

# **NORTHWEST TERRITORIES INFORMATION AND PRIVACY COMMISSIONER**

Review Recommendation 09-078

File: 09-112-4

March 31, 2009

## **BACKGROUND**

The Applicant in this case made a request of the Hay River Health and Social Services Authority for “financial information related to staff ....who have left their workplace and subsequently received a settlement or payout”. The Applicant specifically noted that he was not interested in the names of the individuals who received the payments, just the amounts. He requested this information for the years 2000 to 2008.

In its response to the Applicant, the public body indicated that they had provided incentives to only four employees since 2000 in settlement of employment issues. They point out that in each case the agreement between the individuals and the public body includes a confidentiality clause that forbids the Employer, the Employee and the Union from disclosing the terms of the settlement. They also indicated that section 23(2)(f) of the *Access to Information and Protection of Privacy Act* protected the specific amounts paid to specific people from disclosure as that would constitute an unreasonable invasion of the privacy of the individuals involved.

I asked for and received copies of all responsive records from the public body. In their response to me, they relied strongly on the confidentiality clauses of the signed agreements as authority for their decision not to disclose the information requested. They also indicated their position that the Authority is small and, because of the very few termination agreements entered into over the past eight years, it would be easy to determine who received the settlements from the disclosure of the amounts paid. They further rely on section 23(2)(f) of the Act.

## THE RELEVANT SECTIONS OF THE ACT

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

Section 1, outlines the intents and purposes of the Act, which are always relevant when considering the application of privacy issues:

1. The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
  - (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and

The definition of "personal information" as contained in section 2 of the Act includes the following:

"personal information" means information about an identifiable individual, including

- (a) the individual's name, home or business address or home or business telephone number

.....

- (g) information about the individual's educational, financial, criminal or employment history,

7(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
- (b) creating the record would not unreasonably interfere with the operations of the public body.

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.

2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where

(f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities or credit worthiness;

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where

.....

(e) 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;

....

(h) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, but not personal information supplied in support of the application for the benefit or that is referred to in paragraph (2)(c);

## **DISCUSSION**

The first thing I would point out in this case is that the Applicant is not seeking any identifying information about the individuals who received severance agreements from the public body. He is asking only for amounts which were paid pursuant to any such agreements. It appears that he is not looking for a global amount, but for amounts paid to each individual, although that is not entirely clear from the exchange of correspondence between the Applicant and the public body.

1. Does the information requested qualify as “personal information” such that section 23 applies?

By definition, personal information is information about an identifiable individual. In this case, the Applicant is not looking for names. He is asking only for amounts that have been paid out to people as severance over an eight year period. On the face of it, the disclosure of those numbers are not about an identifiable individual.

The public body, however, says that because there were so few situations over the last eight years that this happened, disclosing the numbers is tantamount to identifying which individual received how much money. They say that it is likely that the individuals could and would be identified in such circumstances and what might not otherwise be considered personal information is transformed into personal information as a result.

Clearly, the fewer the number of payouts over any given time period, the easier it will be to identify which individual received how much. So, if there had been only one payout, it would be reasonable to conclude that the disclosure of the amount paid would constitute the disclosure of personal information. Assuming that the Applicant has personal knowledge of the names of each of the four persons who have received payouts from the public body over the last eight years, as well as some information about how much they might have been earning at the time of their settlements, and how long they had each been employed with the public body, he might be able to surmise and make an educated guess as to which of the four individuals received which payout. I have had the opportunity to review each of the four contracts in question and, despite the low number, I am not convinced that disclosing the amount paid out in each case will positively identify how much was paid to which of the four individuals. I am not convinced that if the Applicant received the amount paid out on each contract that he could accurately identify which of the payouts was made to which individual, even if he knew background information for each of the four individuals involved. I am not convinced, in other words, that the disclosure of the amounts requested would be a disclosure of personal information, much less that such a disclosure would be an

unreasonable invasion of the privacy of the four individuals involved. Section 23 would not, therefore, apply to the disclosure of the information requested.

2. If the information in question is personal information, would the disclosure amount to an unreasonable invasion of the privacy of the third parties involved.

In the event that I am wrong in this analysis, and the information requested were to be considered personal information, we then have to determine whether its disclosure would constitute an unreasonable invasion of the privacy of those third party individuals.

The first thing to do is to see if the information falls under any of the categories listed in section 23(2) (presumption of unreasonable invasion of privacy) or 23(4) (presumption that disclosure would not be an unreasonable invasion of privacy).

The public body in this case refers to and relies on section 23(2)(f), arguing that the disclosure of the information requested would reveal the third party's income. Although the information in question might fall under this category, it must be read in conjunction with section 23(4) which states that, notwithstanding 23(2), the disclosure of certain specific information will not be an unreasonable invasion of a third party's privacy. Specifically applicable to this case, are 23(4) (e) and (h). These provisions state that it will not be an unreasonable invasion of privacy if the personal information relates to the third party's salary range or discretionary benefits as an employee or if the information would reveal details of a discretionary benefit of a financial nature granted to the third party by a public body.

There is an argument to be made that a severance package is discretionary. The public body must make a decision that it is an appropriate case in which to offer such a package and, if so, how much would be an appropriate amount. I do not, however, think that it is necessary to decide the issue in this review as, in my opinion, the disclosure of the information requested would reveal, at best, enough information from

which a knowledgeable person with personal knowledge about the employment history of the individuals involved might be able to determine a probable salary range for each of the third parties. It would, in my opinion, be impossible to determine the person's actual income from the disclosure of the information requested.

3. What significance, if any, do the confidentiality clauses have?

The public body relies on the confidentiality clauses in each of the Agreements in support of its position that the information requested should not be disclosed. In each case, the confidentiality clause provides that the terms of the agreement will remain confidential except "as required by law". The *Access to Information and Protection of Privacy Act* is law and it therefore takes precedence over any contractual provisions which might exist. The confidentiality clauses might bear some weight where the public body is exercising its discretion as to whether or not it will disclose a record in certain circumstances where discretionary exemptions apply, or in evaluating whether the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy. But they cannot be relied upon to refuse disclosure where no exemption otherwise exists.

## **CONCLUSIONS AND RECOMMENDATIONS**

Based on the above, I cannot agree with the public body in this case that the disclosure of the requested information would constitute an unreasonable invasion of the privacy of any third party. No names have been requested by the Applicant and, even if the Applicant has sufficient knowledge of the corporate history of the public body to know the names of all individuals who have received settlements in the last eight years, it would be almost impossible to identify with certainty, which of the four individuals received which payout with no more information than a total of the amounts paid out under each contract.

It is therefore my recommendation that the public body disclose to the Applicant the amount actually paid out to each of the four individuals who entered into settlement agreements with the public body since 2000, to be identified only as "Employee A", "Employee B", "Employee C" and "Employee D", followed only by the total aggregate amount paid out pursuant to the each Settlement Agreement respectively. It will, in some cases, be necessary to do some calculations to add up the amounts paid but it seems to me that the calculations should not be difficult to do. It appears that in at least some cases it will be necessary to go outside of the contracts and to determine by other means the specific amounts paid out, but it seems to me that this information should be fairly readily available in the financial records of the public body.

Elaine Keenan Bengts  
NWT Information and Privacy Commissioner