the personal information of a third party, the onus of establishing that the Applicant is entitled to receive the information lies on him pursuant to section 33 of the *Act*, and not on the public body. They further go on to argue that the Applicant has not met that onus.

It is the public body's submission that while Ms. Keenainak is deputy head of a public body, the requested emails were in no way associated with her professional duties, nor was she exercising her authority as a deputy head when sending them. They say that the signature at the bottom of the page is automatically appended by the government's email application. They further point out that the recipients of the emails were not her staff and do not report to her. It is submitted that the emails were merely "idle speculation among friends" as to the possible results of the election campaign under way at the time. The severed information, they say, consists of the specific candidates which Ms. Keenainak was predicting would win their respective ridings.

The Department takes the position that, in this context, Ms. Keenainak is a "third party" as she was not carrying out duties as an employee of a public body when she sent the emails. Instead, they say, she was engaging in personal correspondence. It is their contention that the severed sections of the emails reflect an aspect of Ms. Keenainak's political beliefs and personal opinions and as such are her personal information as defined in section 2 of the *Act.* They therefore take the position that section 23(1) of the *Act* prohibits the disclosure of the information in question as the disclosure would

constitute an unreasonable invasion of Ms. Keenainak's personal privacy pursuant to section 23(2)(h)(i). Were this information to be disclosed, her name would be associated with her personal beliefs and personal opinions and that would be a breach of the *Act.*

THE APPLICANT'S POSITION

The Applicant's position was set out in his initial Request for Review as indicated above. He felt that because the emails originated from Ms. Keenainak's government email address, were sent over the Nunavut email system, apparently during government business hours and identified the sender under electronic signature as the Deputy Minister, they could not be classified as "personal correspondence".

He was invited to respond further to the Department's submissions but no further submissions were received from him.

THE RELEVANT SECTIONS OF THE ACT

The relevant provisions of the *Access to Information and Protection fo Privacy Act* for the purposes of this review are the following:

1. The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

   (a) giving the public a right of access to records held by public bodies;
   ....
   (c) specifying limited exceptions to the rights of access;

2. 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,

.....

(h) anyone else's opinions about the individual,

....

(i) the individual's personal opinions, except where they are about someone else;

"third party" means a person other than an applicant or a public body;

3.(1) This Act applies to all records in the custody or under the control of a public body

5.(1) A person who makes a request under section 6 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

(2) The right of access to a record does not extend to information excepted from disclosure under Division B of this Part, but where that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.

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;

(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 Nunavut or a public body to public scrutiny;

(b) the disclosure is likely to promote public health and safety or to promote the protection of the environment;

(c) the personal information is relevant to a fair determination of the applicant's rights;

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people;

(e) the third party will be exposed unfairly to financial or other harm;

(f) the personal information has been supplied in confidence;

(g) the personal information is likely to be inaccurate or unreliable; and

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

4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where

....

(e) the personal information relates to the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council;

DISCUSSION

This case raises a number of issues about the nature of email and the use of the government email system by employees for conducting personal correspondence and

personal business. The obvious question is whether, when an employee uses a government computer to send an email over the government email system, it can ever be considered personal correspondence. Is the sender a "third party" pursuant to the *Act*, such that the disclosure of the contents of an e-mail might be considered an unreasonable invasion of that person's privacy? If so, where does one draw the line between a personal communication and one that takes place in the employment context? Who has the onus of establishing that the email qualifies as a third party communication?

Is Ms. Keenainak a "Third Party" as defined in the Act?

The use of the government email system for personal correspondence has been the focus of a number of discussions I have had over the years with numerous public bodies and others. I have consistently warned that when the government system is used for personal correspondence, the author risks that it will become the subject of an access to information request. It may be in some cases that it is fairly clear that the communication was entirely outside of the realm of the person's duties as an employee. In this case, however, we have a senior bureaucrat discussing with other senior managers her thoughts on an election which could well affect their respective departments in the future. The communication may not have been directly attributable to a specific file or project within Ms. Keenainak's mandate, but her position as a deputy minister is such that this kind of discussion would not necessarily fall outside of the general kinds of discussions which senior bureaucrats have with one another in the course of their employment. Those elected to the Legislative Assembly may well have an impact on how departments are run and it would be reasonable to expect that Deputy Ministers and other senior managers would have a legitimate interest in the outcome of the election insofar as it relates to the running of their department.

