

**NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER**

Review Report 20-246

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BACKGROUND

In November, 2019, I received a request from an employee of the Department of Education, Culture and Employment to investigate whether the employer's actions amounted to a breach of privacy under the *Access to Information and Protection of Privacy Act*.

The Complainant and his co-workers participated in a self-awareness program sponsored by their employer in which they provided answers to a number of questions which, when analyzed, were put into a report and provided to each of the participants individually. According to ECE's submissions, the Talent Insights Report referred to by the Complainant "provides insight to three distinct areas; behaviors, driving forces and the integration of these". It is, they say, "promoted that understanding strengths and weaknesses in these areas will lead to personal and professional development and a higher lever of satisfaction in the organization". Before the online evaluation questions were completed by each of the staff members, they were advised that the results would be confidential. This was re-iterated after the questions had been completed. The staff was, however, "encouraged to share the report where they felt comfortable". The facilitator advised the participants in writing:

I do hope that you will find benefit of sharing your report with the rest of your team. Remember, all the reports are confidential (no sharing outside of the office) and please, no printing of other people's reports.

After the reports were completed, however, the Complainant says there was a concerted effort by management to get employees to put their results on a shared drive

for all co-workers to see. According to the Complainant:

We were given a hard copy of our Talent Insights Report on January 29th. [The facilitator] let us know that these were private, and that we did not have to share these, and that we may want to keep them private if we wished. [The facilitator] asked us to share some information about ourselves which was in the report on the day to better help us understand team dynamics. On February 11th, digital copies of our reports were emailed to us at our GNWT accounts.

The Complainant alleges that the next day (February 12th) a request was made by the team's supervisor at their morning team meeting "that all of us upload our reports to the shared L drive because she wanted to have a look at them". Someone in the meeting questioned this direction, indicating their understanding that sharing the reports was optional. The Complainant says that another request was made to the team by the same supervisor some weeks later (this too was a verbal request). The Complainant says that at least one team member shared a small portion of their report "to satisfy [the supervisor's] request for our personal information". The Complainant said that yet another request was made for the team to share their reports in May, this time by way of email from another employee at the behest of the supervisor. One of the other team members responded to this email indicating "my understanding was that this was optional". The response from the supervisor suggested that if the employee had objections to sharing the report with the team, they could email it directly to the supervisor as an alternative. There was no acknowledgment that the employee had a choice not to share it at all.

After receiving the written request to share the reports with the team, the Complainant also sent an email to the supervisor, indicating that he did not feel comfortable sharing the report with the team. The supervisor, in turn, requested a meeting with the Complainant and he says he was given a "verbal reprimand for insubordination" by the supervisor for refusing to comply with the request.

It does not appear that, with the exception of one employee who shared a portion of the report on the shared drive, that any of the other team members did so.

THE DEPARTMENT'S RESPONSE

The Department's view of the situation is quite different. According to the Department, only one request was made by the supervisor for the team to share their reports with everyone else on the team and that

Recognizing the intended benefits of sharing the information contained in the reports, [the supervisor] wanted to be sure staff were aware that the option to share their results was available to them. When [the supervisor] learned that staff had considered it and made their decision (to share or not) no further requests were made of staff.

DISCUSSION

One of the stated purposes of the *Access to Information and Protection of Privacy Act* is "preventing the unauthorized collection, use or disclosure of personal information by public bodies".

Collection

Section 40 of the Act allows public bodies to collect personal information about individuals where the information relates directly to and is necessary for an existing program or activity of the public body. In this case, it was not the public body collecting the information, but an independent contractor providing a service to the GNWT. The GNWT never had either custody or control of the questionnaires completed by the employees and it was never intended that the GNWT would have access to the answers provided or the evaluations that resulted from the exercise. It was, intended, from the beginning that this was to be a confidential exercise for the direct benefit of the

employee (on the understanding that an employee that knows his/her own strengths and weaknesses will be a better employee). The GNWT did not “collect” any information through the exercise. The information was collected by a third party. However, the reports prepared from the information collected by the third party were provided to each individual employee for their own use. It was provided to them via their own individual GNWT email account. They were provided on the basis that they were confidential to the individual unless, of course, the individual chose to share his/her report with others. That said, each employee received that information in their role as a GNWT employee, by means of their GNWT email account. The GNWT, therefore, can be said at that point to have “custody or control” of the reports by virtue of their ownership of the email servers and email accounts. At this point the GNWT has “collected” personal information about its employees. That does not mean that it belongs to the GNWT or that anyone but the intended recipient necessarily has a right to the information contained in the reports. It means merely that the information has been collected. It can only be used or disclosed, however, in accordance with the ATIPPA Act.

I find that the Department collected the information in the individual employee reports and, to the extent that the collection was associated with human resources support and advancement, it was properly collected as part of a government activity under section 40.

Use and Disclosure

While the information in the reports may have been appropriately “collected” by the Department, this information cannot be used or disclosed except in accordance with the *Access to Information and Protection of Privacy Act* and, in particular sections 43 and 48.

Once collected a public body can only use that information or disclose it for specific purposes. Section 43 provides that:

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.

With this as a guide, the personal information collected and compiled into a report for each employee was collected for the purpose of the self-evaluation of the employee. It was not intended as a management tool and was not intended to be shared except with consent. If employees were told that the results were intended to be confidential, then that narrows the parameters for which the information can be used by the public body. Subsection (b) does allow for the use of the information by management if the employee consents to that use but in this case, there was clearly reluctance by the Complainant, and apparently at least some of the other team members, to share these results. Without consent, use of this information for management purposes was not authorized.

Because the reports were always intended to be confidential to the individual employees, and the purpose of the collection was for each employee's personal self-assessment, use of the information in the records is limited to this purpose unless the employee agrees to an expanded use of that information.

Here, while the supervisor was hoping to use the information for an expanded purpose, she required the consent of each of her employees to obtain access to the records. It appears that most of the employees chose to withhold that consent and the supervisor, therefore, was unable to use the information as she had hoped to. Because of the way in which the information was given to the employees (emails directed to each employee), the supervisor was unable to use or disclose the information further. There

was, therefore, no unauthorized use or disclosure of the information contained in the individual employee reports.

I will not comment further on the supervisor's tactics in attempting to obtain the consent of her employees to use the reports for her own purposes, other than to point out that a valid consent must be knowledgeable and voluntary. Coercion, bullying and intimidation are all factors that would factor into a determination as to whether or not a given consent was voluntary and, therefore valid. However, because it appears that most of the employees chose not to provide consent, there is no need for me to discuss whether consent was voluntary.

RECOMMENDATIONS

In the circumstances, I make no recommendations as there was no inappropriate collection, use or disclosure of employee information.

Elaine Keenan Bengts
Information and Privacy Commissioner