

**NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER**

Review Recommendation 06-053

File: 05-196-4

February 1, 2006

BACKGROUND

This recommendation arises as a result of a request from an individual who felt that her privacy rights had been infringed by the Department of Education, Culture and Employment when they relied on information received from a third party to deny her student financial assistance without providing her with the opportunity to refute or even see the information upon which the decision was based. She says the information upon which the decision was based is untrue.

The complaint was received on August 9th, 2005. On the face of it, the complaint appears to be against a First Nations organization with whom the complainant had been employed. She alleges that a member of the First Nation improperly provided financial information about her to various organizations and governmental agencies, including the Department of Education without her consent. The complainant says she received a copy of the letter from the press, who had received a copy of it and were planning to write a news report concerning the information in the letter. The correspondence was apparently provided to both the Department of Education and the local housing authority and, she says, was relied on to revoke her student financial assistance. She indicates that she was not allowed to view the documents which were provided to the Department of Education.

ISSUE

The issues which I identified from the Complainant's letter of complaint were as follows:

- a) did an employee with the Department of Education Culture and Employment (ECE), in particular the Student Financial Assistance division, provide a third party with information about benefits being paid to the Applicant?
- b) did the Housing Authority share personal information received by them from a third party with ECE and did ECE, in turn, then improperly use that information to deny or cancel assistance already approved for the Complainant?
- c) was the Complainant provided with the opportunity to review and/or refute unsolicited information received by ECE and to correct the record?

DISCUSSION

The first thing that must be stated is that this office has no jurisdiction to deal with breaches of privacy which arise in the private sector. The Information and Privacy Commissioner can only address privacy complaints within the Territorial government and its agencies. I am not, therefore, able to comment on whether or not the alleged initial disclosure of the Complainant's personal financial information by a First Nations organization to a number of agencies was improper. My recommendations can deal only with whether or not the public body properly received and relied on the information once in its possession.

There is legislation which governs privacy in the private sector and that is the *Personal Information Protection and Electronic Documents Act* (PIPEDA). This is federal legislation which delineates appropriate and inappropriate uses of personal information, including information gathered by employers about employees where the employer is within the constitutional responsibility of the federal government. Because First Nations are within the federal government's jurisdiction, I would imagine that PIPEDA would apply to the original disclosure of the information in question. If the Complainant continues to have concerns about whether or not the initial disclosure of

her personal information was lawful, she will have to ask the Federal Privacy Commissioner to review the matter.

1. Did an ECE employee provide a third party with information about benefits being paid to the Applicant?

In response to the first of the Complainant's issues, the public body denies that anyone in ECE used or disclosed information contrary to the Act. It says it has conducted an internal review of the matter and could find no indication that any employee in the Student Financial Assistance division (SFA) disclosed any information about the Complainant to anyone. It points to its policies, which indicate quite clearly that no personal information about a client can be disclosed to others without the written consent of the individual in question. It has provided me with copies of the policy, as well as the documentation provided to students applying for benefits under the SFA program.

I appreciate that SFA and the Department have policies about when information can be used or disclosed to third parties. This is certainly a good starting point. Having a policy, however, does not by itself guarantee that information will be properly handled. The human element is not always reliable. The public body has an obligation to take steps to ensure that the policy is adhered to, and to monitor its employees in the exercise of their duties. This duty would also include ongoing training and reminders about the importance of confidentiality.

In this case, the Complainant provided me with a copy of a letter written by a third party in which the third party indicated as follows:

We contacted SFA and discovered that [the Complainant] was receiving [a specified amount] per month...

This suggests that, despite the policies about the disclosure of personal information, it is very possible that someone employed with FSA did discuss the Complainant's personal information with the third party and provided the third party, probably verbally, with details about the Complainant's benefits.

As noted, the existence of a policy cannot, in and of itself, ensure that it is adhered to. In fact, it may well be difficult, if not impossible, to prove either the complainant's allegations or the public body's denial in this case. Many government employees, not only in ECE but throughout the government, have access to personal information about NWT residents. Because we live in small communities, it is inevitable that some employees will have access to personal information about their neighbors, friends, relatives, and even rivals and "enemies". Human nature being what it is, it is possible, and even likely, that certain employees might be tempted to use such information for illegitimate purposes from time to time and it is not inconceivable that an employee might act on those impulses. It is possible that an employee might inadvertently provide verbal information upon request before considering the propriety of doing so. It is also conceivable that information might be disclosed without the knowledge of the senior staff and supervisors. It is, therefore, important for public bodies to be diligent and to monitor their employees to ensure, as far as possible, that all employees adhere to the policies set.

Because I have no jurisdiction over the third party and cannot question him as to the source of his information, I cannot come to any definitive conclusions as to whether or not there was a breach of confidentiality in this case. I can only conclude that it is possible that there was a breach in this case and caution the public body that, although policies are a very good starting point, they do not absolve the public body of due diligence to ensure that the policy is adhered to.

2. **Did the Housing Authority share personal information received by them from a third party with ECE and did ECE, in turn, then improperly use that information to deny or cancel financial assistance already approved for the Complainant?**

ECE denies that they received any information from the housing authority with respect to the Complainant. They say that all of the information on their file was collected by their own staff, directly from the sources or was submitted to them unsolicited. They say they have no record of having received any information from the housing authority.

ECE goes on to cite sections 40(c)(i) and 41(g)(i) of the *Access to Information and Protection of Privacy Act* which they say give them the authority to collect information about individuals from third parties.

Sections 40 and 41 of the Act deal with how and when a public body can collect information. As a general rule, all personal information collected should be collected directly from the individual the information relates to. Only in narrow circumstances should the information be gathered from other sources.

40. No personal information may be collected by or for a public body unless

- (a) the collection of the information is expressly authorized by an enactment;
- (b) the information is collected for the purposes of law enforcement; or
- (c) the information relates directly to and is necessary for
 - (i) an existing program or activity of the public body, or
 - (ii) a proposed program or activity where collection of the information has been authorized by the head with the approval of the Executive Council.

41. (1) A public body must, where reasonably possible, collect personal information directly from the individual the information relates to unless

- (a) another method of collection is authorized by that individual or by an enactment;
- (b) the information may be disclosed to the public body under Division C of this Part;
- (c) the information is collected for the purpose of law enforcement;
- (d) the information is collected for the purpose of collecting a fine or a debt owed to the Government of the Northwest Territories or a public body;
- (e) the information concerns the history, release or supervision of an individual under the control or supervision of a correctional authority;
- (f) the information is collected for the purpose of providing legal services to the Government of the Northwest Territories or a public body;
- (g) the information
 - (i) is necessary in order to determine the eligibility of an individual to participate in a program of or receive a benefit, product or service from the Government of the Northwest Territories or a public body and is collected in the course of processing an application made by or on behalf of the individual the information is about, or
 - (ii) is necessary in order to verify the eligibility of an individual who is participating in a program of or receiving a benefit, product or service from the Government of the Northwest Territories or a public body and is collected for that purpose;
- (h) the information is collected for the purpose of informing the Public Trustee about potential clients;

(i) the information is collected for the purpose of enforcing a maintenance order under the *Maintenance Orders Enforcement Act*; or

(j) the information is collected for the purpose of hiring, managing or administering personnel of the Government of the Northwest Territories or a public body.

I agree with the public body when they say they had the authority to collect or receive information about the Complainant from third parties. Because they **can** collect from third parties, however, does not change the overarching requirement that, where possible, information should be collected directly from the individual. I would also point out that, when information about an individual is collected from a third party in particular, there is an obligation on the public body to ensure that it is accurate. Furthermore, the public body remains accountable to the individual with respect to the information which comes into their hands, particularly where that information may directly affect that person. Section 44, in particular, provides that:

44. Where a public body uses an individual's personal information to make a decision that directly affects the individual, the public body must

(a) make every reasonable effort to ensure that the information is accurate and complete; and

(b) retain the information for at least one year after using it so that the individual has a reasonable opportunity of obtaining access to it.

The public body advises that SFA practice is to accept unsolicited information that is relevant to a client's eligibility for benefits but that decisions are not taken without checking with other sources and providing the client with a chance to respond. They do not say whether or not in this particular case that opportunity was afforded to the Complainant but it appears from the information in the Complainant's original letter to me that they may have done so. Where unsolicited information is received, it stands to reason that it is at least conceivable that the person providing the information has ulterior motives. In my opinion, the spirit of the *Access to Information and Protection of*

Privacy Act dictates that when this happens, it is incumbent on the public body to inform the person about whom the information relates of the nature of the information received and that that person be given the opportunity to fully respond before any decisions are made based on the information received.

c) Was the Complainant provided with the opportunity to review and/or refute unsolicited information received by ECE and to correct the record?

In response to this issue, the public body indicates that there is no indication on their file that the Complainant made either a verbal or a written request to view the information on their files. They do say, however, that she questioned ECE's legal authority to collect information about her from third parties. ECE indicates that they advised the Complainant as to the allegations which had been made about her, but did not identify the sources of that information. The Complainant, they say, responded by suggesting that any documents received from her former employer were supplied in violation of her privacy rights and that ECE could not rely on documents obtained "illegally". She also indicated that allegations made by her former employer were untrue. In response, the public body referred the Complainant to her application for Student Financial Assistance which includes a consent to the collection of information from third parties, including employers, to verify information given in the application. A follow up letter was sent to the Complainant some time later which included the following statement:

In previous correspondence, we have indicated that we have information concerning your full-time employment status with [a third party]. Accordingly, we have provided sufficient information regarding the events surrounding your case. The GNWT is not obliged to disclose any further information about these records nor is it required to provide you with the interview questions.

The public body takes the position that this does not constitute a denial of access to the records used to decide the Complainant's case, but is a refusal to provide information about the records concerned, including the source of the records. I suggest this is semantics.

A number of issues arise in this circumstance. It appears (though this is not entirely clear) that information was provided to ECE about the Complainant by a third party. There is no suggestion that ECE requested the information. The third party in question appears to have been a former employer of the Complainant, although this, too, is unclear. The third party employer, in this case, is subject to the *Personal Information Protection and Electronic Documents Act* (PIPEDA) and must, therefore, protect its employee's information and use it only for the purposes it was collected. In this case, if the employer or an agent of the employer did, in fact, provide ECE with information about the Complainant without first having a written consent to do so, it has most likely done so contrary to PIPEDA. However, this is something to be addressed by the Federal Privacy Commissioner's Office, not mine. Assuming, however, that the information was passed on to ECE contrary to law, does ECE have a positive duty to ignore or disregard that information? I would suggest not because they are simply not in a position to evaluate the nature of the information. Nor is it up to the public body to do that evaluation.

On the other hand, I do not agree with the statement made in the letter written to the complainant that "the GNWT is not obliged to disclose any further information about these records". Section 33 of the *Access to Information and Protection of Privacy Act* provides that where access to a record is denied, the onus is on the public body to establish that the Applicant (or in this case, the complainant) has no right to the information. Furthermore, as outlined in previous recommendations, exceptions to disclosure must be read and applied narrowly. There is nothing in the letter to the Complainant from the public body or in the public body's correspondence to me which suggests why the public body feels that there is no obligation to disclose the records in question. I can find no provision in the Act which, with my limited knowledge of how this information came to be in the possession of the public body, would allow the public body to deny access.

The public body admits that it did not refer the Complainant in this case to the provisions of the *Access to Information and Protection of Privacy Act* concerning her

rights to request access to her own personal information. Furthermore, it admits that, in retrospect, that perhaps that should have been done. I agree. I would go further, however, and suggest that in the circumstances of this particular case, it should not be necessary for an individual who clearly has concerns about the information the public body holds about them to make a formal request for information under the Act. It is apparent to me that a decision was made which directly affected the Complainant and the decision appears, on the surface at least, to have been made as a result of the public body's receipt of unsolicited information from a third party who may have had a personal grudge with the Complainant. It would have been appropriate in this case, to offer the Complainant the right to review her file and the right to respond directly to the allegations made.

ECE then goes on to say that had the Complainant made the request to see her file, disclosure would have been at the discretion of the Director of the program. In support of this assertion, the public body refers to section 20 of the Act which relates to disclosure in circumstances which might be prejudicial to law enforcement. That section reads as follows:

20. (1) The head of a public body may refuse to disclose information to an applicant where there is a reasonable possibility that disclosure could

- (a) prejudice a law enforcement matter;
- (b) prejudice the defence of Canada or of any foreign state allied to or associated with Canada or harm the detection, prevention or suppression of espionage, sabotage or terrorism;
- (c) impair the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement;
- (d) reveal the identity of a confidential source of law enforcement information;

- (e) endanger the physical health or safety of a law enforcement officer or any other person;
- (f) deprive a person of the right to a fair trial or impartial adjudication;
- (g) reveal a record that has been confiscated from a person by a peace officer in accordance with a law;
- (h) facilitate the escape from custody of an individual who is being lawfully detained;
- (i) facilitate the commission of an unlawful act or hamper the control of crime;
- (j) reveal technical information relating to weapons or potential weapons;
- (k) prejudice the security of any property or system, including a building, a vehicle, a computer system or a communications system; or
- (l) reveal information in a correctional record supplied, explicitly or implicitly, in confidence.

I have to respectfully disagree with the public body's interpretation of this section. There is nothing on the file to suggest that the public body was undertaking a "law enforcement" role, as that term would be normally understood, when they received this information from a third party. When read in the context of the entire section, it is clear that the intention is to allow police and other law enforcement agencies to do their jobs. ECE is not a law enforcement agency, nor is SFA and there is no suggestion that the Complainant was being investigated for the purpose of laying charges. Section 20 does not apply in this circumstance.

Generally speaking, every individual has the right to see all information which a public body holds about him or her. This includes information received from third parties, whether that information is unsolicited by the public body or overtly collected by it. Furthermore, under the Act, a person has a right to request that any information which

the public body might hold be corrected. The process for this is outlined in section 45 of the Act. Even where the public body chooses not to make a correction when requested to do so, it must make a note of the request and notify any other party with whom that information has been shared that the correction has been requested. It seems to me that in a situation like this, where a person has clearly articulated their position that information in the possession of the public body is untrue, there is a positive duty placed on that public body to inform the individual of his or her rights to seek a correction to the information.

CONCLUSIONS AND RECOMMENDATIONS

It is impossible in this case to come to any definitive conclusion with respect to whether or not the public body improperly disclosed the Complainant's personal information. It appears that this may have happened, though I cannot determine that with any certainty. It is heartening to see that there are clear policies and guidelines in place to deal with these kinds of issues and I commend FSA for having those clear written policies. Policies, by themselves, however, are not always effective. The policies must go along with ongoing training and repeated reminders about privacy issues so as to ensure that the protection of personal information is imbedded in the "corporate culture" of the department. I encourage ECE, and all government agencies and departments to make this a consistent message and to monitor the policy to ensure that it is followed. I further recommend that steps be taken to create a system for ensuring that employees receive ongoing and repeated reminders about this issue on a regular basis.

Nor can it be said that the public body improperly used information which came into their possession from a third party. They were entitled to use information in their possession without looking behind it to determine whether the person who provided it did so in contravention of federal law. It may be different if the Northwest Territories had its own private sector privacy legislation. Public bodies, however, do not have the responsibility to enforce federal legislation.

Where I think the public body did not comply with the spirit of the Act is in refusing to be completely forthcoming with the Complainant about the information it received, and in refusing to provide her with a copy of the information or advising her of the source. Although there may be instances in which it is important to protect the identity of a source of information, there is nothing in this situation which suggests that that was necessary in this case. It does not appear that Complainant is in a position of power *vis a vis* the third party such that there may be repercussions for that person or agency for “whistle blowing”. Nor is there any suggestion that the third party provided the information in confidence. Furthermore, in this case, the alleged third party is not an individual, but a corporate entity. Corporate entities do not have the same rights to privacy as individuals. Opinions stated belong to the person about whom the opinion relates. Where the opinion is expressed by an individual in his or her own capacity, there may be an argument that the author’s name is his personal information and should not be disclosed. But where the opinion is expressed in the name of a corporate entity, as appears to have been the case here, there is no such protection. I recommend that ECE provide the Complainant with a copy of all information received by it in connection with her application for SFA, whether that information was received as a result of inquiries made or from an unsolicited source. It may be that the public body may have to consider whether it is appropriate to disclose the source of the information if the source is an individual. I further recommend that the public body provide the Complainant with the information she needs to request a correction to her personal information and that, if she chooses to make that request, that they assist her to ensure that her concerns are properly recorded under the Act.

Elaine Keenan Bengts
NWT Information and Privacy Commissioner