NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 08-065
File: 07-164-4
January 4, 2008

BACKGROUND

The Applicant made a written request for information from the Deh Cho Health and Social Services Authority (the Authority) on or about November 20th, 2006. The request was for "the legal cost of current labour negotiations between your contract to Nats'ejee Keh Treatment Centre (the Treatment Centre) and the PSAC". The request also sought "the salary currently of the CEO", presumably for the same organization. The Applicant in this case was a representative of a union which was then involved in contract negotiations with the Treatment Centre.

By letter dated November 28th, the Authority responded to the Applicant by advising that, because the disclosure of the information may "invade the personal privacy of a third party" they were required to consult with the third party pursuant to section 26 of the Act and that the response would, therefore, be delayed. A further response was provided on February 21st, 2007 in which the public body indicated that they had considered all the relevant factors, including representations received from the third party whose interest could be affected by the disclosure of the records, and were refusing access to the records requested. With respect to the first part of the request for information about legal costs associated with contract negotiations, the Authority relied on section 15(a) of the Act, indicating that the information was subject to solicitor-client privilege. They also relied on section 24(1)(b) and (c), stating that the information pertained to the business interests of a third party and that they were prohibited from disclosing the information because it was "obtained in confidence and supplied by the third party in compliance with a lawful requirement". They also suggested that the disclosure "could interfere with contractual or other negotiations of the third party or result in similar information not being supplied to a public body". No further details or explanation was provided.

Based on this refusal to disclose, the Applicant applied to my office for a review of the decision on March 20, 2007.

ISSUE

This review raises several issues.

a) Is the information about the legal cost of contract negotiations privileged information pursuant to s. 15(a) of the Act?

b) If so, did the public body adequately exercise their discretion in refusing to disclose the information requested?

c) Was the information about the legal cost of contract negotiations "obtained in confidence and supplied by the third party in compliance with a lawful requirement" pursuant to section 24(1)(b)?

d) Have the public body and/or the third party met the onus imposed on them pursuant to section 24(1)(c) of the Act to establish that the disclosure "could interfere with contractual or other negotiations of the third party or result in similar information not being supplied to a public body" pursuant to section 24(1)(c)?

e) Has the public body properly refused to disclose the current salary of the CEO of the Treatment Centre?

THE RELEVANT SECTIONS OF THE ACT

Section 15(1) (a) of the *Access to Information and Protection of Privacy Act* provides as follows:

15. The head of a public body may refuse to disclose to an applicant
    (a) information that is subject to any type of privilege available at law, including solicitor-client privilege;

The public body also refers to and relies on section 24(1)(b) and (c) of the Act. Those sections read as follows:

> 24. (1) 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
>
> (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 a public body

Subsection (2) reads:

> (2) A head of a public body may disclose information described in subsection (1)
>
> a) with the written consent of the third party to whom the information relates;
>
> b) if an Act or regulation of the Northwest Territories or Canada authorizes or requires the disclosure.

Also important to keep in mind is section 1 of the Act which outlines the purposes of the legislation:

1. 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 a right of access to records held by public bodies;
   (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves held by public bodies;
   (c) specifying limited exceptions to the rights of access;
   (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and
   (e) providing for an independent review of decisions made under this Act.

In its submissions to me, the public body also referred to and relied on Section 23(2)(f) with respect to the second part of the request, that is, for the salary of the CEO.

Section 23(1), which is necessary to the discussion reads:

> 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.

Section 23(2)(f) provides one of several situations in which the disclosure of personal information will be deemed to be an unreasonable invasion of an individual third party's privacy:

> 2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where...
>
> (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities or credit worthiness

Finally, also important in this case is section 33 of the Act which puts the onus on the Third Party who objects to the disclosure of information to establish that the Applicant is not entitled to access to the records:

> 33 (3) On a review of a decision to give an applicant access to all or part of a record containing information that relates to a third party,
>
> (a) in the case of personal information, the onus is on the applicant to establish that disclosure of the information would not be contrary to this Act or the regulations; and
>
> (b) in any other case, the onus is on the third party to establish that the applicant has no right of access under this Act to the record or the part of the record.

THE PUBLIC BODY'S POSITION

In its submissions to me, the Authority explained the relationship between itself and the Treatment Centre. They indicated that the Authority is responsible for administering and managing the terms and conditions of the contract with the Treatment Centre, and the Board of the Treatment Centre is responsible for the delivery of programs and services to the public. The Treatment Centre is registered under the Societies Act of the Northwest Territories and its Board is comprised of representatives from four regions of the Northwest Territories. It appears that the members of the Board are appointed by the Department of Health and Social Services. They say that the contract negotiations which are the subject of this request were between the Treatment Centre and the unions and that the Authority was not involved in any way in the negotiations. For these reasons, the Authority takes the position that the Treatment Centre is a "third party" under the Act.

They point out that at the time the request was made, the Treatment Centre and the union were in contract negotiations and had exchanged proposals in order to settle a strike by the unionized workers. Because the of this, the Authority refused to disclose any of the

requested information as that disclosure might have had some impact on the ongoing negotiations.

The Authority takes the position that the legal costs of the then current labour negotiations were part of a contractual arrangement between the Treatment Centre and its solicitors and was subject to solicitor/client privilege pursuant to section 15 of the Act. They say that the information was provided by the Treatment Centre to the Authority in compliance with the contractual obligation of the Treatment Centre but that it was provided either explicitly or implicitly in confidence. Further they take the position that the information constituted both financial and labour relations information of the third party. No documentation was provided to support the public body's position that the information was provided either explicitly or implicitly in confidence. Nor was I provided with a copy of the contract between the Authority and the Treatment Centre which would have addressed more clearly the relationship between those two bodies.

With respect to the second part of the request, the public body once again argues that the Treatment Centre is a third party which provides contract services to the Authority and it is governed by its own board. While the costs of the salary and benefits of each position must be part of the overall budget, the descriptions and classifications of positions are not part of the contractual obligations nor do they fall within the procedures for financial control within the government. Hence, it was their position that the request for the current salary and benefits of the CEO of the Treatment Centre was about a readily identifiable individual and the disclosure would be an unreasonable invasion of that person's privacy pursuant to section 23(2)(f) of the Act.

THE POSITION OF THE THIRD PARTY

Both the Treatment Centre and the individual whose salary was requested were consulted in my review process. The CEO objected to the disclosure of her salary as an invasion of her personal privacy.

The Treatment Centre supported the position taken by the Authority. In addition, they provided the following comments:

- at the time the request for information was made, the Treatment Centre's unionized staff were on strike and contract negotiations with the Applicant were ongoing. They pointed out that the negotiation process allowed for the exchange of information and mechanisms for the resolution of disputes about whether requested information should be provided. For the Applicant to seek this or any other information outside of the negotiation process, they suggested, would have been an interference with the negotiation process.

- the requested information was obtained by the Authority from the Treatment Centre and involved "financial and labour relations information". They also stated that the information had been provided "explicitly or implicitly" in confidence and that section 24(1)(b) of the Act applied to prohibit disclosure

- the information was subject to solicitor/client privilege

- the information with respect to the CEO's salary was obtained by the Authority from the Treatment Centre and involved financial information. It was provided to the Authority "explicitly or implicitly" in confidence as was protected from disclosure pursuant to section 24(1)(b)

- the information with respect to the CEO's salary was information about a readily identifiable individual employed by the Centre and in particular, information about the specific salary received by an individual and the disclosure was prohibited pursuant to section 23(2)(f) of the Act.

THE APPLICANT'S POSITION

The Applicant pointed out that it was not seeking any access to the lawyer's billing or any other supporting records with respect to the first part of its request. They argue that the disclosure of an amount alone, without more, would not disclose solicitor/client communications. They take the position that the Treatment Centre delivers services to the public under contract with the Authority, which has the overall authority over the affairs of the Treatment Centre. In effect, they say, the Treatment Centre is the agent of the

Authority. It is not a "third party" as contemplated by the Act which is entitled to the protection of disclosure of information under section 24(1) of the Act. From the Applicant's perspective, they (the union) bargained with the Authority and the Treatment Centre as one organization. According to the Applicant, the Authority is the employer of the employees at the Treatment Centre and a collective agreement was, at the time of the Request for Review, in place.

With respect to the request for the current salary of the CEO, the Applicant argued that the CEO position is undoubtedly classified in the employer's organization and would have a framework for the position description and classification and in the procedures for financial control within the government. They say that the information requested is not "personal information about an employee" but about "a position in the employer's organization" and the disclosure would not, therefore, constitute an unreasonable invasion of the personal privacy of the current CEO.

DISCUSSION

I will deal first with the refusal to disclose the salary of the current CEO of the Treatment Centre. Section 23 is clear. If information constitutes the personal information of a third party and its disclosure would constitute an unreasonable invasion of that person's privacy, disclosure is prohibited. Further, section 23(2)(f) says quite clearly that where the information describes a third party's income, the disclosure of the information is deemed to be an unreasonable invasion of the third party's privacy.

Although the Applicant suggests that they are seeking the salary for a "position" as opposed to the salary for an "individual", it amounts to the same thing. There is only one CEO and the disclosure of the salary currently being paid to the person holding that position is really a disclosure of that person's income. The disclosure would be an unreasonable invasion of the CEO's personal privacy. If the Applicant were seeking a classification or salary range allotted for the CEO, that might be different. But here they were clearly seeking the "current salary" of the CEO. In my opinion, the public body is prohibited from disclosing this information pursuant to section 23(2)(f).

The next issue that has to be addressed is whether, in fact, the Treatment Centre is a "third party" under the Act. Under section 2, the term "public body" is defined as

> (a) a department, branch or office of the Government of the Northwest Territories, or
> (b) an agency, board, commission, corporation, office or other body designated in the regulations.

A "third party" is defined as:

> a person other than an applicant or a public body

In this case, the Authority is listed specifically as a public body in the regulations under the *Access to Information and Protection of Privacy Act*. The Treatment Centre is not.

The question for me is whether the Treatment Centre is, in fact, a separate entity, autonomous from the Authority, or whether it is, in fact, simply an arm of the Authority. I am not entirely convinced that it is a separate entity. It appears that the Treatment Centre is fully funded by the Authority, and the Authority has financial control of the organization, although it's day to day operations are administered by a separate board. That board, however, as far as I can tell, is appointed by the Department of Health and Social Services and is contractually accountable to the Authority. The employees of the Treatment Centre are unionized and represented by the same union which represents employees of the Government of the Northwest Territories. The union itself indicates that when negotiating the collective bargaining agreement, they considered that they were negotiating with the Authority through the Treatment Centre. I have not been provided with any documentation from the Authority which supports their position that the Treatment Centre is an autonomous third party. It seems to me that it would be contrary to the spirit and intent of the Act for the government to be able to hide how its spends its money simply by establishing societies to administer its programs and then hiding spending behind the wall created by the establishment of a "third party". I am not convinced in this case that the Treatment Centre is a "third party".

That being said, I'm not sure that this makes much difference in analyzing the issues. Clearly, the Authority has control of records responsive to the Applicant's request. The only question is whether they are protected from disclosure.

Here we are dealing with the first part of the request only - the legal costs associated with the contract negotiations. The request was made by the union on November 20th, 2006, when the employees of the Treatment Centre were on strike and while the Treatment Centre was in negotiations with the union on a collective agreement. On February 19th, 2007, the Minister of Health and Social Services made a statement in the Legislative Assembly announcing that the labour dispute at the Treatment Centre had been resolved, so presumably by that date the negotiations had been completed and were no longer ongoing. On February 21st, 2007, the Authority responded to the Applicant's request for information. As noted above, both the Authority and the Treatment Centre cited ongoing negotiations and the effect that the disclosure might have on those negotiations as one of the reasons for refusal to disclose the information.

Whether the Treatment Centre was a public body or a third party, there are sections of the *Access to Information and Protection of Privacy Act* that would allow the public body to refuse to disclose information which might interfere with contractual or other negotiations of the organization (section 17(1)(c) (iii) or section 24(1)(c)(iii)). Although it may be that the disclosure of the information in question might have been such that it would be likely to interfere with the ongoing negotiations when the application was actually made, by the time the request was responded to on February 21st, the negotiations had been successfully concluded and there were no further negotiations under way. I am not convinced that the disclosure of the information in question could interfere with completed negotiations.

Both the Authority and the Treatment Centre have also suggested that the disclosure of the cost of contract negotiations relates to the "financial information of a third party obtained in confidence". For the purposes of this discussion I will assume that the Treatment Centre is a "third party". However, it is an organization that is fully funded by public dollars. As such, it is accountable to the public body, contractually or otherwise, and the public body, in turn, is accountable to the people of the Northwest Territories. As such, if the contract between the Treatment Centre and the Authority does not specifically allow for the publication of

financial information to the public, in light of section 1 of the *Access to Information and Protection of Privacy Act*, the absence of such a provision must be interpreted as an acknowledgment by the Treatment Centre that, as an organization fully funded by the government, it will be financially accountable not only to the government under its contract, but also to the people of the Northwest Territories. This is not a "for profit" public company which has trade secrets or the right to keep its finances a private matter. This is a society created by the government of the Northwest Territories, funded by the Government of the Northwest Territories and run by a board of directors appointed by the Government of the Northwest Territories to provide an essential element of its Territorial health strategy. It would be very difficult to convince me that any information that is exchanged between the Treatment Centre and the Authority with respect to financial matters is exchanged "in confidence". This would deny public accountability for the expenditure of public funds. I would suggest that there must be some proof of an explicit intention that financial information provided to a public body in this fact situation is intended to be confidential because there is nothing, in my opinion, which suggests an implicit intention in these circumstances. In this case neither the Authority or the Treatment Centre have provided me with anything to show such an intention existed.

This leaves us to consider whether the information requested is subject to solicitor/client privilege, such as to give the public body a discretion as to whether or not to disclose the information.

It is relevant in this case that the Applicant has made it clear in his correspondence with the Authority that it is not interested in obtaining copies of lawyers statements of accounts in connection with the issue at hand. Instead, the Applicant is seeking only the "legal costs" associated with the negotiations - an indication of the total amount spent on lawyers. Solicitor-client privilege is one of the discretionary exceptions to disclosure included in the *Access to Information and Protection of Privacy Act*. Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation. The application of this exception under access legislation has been addressed a number of times in courts at all levels.

In *Stevens v. Canada (Privy Council)* (1998), 161 D.L.R. (4th) 85 (F.C.A), the court described the reason for the exception as follows:

> It will be seen that Canadian law has sought to strike an appropriate balance between openness and secrecy by creating two exceptions to the privilege. One exception ... is for communications which are themselves criminal or which counsel a criminal act (e.g. Where a lawyer advises a client to conceal evidence). The second exception ... relates to that information which is not a communication but is rather evidence of an act done by counselor is a mere statement of fact. ...

Further on in the judgement (at page 99), the Court makes it clear that:

> Thus statements of fact are not themselves privileged. It is the communication of those facts between a client and a lawyer that is privileged
> .....
> Thus, the jurisprudence in this area is not really in conflict. It merely reflects the existence of a broad exception to the scope of the privilege, namely, that it is only communications which are protected. The acts of counsel or mere statements of fact are not protected. This is an important balancing mechanism which, along with the prohibition against protecting communications which are themselves criminal, takes into account the public interest inherent in the proper administration of justice.

The Information and Privacy Commissioner of Ontario has considered the matter as well, most significantly in Order PO-1952. In that case, the Government of Ontario had been ordered by the Court to pay the defense costs for the infamous Paul Bernardo and the Applicant was seeking access to a record which outlined the amount spent pursuant to that order. The record in question was not a copy of statement of accounts paid, but was a compilation showing only the amounts paid to counsel acting for Mr. Bernardo, without identifying either the lawyers involved, any kind of breakdown of the amounts, or any other information what might reveal communications between Mr. Bernardo and his counsel. In that case, the Information and Privacy Commissioner of Ontario found:

> I find that the record at issue in this appeal does not fall within the scope of solicitor-client communication privilege. It is not a communication between a solicitor and a client, nor does its content reveal any communication of this nature. Rather, the record contains the type of information identified by the Court in Stevens as an exception to solicitor-client privilege - a "statement of fact". Specifically, the record is a factual statement of the amount of public funds paid by the Ministry to four lawyers in consideration for the legal services provided to the affected person in the appeal of certain criminal convictions.

The Order of the Ontario Information and Privacy Commissioner in this case was appealed to the Divisional Court and then to the Court of Appeal of Ontario, both of which upheld the Order made by the Information and Privacy Commissioner. The Court of Appeal, in making its decision, made the following comments:

> If there is a reasonable possibility that the assiduous inquirer, aware of background information available to the public, could use the information requested concerning the amount of fees paid to deduce or otherwise acquire communications protected by the privilege, then the information is protected by the client/solicitor privilege and cannot be disclosed. If the requester satisfies the IPC that no such reasonable possibility exists, information as to the amount of fees paid is properly characterized as neutral and disclosable without impinging on the client/solicitor privilege.
>
> Whether it is ultimately disclosed by the IPC will, of course, depend on the operation of the entire Act.
>
> We see no reasonable possibility that any client/solicitor communication could be revealed to anyone by the information that the IPC ordered disclosed pursuant to the two requests in issue on this appeal. The only thing that the assiduous reader could glean from the information would be a rough estimate of the total number of hours spent by the solicitors on behalf of their clients. In some circumstances, this information might somehow reveal client/solicitor

> communications. We see no realistic possibility that it can do so in this case. For example, having regard to the information ordered disclosed in PO-1952, we see no possibility that an educated guess as to the amount of hours spent by the lawyers on the appeal could somehow reveal anything about the communications between Bernardo and his lawyers concerning the appeal. We are also satisfied that information as to the total amount paid for legal fees did not in anyway describe the finances of the clients to whom the legal services had been provided (s. 21 (3)(f)). The clients had nothing to do with the payment of the fees by the Attorney General and the amount revealed nothing about their finances.
>
> Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner [2005] O.J. No. 941 (C.A.)

The only question I have in this case is whether there is a record held by the Authority which identifies the specific cost of legal services with respect to the labour negotiations in question. It appears from the records provided to me for the purposes of this review that the Authority receives regular accounting information from the Treatment Centre, which includes a line item for "legal fees". It does not appear that that line item differentiates between legal costs associated with negotiation and other legal costs. It does appear, however, that the public body could most likely create a record which would give the Applicant a fair idea of the cost of legal services rendered to the Treatment Centre during the period in which the labour negotiations were taking place simply by adding the amounts indicated as spent on "legal fees" during that time period and giving the Applicant a statement of the total amounts spent under this line item.

Section 7(2) of the Access to Information and Protection of Privacy Act provides that:

> (2) The head of a public body shall create a record for an applicant where
>
> (a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical

expertise, and

(b) creating the record would not unreasonably interfere with the operations of the public body.

It seems to me that one of the most important objects of the *Access to Information and Protection of Privacy Act* is to keep governments and government agencies accountable as they spend public funds. Although in this case it is argued that the Treatment Centre is a "third party", and therefore has the right to have its financial information protected, the reality is that the Treatment Centre appears to be an organization entirely funded by the Government of the Northwest Territories, and, through contract, fully accountable to the people of the Northwest Territories. In my opinion, the balance should always fall in favour of disclosure in such circumstances, particularly once negotiations have been completed and the disclosure can no longer possibly have any impact on the ongoing negotiations. If I am wrong in my analysis, I note that the public body does not appear to have exercised the discretion given to them pursuant to section 15 based on the circumstances as they existed on the date the response was provided. As I have said in previous recommendations and in my Annual Reports to the Legislative Assembly, where discretion is granted, it should be exercised to deny disclosure only in the exception, not as a matter of practice. Here, there may well have been good reason to exercise the discretion to deny disclosure while negotiations were ongoing. By the time the public body responded to the Applicant in this case, however, the negotiations had been successfully concluded. The considerations that might go into the exercise of the discretion become different as the circumstances changed, but the public body does not appear to have taken those new circumstances into account.

RECOMMENDATION

It is, therefore, my recommendation that the DehCho Health and Social Services Authority provide the Applicant with a statement showing, to the best of its ability, the legal costs paid by the Treatment Centre for legal services in connection with the negotiation of the collective bargaining agreement reached between the Treatment Centre and its union in February of last year.

It is further my recommendation that the public body not disclose to the Applicant the current salary of the CEO of the Treatment Centre.

Elaine Keenan Bengts
Information and Privacy Commissioner