

**NUNAVUT  
INFORMATION AND PRIVACY COMMISSIONER**

Review Recommendation 14-073

April 22, 2014

Review File: 13-136-5

**BACKGROUND**

The Complainant in this case was concerned about how his personal information was collected, used and disclosed during a job competition process. The Complainant applied for a job with a certain GN department (the "Hiring Department"). During the competition process, he felt that there were some unusual delays and peculiarities about the process that concerned him. After being offered, and accepting, the position, he made a formal Request for Information in relation to the job competition process. The records received revealed, among other things:

- a) correspondence and email between individuals apparently having nothing to do with the competition process in which the Complainant's personal situation was discussed, including references to a "disability leave", which had not been raised or discussed in the interview process;
- b) an indication that this correspondence had been fairly widely distributed throughout two departments (the Hiring Department and the Department of Human Resources (now Finance))
- c) within the correspondence, allegations that the Complainant had "lied" to the hiring committee;
- d) within the correspondence, allegations that the Complainant had private interests which created a conflict of interest.

Both the Hiring Department and the Department of Finance were asked to address the concerns raised. Both public bodies provided a response.

## **THE DEPARTMENT OF FINANCE**

The Department of Finance provided an explanation of the hiring process, as well as some context for the job competition in question.

With respect to the general hiring process, the Department indicated that the recruitment and selection process used by the GN is based on the "merit" principle. Candidates are assessed on their skills and related experience and screened using the Priority Hiring Policy by a panel, generally made up of three individuals including the staffing consultant, the position's manager and the human resources co-ordinator for the Hiring Department. This panel also sometimes includes a technical expert. This panel is responsible for screening applicants, creating interview questions, conducting the interview, assessing reference check material and choosing the successful candidate. Applicants "screened in" to the competition are asked to attend an interview with the panel, during which they are asked for references, including those from the most recent supervisor. Once positive references have been gathered from the top ranking candidate, the panel makes an offer of employment. In many cases, as in the one under discussion, the offer is a conditional one due to the need to provide for the staffing appeals process.

In this case, the Department of Finance indicates that there were, in fact, several delays in the process due to the availability of the hiring panel, the proximity to public service holidays, requirements for the appeal process (an appeal was received in this case), as well as a delay caused by the Complainant's failure, initially, to provide his most recent supervisor's name as a reference. The Department indicated that none of these delays were unusual and none were excessive in this case.

The Department of Finance also indicated that during this competition, the Deputy Minister of the Hiring Department did enter into an email exchange with the Deputy Minister of Human Resources in which concerns were raised about certain aspects of the Complainant's suitability for the position, including references to rumours about him being on disability leave, and information which would suggest that the candidate might

have had a conflict of interest. In this correspondence, there were also comments made questioning the Complainant's integrity.

## **THE HIRING DEPARTMENT**

The Hiring Department also provided an outline of the circumstances surrounding this job competition. They say that there was "nothing unusual" about the manner in which this particular competition was undertaken. According to this department, "the personal information in question was either supplied by the applicant, or was public knowledge". In particular, they say that the "public knowledge" information was generally about the Complainant's leave status and a possible conflict of interest - information that the Complainant indicated in his complaint to my office was information not raised in the competition process. The department also indicated that none of this "public knowledge" information was used to make a decision affecting the Complainant. They admitted that questions were raised in the course of the competition pertaining to this personal information and there was disclosure of this information between the Hiring Department and the Department of Human Resources. It was the department's position, however, that "this type of disclosure is essential to the collaborative interdepartmental relationship that is the norm during the hiring process."

As to the public body's right to collect information for the hiring process, they made the following submission:

Hiring personnel is considered an existing program for the purpose of applying the section 40(c)(i) exemption. As you note in your letter, the section 41 requirement that information be collected directly from the individual is subject to an exception. Sub-section 41(1)(j) provides for an exception when 'the information is collected for the purpose of hiring, managing or administering personnel of the [GN]...'. Section 47 and 48 which limit personal information disclosure are subject to an identical

exemption. Therefore the ATIPP Act does not place any restrictions on information collected during the hiring process.

They go on to say that:

In accordance with section 42 and 44(a) of the Act, personal information used in decisions affecting the applicant have been securely maintained either in the GN email system or in the applicant's HR file, a copy is also maintained in the applicant's ATIPP file.

The Hiring Department indicated that information about the Complainant's "leave status" entered the hiring process in an email between the Deputy Minister of the Hiring Department and the Deputy Minister of Human Resources. The person providing the submissions said he could not presume to know where or how the Deputy Minister of the Hiring Department had obtained or collected that information. The submissions point out that "the only administrative decision which made use of the applicant's personal information was to hire the applicant".

By my count, at least six people were included in email chains concerning the Complainant's candidacy for the position at one point or another during the competition. The Hiring Department has suggested that all "are appropriately involved in the human resources process". They have provided me with a list of those people and their role or position within the GN. No explanation has been provided as to how each of these people is/was involved or needed to be involved in this particular job competition or why they were included in this particular email exchange.

The Hiring Department denies that anything in the email exchanges with respect to the Complainant's job application suggest in any way that the Complainant had lied during the interview process.

Finally, the Hiring Department makes the following statement:

I would like to emphasize that notwithstanding our commitment to the secure storage and appropriate use of personal information, it is also the case that such information is not subject to the normal requirements for the collection, use or disclosure of personal information set out in sections 40, 41, 47 and 48 when it is used for hiring purposes.

## **DISCUSSION**

The purposes of the Access to Information and Protection of Privacy Act are set out in Section 1 of the Act which provides as follows:

1. The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by ....
  - (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies;

Section 40 outlines when public bodies can collect personal information about an individual:

40. No personal information may be collected by or for a public body unless
  - (a) the collection of the information is expressly authorized by an enactment;
  - (b) the information is collected for the purposes of law enforcement;
  - (c) the information relates directly to and is necessary for
    - (i) an existing program or activity of the public body, or
    - (ii) a proposed program or activity where collection of the information has been authorized by the head with the approval of the Executive Council; or
  - (d) the collection of the information for research or statistical purposes is authorized by or under the Statistics Act.

In this case, the public body relies on subsection 40(c)(i) for its authority to collect the personal information of the Complainant and, in fact, for the collection of personal information from all potential employees. I do not necessarily agree that hiring is a “program” in and of itself. However, the position for which the Complainant was hired is attached to an existing program. I am satisfied that the collection of the Complainant’s personal information for that purpose was, therefore, authorized under the Act. This does not, however, give a public body *carte blanche* to collect whatever information it wants from whatever source that it wants to collect it. It simply authorizes a collection of information for the purpose of hiring an individual to do a particular job within a particular department.

Section 41 of the Act provides that, where reasonably possible, a public body **must** collect personal information directly from the individual the information relates to. There are some exceptions. Section 41(j) for instance allows for collection from another source where

- (j) the information is collected for the purpose of hiring, managing or administering personnel of the Government of Nunavut or a public body.

The Hiring Department essentially argues that this allows the collection of any information about a potential employee from any source and that the information which was collected and used through “public knowledge” was therefore an authorized collection.

I disagree. In fact, the Department of Human Resources (now Finance) indicated that the hiring process is one based on merit, on an interview process and on the a review of personal references, including that of the applicant’s most recent supervisor. Furthermore, the collection of this information is, according to the Department of Finance, the responsibility of the hiring panel. The Deputy Minister of the Hiring Department was not a member of the hiring panel. There is no indication that the Deputy Minister normally has a role in the hiring process of employees within his department and nothing, certainly, to suggest that he had a formal role in the hiring for the Complainant’s position. Any information collected by him, therefore, cannot really

be said to be information collected “for the purposes of hiring” in this case. Section 41(j) does not allow any employee of any department to gather any information they think might be relevant to the hiring of personnel for a particular position and to pass it on to the hiring panel for use in their deliberations. It allows those who are making the decisions (i.e. the panel) to gather relevant information to assist them in making a decision about hiring. The spirit of the Act is such that this should, where possible, be done with the consent of the job applicant. Furthermore, in this case the panel had already made the decision to hire the Complainant and made a conditional offer of employment when the Deputy Minister’s email was sent. The Deputy Minister’s collection of the information about the Complainant’s leave status and/or a possible conflict of interest, was done outside of the hiring process and, in fact, after an offer of employment had already been made. I am not convinced that the information referred to as within the “public knowledge” was properly collected.

It is not entirely clear where the information about the Complainant was collected from. In fact, in its submissions to me, the Hiring Department says:

Information about the applicants (sic) leave status entered the hiring process on [date], in an email between the Deputy Minister of [the Hiring Department] and the Deputy Minister of Human Resources....I have no knowledge of the provenance of that information before it was embodied in a record at that time, and I would not presume to offer my own speculations.

