

**NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER**
Review Report 17-168

File: 17-129-4
August 23, 2017

BACKGROUND

On January 31st, I received a request from a Third Party to review a decision by the Department of Education, Culture and Employment to partially disclose a workplace investigation report in which the Third Party (hereinafter referred to as A.B. for ease of reference) had been involved. The report had been requested by someone under the *Access to Information and Protection of Privacy Act*. A.B. received a letter from the department asking for his input pursuant to section 26 of the Act. While the letter he received did include a copy of the responsive record in question, there were no specifics as to exactly how the record would be redacted, other than that he was advised that no information that would constitute an unreasonable invasion of A.B.'s privacy would be disclosed (section 23). A.B. indicated that the investigation process had been very stressful for him and he did not see a valid reason why the report needed to be accessed since due process had been followed during the investigation process. He asked me to review the decision to disclose any part of the record.

THE PUBLIC BODY'S EXPLANATION

I asked the public body to provide me with both a copy of the responsive record or records without edits as well as a copy with the proposed edits. I also asked for an explanation as to the proposed disclosure.

The department indicated that the requested record was an investigation report done under the GNWT *Harassment Free and Respectful Workplace Policy*. The Investigation

Report contained general and factual information about the process, assessment of the evidence by the investigators, the findings of the investigators, and related documents in the Appendices. As such, a large amount of personal information about a number of individuals in the workplace was included in the Report. They noted that one of the stated purposes of the *Access to Information and Protection of Privacy Act* (the Act) is to provide individuals a right of access to any records in the custody or under the control of a public body, with limited exclusions and limited exceptions to disclosure. Further, where some of the information in a record is protected from disclosure, and that information can reasonably be severed, the applicant has right of access to the remainder of the record.

Based on these principles, ECE planned to release as much of the Report as possible while respecting the privacy rights of third parties included in the investigation. While the Investigation Report is marked "confidentially submitted", and these investigations are generally considered confidential, ECE concluded (after consultation from the Department of Human Resources and the GNWT Access and Privacy Office), that this does not provide the authority for blanket protection of the Report when requested under Part 1 of the Act. Complete confidentiality is not supported by the Guide to Applying the *Harassment Free and Respectful Workplace Policy*, which notes that interview statements may be disclosed in some circumstances. Since the investigation was already completed, and the Department of Human Resources was not concerned about protecting procedures, ECE concluded that there were no broadly applicable exceptions for the Report as a whole and would focus on the limited exceptions for third party privacy and advice to officials.

In order to consider release of as much information to this Applicant as possible, ECE consulted with the third parties, as required for proposed disclosure of third party personal information by sections 23 and 26 of the Act. While waiting for the responses, ECE agreed to release parts of the Investigation Report to the Applicant as Part 1 of the

disclosure, limiting the content to information that did not constitute third party personal information, the disclosure of which might amount to an unreasonable invasion of privacy.

A.B. was one of the parties consulted. He did not consent to the release of his personal information, and also suggested that the Investigation Report should not be disclosed at all. As a result of A.B.'s lack of consent, ECE agreed to protect his personal information under section 23. However, for the other information that did not require his consent, ECE concluded that these concerns, while understandable, did not justify complete refusal. They noted that they considered the following provisions of the Act in making their decision in this regard:

Section 14 Advice to Officials - According to the Guide to Applying the *Harassment Free and Respectful Workplace Policy*, this type of investigation is intended to provide the basis for a decision by the Deputy Minister about appropriate action but is not intended to contain recommendations (page 14). Thus, while this Investigation Report was submitted from investigators (lead by the Department of Human Resources) to the Deputy Minister of ECE, and does contain assessment of the evidence, the Department of Human Resources confirmed that the investigation reports they produce are not intended to fit the exception in section 14. Therefore, ECE decided not to claim this discretionary exception.

Section 20 Prejudicial to Law Enforcement - ECE did not claim this discretionary exception because the investigation was already completed and the complaint file closed, so the disclosure could not prejudice a law enforcement matter. In addition, the Department of Human Resources

agreed to the disclosure of the procedures and was not concerned about protecting their investigative techniques.

Section 23 Personal Privacy of Third Party - As a result of the conclusions noted above, ECE's main concern was to protect third party personal information in the Investigation Report as required by section 23, while balancing the right of the Applicant to access the Report. Although third party personal information of various individuals was located extensively throughout the Investigation Report, ECE concluded that it was possible to consult these parties only about their own personal information in their own interview statements, since consultation about other parts of the Report would reveal other personal information to them. Given that removal of names alone would not adequately protect the identity of the interview subjects, ECE asked the third parties whether they would consent to the release of their own personal information by following the procedures for third party notice in section 26 of the Act. One of the parties consented, therefore that person's information in their interview statement could be disclosed under section 23(4)(a), after information about other third parties was removed from it.

Where the third parties did not provide consent to disclosure, ECE said they applied section 23(2)(i) which provides that where the information could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation, there is a presumption that disclosure would amount to an unreasonable invasion of the privacy of the third party and that disclosure is, therefore, prohibited. ECE also identified third party personal information excepted from disclosure in the other parts of the Report under section 23(2)(d)(h) and (i), including the investigators' discussions of evidence and findings. In making these determinations, ECE also considered relevant circumstances, as required

by Act in section 23(3) when determining whether the invasion of third party privacy is unreasonable.

Based on the input from third parties and the other considerations noted above, ECE concluded all of the third party personal information in the Report would be excepted from disclosure (including that of A.B.), with the exception of the personal information about the party who consented to its release within their own interview statement. This approach includes the partial disclosure of some sections of the Report, and the complete removal of the interview statements provided by third parties who did not consent, under section 23(2)(i) because release of any part of these statements would result in identification of the interviewees, and so they cannot reasonably be severed. ECE also considered the requirement of section 23(5) of the Act to summarize the personal information about an applicant denied under section 23 but concluded that a summary could not be prepared in this case without disclosing the identities of the third parties who supplied the information.

THE THIRD PARTY'S RESPONSE

A.B. was provided with the Department's submissions and invited to respond he but did not provide any further input.

DISCUSSION

The *Access to Information and Protection of Privacy Act* provides for the disclosure of all records in the possession or control of public bodies, with limited and specific exceptions. While I understand that A.B. might be wary or even embarrassed about the disclosure of a workplace investigation report in which he was involved, that is not a sufficient reason for a public body to refuse disclosure. As noted by the Department, even when there is some information that can or must be withheld under one of the

exceptions outlined in sections 13 to 25, the Applicant is entitled to receive as much of the record as can be provided without breaching confidentiality.

The only issue in this case is whether or not the public body's decision to disclose parts of the investigation report to the Applicant in accordance with their proposal would constitute an unreasonable invasion of A.B.'s privacy. I have had the benefit of receiving and reviewing a copy of the report in the form the department intends to disclose it. I am satisfied that this disclosure will not reveal anything that might constitute an unreasonable invasion of A.B.'s privacy. Virtually all references to A.B. and his statement have been redacted from the record. I am satisfied that no one would be able to discern from the proposed disclosure the content of his statement and that only those who were involved in the investigation itself might be able to identify A.B.'s identity from the content of the disclosure as proposed. As those who were involved in the investigation already know A.B.'s identity, this "disclosure" by itself does not constitute an unreasonable invasion of his privacy. I therefore **recommend** that the Department of Education, Culture and Employment disclose the investigation report to the Applicant in the form proposed.

It is to be noted that this is not to be interpreted as a finding that the redactions proposed are in accordance with sections 13 to 25 of the Act. Rather it is a finding that the disclosure of the record in the form proposed will not constitute an unreasonable invasion of A.B.'s privacy. Once the Applicant receives the record, he will be entitled to request a review of the redactions in the record pursuant to section 28 of the Act. If that happens, A.B. will be given notice of the review pursuant to section 30 of the Act and will have the opportunity to make additional submissions on the issue at that time.

Elaine Keenan Bengts
Information and Privacy Commissioner