

NORTHWEST TERRITORIES INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 11-093
10-149-4
January 6, 2011

THE COMPLAINT

This matter arose as a result of a complaint received from an individual (to be referred to in this Review Recommendation as A.B. for ease of reference) who was upset because he felt that the Legal Services Board of the Northwest Territories had breached both his and his mother's privacy and had improperly used or disclosed his personal information.

THE COMPLAINANT'S POSITION

A.B. had applied for and received approval for legal aid assistance and was assigned a lawyer to assist him with his legal problems. A.B.'s mother was assisting A.B. in dealing with both Legal Aid and with his lawyer. It appears that A.B.'s mother was authorized by A.B. to act as his agent to communicate with both. According to A.B., he was unhappy with the services he was receiving from his lawyer. He asked his mother to contact the Legal Services Board (L.S.B.) on his behalf to find out what options he had if he was not satisfied with the lawyer who had been assigned to his case. It is his position that his mother did call the L.S.B. and asked that question. She was advised that A.B. should discuss his concerns with the lawyer and, if the issue was not resolved to his satisfaction, that he could file a formal complaint with the L.S.B.. He says that the person they spoke with at the Legal Services Board was expressly told that they did not want the lawyer to be contacted with respect to the stated concerns, but that they were simply making an inquiry as to what options were available so that A.B. could make some decisions on how to proceed.

Very shortly after this conversation was complete, A.B.'s mother received a phone call from the lawyer who, according to her, was extremely upset and threatened to take her to court for slander. This, in turn, led to a complete breakdown of the lawyer/client relationship and had ongoing consequences for A.B. in dealing with his legal difficulties. A.B. alleges that the only way that the lawyer could have known of his dissatisfaction or of his mother's discussion with the employee of the L.S.B. was if the L.S.B. had disclosed that information to the lawyer contrary to his mother's express direction in that regard.

THE LEGAL SERVICES BOARD'S POSITION

The L.S.B. advises that they disclose personal information to lawyers assigned to clients by providing a copy of the application completed by the client, along with an approval notice that contains the client's name and contact information. If they have received any other information pertinent to the client's case, that information is also provided to the lawyer when he or she is retained. They say there is no written policy concerning what information is shared or how it is shared and clients do not sign any document authorizing the transfer of this information. Rather, it is simply a part of the application process and clients are assumed to understand that in order for a lawyer to be assigned to them, the lawyer must be provided with the information contained in the application form. They confirm that the Board does not release any client's personal information to any other third party without the client's consent.

If the Board or a staff member receives a complaint about a lawyer from a client, the Board indicated that the complaint is almost always discussed with the lawyer. This, they say, is a longstanding practice of the Board based on the concern for the solicitor/client relationship. In their letter to me, they say:

In our opinion a lawyer needs to be made aware of anything that may impact the solicitor and client relationship.

In addition, they say that if a client complains about a lawyer the Board is obligated to make some inquiries into the concerns raised by the client to ensure that the client is receiving full and proper representation. They did not, however, provide me with any source or authority that would support this statement.

Finally, the public body suggested that the complaint really should have been made by A.B.'s mother because it was her discussion with staff that lead to the disclosure (which they concede was made) and it was therefore her personal information which was disclosed and not A.B.'s. In the circumstances, they felt they could not comment further unless A.B.'s mother complained about a breach of privacy.

THE LAW

The *Access to Information and Protection of Privacy Act* sets out specifically when personal information collected or received by a public body can be used or disclosed. A use of information refers to an internal use of information within the confines of the public body. A disclosure refers to the transfer of personal information to a third party outside of the public body. In this case, as the lawyer involved is a private sector lawyer, we are dealing with a disclosure of personal information. This is dealt with in Division C of the Act, specifically sections 47 and 48. The public body has not, in this case, indicated the specific authority under which it acted when it disclosed the content of the conversation between A.B.'s mother and the employee of the L.S.B. to A.B.'s appointed counsel. I will, therefore, limit my comments to those provisions which I consider to be relevant or possibly applicable to the case at hand which are the following:

- 47.1. An employee shall not, without authorization, disclose any personal information received by the employee in the performance of services for a public body.
- 48. A public body may disclose personal information
 - (a) for the purpose for which the information was collected or compiled or for a use consistent with that purpose;

- (b) where the individual the information relates to has identified the information and consented, in the prescribed manner, to its disclosure;

.....

- (s) for any purpose when, in the opinion of the head,

....

- (ii) disclosure would clearly benefit the individual to whom the information relates;

.....

- (u) for any purpose in accordance with any Act that authorizes or requires the disclosure;

Personal information is defined in the Act as being information about an identifiable individual

DISCUSSION

I would deal first with the public body's concerns about whether A.B. could properly complain about the disclosure made because his mother was the person who had the conversation with Legal Services Board staff and it was, therefore, not a disclosure of A.B.'s personal information but a disclosure of his mother's information.

Personal information is defined in the Act as being information about an identifiable individual. The source of the information is not relevant. The fact that the information about A.B. (i.e. that he has not happy with the services he was receiving from his lawyer) came from his mother, and not from him does not make it any less his personal information. Unless it was disclosed in accordance with the Act, the L.S.B.'s disclosure of that information was an improper disclosure.

The question then becomes whether the L.S.B.'s disclosure of the information received from A.B.'s mother was disclosed to the lawyer in accordance with the Act.

Section 48 (a)

As noted above, personal information can be disclosed for the purpose for which the information was collected. For this reason, I have no difficulty whatsoever with the L.S.B.'s disclosure of A.B.'s personal information to a lawyer assigned to represent him. In other words, when an individual provides personal information to the L.S.B. in applying for legal aid, the reasonable person would expect that basic information about the client would be provided to the lawyer assigned to represent the individual.

In this case, however, the public body later disclosed other information about the client which the client asked be kept confidential. The client was uncomfortable with the representation he was receiving but was uncertain what to do about it. He had his agent call the L.S.B.'s office to find out what his options were. He was, at this point, not willing to jeopardize his relationship with his lawyer further by disclosing his disappointment about the services being provided, but wanted to know if there were alternatives. It is the Complainant's position, in fact, that his mother specifically asked that his concerns remain confidential until A.B. could consider how to deal with the matter. The L.S.B. does not in any way suggest that they had the client's permission to discuss his concerns with the lawyer. Instead, they rely on a long term practice within the office to address "complaints" by discussing them with the lawyer. They did not, however, provide me with any written policy or legislation which requires them to report complaints about representation received to the lawyers involved.

In this case, the information received from A.B.'s mother was not received by the L.S.B. for the purpose of filing or registering a complaint about the lawyer. It was provided for the purpose of allowing A.B. to determine what his options were if he were not satisfied with the services he was receiving from the public body. There was no formal complaint lodged, although it appears that there was discussion about why the client

was not entirely happy about what was happening with his case. Section 48(a) does not, therefore, justify the disclosure.

Section 48 (b)

Section 48(b) allows a public body to disclose information where the individual the information relates to has identified the information and consented, in the prescribed manner, to its disclosure. In this case there is no suggestion made by the public body that A.B. consented to the disclosure of the information. As noted, in fact, it appears that there was an express request that the information provided remain confidential. Section 48(b) does not, therefore justify the disclosure either.

Section 48 (s) (ii)

The public body in this case suggests that the long held practice of discussing “complaints” with the lawyers involved stems from a concern to ensure that the client is receiving adequate legal services and is based upon a concern for the solicitor/client relationship. If the disclosure “would clearly benefit the individual to whom the information relates” the head of a public body may disclose personal information. However, in this case, there is no argument made that this disclosure benefited the client. Rather, the public body argues that the **lawyer** needed to be made aware of anything that might affect the solicitor and client relationship. In this case, the result of the disclosure clearly did not benefit the client, as it resulted in a complete breakdown of the solicitor/client relationship and left the client without a lawyer. In my opinion, the public body has not established that the disclosure in this case was clearly for the benefit of the client and the disclosure is not, therefore, justified pursuant to section 48(s) (ii).

Section 48 (u)

That leaves section 48(u) which allows a public body to disclose personal information of an individual where authorized by legislation to do so. The public body in this case

suggested that they were “obligated” to make some inquiries into A.B.’s concerns about a lawyer to ensure that the client was receiving full and proper representation. I have reviewed the *Legal Services Act* which establishes the Legal Services Board but I could find no provision which placed this obligation on the public body. The only possibly relevant section I could find, in fact, suggested that the Board is bound by a solicitor/client privilege insofar as the client’s communications with the Board is concerned:

48. Any communication between a person applying for or receiving legal services and the Board or a regional committee or a member or employee of the Board or a regional committee, including any information disclosed by the applicant or recipient that would be privileged if made between a client and his or her solicitor, is privileged to the same extent and in the same manner as if it had been made between a client and his or her solicitor.

In the circumstances, therefore, it is my opinion that the disclosure of the context of the conversation between the Legal Services Board employee and A.B.’s mother to A.B.’s lawyer was not justified pursuant to the *Access to Information and Protection of Privacy Act*.

RECOMMENDATIONS

A breach of privacy is not something that you can take back. The damage has been done and there is no way to change that. For this client, what’s done is done and my conclusion that the disclosure was not authorized under the Act cannot put things back for him. The most that I can do in this case is to make recommendations so as to avoid such wrongful disclosures in the future.

I am satisfied that the disclosure was made in accordance with a long standing practice in the Legal Aid office in terms of dealing with complaints made by clients about lawyers assigned to their cases. The Applicant in this case would have me believe that there was some ulterior motive on the part of the employee (i.e. trying to protect the lawyer) but I am not satisfied that that was the case. Rather, it appears that the employee was

just following established protocol when a complaint is received by the Board. In this case, however, no complaint was actually registered. The client's intention was merely to get information about what would happen **if** a complaint were made. That said, without the client's express consent to the disclosure of the concerns held by the client, no disclosure should have occurred whether a formal complaint had been received or not.

It seems to me that the lack of any formal policies or protocols in these situations and a failure to review policies and protocols in the context of the *Access to Information and Protection of Privacy Act* may be the culprit which was at the root cause of the mistake in this case.

I asked the Board if clients were asked to sign any general authorization with respect to the disclosure of information or whether any kind of notice was given to applicants for Legal Aid about how their personal information would be used or disclosed. I was advised that there were no such notices and no written policies or procedures in place.

In order to avoid this kind of error in the future, therefore, I would make the following recommendations:

- a) All applicants for Legal Aid should be provided with a brochure or other written material at the time of their application for legal aid which clearly explains what information the Board will collect from them and how that information will be used and/or disclosed.
- b) The Legal Services Board should develop a written policy with respect to the handling of complaints against lawyers on the Legal Aid panel. The policy should include a statement about how a complaint can be made and how the information contained in the complaint will be used or disclosed. The policy should ideally state that no information will be disclosed to the lawyer about the complaint without the client's express

consent and how the handling of the complaint might be affected by the refusal of a complainant to consent. This information should also be included in the brochure provided to applicants recommended in (a).

- c) the Legal Services Board should immediately discontinue their long standing policy of contacting the lawyer to discuss client complaints unless and until there is a formal complaint made by the client and the client has given explicit authorization for the Legal Services Board to discuss the complaint with the lawyer

Elaine Keenan Bengts
Information and Privacy Commissioner