This submission concerns me on several levels. Firstly, I am assuming that the person who provided me with the department’s position with respect to the complaint made has the full authority of the public body to respond. As such, it was incumbent upon him to determine from the Deputy Minister of his department where the information was collected from and for what purpose. If the Deputy Minister (or whoever else brought the information into the discussion) cannot answer that question, then it seems to me that the information must fall into the category of “rumour” or “speculation”. In fact, the email from the Deputy Minister of the Hiring Department refers to the information about

the Complainant's leave status quite clearly as "rumour". I have trouble believing that the use of rumour or gossip is condoned in any way within the policies and procedures in place for the hiring of GN employees. Nunavut is a small jurisdiction. Rumour and gossip are everywhere. As anyone who lives in a small community will attest to, rumour and gossip are notoriously unreliable. I am surprised and troubled by the submissions provided by the Hiring Department which make it appear that this public body does not have any concerns about such collection, much less the use of that information in the hiring process.

Even if I am wrong about the fact that the collection of the information in question was not authorized, I am not convinced that it was used for an authorized purpose under the Act. Section 43 of the Act sets out the circumstances in which personal information can be used:

43. A public body may use personal information only
  - (a) for the purpose for which the information was collected or compiled, or for a use consistent with that purpose;
  - (b) if the individual the information is about has identified the information and consented, in the prescribed manner, to the use; or
  - (c) for a purpose for which the information may be disclosed to that public body under Division C of this Part.

Assuming, for the purpose of discussion, that the information about the Complainant's leave status and/or information concerning a possible conflict of interest was properly collected, that does not mean that it can be used or disclosed however the public body wants to use or disclose it. The information can be used only for the purpose the information was collected for or for another purpose with the consent of the individual.

In using the information, regard must also be had to section 44 which states that where a public body uses an individual's personal information to make a decision that directly affects the individual, the public body must make every reasonable effort to ensure that the information is accurate and complete. This suggests that before the information

collected in this case (ie: the rumour about the Complainant's leave status or about a possible conflict of interest) is used in any way in connection with the decision as to whether or not to hire him, the public body must make every reasonable effort to ensure that the information is accurate and complete. That is not what happened here. The information was used and disclosed by the Deputy Minister of the Hiring Department in an attempt to impact on the hiring decision.

The public body in this case argues, several times, that the use of the information in question had no negative affect on the Complainant, presumably leading to the conclusion that the use was justified. The Complainant was still offered the position and is currently in that position.

I disagree with this argument. A simple reading of the email correspondence between the two Deputy Ministers reveals that the Deputy Minister of the Hiring Department was questioning the appropriateness of hiring this individual based on his rumoured leave status and on other rumours, assumptions and innuendo about a possible conflict of interest. Whether or not the information was used to deny the Complainant the position, it was used in the decision process. The test is not whether the information is used in a way that has a negative impact on the hiring of the Complainant. The test is whether the information was used in any way in coming to a decision which affects the individual. It was clearly used by the Deputy Minister of the Hiring Department to question a decision which affected the Complainant. Even if one concludes that the information was properly collected, the public body used the information brought forward by the Deputy Minister and that use was in connection with matters directly affecting the Complainant, whether or not the Complainant, in the end, was offered the position. At the very least, the public body had the obligation to confirm the accuracy of the information before it was used.

This brings us to the disclosure of the personal information. In providing the information in question to the Deputy Minister of Human Resources, the Deputy Minister of the Hiring Department disclosed the personal information of the Complainant. The relevant subsections of section 48 outline when personal information can be disclosed by a public body:

- (a) for the purpose for which the information was collected or compiled or for a use consistent with that purpose;
- (b) where the individual the information relates to has identified the information and consented, in the prescribed manner, to its disclosure; ...
- (g) for the purpose of hiring, managing or administering personnel of the Government of Nunavut or a public body.

As noted above, I have concluded that the information with respect to the Complainant's leave status and with respect to possible conflicts of interest was improperly collected by the Deputy Minister. If it was improperly collected, there is nothing which would make its disclosure lawful.

The Hiring Department suggests that the correspondence between the Deputy Minister of that department and the Deputy Minister of Human Resources (the disclosure) was for the purpose of hiring personnel. I find it strange that this discussion would take place at the Deputy Minister level, even for a high ranking civil servant within the department. I see nothing in the records to show that the panel tasked with the hiring for this position asked the Deputy Minister to inquire about the issues raised by him in his email to the Deputy Minister of Human Resources. In fact, it appears from the records that the panel had already made its decision and made the conditional offer of employment before the Deputy Minister inserted himself into the process. I do not read the emails in question as part of the hiring process. For this reason I am not convinced that the Deputy Minister was authorized to disclose the Complainant's personal information to the Deputy Minister of Human Resources in this case.

The Complainant alleges that the Deputy Minister of the Hiring Department made allegations that the Complainant had lied to the hiring committee. While the submissions made by the Hiring Department deny that there was such an allegation, at least one of the emails I saw clearly makes that allegation. Section 45 of the Act allows an individual who believes that there is an error or omission in his or her personal information to request the head of the public body that has the information to correct that information. I would, in this case, suggest to the Complainant that this is the method he needs to use to deal with this situation and that his request should be made

to the Minister responsible for the department. Section 46 also requires that where a public body has disclosed personal information to another public body in the 12 months before a request for correction of that information is received by the public body, the head of the public body must notify the other public body or the third party recipient that the personal information has been corrected or that a note of the requested correction has been made under section 45(2). In the circumstances of this case, I would recommend that if the request is made, the public body go back to the date of the offending email, which is more than 12 months ago.

Finally, the hiring public body has not given any good explanation for why it was necessary to include so many people in the email exchanges between the two Deputy Ministers in this case. The information involved is sensitive and presents the Complainant in a negative way. Even if this information were properly collected, used or disclosed, the Act requires that such information would be closely held and narrowly used or disclosed. It is sensitive information of a speculative nature which suggests wrongdoing on the part of the Complainant. If the information is going to be widely distributed, as it appears to have been in this case, there must be a reason for each person to be included in the distribution and that reason really must be more than that he or she is an employee within a department who might, at some point, have something to do with the hiring of this individual. If the public body cannot articulate the specific reason that each person needed the information to do his or her job, the information was, once again, improperly disclosed.

While not strictly part of the complaint, I would also comment on one of the statements made by the Hiring Department about the storage of the personal information in question here. Firstly, there seems to be an implication that if personal information is collected as a result of the hiring process, the GN somehow has less obligation (in fact no obligation) to maintain its security or to protect it from further unauthorized use or disclosure. This is absolutely not the case. Once personal information is in the hands of a public body, that information can only be used/disclosed in accordance with the Act and it must always be securely maintained. Secondly, I have to question the suggestion that the GN email system is a secure method or appropriate way to store sensitive personal information. While I appreciate that most of GN business is done via email, I

continue to be concerned that most people do not appreciate the essential lack of security that surrounds email. Assuming that personal information is stored in the GN email system is sufficient to ensure that it won't be inappropriately used or disclosed is, I think, shortsighted. Nor, to my knowledge, does this comply with the GN's information management systems.

## **SUMMARY AND RECOMMENDATIONS**

I am not at all convinced that the Hiring Department in this case fully understands the basic underpinnings and spirit of the *Access to Information and Protection of Privacy Act*. Nor am I convinced that rumour or speculation has any place in the hiring process or that it was in any way appropriate for the Deputy Minister of the Hiring Department in this case to be collecting, using or disclosing the information in question. In consequence, I would make the following recommendations:

- a) firstly, that a formal apology be provided to the Complainant for the improper collection, use and disclosure of his personal information;
- b) secondly, that all and any reference to the Complainant's information collected, used and disclosed by the Deputy Minister of the Hiring Department during the hiring process be removed from the Complainant's personnel file;
- c) thirdly, in the event that the Complainant in this case decides to request a correction to his personal information, that the Hiring Department go back in time as far as necessary to mitigate any damages that might have occurred as a result of the use or disclosure of the information in question, even if that use or disclosure was more than 12 months ago;
- d) finally, that the Hiring Department, in conjunction with the Department of Finance, review the policies and practices in place with respect to the hiring process so as to ensure that the collection, use and disclosure of personal information in the hiring process is limited to those tasked with

the responsibility of hiring, and that a list of best practices be developed, which would include a statement that, whenever possible, personal information should be collected directly from the job applicant and that the use of “public knowledge” information should be discouraged.

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