

NORTHWEST TERRITORIES INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 13-119

File: 13-138-4

August 23, 2013

THE REQUEST FOR REVIEW

In April, 2013, I received a request from an Applicant, asking me to review the response which he had received to his Request for Information from the department in which he was employed. His request was, for the most part, for his own personal information in relation to a staff meeting which had been held at the request of individuals within his workplace at which he was the subject of the discussion. The Applicant was not invited to, nor did he attend this meeting. After the meeting, certain actions were taken by the employer, including a request to the Applicant to provide a "prognosis" as to his medical fitness for the job. This request was apparently made as a result of the information imparted to management at the meeting noted above. The Applicant is seeking copies of the minutes of that meeting, and all correspondence surrounding the circumstances discussed at the meeting.

In response to the request, the public body identified a number of records, most of which were provided to the Applicant in their original form. There were, however, also some records which were either not provided to the Applicant at all or were provided in an edited form. The public body relies variously on the following sections of the Act to justify the exceptions to disclosure:

- Section 14(1)(b)(i) - information that would reveal consultations or deliberations involving officers or employees of a public body;
- Section 14(1)(b)(ii) - information that would reveal consultations or deliberations involving a member of the Executive Council;
- Section 14(1)(d) - information that would reveal plans that relate to the management of personnel that have not yet been implemented
- Section 23(2)(a) - the medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation of a third party;

- Section 23(2)(d) - information relating to the employment, occupational or educational history of a third party
- Section 23(2)(i) - information which, if disclosed, could reasonably be expected to reveal that the third party supplied, in confidence a personal recommendation or evaluation, character reference or personnel evaluation;

The Applicant has a number of complaints about the response he received:

- he does not believe that the Department responded in a timely manner (i.e. within 30 days) as required by the *Access to Information and Protection of Privacy Act*.
- he believes that there are additional relevant and responsive records which have not been identified and/or disclosed. Specifically, the Applicant noted the absence of the following:
 - there were no records from the employees who attended the meeting;
 - there were no meeting minutes;
 - he says a letter was given to the manager during the meeting but that letter was not disclosed
 - there were no phone logs or notes provided
- he does not accept that the exemptions under which the public body based their refusal to provide some information were properly applied;

THE PUBLIC BODY'S POSITION

With respect to the delay in responding to the Applicant's request for information, the public body has provided me with a time line and the steps that were taken. The Request for Information appears to have been received by the Department on November 28th, 2012. There were some discussions between the Applicant and the department to clarify and focus the request and on December 4th, the department acknowledged receipt of the request and confirmed the understandings reached. The public body immediately started the necessary search for records, with a view to completing the request within the required 30 days. As they were collecting the information, they determined that they would require an extension and an extension letter was sent to the Applicant on December 19th. In that letter, the department extended the response date to January 31, 2013. The reason given for the extension was that

...a preliminary review of the records you have requested indicates that there may have to be extensive consultations with the Department of Human Resources before we can fully process your request....Also, given the time of the year [the department] is closed over the Christmas season from December 21st to January 2nd.

Further delays occurred because some of the employees from whom information was being requested were difficult to contact as the nature of their jobs was such that they did not always receive email correspondence in a timely way. The contact person in the Department of Human Resources was also away on holidays for an extended period of time and did not respond to inquiries from the public body. As a result, an additional 15 days was added to the extension period, with notice being given to the Applicant by letter indicating that the further extension was needed because of the "complexity and necessary consultations with the Department of Human Resources". As there was still no response from the other department to their consultation, this public body proceeded to compile the information required to respond to the Applicant but found that they still required more time. A third extension letter was sent to the Applicant on February 14th, extending the time for responding another 15 days to March 1st. No further explanation for the extension was provided except that the processing of the response was not complete. The records were forwarded to the Applicant by mail on March 4th and received by him on March 7th.

With respect to the completeness of the response, the public body outlined the process taken to identify responsive records. In this case, the process was to contact all the individuals involved and brief them on the requirements of the Act. These employees were asked if they were in possession of any relevant records and, if so, to provide copies of those records to the ATIPP Co-Ordinator.

With respect to the specific items listed by the Applicant as missing, the public body indicated that there was no correspondence exchanged during this meeting. All information was imparted verbally from the discussions. The discussions were recorded and minutes taken by the other department involved and those minutes had not been shared with this department.

The public body did confirm that when reviewing the response provided to the Applicant for the purpose of this review, additional records were discovered, which have since been provided to the Applicant.

With respect to the exemptions claimed, the public body has applied Section 14 a number of records or portions of records. Where this section was applied, the public body notes that the records involved discussion with respect to the administration and management of an employee and that this raised concerns that releasing opinions, advice, and deliberation of this nature might affect the ability of the public service staff to be candid and forthright in future management of staff and labour relations.

Section 23 was applied in cases where they felt that the record included the personal information of a third party, including the opinions of co-workers and to third party employment and medical information.

THE APPLICANT'S RESPONSE

The Applicant was provided with a copy of the Department's letter and the list of records with a record by record explanation as to why parts or all of the record were not disclosed and was invited to provide further comment. No further comment was received.

THE RELEVANT SECTIONS OF THE ACT

It is helpful to review the most relevant provisions of the *Access to Information and Protection of Privacy Act* in relation to this request and the starting point should always be Section 1 which sets out the purposes of the Act:

1. The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
 - (a) giving the public a right of access to records held by public bodies;
 - (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves held by public bodies;

- (c) specifying limited exceptions to the rights of access;
- (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and
- (e) providing for an independent review of decisions made under this Act.

Section 5 of the Act provides members of the public with the right to request access to records in the custody or under the control of a public body, but limits that right of access if the information is specifically excepted from disclosure under the Act. However, section 5(2) further requires that where excepted information can reasonably be severed from a record, an Applicant has a right of access to the remainder of the record.

With respect to the delay in responding, the relevant provisions are sections 8 and 11, which provide as follows:

- 8.(1) The head of a public body shall respond to an applicant not later than 30 days after a request is received unless
 - (a) the time limit is extended under section 11;

- 11.(1) The head of a public body may extend the time for responding to a request for a reasonable period where
 - (a) the applicant does not give enough detail to enable the public body to identify a requested record;
 - (b) a large number of records is requested or must be searched to identify the requested record and meeting the time limit would unreasonably interfere with the operations of the public body;
 - (c) more time is needed to consult with a third party or another public body before the head can decide whether or not the applicant is entitled under this Act to access to a requested record; or
 - (d) a third party asks for a review under subsection 28(2).

- (2) Where the time for responding to a request is extended under subsection (1), the head of the public body must tell the applicant without delay
 - (a) the reason for the extension;
 - (b) when a response can be expected; and

- (c) that the applicant may ask for a review of the extension under subsection 28(1).

Section 23 is one of the sections relied on by the public body with respect to the severed portions of the records provided. Subsection (1) provides that:

23.(1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.

Subsection (2) sets out a series of situations in which there is a presumption of an unreasonable invasion of a third party's personal privacy. In this case, the public body relies on subsections 23(2)(a)(d) and (i). These subsections provide that an unreasonable invasion of a third party's privacy will be presumed where:

- (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation; ...
- (d) the personal information relates to employment, occupational or educational history; ...
- (i) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation;

If section 23(1) applies, it is a mandatory exception to disclosure. In other words, the public body is prohibited from disclosing the offending information.

Section 14(1)(b)(i) and (ii) and 14(1)(d) which grants public bodies the discretion to refuse access to a record or part of a record as follows:

The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal...

- b) consultations or deliberations involving
 - i) officers or employees of a public body,

- li) a member of the Executive Council, or the staff of a member of the Executive Council, ...
- d) plans that relate to the management of personnel or the administration of a public body that have not yet been implemented;

If section 14 applies, the exception is discretionary and the public body must exercise its discretion and decide whether or not, in all of the circumstances, to disclose the record.

DISCUSSION

1. Delay

The *Access to Information and Protection of Privacy Act* imposes on public bodies certain obligations, including the positive duty to respond to access requests within 30 days except in narrow and defined circumstances. The onus of establishing that those circumstances exist lies squarely on the public body. Even if the public body can meet that onus, the section allows only that the public body can extend the time for response for a "reasonable" period of time. In this case, it took the public body 96 days to respond.

The 30 day response period is in the Act for a reason. It is not a goal, or a suggestion. It is a requirement. When there are circumstances which might justify extending the time, there is a clear process for extensions.

In my opinion, there were problems with the process that was followed in the taking of the extensions. Further, I am not convinced that the extension was "reasonable" in all of the circumstances. While the first extension appears to have been properly done, the second and third did not follow process. Nor is there anything in the Act which provides for a second or third extension of time. For the number of records involved, the time frame for responding was much too long.

In my opinion, the public body in this case may have had grounds for an extension of time for responding in the first instance, but the subsequent extensions were not allowed under the Act, were not properly executed in any event, and extended the response period beyond what was reasonable.

2. Missing Records

There are several mentions in the records of a letter that was delivered to management by a co-worker during the meeting which was held to discuss the concerns about the Applicant's behaviour in the workplace. The Applicant notes that this record was not disclosed. It was, however, identified as being a responsive record. The public body, however, chose not to disclose the contents of that letter, as will be discussed below. There is no indication that there were any other records which were not disclosed.

3. The Application of Exemptions

In order to properly assess whether the exceptions have been appropriately applied, it is necessary to review the records page by page and line by line. Where a page or a record is not referred to in these recommendations, it is because the records have been provided to the Applicant in their original form, without any edits or redactions. Many of the records are duplicates or partial duplicates. I will comment only on the first appearance of each writing.

Package 1 - From the records of Russell Neudorf, Deputy Minister

Record 1 - Email dated October 9, 2012 - 3 pages

The first page of this record is an email from one senior manager to another on the topic of concerns about incidents involving the Applicant during work hours and on the work site. A portion of the second and third paragraphs of this page have been redacted pursuant to section 14(1)(b)(i). This is a discretionary section. The public body must exercise its discretion as to whether or not to disclose the information. While the public body has not provided much in the way of an explanation, it does appear that they have exercised their discretion with respect to this record as the entire content of the email might well have qualified for an exemption under section 14. Parts of paragraph 3 that have been redacted are the personal information of a third party, the disclosure of which would constitute an unreasonable invasion of that person's privacy. In the circumstances, I am satisfied that the redactions on this page were properly applied.

The next two pages of this record contain a letter written by a third party to three senior managers of the department. Everything but the date of the letter and the names of the addressees have been redacted pursuant to section 23(2)(1). The public body claims that the letter contains the opinions of a third party related to workplace safety issues which were provided to the department in confidence. I am not convinced that section 23 applies in this instance. Section 20(1)(d), however, may well apply. This section provides public bodies with the discretion to refuse to disclose information where there is a reasonable possibility that the disclosure could “reveal the identity of a confidential source of law enforcement information”. It should be noted that the definition of “law enforcement” in the Act includes “investigations that lead or could lead to the imposition of a penalty or sanction”. The circumstances involved in this case satisfy me that this was intended to be a confidential statement by a witness with respect to an investigation which might have lead to “a penalty or sanction” for the Applicant. I am, therefore, satisfied that this letter was properly withheld, but not pursuant to section 23(2).

Record 5 - Email dated November 20th (most recent in chain) - 2 pages

This appears to be an exchange of email involving two members of the legislative assembly, and between the Deputy Minister and the Minister of the Applicant’s department in which the Applicant’s work situation is being addressed. The public body relies on section 14(1)(b)(ii) which provides a discretionary exemption for information which could reasonably be expected to reveal consultations or deliberations involving a member of the Executive council. While I am satisfied that the redactions are all authorized under the Act, I do not believe that section 14(1)(b)(ii) applies to all.

- a) Email 1, Paragraph 2 - The redacted portions of this paragraph are the personal information of a third party, the disclosure of which would constitute an unreasonable invasion of that person’s privacy and the public body. Section 23(1) applies, not section 14
- b) Email 2, Paragraphs 1 and 2 - I am satisfied that section 14(1)(b)(ii) applies to this email.

- c) Email 3, Paragraphs 1 and 2 - The redacted portions of these paragraphs are the personal information of a third party, the disclosure of which would be an unreasonable invasion of that person's privacy and disclosure is, therefore, prohibited pursuant to section 23(1).

- d) Email 3, Paragraphs 3, 4 and 6 - This is an email between two members of the Legislative Assembly, both of whom are members of the Executive Council. I am satisfied that section 13(1)(c) of the Act protects the redacted portions of this email. Section 13(1)(c) prohibits the disclosure of information that would reveal a confidence of the Executive Council, including consultations among members of the Executive Council on matters that relate to the making of government decisions.

Record 6 - Email dated November 22, 2012 (most recent in the chain) - 3 pages

Only the first three chains of the email in this record are new. The rest have all been addressed under "Record 5". In the "new" chains, only the second paragraph of the second email has been edited. The public body has referred to section 14(1)(d) as the applicable section, but the redacted information is the personal information of a third party, the disclosure of which would constitute an unreasonable invasion of that person's privacy. Its disclosure is, therefore, prohibited pursuant to section 23.

Record 7 - Email dated November 22nd, 2012 (most recent in the chain) - 3 pages

The emails on the second and third pages have already been addressed above. In the first page of this email chain, the only information which has been edited from the record is third party personal information, the disclosure of which would be an unreasonable invasion of that person's privacy. The public body is, therefore, prohibited from disclosing it pursuant to section 23. The public body has, however, relied on section 14(1)(d).

Record 8 - Email dated November 22nd, 2012 (most recent in the chain) - 3 pages

All of the emails in this record have been discussed in previous records.

Record 9 - Email dated November 23rd, 2012 (most recent in the chain) - 5 pages

Pages 1, 2 and 3, Email 4 - The information redacted from this email is all the personal information of a third party, the disclosure of which would constitute an unreasonable invasion of that person's privacy. The public body has cited section 23 for some of the redacted portions, but relies, for the most part, on section 14(1)(b)(ii). Because section 23 is mandatory, and section 14 only discretionary, section 23 should have been applied to all redacted items.

The remaining emails in this record have all been discussed above.

Record 10 - Email dated November 25th, 2012 (most recent in the chain) - 3 pages

The only new emails in this record appear on the first page of the record and there has been nothing redacted from this page. All remaining emails have been discussed above.

Record 11 - Email dated November 27th, 2012 (most recent in the chain) - 5 pages

The only new emails in this record appear on the first page of the record and there has been nothing redacted from this page. All remaining emails have been discussed above.

Record 12 - Email dated November 27th, 2012 (most recent in the chain) - 5 pages

The only new emails in this record appear on the first page of the record and there has been nothing redacted from this page. All remaining emails have been discussed above.

Package 2 - From the records of Greg Whitlock, Regional Superintendent

Record 1 - Email dated October 3, 2012 (most recent in the chain) - 1 page

I am satisfied that the information edited from this record constitutes the personal information of third parties, the disclosure of which would be an unreasonable invasion of the privacy of those individuals and the public body was, therefore, prohibited from disclosing the information pursuant to section 23(2)(h).

Record 3 - Email dated October 8th, 2012 (most recent in the chain) - 3 pages

The only information masked in this record is a small portion of one line on the second page of the record. The public body has cited section 14(1)(b)(i) as the relevant section of the Act justifying the edits. This section gives the public body the discretion to refuse disclosure of information where the disclosure could reasonably be expected to reveal "consultations or deliberations involving officers or employees of a public body". I am not satisfied that the redacted portion of this record can be categorized as being a consultation or deliberation. **I RECOMMEND** that this portion of the record be disclosed.

Record 4 - Email dated October 9th, 2012(most recent in the chain) - 3 pages

This is a copy of Record 1 in Package 1 and has, therefore, already been addressed.

Record 9 - Email dated October 15th, 2012(most recent in the chain) - 2 pages

The body of two emails on the first page of this record have been masked, with the public body relying on Section 14(1)(b)(i) of the Act for justification. I am satisfied that the information redacted would reveal consultations or deliberations involving officers or employees of the public body. In light of the other information which has been disclosed, I am also satisfied that the public body exercised its discretion in its decision not to disclose these portions, even though there is no explanation provided. The fact is that the public body has, for the most part, been very open in its disclosure in this case and has disclosed many records that might otherwise have qualified for a discretionary exemption. I therefore make no further recommendation with respect to this record.

Record 14 - Email dated October 18th, 2012(most recent in the chain) - 3 pages

In the first email in this record, the public body has redacted four small segments pursuant to section 14(1)(b)(i) of the Act. While I am not convinced that this section applies, I do believe that the disclosure of these portions of the email is prohibited pursuant to section 23 in that the disclosure would be an unreasonable invasion of the privacy of a third party. The sections have, therefore, been appropriately redacted.

The entire body of the next email in the chain has been edited, again citing section 14(1)(b)(i) of the Act. I am satisfied that this email constitutes consultations involving officers or employees and the public body has a discretionary exemption, though no reasons have been given for the manner in which the discretion has been exercised.

The remaining emails in this record have been previously addressed in this report.

Record 15 - Email dated October 27th, 2012(most recent in the chain) - 5 pages

Once again, the department has redacted only two small portions of the first email in this record citing section 14(1)(b)(i) of the Act. While I am not satisfied that this section applies, I do believe that the disclosure of these portions of the email is prohibited pursuant to section 23 in that the disclosure would be an unreasonable invasion of the privacy of a third party. The sections have, therefore, been appropriately redacted.

Record 16 - Email dated October 29th, 2012(most recent in the chain) - 2 pages

Only the first email in this chain is new. The rest have been previously addressed in this report.

One paragraph of this email has been redacted in full, citing section 23(2)(a) and (d). I agree that the disclosure of this paragraph would constitute the unreasonable invasion of the privacy of a third party and has been properly edited.

The remaining edits in this record are in the first paragraph of the first email and the public body cites section 14(1)(b)(i) as the reason for the edits. I am satisfied that the disclosure of the information in question would constitute an unreasonable invasion of the privacy of one or more third parties and these sections have been properly withheld pursuant to section 23 of the Act.

Record 17 - Email dated October 30th, 2012(most recent in the chain) - 3 pages

The second email on the first page of this email has been edited by masking an entire paragraph. It is marked as having been withheld pursuant to section 14(1)(b)(i). It is, however, once again the personal information of a third party, the disclosure of which would be an unreasonable invasion of privacy and the public body is, therefore, prohibited from disclosing it pursuant to section 23.

I note that there is a name in the body of the third email on the first page and again on the second email of the second page which should have been redacted pursuant to section 23, but which has not been. As a result, the third party's privacy has been breached.

The remaining edits have been dealt with in previous records.

Record 20 - Email dated November 23rd, 2012(most recent in the chain) - 5 pages

All of the redacted information in this record has been dealt with in previous records.

Record 22 - Email dated November 28th, 2012(most recent in the chain) - 2 pages

There are two edits in one paragraph on the second page of this record. While the department has cited section 14(1)(b)(ii) of the Act as justification for the redactions, these edits are of third party personal information, the disclosure of which would constitute an unreasonable invasion of their privacy. The public body was prohibited from disclosing this information pursuant to section 23 of the Act.

Package 3 - From the records of Robert Billard, Regional Manager

With the exception of three records, all of the edited portions of emails in this package have been dealt with in previous records. The three exceptions are:

Record 3 - Email dated October 8th, 2012 (most recent in the chain) - 3 pages

This is, for the most part, an email chain which has been commented on above. That said, it appears that the public body did not mask all of the information in this record that they masked in the previous record. The previous appearances of this information, therefore, should be disclosed as well.

Record 11 - Email dated October 29th, 2012 (most recent in the chain) - 3 pages

All of the emails in this record have been previously commented on with the exception of the first email in this record. Here, the public body has edited several words that would identify a

third party, citing section 23(2)(a) of the Act as justification. I agree that the disclosure of this information would constitute an unreasonable invasion of a third party's privacy.

Record 19 - Email dated November 22nd, 2012 (most recent in the chain) - 5 pages

The second email in this chain has already been disclosed to the Applicant in a previous record, without redactions. The public body has chosen, in this appearance of the email, to delete a paragraph pursuant to section 14(1)(b)(i) of the Act. As the information has already been disclosed in another record, and it contains no third party personal information, I

RECOMMEND that it be disclosed in this record.

All of the remaining redacted information in this record has been dealt with in previous records

CONCLUSIONS AND RECOMMENDATIONS

My recommendations with respect to the individual records are outlined in the discussion above. For the most part, the public body did appropriately edit the records provided to the Applicant, notwithstanding the fact that they often relied on the wrong section of the Act for their justification. Most of the information withheld was third party personal information, the disclosure of which would have been an unreasonable invasion of the third party's privacy. While the onus on the public body is to establish that an exemption applies, where the exemption is mandatory, it is appropriate for me to consider whether or not it applies, even where the public body fails to identify the proper exemption.

With respect to the issue of delay, there is little that can be done to correct the error made here. I reiterate my opinion that only one extension of time for responding to an Applicant's request is provided for in the Act and the second and third extensions were not properly taken. I would recommend only that the public body review its practices and procedures to reflect the fact that only one extension of time is available on any given Request for Information.

Elaine Keenan Bengts
Information and Privacy Commissioner