

**NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER**
Review Recommendation 16-101
May 25, 2016

Review File: 15-168-5

BACKGROUND

The Applicant in this case made a request for his own personal information from the Department of Finance. The request was dated August 19, 2015. He was specifically requesting copies of all records in which he was mentioned in any way from the records of three named GN employees.

The Department identified and disclosed 202 pages of responsive records. Of those 202 pages, three were edited to some extent pursuant to section 23 of the Act as the public body determined that disclosure of the edited portions would amount to an unreasonable invasion of the privacy of third parties.

The Applicant's request to the Office of the Information and Privacy Commissioner raised the following concerns which he asked be reviewed:

- a) there should have been additional responsive records dated prior to June/July of 2015;
- b) portions of two emails had been "cut and deleted" in part;
- c) there were no records of text messages or phone calls;
- d) no records were received for the time period July 14 to September 20, 2015
- e) some attachments referred to in emails were not included in the response.

THE DEPARTMENT'S EXPLANATION

The Department provided me with an explanation of the searches done in response to the Request for Information. The email records of the named employees were searched and all responsive records provided.

With respect to records that the Applicant claims were missing, the public body had no real explanation other than to say that all email records had been searched and everything identified as being responsive had been provided.

Three 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 Department advised that they had consulted with Information Communication and Technology (ITC) in charge of GN technology and were advised that the GN does not currently have the technical capacity to recover voice messages either from desk telephones or cell phones. Nor does it have the technology to recover text messages from its server.

THE APPLICANT'S RESPONSE

The Applicant provided the following comments in response to the public body's submissions:

- he had received no documents prior to June, 2015 from the division in which the three individuals worked. He says, however, that his supervisor contacted that division "all the time in regards of me, asking for guidance and follow up". He says he has records from a separate ATIPP request which shows this but has not provided those records for the purposes of this review;
- he identified the "cut and deleted" email communications, which coincided with the emails from which information has been redacted pursuant to section 23 of the Act;
- he notes that he received "only one phone text".
- he had no communication for the period July 14, 2015 until September 20, 2015;
- he has no records before June, 2015. He says he has copies of email correspondence which pre-dates June, 2015 involving his supervisor which include one or more of the three individuals named in this Request for Information, either as the author or as a recipient. He did not provide copies of those emails.

- he notes that one of the records he received is a “text message” in which the author indicates that he will “speak to [a specific person] and deal with this” but there are no other records of communication with that specific person.

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 prior to June, 2015

There are no records in the package provided to the Applicant dated prior to June 15, 2015. That said, there is nothing from which I can conclude that there would be or should be communications in the email records of the three individuals named in the Applicant’s Request for Information prior to that date. An incident occurred in June involving the Applicant which clearly created a lot of email traffic among a number of individuals. There is, however, nothing in the records I have been given to suggest that these three individuals had any reason to have been included in discussions prior to this date. Though the Applicant states that his supervisor contacted the division in which the three individuals worked to discuss the Applicant “all the time”, I have been provided with nothing to support that assertion. Without more, I cannot conclude that there was anything prior to June 2015 involving any of these individuals.

2. Section 23

The Applicant has asked that I review those portions of the responsive records which were redacted before being provided to him. There are three pages with minor redactions.

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 references to third parties from three pages of the responsive records. In each case, I am satisfied that the information redacted was subject to a mandatory exception from the disclosure rule because the information was about a third party and was

of a sensitive and personal nature, the disclosure of which would have constituted an unreasonable invasion of the privacy of the third party. The largest deletion involves a personnel matter about a different individual which had nothing whatsoever to do with the Applicant. The other two deletions are of names of individuals where the discussion was about income information relating to the third party. 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.

3. 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.

The Director of Information Communication and Technology (ITC) has advised that the GN does not currently have the technical capacity to record or recover text messages or phone messages from the system. As I understand it, the GN does not have a blackberry server which saves text messages. While the Applicant says he received one record of a text message, my eye tells me that the message he is talking about is an email sent from a blackberry telephone, rather than a text message. 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 terms of the statement in one of the records which stated that the author was going to “speak with [a specified individual] and deal with it”, the Applicant is quite right in saying that there is no record of that intended conversation taking place. Not all communications, however, are written and there is no way to record every conversation that takes place in the workplace. If there was a conversation between the author and the specified individual, it may well have been an oral one, with no record being produced as a result. Without more, I cannot conclude that there were further written communications.

4. Missing attachments

The Applicant has referred me to a record which is an email dated July 14, 2015 from his supervisor to one of the individuals whose records were requested, saying that the attachment to that email was not provided to him. There are a great number of emails from the Applicant’s supervisor to this person on July 14th. The Applicant did not specify which of these records he thought should have included an attachment. I have, therefore, reviewed every record to find this particular email, but none of the correspondence of that date from the supervisor to the specified individuals indicates that there was an attachment.

The Applicant also referred me to page 145 of the responsive records in this regard but once again, none of the emails on this page refer to any attachments. I cannot, therefore, find that attachments were missing.

5. No records for the period from July 14, 2015 until September 20, 2015

The Applicant says that there are no records dated from July 14, 2015 to September 20th, 2015.

I start with the observation that the Applicant's request for information is dated August 19th, 2015. The documents provided to me for this review include records dating to and including August 10th. In normal circumstances if a Request for Information were made on August 19th, that would be the latest date that records would be provided for. The Act does not contemplate access to records not yet created. There has to be a cut-off date and, in this case, that date is August 19th. There are, in fact, a good number of records dated between July 14th and August 10th, 2015. There are no records dated after August 10th. There is nothing that the Applicant can point me to or which I can glean from the records themselves which would suggest that there were additional records between August 10th and the 19th. It is impossible for me to conclude, therefore, that there are, or even that there should be, additional records between those dates.

The subject matter of the Request for Information is clearly the kind of information that hits very close to home for the Applicant and there is therefore an intense need for him to gather all of the information available. There was clearly no love lost between the Applicant and his supervisor and this lead the Applicant to believe that the supervisor was much more active than appears to be the case in dealing with the dispute between them. There is, however, simply nothing in the records themselves or in the information provided to me by the Applicant that provides any real support to those suppositions. There is nothing to suggest that there are additional records responsive to the request made or that there is any attempt being made to hide records which might be incriminating or embarrassing. I say this because it is pretty clear from the records provided that some of the discussions disclosed were quite harsh and did not necessarily reflect well on the authors.

I therefore recommend that no further steps be taken in this matter.

Elaine Keenan Bengts
Information and Privacy Commissioner