NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER
Review Report 03-32

File: 02-197-4
August 6, 2003

BACKGROUND

On April 8, 2002, the Applicant made a request to the Executive Council of the Government of the Northwest Territories for access to information pursuant to the *Access to Information and Protection of Privacy Act*. The request was for a copy of the contracts under which the terms of the departure of two former senior government officials from their employment with the Government of the Northwest Territories were determined. In its response to the Applicant, which is dated May 10th, 2002, the Applicant was advised that access to the documents in question was denied pursuant to section 23(1) and 23(2) (d) of the Act, claiming that the disclosure of the information in question would be an unreasonable invasion of the privacy of the two individuals involved.

By letter to this office dated June 14, 2002, the Applicant requested that I review the decision to deny access.

On July 26th, 2002, the Financial Management Board provided their submissions with respect to the matter, complete with case law in support of their position. A copy of those submissions were provided to the Applicant on July 31st, 2002 and she was asked to provide any response she might have by September 6th. No further submissions were received from her.

ISSUE

The issue in this review is whether the contracts between the Government of the Northwest Territories and the two government employees in question constitute

personal information, the disclosure of which would constitute an unreasonable invasion of the privacy of the two individuals involved.

THE PARTIES' POSITIONS

The Financial Management Board, who responded to my request for information relating to the Request for Review, takes the position that the contracts constitute personal information as that term is defined in section 2 of the Act. Section 2 reads as follows:

> "personal information" means information about an identifiable individual, including
>
> (a) the individual's name, home or business address or home or business telephone number,
>
> (b) the individual's race, colour, national or ethnic origin or religious or political beliefs or associations,
>
> (c) the individual's age, sex, sexual orientation, marital status or family status,
>
> (d) an identifying number, symbol or other particular assigned to the individual,
>
> (e) the individual's fingerprints, blood type or inheritable characteristics,
>
> (f) information about the individual's health and health care history, including information about a physical or mental disability,
>
> (g) information about the individual's educational, financial, criminal or employment history,
>
> (h) anyone else's opinions about the individual,
>
> (i) the individual's personal opinions, except where they are about someone else;

Financial Management Board (FMB), in their submissions, take the position that the

attributes listed under the definition do not represent a finite list of what constitutes "personal information" and that it is clear from the use of the word "includes" that it is not meant to be an exclusive list. They point to section 2(g) which specifically includes "educational, financial, criminal or employment history" in the definition and claim that this would cover "the bulk of the information found in the Severance Contracts".

FMB goes on to point out that section 23(1) of the Act prohibits a public body from disclosing personal information where the disclosure would be an unreasonable invasion of the privacy of a third person. Section 23(2) then goes on to provide for circumstances in which the disclosure of personal information is presumed to be an unreasonable invasion of privacy. That section says:

> (2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where
>
> (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible contravention of law, except to the extent that disclosure is necessary to prosecute the contravention or continue the investigation;
>
> (c) the personal information relates to eligibility for social assistance, student financial assistance, legal aid or other social benefits or to the determination of benefit levels;
>
> (d) the personal information relates to employment, occupational or educational history;
>
> (e) the personal information was obtained on a tax return or gathered for the purpose of collecting a tax;
>
> (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank

balances, financial history or activities or credit worthiness;

(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, or

(ii) the disclosure of the name itself would reveal personal information about the third party;

(i) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation; or

(j) the personal information indicates the third party's race, religious beliefs, colour, gender, age, ancestry or place of origin.

It is FMB's submission that the terms of the severance contracts constitute financial and/or income information about the individuals and as a result, *prima facie*, the disclosure of the contracts would be an unreasonable invasion of the third parties' privacy.

The FMB also went on to address the provisions of section 23(4) which list a number of circumstances in which the disclosure of information is deemed **not** to be an unreasonable invasion of privacy. The relevant portions of that section are as follows:

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

(a) the third party has, in writing, consented to or requested the disclosure;

(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;

The most relevant portion of this section, says FMB, is subsection (e). It is their position that the information in the severance contracts does not fall within this subsection because the information contained in those contracts refer to specific salaries (as a opposed to salary range). Further, they argue that the benefits mentioned in the contracts are not "discretionary" in the true sense of that term and point to several decisions made pursuant to federal legislation and Ontario legislation to support that assertion.

Finally, they address the provisions of section 23(3), which state as follows:

(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

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of the Northwest Territories or a public body to public scrutiny;

(b) the disclosure is likely to promote public health and safety or to promote the protection of the environment;

(c) the personal information is relevant to a fair determination of the applicant's rights;

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people;

(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.

It is the position of FMB that this section should be resorted to only where neither 23(2) nor 23(4) apply. In other words, unless the disclosure of the information in a record would create a presumption of unreasonable invasion of privacy or the information can be categorized as being information that creates a presumption of no unreasonable invasion of third party privacy if disclosed, this section should have no application.

However, they submit that if subsection 23(3) is to be considered in this case, the analysis is, at best, neutral in that there are factors which would weigh in favour of disclosure and factors which would weigh in favour of non-disclosure of the information in question. They acknowledge that public scrutiny of public bodies is a worthwhile goal. They go on, however, to make the following statement:

> However, given the attention that this subject matter has already received, we would submit that this goal has been more or less satisfied. It is public knowledge that M.S and M.B. were not dismissed for cause. It is also publicly known that the lack of cause resulted in the need for the Severance Contracts. It should therefore be clear that the termination of MS and MB has already been exposed to public scrutiny. Arguably, the exact terms of these contracts would add very little to the cause. As well any need for further public scrutiny is not sufficient to overcome the presumption against disclosure established by subsection 23(2). (Note: I have abbreviated the names of the third parties involved)

They go on to point out, as well, that the disclosure of the information in the contracts may unfairly expose each of the two individual third parties to financial or other harm, or may unfairly damage each of their reputations. They do not explain how these

effects might come about because of the disclosure of the severance contracts. They also suggest that although the information in the contracts was not “supplied” in confidence, there is a provision in the agreement which requires the parties to hold the contents of the agreements in the strictest confidence.

FMB suggests that all or nearly all of the provisions of the Severance Contracts contained personal information and it would be difficult, if not impossible to sever the personal information from the remainder of the contracts so as to at least provide some of the record which had been requested. In their words “it was determined that the resulting product would contain nothing more than meaningless ‘boilerplate’ contract clauses”. They argue that “given that this product was likely to have no value to the applicant, in our view, the spirit of the Act dictated a complete refusal to disclose the records. To do otherwise might have been viewed as making a mockery of the Act”.

Finally, FMB argues that, at least with respect to one of the two third parties involved, there is (was) litigation pending before the Supreme Court of the Northwest Territories on the issue of whether the contract for employment (as opposed to the contract effecting severance) must be disclosed and, to the extent that the severance contract refers to the employment agreement or contains the same information, it is possible that disclosure of the Severance Contract would pre-empt the proper adjudication of the Court.

In its closing, FMB states that “this is not an instance where a lucrative contract was secretly granted as a result of nepotism or patronage. Two high ranking employees were paid severance pay after being terminated without cause. On our interpretation of the Act as a whole, the information contained in the Severance Contracts is precisely the type of personal information that the privacy objectives of the Act seek to protect.”

Unfortunately, as noted above, the Applicant chose not to respond to the arguments made on behalf of the public body. I am, therefore, left to make may own response and give my own opinion and base my recommendations on that.

DISCUSSION

I have had the benefit, in my capacity as Information and Privacy Commissioner, of having been able to review the two contracts in question.There is no doubt whatsoever that much of the information contained in each of the two contracts is personal information, as that term is defined in the Act, specific to the individual third parties.

Much of the information in the two contracts is about “an identifiable individual”. In my opinion, it is not necessary to determine whether the information falls into one of the specific examples provided for in the definition of “personal information”. The list of the kinds of information to be included as “personal information” provides assistance in determining what information is and what is not “personal information” but does not, in my opinion, limit the definition. In this I agree with the public body.Here, the contract identifies a third party and sets out the terms of a financial contract between that person and the Government of the Northwest Territories arising out of the end of their employment relationship with the Government.

The fact that much of the information in each of the contracts is personal information does not result in an automatic prohibition of its disclosure. To be protected from disclosure, the release of the information in question must amount to an unreasonable invasion of the third party’s privacy. Section 23 assists us in determining whether or not there is s presumption of unreasonable invasion of privacy.

Ontario’s information and privacy legislation, both at the municipal level and at the provincial level, contains provisions very similar to our section 23 and the Privacy

Commissioner in that jurisdiction has considered the application of these sections to the terms of a severance agreement a number of times.

In Order MO-1332, [2000] O.P.I.C. No 151, an order dealing a request for copies of a series of severance contracts entered into between the City of Hamilton and five named individuals who had formerly been employed by either the City of Hamilton or by the Regional Municipality of Hamilton-Wentworth, the following comments were made by S. Liang, the adjudicator:

> A number of decisions of this office have considered the application of this section of the Act, or its provincial equivalent, to severance agreements entered into by former public officials or employees. In Order M-173, which dealt with severance agreements between the City of Ottawa and three former high-ranking employees, the monetary entitlements under those agreements was found **not** to fall under the presumption in section 14(3)(f) (finances, income etc.) of the Act, insofar as they represented "one time payments to be conferred immediately or over a defined period of time that arise directly from the acceptance by the former employees of retirement packages." Further in the same order, Assistant Commissioner Irwin Glasberg found that much of the information in those agreements did not pertain to the "employment history" of the individuals for the purposes of section 14(3)(d) of the Act, but could more accurately be described as relating to arrangements put in place to end the employment connection. (emphasis added)

The legislation under consideration in that case is almost identical in wording to our section 23(2)(f) which creates a presumption of unreasonable invasion of third party privacy where the record to be disclosed describes the third parties' finances, income, assets, liabilities, net worth, bank balances, financial history or activities or credit worthiness.

The Adjudicator went on, however, to distinguish cases which deal with "one time" payments and those which deal with salary continuation agreements as follows:

> In Order P-1348, which dealt with the application of the provincial equivalent to sections 14(3)(d) and (f) to severance agreements, Inquiry Officer Laurel Cropley reviewed other decisions in this area,

> and concluded that the start and finish dates of a salary continuation agreement have been found to fall within the presumption in section 14(3)(d) (employment history), and references to the specific salary to be paid to an individual over that period of time, within the presumption in section 14(3)(f) (finances and income).
>
> Further, information which reveals the dates on which former employees are eligible for early retirement, the number of years service, the last day worked, the dates upon which the period of notice commenced and terminated, the date of earliest retirement, and the number of sick leave and annual leave days used has been found to fall within the section 14(3)(d) presumption: Orders M-173 and P-1348. Contributions made to a pension plan have been found to fall within the section 14(3)(f) presumption: see Orders M-173 and P-1348.

In the end, the Adjudicator made the following finding:

> I am satisfied that the information in the severance agreements which sets out the period during which the salaries of the individuals will continue to be paid is covered by the presumption in section 14(3) (d), and the amount of those bi-weekly payments, by the presumption in section 14(3)(f). Further, information as to the amount of vacation entitlement, sick leave entitlement, credited service in the OMERS, and the dates on which individuals may be entitled to draw a pension, also fall within the ambit of section 14(3)(d).

In this case, the severance contracts in question are written in the form of salary continuation contracts. I agree with my colleague in Ontario and find that the following specific information is protected from disclosure pursuant to section 23(2)(d) (employment history):

- the first day worked
- last day worked
- the length of the continuation of salary
- the commencement date of the payments
- the length of the continuation of pension and health related benefits;

and that the following information is protected from disclosure pursuant to section 23(2)(f) (finances, income):

- the rate of compensation
- the amount of Performance Pay to be paid

That having been said, when we remove those specific bits of information, there remains a lot of information in the contracts.

There are provisions in one or both of the contracts in question which in my opinion contain personal information, but which fall under section 23(4) which provides circumstances in which the disclosure of the information is deemed NOT to be an unreasonable invasion of privacy. Section 23(4)(e) provides that the disclosure of information is not an unreasonable invasion of a third party's privacy if:

> (e) the personal information relates to the 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

The provisions of the contracts which, in my opinion, fall into this category are the provisions in the agreements which relate to the fact that the third party employee was entitled by contract to "Performance Pay" pursuant to the terms of his/her contract of employment and the provision which relates to entitlement to removal assistance. In my opinion, these bits of information constitute personal information in that it is information about the individual's contract of employment/terms of settlement.

However, in my opinion, this is information that relates to the third party's discretionary benefits. In my opinion, the term "discretionary benefits" include all benefits, financial and otherwise, that are not required to be paid for work done but which, at some point, are within the discretion of the employer to include or not in a

pay package. They include such things as medical benefits, housing assistance, removal assistance and performance pay. Section 23(4)(e) provides that information that relates to a party's discretionary benefits is deemed not to be protected from disclosure as personal information. I read this as saying that the fact that such a discretionary benefit is payable to an individual cannot be protected from disclosure as personal information. That having been said, the specific amounts paid to the individual pursuant to these discretionary benefits is protected from disclosure as financial or income information of the third party (section 23(2)(f))

In my opinion, the balance of each severance agreement (which the public body refers to as "boiler plate") does not constitute personal information except to the extent that each contract confirms that the individuals in question did, in fact, enter into a severance agreement with the Government of the Northwest Territories, a fact which is clearly already in the public domain and therefore no longer subject to protection from disclosure.

If I am wrong in my opinion that the balance of the agreements do not constitute personal information, then we must go on to apply the provision of section 23(3) to determine whether the disclosure of these remaining provisions of the contracts would constitute an unreasonable invasion of the privacy of the third parties involved.

At least for the purposes of this review, I agree with FMB that section 23(3) should not come into play unless neither section 23(2) or section 23(4) apply - i.e. where there is neither a presumption of unreasonable invasion nor a presumption that the disclosure would not be an unreasonable invasion of the privacy of the third parties.

Section 23(3) recognizes that even if information does not fall within one of the presumptions of unreasonable invasion of privacy, the disclosure of that information may still constitute an unreasonable invasion of privacy. The section directs the head of the public body to consider all of the circumstances and provides a list of some of

the matters that should go into the analysis. These include:

a) whether disclosure is desirable for the purpose of subjecting the activities of the public body to public scrutiny;

b) whether the third party will be exposed unfairly to financial or other harm;

c) whether the personal information has been supplied in confidence;

d) whether the information is likely to be inaccurate or unreliable; and

e) whether the disclosure may unfairly damage the reputation of any person referred to in the record requested

As noted above, I agree with the public body's submission that section 23(3) should only be applied only in circumstances where no presumption of unreasonableness or deemed lack of unreasonableness arises. That having been said, however, only some parts of the two contracts fall within the application of sections 23(2) and 23(4). Section 23(3) considerations must be applied to the balance.

The public body argues that a consideration of all of the circumstances of the matter results in a neutral conclusion. If that were the case, the disclosure of the personal information cannot be said to result in an unreasonable invasion of the third party's privacy. If the balance between reasonable and unreasonable is a neutral one, by definition, the disclosure of the information could not be said to constitute an unreasonable invasion of the third party's privacy.

However, I disagree with the public body's conclusion that the balancing of the considerations results in a neutral conclusion. In my opinion, the balance is in favour of disclosure. The first consideration listed in section 23(3) is the goal of subjecting public bodies to public scrutiny. The public body suggests that the press attention given to the dismissal of these two individuals is such that the public is aware of all the facts that they need to be aware of. They argue that the two parties were dismissed without cause and had to be paid severance packages as a result and that

the disclosure of the terms of the Contracts would add very little to the cause. I disagree. The dismissal of the two individuals in question from their employment was the culmination of a series of events which created much controversy about the way in which the public body dealt with the matters which arose, the end result of which was the dismissal of the employees and the need for severance agreements. The disclosure of the "boilerplate" parts of the contract may or may not add to the public knowledge and understanding of how the public body dealt with the matters. That is not the point. The point is that the public is entitled to all public documents within the possession of the public body. The cost to the public of resolving these issues (not only the severance packages, but the legal dealings leading up to the severances) is a matter which the public has the right to scrutinize, subject only to the specific exemptions set out in the Act. The more controversial the issue, the more important it is to the credibility of government that the public be able to scrutinize the government's actions as minutely as possible. In the circumstances of this particular case, the ability to scrutinize the actions of the government weigh heavily in favour of disclosure.

The public body also suggests that the disclosure of the information in question "may" expose the third parties to financial or other harm or unfairly damage the reputation of the third parties. However, they provide no substantiation for that or even any indication of how they might be harmed by the disclosure of the information or how it might damage the third party's reputations. For my part, I see nothing in either of the contracts which, *prima facie*, would damage either of the third party's reputations or expose them to financial harm. If the public body is going to rely on these considerations as a reason for their decision not to disclose the records, there must be something more than simply bald statements that this may be so. What is the specific harm that might affect the third party and what is the likelihood that that harm might arise? If the harm arose, why would it be "unfair"? How might the disclosure of the information (boilerplate provisions) damage the reputation of the individual third parties? What are the possible consequences to the third party? There is nothing in this case which would suggest that these

consequences might arise from the disclosure of the boilerplate provisions of the two contracts in question.

The public body concedes that the information in the contracts was not "supplied" in confidence but points to a provision in each of the Agreements which requires the parties to "hold in strictest confidence the contents of the agreement". With respect, a public body cannot "contract out" of the provisions of the *Access to Information and Protection of Privacy Act.* I agree that clear evidence that the third parties had an expectation of confidentiality may be a factor to be considered in determining whether the disclosure might constitute an unreasonable invasion of privacy. However, in this case, we have contracts which were clearly drafted by the public body and the wording of the confidentiality clause in at least one case suggests that the clause was drafted exclusively for the benefit of the public body and not for the benefit of the third party.

Without any input from either of the third parties, it is hard to know what their expectations were. This consideration, therefore, cannot weigh heavily in a consideration of section 23(3).

In the end, it is my opinion that most of the terms of the two severance contracts are not protected from disclosure. To the extent that the information is not protected by section 23(2) of the Act, it is my opinion that the contracts should be disclosed to the Applicant. The protected provisions can be severed.

The public body argues that they considered the option of severing the personal information and releasing the remainder of the record but determined that the resulting product would contain nothing more than meaningless boilerplate contract clauses which would have no value to the applicant. With due respect, it is not for the public body to decide what is and is not useful to the Applicant. The only thing that the public body should be considering is the wording of the Act. The Act states at section 5(2) that:

> The right of access to a record does not extend to information excepted from disclosure under Division B of this Part, **but where that information can reasonably be severed, an applicant has a right of access to the remainder of the record**. (emphasis added).

The Act makes the public body's obligation clear. If it is not excepted from disclosure, the Applicant has the right to receive the edited version of the record whether the public body feels that it is useful information or not. It is for the applicant to decide what is or is not useful to him/her.

Finally, the public body argues that the severance contract of one of the parties should not be disclosed because that Third Party has an appeal currently pending in the Supreme Court of the Northwest Territories on the issue of whether or not the original contract of employment between the Government and the Third Party must be disclosed. They argue that to the extent that the Severance Contract entered into by the third party refers to the employment agreement or contains the same information as the employment agreement, it is possible that the disclosure of the Severance Contract would preempt the proper adjudication by the Court. Having decided that many of the specifics relating to the terms of the severance which might have reference to the original contract of employment are protected from disclosure as personal information, I believe that this concern no longer exists. In any event, that would be a matter for the Court to decide. The public body's obligation is to comply with the provisions of the Act, not to take a position on behalf of a Third Party. If the Third Party has an objection or disagrees with the public body's interpretation of the Act, he or she has recourse to the Information and Privacy Commissioner and, ultimately to the courts.

CONCLUSION AND RECOMMENDATION

In view of the above discussion, it is my conclusion and recommendation that the two contracts be provided to the Applicant, but that certain specific information be severed. In particular:

- the name of the individual third party in each contract, where ever the name appears in the contract;
- any reference to the specific position held by the third party;
- any reference to specific dates anywhere in the contract;
- any reference to the third party's gender;
- the length of time that salary was to continue pursuant to the terms of each contract and the actual annual salary upon which the payments were to be based;
- the specific amount to be paid to each third party by way of "performance pay"
- The signature of the third parties and witnesses

I have, for ease of reference, provided the head of the public body with a copy of each contract with the parts that should be severed highlighted.

Elaine Keenan Bengts
Northwest Territories Information and Privacy Commissioner