

**NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER**

Review Report 20-239

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BACKGROUND

On September 17th, 2019, our office received a letter from an employee of the Department of Education, Culture and Employment (ECE) in which the employee raised a concern about his receipt of a hard copy of a portion of a colleague's performance appraisal document, ostensibly for the purpose of assisting the employee to complete his own performance appraisal document. The Complainant noted that the performance appraisal document given to him included his colleague's (to be referred to herein as A.B.) personal performance objectives as well as his supervisor's personal written comments about the appraisal. The Complainant was uncomfortable with this apparent breach of A.B.'s privacy and asked the Office of the Information and Privacy Commissioner to review the potential breach of privacy.

THE DEPARTMENT'S RESPONSE

The Department advised that A.B. had met with his supervisor to review his performance appraisal document and at that meeting a list had been prepared of all the training that he had completed during the year and a list was made of training still required. Because a number of the employees of this division had all completed the same training during the year and all needed to complete a similar list of ongoing training in the upcoming year, the supervisor asked A.B. if she could take a copy of the page on which the training courses were listed and share it with his co-workers so as to save the time it would take to create the same list for each employee and A.B. agreed. A.B.'s authorization was given verbally. The Department alleged that the document that was to be shared did not contain A.B.'s name and could not be linked to him personally so there was no breach of his privacy.

A.B.'s POSITION

Because the Complainant's concerns were about the privacy of a third party, our office reached out to A.B. to ask for his understanding of the situation. The response we received was as follows:

I had no issue with my performance appraisal being shared. I work as a part of a team and I try to be as transparent as possible. There was no breach of my privacy.

THE COMPLAINANT'S RESPONSE

The Complainant questioned the bona fides of A.B.'s response to this office, suggesting that the workplace was "toxic" and that in order to retain favour with the supervisor, A.B. had no option but to advise my office that he had consented to the use of his personal information in the manner outlined. He pointed out that notwithstanding A.B.'s indication that he had consented, the sharing of A.B.'s performance appraisal document was inconsistent with the policy regarding the performance appraisal process which dictates confidentiality. Finally, the Complainant alleged that, contrary to the information provided by the Department, the document he received from the supervisor clearly contained information identifying A.B., and it included considerably more information than the information about training completed and still required. He provided a copy of the document he received as proof of his allegation in this regard.

DISCUSSION AND CONCLUSIONS

1. Jurisdiction

The discussion of this complaint must start with a consideration as to whether this office

can accept a complaint about a privacy breach in which the privacy of the Complainant is not affected.

Section 49.1 of the *Access to Information and Protection of Privacy Act* provides that:

49.1. (1) An individual may request the Information and Privacy Commissioner to review whether a public body has collected, used or disclosed the individual's personal information in contravention of this Part.

This section allows for an individual to seek a review in respect of an alleged breach of his/her own privacy. This does not extend, however, to asking for a review of an alleged breach of someone else's privacy. The Complainant in this case, therefore, has no standing to request a review of a breach of A.B.'s privacy.

This, however, does not end the matter. The Information and Privacy Commissioner has independent oversight over how public bodies collect, use and disclose personal information. This oversight role goes beyond addressing specific complaints received and extends to commenting on and providing guidance to public bodies when issues come to her attention that raise concerns about compliance with the *Access to Information and Protection of Privacy Act*. In this case, I felt that the concern raised by the Complainant raised legitimate privacy concerns and merited comment. I therefore continued with the review under section 49.2 which allows the Information and Privacy Commissioner to conduct a review if she is of the opinion that a review is warranted in the circumstances.

2. Consent to Use

The *Access to Information and Protection of Privacy Act* dictates how, when and for

what purposes public bodies can collect, use and disclose personal information.

The information in a performance review record is, without a doubt, personal information. Section 43 sets out those circumstances in which personal information can be used by a public body as follows:

43. A public body may use personal information only
 - (a) for the purpose for which the information was collected or compiled, or for a use consistent with that purpose;
 - (b) if the individual the information is about has identified the information and consented, in the prescribed manner, to the use; or
 - (c) for a purpose for which the information may be disclosed to that public body under Division C of this Part.

Section 43(b) clearly allows for the use of personal information where the person the information is about has consented to that use.

Similarly, section 48(b) allows for the disclosure of personal information with the consent of the individual involved:

48. A public body may disclose personal information ...
 - (b) where the individual the information relates to has identified the information and consented, in the prescribed manner, to its disclosure;

On the face of things, A.B. has consented to the use of information in his performance appraisal document to assist his co-workers in completing their own. He has put this consent in writing in correspondence with this office.

I point out, however, that the consent must exist at the time of the use or disclosure and both section 43 and 48 require consent “in the prescribed manner”. The “prescribed manner” is set out in the Regulations. Section 5 of the Regulations provides:

5. The consent of an individual to a public body’s use or disclosure of his or her personal information under paragraphs 23(4)(a), 43(b) and 48(b) of the Act
 - (a) must be in writing; and
 - (b) must specify to whom the personal information may be disclosed or how the personal information may be used.

The consent provided in this case was not in writing. It did not, therefore, meet the requirements for a valid consent for the purposes of authorizing the use/disclosure pursuant to either section 43(b) or 48(b). As a result, the use/disclosure of portions of A.B.’s performance review document amounted to a breach of his privacy, notwithstanding his verbal consent.

One of the reasons for requiring written consent is to create a record of precisely the scope of the consent. In this case, it is not entirely clear to me that A.B. was consenting to the disclosure of anything other than a list of training he had received and planned to obtain in the future. It is clear from the documents provided to me by the Complainant, however, that the information actually shared with other team members contained not only this training information, but also information relating to A.B.’s personal performance objectives and written comments made by A.B.’s supervisor about A.B.’s appraisal. Further, I am satisfied that, contrary to the Department’s first set of submissions to this office, A.B.’s identity was clearly and easily discernable on the face of the documents shared. I cannot, therefore, confirm that the consent given matched the use/disclosure that resulted. I am not completely convinced that A.B.’s verbal consent was intended to go this far.

Furthermore, it seems to me that the supervisor's goal of assisting team members to identify training opportunities both received and needed, could have been met more appropriately by creating a separate list for use by other team members, rather than risking the privacy of A.B. by copying or printing it directly from his performance appraisal document.

RECOMMENDATIONS

I recommend that the Department of Education, Culture and Employment ensure that records created and information collected in the Department's performance evaluation process be held as strictly confidential and that the sharing of any part of such documents be strictly prohibited so as to protect the privacy of the employees.

I further recommend that the Department develop a policy or guidelines with respect to the consent necessary to comply with section 5 of the Regulations, including a draft consent form to be used by the department in appropriate circumstances.

Elaine Keenan Bengts
Information and Privacy Commissioner