

**NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER**

Review Recommendation 16-098

April 21, 2016

Review File: 15-148-5D

THE COMPLAINT

The Applicant in this case made a request for certain information from each of four public bodies. He has asked for a review of each of the four responses he received. This review relates to the request made to the Department of Economic Development and Transportation.

The request was for:

all information and documents pertaining to complaints and concerns that I ...have had or have been involved in, regarding sexual harassment, improper conduct and unwelcome behaviour by my co-worker [A.B.] dating from April 2008 to present.

It appears that the request to this department was narrowed only to responses to a particular email sent by a specific employee as a result of discussions between the Applicant and the department.

THE DEPARTMENT'S RESPONSE

The Department indicates that when they sought to respond to the request, they found that the index for searching for the responsive records was "corrupt" and that they could not, therefore, use the search function to find the record requested. This meant that the only way to search for the particular record in question was to review each email record one at a time. This said, they also suggested that this "corrupt index"

problem was likely not the reason that no responsive records were identified. They say that the specific employee whose email was being sought was not employed with the Department of Economic Development and Transportation during the time frame that the Applicant was interested in.

Notwithstanding this, the Department chose to work with the Help Desk technicians in an attempt to find relevant email correspondence from the named employee for the period of time that the employee was working with the department. Though considerable effort and expertise was put into the project, no relevant records were found.

Subsequently, however, another department (Community and Government Services) was, "after some considerable effort", able to locate the email requested on back-up tapes. After receiving a copy of that email, the Department followed up to determine if they could find any additional records from the information contained in the record found. Two additional short records were found but neither of them referred in any way to the Applicant. Further, the department takes the position that it would have been prohibited from disclosing any of them in any event pursuant to section 23 of the Act (unreasonable invasion of a third party's privacy). The Department has drawn on section 23 to deny access to all three of the records identified. In making the decision to deny access, they have considered that the personal information in the records:

- a) relates to the employment, occupational or educational history of a third party – the department points out that the Applicant makes it clear in his request for information that workplace harassment is the subject of his request. Further, the subject of the responsive records "describe situations that on their face could be characterized as harassment". The records do not contain the Applicant's own personal information, nor do they refer to him explicitly or implicitly. The apparent victim of the alleged workplace harassment being discussed is a third party. Furthermore, the records are documentation of a complaint of workplace harassment and could be viewed as a very personal and sensitive party of the employment history of both the victim and of the perpetrator.

- b) is relevant to a fair determination of the Applicant's rights – the Department notes that it is reasonable to assume that the Applicant may be contemplating some kind of grievance or legal action with respect to workplace harassment and that the requested records are relevant to this endeavour, which supports the argument to disclose.
- c) was supplied in confidence – the content of the email implies that the person who sent it did not wish for the information to be circulated beyond the named recipients, which is a point against disclosure
- d) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the Applicant – the allegations in the email are unproven and could have consequences for the alleged perpetrator referred to in the email

In balancing all of the interests involved, the department determined that disclosure would constitute an unreasonable invasion of the privacy of two third parties.

THE APPLICANT'S SUBMISSIONS

The Applicant responded to the department's submissions by noting that he did, indeed, request these records so that he could use them as supporting evidence in the union grievance and human rights complaint which had been filed against the employer for failing to protect him from workplace sexual harassment. The email records in question, he says, are significant to his case because they establish a course of conduct by the alleged perpetrator. He says that he was aware of the third party's complaint against the perpetrator because he witnessed the incident himself, and had discussed it with the third party afterwards.

DISCUSSION, CONCLUSIONS AND RECOMMENDATION

I have had the benefit of having seen the three records in question. While I appreciate the department's analysis of the matter, and appreciate their caution when it comes to protecting third parties from unreasonable invasions of their privacy, it seems to me that the privacy concerns can be alleviated here with some strategic redactions. It is clear that the Applicant is aware of the names of the two individuals whose identity the department is attempting to protect. These emails do not appear to "disclose" to the Applicant anything about either of the two third parties that is not already within his knowledge. I don't think that the information in the emails can be said to reveal "employment, occupational or educational history". Though they do refer to things which occurred during the workday, that, in and of itself, does not make the incident part of anyone's "employment history". Nor is it clear from my perspective that the third party who wrote the emails in question intended for them to be confidential. In fact, they take the form of a complaint and that suggests, to me, that there was an intention that something further be done with the information contained. I do not believe that there is a "presumption" that the disclosure of this information would constitute an unreasonable invasion of the privacy of either of the third parties under section 23(2).

As I have noted time and again, disclosure is always the rule and records must fall squarely within an exemption to avoid disclosure. Clearly, when the information relates to a third party, section 23 must be carefully considered. In this case, however, if the records are appropriately redacted, I do not believe that it would constitute an unreasonable invasion of the privacy of any third party to disclose the emails.

I note, as well that section 3(2) of the Act clearly confirms that the Act does not "limit the information otherwise available by law to a party to legal proceedings" and does not "affect the power of any court or tribunal to compel a witness to testify or to compel the production of documents". The Applicant's interest in obtaining these records is in the context of a grievance and/or a human rights hearing. There is nothing that should

prevent him from obtaining these documents within the context of the grievance and/or the human rights proceedings, whether or not he receives them pursuant to his ATIPP request. He is aware of the names of both third parties, knows the general allegations made in the emails, who made the allegations and the person against whom the allegations were made. He knows the emails exist and if they are requested for the purposes of either the grievance or the human rights review, should be made available to him, unredacted.

In all of the circumstances, I cannot conclude that disclosing a redacted version of these records would constitute an unreasonable invasion of any person's personal privacy. I therefore recommend that the emails be disclosed with appropriate edits. I have provided a copy of the records with the proposed redactions to the Department with these recommendations.

Elaine Keenan Bengts
Information and Privacy Commissioner