

**NORTHWEST TERRITORIES  
INFORMATION AND PRIVACY COMMISSIONER**

Review Recommendation 15-135

File: 14-134-4

May 21, 2015

**BACKGROUND**

The Applicant is an employee of the Government of the Northwest Territories. He was in a supervisory role to several employees within his department. At some point, a report was made to the R.C.M.P. by one or more of the Complainant's co-workers about possible criminal activities by the Complainant. The R.C.M.P. did an investigation and apparently found that there was no evidence to support the allegations. The Complainant subsequently made a Request for Information to the department for his own personal information with respect to this report to the R.C.M.P.. In the Request for Information, the Complainant provided a list of fellow employees who he felt had or might have relevant records and whose records he specifically asked be reviewed within the ATIPP process.

The Complainant contends that in the course of responding to the Request for Information, the ATIPP Co-ordinator and others in the department breached his privacy on at least three occasions:

- a) when the ATIPP Coordinator disclosed him as the applicant by providing a regional supervisor with the list of the names from whom information was being requested;
- b) when the ATIPP request was discussed between a number of the individuals within the workplace, all of whom were on the list he had submitted as part of his Access to Information request;
- c) when a manager attempted to interfere with the ATIPP process and went outside of the department to seek information about him from the R.C.M.P.

**First Complaint**

The Complainant's Request for Information was sent to the ATIPP Coordinator for the department in question. In it, he asked for information from a number of named individuals

within his work group, including several of his own supervisors. The department says that some of the employees named in the request were emailed and some were sent individualized letters via Canada Post to their work addresses in envelopes marked 'confidential'. The department was, apparently, aware of conflicts within the workplace between several of the named individuals and the Complainant and were trying to be careful about how they went about collecting the information requested so as not to reveal the Complainant as the applicant.

Most of those who received the request completed the necessary searches, completed the requested statutory declarations and sent them back to the ATIPP Coordinator as instructed. Some did not respond. As a result, the ATIPP Coordinator decided to re-issue the same letter via Express Post to the employees that had not yet responded to the initial letter.

This is where the confusion begins.

#### The Department's Statement

According to the department, the ATIPP Coordinator at this point contacted a regional supervisor to confirm whether certain individuals who had not responded to the initial request were still employed with the Department. It appears that the supervisor responded in the negative. The Coordinator then sent the supervisor another email asking "if he was aware of any information that these individuals may have had pertaining to the request". This email included a question as to whether the supervisor knew of "anyone else who may have information that isn't on this list" and then listed all of the names in the Complainant's request. It is to be noted that the supervisor's name was on that list.

#### The Complainant's Statement

The Complainant, who works closely with many of the individuals named in his request for information, has a different take on what happened next. He says that the individuals who did not respond to the first request from the ATIPP Coordinator for records were all indeterminate full time employees of the department and, in fact, still are. He further states that all of the individuals named in his request for information were still employed by the department at the time they were being asked to respond to the ATIPP Coordinator and he cannot understand why the Coordinator would have been told otherwise. He says he knows who responded and

who did not respond to the first letter from the Coordinator because he was the one who picked up and hand delivered both sets of letters. None of the letters he delivered the second time were addressed to those discussed in the email correspondence between the Coordinator and the supervisor. The Complainant can't understand why the Coordinator would be asking the regional supervisor about how to contact employees who had already responded to her request. He argues, in fact, that there was no need at all for the Coordinator to contact the regional supervisor about anything to do with the request, let alone provide him with the details and the names of all the individuals from whom information was requested. If she needed to confirm these individuals were still employed she could have, and should have, contacted Human Resources, not the supervisor. The Complainant argues that his privacy was breached when the Coordinator sent the email to the regional supervisor because the content of the email effectively identified him as the applicant. Because the regional supervisor was on the list of individuals from whom information was being requested, he feels that this was especially significant and allowed the supervisor the opportunity to couch his own response so as to avoid revealing his own failures in dealing with the situation.

### **Second Complaint**

A second concern raised by the Complainant was about the use and disclosure of the Complainant's personal information by another manager in the Complainant's work group. This manager apparently took it upon himself to "assist" the ATIPP Coordinator in gathering the necessary information to respond to the request for information. The Coordinator had not requested any assistance and the manager's actions were undertaken without the Coordinator's knowledge.

This manager (whose name was on the list) and another employee (also on the list) were heard discussing the Request for Information between them and the Complainant's name came up. It appears that as a result of this discussion, the manager took it upon himself to "help facilitate the response back to the ATIPP Co-ordinator". He had or obtained a copy of the original letter which had been sent to each of the employees by the ATIPP Coordinator, edited it so as to direct it to four other employees (who had apparently already responded to the ATIPP Coordinator directly) and faxed the letters to these four employees with a direction that the responses be returned to his attention, rather than following the proper protocol of sending the information directly to the ATIPP Coordinator. The Complainant suggests that this amounted to

forgery and was an attempt on the part of the manager to find out what records other employees had and to control the response so as to try to protect himself.

While the department acknowledges the manager's actions, they say that none of the four who received this letter actually responded to the manager - they all sent their information directly to the ATIPP Co-ordinator as per protocol. The Complainant's privacy was never, therefore, actually breached by this request. The public body also acknowledges that the manager's actions were not in keeping with the department's policies or protocol for processing ATIPP requests and that he has since been advised about the proper procedure.

According to the Complainant, this manager went further and visited the R.C.M.P. office in an attempt to obtain more information. While the R.C.M.P. refused to disclose anything to the manager, the Complainant feels that the disclosure of information to the R.C.M.P. by the manager about the situation itself constituted a breach of his privacy.

In yet another twist to this saga, at some point this same manager came to the Complainant's office and demanded that he be able to search his (the Complainant's) office for records responsive to the Request for Information. The manager had not been asked by the ATIPP Coordinator to do this. He decided, apparently on his own, to conduct this search. While the Complainant refused the manager access to his personal records, and the Complainant's office was not searched, there were a number of discussions between the manager and other employees about his right to search the Complainant's office. There are records which confirm that in the course of these discussions about what the manager had or did not have the right to search, he was shown a copy of the actual Access to Information request by someone in the Human Resources department, which confirmed that the Complainant was the one asking for the information, thereby resulting in another breach of the Complainant's privacy.

Finally, the Complainant says that when talking with the R.C.M.P. about the complaint to them, the manager disclosed historical employment related information about the Complainant that the manager had no right to know and certainly no right to disclose. He feels, therefore, that someone in Human Resources had disclosed further information to the manager when he was shown the ATIPP Request form.

## Other Issues

### “Transfer” of the Request to the Department of Justice

At some point in the process of responding to the Complainant’s Request for Information, it was determined that there were too many potential conflicts of interest for the administration of the request to remain within the department and they therefore delegated this responsibility to the Department of Justice. The Complainant takes objection to this, saying that the department did not follow the appropriate protocol for transferring a Request for Information to another department.

### Potential Conflicts Posed by Employees Conducting Searches of Their Own Records

The general protocol for responding to an ATIPP request is for the ATIPP Coordinator to send requests to one or more employees within the department to search their own records and provide all responsive records back to the Coordinator for processing. This can result in a situation in which an employee is essentially being asked to provide records that might make him look bad or reveal inappropriate or embarrassing behaviour or actions by that employee. This is inherently a conflict of interest. When asked about this, and what checks and balances there are to ensure that all responsive records are identified and produced, the public body notes the following:

- in all correspondence to employees, they are advised that any destruction of records in order to evade an Access to Information Request could be “the subject of representation to an investigation by the Information and Privacy Commissioner”.
- documents are all entered into a document table in order to properly manage responsive records. This table is very specific in detailing information that was submitted and by whom. If, after reviewing all of the records received, there are any gaps in the documentation, then the ATIPP Coordinator would follow up with the appropriate employee to obtain the missing information

- All GNWT employees are also required at the time of their appointment to sign an oath or affirmation of confidentiality which “underscores the importance of keeping any personal information they become privy to in the course of their work confidential

## **DISCUSSION**

### Privacy Issues

While it would appear that a number of the concerns raised by the Complainant in this case did not amount to a breach of his privacy because, ultimately, no information about him was disclosed, the manager’s unsuccessful attempts to collect information are troubling. In addition, while not all of the Complainant’s concerns amounted to a breach of his privacy, some of them did.

A review of the relevant provisions of the Act will assist in focussing on the issues raised.

Section 40 of the *Access to Information and Protection of Privacy Act* outlines when a public body can collect personal information. It prohibits the collection of personal information unless:

- a) the collection is expressly authorized by an enactment;
- b) the information is collected for the purpose of law enforcement;
- c) the information relates directly to and is necessary for an existing program or activity of the public body.

In this case, the manager’s attempts to collect information about the Complainant did not fall within the parameters of section 40. There was nothing in the manager’s job description which authorized him to collect the information he attempted collect, either from his fellow employees from the R.C.M.P., or from Human Resources. Two of these attempts were, in fact, unsuccessful. One was successful. The successful inappropriate collection of the Complainant’s personal information resulted, as well, in a breach of his privacy.

Section 42 provides that public bodies who collect personal information must protect that information by making reasonable security arrangements against such risks as unauthorized

access, collection, use, disclosure or disposal. Here, the Human Resources people did not properly protect the Complainant's personal information from the manager. They disclosed the ATIPP Request to the manager, breaching his privacy. They did not comply with section 42.

Sections 43 and 48 set out the circumstances in which information collected by a public body can be used or disclosed. While not all are relevant in this context, some of them are and might apply so as to justify the public body's use and disclosure of the Complainant's personal information in this case. Personal information in the possession of a public body can be used or disclosed:

- a) for the purpose for which the information was collected;
- b) for any other purpose if the individual who the information is about consents to that use;
- c) for law enforcement purposes;
- d) for the purpose of hiring, managing or administering personnel of a public body;
- e) to the Information and Privacy Commissioner, where the information is necessary for the performance of her duties;
- f) to an officer or employee of the public body where the information is necessary for the performance of the duties of the officer or employee;
- g) for the purpose of complying with a law or with a treaty, written agreement or arrangement made under a law;

With this in mind, my first comment is that in making an Access to Information request, the Complainant gave implicit consent to the use of his personal information for that purpose. The question is how widely did the consent extend? The ATIPP manual and general practice is to protect the name of an applicant in most cases. In this case, that was a difficult task because of the nature of the request. The Applicant was an employee and he was asking for information from all of his co-workers. In my opinion, the ATIPP Coordinator found the right balance with the first letter - personalized letters to those employees with limited email access and an email to the others. Where things started to go wrong on this file is when the second mailing went out. While I can understand why the ATIPP Coordinator contacted the supervisor to request information about whether or not all of the individuals were still employed by the department, it is puzzling to me why the supervisor would respond in the negative when all of the named individuals were still employed. This prompted another email in which the ATIPP Coordinator

then provided the supervisor with enough information that it was fairly evident who the applicant was. This may have been a reasonable use/disclosure of the applicant's information in that the supervisor may well have been in a position to point the ATIPP Coordinator in the right direction. The tricky point here is that the supervisor was on the list of names that the applicant wanted records from. While it may have been better not to engage in this discussion, I cannot conclude that it resulted in an unreasonable invasion of the Complainant's privacy because the supervisor's role was, in part, to manage both the applicant and his co-workers. The exchange of personal information for this purpose is allowed by the Act in that it was reasonable for the ATIPP Coordinator to go in this direction when she needed more information.

I cannot say the same for the manager who took it upon himself to not only try to collect the records responsive to the ATIPP request, but in doing so also disclosed the Complainant's personal information both within the workplace and beyond. At worst, the manager's interference was an intentional effort to sabotage either the Applicant or the ATIPP process. Because of the circumstances, this is how the Complainant sees it. At best it was a well intentioned, though completely improper, attempt to assist in the response. In fact, all the manager needed to do was respond to the request he received from the ATIPP Coordinator to gather the responsive records in his possession. Instead, he actively sought out information – from employees by sending out doctored copies of the letters sent by the ATIPP Coordinator, from an outside agency (the R.C.M.P.), from Human Resources, and from the Complainant himself. In the course of attempting to collect information, the applicant also breached the Complainant's privacy by obtaining a copy of the ATIPP request from Human Resources, and by providing the R.C.M.P. with information about the applicant and incidents involving the incident within the workplace which had nothing to do with any existing or potential criminal investigation. Whether it was an intentional attempt to control the information disclosed or was an improper but well intentioned attempt to help, it resulted in a breach of the Complainant's privacy.

#### Transfer of the Request to the Department of Justice

One of the Complainant's issues was that the public body had "transferred" his Request for Information to another department without following the protocols or the procedures provided for in the *Access to Information and Protection of Privacy Act* which would have required the public body to give the Applicant notice that the transfer was taking place. In this case,



however, the Request for Information was not transferred to another public body for response. Instead, the public body decided that, because of the huge potential in this case for conflict of interest, they would ask another public body (in this case the Department of Justice) to administer the request. The response received by the Applicant was still a response from the department he directed it to, and included all the records in the possession of that public body. It was not transferred to another department. The only role played by the Department of Justice was to review and disclose the records and this was so as to ensure a full and unbiased response. There was nothing improper in this and, in fact, was probably the best way to deal with the matter in light of the number of potential conflicts of interests within the Complainant's own department.

### Conflicts of Interest

This issue is not unique, by any means, to this particular Request for Information. Email and electronic records are the way business is done today. Each GNWT employee has his/her own computer and a unique password to gain access to that computer and its contents. As a result, the protocol for collecting responsive records is to ask individuals who are identified as possibly or probably having responsive records in their possession to search their own records and to provide copies of anything found, along with a statutory declaration confirming that they searched their records and that the only records that were found have been provided. There are a number of issues that arise from this process. Firstly, not all employees are going to be knowledgeable enough to do a thorough search. A search for electronic records is only as good as the keywords used to do the search. It may be that a conversation refers to someone only by their initials or by a nickname or a misspelled name. It is unlikely that any of these conversations would be identified as responsive if the only keywords used were a first and last name. On the other hand, while it might be of assistance for the ATIPP Coordinator to provide some suggestions for keywords to search, the Coordinator will not always know the names used in the workplace or be able to identify what keywords should be searched to pull up all the responsive records. This is a records management issue. More importantly, perhaps, this method of collecting the responsive records can be rife with conflicts of interest, either real or apparent. In this case, the public body was aware of workplace conflict between the Complainant and a number of the individuals from whom he was seeking information. By asking them to collect their own records, the opportunity was afforded to them to skip certain records or even delete records that might have been responsive. While the public body warned each

employee about the destruction of records during an access request, there do not appear to be any clear consequences for doing so, except the possibility of being investigated by the Information and Privacy Commissioner IF they're found out. Frankly, the prospect of being investigated by the IPC isn't much of a deterrent, particularly when the chance of being discovered are slim to none. The warning might be slightly more dissuasive if there was a reference to section 59 which provides for an offence for the improper collection, use or disclosure of personal information or for obstructing any person in the exercise of their duties under the Act, with a fine of up to \$5,000.00 on conviction. There have to be real consequences for failing to provide a full and complete complement of responsive records and employees need to know that. While an ATIPP Coordinator may sometimes be able to identify gaps by reviewing the document table, this is not always going to identify missing records. Where, as in this case, there is the very real possibility of a conflict of interest, something more must be done to ensure full and complete disclosure. Either the ATIPP Coordinator or another independent person should be conducting the searches or "screen shots" should be taken of the individual's computer before they are asked to conduct the search or some other audit function should be available to ensure full and complete responses. Employees who are asked to provide their own records should be aware that their searches are verifiable and will be checked for completeness and that consequences will flow from incomplete responses.

## **CONCLUSIONS AND RECOMMENDATION**

I conclude that the Complainant's concerns about the breach of his privacy are, at least in part, well founded. The manager's attempt to collect the Complainant's personal information was in breach of the Act to the extent that he received information, both in terms of inappropriate collection and in terms of the use and disclosure of the Complainant's personal information, which constituted a breach of privacy.

I am advised by the public body that the manager who took it upon himself to collect records and information in response to the Request for Information has been advised that this was inappropriate behaviour. While I cannot say for certain what his motives were when he decided to investigate matters himself, the appearance of a conflict of interest is significant. It is the ATIPP Coordinator's job to collect records responsive to a Request for Information. It is important for all those who work for the Government of the Northwest Territories to know this and to have a basic understanding of the *Access to Information and Protection of Privacy Act*

and how it works. It is even more important that managers and more senior employees are well schooled in how an ATIPP response is provided. I **recommend**, not only for this department, but for all public bodies, that management personnel all receive basic ATIPP training within the first six months of their employment, which would include not only basic concepts but also what is expected of them and what is not acceptable in the course of responding to an ATIPP request. This training should be renewed at least once every two years thereafter so as to keep up to date with processes, procedures and expectations.

I further **recommend** that specific protocols be established in this department and in all public bodies to deal with real, apparent, possible and probable conflicts of interest which arise when individuals are asked to search their own records to identify records responsive to an ATIPP request. Such a protocol might include:

- a) approval by the ATIPP Coordinator of keywords to be searched;
- b) having a third party conduct the searches;
- c) doing screen shots prior to the searches being requested;
- d) ongoing education on records management and consistent email filing practices;
- e) guidelines for when these protocols and procedures should be used;
- f) a clear and unequivocal internal disciplinary procedure in the event that the policies are breached or records are tampered with.

Elaine Keenan Bengts  
**Information and Privacy Commissioner**