NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 04-044
File: 04-211-4
September 28, 2004

BACKGROUND

On June 16th, 2004 I received a request from the Applicant to review a decision made by the Financial Management Board to deny her access to a report prepared by an outside consultant for the Department of Education, Culture and Employment. The report was commissioned and undertaken as a direct result of complaints made by the Applicant about harassment in the workplace.

I requested that FMB provide me with a copy of the report in question, along with a detailed explanation as to the reasons that access to the record was denied. FMB provided me with their response and a copy of the record in question. The applicant was afforded a further opportunity to comment on the submissions made by FMB but no further comment was received.

ISSUE

FMB takes that position that the report is protected from disclosure pursuant to the *Access to Information and Protection of Privacy Act*. They rely on section 14(1) (a) of the Act which provides that the public body may refuse to disclose information to an applicant where it could reasonably be expected to reveal “advice” or “recommendations” developed for a public body. Further, they rely on section 23 of the act, which is the section which prohibits disclosure of personal information of a third party where that disclosure would be an unreasonable invasion of the third party’s privacy.

DISCUSSION

Section 14

FMB relies on section 14(1)(a) of the Act which reads as follows:

> **14.** (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal
>
> (a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council;

They do not elaborate on this contention in their submissions, merely indicating that a public body has the discretion to withhold access to a record if it would reveal advice or recommendations.

Section 5(2) of the Act provides that where a record contains information that is excepted from disclosure, and that "exempt information" can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.

It is true that the report does, indeed, contain portions that would constitute advice or recommendations made to the public body. It also contains a good deal of background information and findings of fact. Background and findings of fact do not constitute "recommendations" or "advice". Those sections of the report which can be said to be recommendations or advice are fairly easy to identify within the report, however, and can be easily severed from the report for the purposes of complying with the Applicant's request.

The report is divided into a number of sections, each numbered and titled. I will refer to each section individually.

Before reviewing the parts of the report individually, I would note that a lot of the information in the report consists of the Applicant's own personal information, which

include the opinions which other people have expressed about her personally. Generally speaking, the Act provides that an individual is entitled to receive any personal information about themselves. This is one of the most basic tenants of open and accountable government – that we can see what information the government holds about us as individuals. Unless the public body can point to a specific provision in the Act which would "trump" the Applicant's right to receive her own personal information, she should be entitled, as a minimum, to her own personal information.

Now, dealing with each of the sections of the report:

Part I - Introduction - this section contains nothing that could be considered "advice" or "recommendations" in the common dictionary meaning of those words.

Part II - Conduct of the Review - again, nothing in this section could be considered to contain advice or recommendations.

Part III - Terms of Reference - once again, there is nothing in this section that might be considered to be advice or recommendations

Part IV - Analysis, Findings and Recommendations - this is a lengthy section and, as its title suggests, it does contain some recommendations. It also contains some "analysis" of the findings made by the investigator. Section 14 of the act gives the public body a discretion to refuse disclosure where the disclosure could reasonably be expected to reveal "analysis" as well as "advice" and "recommendations". The public body, however, has not pointed to the "analysis" of the information as being protected from disclosure on a discretionary basis. I am assuming, therefore, that the public body has exercised their discretion in favour of disclosing those parts of the report that constitute analysis. In the event that I am wrong in this assumption, however, I will discuss this discretionary exclusion in the context of my recommendations as well.

Although this section of the report is entitled “analysis, findings and recommendations”, much of the discourse is a statement of facts, as found by the investigator, and an indication of who she talked to and what she learned from speaking with various people. This part of the discourse cannot be said to be “advice or recommendations”.

Part A -

Pages four through the middle of page 10 contain a statement of the specific complaint made and the investigator’s discussions with the various individuals involved. There is no analysis or attempt to interpret the information gathered, nor are there any recommendations given or advice provided in these pages.

Toward the bottom of page 10, a subsection of the paper entitled “Analysis of the Harassment Complaint” begins. Here, the investigator begins to analyze the information she gathered. She begins, for example, by quoting the definition of harassment from Workplace Conflict Resolution Policy (WCRP) of the Government of the Northwest Territories. The next paragraph simply sets out the test which the investigator has drawn from the definition. The WCRP is a public document and I can see no reason that this quote or the investigator’s interpretation of that quote should not be disclosed to the Applicant. This cannot constitute “advice or recommendations”. Nor can it be considered to be “analysis”. It is a statement of the policy and a test for applying it. Nothing more.

Beginning at the top of page 11, however, and continuing to the first boxed section of page 12, the investigator does outline her evaluation and “analysis” of the information she gathered and sets out how she came to her finding. Subject to what I will say later in this report with respect to the Applicant’s right to receive her own personal information, this section of the report would be subject to a discretionary exemption from disclosure should the public body chose to rely on this section of the act and to exercise their discretion accordingly. As noted above, they have not relied on that particular exclusionary rule in their submissions to me.

There are two boxed statements in the middle of page 12 of the report. The first is the investigator's finding with respect to the Applicant's specific harassment complaint. A finding is a conclusion reached as a result of an inquiry, investigation or trial. It is the result of analysis and, therefore, is not part of the analysis. As a statement of fact, it is neither advice or a recommendation. The finding itself does not fall under the protection of section 14(1)(a) of the Act.

The next boxed statement is entitled "Recommendation". Clearly this is a recommendation and is subject to the discretionary exclusion from disclosure provided for in section 14(1)(a).

Part B

In this section of the report, the investigator moves on to another of the mandates which she had under the terms of reference for her investigation. The title to this section and the first paragraph cannot be said to be "analysis, advice or recommendations" and they are not protected from disclosure pursuant to section 14(1)(a). Beginning from the first indented paragraph at the bottom of page 12, all of page 13 and the top of page 14 do constitute "analysis". Again, I note that if the public body chose to exercise its discretion to deny disclosure to the analysis in the report, this portion of the record might be subject to the application of that discretion. I does not appear, however, that the public body is relying on that discretionary option.

Once again at the end of page 14 are two boxes, one entitled "finding" and the other entitled "recommendation". My comments above apply to these two boxes.

Part C

Pages 15, 16 and the top of page 17 are a recitation of facts found by the investigator during her investigation. There is no analysis involved, nor is there any recommendations or advice in these pages. They do not fall under any of the

exceptions to disclosure set out in section 14(1)(a) of the Act.

The first full paragraph of paragraph 17 to the end of the page constitute the investigator's analysis of these facts in consideration of the terms of reference for the report. Again, to the extent that the public body chose to do so, they might use their discretion to deny access to these pages as being "analysis", but they have not chosen to do so in their submissions to me.

At the top of page 18 is a text box headed "Findings" and underneath that is a text box headed "Recommendations". My comments above apply to these boxes.

Part D

Page 19 consists of the investigator's discussion of facts found by her with respect to the Applicant's work performance and her relationships within the office setting. It is to be noted that this portion of the report is almost exclusively a discussion about the Applicant herself and it therefore constitutes her personal information, which she has a right to receive, barring a mandatory obligation within the act to the contrary. Even though this portion of the report might be considered analysis, it relates directly to the Applicant and is about her and, in my opinion, she has a right to receive it.

At the top of page 20, once again there are two boxes, one titled "Findings" and one titled "Recommendations". My comments above apply

Part E

The commentary which follows the heading of this Part is a mixture of facts, findings and analysis. In the case of this section, it would be difficult to sever the "analysis" from the facts and the findings. Should the public body wish to rely on the discretionary exemption set out in section 14(1)(a) to deny disclosure to the "analysis" contained in this section, the entire commentary on pages 20 and 21 would have to be

exempted.

Page 22 contains, once again, two boxes entitled “Findings” and “Recommendations” and my comments above apply.

Part F

The first two paragraphs of this part are a recitation of facts by the investigator and cannot constitute advice, recommendations or analysis. The third paragraph may constitute analysis which the public body would have to consider disclosing under the discretionary power provided to them by section 14(1)(a).

The “Finding” and the “Recommendation” boxes on page 23 should be dealt with in accordance with the above discussion.

Page 24 of the record is entitled “Conclusion”. It contains no advice, no recommendations and no analysis and is not, therefore, protected from disclosure pursuant to section 14(1)(a).

Page 25 of the report is a Summary of Recommendations. This clearly is subject to the discretionary exemption provided for in section 14(1)(a).

The report then has a number of appendices. None of them contain any advice, recommendations or analysis. Most of them are correspondence between the Applicant and the department and/or other governmental agencies and, therefore, constitute the Applicant’s personal information. None of them, however, contain any advice, recommendations or analysis and none of them are, therefore, subject to the exemption provided for in section 14(1)(a) of the *Access to Information and Protection of Privacy Act*.

Before moving on to section 23, reference should be made to section 14(1)(b) of the Act. Although this section has not been referred to or relied on by the public body, it is relevant to this case. Section 14(1)(b)(i) gives the public body the discretion to refuse access to a record or part of a record where the disclosure could reasonably be expected to reveal consultations or deliberations involving officers or employees of a public body.

In Alberta, the Access to Information legislation has provisions identical to our section 14(1)(b)(I). In Alberta Order 96-006, the Alberta section was considered and the following comments made:

> I therefore believe that a "consultation" occurs when the views of one or more officers or employees is sought as to the appropriateness of particular proposals or suggested actions. A "deliberation" is a discussion or consideration, by the persons described in the section, of the reasons for and against an action.

In Order 97-014 the Alberta Information and Privacy Commissioner stated, at paragraph 15:

> …to correctly apply section 23(1)(a) [now section 24(1)(a)], there must be advice, proposals, recommendations, analyses, or policy options ("advice"), and the "advice" must meet the following criteria:
>
> i. be sought or expected, or be part of the responsibility of a person by virtue of that person's position
> ii. be directed toward taking action
> iii. be made to someone who can take or implement the action.

This test has been accepted by and applied by the Saskatchewan Information and Privacy Commissioner in recent recommendations made in that jurisdiction, which also has the identical provisions.

So, was this record sought from the investigator by virtue of her position? The answer to that is "maybe". The investigator is not a government employee. Nor does she

specialize in labour relations issues. She was independent of government and it was for this reason, I think, she was chosen to undertake the investigation, not because it was her responsibility generally to investigate complaints within the department in question.

Was the report directed toward taking action? I would answer this in the negative. The report was commissioned to gather information. In the section entitled “Terms of Reference”, the investigator set out a number of questions which she set out to answer. For instance, one of the questions she investigated was “Was <AB> subject to workplace harassment?”. Another was “Regardless of whether or not <AB> was subject to workplace harassment, does <AB’s> complaint raise any issues with respect to the supervision of <AB> by <CD>?” These are factual questions. They are not questions directed toward taking action. Furthermore, in a record entitled “Terms of Reference Deputy Minister’s Review of Complaint of <AB>”, which is included as one of the appendices to the report, it clearly indicates that “Upon receipt of the final report from the investigator, the Deputy Minister shall determine what actions, if any, are required as follow up to the report”. In other words, the report was not directed toward taking action, but toward gathering facts. In my opinion, therefore, this was an investigation to determine factual circumstances which provided some suggestions as to change. To the extent that the report was “directed toward taking action”, those parts of the report fall under the “Recommendations” sections of the report and can be severed. Section 14(1)(b) does not, therefore, in my opinion, protect the record from disclosure.

Section 23

The public body takes the position that much of the information in the report is “personal information, the disclosure of which would be an unreasonable invasion of the third party’s privacy” and therefore cannot be disclosed pursuant to section 23 of the Act.

The first thing that I would point out is that all of the “third parties” mentioned in the report, save one, are employees of the public body. The one who is not an employee of the public body was referred to only in the context of his employment with another public body.

My counterparts in other jurisdictions have all considered whether the disclosure of information about a third party individual can be an unreasonable invasion of a third party’s privacy where the information is about the individual acting in his or her capacity as a public servant or employee of the public body. In Ontario, Adjudicator Donald Hale made the following comments in Order R980015 under the Ontario legislation:

> I find that the information associated with the names of the affected persons which is contained in the records at issue relates to them only in their capacities as officials with the organizations which employ them. Their involvement in the issues addressed in the correspondence with the Ministry is not personal to them but, rather, relates to their employment or association with the organizations whose interests they are representing. This information is not personal in nature but may be more appropriately described as being related to the employment or professional responsibilities of each of the individuals who are identified therein. Essentially, the information is not **about** these individuals and, therefore, does not qualify as their "personal information" within the meaning of the opening words of the definition.
>
> In order for an organization, public or private, to give voice to its views on a subject of interest to it, individuals must be given responsibility for speaking on its behalf. I find that the views which these individuals express take place in the context of their employment responsibilities and are not, accordingly, their personal opinions within the definition of personal information contained in section 2(1)(e) of the Act. Nor is the information "about" the individual, for the reasons described above. In my view, the individuals expressing the position of an organization, in the context of a public or private organization, act simply as a conduit between the intended recipient of the communication and the organization which they represent. The voice is that of the organization, expressed through its spokesperson, rather than that of the individual delivering the message.

I tend to agree with my colleague. It is important to remember that just because a record reveals personal information about a third party, as that term is defined in the

Act, it does not always mean that the disclosure of that information will constitute an unreasonable invasion of the third party's privacy. In fact, section 23(4)(e) provides that the disclosure of personal information is deemed **not** to be an unreasonable invasion of a third party's privacy if "the personal information relates to the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council".

The public body argues, however, that at least some of the information contained in the record about at least one of the third parties goes beyond his or her duties as an employee of the public body and constitutes "personal recommendations or evaluations about the third party, character references or personnel evaluations" and that at least some of the information in the record relates to the third party's employment, occupational or educational history". Pursuant to section 23(2), the disclosure of such information should be deemed to be an unreasonable invasion of the third party's privacy.

It seems to me that although there is a good bit of personal information contained in the report about a number of individuals, those parts of it which fall within the mandatory exemptions can be fairly easily identified and severed. I note that the record also contains personal information about the Applicant herself and she is, by rights, entitled to receive that information and it has, to this point, been denied to her.

CONCLUSION AND RECOMMENDATION

In view of the above discussion, it is my conclusion that the public body did not properly apply the various provisions of the Act in refusing to disclose the record to the Applicant. I recommend that the report be disclosed to her, subject to severance of the information which does fall within the exceptions to disclosure under the Act. I have attached a copy of the report to the public body's copy of this Review Recommendation. I have highlighted in yellow those portions of the report which are

subject to the discretionary exemption from disclosure provided for in section 14(1)(a) of the Act and in pink those portions of the report which are subject to the mandatory exemptions provided for in section 23. For those portions of the record that are subject to a discretionary exemption, the public body must exercise that discretion and advise the Applicant of the considerations which went into their review of the matter. I note that section 23(5) of the Act provides that, where an applicant has been refused access to information contained in a record under section 23 (unreasonable invasion of a third party's privacy), the head of the public body is required to give the Applicant a summary of the information to which access has been denied unless the summary cannot be prepared without disclosing the identity of a third party who supplied the information. It seems to me, therefore, that for those portions of the record that are subject to a section 23 exemption, the public body must provide the applicant with a summary and I recommend, as well, that this be done.

Elaine Keenan Bengts
Northwest Territories
Information and Privacy Commissioner