

NUNAVUT INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 10-050
November 10, 2010

Review File: 10-143-5

BACKGROUND

This review arises out of a request made by the Applicant to the Department of Human Resources for information relating to Educational Leave granted to employees of the Territorial Government in Nunavut. Specifically, the Applicant requested:

As per HR Directive 309, Section 25, copies of the “annual report of all approved Education Leave applications for submission to the Department of Human Resources (Training and Development Division)” submitted by departments for the last five years, specifically outlining the details of approvals granted for “employee requested” Long Term Education Leave.

Details to include, but not limited to:

- Department that the application was made to
- Employee position within the Department
- Term of employment prior to application for Education Leave
- Term of employment in position held at the time of application for Education leave
- the pay range of the employee at the time of application for Education Leave
- Education Program applied for
- the term of Education leave approved

The request also included a request that if the information was not available in the format stipulated (i.e. in annual reports), it information be gathered, collated and provided to him. There was a further request for a copy of the terms of reference for all Departments’ Education Leave committees.

The Department provided the Applicant with a response which included three entries, relating only to the Department of Human Resources. These three entries indicated that three employees had received Education Leave within the time period specified. For these three employees, the record showed the Employee Position within the Department, the Pay Range for the position and the length of the Education Leave granted. No names were provided. The response further indicated that the disclosure of any further information was prohibited pursuant to section 23 of the *Access to Information and Protection of Privacy Act* which precludes the disclosure of personal information where that disclosure would be an unreasonable invasion of the privacy of a third party.

When the Applicant received the response to his request, he pointed out that he was looking for the information government wide, not merely from one department. He also amended his request to include, as well, “the partial allowance in lieu of salary paid to each employee receiving Educational Leave for the term of the leave approved”.

It seems that there was a good deal of discussion between the Manager of Information and Privacy and the Applicant, much of it by e-mail and telephone, during which the Manager of ATIPP attempted to explain to the Applicant that adding any more information to the Request for Information may result in identifying the individuals who had received funding and that he risked getting less, rather than more information as a result. Unfortunately, the Manager’s explanation in the first instance was, perhaps, not as specific as it might have been and the Applicant fixated on it a little bit such that the discussion went off the rails and the matter ended up on my desk.

It seems that there were no “annual reports” submitted to the department as contemplated in the Applicant’s initial request for information. According to the Manager of ATIPP, each department keeps its own records of Educational Leave granted which means that the information government wide is not readily available without requesting it from each department. In the circumstances, the Manager of ATIPP decided to step in and co-ordinate a response to the Applicant. This, however,

happened only after the Applicant had received a response to the request for information from the Department of Human Resources, apparently for that department only.

The Manager of ATIPP, in consultation with the departments, determined that the information that could be disclosed to the Applicant was the following:

- a. the Department that the application for Educational Leave was made to
- b. the Employee position within the department
- c. the pay range of the Employee at the time of the application for Educational Leave
- d. the term of the Education Leave approved
- e. the terms of reference for all Departments' Education Leave Committees

They further determined that the following information could not be disclosed without offending section 23 (unreasonable invasion of third party privacy):

- a. the Education program that was applied for
- b. the term of employment prior to the application for Education Leave
- c. the term of employment in the position held at the time of the application for Education leave
- d. the partial allowance in lieu of salary paid to each employee receiving Educational Leave for the term of the leave approved

There were, at this point, apparently a number of discussions between the Manager of ATIPP and the Applicant in an attempt to try to find a combination of information that would meet his needs without identifying and disclosing the personal information of third parties contrary to section 23. None of the combinations of information suggested by the Manager were satisfactory to the Applicant and he asked to put his application on hold until a reasonable solution could be found that would allow him to get the information he wanted without breaching privacy. The Applicant was told that they could not put his application on hold, but that he could withdraw or cancel his request.

As a result, it appears that the Applicant cancelled his request for information, but continued to discuss the matter with the Manager in an attempt to find a way to provide him with the information he was seeking. It was at this point that it became clear that the information that the Applicant was really focused on receiving was the amount of partial allowance in lieu of salary paid to the employee for the term of the leave approved. The Manager took the position that that information could not be disclosed because to do so would most likely identify the individual and that would result in an unreasonable invasion of that person's privacy.

