

**NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER**

Review Recommendation 14-085

October 8, 2014

Review File: 14-148-5

BACKGROUND

In early May, 2014, I received a request from an Applicant (referred to herein as A.B.) asking me to review the response he received to a request which he had made to the Department of Finance for information in relation to a job competition within the Department of Transportation. His request was for “all documents related to” the competition but in his request for review he has asked me to consider only three records. These records are:

- a) the Screening Criteria Sheet containing A.B.’s own personal information;
- b) the resume of the successful applicant;
- c) the Screening Criteria Sheet of the successful applicant

In supporting his right to receive these records, A.B. points to section 5(1) the *Access to Information and Protection of Privacy Act*, which provides that:

A person who makes a request under section 6 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

The Applicant says he was denied access to his own personal information – that information contained in the Screening Sheet with respect to his application for the job in question. The public body relied on section 22 of the Act as their authority to refuse access. That section provides that a public body may refuse to disclose personal information that is evaluative or opinion material compiled solely for the purpose of determining the applicant’s suitability, eligibility or qualifications for employment when the information has been provided to the public body in confidence.

A.B., however, argues that the information on this sheet is neither evaluative or opinion material. Rather, it is a matter of checking a “yes” or a “no” beside a set of pre-determined criteria.

A.B. also argues that in the screening process, he was not given credit for a number of his qualifications, resulting in his being improperly ‘screened out’ of the selection process. He says that the public body failed to consider qualifications which he outlined in his cover letter which were not included in his resume. He argues that this is a contravention of section 44 of the *Access to Information and Protection of Privacy Act* which requires 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. The failure to use the information in the cover letter, he argues, constitutes a “privacy incident” under GN policy.

With respect to A.B.’s request for access to another individual’s resume and screening criteria sheet, he argues that section 48(a) and (g) allow the disclosure of the third party’s information. Those subsections, he argues, allow a public body to disclose personal information for the purpose of which the information was collected or compiled (or a purpose consistent with that purpose) or for the purpose of hiring, managing or administering personnel of the GN. He suggests that his request is “consistent” with the purpose for which the third party’s information was collected as these documents are directly connected with a hiring process in which A.B. was involved as a candidate. He also argues that the disclosure is “relevant to a fair determination of” his rights, and should, therefore, be disclosed (section 23(3)(c)).

Finally, A.B. provided information about the appeal process which he initiated with respect to the competition. He claims that the process was unfair and that the policies and procedures set out in the HR Manual of the GN were not complied with

The Position of the Department

As per my request, the public body in this case provided me with copies of all the records which they identified as being responsive to A.B.'s Request for Information in their original form and in the form (with redactions) that they were provided to the Applicant. While the public body has provided me with an explanation for all of the exemptions claimed, I have been asked by A.B. to address only three records and my review will, therefore, be limited to those three records.

With respect to A.B.'s own "Screening Criteria" form, the public body states that this page consists of the selection committee's evaluation of how the A.B.'s cover letter and resume matched the requirements of the position. In this case, they say that the selection committee (and the appeals committee) deemed the applicant's qualifications insufficient to invite him to an interview for the position. They relied on section 22 of the Act to refuse access to this document. Section 22 provides as follows:

22. The head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material compiled solely for the purpose of determining the applicant's suitability, eligibility or qualifications for employment or for the awarding of government contracts or other benefits when the information has been provided to the public body, explicitly or implicitly, in confidence.

On this review, the public body reconsidered their reliance on this section and concluded that their interpretation of section 22 was in error and that the Applicant should have been provided with this record. As a result, the department provided the record to the Applicant. I agree that section 22 does not apply. Because the department corrected its position and provided the Applicant with the record, I do not propose to provide any in-depth analysis on this point.

The public body's only comment with respect to the two remaining records (the resume of the successful candidate and the Screening Criteria sheet for the successful candidate) was that these records contained the personal information of other third party candidates. No reference was made to what exemption in the Act was relied on in this regard, but I presume they are relying on section 23 of the Act which prohibits the disclosure of personal information where that disclosure would constitute an unreasonable invasion of a third party's personal privacy.

The Applicant's Response

In response to the department's submissions, the Applicant points out that the remaining records in question are not specifically referred to in the department's submissions to me. He has been advised by the ATIPP Co-Ordinator for the department that these records have, however, been provided to me as part of the review process and he is prepared to accept that explanation for the purposes of this review.

Apart from this, the Applicant's comments are focussed on the GN's hiring policies and processes and his interpretation of the Staffing Review and Appeals Regulations of the *Public Service Act*. These comments are well outside the parameters of my jurisdiction and add little to the focus of my review.

The Relevant Provisions of the Act

As always, it is important to consider section 1 of the *Act* which outlines the purposes of the legislation. As it pertains to this review, that section reads as follows:

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;...
 - (c) specifying limited exceptions to the rights of access;...

It appears that the public body is relying on section 23 for its refusal to disclose the two remaining documents. Section 23 deals with third party personal information and provides for a **mandatory** exemption which means that if the section is applicable, the public body is prohibited from disclosing the third party personal information. Specifically, section 23 reads as follows:

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.

Section 23(2) provides for certain situations in which the disclosure of personal information will be presumed to be an unreasonable invasion of a third party's personal privacy. The public body does not specify which of the subsections of section 23(2) they are relying on (if any). However, in my view, the following are relevant:

- (2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where...
- (d) the personal information relates to employment, occupational or educational history; ...
 - (h) the personal information consists of the third party's name where
 - (i) it appears with other personal information about the third party, or
 - (ii) the disclosure of the name itself would reveal personal information about the third party;

As noted by the Applicant, the onus of establishing that a record is exempt from disclosure is on the public body pursuant to section 33 of the Act.

33.(1) On a review of a decision to refuse an applicant access to all or part of a record, the onus is on the head of the public body to

establish that the applicant has no right of access to the record or part.

Notwithstanding section 33, where the exemption is mandatory, as it is in section 23, if it is clear that the exemption applies, I will apply the exemption so as to protect the privacy of third parties.

The Applicant has referred me to section 44, which states that :

44. Where a public body uses an individual's personal information to make a decision that directly affects the individual, the public body must
 - (a) make every reasonable effort to ensure that the information is accurate and complete;

He has also referred me to section 48(a) and (g) of the Act which provides as follows:

48. A public body may disclose personal information
 - (a) for the purpose for which the information was collected or compiled or for a use consistent with that purpose; ...
 - (g) for the purpose of hiring, managing or administering personnel of the Government of Nunavut or a public body;...

DISCUSSION

As a preliminary matter, I must point out, particularly to the Applicant, that my role is very limited. I cannot, and will not, comment on the hiring process or on whether or not it was "open, fair and transparent". That question is for another forum. What the public body considered or failed to consider in the hiring process is well beyond my jurisdiction or my expertise. My role is limited to determining whether the Applicant in this case received all of the records responsive to his Request for Information under the *Access to Information and Protection of Privacy Act*, subject only to any applicable exemptions.

In the case of exemptions, it is also my role to review the public body's application of those exemptions and to comment on whether or not they were properly applied.

In this case, the Applicant asked me to review whether or not the public body's failure to disclose three specific records was in accordance with the Act. The first of those records identified by the Applicant was disclosed to him as a result of this review process when the public body took a second look at the record and at the exemption claimed. This leaves us with only two remaining records to consider:

- a) the successful candidate's resume; and
- b) the successful candidate's Screening Criteria worksheet.

It is to be noted that these two records were not included in the package of records which the public body identified as being responsive to the Applicant's request and, contrary to their statements to the Applicant, I did not receive copies of these two records. Clearly these were responsive records. As there appear to have been a number of additional applicants for the position as well, and there were no records relating to those individuals either, I can only assume that the public body failed to identify all of the responsive records or determined that, for some reason, the other third party resumes and Screening Criteria Sheets did not fall within the request for "all documents related to competition #..." This, however, is a matter for another day as the Applicant has not asked me to address the absence of these records.

For the purposes of this review, I am of the opinion that while I do not have the particular records in question, I have sufficient information to make my recommendation.

Firstly, with respect to the successful candidate's resume, I have no hesitation in finding that all of the information in the third party's resume is the personal information of that third party, the successful candidate. Furthermore, by definition, a resume consists exclusively of information relating to "employment, occupational or educational history". Section 23(2) raises a presumption that the disclosure of any employee's resume

without that person's consent would constitute an unreasonable invasion of the individual's personal privacy. The department is, therefore, prohibited from disclosing the resume to the Applicant or to any other member of the public without the third party's consent.

The Applicant argues that section 48 allows the disclosure of the personal information to him because the disclosure would be within the confines of the purpose for which the information was collected or compiled or for a use consistent with that purpose. I disagree. The resume was collected for the purpose of allowing the GN to consider the third party for a position with the Department of Transportation. The Applicant's desire to contest the GN's decision is not a consistent purpose. The Applicant further suggests that the information can be disclose because it relates to the "hiring, managing or administering personnel of the Government of Nunavut or a public body". In my opinion, disclosing the resume to the Applicant would not assist the GN in it's management or administration of the personnel of the GN. The Applicant is not someone who's opinion is required for the purpose of evaluating the third party's suitability for the position or for managing the employee. Section 48 of the Act does not negate the privacy protections of section 23. I agree that the third party's resume was properly withheld.

Similarly, the Screening Criteria sheet as it relates to the successful applicant would disclose information about the third party's "employment, occupational or educational history". While the information in this form is not as detailed or specific as the information in a resume, it would reveal clear details about the third party's employment, occupational and educational history. Section 23(1), therefore, prohibits its disclosure to the Applicant pursuant to an Access to Information request.

In the circumstances, I conclude that these two records were properly withheld from the Applicant insofar as the *Access to Information and Protection of Privacy Act* is concerned. While I may sympathize with the Applicant's frustration with the way in which this particular job competition was handled, as noted above, my role is solely to determine whether the provisions of the ATIPP Act were complied with in relation to the

Applicant's Request for Information pursuant to that Act and, in my opinion, they were. I make no further recommendations.

With respect to A.B.'s allegation that the public body did not "make every reasonable effort" to ensure that the information used to screen him out of the interview process was "complete" I find that there may be some merit to this complaint. It is clear that the public body had A.B.'s resume and the cover letter, as did the appeal body. However, in the records before me, it appears that both on the original decision and on the appeal, the public body chose to consider only the resume. In this case, the Applicant provided additional information as to his suitability for the job in his cover letter though no mention is made of this by either the public body after the original review or by the appeal body. I agree with the Applicant that, as they were given both, they had an obligation pursuant to section 44 to consider all of the information provided. This said, there is no guarantee that the selection committee's inclusion of the additional information would have resulted in any different conclusion than the one reached.

With respect to this issue, I would recommend that if it is policy to consider only information contained in a resume, that this policy be made clear to all applicants for all GN positions. Alternatively, and perhaps more in keeping with section 44 of the *Access to Information and Protection of Privacy Act*, the policies should be changed so as to ensure that if relevant information is contained in a cover letter accompanying a resume, that that information be included in the assessment of the application for screening in.

CONCLUSIONS AND RECOMMENDATIONS

As noted above, I am satisfied that the public body in this case properly applied the provisions of the *Access to Information and Protection of Privacy Act* to the response provided to the Applicant pursuant to his Request for Information and I make no recommendations on this issue. I do, however, recommend that the public body review its policies and procedures with respect to what information is used in the screening process when considering which job applicants will be invited for an interview such that

all of the information provided by the job candidate is considered, whether it is contained in the resume itself or the cover letter. Only in this way can the public body be assured that its information is “complete” when making a decision as to whether or not to offer an interview.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner