NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 09-074.1
File: 08-190-4
June 4, 2009

BACKGROUND

This matter first came to my attention when the Applicant sought to have the public body (in this case, Education, Culture and Employment) include a search of the backup of e-mail records in making their response to his request for information. In January of this year, I issued Review Recommendation 09-074 based only on the Applicant's initial letter to me and the public body's responses. In making my recommendations, I relied on the public body's assertions that:

a) only monthly backups would be available and those backups would only show only a "snapshot" of the files on the date of the backup and that anything created but deleted during the month would not appear. As a result, they argued, there was only a very slim possibility that any further records would be found;

b) tape media deteriorates over time and, as a result, the public body could not guarantee a successful restore of the files in question;

c) such a restore would take approximately 40 hours of staff time and that amount of time, combined with their opinion that there was a very small likelihood that any additional relevant information would be found, added up to an unreasonable impact on the operations of the Technical Services Centre;

d) the employees involved had been asked if there had been any other records or whether any records concerning the Applicant might have been deleted, and they had advised that they had retained all relevant records;

e) the Applicant had provided no reason to believe that there were any deleted e-mail records. He had submitted no evidence upon which one could reasonably conclude that such e-mails ever existed, nor had he explained why the thought there might be such records.

Based on this, I found that in the particular circumstances of this case, and without at least some evidence to support the Applicant's assertion that the backups might contain additional responsive records, the public body had complied with section 7 of the Act. In other words, their efforts to assist the Applicant, in the circumstances, had been reasonable.

Upon receiving my Review Recommendations, the Applicant wrote to me and indicated that he had not received the correspondence in which I had asked him for any further comments he might have and he wanted the opportunity to make further submissions. I advised him that I would receive his submissions and would, based on the contents of those submissions, determine then whether I would reconsider my recommendations. The Applicant provided me with further submissions, which raised some new issues, and I asked the public body to respond, which they did.

I think the issues raised by the Applicant merit some comment, and I am, therefore, issuing these supplemental recommendations.

FACTS

By way of brief background, the Applicant originally sought records which referred to him, particularly e-mail records between two individuals who worked with the Department of Education, Culture and Employment. He asked that the public body search e-mail backups as well as regular records. The public body provided the Applicant with approximately 130 pages of responsive records, but refused to do a search of the back-up e-mails as requested by the Applicant. They considered that they had made “reasonable” efforts to assist the Applicant and that the time, effort and cost required to reconstitute backups was unreasonable. They provided an estimate of 40 hours of time would be necessary to reconstitute the records by the Technology Services Center and another 56 to 140 hours to review the reconstituted records by the Department of Education.

THE RELEVANT SECTIONS OF THE ACT

The relevant sections of the *Access to Information and Protection of Privacy Act* are as follows:

Section 1, which outlines the intents and purposes of the Act, and which is always relevant when considering the application of exceptions to disclosure:

> 1. The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
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> (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.

The definition for “record” as contained in section 2 of the Act:

> "record" means a record of information in any form and includes information that is written, photographed, recorded or stored in any manner, but does not include a computer program or other mechanism that produces records;

Section 3 of the Act outlines what records are covered by the Act:

> 3. (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:...

It should be noted that none of the exceptions to this section are applicable to this case.

Section 5 of the Act provides that any person has the right to access to any record in the custody of or under the control of a public body.

Section 7 of the Act outlines the responsibility of a public body to assist an individual who has made a request for information:

> 7. (1) The head of a public body shall make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay.
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> (2) The head of a public body shall create a record for an applicant where
>
> (a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and
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> (b) creating the record would not unreasonably interfere with the operations of the public body.

THE APPLICANT'S POSITION

The Applicant indicated that he was employed by the Government of the Northwest Territories in the Technical Services Centre and that, as a result of this employment, he was very familiar with the backup system and the steps needed to recover and reconstitute the types of records that he had asked for.

Perhaps the most important thing that the Applicant's letter included, however, was a copy of an e-mail exchange which was clearly responsive to the request for information he had made but which had not been provided by the Department in response to his request. Not only does this e-mail provide a reason to believe that there were, in fact, other records which may have been deleted, but it also calls into question the veracity of the individuals who advised the ATIPP Co-Ordinator that they had retained all records relating to the Applicant. The content of the e-mail exchange is also disturbing in that it appears to have been an inappropriate use or disclosure of the Applicant's personal information.

In addition to this e-mail, the Applicant also provided his opinion on some of the technical arguments which had been made by the public body with respect to their ability to recover e-mail records. He made the following observations:

a) although backups of the e-mail system were done only once a month and created only a snapshot of the e-mails on the system at the time of the backup, he was confident that they would be able to find any additional e-mails because:
    i) most users keep e-mails for a long time without deleting them;
    ii) even if a user does delete his/her e-mails, they still exist in a "deleted" folder until deleted a second time and often users do not take the second step;
    iii) when a user sends a message, a copy of the e-mail is saved in a "sent" folder and it is even rarer that a user would delete items from their sent folders

b) although backup tapes do deteriorate, the tapes for the time period in question were not likely deteriorated as the back-up tapes used had a lifetime warranty from Hewlett Packard. Furthermore, the backups were stored in a warm, secure and dry environment, mostly in fire proof safes. He suggested that there was very little probability that deterioration of the tapes would be an impediment to the recovery of records;

c) based on his experience, the Applicant felt that the time required to identify and restore the records requested was greatly exaggerated and 12 hours (rather than the 40 suggested by the public body) would be a far more realistic estimate.

Finally, he points out that restoring data is something that the Technical Services Centre does on a daily basis and that, in most cases, it is a simple thing to do. He also points out that the ease and success rate of restorations is improving rapidly, making what was difficult or impossible 10 years ago, a relatively simple task today.

THE PUBLIC BODY'S POSITION

The public body's argument is outlined in Review Recommendation 09-074 and I do not intend to repeat that argument here. In responding to the Applicant's submissions above, the public body simply reiterated their previous argument. They did not accept the evidence provided by the Applicant with respect to the nature of the backup system.

They did, however, indicate that they were concerned that the e-mail correspondence provided by the Applicant did suggest the existence of a record which had not been retrieved in the searches that they had done. They indicated, therefore, that they would be conducting a review which they said "may" include the recovery of back-up tapes. They said they would provide the Applicant with a further response once that review had been done. As at the date of the writing of this review recommendation, the public body has not confirmed that this has been done.

DISCUSSION

In my opinion, the e-mail provided by the Applicant in his submissions changes things completely. The public body relied heavily on the fact that the Applicant had not provided any reason, other than his own suspicions, to believe that there might be additional records to be found. The evidence provided by the Applicant provides that reason.

In my original recommendations, I asked the question "What is reasonable and when does the time and effort necessary to comply with a request become an unreasonable interference with the operations of a public body generally?" In answer, I suggested that it was a question of balance and that each case must be considered on the basis of the facts presented. I concluded, based on the information which I had at the time, that the search done was reasonable because:

a) The search of current and existing records appeared to have been thorough and wide ranging;
b) the nature of the backup system was such that there was a good possibility that any e-mails not already discovered would have been deleted and never saved on the backup system
c) the Applicant had not provided any evidence, other than his own suspicions, that other records existed

As to the first, I still feel that the search conducted by the public body was thorough and wide ranging, stopping only at the backup system. Having received the Applicant's submissions, however, I am not as convinced that recovering backup records would be as difficult or time consuming as suggested by the public body. However, more importantly, the Applicant has provided cogent reason to believe that there may, in fact, be other records responsive to his request which were missed in the conventional search of current records.

CONCLUSIONS AND RECOMMENDATIONS

Based on the above, it is my opinion that the Applicant has provided evidence, in the form of an e-mail that was not uncovered in the original search of active records, that there may well be additional records responsive to his request in the backup system. The time and the effort required to restore those records, even if one accepts the public body's estimate of time needed to recover the records, is not so significant as to affect the ability of the public body to conduct its business. Once the records are identified and reconstructed, the Department will be in a much better position to estimate the length of time it will take to review those records with a view to vetting them for disclosure. I suspect, however, that most records recovered in this fashion would be weeded out fairly quickly as having already been provided to the Applicant in the first instance, therefore requiring only a cursory review. The number of additional documents will, most likely, be limited. I find it hard to believe that the Department's estimate of between 9 and 21 full working days for such a review is accurate. However, even if it is accurate, the department would have to show me that it would constitute an unreasonable interference with the ability of the department (or division) as a whole to undertake their other responsibilities. It is well established that the *Access to Information and Protection of Privacy Act* must be interpreted in such a way as to encourage disclosure and to narrowly interpret those sections of the Act which would limit disclosure. Just because the review and preparation of records for disclosure might be time consuming does not in and of itself give the public body a valid reason for refusing to disclose.

As noted above, the public body has indicated that they intend to review the records again in light of the document provided by the Applicant, and that the review **may** include the recovery of back-up tapes. In light of the above, I would recommend that the review should include the backup tapes.

As a side note, I am concerned about the content of the e-mail provided to me by the Applicant. The contents of the e-mail are such that it appears that a number of civil servants have exchanged personal financial information about the Applicant. On the face of it, it does not appear that the recipients of the e-mail, although all government employees, required the information for the purpose of their positions or for the purpose of assisting the Applicant in any way. To the contrary, it appears that the information contained in the e-mail exchange was shared for the purpose of gossip and comment simply because the individuals knew or were acquainted with the Applicant. This is inappropriate. I therefore further recommend that the public body raise this matter with the individuals involved and, if I am correct in my assumptions, that appropriate disciplinary action be taken. There must be a clear message sent to all employees that the use of personal information that comes to them as a result of their work is confidential and that the inappropriate sharing, use or disclosure of that information will be dealt with decisively. An apology to the Applicant would also be appropriate.

Finally, I would strongly suggest that the inclusion of personal health or financial information in e-mail communications is dangerous and perhaps inappropriate. Unlike paper records, electronic records require no more than the push of a button to be disseminated widely. Unless the information is encrypted, therefore, care should be taken not to discuss matters concerning individuals in e-mail exchanges. Public bodies have a clear responsibility under the Act to maintain the security and confidentiality of personal information. E-mail communication, although convenient and fast, is not secure and once it leaves the sender’s desk, there is no control over its further dissemination. More thought should be given to what kinds of exchanges are better on paper and which exchanges are such that e-mail is an appropriate mode of communication.

Elaine Keenan Bengts
NWT Information and Privacy Commissioner