

NUNAVUT INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 13-063
May 10, 2013

Review File: 12-191-5

BACKGROUND

In October, 2012, I received a request from the Applicant in this matter to review the response he had received to his Request for Information. The request for review was made within the 30 days for such a request, as contemplated under Section 29 of the *Access to Information and Protection of Privacy Act*, but the Applicant requested more time to review the voluminous materials he had received before providing his specific objections. Those particulars were received in early January and were provided to the public body for its comments. In February, I received the public body's comments, which were passed on to the Applicant for his review and response, which was received in early April.

The Applicant's original Request for Information was for records surrounding certain workplace issues involving the Applicant. He made the request to two public bodies - the department he was employed with and the Department of Human Resources. Each of these departments responded separately and not all records were in the possession of both departments. That said, the Request for Review filed by the Applicant involved ALL of the records he had received from both departments. This Review arises out of the response received from the Department of Human Resources only. While the total number of records involved was significant, the Applicant asked me to focus only on 35 specific records, comprised of approximately 50 pages. Where the Department of Human Resources has indicated that it does not have any records meeting the description of the records listed by the Applicant, I am assuming that these were records provided by the department the Applicant was employed with.

The public body has provided me with copies of all of the records which it has identified as being in its possession, both in the form that they were disclosed to the Applicant and in their original form. The public body relies variously on Section 23(2)(a), 23(2)(d), 23(2)(h)(i), and 14.1((b)(i) of the *Access to Information and Protection of Privacy Act* for its refusal to disclose certain parts of the records in question. These exceptions relate to the protection of the personal information of third parties (Section 23) and the discretion provided to public bodies to

refuse to disclose records where the disclosure could be reasonably expected to reveal consultations or deliberations involving officers or employees of a public body (section 14.1).

THE RELEVANT SECTIONS OF THE ACT

It is helpful to review the most relevant provisions of the *Access to Information and Protection of Privacy Act* in relation to this request and the starting point should always be Section 1 which sets out the purposes of the legislation:

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;
 - (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves held by public bodies;
 - (c) specifying limited exceptions to the rights of access;
 - (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and
 - (e) providing for an independent review of decisions made under this Act.

Section 5 of the *Act* provides members of the public with the right to request access to records in the custody or under the control of a public body, but limits that right of access if the information is specifically excepted from disclosure under the *Act*. However, section 5(2) further requires that where excepted information can reasonably be severed from a record, an Applicant has a right of access to the remainder of the record.

Section 23 is the main section relied on by the public body with respect to the severed portions of the records provided. Subsection (1) provides that:

- 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.

Subsection (2) sets out a series of situations in which there is “presumed to be an unreasonable invasion of a third party’s personal privacy”. In this case, the public body relies largely on subsection 23(2)(a) and 23(2)(h)(i). These subsections provide that an unreasonable invasion of a third party’s privacy will be presumed where:

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

and

(h) the personal information consists of the third party's name where

(i) it appears with other personal information about the third party

If this section applies, it is a mandatory exception to disclosure. In other words, the public body is prohibited from disclosing it.

Section 14 grants public bodies the discretion to refuse access to a record or part of a record where the disclosure could reasonably be expected to reveal consultations or deliberations involving officers or employees of a public body, a member of the Executive Council or the staff of a member of the Executive Council.

If this section applies, it is discretionary and the public body must exercise its discretion and decide whether or not, in all of the circumstances, to disclose the record.

THE RECORDS

Each of the records was dealt with on a record by record/page by page basis and I will refer to the records involved as they have been identified by the parties. The first number shown is how the record was identified by the Applicant and the second number refers to the numbered pages provided to me by the public body for my review purposes. I understand that the same information often appears in more than one record and which is why the Applicant has often referred to more than one page or series of pages.

1. **Page 256 (pkg 2) and Page 833 (pkg 2a)** (Pages 3 and 4 of 66)

This is one page of a record which was identified as being part of the Applicant's correspondence with the Executive Director of the Nunavut Employee's Union in relation to a grievance. The public body masked one part of this record, consisting of one paragraph. The public body relies in this case on section 23(2)(a), saying that disclosure of the information in this paragraph would constitute an unreasonable invasion of the privacy of a third party patient.

The Applicant takes the position that this is information which was in a record which he, himself created. He knows what the paragraph says, so there can be no possible "breach of privacy".

From my perspective, there is no identifiable third party information in the paragraph in question. It refers to a patient (not by name), the presenting ailment and some discussion about treatment provided. It would be difficult, if not impossible, for anyone other than those who were directly involved in the incident, to put a name to the patient, even if you knew the community in which it happened. Out of an abundance of caution, perhaps the public body might have chosen to mask the four words following the word "with" in the first line, the two words at the beginning of the fourth sentence (line 3) and the two words following the word "and" in the last line. **I recommend** that this paragraph be disclosed with only those words masked.

2. **Page 64 (pkg 1) and Pages 172 / 252 / 257 (pkg 2) and 702 / 798 / 799 / 830 / 832 / 834 / 868 / 903 (pkg 2a)** (Pages 7- 11 of 66)

This record includes several pages of a record which appear to be parts of a longer email chain.

On the first page, the public body has masked two lines contained in an email from the Applicant to an individual with the Nunavut Employee's Union. The public body relies on Section 23(2)(h)(i) for its refusal to disclose this information. The Applicant says, once again, that he wrote the lines which have been masked and the disclosure of the lines cannot, therefore, constitute an unreasonable invasion of any third party's privacy.

In fact, the lines masked contain an opinion expressed by the Applicant about two co-workers. The opinion is not a flattering one. Section 2 of the Act defines the term "personal information"

to include information about an identifiable individual where the information is an opinion expressed about the individual. In this case, the opinion expressed by the Applicant is about two identifiable individuals. As such, the opinion is the personal information of the two third parties. This, in and of itself, is not sufficient to prohibit the disclosure of the opinion. In order for the opinion to be protected, the disclosure of the opinion would have to constitute an unreasonable invasion of the privacy of the third parties involved. In light of the fact that the Applicant himself expressed the opinion, there would be no 'disclosure' of the opinion. One might be concerned about the possibility that the Applicant, once in possession of the unedited version of the record, might disclose it further, which might well then truly constitute an unreasonable invasion of the third party's privacy. In the circumstances, however, I am not satisfied that disclosing these two lines would constitute an unreasonable invasion of the privacy of the two third parties, particularly given the very real probability that the Applicant already has a copy of the entire email saved on his own computer and the fact that the Applicant is free to express the same opinion again, whether or not he has a copy of the record in hand. My recommendation would be different if it were some other third party seeking the record.

I recommend that these two lines be disclosed.

On the next page on which some information has been deleted, the public body has deleted part of the second paragraph (page 9 of 66). Again, the information excluded is an opinion expressed by the Applicant. It is not an opinion about a specific individual. It is an opinion (again, not a flattering one) held by the Applicant about the way in which the office in which he was employed was being run. That said, when read in the context of the rest of the record, one would be able to easily identify the individuals who were running the office and it may, for that reason, be considered the personal information of those individuals. However, for the reasons outlined above, I cannot see how the disclosure of these two lines could constitute an unreasonable invasion of the privacy of the third parties involved. **I recommend** that this page be disclosed without editing.

The third page of this record which has been edited is similar to the two discussed above. The record appears to be one originating from the Applicant in which he, once again, makes less than flattering comments about certain co-workers. In this case, the first sentence of the paragraph deleted is not a statement of opinion, but is a statement of observations from the Applicant's viewpoint. The second sentence does constitute an opinion about the third parties

named. For the same reasons set out above, however, **I recommend** that this page be disclosed to the Applicant.

3. **Page 165 (pkg 2) and Page 706 / 740 / 741 / 794-795 (pkg 2a)** (pages 13 and 14 of 66)

The record provided to me shows that this record has been provided to the Applicant with no redactions. I therefore make no further comment or recommendation.

4. **Page 169 (pkg 2)** (pages 16 and 17 of 66)

The record provided to me by the public body shows that it was provided to the Applicant without redactions. I therefore make no further comment or recommendation.

5. **Page 053 / 066 (pkg 1), Page 163 (pkg 2), Page 793 (pkg 2a)** (Pages 19 to 24 of 66)

Again, the records provided to me by the public body show that these were provided to the Applicant without redactions. I therefore make no further comment or recommendation.

6. **Page 397 / 406 / 490 / 499 (pkg 2), Page 855 / 929 / 932 / 949 (pkg 2a)**

The public body advises that it has no records which meet this description. There are, therefore, no redactions and no recommendation to be made.

7. **Page 340 / 341 (pkg 2), Page 747-748 / 761-762 (pkg 2)** (Pages 25 to 29 of 66)

The first page of this record contains no redactions. On the second page, however are a number of edits. This once again appears to be from a record which was written by the Applicant himself. At the end of the first paragraph, the public body has redacted part of a sentence in which the Applicant offers an opinion about a certain aspect of a fellow employee's approach to the job. It is an opinion about the third party and as such is the third party's personal information. However, for the same reasons as outlined above, I am not convinced that the disclosure of the opinion would constitute an unreasonable breach of that person's privacy. **I recommend that the last sentence of the first paragraph on this page be disclosed.**

The next redaction is after the words "January 16, 2012" in the second paragraph of the page. Much of this paragraph has been redacted by the public body on the basis that it contains information about an unnamed patient, the disclosure of which would be an unreasonable invasion of the third party patient's privacy. It seems to me that it is unlikely, even in a small community, that the disclosure of the information in this record would disclose personal information about an identifiable individual. The patient is not named. The complaint discussed is not something so unique as to identify the patient merely because of the ailment. Subsequent parts of the same paragraph identify the patient as a child. Again, out of an abundance of caution, perhaps the seven words at the beginning of the second line of this paragraph might be removed. However, the balance of the paragraph is unlikely to reveal the identity of the patient. **I recommend that this paragraph be disclosed except for the seven words at the beginning of the second line.**

The remaining redactions on this page are all, once again, unflattering comments and opinions held by the Applicant about named fellow co-workers. For the reasons discussed at #1 above, **I recommend that the balance of this record be disclosed.**

8. **Pages 084 and 085** (Pages 31 to 34 of 66)

This record involves two emails in a chain. The Applicant is not a party to the conversation.

The public body has removed the subject line of the email at the top of the page as well as everything in the second email from the subject line to the last paragraph of the email. It relies on section 14(1)(b)(ii) of the Act for its decision not to disclose. This section gives public bodies the option not to disclose records or parts of records which "could be reasonably expected to reveal" the substance of consultations or deliberations involving employees of a public body.

I have no hesitation in accepting that the disclosure of those parts of this record which have been masked would reveal the substance of a consultation between two employees of the Government involving the Applicant, who was at the time an employee. As such, section 14(1)(b)(ii) does provide for a discretionary exemption. That said, however, it appears from the explanation provide by the public body that no discretion was exercised. In its submissions to me, it indicates only that because it was a consultation involving an employee, the consultation was "considered exempt". In fact, the public body must weigh the pros and cons of disclosure

in all of the circumstances and exercise a considered discretion as to whether or not to disclose the record or parts of the record. Because of the overriding purpose of the Act, the default position is always disclosure and there should be good reason for the public body to exercise its discretion to refuse access.

In the circumstances, **I recommend that the public body actively exercise its discretion pursuant to section 14(1) of the Act and make a considered decision as to whether or not to disclose, keeping in mind the overarching purpose of the Act and that it advise the Applicant as to its reasoning, whether or not it chooses to disclose.**

9. **Page 605-607 / 911 (pkg 2)**

The public body advises that there are no records which meet this description. There are, therefore, no redactions and no recommendation to be made.

10. **Page 153, 154 & 155 (pages 36 to 41 of 66)**

The first page of this email record contains nothing except the name of the person who sent it, the date and time it was sent, the name of the persons it was sent to, a subject line and reference to an attachment. The copy of this record provided to the Applicant contained everything on this page. There was nothing masked.

The two remaining pages of this record are the document which was attached to the email. It is dated March 29th, 2012 and is headed with the words "Grievance Resolution Meeting". It is a chart with various headings across the top (Grievance #, Last Name, First Name, Department, Location, Nature of Grievance and Comments). What follows is a list of 10 grievances apparently dealt with at the meeting, most of which had nothing to do with the Applicant. The names and other details of individuals not involved with the Applicant's request were removed pursuant to section 23 (2) (d) of the Act. I am satisfied that the disclosure of this information would have constituted an unreasonable invasion of the privacy of the third parties named, and agree that the information was properly severed. I therefore make no further recommendation with respect to this record.

11. **Page 079, 150** (Pages 43 to 46 of 66)

Page 150 was disclosed without anything masked. There is, therefore, no further recommendation to make with respect to this page.

Page 79 is an email from which everything has been redacted except for the name of the person who sent it, the time and date it was sent, and the names of the recipients. The public body relies on Section 14(1)(b)(ii) to refuse disclosure of the balance of the record.

The second email on the page (the first in time) is the same as the one discussed at #8 above and should be dealt with accordingly. The first email on the page (later in time), has a similar subject matter and clearly involves a discussion between two employees or managers on how to deal with an employee situation. As such it also qualifies for an exemption pursuant to section 14(1)(b)(ii). Again, however, the public body must actively exercise its discretion in this matter. **I therefore recommend that the public body actively exercise its discretion pursuant to section 14(1) of the Act and make a considered decision as to whether or not to disclose this part of the record, keeping in mind the overarching purpose of the Act and that the department advise the Applicant as to its reasoning, whether or not it chooses to disclose.**

12. **Page 333 (pkg 2), Page 712 / 749 (pkg 2a)** (Pages 48 and 49 of 66)

The records provided to me by the public body show that these were provided to the Applicant without redactions. I therefore make no further comment or recommendation.

13. **Page 712 (pkg 2)**

The public body advises that it has no records which meet this description. There are, therefore, no redactions and no recommendation to be made.

14. **Page 332 (pkg 2), Page 750 (pkg 2a)** (Pages 51 and 52 of 66)

Again, the records provided to me by the public body show that these were provided to the Applicant without redactions. I therefore make no further comment or recommendation.

15. **Page 446-447 (pkg 2), Page 714-715 / 717-718 / 751-752 (pkg 2a)**

The public body advises that it has no records which meet this description. There are, therefore, no redactions and no recommendation to be made.

16. **Page 330 - 331 (pkg 2), Page 924 - 926 (pkg 2a)** (Pages 54 to 57 of 66)

Again, the records provided to me by the public body show that these were provided to the Applicant without redactions. I therefore make no further comment or recommendation.

17. **Page 751 (pkg 2)**

18. **Page 777 / 778 (pkg 2a)**

19. **Page 778 (pkg 2a)**

The public body advises that it has no records which meet the description of these records. There are, therefore, no redactions and no recommendation to be made.

20. **Page 330/331 (pkg 2), Page 924 - 926 (pkg 2a)** (Pages 54 to 57 of 66)

This is in part a duplication of #16 above. As noted, and as confirmed by my review of the pages in question, these pages were provided to the Applicant with no edits. There is, therefore, no recommendation to make.

21. **Page 091 (pkg 1)** (Pages 59 and 60 of 66)

The records provided to me by the public body show that these were provided to the Applicant without redactions. I therefore make no further comment or recommendation.

22. **Page 883 / 928 / 931 (pkg 2a)**

23. **Page 884 / 927 (pkg 2a)**

24. **Page 371-373 / 367 / 368-369 / 460 - 463 / 464 - 467 (pkg 2), Page 851 (pkg 2a)**
Page 372-373 / 368 (pkg 2), page 852 - 854 (pkg 2a)

25. **Page 882 (pkg 2a)**

26. **Page 766/ 766-768 (pkg 2a)**
27. **Page 769 - 770 (pkg 2a)**
28. **Page 773 (pkg 2a)**

The public body advises that it has no records which meet the description of these records as provided by the Applicant. There are, therefore, no redactions and no recommendation to be made.

29. **Page 226 / 670 (pkg 2)** (Pages 62 and 63 of 66)

The records provided to me by the public body show that this page was provided to the Applicant without redactions. I therefore make no further comment or recommendation.

30. **Page 212 (pkg 2), Page 817 - 824 (pkg 2a)** (Pages 65 and 66 of 66)

The last paragraph of the last email on this page has been severed in the copy provided to the Applicant. It is the same paragraph discussed at #2 and should be dealt with accordingly.

31. **Page 914 (pkg 2a)**
32. **Page 916 (pkg 2a)**
33. **Page 914 (pkg 2a)**
34. **Page 424 - 428 (pkg 2)**
35. **Page 424 - 428 (pkg 2)**

The public body advises that it has no records which meet the description of these records as provided by the Applicant. There are, therefore, no redactions and no recommendation to be made.

SUMMARY AND RECOMMENDATIONS

My specific recommendations with respect to the records in question are contained in the discussion above.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner