

NORTHWEST TERRITORIES INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 07-059

File: 06-190-4

March 30, 2007

BACKGROUND

On May 6, 2006, this office received a Request for Review from an individual who had requested information relating to the calculation of bonus salary paid to employees of the Northwest Territories Power Corporation. The complaint indicated that a request for the information had been made to the Power Corporation but no response had been received within the 30 days provided for in the *Access to Information and Protection of Privacy Act*. The specific request was for

the number of non-bargaining unit employees and the total amount of bonuses paid to them over and above their normal salary for fiscal years 2004 and 2005 for the NWT Power Corporation and the rationale for the payment of bonuses.

The public body belatedly responded to the Request for Information by providing a summary of some of the considerations which went into the calculation of bonuses, the number of non bargaining unit employees and the total amount of bonus paid in each of the years in question.

On July, 2006, the Applicant requested that I review the matter, indicating that she was not satisfied with the response received. In making the Request for Review, the Applicant provided clarification for what she was seeking. In this correspondence, the Applicant indicated that she wanted to receive:

a breakdown of bonuses paid on an individual basis, together with the rationale for each such payment

THE RELEVANT SECTIONS OF THE ACT

The relevant sections of the *Access to Information and Protection of Privacy Act*, insofar as this review is concerned, are the following:

- 23.** (1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.
- (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;
- ...
- (g) the personal information consists of personal recommendations or evaluations about the third party, character references or personnel evaluations;
- (3) In determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of the Northwest Territories or a public body to public scrutiny;
- ...
- (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where
- ...
- (e) the personal information relates to the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee

or member of a public body or as a member of the staff of a member of the Executive Council;

...

- (h) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, but not personal information supplied in support of the application for the benefit or that is referred to in paragraph (2)(c); or

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 takes the position that the information cannot be disclosed to the Applicant by virtue of the provisions of the *Access to Information and Protection of Privacy Act* and, in particular, section 23 of the Act which prohibits the disclosure of personal information where the disclosure would constitute an unreasonable invasion of a third party's privacy. The public body has referred me to the recent decision of *Canadian Broadcasting Corporation et al v. the Commissioner of the Northwest Territories* (2006 NWTSC 33) from the Supreme Court of the Northwest Territories. They argue that this case decided that in a case in which section 23 is claimed as justification for refusal to disclose information, there must first be a determination as to whether the information in question is "personal information" as defined in the Act. If it is, then regard must be had to whether any of the conditions contained in Section 23(2) apply so as to create a presumption that the disclosure of the information in question would be an unreasonable invasion of a third party's privacy.

In this case, the public body argues that the information being requested is clearly "personal information" as defined in section 2 of the Act. They also argue that the information being requested constitutes part of individual employee's income and that section 23(f) therefore applies to create a presumption that disclosure of this information would be an unreasonable invasion of the individual employee's information. They argue that the amounts paid to individual employees as bonuses are included in their income for tax purposes and are shown on the employee's T-4 statement at the end of each year.

They argue that the corporation's bonus policy, called "At Risk Compensation", does not create a "discretionary benefit" so as to bring the amounts paid under section 23(4)(e) or (h) of the Act. If either of these sections applied, the disclosure of the information would not be considered to be an unreasonable invasion of the third parties' privacy. They say that the amount of the payment to each individual employee is uncertain until the completion of the fiscal year, at which time the various performance

measurements become known, but that the payment of the bonus is a contractual requirement for each of the employees who receive it and the payments are not, therefore, discretionary. They say that each non-bargaining unit employee is entitled, by contract, to the bonus and that the public body has no discretion about whether or not it will be paid in any particular year. Furthermore, they say that it is calculated in accordance with a precise formula provided for in the contract.

DISCUSSION

There is one issue in this inquiry:

Would disclosure of the information requested constitute an unreasonable invasion of the Third Party's personal privacy, as provided by section 23 of the *Access to Information and Protection of Privacy Act*?

Both parties concede that the information being requested constitutes the personal information of third parties under the *Act*. With that being a given, would the disclosure of the information be an unreasonable invasion of the privacy of the third parties involved?

Although section 23 prohibits the disclosure of personal information where that disclosure would constitute an unreasonable invasion of a third party's privacy, section 23(4) acknowledges legislatively that not all disclosures of personal information will be unreasonable and provides for circumstances in which such disclosures are deemed not to constitute an unreasonable invasion of privacy. One of the enumerated circumstances in section 23(4) includes the amount of any "discretionary benefit" provided to an employee.

The first question that must be addressed is whether the bonuses or "At Risk Compensation" for NWT Power Corporation Senior Managers is a "discretionary benefit" as contemplated in section 23(4)(e). In this regard, the public body refers me to

the decision of Justice Vertes of the Supreme Court of the Northwest Territories in the case of *Canadian Broadcasting Corporation v. The Commissioner of the Northwest Territories et al* [2006 NWTSC 33]. In that decision, Justice Vertes considered whether the amount granted to a former employee in a severance agreement was a discretionary benefit. He noted, in that case, that the calculation of the severance amount was based on "a precise calculation based on salary over a period of time" and that it was not made merely as a part of a negotiated termination of employment, but pursuant to the terms of a pre-existing contract of employment. I have had the benefit of reviewing the terms of the employment contracts involved and in my opinion the plans under discussion are of a very different genre than the severance agreement discussed in the CBC case.

In this case, there are two forms of contract involved. One provides that the employee is "eligible to participate" in the company's bonus program and the other provides that the employee is "eligible to receive" compensation pursuant to the public body's Incentive Compensation Plan. In neither of the contracts does it suggest that a bonus will be paid annually or at any other interval. Rather, the wording is such that it suggests that if a bonus is paid, the employee will be "eligible" to receive a bonus. I disagree with the public body's assertion that the payment of a bonus is a contractual obligation. Nothing in the contracts suggests that the payment of a bonus is mandatory.

In the Senior Management & Excluded Employee's Handbook there is a section which outlines when and how much bonus will be paid. That publication provides that for senior management, eligibility for bonus will be discussed with the employee at the time of hire. For excluded employees, it provides that the employee "may be" eligible for such compensation if certain criteria are met. There are also provisions which outline when an employee will not be eligible to receive a bonus payment.

The handbook goes on to outline the maximum potential bonus and creates two categories of performance upon which the bonus compensation will be based. The first is corporate performance. The second is individual performance. Under the "individual

performance" criteria, it provides that the employee's individual performance will be evaluated against a set of objectives and, based on that evaluation, a recommendation will be made to the President, who will then make a final decision with respect to the amount of the individual bonus the employee is to receive. It is clear that there is a possibility that any particular employee may not be entitled to receive any bonus in any given year in certain circumstances, including if there is a negative recommendation for the individual employee as a result of the evaluation process.

The corporate performance component of the payment is based predominantly on the achievement of certain targets set in the budgeting process but "may be influenced by" other factors "that the President feels is appropriate". In some specified circumstances, the payment of and amount of the bonus is "at the sole discretion of the President". In my opinion, the language used in all of the documents which refer to the bonus program is permissive rather than mandatory in nature. There is no guarantee that a bonus will be paid in any year. There is a large amount of discretion placed in the hands of Directors and then in the President based on evaluation of job performance for each individual employee. The bonus paid may differ from employee to employee both in terms of percentage of total salary and in terms of actual amount paid. On the corporate side, the President is, again, given discretion as to how much will be paid out by way of bonus in each year. Although it is to be grounded in certain objective criteria, performance measures and methods of calculation, once that basic calculation is done, the President continues to have discretion to adjust the amount, either upwards or downwards. In my opinion, just because these bonuses become part of income when paid, does not take them out of the realm of discretionary. Furthermore, unlike the severance package in the CBC case cited, the bonuses are not established by means of a "precise calculation". There is no exact mathematical calculation which the employee could use to estimate his or her annual bonus. Too much is left to discretion of the Directors and/or the President.

In his Order 98-014, the Alberta Information and Privacy Commissioner considered the meaning of the term "discretionary benefit" and said this:

[para 16.] The word "discretionary" refers to a choice given to a decision maker as to whether, or how, to exercise a power. A discretionary power is different from a duty, which requires a decision maker to act whenever the duty arises. As provided by section 16(4)(g), the discretion is exercised in granting the "benefit". In other words, the decision-maker must have the choice as to whether, or how, to grant the "benefit". There must not be a duty to grant the "benefit".

As noted above, in this case, all of the documents which refer to the bonus and the bonus program refer to it in permissive rather than mandatory language. The contracts refer to "entitlement to participate" in the plan and to "eligibility to receive" incentive compensation. The Senior Management and Excluded Employee's Handbook indicates that employees "may be eligible" to receive At-Risk compensation. It refers to "performance evaluations" and "recommendations". The policies provide for "absolute discretion" in the President to make certain decisions with respect to the payment of these bonuses. There is absolutely no guarantee that any employee will receive any bonus in any given year. In my opinion, all of this suggests that the payment of this bonus is a discretionary benefit arising out of employment with the public body.

Section 23(4) of the Act provides that the disclosure of personal information will not be considered to be an unreasonable invasion of a third party's privacy where "the personal information relates to the third party's ... discretionary benefits as an officer, employee or member of a public body". The amount of the bonus paid to individuals who were not in the bargaining unit in the years 2004 and 2005 is not, therefore, protected from disclosure pursuant to section 23 of the Act.

The Applicant, however is also looking for the "rationale" for each of the bonus's paid. To the extent that there is a record or records which outline the rationale for the corporate performance component of the compensation, it seems to me that this information should be provided. The public has the right to know how public funds are being expended and how decisions are made with respect to the expenditure of those

funds. As this portion of the bonus payment is based on corporate performance and not individual performance, the disclosure of the rationale and criteria for this portion of the bonus payments would not involve the disclosure of any additional third party personal information.

I have more concern, however, with respect to the rationale that went into the individual component of each payment. Section 23(4) of the Act provides that the amount of a discretionary benefit and the fact that it was paid is not to be considered an unreasonable invasion of a third party's privacy. However, section 23(2) provides that the disclosure of third party information is deemed to be an unreasonable invasion of a third party's privacy and the public body is therefore prohibited from disclosing such information where

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

...

(g) the personal information consists of personal recommendations or evaluations about the third party, character references or personnel evaluations;

The individual portion of the At-Risk Compensation clearly depends on the evaluation of the individual's work performance over the course of the previous year. As such, the disclosure of that information would be an unreasonable invasion of the individual third party's personal information. For this reason I believe that the disclosure of the rationale for the "individual" portion of each bonus is protected from disclosure.

CONCLUSIONS AND RECOMMENDATIONS

Based on the above, it is my opinion that:

- a) the information being requested is, indeed, the personal information of third parties;
- b) the information being requested concerns a "discretionary benefit" paid to the third parties as employees of the public body;

The payments made and the persons to whom the payments were made falls within section 23(4) and the disclosure of the information is, therefore, not an unreasonable invasion of the privacy of the third parties involved. To the extent that the records exist, **I recommend** that the public body disclose to the Applicant the bonus or "At Risk Compensation" paid to non-bargaining unit employees of the public body in 2004 and 2005. **I also recommend** that, to the extent that it exists in a record, the specific rationale for the corporate performance portion of those payments in the years noted should be disclosed. However, the rationale for the individual portion of the bonus should not be disclosed as to do so would constitute an unreasonable invasion of the privacy of the individuals in question.

Elaine Keenan Bengts
NWT Information and Privacy Commissioner