NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER
Review Recommendation 14-080
August 28, 2014

Review File: 14-142-5

BACKGROUND

In January of 2014, the public body received a Request for Information from an individual in which he requested information about himself. The request indicated that the Applicant had reason to believe that he had been branded as an "undesirable employee" and that, as a result, his applications for employment were being rejected out of hand. He believed that there were a series of emails exchanged which depicted him as unemployable because he had reported two fellow employees for work related issues. When he attempted to apply for work, he was continually advised that there was nothing suitable for him, though he had spoken to other employees and been told that there were vacancies that the department was having a hard time filling because of the lack of qualified applicants. He therefore sought all correspondence between a list of 27 individuals within the department which referred in any way to him for a specified time period.

Part of the request for information was transferred to the Department of Finance in accordance with section 12 of the *Access to Information and Protection of Privacy Act.* This review relates only to the records in the possession and control of the Department in which the Applicant had been seeking employment.

The public body identified 361 pages of responsive records. Of those, 222 pages were disclosed to the Applicant without any exemptions and 139 pages with some or all of the information masked pursuant to one of several of the exemptions provided for in the Act.

The Applicant asked that I review the exemptions claimed. Further, he was fairly adamant that there were additional records that should have been identified as

responsive. The basis of his belief in this regard was the fact that some of the records he did receive alluded to previous consultations, discussions or emails between employees of the department concerning the Applicant.

By way of example, he pointed to an email which stated:

> ...[the Applicant] worked in the [region] as a [position] and we made a decision not to bring [the Applicant] back due to unpleasant experiences with [the Applicant].

This references a “decision” made by the public body about the Applicant some time before the date of this email, but no records were provided with respect to that decision at the time it was made. The Applicant questions why he did not receive any records with respect to this decision or the “unpleasant experiences”. The Applicant speculates that perhaps this correspondence might have been undertaken via text message instead of email and that that is why no records were found.

The Applicant further pointed out that there were no records of his email conversations with departmental staff with respect to his questions as to whether or not he had been blacklisted.

In another email, the Applicant points to another exchange in which the following is said:

> We have had problems with [the Applicant] and I have informed my directors and HR people not to bring [the Applicant] back to my region.

Not provided, says the Applicant, were copies of the emails or other records in which this direction not to hire the Applicant was discussed and communicated.

The Applicant further points out that he had email correspondence with a specific named employee, but that those emails were completely missing from the package

provided to him. Furthermore, in this correspondence, the Applicant had been told that the Applicant's concerns had been sent to the Deputy Minister. Once again, that correspondence was not included in the responding records.

With respect to those records which were disclosed, but with some editing, the Applicant has asked me to review those edits for a limited number of specific records.

THE DEPARTMENT'S EXPLANATION

With respect to the "missing" records, the public body states that all GN employees are bound by the *Access to Information and Protection of Privacy Act*. When employees are asked to search their files for relevant records for the purpose of an ATIPP request, they are also asked to complete a Records Search Declaration form confirming that the employee "has done a full and comprehensive search" to locate responsive records. Because all of the listed employees provided records and the declaration form to the ATIPP Co-Ordinator in a timely manner, the ATIPP Co-Ordinator did not conduct any further searches.

Concerning the Applicant's complaint that he had not received copies of email correspondence with a specific named employee, the public body points out that the Applicant's original request for information did not include that named individual. As a result, while some records involving that person were identified and disclosed because they were included in the records of some of the other individuals, no specific search had been done of this person's records. Subsequently, however, the Applicant had filed a second ATIPP request specifically for records from that individual and that request had been completed.

I specifically asked the public body to address the issue of the possibility of text messages and whether or not such methods of communication were approved and, if so whether records were kept of these communications. In response, the public body indicated that:

> When significant information is exchanged or decisions are made in the course of a meeting, telephone call, instant text messaging or via email, staff must ensure that a record of the exchange is properly stored and managed using GN facilities.

They also provided copies of two existing policies with respect to the acceptable use of handheld wireless devices and acceptable email and internet usage.

With respect to the records with exemptions claimed, the public body provided their detailed explanation for the specific items edited out of the records which were provided to the Applicant for those records specifically referred to in the Applicant's Request for Review.

DISCUSSION

As noted, there are several issues raised in this Request for Review.

"Missing" Records

The first issue is whether or not the public body has identified all of the records responsive to the Request for Information. The Applicant has pointed to several instances in which one would have expected there to be additional records because the records that were produced made reference to earlier communications/decisions about the Applicant that would have been responsive but which were not produced. The first question that I asked, therefore, is how the public body went about looking for and identifying the responsive records. In this case, and I believe in most cases, this is done by asking each party named in the Request for Information to search his or her own records and to provide them to the ATIPP Co-Ordinator, who then reviews the records in preparation for disclosure to the Applicant. While I appreciate that this is likely the easiest and most efficient way to identify responsive records, it is not, in my opinion, likely to produce the best results particularly in a case such as this where there is a potential conflict of interest. In this case, the Applicant feels that the people named in

his Request for Information have been complicit in creating a situation in which he cannot obtain employment. Furthermore, he is making allegations which could potentially have a direct impact upon the employees if they are well founded. The individual employees may not have access to the specific Request for Information or be told directly who is making the application, but it will often be obvious. Human nature being what it is, the instinct toward self preservation may well result in individual providing an incomplete response, or even deleting or attempting to delete records that might be responsive, especially where the employee thinks that he/she is unlikely to "get caught". It is all fine and good to make employees sign declarations attesting to the fact that they have provided a complete response but I am not naive enough to believe that a signed declaration is sufficient to guarantee compliance. Public bodies should be similarly cautious, particularly where there can be any perception of a conflict of interest. Either some other way must be found to gather responsive records in these situations, or there must be a way found to double check the responses provided. This is not to say that in this case that the individuals involved failed to provide full documentation - only that there is a perception of a conflict of interest and we cannot rely solely on a declaration as proof that every responsive record has been identified and provided for review.

In this particular case, the Applicant has provided some fairly good evidence that there should be additional responsive records. I would have expected that, notwithstanding the signed declarations, this evidence might have prompted the public body to go back and double check the responses received. It does not appear that this happened.

The Applicant also raises some interesting points about the use of mobile devices and email for doing the work of public bodies. I note that the public body in this case was able to produce two policies with respect to electronic records. I was not, however, provided with any background. For example, a number of questions pop quickly into my mind:

- how are these policies applied and enforced?
- what oversight is there?

- how are employees educated about these policies?
- what kind of reinforcement of these policies is there?

Policies are good. But, like declarations, it would be naive to believe that they are always followed. Public bodies should be cautious about relying exclusively on the existence of policies as proof of compliance. I note, as well, that both policies appear to have expired. One notes that it expired on October 31st, 2010 (Acceptable Email and Internet Usage Policy) and the other expired on December 31st, 2013 (Acceptable use of Handheld Wireless Devices Policy). And while each of the policies has a provision which generally refers to the obligation to document, there are no specific provisions that require communications such as text messages to be printed or saved on the network.

Finally, with respect to the Applicant's stated concerns about not having received records from a specific individual, I am satisfied that the Applicant did not include the name of that person in his original request for information. In the circumstances, it is not surprising the public body did not identify some records from that employee's correspondence as responsive to the Request for Information. I am assuming that this was corrected in the subsequent Request for Information submitted by the Applicant.

Edited records

The Applicant has identified five of the records which he received and has asked me to review the exemptions applied by the public body.

1. Page 237

The email identified by the Applicant on page 237 is part of an email chain, the most recent of which was dated August 22, 2013. Part of that chain was an email dated January 18, 2012 in which the Applicant is mentioned. The Applicant claims that he made an earlier Request for Information which should have included this January 18th, 2012 email but this is the first time he's seen it. This fact, in his mind, "confirms my

belief that emails have been kept from me and under the ATIPP request, not all emails were submitted as requested". He seeks full disclosure of the January 18th email and any other email chains to which this email might have been attached.

