

# NUNAVUT INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 12-055  
January 23, 2012

Review File: 10-181-5

## **BACKGROUND**

This Request for Review comes from the Nunavut Employees Union (NEU). The union requested information in relation to the terms and conditions of the resignation of one of its members. The public body's response to the request resulted in the disclosure of one piece of paper, which appears to be a copy of a hand written letter from the union member (who will be referred to herein as A.B. for ease of reference) in which he asks the employer to accept his resignation as of 5:00 pm on the date of the letter. The union provided the public body with a written consent from A.B. which authorized the public body to disclose his personal information to the union.

In the public body's submission to me with respect to the matter, the public body indicated that they had identified only one document in direct response to the original request from the union, but that the union had provided clarification of their request which, in their view, widened the scope of the request. A number of documents were identified which were responsive to the "widened scope" request. The public body says that "upon a review of the related materials, and in conversation with Senior Management, it was determined that the best course of action was to release the one page resignation letter as per the original ATIPP request, while keeping the remainder of the materials requested in the Nunavut Employees Union (NEU) follow-up letter undisclosed for the time being", on the basis that the disclosure would constitute an unreasonable invasion of A.B.'s privacy.

The public body went on to explain that the circumstances surrounding A.B.'s resignation were such that criminal proceedings were being contemplated against him. They decided, therefore, that based on the sequence of events that led to A.B.'s resignation:

it was deemed appropriate not to disclose the information at this time. Although [A.B.] consented to the NEU having access to his personnel files, this may not have been informed consent, as releasing information about potential criminal activity to a third party is not the norm. The [public body's] motive was to protect the integrity of [A.B.], not to circumvent the ATIPP process.

## **ISSUE**

The issue here is whether the public body properly refused to disclose the additional records in response to the union's request, notwithstanding the consent of A.B.

## **THE RELEVANT SECTIONS**

Section 23(1) of the ATIPP Act provides that 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. This is a mandatory section and if the information in question would constitute an unreasonable invasion of an individual's personal privacy, the public body is prohibited from disclosing it. In the absence of a consent from A.B., the records requested by the union in this case would clearly fall within the prohibition of this section. Section 23(4), however, provides that a disclosure of personal information is **not** an unreasonable invasion of a third party's personal privacy where, among other situations, the third party has, in writing, consented to or requested the disclosure.

## **DISCUSSION**

The issue here is whether a public body can refuse to disclose records to an Applicant which contain the personal information of an individual, the disclosure of which would constitute an unreasonable invasion of that individual's privacy but for the existence of a written consent from the individual, where the public body questions whether the consent is fully informed and the information contained in the records might be detrimental to the individual.

It is not entirely clear from the information provided to me why the union was seeking to obtain information about the circumstances surrounding A.B.'s resignation. It is very possible that the union was seeking the information as agent for and on behalf of A.B. to represent his interests in connection with his resignation, which appears not to have been altogether voluntary. The union did not give any background about the reason they were seeking the information. It is also possible, of course, that the union was seeking the information for a purpose that had absolutely nothing to do with assisting or representing A.B.. Although the Applicant's reasons for requesting information are not usually relevant except, perhaps to provide context or to narrow the scope of a request, in this case it would have been very helpful to have this information.

Regardless of the purpose behind the union's request for information about A.B.'s resignation, the union produced a consent to the disclosure of information from A.B.. A.B. was apparently willing to allow the union access to his personal information. I was not given a copy of the consent so I have no way to determine whether or not there were any limitations to the terms of the consent. However, the circumstances were such that the public body was concerned that the consent was not an informed consent, particularly because of the possibility of criminal prosecution and the fact that the requested records contained information that might lead to criminal sanctions against A.B.. There is no suggestion that the public body followed up with A.B. to confirm the nature and extent of the consent given. Nor did they follow up with the union to ask them to provide evidence that A.B.'s consent was fully informed. Rather, the public body simply decided that they didn't think that A.B. really wanted the information disclosed and refused to disclose it to the union.

On the surface, the public body had the consent of A.B. to the disclosure of the information requested. By definition, therefore, the disclosure of the information would NOT be an unreasonable invasion of A.B.'s personal information and, under the general scheme of the Act, access is the rule and exceptions to disclosure are to be narrowly interpreted and defined. There was no reason not to disclose the requested documents.

While I may understand the public body's concern about disclosing information to the union where the records might include incriminating information, I do not understand their resulting refusal to disclose. It seems to me that the appropriate thing for them to do if they were uncertain about the efficacy of the consent provided would have been to contact A.B. to make sure that he understood the nature and extent of his consent and the possible consequences of such disclosure. Alternately, the public body might have followed up with the union asking them to provide a more specific consent, which addressed their concerns such that it:

- a) was clear and unambiguous as to the records which A.B. was consenting to the release of,
- b) included a statement as to the purpose of the disclosure (e.g. - so that the union can represent my interests in relation to my recent resignation),
- c) included a statement acknowledging that he understood that the records might include information which could have a detrimental impact on him personally if disclosed,
- d) included a statement that the union is not subject to the privacy provisions of the ATIPP Act,
- e) included a statement that A.B. understood and was prepared to agree to the disclosure notwithstanding these possibilities.

In my opinion, refusing disclosure in this circumstance, without more, is simply not the appropriate response. It is not for the public body to simply ignore a consent received and assume that the person consenting doesn't really know what it is he consented to. This is paternalistic and not in accordance with the terms of the Act. If there is a question about the efficacy of a consent, it is incumbent on the public body to follow up.

## **RECOMMENDATIONS**

In light of the above, I recommend as follows:

- a) that the public body follow up directly with A.B. to satisfy themselves that his consent to the disclosure of his information to the union is fully informed and that he understands the possible consequences of such a disclosure;
- b) in the alternative, that the public body require the Applicant (NEU) to provide a more specific consent as set out above or in such other format which would satisfy a reasonable person that A.B. was aware of his right to refuse his consent and that the records requested may reveal information that could have a negative impact on him;
- c) if they receive verification that A.B.'s consent is genuine and informed, that the responsive records be disclosed to the Applicant;
- d) should A.B. not be willing to allow his consent to stand, then the Applicant will have leave to ask this office to review the remaining records with a view to determining whether there are any parts of the records in question that can be disclosed notwithstanding the lack of consent from A.B.
- e) if not already done, that the Government of Nunavut develop a form of consent that can be used (on a non-mandatory basis) by third parties to provide their consent to the disclosure of their personal information to an Applicant which includes the necessary cautions about the possibility of further disclosure.

**Elaine Keenan Bengts**  
**Nunavut Information and Privacy Commissioner**