

# NORTHWEST TERRITORIES INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 02-27

File: 02-109-4

## BACKGROUND

On January 3<sup>rd</sup>, 2002 I received a request from the Applicant to review a decision made by the Department of Health and Social Services who denied her request for access to a copy of a report of a preliminary ethics investigation written by Dr. Robert van Mastrigit of Calgary, Alberta into the conduct of a certain psychologist practicing in the Northwest Territories. The request for the information was denied under Sections 23 (1) and 23(2)(g) and (i) of the *Access to Information and Protection of Privacy Act*, which read as follows:

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
2. A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where
  - g) the personal information consists of personal recommendations or evaluations about the third party, character references or personnel evaluations
  - 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

## FACTS

The facts surrounding the request for information are somewhat sketchy. It appears that the Applicant was involved in some way with a complaint which was filed against a particular psychologist working in the Northwest Territories. The complaint was apparently filed pursuant to the *Psychologists Act* of the Northwest Territories, however that Act does not appear to have any provisions for a formal complaint process. The

complaint, therefore, was dealt with without the guidelines of a legislated process. It appears that this may, in fact, be the first time a complaint of this kind had been received against a psychologist in the Northwest Territories. In any event, Dr. Robert van Mastrigt, C. Psych. ABPP (CN), was asked to undertake an investigation, which he did. It is to be noted that in his report, Dr. van Mastrigt indicates that the investigation was carried out in accordance with the investigation and discipline procedures then in place in the Province of Alberta because of the lack of such specified procedures in the Northwest Territories.

It is the report of Dr. van Mastrigt which has been requested by the Applicant.

## **THE DEPARTMENT'S POSITION**

The Department of Health and Social Services finds themselves in what they consider to be a difficult position. The psychologist community in the Northwest Territories is very small and the department is afraid that it would be almost inevitable that the Applicant would be able to figure out the names of the individuals mentioned in the report, even with judicious severing of some parts of the report. They feel that the integrity of the office of the Registrar of Psychologists would be damaged by disclosing the report and that it would affect the ability of the Registrar to investigate such matters in the event of future complaints because those providing the information might be more careful and reserved in their responses to inquiries if they knew that their answers may not be kept confidential.

## **DISCUSSION**

The issue for me to determine is whether the information requested is protected from disclosure pursuant to the *Access to Information and Protection of Privacy Act*. I have

had the benefit of having been provided with a copy of the investigation report in question to assist me in completing this review.

I would begin by commenting that, although I appreciate the Department's dilemma about the release of the information requested, in the absence of any legislative protection either in the form of an exemption under the *Access to Information and Protection of Privacy Act* or in the legislation governing psychologists, the information must be provided to the Applicant in accordance with the Act. It may be that the Department might want to consider appropriate amendments to the *Psychologists Act* to deal with issues of discipline so as to ensure an effective process.

We begin by pointing out that the onus is on the public body to show that the information in question is protected from disclosure under the *Access to Information and Protection of Privacy (ATIPP) Act*.

Several questions need to be answered in order to analyze this request. Firstly, does the record in question constitute "personal information" of a Third Party? Secondly, if so, would its disclosure, in whole or in part, constitute a presumed unreasonable invasion of the privacy of the person or persons in question? Thirdly, if one of the listed presumptions does not apply, do the relevant circumstances of this particular case suggest that the disclosure of the report would in any event, constitute an unreasonable invasion of a third party's privacy? Finally, one has to consider whether the record itself might be edited such that it could be released to the Applicant with some sections severed so as to avoid the disclosure of personal information.

I am sensitive to the fact that I myself must be careful not to reveal personal information which might be an unreasonable invasion of any individual's privacy in my discussion of this matter. The Applicant has specifically asked that his identity not be revealed. This makes a frank discussion of the circumstances even more difficult. For these reasons, my comments in this Review Recommendation will be far less thorough than I would

like them to be, as I believe the issues raised are very important ones and it would be beneficial to the Department, as well as to public bodies in general, to be able to discuss the issues in detail. However, I must respect the privacy of the individuals involved.

There is no doubt that the report refers to a number of individuals. The *Access to Information and Protection of Privacy Act* allows that any person is entitled to receive his or her own personal information. Therefore, to the extent that any of the information in the report relates to the Applicant, there is no reason that that information should not be disclosed to him.

The report is in response to a complaint about a specific psychologist. There is much information about that psychologist in the report. There is also a significant amount of information about the person who filed the complaint. Several other third parties are also mentioned. No patient names appear in the report, although there is some case information from which it may well be possible to identify the patient involved.

Without revealing identities, I can only really discuss the issues in general terms. If the Minister wishes to discuss my recommendation with me further, I would be pleased to provide more detail verbally to him.

With respect to the psychologist who was the subject of the investigation, it is my opinion that one must look at the context of the record as a starting point. Although the *Psychologists Act* does not provide for a disciplinary process, it does deal with registration and licencing and provides for the possibility of disciplinary outcomes. Legislation regulating professions such as doctors, lawyers, engineers and others provides for a method of maintaining basic competency levels within a given profession and for dealing with transgressions and poor professional performance within that particular profession. The *Psychologists Act* is no different. Those who practice in the profession must meet certain educational standards and be licenced under the Act

before they can lawfully practice their trade in the Northwest Territories. In many professions, membership or registration under the legislation also subjects the individual professional to scrutiny by the professional body and to disciplinary procedures. Although that is not clearly spelled out in the *Psychologists Act*, I am satisfied that that is the intention of the legislation. Any psychologist who registers to practice his trade in the Northwest Territories knows that he will be subject to such scrutiny. If the purpose of such legislation is to protect the public from those who would hold themselves out as professionals without the necessary qualifications or skills, then that individual must also know that disciplinary matters might well be subject to public scrutiny. The integrity of the disciplinary system would quickly be impugned if the findings of investigations, such as the one in question today, were hidden from public eyes. On the other side of the coin, it may well be that a psychologist who has been exonerated of wrongdoing as a result of a complaint may well want that fact to be made public, particularly if there was a lot of publicity surrounding the complaint in the first place. There are, therefore, good public policy reasons for ensuring that the public has access to the results of disciplinary investigations.

The Department suggests that much of the personal information about the psychologist in the report amounts to “personal recommendations or evaluations about the third party, character references or personnel evaluations” and should, therefore, be protected from disclosure pursuant to section 23(2)(g) of the Act. In my mind, this section relates to information about an employment situation. Clearly the information in question is not a character reference or personnel evaluation. Nor do I think that the information in the report constitutes personal recommendations or evaluations. In my opinion, this section of the Act relates to performance evaluations or recommendations respecting a person’s employment by his or her employer. The context in this report is much different. It is in the context of a disciplinary investigation by the individual’s professional organization. There are no “personal recommendations” made in the report, nor any “personal evaluations”. The report focuses on the professional

conduct and competency of the individual in the context of a disciplinary process. In my opinion, section 23(2)(g) was not intended to apply to such a situation.

The Department also relies on section 23(2)(i). That section provides that it is presumed to be an unreasonable interference with the personal privacy of a third party if the information was provided by the third party in confidence and is a recommendation, character reference or evaluation. Again, it seems to me that this section deals with references given with respect to an employment situation. In this case, even if the information given by the third parties consulted during the discipline investigation was provided with an understanding of confidentiality, the information given by these third parties could not be characterized as character reference, evaluation or recommendation. Some of the information provided might be characterized as opinion, but that is not the test. For this reason, I do not believe section 23(2)(i) can apply.

If the sections of the Act which outline situations in which a presumption of unreasonable invasion of privacy arises do not apply, section 23(3) provides that one must look at "the relevant circumstances" to determine whether the disclosure of the information would constitute an unreasonable invasion of a third party's privacy, including whether

- a) the disclosure is desirable for the purpose of subjecting the activities of the Government of the Northwest Territories or a public body to public scrutiny
- b) the disclosure is likely to promote public health and safety or to promote the protection of the environment;
- c) the personal information is relevant to a fair determination of the applicant's rights

- d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal peoples;
- e) the third party will be exposed unfairly to financial or other harm;
- f) the personal information has been supplied in confidence;
- g) the personal information is likely to be inaccurate or unreliable; and
- h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

In the context of this particular request for information, I have no reason to believe that subsection (c), (d), (e) or (g) are applicable. The other considerations I will discuss briefly.

Insofar as the Government of the Northwest Territories has taken on the role of registering and disciplining psychologists working in the Northwest Territories, its role in doing so should be open to scrutiny by the general public. In this case, the thoroughness and results of a discipline investigation should be open to scrutiny.

I cannot say with any certainty one way or the other that the disclosure of the discipline investigation report is likely to promote public health in the Northwest Territories. It depends, I suppose, on what use is made of the report in the hands of the Applicant. We don't know what the Applicant's intention is in this regard. Generally speaking, I would suggest that the openness of disciplinary proceedings filed against health care professionals can only help to improve, in a broad sense, public health. The more people know, the more informed decisions they can make about who they chose for their health care needs. On balance, therefore, this consideration tips in favour of disclosure of the record in question.

I do not believe that the analysis and conclusions reached by the investigator in this matter is information that can be said to be “information provided by a third party” and those sections of the Act which fall under this heading cannot, therefore, be saved by the personal privacy provisions of the Act. However, some of the conclusions reached by the investigator were based on information he obtained from a number of third parties. Did these third parties speak to the investigator on the condition of confidentiality. It does not appear that there was any explicit confidentiality agreement. However, in an investigation such as this, in order to encourage witnesses and other third parties to be candid, it is often important to protect the confidentiality of sources. This consideration, therefore, favours protecting the identity of those who gave “evidence” or were asked for their comments on the issues raised.

One must also consider whether the disclosure may unfairly damage the reputation of any person referred to in the record. To the extent that the witnesses are identified in the report, I do not see anything in their participation in the investigation that might lead to the unfair damage to their reputation. The individual who has most to lose in this instance, is the psychologist who was being investigated. As the matter was resolved in his favour, it is difficult to see how the release of the report could damage his reputation. That having been said, I have only limited knowledge of the facts and no knowledge of the use to which the Applicant intends to put the report should it be released. This consideration must, therefore, be given a neutral value.

Having looked at the report and given consideration to the concerns of the Department and the purpose of the report, it is my conclusion that the report should be provided to the Applicant in an edited form. I have provided a copy of the report, showing which sections I feel should be blacked out so as to protect the privacy of third parties. I do not agree with the Department’s contention that the report cannot be edited so as to protect the identity of the third parties named in the report. It may be that some of the Third Parties will be identifiable to readers familiar with the psychology profession in the Northwest Territories. I believe, however, that this can be minimized with judicious editing.



## CONCLUSION AND RECOMMENDATION

In light of the above discussion, it is my recommendation that the report prepared by Dr. Robert van Mastrigit should be released to the Applicant, subject to the editing indicated on the copy of the report which I have provided to the Minister of Health and Social Services along with a copy of this recommendation.

Elaine Keenan Bengts  
Northwest Territories  
Information and Privacy Commissioner