The public body, in its submission to me, did not address this particular issue. Instead, they addressed the exemptions claimed on that record.

In the circumstances, I recommend that the public body conduct an additional search and provide the Applicant with copies of the records identified by him in his Request for Review with respect to Page 237.

2. Email on Page 93,275,356

I am assuming that these pages all contain a copy of the same particular email. All of these emails appear in chains of emails, but it appears that the Applicant is only concerned about the specific email noted by him.

There is one large section of the email which has been edited pursuant to section 14(1)(a) of the Act. Other, shorter portions of the email have been masked pursuant to section 23(1)(d).

Section 14(1)(a) provides public bodies with a discretion to refuse to disclose information where the disclosure could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council. The public body in this case argues that the portion of this record that has been deleted pursuant to section 14(1)(a) is part of a consultation between two directors and that it contains open and frank advice and recommendations with respect to a proposed action, which the recipient of the advice was in a position to follow.

In Order 99-013, the former Information and Privacy Commissioner of Alberta outlined the requirements that must be met for a valid exemption under the equivalent section to our section 14 in Alberta legislation. He noted that the advice, proposals, recommendations must be:

(i) sought or expected, or be part of the responsibility of a person by virtue of that person's position,
(ii) directed toward taking an action, and
(iii) made to someone who can take or implement the action.

I am satisfied that the portion of this email which has been masked pursuant to section 14(1)(a) does, in fact meet the criteria for the exemption. Furthermore, the information in the deleted portion is largely about third parties (not the Applicant) and would likely have qualified for a mandatory exemption pursuant to section 23.

Section 23(2)(d) creates a presumption that the disclosure of information would be an unreasonable invasion of a third party's privacy if the information relates to employment, occupational or educational history about a third party. If the section applies, public bodies are prohibited from disclosing the information. I am satisfied that those portions of the email in question are exempt from disclosure pursuant to section 23(2)(d) of the Act and have been properly withheld.

3. Page 11/71/118/153 &154/160/167/297/306/301/314/319/326/344 &345/351

Again, the Applicant refers to one email which appears a number of times in a number of email chains.

This email has a number of items that have been masked, all pursuant to section 23(2)(d) of the Act. I am satisfied that all of the exemptions have been properly applied and that disclosure of the masked words would constitute an unreasonable invasion of the privacy of a third party.

4. Page 69/151/334/347/349

This email, again appears a number of times.

The public body has masked a portion of this email pursuant to section 23(2)(d). I am satisfied that the edited portion refers to a third party and that disclosure would be an unreasonable invasion of that person's privacy. Accordingly, the public body is prohibited from disclosing this information.

5. Page 149

There is one small portion of the email on page 149 which has been masked pursuant to section 23(1)(d) of the Act. Once again, I am satisfied that the information masked is the personal information about a third party and that the disclosure of this information would constitute an unreasonable invasion of the third party's privacy. The public body properly edited this record as well.

CONCLUSIONS AND RECOMMENDATIONS

I am satisfied that, for those records that were provided to the Applicant, all of those portions of the records that were masked which the Applicant has asked me to review properly fell under either section 23(2)(d) as being the personal information of a third party, the disclosure of which would constitute an unreasonable invasion of that person's privacy or section 14(1)(a) and I make no further recommendations in this regard.

With respect to the missing records, I recommend that a further searches be done by someone other than the "owner" of the various email accounts in question to ensure that all responsive records were, in fact, identified and provided to the ATIPP Co-Ordinator, with particular attention to the records noted in the Applicant's complaint. This recommendation also applies to the missing emails and records identified by the Applicant in his comments with respect to Page 237.

Finally, while I understand that this is not something that can be done by the public body involved in this review, I strongly recommend that steps be taken by the appropriate GN department to update and add to the policies on internet use and mobile devices, providing significantly more detail on the obligation of employees to properly document, classify, and store the work done by email and on mobile devices. This is the way that the GN primarily does its business and these existing (but expired) policies must be reviewed consistently and kept up to date to meet the challenges of ever-changing technologies.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner