NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER
Review Report 17-157

File: 16-202-4
February 22, 2017

BACKGROUND

The Applicant submitted a Request for Information to his employer (a public body) for

> copies of all harassment, discrimination, human rights, abuse or other allegations made against me by [A.B.]

For the purpose of this review, [A.B.] will be used to identify the third party involved.

The request was made on June 27th, 2016. The request was acknowledged by the public body on June 28th with an indication that the processing of the request had begun. On July 13th, the public body wrote to the Applicant indicating that they had determined that they needed to conduct a third party consultation with respect to the Request for Information pursuant to section 12 of the Act. As a result of the third party consultation, the public body indicated that they would contact the Applicant again by October 12th. Also on July 13th, the public body appears to have sent out a letter or letters to third parties pursuant to section 12, seeking their comments.

On approximately September 19th, the Applicant entered into negotiations with the public body with a view to resolving employment issues. Both the Applicant and the public body were represented by legal counsel in these negotiations. It appears that during the course of the negotiations, the Applicant's many access to information requests, including this one, were added to the issues under negotiation and were removed from the formal ATIPP process with the consent of the Applicant. As a result, further processing of the requests was halted. In November, the negotiations broke down, and the Applicant notified the public body that he expected his requests for information to proceed and was waiting for his response. It is not entirely clear exactly when this was communicated to the public body but it is clear that the

direction was acknowledged by the public body on November 23rd. The Applicant referred the matter to my office on December 7th when he had not yet received a response to the request.

Apparently, the public body once again ceased working on the request when this matter was referred to me for review and nothing further has been done. In fact, it is not clear that the public body took any steps after November 23rd to move the request along. The Applicant has yet to receive any response. This review, therefore, proceeded on the basis of a deemed refusal pursuant to section 8(2) of the *Access to Information and Protection of Privacy Act*.

THE RELEVANT SECTIONS OF THE ACT

Section 6 of the Act provides that an applicant may make a written request to a public body believed to have custody or control of a record.

Section 7 requires the public body to make “every reasonable effort” to assist an applicant and to respond to an applicant openly, accurately, completely and without delay.”

Section 8 requires the public body to respond to a Request for Information within 30 days unless the time for the response is extended pursuant to section 11 or other certain conditions (none of which are present here) apply. The failure to respond within 30 days is “deemed to be a decision to refuse access to the record.”

Section 11 allows a public body to extend the time for responding to the Request for Information for a “reasonable period” in certain circumstances, including where “more time is needed to consult with a third party....before the head can decide whether or not the applicant is entitled” to the requested records.

Section 26 provides that where the head of a public body is considering giving access to a record that may contain information about a third party and that disclosure would amount to an unreasonable invasion of that person’s privacy, the

public body must give written notice to the third party which indicates that a request has been made, and describes the contents of the record(s) in question. The third party is given up to 60 days to provide comments, after which the public body must make a decision whether or not to disclose the record(s). Notice of that decision must be given to both the Applicant and the third party and each of the parties has 30 days from the date of that notice to seek a review from this office.

THE RECORDS

The public body has provided me with copies of all the responsive records. They have not provided me with redacted copies because “no formal decision had been made regarding this request”. They did note, however, that it was their position that partial access could be possible. They referred me to Section 23(2)(a) as the primary exception that would be applicable and noted that there are numerous exchanges that relate to health information within the records.
They also referred me to section 23(2)(d).

Section 23 (1) of the *Access to Information and Protection of Privacy Act* prohibits the disclosure of personal information to an applicant where the disclosure would be an unreasonable invasion of a third party’s personal privacy. Section 23(2) outlines circumstances in which there will be a presumption that the disclosure would be an unreasonable invasion of privacy. Subsection (a) raises the presumption where:

> (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation

and subsection (d) provides for a presumption where

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

The public body provided me with two records, and a total of six pages which they have identified as being responsive. I note at the outset that the first record appears to be missing page 2. Unfortunately, I cannot therefore comment on it directly.

DISCUSSION AND RECOMMENDATIONS

1. Disclosure of the Records

There is information in these records which, if disclosed, would amount to an unreasonable invasion of the privacy of a third party. Most of the content of these records can, however, and should be disclosed. Specifically, it is my opinion that all six pages of the responsive records could be disclosed, with appropriate redactions, without resulting in an unreasonable invasion of the third party's privacy.

Recommendation #1

I **recommend** the disclosure of all six pages with the following redactions:

- Page 1 - the personal telephone number of [A.B.]
- Page 2 - under the heading "Specific Complaint", paragraph 6, the word following "going to" in the handwritten portion of the paragraph.
- Page 3 -
    a) in line one, the word after "to"
    b) in line two, the first two words and the last word
    c) in line four, the entire line
    d) in line seven, the word after "am" and the word after "need"
    e) in line eight, the last word
    f) in line nine, the words after "the" to the end of the line
    g) in line ten, the entire line
    h) in line eleven, the two words after the word "I"
    i) in line twelve, all words after the word "I"

- Page 4 - in the email dated Thursday, January 14, 2016 1:25 pm from [A.B.] to the Applicant,
  a) in the first paragraph of the body of the email, the six words after “for” in the first line and the two words after “to go” in the second line
  b) in the second paragraph, the four words after “request”, the two words after “for”, and the two times referred to in the first line.
  c) in the second line of the second paragraph, the four words after “I got” and the two words after “going”, as well as the last three words of the line
  d) in the second paragraph, the first two words of line three.
- Page 5 -
  a) in the email dated Wednesday, January 13, 2016 4:06 pm from [A.B.] to the Applicant, the word after “My”;
  b) in the email dated Wednesday, January 13, 2016 3:48 pm from [A.B.] to the Applicant, the word after “schedule”
  c) in the email dated January 13, 2016 3:30 pm from the Applicant to [A.B.], the first word of the second line.

I would further recommend that the public body locate and disclose “Page 2 of 3" of the Complaint Form, applying any appropriate redactions as indicated pursuant to the Act.

2. Other Issues

While this addresses the records which should have been disclosed to the Applicant, it does not address the other issues surrounding the way in which this Request for Information was handled by the public body.

Firstly, there was no reason, in my opinion, to conduct a third party consultation in this case. It is a file that should have been handled with redactions rather than with a consultation. While there are cases in which a consultation of a third party are, indeed, necessary and appropriate, most often these matters can be addressed by removing

from the records words and phrases, and even paragraphs, which might identify the third party or other personal information about the third party. The third party consultation process takes approximately 90 days, and potentially much longer than that if the third party files a Request for Review, which in turn delays the response to the Applicant by the same amount of time. For this reason, consultation should be undertaken only when necessary. To borrow from a well-known idiom, access delayed is access denied. In this case, the Applicant already knows the name of the third party - he named [A.B.] in his Request for Information. He knows that a complaint was made and the general import of the complaint. Other information about the third party is, in this case, easy to mask so as to prevent any unreasonable invasion of [A.B.]s privacy.

Secondly, there is nothing in the *Act* which allows for an access to information request to be put “on hold” as it apparently was in this case. That said, if the Applicant agrees to a different approach, I see no reason why this can’t or shouldn’t be done. Anything which streamlines the process or leads to a resolution that gets the requested information into the hands of the Applicant in an effective and efficient way is to be encouraged, even if it is outside the formal ATIPP process. It is important, however, that the Applicant understands the consequences of such an agreement, including the fact that the time lines set out in the Act no longer apply. There must be a clear understanding of the “rules of engagement” such that the Applicant (and, for that matter, the public body and the Information and Privacy Commissioner) knows what the parameters of the agreement were. Nor should this approach be used by a public body to deliberately delay or avoid providing access. If such a step is taken, it is important that, within the formal process, there be something in writing which outlines the understanding reached and how the Applicant can renew the application if the alternate arrangements prove unsuccessful. In this case, while there appears to have been correspondence between counsel for the Applicant and counsel for the public body in which the Applicant appears to have agreed to allow the response to his ATIPP requests to be dealt with in the context of the wider negotiations in relation to his dispute with the GNWT, there was nothing which outlined the parameters of this

agreement. There was no letter written *within the ATIPP process* which confirmed the agreement. Nor was there any clear outline of how the matter would proceed if the request could not be or was not addressed to the Applicant's satisfaction in the negotiation process. The formal ATIPP process simply came to a full stop. The result was a good deal of confusion and uncertainty when the negotiations failed. The Applicant did not know whether he had to start the process all over again or, alternatively, what he needed to do to re-start the requests which had been placed in abeyance. Nor was there any clear understanding as to what time lines the public body was required to meet in light of the hiatus.

Recommendation #2

I **recommend** that the Department of Justice or such other public body as is responsible for the administration of the *Access to Information and Protection of Privacy Act* create appropriate policies to deal with instances such as the ones that occurred here. In particular, there should be:

a) guidelines around when such an agreement can be entered into;
b) a formal process for entering into such an agreement;
c) a policy for what happens if the agreement fails;
d) a requirement that a letter be written to the Applicant within the formal ATIPP process confirming the terms of the agreement;
e) guidelines to ensure that the parameters of the agreement are clear and what issues should be addressed when making such an agreement, including:
    i) how the Applicant can return to the formal process;
    ii) time lines that will apply if the formal process is renewed;
    iii) the specific obligations of the public body to respond to the renewed process

Thirdly, I am concerned that the public body has failed to comply with its obligations pursuant to section 7 of the Act to "make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay".

Prior to the agreement to take the ATIPP requests out of the formal ATIPP process, the public body had undertaken a third party consultation with respect to the responsive records. This consultation was in its final stages when the formal process was halted. When the request was put on hiatus on or about September 9th, the public body was awaiting the third party's response, which was due on September 13th. The deadline for the third party's submissions was days away. No notice was given to the third party that the request had been put on hold, so that September 13th deadline remained an active deadline for the third party. When the Applicant brought the matter back into the formal process on November 23rd, therefore, the public body should have been in a position to make its decision almost immediately (it took me about ten minutes to review the records and make recommendations with respect to what should be disclosed). The public body should have been able to give the third party notice of its decision within one or two working days. The third party would then have had 30 days from that point to seek a review and the public body should, therefore, have been ready to disclose records before the end of December. It appears, however, that when the Applicant made his request to my office to review the matter, the public body once again put everything on hold and no further steps have been taken to respond to the request, including the necessary step of providing the third party with notice of its decision. While I believe that the consultation in this case was not necessary, the public body decided to go that route and for that reason, it must be completed in accordance with the Act. The third party must, therefore, be given notice of the public body's decision with respect to disclosure and the third party must be given thirty (30) days to respond. I would have expected the file to be completed and closed by now. But no further steps have been taken to complete the response and no explanation for that failure has been provided.

Again, I note that section 7 of the Act requires public bodies to "make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay". Granted, this case is a little unusual because of the attempt to resolve the issues outside of the process. That said, when that attempt failed, I would have expected the public body to act quickly to respond to

the request, particularly in light of the fact that there are only a few pages of responsive records. This could have been completed within a very short period of time. Yet two weeks later, when the Applicant filed his Request for Review with my office, no further steps had been taken to move the request along. From what I can tell, in fact, no steps have been taken to provide the Applicant with his response since negotiations came to an end.

Recommendation #3

I **recommend** that the third party consultation process be completed forthwith by giving the third party notice of the public body's decision with respect to disclosure and giving him 30 days to register a review with my office if he disagrees with the disclosure. Unfortunately, this means yet another delay for the Applicant.

Recommendation #4

Assuming that the third party does not object to the proposed disclosure, I **recommend** that the disclosure be completed as soon as allowable under the Act. If the third party seeks a review of the public body's decision, unfortunately the Applicant will have to wait until that review has been completed before he can receive the response to his Request for Information.

CONCLUSIONS

It is to be noted that the Applicant in this case has made many Requests for Information from the public body involved in this review. I accept that in trying to take the requests out of the formal ATIPP process, the public body was attempting to streamline and focus all of the requests made and to provide the Applicant with a full response to all his requests as expeditiously as possible. Unfortunately, that attempt failed rather strikingly and this ended up causing confusion and further and significant delay. I do not fault the public body for trying to find an easier, faster route to responding to the Applicant's many Requests for Information, including this one and,

in fact, I applaud that effort. Unfortunately, the process was not, perhaps, fully thought out and defined, which ended up causing more confusion and resulting in unacceptable delays. And when the negotiations failed, the public body failed to proceed to complete the response “openly, accurately, completely and without delay” as required of it pursuant to section 7. For the sake of clarity, my recommendation for the public body going forward is:

a) make an immediate decision with respect to disclosure, keeping in mind the recommendations as to disclosure made above;
b) give the third party and the Applicant immediate notice of its decision pursuant to section 27(2) and (3);
c) assuming that there is no Request for Review filed by the third party, provide the Applicant with the requested records immediately after the expiration of the 30 day response period outlined 27(3).

Elaine Keenan Bengts
Information and Privacy Commissioner