

**NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER**
Review Recommendation 16-100
May 23, 2016

Review File: 15-167-5

BACKGROUND

The Applicant in this case made a request for his own personal information from the Department of Finance. He was specifically requesting copies of all records in which his supervisor mentioned him. He also sought copies of any written complaints from his colleagues about him. A list of co-workers whose email correspondence should be searched was provided.

After reviewing the records provided in response to the request, the Applicant felt that there were records missing. In asking me to conduct a review, he provided a number of particulars:

- a) a number of emails which originated with the Applicant had not been disclosed;
- b) some (or all) of the emails that originated from the Applicant had been “modified”;
- c) there were no records from or involving the supervisor between August 2014 and February 2015, or between July 14, 2015 through August 5, 2015
- d) a report that was provided was not accurate;
- e) some of the records had been edited;
- f) there were no phone or text message records;
- g) the public body did not take proper steps to extend the time for responding to the Request for Information.

THE DEPARTMENT’S EXPLANATION

The Department provided me with an explanation of the searches done in response to the Request for Information. Each of the 31 co-workers named in the Applicant’s Request for

Information were provided with a request to identify responsive records from their records. They say that most of the individuals listed returned no responsive records but that those that were received were provided to the Applicant. They also contacted Employee Relations to see if any complaints had been raised against the Applicant and were told that there had been no such complaints.

With respect to records that appeared to be missing from the supervisor's response (in that there were no records from September, 2014 to January, 2015) an electronic search of the supervisor's outlook emails was conducted but no new emails were found.

Some of the records which the public body identified as responsive were edited and partially redacted pursuant to section 23 of the Act, which prohibits the disclosure of third party information where that disclosure would constitute an unreasonable invasion of the privacy of the third party.

The Director of Information Communication and Technology (ITC) was consulted about the possibility of recovering deleted emails and about whether or not the GN has the technical capacity to recover voice messages and/or text messages. The answer was that they did not currently have this capacity. Nor do they have the technology to listen/record conversations on GN phone systems. ITC did say that if there is a suspicion that emails had been deleted from the employee outlook emails, a request could be made for ITC to review the message journaling archive which keeps a record of all message transactions even if they are deleted. This functionality has been in place since May, 2015. The GN does not have any services that will allow them to archive voicemail messages on individual phones. Nor are they able to record text messages on GN cell phones.

DISCUSSION, CONCLUSIONS AND RECOMMENDATIONS

There are a number of concerns outlined by the Applicant and I will attempt to address each of those concerns individually.

1. Records from July 14 to August 5

The Applicant notes that there are no records dated from July 14, 2015 to August 5, 2015. The Applicant's Request for Information is dated July 2nd, 2015. Some of the records which

he received in response to his request for information had dates after July 2nd. I consider this going above and beyond what is required. In normal circumstances if a Request for Information were made on July 2nd, that would be the latest date that records would be provided for. The Act does not contemplate access to records not yet created. There is nothing in the Applicant's request which would suggest that he is looking for records not yet created or that he was expecting to receive records dated right up to the date he received his response. There has to be a cut-off date and, in this case, that date is July 2nd, 2015. His complaint that there were no records from July 14th to August 5th is, therefore, not well founded. If he wants those records, he can (and should) make another ATIPP request for records which came into existence after July 2nd, 2015.

2. Documents have been modified

With respect to the allegation that some of the records that the Applicant received had been modified, the Applicant has not provided me with any specifics about this allegation and I cannot see any such alterations (other than redactions which were done in accordance with section 23, which will be discussed below). I am not, therefore, able to conclude that this allegation is well founded.

3. Inaccurate report

One of the Applicant's complaints was that "a report" he received was not accurate. He has not identified what report he is referring to, nor has he provided me any particulars with respect to how it is, in his estimation, inaccurate. In the circumstances, therefore, I am not able to address this complaint.

4. Delayed response to ATIPP Request

The Applicant has also asked me to review the delay in responding to his request for information. Under section 8 of the Act, responses are to be provided within 30 days of the receipt of a Request for Information unless that time limit is extended pursuant to section 11 of the Act. In this case, the Applicant made his request for information on July 2nd, 2015 and it appears that the response was not sent by mail to the Applicant until approximately August 24th, which is 23 days beyond the date that it should have been provided. There was no extension taken pursuant to section 11. It appears that the ATIPP Co-Ordinator dealing with the request was away on holidays and it was not passed on to anyone else to deal with.

While the response was somewhat later than it should have been given, at this point the issue is moot, as it appears that the response was, by the Applicant's own records, picked up at the post office on September 3rd. I do not propose to make any recommendations with respect to the delayed response at this point other than to remind the department that they must comply with the time frames provided for in the Act for responding to access requests.

5. Missing records

The Applicant states that the response he received is incomplete and to support this he has provided a series of records which, by all accounts, appear to be responsive but which were not included in the package the Department of Finance provided to him. Most of these emails are dated in and around the time which the Applicant took up his position with the GN in the late summer of 2014. In fact, there are very few emails or other records dated between the time the Applicant started work with the GN until about March, 2015 and given that the Applicant reported to his supervisor, I would have anticipated a great number of such records. The Department has provided no explanation with respect to these missing records. More and better searches are obviously necessary. I **recommend** that the ATIPP Co-ordinator for the Department of Finance, with the assistance of personnel from technical services, personally undertake a search for additional records, particularly those for the period from August, 2014 until March, 2015 and to provide the Applicant with any additional records discovered. I would further **recommend** that the ATIPP Co-ordinator touch base with the Applicant to obtain a copy of the records he has (the same records he provided to me) in order to assist the ATIPP Co-ordinator in his searches. Finally, I **recommend** that the ATIPP Co-ordinator keep my office advised of the outcome of this further search.

6. Section 23

The Applicant has asked that I review those portions of the responsive records which were redacted before being provided to him. Section 23 of the Act prohibits the disclosure of any records, the disclosure of which would constitute an unreasonable invasion of the privacy of a third party. In this case, the public body has redacted a handful of references to third parties from the records provided to the Applicant. The Applicant says that, because he was either the originator of the emails with the redactions or was a recipient of these emails, there is nothing confidential in them that should have been redacted. I disagree. Once these

records are provided to the Applicant outside of his employment, there are no restrictions on how he uses or further discloses them. The information which has been redacted is sensitive personal information about third parties. The information redacted is minimal but deals with remuneration and taxes of named GN employees. In my opinion, all of the items redacted from the responsive records were properly redacted pursuant to section 23 of the ATIPP Act. I make no further recommendations with respect to these redactions.

7. Text messages and phone messages

The Applicant thinks that there were likely text messages, blackberry messages and phone messages in which he was the subject of the discussion and wants copies of all of those.

As noted by the Director of Information Communication and Technology (ITC), the GN does not currently have the technical capacity to record or recover text or phone messages or phone calls. Section 7(2) of the *Access to Information and Protection of Privacy Act* requires public bodies to “create” a record for an Applicant where it

- a) can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise; and
- b) creating the record would not unreasonably interfere with the operations of the public body.

There is no obligation to create records where none exist. I am not as naive as to believe that GN employees never use text messages to conduct business. Furthermore, I have commented on numerous previous occasions that if public bodies are going to conduct government business via text message, there must be an obligation to save those text messages and the ability to recover them for the purposes of an ATIPP request or simply to confirm what was said and done for the sake of posterity. More must be done to address this issue, including policies which prohibit the use of text messaging for the purpose of government activity, or finding a way to record and recover those text messages. For the purpose of this review, however, there is simply nothing to recover, as the technology to do so does not currently exist within the GN.

In summary, I recommend that additional searches be done, with the assistance of technical services as necessary, to identify additional records. While I fully expect that the

records identified by the Applicant will be discovered on this second go-round, I would also expect additional records to be found which would be new to the Applicant. These records should be provided to the Applicant, with any appropriate redactions, as soon as possible. I will leave it to the Applicant to request a review of any redactions necessary from these new records.

Elaine Keenan Bengts
Information and Privacy Commissioner