The public body relies specifically on section 23(2) (d) and (f) . Section 23(1) provides that a public body is prohibited from disclosing information where that disclosure would result in an unreasonable invasion of a third person's privacy. Section 23(2) provides guidance for when the disclosure will be deemed to be an unreasonable invasion of privacy. Specifically, they rely on Section 23(2)(d) and (f). These provisions state that the disclosure of personal information about a third party will deemed to constitute an unreasonable invasion of privacy if

- a) the information relates to employment, occupational or education history or
- b) if the information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities or credit worthiness.

Not discussed in detail by the public body, but relevant to the discussion, is section 23(4), particularly subsections (e) and (h) which outline circumstances in which the disclosure of information is specifically stated NOT to constitute an unreasonable invasion of an individual's privacy. These circumstances include:

- where 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;

- where the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, but not personal information supplied in support of the application for the benefit or that is referred to in paragraph (2)(c); or

DISCUSSION

I understand the position taken by the public body in this case. They are rightfully concerned about breaching the privacy of third parties. Because of the relatively small population of Nunavut, it is easy to inadvertently reveal the identity of an individual without meaning to by revealing only small details. For instance, disclosing the fact that an employee who resided in Arviat and who was a Wildlife Officer with the Department of the Environment received Educational Leave, when there is only one person in the community holding that position, is tantamount to identifying that person, even without naming them.

I appreciate the fact that the public body was willing to try combinations and permutations of the information that the Applicant was seeking in order to allow him access to the most information possible. I am not, however, convinced that more could not be disclosed without identifying individuals or revealing their personal information. Section 23 has to be read as a whole. In particular, I would point out that both 23(4)(e) and 23(4)(h) provide specifically that it is NOT an unreasonable invasion of a third party's privacy to disclose the details of a discretionary benefit received by them. Although it is not absolutely clear from the materials provided to me, it would appear that Educational Leave and compensation provided for that leave are discretionary benefits. It seems to me, therefore, that the disclosure of the fact that an individual received Educational Leave benefits and even the amount of benefit he/she received would not, by itself, constitute an unreasonable invasion of privacy.

With this in mind, it seems to me that various combinations and permutations of information could be made available to the Applicant without constituting an

unreasonable breach of the privacy of the third parties. The Applicant cannot, however, have all of the information he has requested as to do that would reveal far more than how much was received by specific individuals by way of Education leave benefits. In other words, I agree with the public body that they cannot disclose all of the information requested. I do not, however, necessarily agree with their lists of what can and cannot be disclosed.

Based on the information received from the Applicant, it appears that, from his perspective, the most vital piece of information that he wants is the partial allowance in lieu of salary paid to each employee receiving Educational Leave for the term of the leave approved. If one starts with this as the most important piece of information that the Applicant wants, I think that most of what he is asking for can be disclosed without offending the prohibition contained in section 23(1). Keeping in mind that Educational Leave is a discretionary benefit, and that the disclosure of the range of pay for employees is not to be considered an unreasonable invasion of a third party's privacy, I would suggest that the following information can be disclosed without contravening the Act:

- a) the Department that the application was made to
- b) pay range for the employee at the time the application was made
- c) the length of time for which the Education leave was granted
- d) how long each employee had been an employee when Education leave had been granted (in yearly increments)
- e) the partial allowance in lieu of salary (expressed as a range - eg. between 30 and 40 percent of pay or between \$30,000.00 and \$40,000.00)
- f) the terms of reference for all Departments' Education Leave committees.

Although this does not give the Applicant all of the information he was asking for, it covers everything except the position which the person held at the time the application was made and the period of time that the employee had been in that particular position (protected by section 23(2)(a) - employment history) and the course of studies intended (also protected by section 23(2)(a) - educational history). The disclosure of the rest of

the information, to the extent that it might identify an individual or disclose personal information about that person, would not constitute an “unreasonable” invasion of privacy as defined in the Act by reason of sections 23(4)(e) and (h) as they relate to discretionary benefits.

SUMMARY AND RECOMMENDATION

I have often said that the balancing between the right of the public to obtain information under the *Access to Information and Protection and Privacy Act*, and the obligation placed on government to protect the privacy of individuals is a difficult one to navigate. In this case, the public body erred on the side of caution in not disclosing as much information as they might have because they were concerned about the possibility of breaching the privacy of third parties. I appreciate this approach and think it was the right one to take. That said, however, I think that when one analyzes section 23 in its entirety, the public body should be disclosing the information outlined above and I recommend that they do so.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner