NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 07-058
File: 06-278-4
January 15, 2007

BACKGROUND

On October 17th, 2006, this office received a complaint from an individual (the "Complainant"). The Complainant is an employee of a public body. She complains that certain individuals breached her confidentiality by inappropriately sharing sensitive personal information with others both inside and outside of her workplace. The alleged improper disclosures involved both medical and employment information about her by persons within her work place who held positions of seniority to her. She alleges that this sensitive information was shared, without her prior knowledge and consent with a union representative and with another third party, a counselor.

Briefly, management of the public body arranged for a meeting with the Complainant to discuss a sensitive issue. Instead of advising her about the time and place of the meeting, however, they gave that information to a union representative, providing details about why it was being called and a copy of the letter they intended to give to the Complainant at the meeting. The union representative, armed with this information, was sent to get the Complainant and bring her to the meeting. At the meeting, the Complainant was provided with the letter which provided, among other things, that they were requiring her to undergo certain evaluations as a condition of her continued employment. Prior the meeting, the employer had also contacted a counselor and provided the counselor with details about the background of the situation and what they intended to discuss with the Complainant at the meeting. They also advised the counselor that it was anticipated that the Complainant might be contacting the counselor after the scheduled meeting.

These basic facts with respect to the events were confirmed as being accurate and the

public body provided an explanation as to why matters were handled in this manner.

The Complainant was provided with a copy of the public body's response and given the opportunity to make any further comments she felt would assist me. She accepted that opportunity and provided me with further correspondence which was then provided to the public body.

THE RELEVANT SECTIONS OF THE ACT

The *Access to Information and Protection of Privacy Act* outlines specifically how an individual's personal information can be collected, used and disclosed. In particular, the relevant parts of section 43, 47, 47.1 and 48 are as follows:

> **43.** A public body may use personal information only
>
> (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.
>
> **47.** A public body may disclose personal information only
>
> (a) in accordance with Part 1; or
>
> (b) in accordance with this Division.
>
> **47.1.** An employee shall not, without authorization, disclose any personal information received by the employee in the performance of services for a public body.
>
> **48.** A public body may disclose personal information
>
> (a) for the purpose for which the information was collected or compiled or for a use consistent with that purpose;

> (q) when necessary to protect the mental or physical health or safety of any individual;

For the purposes of the Act, personal information is defined in section 2 as follows:

> "personal information" means information about an identifiable individual, including
>
> (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 PUBLIC BODY'S POSITION

The public body acknowledges that personal information about the Complainant was disclosed to the two individuals mentioned. It is therefore unnecessary to consider whether the information shared constitutes the Complainant's "personal information" under the Act. Without doing an in depth analysis of it, it is clear that the information exchanged between the public body and the two individuals in question did include personal information about the Complainant and, in addition, that much of it was quite sensitive information.

The public body acknowledges that it did not have the Complainant's consent to the disclosure.

Finally, the public body acknowledges that the meeting to which the Complainant was invited with the assistance of the union representative was not a disciplinary hearing. Had it been, Article 48 of the Collective Bargaining Agreement (CBA) would have required that the Complainant be given notice in writing of the disciplinary action being taken and a copy of that writing would have had to be provided to the Union. However that Article does not apply here. Instead, the public body relies on Article 40.06 of the CBA which provides that where the employer requires an employee to undergo a specific medical, hearing or vision examination by a medical practitioner, the employer will undertake the cost of that examination and the employee is entitled to a copy of the results of that examination.

The public body says that they were dealing with what they considered to be a sensitive and somewhat difficult personnel issue. There had been an ongoing conflict resolution process within the workplace and the union had been involved with that. They indicated that it is their common practice to give the Union prior notification when there is a significant event that could potentially affect the long-term employment of a union member. They also rely on section 23(4)(b) of the Act as justification for disclosure. That section provides that

> (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where
>
> (b) there are compelling circumstances affecting the health or safety of any person and notice of the disclosure is mailed to the last known address of the third party;

They did not provide any specifics about what those compelling circumstances were,

what the safety concerns were, or who they considered might be in harm's way.

The public body also relies on section 48(q) , which allows the disclosure of personal information when necessary to protect the mental or physical health or safety of any individual. They indicate that they felt they were acting in the Complainant's best interests and the best interests of the public body. Again, no specifics have been provided.

THE COMPLAINANT'S POSITION

The Complainant challenges the public body's assertion that there was ever any genuine concern about the health and safety of either herself or of any other person. In fact, she provides a copy of a letter provided by the counselor who indicates that the telephone discussion she had with an individual from the public body about the Complainant did not include any expressions of concern about anyone's safety. She says that the purpose of the phone call was specifically to advise her that a meeting was planned with the Complainant and to confirm that the counselor would be available to meet with the Complainant afterward to provide her with "support" should she want it.

With respect to the disclosure to the union representative, she points out that the meeting to which she was summonsed was not a discipline meeting under the Collective Bargaining Agreement and, therefore, the union had no right under the CBA to receive any of her personal information without her consent. She feels that if she wanted the union to be involved, it should have been her prerogative to involve the union and to choose who to share the information with. She further challenges the public body's assertion that the union had been involved in an ongoing dispute resolution process within the workplace. She says the dispute resolution process had been completed almost a year previously and, in any event, the union had not been involved in the process. She further states, in any event, that the dispute resolution process had nothing to do with the steps the employer was taking when the disclosures were made.

Finally, she makes the point that the fact that the public body has a "practice" of informing the union ahead of time whenever there is a matter which might affect the long term employment of a union member, does not make it an acceptable or appropriate practice.

DISCUSSION

An employee of a public body has just as much right to have his or her personal information protected as does the general public. Where a public body has or is given access to such personal information, it must be treated with due care. There will be instances in which the employee's consent to the use of such information can be implied as, for instance, when they are members of the union and the Collective Bargaining Agreement by which they are bound provides that the public body can share that information with the union. From my reading of the materials provided in this instance, it appears to me that management in this case was concerned about the effect that the planned meeting might have on the employee. They say that in involving the union representative prior to the planned meeting it was their intention to ensure that the employee had support during the meeting. Similarly, their intent in contacting the counselor was to make sure she had someone to talk to afterwards. I am satisfied that they were attempting to be sensitive to the employee's needs in a difficult situation. Good intentions, however, do not justify the disclosure of personal information without the Complainant's consent.

Where the employee is a member of the union, as noted above, the CBA may in some instances create an implied consent to the disclosure of information to the union as, for instance where Article 48 applies. Under Article 48, once a disciplinary step has been taken there is an obligation on the public body to provide the union with a copy of the written record of that disciplinary action. Where the Collective Bargaining Agreement provides for disclosure, it is reasonable to conclude that the union member has impliedly consented to the disclosure of that information specifically required to be provided to the union by the public body. Section 48, however, clearly does not apply

here as the meeting had nothing to do with a disciplinary issue. The public body says that they are relying on Article 40.06 of the CBA. That Article has nothing in it, however, that requires or allows the sharing of information with the union. It only requires the sharing of information with the union member. Article 40.06 does not, therefore, justify the disclosure of the information in question to the union representative.

If the disclosure is to be justified, therefore, it must be justified pursuant to the Act itself. The public body relies on Sections 48(q) and 23(4)(b) suggesting in doing so that there were concerns about the health and safety of either the Complainant or of others around her. There is nothing before me to suggest that there were any serious concerns in this regard, let alone any "compelling circumstances" affecting health or safety in the workplace. Undoubtedly, the planned meeting was going to deal with some difficult issues. Undoubtedly, the Complainant was going to be upset about what was going to be discussed at the meeting . But there is nothing to suggest that there was any genuine concern about either her own safety or that of any other person. It may well have been that, given advance notice of the meeting and the general purpose of the meeting, the Complainant may well have chosen to seek the assistance and support of a union representative at the meeting. Instead, the union representative was provided in advance with a copy of the letter the public body intended to give to the Complainant and a general understanding of what was going to happen in the meeting, before the Complainant had any idea that it was going to happen and certainly before the Complainant knew about the contents of the letter. It may be that the union should have been given a "heads up", but there was no reason that the union representative should have been provided with the details of the matter before the Complainant gave her consent to the disclosure. The disclosure to the union representative was not justified under the Act.

The same can be said with respect to the disclosure to the counselor. There is nothing whatsoever to justify the public body's disclosure of the Complainant's personal information to the counselor. Once again, it may have been appropriate for the public

body to advise the counselor that they were going to refer an individual to her, without giving any details. It was not appropriate for the public body to disclose the significant detail that was disclosed.

CONCLUSIONS AND RECOMMENDATIONS

Based on the above, it is my opinion that the Complainant's concerns are well founded and the public body failed to maintain the confidentiality of the personal information of one of its employees. They may have been acting in what they thought was the best interests of the Complainant. That, however, does not justify the wrongful disclosures.

I make the following recommendations:

1. I recommend an apology in writing to the Complainant and, if she so requests, that a copy of the apology be put on her personnel file

2. Unless specifically provided for in the Collective Bargaining Agreement or the consent of the employee has been obtained, personal information about employees should be shared with union officials only where there are **compelling** reasons to do so pursuant to the Act, particularly where the information is especially sensitive.

3. The public body indicated that it is their "common practice" to give the Union prior notification when there is a significant event that could potentially affect the long-term employment of a union member. This practice should be reconsidered. Unless the CBA specifically requires that the union be provided with information, it should be left to the employee to make the decision as to whether or not the union is brought in on their behalf. In particular, there will be very few circumstances in which the union should be advised of information with respect to an employee before the employee himself is provided with the information.

4. Although it may be trite to say so, it is clear that policies need to be reviewed from time to time to ensure that they continue to reflect the law. General practice often becomes ingrained and people stop thinking about how information is used. Not only should policies be reviewed from time to time, they should be disseminated and reinforced again and again so that bad practices do not arise by default. I recommend that the public body remind employees often of the confidentiality and security requirements when dealing with personnel issues.

The circumstances in this case illustrate that even where public bodies have good intentions and even where policies and procedures are in place to address informational privacy and confidentiality requirements, those policies need to be reviewed from time to time. Public bodies need to be diligent in reviewing such policies and procedures with their staff on an ongoing basis, and in following-up any failure to comply. Public bodies must also ensure that personal information is only disclosed when there is a justifiable purpose for doing so under the Act.

Elaine Keenan Bengts
NWT Information and Privacy Commissioner