NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 06-054
File: 05-260-4
June 10, 2006

BACKGROUND

This recommendation arises as a result of a request from an individual who wanted information from the Department of Education, Culture and Employment relating to a decision of the Labour Standards Board in which the Applicant was a party, as well as information about a company with whom the Applicant had previously been employed and with whom he had had a dispute concerning remuneration for work done.

The request for information was made to the Department on or about October 13th, 2005. It appears from the materials received that the Applicant used a form he received from the Alberta Information and Privacy Commissioner's office to make his request. On October 14th, the Department wrote to the Applicant indicating that in order to process the request, the Applicant would have to re-submit it on forms developed under the Northwest Territories legislation and provide a $25.00 fee. On October 22nd, the Applicant re-submitted his request and provided the necessary fee. The materials further show that on November 4th, the Department contacted the Applicant by telephone to clarify his request.

The next correspondence from the Department is dated December 20th. In this letter, the Applicant was advised that the requested records contained information that may affect the interests of a third party and that the third party was being consulted pursuant to section 26 of the Act. That letter indicated that the Department's decision with respect to the Applicant's request would be provided by March 22nd, 2006.

On December 21st, the Applicant requested that my office review the Department's failure to disclose. On December 22nd, this office wrote to the Department outlining the nature of the Applicant's request and asking for input from the Department, as well as a copy of all responsive documents by January 23rd.

On January 23rd, the public body wrote to this office indicating that they were not yet in a position to respond as requested for a number of reasons, including the fact that there is a mandatory office closure from December 23rd to January 3rd. The public body also pointed out that they had received a large volume of requests for information and did not have the resources to respond within the time provided for in the act. In the letter, they acknowledged that this was not sufficient to relieve them of the responsibility to respond in a timely fashion, but provided the information by way of explanation. The Department requested an extension of time to respond to February 10th. On February 10th, the public body provided another letter saying that they would be unable to meet the February 10th deadline, again citing the very large volume of access requests which had been received and the limited resources which were dedicated to such requests. The letter indicated that it hoped to provide the public body's submissions by February 28th. On March 2nd, I received copies of a large volume of records responsive to the request for information, as well as the public body's submissions with respect to their decision to disclose. The letter also contained an indication that there continued to be some documents which were not included in the package sent to the Applicant because objections had been received from third parties to the disclosure and that the public body was considering the objections before responding. It was not until May 15th that the public body gave its final response to the Applicant, seven months after the initial request was made.

The original request was for access to all records with Labour Services related to a specific employer from 2002 to 2005 and for more specific records related the Applicant's complaint against the employer, including all communications between Labour Services, the employer and the Applicant.

The public body eventually disclosed 30 pages of records, most of which had already been provided to the Applicant in the course of an appeal which the Applicant had launched with respect to a ruling made by Labour Services. Some of the records contained information for which the public body claimed an exemption pursuant to section 23 of the Act (unreasonable invasion of a third party's privacy).

The public body, in its eventual response to the Applicant, also indicated that they were refusing to confirm or deny the existence of records relating to third party complaints against the employer. They went on to suggest that if the information existed, it would, in any event, be exempted from disclosure under section 23(2)(d)(h), and section 24 of the Act.

ISSUES

As a preliminary matter, I would simply comment that the fact that the Applicant submitted his request for information on an Alberta form, rather than on the one available in the Northwest Territories should have not have been used as a reason not to respond to it. The Act requires only that a request for information be made in writing. The form of that writing is not specified. The request on the Alberta form should have been accepted by the Department, provided that it had sufficient information to identify his request.

A number of substantive issues arise from this request.

The first is issue that needs to be addressed is the Department's inability to respond to the request for information within a reasonable time.

The second is whether the public body properly applied section 23(2)(d) and (h) to sever parts of the responsive records before providing them to the Applicant

Thirdly, did the department properly apply section 9(2) of the Act which allows a public body to refuse to confirm or deny the existence of certain records.

Lastly, if there were such records, would they be exempt from disclosure pursuant to section 23 (personal information, the disclosure of which would be an unreasonable invasion of a third party's privacy) section 24(1)(b) (labour relations information obtained in confidence that is of a confidential nature, supplied by a third party in compliance with a lawful requirement) and/or 24(1)(c)(ii) (information the disclosure of which could reasonably be expected to prejudice the competitive position of a third party).

DISCUSSION

1. Failure to respond to request

The public body in this case is candid in admitting that it has not been able to meet the time lines set out in the Access to Information and Protection of Privacy Act for responding to a request for information. They point to a huge volume of requests (more than 50 request made over a period of about three months) made of the department for access to personal information in relation to individuals who have or may have a claim for compensation as former students in the residential school system. The department is clearly frustrated with the lack of resources available to meet their obligations. That they have not been able to do so is not a reflection on those who are charged with responding, as it does appear that they have been doing their best to keep up with the requests while still addressing their other responsibilities within their job descriptions. Something, however, must be done to ensure that the clear time limitations in the Act are complied with.

In this case, the public body felt that it was necessary to consult third parties. Section 11 of the Act provides for an extension of the time to respond to a request where this is the case. However, the section also sets out specific steps that must be taken in order for the extension to be made. In this case, again because of the staff in the public body was overextended, they did not follow the necessary steps. Furthermore, this provision provides only that an extension can be for a "reasonable time" and, in my respectful opinion, six months is not reasonable. I believe that the public body recognizes this.

The bottom line is that the public body is required by law to respond within the time limits set out in the Act or any reasonable extensions necessary. I am left only to recommend that this public body be given the resources it needs to respond to the large number of access requests it is receiving. If this means hiring someone whose position, either permanently or temporarily, is only to respond to access requests, then so be it. Something has to be done to ensure that the public body has the human resources it needs to meet it's legislated obligations.

2. Section 23(2)(d) and (h)

The public body did disclose a number of records to the Applicant. From those records, however, certain information was severed. The public body takes the position that they were prohibited from disclosing these sections pursuant to section 23(2)(d) and (h) of the Act. Section 23(1) prohibits the disclosure of information where the disclosure would be an unreasonable invasion of the privacy of an individual third party. Section 23(2)(d) and (h) outline some of the situations in which there is a presumption that disclosure would constitute an unreasonable invasion of privacy. These sections read as follows:

> (2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where

d) the personal information relates to employment, occupational or educational history;

h) the personal information consists of the third party's name where

(i) it appears with other personal information about the third party, or

(ii) the disclosure of the name itself would reveal personal information about the third party;

In order to be protected from disclosure pursuant to section 23, the information in question must, firstly, be "personal information". Personal information is defined in section 1 of the Act as:

> information about an identifiable individual, including
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> (a) the individual's name, home or business address or home or business telephone number,
>
> (b) the individual's race, colour, national or ethnic origin or religious or political beliefs or associations,
>
> (c) the individual's age, sex, sexual orientation, marital status or family status,
>
> (d) an identifying number, symbol or other particular assigned to the individual,
>
> (e) the individual's fingerprints, blood type or inheritable characteristics,
>
> (f) information about the individual's health and health care history, including information about a physical or mental disability,
>
> (g) information about the individual's educational, financial, criminal or employment history,
>
> (h) anyone else's opinions about the individual,
>
> (i) the individual's personal opinions, except where they are about someone else;

The mere existence of personal information about a third party in a record does not exempt it from disclosure pursuant to section 23. In order to be exempt, its disclosure must also constitute an unreasonable invasion of the third party's privacy. Section 23 assists us in determining when that will be the case. Here, the public body relies on section 23(2)(d), which provides that unreasonable invasion of privacy will be presumed where the personal information relates to employment, occupational or educational history.

PAGE 2.1 There are a number of delineations in the first four dated entries on this page. Some of these are names, and the rest are references to the gender of the named person. In severing the name, I am assuming that the public body feels that the name would reveal that a particular person worked for a particular company on a particular date and that that might be considered "employment history". Because the onus is on the Applicant to show that third party information is not protected from disclosure (see section 33(2)), and he has not addressed that issue, I will accept the public body's position in this regard. However, I do not agree that the reference to gender qualifies for the exemption and I would recommend that the page be disclosed with the references to gender intact.

On this page, it would appear that one entry (dated August 12, 2005) was initially completely severed before being provided to the Applicant. In the public body's final response, this section was included, but there were a number of names and references to gender deleted. This particular entry appears to be the notes taken by an employee of the public body of a conversation with the Applicant and it appears to be a statement of his personal view of events in connection with his complaint to Labour Services. There is nothing in here that might disclose anything new to the Applicant as it simply reflects his own words. I recommend that this part

of the page be disclosed to the Applicant without any deletions.

PAGE 36 This is a record entitled “Complaint by Employee” and appears to be a form which was completed by the Applicant in making his complaint to Labour Services. In this record, the name of several people, all of whom the Applicant indicates are employees of his former employer, a private sector company. Since the Applicant provided the information in the first place, providing him with a copy of the complaint with those names intact will not constitute a “disclosure” of any personal information. I recommend that the page should be provided to the Applicant with nothing severed.

PAGE 3(D) This is a copy of a cheque from the company with whom the Applicant had a dispute. The signature has been severed. The original signature is not legible. I do not believe that a signature, by itself, can constitute personal information, the disclosure of which might constitute an unreasonable invasion of a third party’s privacy. I recommend that this page be disclosed in full.

PAGE 3(E) This page is entitled “Time Sheet” and appears to be a record of the hours worked by the Applicant with respect to a certain job over a certain period of time. On the bottom is a hand written notation which appears to be a request for the Applicant to provide more information about the hours worked. The signature is, once again, severed.

My comments with respect to the previous record hold true here. Further, it seems that the Applicant has probably already seen the document before and disclosing the signature cannot constitute a “disclosure”. I recommend that this page be disclosed with no editing.

PAGE 3(G) This is a record entitled “Employee/Contractor Questionnaire Worker’s Version”. On the bottom there is a notation which indicates that it was submitted by the Employee. Once again, the name of the Applicant’s supervisor has been severed. Once again, because the Applicant submitted this record himself, he will already knows what it says. There is noting being “disclosed” and therefore section 23 cannot apply. I therefore recommend that this page be disclosed with no editing.

PAGE 4(A) This is a copy of a letter from the public body to the Applicant dated August 4, 2005. In this record, the name of an employee with the Applicant’s former employer is severed along with a reference to the gender of this person. Clearly, this information has already been provided to the Applicant in the original letter to him. There is, therefore, no “disclosure” and the record should be disclosed with no editing.

PAGE 4(B) This appears to be a fax cover note from the employer company to Labour Services. The name of the sender has been severed, as has a signature at the bottom of the page. As discussed above, a name alone does not constitute personal information, the disclosure of which is likely to constitute an unreasonable invasion of a third party’s privacy. Furthermore, in this case the name appears only in the individual’s representative capacity as an employee/spokesperson for the company. I question, in those circumstances, whether the disclosure would constitute an “unreasonable” invasion of the person’s privacy. This page should be disclosed without editing.

PAGE 4 (C) This is a contract of employment, apparently between the employer and the Applicant. It appears to have been signed by the Applicant himself, as well as by a representative of the company. On the second page of this contract, the name of two supervisors to whom questions can be directed

have been severed. Once again, this is a record which the Applicant has already seen without any information severed. Providing him with a copy with these names intact will not constitute a "disclosure" of personal information, as the Applicant already has that information. I recommend that it be disclosed without any editing.

3. Section 9(2)

The public body says that it refuses to confirm or deny the existence of any other complaints against the Applicant's former employer. They do not refer me to the section of the Act upon which they rely for this. I am assuming that they are relying on Section 9(2) of the Act which is the only section which provides public bodies with the discretion to refuse to confirm or deny the existence of records. That section reads as follows:

> (2) The head of a public body may refuse to confirm or deny the existence of a record
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> > (a) containing information described in section 20 or 21; or
> >
> > (b) containing personal information respecting a third party, where disclosure of the information would be an unreasonable invasion of the third party's personal privacy.

Because sections 20 and 21 relate to law enforcement, which does not apply in this case, I am assuming that they are relying on 9(2)(b). The information in question is not "personal information". By definition, only "individuals" can have personal information. Companies are not "individuals". Section 9 cannot, therefore, apply. I recommend that the public body reveal whether there are any records of any other claims against this company.

4. 24(1)(b) and/or 24(1)(c)(ii)

The public body takes the position that if there are records of other complaints against the third party company, that information would be protected, in any event by sections 23, 24(1)(b) and/or 24(1)(c)(ii). The latter sections read as follows:

> 24. (1) Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant
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> .....
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> (b) financial, commercial, scientific, technical or labour relations information
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> (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;
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> (c) information the disclosure of which could reasonably be expected to
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> (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
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> (iv) result in similar information not being supplied to a public body;

It is not enough simply to say that the disclosure of the information in question is denied pursuant to section 24. They must show that the information contained in the records is "financial, commercial, scientific, technical or labour relations information" which was either obtained in confidence from a third party or which is of a confidential nature and was supplied by the third party in compliance with a lawful requirement. It seems to me that the biggest question that the public body is going to have to address is whether, if these records exist, the information in them was intended to be of a "confidential nature" and that it was supplied by the third party (the company) in compliance with a

lawful requirement. Having looked at the records in relation to the Applicant's complaint, it is clear that not all of the information with respect to **his** complaint was "supplied by the third party". It stands to reason that if there are other complaints, those files may include some information supplied by the third party, there would likely be other information provided by individuals who were under no legal obligation to provide the information. It is unlikely that the records would be 100% exempted from disclosure.

Furthermore, if there are such records and the public body intends to rely on section 24(1) (c) to exclude the records from disclosure to the Applicant, the onus is on them to show that the disclosure of the records would likely result in undue financial loss or gain to any person, prejudice the competitive position of a third party, interfere with contractual or other negotiations of a third party, or result in similar information not being supplied to a public body. It is not enough simply for the public body to say that it is so. They must provide some reasonable background and proof that one of these results may result. For this, they may need the input of the company in question.

CONCLUSIONS AND RECOMMENDATIONS

I am very concerned about this department's apparent inability to meet its obligations under the Act. As noted above, this is not a reflection on the people charged with answering requests for information but is a function of the number of requests being received by the department and a clear lack of adequate manpower to meet the demand. I recommend that immediate steps be taken to provide the necessary manpower to meet the demand currently being experienced by the Department for information under the Act.

With respect to the records disclosed, I have outlined my individual recommendations above with respect to the records which were edited prior to disclosure.

In my opinion, section 9 does not apply to any other records which might exist concerning other complaints which may have been made against the employer in question. If there are such records, I recommend that this fact be disclosed. Further, if such records do exist, it is unlikely that they would be wholly exempt from disclosure pursuant to sections 23 and 24. The onus is on the public body to show that the exemptions apply and it is not sufficient, in the case of section 24, simply to say that they apply. They must be shown to apply with appropriate background information and evidence of how the company's business is likely to be affected. I recommend that, if such records exist, they be reviewed and disclosed subject to the Act. In the event that the Applicant does not accept the public body's position with respect to the existence or non-existence of any responsive records or with respect to any record or part of any record not disclosed, he will be entitled to ask this office, once again, to review the decision.

Elaine Keenan Bengts
NWT Information and Privacy Commissioner