NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 11-095
10-141-4
April 11, 2011

BACKGROUND

In April of 2010 I received a request from the Applicant, who is a reporter with a northern news organization, to review a response he had received from the Department of Education, Culture and Employment in response a request which he had made for:

> a document known as the "Handley" letter - Joe Handley correspondence of January, 1986, dealing with Ed Horne.

In response to that request, the public body provided a copy of a three page letter, heavily redacted, with a line by line explanation outlining why the severed portions of the letter had been refused. The public body cited Section 20 (1) (disclosure harmful to law enforcement), Section 21 (disclosure harmful to individual safety), and Section 23 (disclosure prohibited as a breach of third party personal information) for their refusal to disclose.

The letter in question is more than twenty years old. This same letter was the subject of a previous recommendation by my office (Recommendation 10-092). The recommendations I will be making, therefore, are the same.

BACKGROUND

According to the public body, a letter was located by the Department and identified in the course of gathering documentation required to defend the civil suits filed against the Governments of the Northwest Territories and Nunavut for harm suffered by the victims of abuse by Edward Horne, a former teacher who worked in a number of remote northern communities of what is now Nunavut. Mr. Horne has been convicted of a large number of offences involving past students. A copy of this letter, addressed to a senior employee of the

Baffin Divisional Board of Education at the time, was provided to the Plaintiff's counsel as part of the discovery process, and a copy of that letter was subsequently attached to an affidavit filed in support of an interim motion in the civil proceedings. The Nunavut Court of Justice ordered that the Affidavit should be sealed. An application was later made by a member of the press to have the documents unsealed, but the application was unsuccessful. The court held that the documents were provided in the context of pre-trial discovery and so were subject to the implied undertaking rule.

The Applicant then sought a copy of the letter pursuant to the *Access to Information and Protection of Privacy Act.*

The letter itself does not deal with Mr. Horne's actions *per se*, but is more in the nature of a *post mortem* of the way in which the matter had been handled by the senior officials of the Department and the Regional School District.

The Department argues that the letter contains personal opinions, character references or personnel evaluations of certain third party employees who are named or otherwise referred to in the letter. Third parties consulted suggest that at least some of what is contained the letter is factually inaccurate such that some of the comments made are fortuitous and without merit. They clearly feel that their personal privacy would be breached were the letter to be disclosed to the Applicant.

THE RELEVANT PROVISIONS OF THE ACT

The public body relies on three main exclusions contained in the *Act* for their decision not to disclose the contents of the letter.

The main argument made is that the disclosure of the information in question would be an unreasonable invasion of the privacy of the parties named or referred to in the letter. They rely specifically on section 23(1) as well as 23(2) (d), (g), and (h)(i) as follows:

> 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 ...

(d) the personal information relates to employment, occupational or educational history;
.....

(g) the personal information consists of personal recommendations or evaluations about the third party, character references or personnel evaluations;

(h) the personal information consists of the third party's name where

(i) it appears with other personal information about the third party, ...

If the information falls under one of the categories of section 23(2), a presumption arises that its disclosure would be a breach of privacy and disclosure is, therefore, prohibited. The presumption is, of course, a rebuttable one, but there must be some cogent evidence to set aside that presumption.

In the event that I were to find that section 23(2) does not apply and that the presumptions do not, therefore, arise, the public body has referred me to a number of the provisions set out in section 23(3) as reasons for refusing to disclose. Section 23(3) provides guidance for situations in which the presumptions do not apply, but the information requested is personal information. That section says:

(3) In determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

.....

(e) the third party will be exposed unfairly to financial or other harm;

(f) the personal information has been supplied in confidence;

(g) the personal information is likely to be inaccurate or unreliable; and

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

The public body has also suggested that the disclosure of some of the information would be harmful to law enforcement. Section 20(1) provides that:

> 20.(1) The head of a public body may refuse to disclose information to an applicant where there is a reasonable possibility that disclosure could
>
> .....
>
> (f) deprive a person of the right to a fair trial or impartial adjudication;

Section 20 is all about “law enforcement”. The public body, however, argues that section 20(1)(f) applies to civil litigation as well as to criminal or quasi criminal matters and that the disclosure would deprive the Government itself of a fair or impartial adjudication if the letter were to be disclosed or become public.

As noted in Review recommendation 10-092, section 2 of the Act does provide a definition for the term “law enforcement” as follows:

> "law enforcement" includes
>
> (a) policing, including criminal intelligence operations,
>
> (b) investigations that lead or could lead to the imposition of a penalty or sanction, or
>
> (c) proceedings that lead or could lead to the imposition of a penalty or sanction

Finally, the public body relies of section 21(1) which provides as follows:

> 21.(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, where the disclosure could reasonably be expected to endanger the mental or physical health or safety of an individual other than the applicant.

In this regard, the public body argues that the disclosure of the information contained in the letter could upset or cause further trauma to the mental health of the victims of Edward Horne who may, as a result of the disclosure of the record, feel devalued or blamed for the abuse they were subjected to. They suggest that history shows that victims of abuse are vulnerable to suicidal or self-destructive behaviour, despite supports in place during legal proceedings, particularly if inflammatory comments are published outside this supportive context. In this case, they say, more than 150 individual victims of Edward Horne have come forward so far and that the disclosure of this letter may well lead to further harm to the victims. They also suggest that the third parties named in the letter may also be unfairly blamed.

The Applicant, for his part, has asked simply that I review the record in question and address, as an independent officer to confirm that the public body has properly applied these sections of the *Access to Information and Protection of Privacy Act*.

DISCUSSION

I have thoroughly discussed the arguments made by the public body with respect to this matter in Review Recommendation 10-092 and would simply adopt that discussion in these recommendations.

In summary, those Recommendations say:

1. With respect to Section 23, although Mr. Horne's time in the north obviously resulted in many victims and those victims continue to suffer many years later, the public body did not provide me with sufficient evidence upon which I could conclude that the disclosure of the specific information contained in the letter could be "reasonably expected" to lead to further harm. I concluded that the information which the public body identified as being withheld subject to this section of the Act is not directed at victims, and does not refer to victims except in the most indirect way. I concluded that for this section to apply, the public body would have to provide much more direct and cogent evidence of the possible harm and the expectation that it might occur.

2. With respect to section 20(1) of the Act, I concluded that the "law enforcement" exemption did not apply to the case at hand or to civil litigation involving the Government generally. I concluded that this section is aimed at protecting the rights of individuals who find themselves before the courts or other tribunals, dealing with criminal or quasi criminal matters and who may be subject to sanction as a result and that it was never intended to protect the public body itself from disclosure of records just because they relate to a pending civil action against the public body. In reaching this conclusion, I relied on a decision made by the Alberta Information and Privacy Commissioner in 2005 (Order F-2005-013) in which the following comments are made:

> The purpose of the law enforcement exception is to ensure that legitimate law enforcement activities are not compromised. It is not to protect public

bodies from public opinion and pressure when law enforcement is directed at them. Any anticipated harm must relate to the law enforcement matter and not to the Public Body. There may be a case where the exception legitimately applies to ensure that a public body can make full answer and defence to a charge, and have an impartial adjudication. However there is no evidence to support that position in this case.

I concluded that in order to rely on this section, particularly to protect the Government itself, the public body bears the onus of providing sufficient evidence to substantiate its claim that disclosure could reasonably be expected to deprive it of the right to an impartial adjudication of the issues before the court. Civil matters are not decided by juries so there is no concern that the disclosure might taint the jury pool. Judges are required to disregard outside influences every time they sit in judgment on a case and are trained to do so. The onus in this case would be a very difficult one to meet and, in my opinion, the public body did not do so.

3. This left the arguments made pursuant to section 23 -- that is, that the disclosure of much of what is in the letter would constitute an unreasonable invasion of the personal privacy of third parties. I concluded that there was, in fact, a good deal of personal information about third parties, including comments about the job performance of identifiable individuals and identifiable individuals working collectively and that these portions of the letter were, in fact, protected from disclosure pursuant to Section 23(2)(g). I also concluded, however, that this did not justify the extent of editing done to the letter before it was provided to the Applicant.

RECOMMENDATIONS

In conclusion, I repeat the recommendations made in my Recommendation 10-092 and recommend the disclosure of the following parts of the record:

a) line 2
b) lines 6-8

c) the first sentence of paragraph 2 (line 9 and part of line 10)

d) lines 40-48

e) lines 55 - 62

f) the second sentence of paragraph 14 (part of line 109 and lines 110-113)

g) lines 114 to 116

Elaine Keenan Bengts
Northwest Territories Information and Privacy Commissioner

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