NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 03-34
File: 03-182-4
September 16, 2003

BACKGROUND

In January of 2003, the Applicant made a request to the Department of Transportation for access to information pursuant to the *Access to Information and Protection of Privacy Act*. In its initial response to the Applicant, the Department directed him to publicly accessible resources with respect to some aspects of his request and advised him as to the status of the remaining records, extending the time for response pursuant to section 11 of the Act, and seeking clarification of the remainder of the request. In early March, the Applicant provided the clarification requested and on April 16th, 2003, the Department provided a response to the Applicant's request. The only information not provided was information relating to the one particular part of the Applicant's request, being the total number and total value of accounts in arrears with the department owed by sitting MLA's. The Department quoted section 24(1)(c) of the Act , stating that the information in question was provided to them in confidence by third parties and it's disclosure could result in the loss of revenue, corporate reputation and goodwill as commonly understood in the private sector.

On June 1st, 2003, my office received a request from the Applicant to review the decision of the Department not to release the specific information in relation to monies owed to the Department by sitting Members of the Legislative Assembly. The Department provided their detailed explanation for their refusal to provide the information requested and that explanation was shared with the Applicant. The Applicant was invited to provide any further comments he might have, but he declined to do so.

PRELIMINARY MATTER

Section 29 of the *Access to Information and Protection of Privacy Act* provides that a request for review of a decision of the head of a public body to deny access to

information “must be delivered in writing to the Information and Privacy Commissioner within 30 days after the person asking for the review is given notice of the decision”. In this case, it is unclear exactly when the Applicant “received notice” of the Department’s decision. The letter is dated April 16th, 2003 but there is no indication when it was received by the Applicant, nor as to how it was delivered. The Applicant’s Request for Review, however, was not received by the Information and Privacy Commissioner’s Office until June 1st, 2003, which was potentially beyond the 30 day limitation period. The Applicant asked me for an extension. The Act does not give the Information and Privacy Commissioner the jurisdiction to extend the time for making a Request for Review. However, I did take the liberty of writing to the Minister of Transportation to determine whether, despite the possibility that the limitation period had been missed, he would consider treating the matter as if it had been made within the limitation period. The alternative was to require the Applicant to make a new Request for Information from the Department for the same information which, presumably, would have been met with the same response, at which point he could then have made the same Request for Review of this office. In the spirit of Section 7 of the Act, which states that “the head of a public body shall make every reasonable effort to assist an applicant “, the Minister agreed to proceed as if the Request for Review had been received within the 30 day limitation period, rather than to require the Applicant to go through the entire process again.

ISSUE

The issue in this review is whether the Department properly exercised its discretion to deny access to the records in question insofar as those records relate to the specific amounts owed by specific individuals (Members of the Legislative Assembly) to the Department of Transportation.

DISCUSSION

The Department made several arguments in support of its decision not to provide the information in question to the Applicant.

If I understand the first of these submissions, the Department takes the position that they gave the Applicant enough information to satisfy what he indicated in his initial request for information was his purpose in requesting the information. In its submission, the Department made the following comments:

> "It is the opinion of the Department that we have answered the request outlined in [the Applicant's] initial letter received January 15, 2003 in which he states that he is "trying to gauge the territorial government's effectiveness in collecting on accounts owed it...". We have provided information about department and government processes and regulations concerning the collection of overdue accounts, and the dollar amounts of overdue accounts."

They go on to state that:

> We feel to attempt to respond to item c) in [the Applicant's] clarification letter received March 7, 2003, goes far beyond what is required to meet [the Applicant's] stated objectives, even in the Public Accounts, which provide bottom line figures only.

This response, with respect, indicates that there is an underlying misunderstanding of the stated purpose of the *Access to Information and Protection of Privacy Act*. The Applicant's motive for seeking information from the Government, or his stated "objectives" may assist the department in responding to the request for information, but those objectives cannot be used to limit the information provided. In fact, there is nothing in the Act which requires any applicant to reveal to the public body why they are seeking the information they have requested. Section 1 of the Act provides, in part, that:

> The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

> a) giving the public the right of access to records held by pubic bodies...

In this case, the Applicant has made a request for records relating to a very specific matter, being the amounts of money owed to the Department by sitting Members of the Legislative Assembly. It is not for the Department to determine what is, or is not, sufficient to meet the Applicant's stated objective. Rather, it is for the Department to provide the Applicant with the records responsive to the request, regardless of whether or not the Department considers those records to have any connection to the Applicant's stated objective.

The second argument put forward by the Department is that the specific information requested is protected from disclosure pursuant to section 24(1)(b) and (c) of the *Access to Information and Protection of Privacy Act*. Section 24(1)(b) and (c) read as follows:

> Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant:
>
> b) financial, commercial, scientific, technical or labour relations information
>
> i. obtained in confidence, explicitly or implicitly, from a third party, or
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> ii. that is of a confidential nature and was supplied by a third party in compliance with a lawful requirement
>
> c) information, the disclosure of which could reasonably be expected to
>
> i. result in undue financial loss or gain to any person;
>
> ii. prejudice the competitive position of a third party;
>
> iii. interfere with contractual or other negotiations of a third party, or
>
> iv result in similar information not being supplied to the public body.

Subsection (b) requires that the information in question must have be **obtained** from the third party in confidence or **supplied** to the Department in response to a lawful requirement to be exempted from disclosure. However, the records that the Applicant is seeking in this case do not contain information which was "supplied" by any third party to the Department. They are Department accounting records which were created and are maintained by the Department. Subsection (b), therefore, does not apply in this case to exempt the records from disclosure.

That leaves subsection (c). However, the Department has not provided any support for their position that the disclosure of the information in question might "result in undue financial loss or gain" to the Members of the Legislative Assembly (if any) who owe money to the department. Nor have they provided any explanation as to how the disclosure of that information might prejudice the competitive position of the third party, or interfere with that third party's negotiations (contractual or otherwise). I have commented in previous recommendations that in any case where the department is claiming an exemption pursuant to subsection 24(c), it will be difficult, if not impossible to make a determination about how the disclosure of the records in question might affect a third party without actually asking the third party for their input. The Department, presumably, is not privy to the details of every third party's business plan or competitive position. Without further information from the third party it is, I suggest, not possible for the department to evaluate whether the disclosure of any information could reasonably be expected to have any particular effect on the third party. In this particular case, without more, I have a difficult time believing that the disclosure of amounts owing by a particular individual or business to the Government of the Northwest Territories could "reasonably be expected to" have any of the consequences outlined in subsection 24(c).

The Department goes on to say that "it has been the Department's past practice to not disclose information of a contractual nature". This concerns me. Firstly, the fact that it may be the Department's past practice does not mean that that practice has been or is in accordance with the legislated requirements of the Act. It is time to review those "practices" and implement new ones that reflect a more detailed consideration of the

legislated exemptions. Just because it is contractual in nature does not mean that it is exempted from disclosure. It must meet the criteria set out in the Act. Secondly, the information that is the subject of this particular request for information is not "contractual" in nature. The information being requested is whether and how much a particular individual or individuals owe to the Department. That specific detail does not and cannot reveal the specifics of any contractual arrangement between the department and the individuals and businesses named.

The Department argues that there is no way to tell, from looking at the Aged Receivable Report whether a sitting Member of the Legislative Assembly might have an interest in a particular corporation named in that list. There are a couple of difficulties with this statement. Firstly, the Applicant has requested only what amounts are owing personally by MLA's. Clearly a debt of a company that an MLA may have an interest in is not the MLA's personal debt. If the Applicant wanted information about what companies or corporations an MLA has a financial interest in, he could seek that information from the appropriate public body (the Conflict of Interest Commissioner or the Legislative Assembly). Members of the Legislative Assembly are required by law to provide a list of companies and corporations in which they hold a financial interest. That would be a separate request for information, should the Applicant wish to make it. He could then make an application for access to information about what amounts those companies owe to the Department. He has not done that in this case. All he's asked for here is a list of the amounts owed to the Department personally by MLA's.

Finally, the Department takes the position that the *Legislative Assembly and Executive Council Act* provides at sections 79 and 80 that the Department is not required to disclose records that may or may not include information of sitting MLA's financial dealings with the Government.

Sections 79 and 80 of that Act read as follows:

> **79.** (1) Subject to section 84, a member shall not hold or enter into any contract with the Government of the Northwest Territories or with a department.

(2) A spouse or dependent child of a member may hold or enter into a contract with the Government of the Northwest Territories or a department other than a contract for or on behalf of the member.

(3) Within 60 days after the commencement of the first session of the Legislative Assembly after the election of a member, he or she shall ensure that his or her personal affairs are so arranged that there is no contravention of this section.

80. (1) A member shall file a disclosure report with the Conflict of Interest Commissioner where a contract is held or entered into between the Government of the Northwest Territories or a department and

(a) a corporation in which the member has a controlling interest; or

(b) a corporation in which a corporation referred to in paragraph (a) has a controlling interest singly or collectively with the member or any other corporation referred to in paragraph (a

(2) A disclosure report filed under subsection (1) must

(a) indicate the nature and value of the contract and the circumstances under which the contract was entered into; and

(b) be filed

(i) within 60 days after the commencement of the first session of the Legislative Assembly after the election of the member to the Legislative Assembly, where the member holds the contract at the commencement of that session, or

(ii) within 30 days after the entering into of a contract, where the contract is entered into after the commencement of the session referred to in subparagraph (i).

With respect, these provisions do not preclude the disclosure of the kind of information being sought by the Applicant in this case. These provisions require a sitting MLA to disclose his or her assets and corporate interests to the Conflict of Interest Commissioner. That does not preclude any further disclosure of the MLA's dealings with the Government of the Northwest Territories. Furthermore, section 4(2) of the *Access to*

Information and Protection of Privacy Act provides that

> If a provision of this Act is inconsistent with or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, prevails notwithstanding this Act.

There is no "notwithstanding" clause in the *Legislative Assembly and Executive Council Act*. Even if it could be said that sections 79 and 80 act to prevent the disclosure of an MLA's financial dealings with a public body, that provision would be in conflict with the *Access to Information and Protection of Privacy Act.*

The public body did not refer to me to section 23 of the Act, which prohibits the disclosure of personal information where that disclosure would be an unreasonable invasion of a third party's personal privacy. Personal information is information about an identifiable individual, and includes names, addresses and "information about the individual's educational, financial, criminal or employment history". Section 23(2)(f) provides that a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where "the personal information describes the third parties' finances, income, assets, liabilities, net worth, bank balances, financial history or activities or credit worthiness". Personal information can always be disclosed with the consent of the third party. One might suggest that a successful candidate in a Territorial Election, knowing the provisions of the *Legislative Assembly and Executive Council Act* have provided implicit consent to the disclosure of information such as that being sought in this case. By accepting the position, it might be argued that they are implicitly consenting to being accountable to the public for their personal dealings with the Government of the Northwest Territories and its agencies.

Without deciding that issue, in my opinion, the spirit of the Act would suggest that the fact that a particular MLA owes money to a public body should be a matter of public record. The question, in my mind, is whether it would be an unreasonable invasion of that person's privacy if the exact amount of that debt were known. Keeping in mind the other

provisions of the Act, and particularly section 23, I believe that the spirit of the Act would suggest that it would be an unreasonable invasion of an MLA's privacy for the exact amount of a debt owing to the Department to be revealed. However, I do not believe that it would be an unreasonable invasion of an MLA's privacy to disclose that he or she owed, for example, less than $1000 or less that $5000, as the case may be, to a public body.

CONCLUSION AND RECOMMENDATION

In view of the above discussion, it is my conclusion and recommendation that, the public body should review the relevant records to determine whether, at the time the application for information was made, any sitting MLA owed money to the department and, if so, take the steps set out in Division C of the Act to give any such MLA notice of the public body's intention to disclose the following information:

a). The name of the MLA
b) The fact that he or she owes or owed money to the Department;
c) A specific range of the amount owed (for example, that the debt is/was less than $1000 or between $2500 and $5000, as the case may be).

If the third party objects to the disclosure of that information, he or she can, once again, ask this office to review the decision and make such arguments as he or she might consider applicable to exempt the specific information from disclosure. If there is no objection voiced, there is, in my opinion, no reason not to disclose the information listed in a), b) and c) above.

Elaine Keenan Bengts
Northwest Territories
Information and Privacy Commissioner