If a senior government employee wishes to be classified as a third party for the purpose of attracting the protection of section 23 of the *Act*, in my opinion the onus lies on the public body or the employee to establish that fact. In this case, having regard to the

content of the email, the fact that it was sent under electronic signature through the government email system during regular business hours and to other senior government employees, I am not satisfied that Ms. Keenainak is a "third party" whose personal information might be affected by the disclosure of the record in question.

Do the severed parts of the records constitute Ms. Keenainak's personal information?

Assuming that I am wrong in that conclusion, however, we need to consider whether the information severed from the responsive document constitutes Ms. Keenainak's personal information. The public body suggests that the disclosure of her predictions about who will win each riding in the Nunavut election would somehow disclose her political beliefs. I disagree. All the email does is give the names of people she is predicting will win each riding. There is no indication at all in these emails as to whether she agrees or disagrees with the politics of any of the candidates or whether she supports any of them, nor is there any explanation from her as to why she has made the predictions which she has. The contents of the email include nothing more than simple predictions with no values or comments attached. Nothing in the emails would, in my opinion, reveal any of Ms. Keenainak's personal political beliefs or her political leanings.

The public body further takes the position that the severed portions of the emails would reveal Ms. Keenainak's personal opinions and that those are her personal information, the disclosure of which would be an unreasonable invasion of her privacy. I'm not sure that I agree with this statement either. Is an " idle speculation" or a prediction the same thing as an opinion? An opinion is completely subjective, where a prediction has more of an element of objective observation. There is nothing in the email that suggests that she supports any of the candidates she had mentioned, or that she thinks they deserve to win, or even any reasons why she has made the predictions she has made. There is nothing which suggests that she has any opinion about any of the candidates named or whether or not, in her opinion, they should win....just her predictions about who will win. Furthermore, to the extent that the list does constitute Ms. Keenainak's

personal opinion, it is her opinion about other persons and is not, therefore, Ms. Keenainak's personal information, but that of the persons named in the list.

Furthermore, section 23(2)(h) does not protect the information from disclosure. Section 23(2)(h) provides that there is a presumed unreasonable invasion of privacy where the personal information consists of the third party's name and the name appears with other personal information about the third party or where the disclosure of the name itself would reveal personal information about the third party. Here, the information which has been severed is not Ms. Keenainak's name. The information which the public body seeks to sever is the name of other persons. This section cannot, therefore, apply.

Would the disclosure of the severed information constitute an unreasonable invasion of the personal privacy of the persons named?

In my opinion, the disclosure of the names of the people who appear in these e-mails would not meet any of the requirements necessary to classify such a disclosure as an unreasonable invasion of the privacy of those persons. It was a matter of public record that they were all running for office. Nothing in the severed parts of the emails would reveal anything else about the named individuals. Those who run for office fully expect that electors will have opinions about them and the outcome of the election. The disclosure of the names in this context could not constitute an unreasonable invasion of the personal privacy of the named politicians.

SUMMARY AND RECOMMENDATION

Keeping in mind that one of the purposes of the *Act* is to provide access to public records, and that exceptions to disclosure should be limited and narrowly interpreted, it is my recommendation that the severed parts of the two emails be disclosed.

I am not satisfied that Ms. Keenainak is a third party as defined in the *Access to Information and Protection of Privacy Act* in the circumstances of this case. That is

sufficient to deal with the matter because the exception to disclosure in section 23 applies only to third party personal information. However, even if Ms. Keenainak is a third party, the information which has been severed from the emails in question cannot be classified as her personal information, the disclosure of which would be an unreasonable invasion of her privacy.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner