NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER
Review Report 19-195

File: 18-130-4
February 12, 2019
Citation: 2019 NTIPC 3

BACKGROUND

The Complainant in this matter was an employee of the Northwest Territories Health and Social Services Authority. He experienced some significant mental health issues, was admitted to hospital and had to take time off work. During his absence, his employer made several requests for medical prognoses in order to assess his ability to return to work. In making those requests, in at least one instance the employer changed the wording of the "Request for Prognosis" form in use by all GNWT departments by adding a paragraph about the Complainant's unusual behavior (loud speech, crying for no reason, throwing furniture), some of which was observed in the workplace and some of which clearly took place outside of the workplace. The Complainant feels that this information was improperly collected by the employer and certainly improperly disclosed in that this personal information was consequently seen/read not only by his physician, who he says already had all of the information, but also by a significant number of his co-workers who had access to his personnel records. He felt that having his medical and personal information outlined in the Request for Prognosis was not necessary and was disrespectful of him. He says he was humiliated. It is his position that all of the information included in the Request for Prognosis was already on his medical file and that his treating physicians were well aware of the facts and circumstances that were associated with his situation.

THE EMPLOYER'S RESPONSE

The employer argued that the Complainant's behaviour at work and his subsequent hospitalization "triggered the employer's duty to inquire". They said that a prognosis was

requested in order to determine if the employee's behavior was a result of a medical condition/disability. If the behaviour was a result of a medical condition, they argue that the employer has a duty to accommodate. In determining an appropriate accommodation, the employer needs to know what limitations or restrictions impact the employee's ability to perform the duties of his position, when the employee will be able to safely return to work, what supports or accommodations may be needed in the workplace and how the treatment plan may affect the employee's ability to attend work or perform their duties. They noted that the Complaint's position is a safety sensitive position and it was important for them to understand the limitations and restrictions of the employee and obtain medical clearance before he could return to work to ensure the health and safety of both the employee and those he served.

In response to my request that the Authority explain why it was necessary to include the sensitive added details in the request for the prognosis, the employer noted that :

> In the NWT, many employees do not have family medical practitioners. They may see a medical practitioner who regularly works at the clinic or they may see a locum who periodically rotates through the clinic. As a result it is important that the medical practitioner understand the context /background of why the questions are being asked. The details of what the employer observed and/or became aware of are disclosed to the medical practitioner in order to provide context and to aid the medical practitioner in determining whether or not the behavior is related to a medical condition (is there a nexus). When an employee sees a medical practitioner they are providing the medical practitioner with his/her perspective. It is important for the medical practitioner to hear what the employer is observing as this can assist the medical practitioner in determining what kind of physical or psychological/cognitive functions are

> involved (i.e. memory, concentration, difficulty bending) to further determine limitations and restrictions.
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> As part of the duty to accommodate process, there is an onus on the employee to follow the treatment plan recommended by their medical practitioner in order to facilitate their recovery. If an employee discloses that they are not following the treatment plan it is important for the medical practitioner to be aware of this.

I also asked the employer to advise how many employees within the organization would have access to the form containing details of the employee's difficulties. They responded that four individuals worked within the Duty to Accommodate unit and that all four plus a manager would have access to this information and any other information in the employee's Duty to Accommodate file. This, they say, allows for collaboration and discussions in order to provide the best advice to managers, to determine the appropriate questions to put in a prognosis and to cover off for each other when someone is absent.

The employer advised that, generally speaking, the process involved in obtaining a medical prognosis to aid an employee's return to work is to provide the employee with a letter explaining the reason for the request along with a form to be provided to and completed by the physician. The letter directs the employee to share the letter with his/her physician so that the physician can also understand the reasons for the requested prognosis and to have the physician fill out the form. The first page of the form contains a consent for the employee to sign. That consent states:

> I hereby authorize the Health Practitioner to release the information to myself and/or the Government of the Northwest Territories.

The employee then meets with the practitioner and the form is completed and given back to the employee who would then submit it to the employer.

DISCUSSION

This case raises three questions:

1. Did the employer "collect" information inappropriately by collecting information about the Complainant's actions outside of the workplace?

2. Did the employer inappropriately "use" the Complainant's personal information when including it in the "Request for Prognosis" form?

3. Did the employer inappropriately "disclose" the Complainant's personal information by including it in the "Request for Prognosis" form which had the consequence of disseminating the information not only to the Complainant's physician but also to a group of co-workers who had no reason to have that information for the purpose of undertaking their work?

1. Did the employer improperly collect the Complainant's personal information?

Section 40 of the *Access to Information and Protection of Privacy Act* outlines the circumstances in which a public body can collect personal information:

> 40. No personal information may be collected by or for a public body unless
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> (a) the collection of the information is expressly authorized by an enactment;
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> (b) the information is collected for the purposes of law enforcement; or
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> (c) the information relates directly to and is necessary for
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> (i) an existing program or activity of the public body, or
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> (ii) a proposed program or activity where collection of the

> information has been authorized by the head with the approval of the Executive Council.

The information collected by the employer in this case includes not only information about the Complainant's behaviour on the job, but also information collected from outside sources about the Complainant's behaviour in his own home, as well as information about how the Complainant found himself admitted to hospital. It also contained some information about the Complainant's treatment while in the hospital. The question here is whether all of this information was appropriately collected under the Act.

As noted above, there are only certain situations in which a public body can collect personal information about an individual. The first is when such collection is expressly authorized by legislation. There does not appear to be any legislation which applies to this situation. The second situation in which personal information can be collected is when it is collected for the purposes of law enforcement. Again, there is nothing in this situation which suggests that the information collected by the employer was in relation to a law enforcement matter. The third situation in which personal information can be collected is when "the information relates directly to and is necessary for an existing program or activity of the public body". Human resources management is certainly an existing program or activity of the public body. To the extent, therefore, that the information collected about the Complainant related to his behaviour in the workplace, I am satisfied that the public body had the authority to collect that information in order to allow it to address and manage the Complainant as an employee. I am less convinced, however, that the collection of information about the Complainant's actions, activities and life outside of the workplace is information that "relates directly to" the management of the Complainant. The public body argued that there is a "duty to inquire" and that the information collected in this duty to inquire was, therefore, appropriately collected. They did not, however, point me to any authority for this "duty to inquire". In order to understand this concept better, I reviewed a number of Canadian legal papers in relation to the subject. In a piece by David Doorey, an Associate Professor of Work Law

and Industrial Relations at York University, entitled “On an Employer’s ‘Duty to Inquire’ Into an Employee’s Disability published in November, 2012 and available at http://lawofwork.ca/?p=5840 , he reviewed a case heard by the British Columbia Human Rights Tribunal called “Mackenzie v. Jace Holdings”. He outlined the facts of the case as follows:

> The employer spoke to the employee multiple times about ‘insubordination’, and in particular the employee’s argumentative nature and moodiness in her dealings with supervisors. The employee went on ‘stress leave’ in the summer of 2009, and had advised a manager prior to this, that she suffered from depression. When she returned to work after 2 months’ leave, she again was argumentative, and the employer decided to dismiss her. At no time did the employee request accommodation or inform the employer that she believed her behaviour was related to a disability. She filed a human rights complaint alleging she was dismissed for reasons related to her mental or physical disability.

The tribunal noted that it is usually the responsibility of an employee to bring to the attention of an employer the need for accommodation of a disability. However, it also found that where the employer has “reason to suspect that a medical condition may be impacting the employee’s ability to work”, its failure to make inquiries regarding the employee’s health may constitute discrimination. The tribunal decided that the employer had discriminated against the employee on the basis of disability by failing to make inquiries into whether accommodation was needed before dismissing her.

I therefore accept that, in the circumstances in this case, the employer had a “duty to inquire” into the Complainant’s situation to determine whether accommodation was required. That said, I am not convinced that that “duty to inquire” justifies the collection of the Complainant’s personal information from random sources outside of the workplace. The duty to inquire is part of the duty to accommodate process and involves the collection of information from medical sources and those who can assist the public

body in making any necessary accommodations. It does not justify the collection of personal information from community sources.

While I appreciate that in small communities incidents that are out of the ordinary often become very public and everyone knows who was involved in the incident and many of the details of the incident, this does not mean that the information should be "collected" by the public body and then included in documentation created by the public body. While the information collected from the sphere of public knowledge may appear to be relevant to a public body, it is a slippery slope when gossip and innuendo can be "collected" and then used by a public body to make decisions that will affect an individual in his employment setting. In my opinion, before "collecting" this kind of information for the purpose of using it for personnel management, there must be a clear need for that information. It must be directly related to and necessary for that purpose. In this case, there was sufficient information about the Complainant's mental health situation from his behaviour in the workplace to make the necessary inquiries about the Complainant's ability to return to work and it was not necessary to go outside the workplace for further evidence that there was a problem. I am not convinced that it was necessary for the purpose of managing the Complainant or accommodating his return to work to collect information about the Complainant from outside sources in the community and I find that this information was not collected in accordance with section 40.

2. Did the employer improperly use the Complainant's personal information?

Section 43 of the *Access to Information and Protection of Privacy Act* outlines when a public body can use personal information collected or maintained by it. Specifically:

> 43. A public body may use personal information only
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> (a) for the purpose for which the information was collected or compiled, or for a use consistent with that purpose;

(b) if the individual the information is about has identified the information and consented, in the prescribed manner, to the use; or

(c) for a purpose for which the information may be disclosed to that public body under Division C of this Part.

In this case, the information collected was collected in conjunction with the public body's personnel management function. Not all of the collection was, however, authorized under the ATIPP Act. To the extent that the information was collected in the workplace, it was used appropriately and in accordance with section 43. However, with respect to the information improperly collected from the community, no use of the information was appropriate. Some of the information included in the Request for Prognosis form was, therefore improperly used.

3. Did the employer improperly disclose the Complainant's personal information?

Section 48 of the Act outlines circumstances in which a public body can disclose personal information. The term "disclose" is not defined in the Act. In my opinion, the word "disclose" or "disclosure" means providing the information to a third party, which would include another employee who does not directly require the information for the purpose doing his/her job. The Act allows for the disclosure of personal information in a number of circumstances, including:

(a) for the purpose for which the information was collected or compiled or for a use consistent with that purpose (s. 48(a))

(b) for the purpose of hiring, managing or administering personnel of the Government of the Northwest Territories or a public body (s. 48(g));

(c) to an officer or employee of a public body.....where the information is necessary for the performance of the duties of the officer or employee ... (s. 48(k))

Based on this, I am satisfied that a public body is authorized to disclose personal information, properly collected, when it is necessary to manage an employee, including in the circumstances of this case. That said, the information disclosed for such purposes should be minimized, particularly when dealing with very sensitive personal health information, such as in this case. The information disclosed should be worded in such a way as to limit, to the greatest extent possible, the detailed personal medical information being disclosed, keeping in mind that the document will be seen not only by the patient's physician, but also by those working in the human resources office of the department. In this case, the form was amended to include a detailed description of the Complainant's observed behaviour at work, as well as third party information provided to (collected by) the public body about his behaviour outside of the work place. The public body suggests that "it is important for the medical practitioner to hear what the employer is observing as this can assist the medical practitioner in determining what kind of physical or psychological/cognitive functions are involved (i.e. memory, concentration, difficulty bending) to further determine limitations and restrictions." While I agree with this statement, I am not convinced that it was necessary, in the circumstances, to provide the detail included in the Request for Prognosis form. In the circumstances of this case all of the information added to the Request for Prognosis form was information which was very likely on the Complainant's medical chart and therefore available to the physician without it being included in the Request for Prognosis form. Because he had been admitted to the hospital, it would have been necessary for the physician (or other medical staff) to collect and record the relevant information about the circumstances leading up to his admission, which would include how he came to be admitted. I am not convinced that it was necessary to disclose the detailed information about observations of the Complainant's behaviour at work (and even less so the third party information included) in making inquiries of the physician for the purpose of accommodating a return to work. It would likely have been sufficient in

this case for the Request for Prognosis form to say, for instance, that the Complainant had displayed unusual and concerning behaviours in the workplace, without specifying the details, particularly at the stage of the Complainant's recovery at which the Request for Prognosis was requested.

CONCLUSION

I find that the employer in this case collected, used and disclosed the Complainant's personal health information contrary to the *Access to Information and Protection of Privacy Act*. In particular:

a) information "collected" from the community (third parties) about the Complainant's behaviour was not information that it needed to meet its duty to inquire or its duty to accommodate;

b) the public body was authorized to use the information properly collected (i.e. information about the Complainant's behaviour in the workplace) for the purpose of personnel management and its duty to inquire and duty to accommodate;

c) the public body was not authorized to use information collected from third parties (i.e. general public knowledge, community sources) for the purpose of personnel management because information inappropriately collected should be not be used for any purposes;

d) the public body is authorized to disclose personal information and personal health information which has been properly collected for the purpose of its duty to inquire and its duty to accommodate but care should be taken to limit the information disclosed to the least amount of information possible in the circumstances, keeping in mind always that the forms will be seen by a number of people other than the physician. In this

case, the amount of information disclosed was more than what was required to meet the employer's obligations, particularly in light of the timing and circumstances;

e) the public body was not authorized to disclose information collected from third parties (i.e. general public knowledge, community sources) for the purpose of personnel management because information inappropriately collected should be not be disclosed in any circumstances.

RECOMMENDATIONS

In light of the above, I make the following specific recommendations:

1. I recommend that the public body review its policies and processes around its "duty to inquire" and its "duty to accommodate" to limit the amount of information collected and used for these purposes and that information from third party sources be collected/used only where absolutely necessary;

2. I recommend that the public body limit the amount of personal health information it includes in a Request for Prognosis to the least amount of information necessary to focus the physician's inquiries on the issue in question;

3. I recommend that the public body ensure that any personnel record containing personal health information about an employee be maintained in an envelope (if written) or a password protected folder (if electronic) so as to limit the number of people who have access to the information.

Elaine Keenan Bengts
Information and Privacy Commissioner