NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 11-094
10-158-4
February 24, 2011

BACKGROUND

In May of 2010, the Applicant sought access to "a copy of the report sent to Social Services by [A.B.] of YK 1 District on April 14 and 16, 2010" about her child. The initial request was addressed to the Department of Education, Culture and Employment (ECE). Upon discussing the matter with the Applicant, it seems that it quickly became clear that the Applicant was distressed that the school district where her child attended school had not followed it's own protocols and procedures when dealing with a report to child welfare authorities. She felt that, as a result, inaccurate and unfounded implications were raised about her parenting abilities and her personal information and that of her family had been improperly disclosed.

ECE attempted to assist the Applicant by explaining to her that certain records were not available to the public, even under the *Access to Information and Protection of Privacy Act* and that the record she was requesting was one of those records. On approximately July 18th, 2010, the Applicant asked me to review the refusal by the Department of Education, Culture and Employment to provide the report in question. The Department was asked for their submissions on that issue and those submissions were received in mid August at which point it became clear that the request for information should have been directed to Yellowknife Health and Social Services (YKHSS) and/or Yellowknife Education District #1 (YK 1). I directed ECE to forward a copy of the Request for Information to those two entities for follow up.

The Department of Education, Culture and Employment complied with that direction and in September, the Applicant's request was forwarded to both YKHSS and YK 1 with

a copy of my correspondence. ECE also followed up with a letter to my office in which they stated the following:

> I would like to explain that ECE did contact Yellowknife Health and Social Services after hearing from the applicant in May, but the representative said that the exemption in their Act prevented them from accepting her ATIPP request.

They indicated that the Applicant had been directed several times to both YKHSS and YK 1 to discuss her concerns further.

Subsequently, the Applicant met with individuals from both YKHSS and YK 1 and both of those public bodies reported that the Applicant had indicated to them that she did not intend to pursue her request further. Both considered the matter closed.

On October 28th, 2010, however, I received further correspondence from the Applicant in which she raised concerns about how her personal information, and that of her child, had been used by YK 1. This now appears to be the main issue, although the Applicant still wants to receive a copy of the report provided to YKHSS by YK 1.

THE ISSUE

The facts which led up to the Applicant's concerns are as follows:

On the date in question, the Supervisor of Instruction , Student Support Services for YK1 received information from a staff member at one of the schools about physical symptoms observed on the Applicant's child, who has special needs. This kind of concern would, apparently, normally be brought to the attention of the principal of the school but the principal was not in that day. A verbal report was apparently made to YKHSS about the concerns. It does not appear that anything came of that report. A second report (in writing?) was made several days later because, the school said, the

physical symptoms had intensified. According to the information provided by YK 1, after making the second report:

> "the Child Protection Worker urged the staff to contact the child's doctor to see what the doctor advised. The staff member told the Child Protection worker that she was uncomfortable with this and was told to put her feelings aside and do what was best for the student"

As a result, the staff member contacted a pediatrician and explained the situation, providing the name of the child and the parent and details about the physical symptoms which were causing concern. The pediatrician, apparently, suggested that someone should talk with the Applicant and encourage her to bring the child to the hospital that day. An appointment was then made for the child to see the pediatrician later that day and the staff member was asked to inform the Applicant. According to YK 1, when these matters were discussed with the Applicant, she "determined she preferred to see another doctor who had previously seen the student".

The Applicant's version is a little bit different. According to her, she was contacted by the school and advised that she should be taking her child to see "a doctor", without also advising her that an appointment had already been made for the child to see a particular pediatrician. When told that she should take her child to the doctor, therefore, she made her own arrangements with her own family physician. She feels that the public body is trying to suggest that she made a choice contrary to the direction they gave her and that, in doing so, she was somehow attempting to avoid the issue and was not acting in the best interests of the child. She was, in fact, quite insulted.

The Applicant is interested in knowing what prompted the complaint to social services and the concerns about her child when the child's presentation and health had been quite constant for years and had seen her family physician several times about the particular physical issue that brought this matter to the fore.

THE ISSUES

There are two issues before me. The first is whether or not YK 1 improperly disclosed the personal information of the Applicant and her child when they contacted the pediatrician directly to discuss the child's physical symptoms. The second is whether the Applicant is entitled to receive a copy of the report filed with YKHSS with respect to the concerns raised by the staff.

DISCUSSION

1. Breach of Privacy

The first issue is whether the school district acted in accordance with the law in contacting a pediatrician and providing that doctor with information about the health and physical symptoms of the child and discussing the case with him.

In my opinion, the actions of YK 1 in doing this, without the knowledge and consent of the child's parent, was contrary to law and constituted an unreasonable invasion of the privacy of both the child and the parent.

Under the *Child and Family Services Act*, teachers and others have a positive duty to report concerns they have about the welfare of a child to a Child Protection worker, a peace officer or another authorized person:

> 8.(1) Subject to this section, a person who has information of the need of protection of a child shall, without delay, report the matter
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> (a) to a Child Protection Worker; or
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> (b) if a Child Protection Worker is not available, to a peace officer or an authorized person.
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> (1.1) Subsection (1) does not require a person to report information received in the course of a judicial proceeding.

(2) For greater certainty, a person may not delegate the duty to report a matter under subsection (1) to another person.

(3) Subsection (1) applies

(a) notwithstanding any other Act; and

(b) notwithstanding that the information is confidential or privileged.

(4) No action shall be commenced against a person for reporting information in accordance with this section unless the report is made maliciously.

(5) Nothing in this section shall abrogate any privilege that may exist between a solicitor and the solicitor's client.

(6) Every person who contravenes subsection (1) is guilty of an offence and liable on summary conviction to a fine not exceeding $5,000, to imprisonment for a term not exceeding six months or to both.

This section is mandatory and attracts significant penalties if not followed. In this case, the school did, in fact, report their concerns to a Child Welfare Worker. According to them, the Child Welfare Worker told them to contact the doctor and pushed them to do that even when they expressed their reticence in doing so.

No one has suggested to me that the pediatrician might fall under the definition of who should be told about child welfare concerns. The pediatrician is not a Child Welfare Worker, nor is he a peace officer or "other authorized person".

Section 47 of the *Access to Information and Protection of Privacy Act* provides direction as to when a public body may disclose personal information to a third party, such as the doctor in this case:

47. A public body may disclose personal information only

(a) in accordance with Part 1; or

(b) in accordance with this Division.

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;
....

(p) for the purpose of complying with a law of the Territories or Canada or with a treaty, written agreement or arrangement made under a law of the Territories or Canada;

(q) when necessary to protect the mental or physical health or safety of any individual;
...

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

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or

(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

I have included only those subsections which might have some bearing on the issues at hand in this case. This said, the public body has not referred me to any of these subsections as justification for their disclosure of the Applicant's personal information and that of her child to the pediatrician's office. Briefly, and based on the information I have received from both YK 1 and from the Applicant, I conclude:

a) that the information was not collected in accordance with the Act for the purpose of disclosing it to a pediatrician. Rather, the information was relevant to a child welfare concern.

b) there is no question that the Applicant provided her consent to the disclosure of her personal information to the pediatrician;

c) the disclosure of this information to the child welfare authorities was authorized by virtue of section 8 of the *Child and Family Services Act*. The disclosure to the pediatrician's office was not so authorized

d) there is nothing before me to suggest that the disclosure to the pediatrician was required for the health and/or safety of the child. The concerns could have been addressed by contacting the Applicant and speaking to her about the necessity of arranging for the child to see a doctor. In fact, when the Applicant was approached with respect to the concerns raised, she herself made an appointment for the child with her own doctor.

e) there is no indication at all in this case that the Head of the public body was in any way involved in this matter. Nor is there any suggestion that he considered section 48(s) in any way before the information was disclosed to the pediatrician.

f) no argument was made that the disclosure of the information was clearly to the benefit of either the child or of the Applicant. Although a case might be made that the disclosure was to the benefit of the child, I can say with some certainty that the disclosure of the Applicant's personal information to the pediatrician in this case was not "clearly" to her benefit.

In short, no matter how well intentioned the personnel at YK 1 might have been when the contacted the pediatrician at the behest of the Child Welfare Worker, their discussion with the doctor's office without the Applicant's knowledge or consent was contrary to the provisions of the *Access to Information and Protection of Privacy Act*.

I note that if the issue was significant enough that a doctor's intervention was necessary in the best interests of this child, and if the staff at the school felt strongly enough that this child's health was in jeopardy, their recourse was to advise a Child Welfare Worker. At that point, it became the responsibility of the Child Welfare Worker to assess the situation and make a decision about how to handle the matter. It may be that the Child Welfare worker would have had the authority to discuss concerns about the child's physical symptoms with the doctor. The employees of YK 1 did not.

Unfortunately, as in most cases of breach of privacy, once the breach has occurred it is impossible to undo the damage done as a result. The most that can be done in this case is to recommend that an apology be provided to the Applicant. There is no situation that I can think of when a school should be calling a pediatrician to discuss a child's health issues without the knowledge and/or consent of a parent. The damage done to the reputation of the Applicant in this case may be irreparable and the public body must do what it can to reduce the harm, if it can.

2. Access to the report made to YKHSS

Sections 71 and 72 of the *Child Welfare Act* prohibit anyone receiving information in their capacity as a child welfare worker from using or disclosing that information to any person, except for very narrow and defined purposes as outlined in these sections. Furthermore, these sections also make it an offence for any other person to disclose information for any purpose:

> 71.(1) Any information or record of information relating to a person is confidential where it is received, obtained or retained by any person
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> (a) under this Act or the regulations;
> (b) in the exercise of his or her powers or in the performance of his or her duties under this Act or the regulations;
> (c) who operates a child care facility or foster home respecting a child in the care of the child care facility or foster home; or
> (d) who is employed by or retained on contract to provide services to a child care facility or foster home respecting a child in the care of the child care facility or foster home.

(2) Notwithstanding the *Access to Information and Protection of Privacy Act*, no person referred to in subsection (1) shall disclose or communicate any information or record of information described in subsection (1) to any person except

(a) where necessary or appropriate in the exercise of his or her powers or in the performance of his or her duties under this Act or the regulations;

(b) with the written consent of the person to whom the information or record relates, or where that person is a child,

(i) the person who has lawful custody of the child, or

(ii) the Director, where the child is in the temporary or permanent custody of the Director;

(c) where giving evidence in court;

(d) on the order of a court;

(e) to a person appointed to conduct an investigation under section 64 or 65;

(f) to the Minister, the Director, an assistant Director, a Child Protection Worker or an authorized person, at their request;

(g) to a peace officer, if the person believes on reasonable grounds that

(i) failure to disclose the information or record of information is likely to cause physical or emotional harm to a person or serious damage to property, and

(ii) the need for disclosure is urgent;

(h) where a disclosure or communication is required for the purposes of this Act or to protect a child;

(i) where necessary for the provision of care, counselling or education to the child;

(i.1) in accordance with subsection 57(4.1) of the Adoption Act;

(j) where, in the opinion of the Minister, the benefit of the release of the information would clearly outweigh any invasion of privacy that could result from the release; or

(k) where it is required for the purposes of this Act.

(3) No person, other than a person referred to in subsection (1), shall disclose or communicate any information or record of information described in subsection (1) to any person except

(a) where giving evidence in court; or

(b) on the order of a court.

72. Any information or record of information disclosed under subsection 71(2) shall be used only for the purpose for which it was disclosed and shall not be disclosed further.

It is to be noted that these sections of the *Child and Family Services Act* take precedence over the access provisions of the *Access to Information and Protection of Privacy Act* . The report, therefore, is protected from disclosure to any person, including the Applicant, notwithstanding the fact that the report relates to her and her child.

That said, I feel that I must comment on one of the statements made to me by the Department of Education, Culture and Employment. In one of their letters to me, they indicated that YKHSS had advised that they were "prevented from accepting" a Request for Information as a result of the above provisions . I must take issue with this statement. Notwithstanding the fact that the information may not be available, there is no instance in which a Request for Information should not be "accepted" and processed fully. All Applicants, whether they receive the records they seek or not, are entitled to have their request considered and reviewed. Furthermore, every applicant should receive a response to their Request for Information, and if access to the record is being denied, an explanation as to why. It is not acceptable for any public body simply to refuse to accept a request because some records in their possession are protected from disclosure.

Finally, I feel I must also comment on the fact that the Department of Education, Culture and Employment did not take steps to forward the Applicant's initial request for

information to either YKHSS or to YK 1 until I suggested that this would be appropriate. There is a positive duty placed on public bodies to assist Applicants to obtain the information they are seeking, including transferring a misdirected request for information. In particular, sections 7 and 12 of the Act provide:

> 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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> 12.(1) The head of a public body may transfer a request for access to a record and, if necessary, the record, to another public body where
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> (a) the record was produced by or for the other public body;
> (b) the other public body was the first to obtain the record; or
> (c) the record is in the custody or under the control of the other public body.
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> (2) Where a request is transferred to another public body,
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> (a) the head of the public body who transferred the request shall notify the applicant of the transfer without delay; and
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> (b) the head of the public body to which the request is transferred shall respond to the applicant in accordance with section 9 not later than 30 days after the request is received by that public body unless this time limit is extended under section 11.

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 Applicant, what's done is done and my conclusion that the disclosure was not authorized under the Act cannot put things back for her. The most that I can do at this point is recommend that the public body, in this case Yellowknife Education District No. 1, provide the Applicant with an apology for their error. I also hope that the discussion in this review will provide the public body with some food for thought and that they will take steps and incorporate new policies and procedures that will avoid the same errors being made in the future. I therefore recommend that YK 1 review it's policies and procedures with respect to the reporting

of suspected child welfare concerns and that those policies be revised so as to ensure that the only communication about such concerns is with the appropriate authorized authorities under the *Child and Family Services Act.*

With respect to the Access to Information matter, I make no recommendations as to further disclosure as the report is protected from disclosure pursuant to the *Child and Family Services Act*. I do, however, make the following recommendations:

a) that Yellowknife Health and Social Services review its policies with respect to receiving and responding to Access to Information requests to ensure that such requests are received and processed and that Applicants are provided with a response to their requests, even if that response is only to advise them that the records cannot be disclosed and why they cannot be disclosed.

b) that the Department of Education, Culture and Employment review its policies with respect to Access to Information requests to ensure that when a request is received that is better answered by another public body, the Department forwards it to the other public body and provides the Applicant with a written confirmation that the application has been transferred, where it has been transferred to and why it has been transferred to the other department.

Elaine Keenan Bengts
Information and Privacy Commissioner