

NORTHWEST TERRITORIES INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 08 -067

File: 07-257-4

March 27, 2008

BACKGROUND

The Applicant made a request to the Department of Human Resources by means of e-mail for access to a set of records consisting of 532 pages. It appears that these records had been gathered originally in response to an earlier Request for Information made by the same Applicant. Before providing the Applicant with access to the records, however, the public body realized that they had misunderstood the original Request for Information and the records gathered were not applicable or responsive to the original request.

When the Applicant learned that these records had been gathered, he asked that they be provided to him as well. The public body responded and provided the records to the Applicant, but 9 pages were not disclosed. The public body relies on section 14(1) for their refusal to provide those pages.

There was an initial issue as to whether the Applicant had submitted his Request for Review in time. In this case, the Applicant had requested that records be provided in electronic form rather than on paper. The public body's response to the Applicant was provided in part by means of e-mail on August 31st. The response included a detailed chart listing the records and providing an explanation as to the reasons that access was being denied to certain of those records (the nine pages in question in this review). The responsive records were forwarded to the Applicant on a CD which was received by the Applicant on September 6th. The Request for Review was received in this office on October 5th.

I undertook a review of the public body's claim that the Request for Review was not properly before me because it had been filed late and I provided a preliminary opinion

that the 30 day review period commenced not when the e-mail was sent, but when the Applicant received the responsive records.

ISSUES

This review raises two separate issues.

- a) was the Request for Review received within the 30 day limitation period for requesting reviews?
- b) were the 9 pages which were not disclosed to the Applicant properly withheld pursuant to section 14(1) of the Act?

THE RELEVANT SECTIONS OF THE ACT

The following are the relevant sections of the *Access to Information and Protection of Privacy Act* for the purposes of this review:

Section 9 (2)

- (2) Where an applicant has asked for a copy of a record, the copy must be provided with the response or the applicant must be given reasons for the delay in providing the copy if
 - (a) the record, or the part of it to which access will be given, can be reasonably reproduced by the public body using its normal equipment and expertise; and
 - (b) creating the copy would not unreasonably interfere with the operations of the public body.

Section 28

28.(1) A person who makes a request to the head of a public body for access to a record or for correction of personal information may ask the Information and Privacy Commissioner to review any decision, act or failure to act of the head that relates to that request;

Section 29

29. A request for a review of a decision of the head of a public body must be delivered in writing to the Information and Privacy Commissioner within 30 days after the person asking for the review is given notice of the decision.

Section 14(1)

14.(1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal:

- a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council;
- (b) consultations or deliberations involving
 - (i) officers or employees of a public body,
 - (ii) a member of the Executive Council or,
 - (iii) the staff of a member of the Executive Council;
- (c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of the Northwest Territories or a public body, or considerations that relate to those negotiations;
- (d) plans that relate to the management of personnel or the administration of a public body that have not yet been implemented;
- (e) the contents of draft legislation, regulations and orders;

- (f) the contents of agendas or minutes of meetings of an agency, board, commission, corporation, office or other body that is a public body; or
 - (g) information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.
- (2) Subsection (1) does not apply to information that
- (a) has been in existence in a record for more than 15 years;
 - (b) is a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function;
 - (c) is the result of product or environmental testing carried out by or for a public body, unless the testing was done
 - (i) for a fee as a service to a person other than a public body, or
 - (ii) for the purpose of developing methods of testing or testing products for possible purchase;
 - (d) is a statistical survey;
 - (e) is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal;
 - (f) is an instruction or guideline issued to officers or employees of a public body; or
 - (g) is a substantive rule or statement of policy that has been adopted by a public body for the purpose of interpreting an enactment or administering a program or activity of the public body.

DISCUSSION

A. The Time for Making a Request for Review

Section 29 of the Act provides that a Request for Review can be made "within 30 days after the person asking for the review is given notice of the decision" which the Applicant seeks to review.

As noted above, in this case, the Applicant received a response to his Request for Information on August 31st, 2007 in the form of an e-mail which listed all of the responsive records and provided an indication as to which of those records were not being disclosed and the reason for the refusal to disclose. The e-mail response did not include copies of the records themselves. These were provided by mail in electronic form on a CD, which the Applicant had indicated was his preference. That CD was received by the Applicant on September 6th. The Request for Review was delivered to the Office of the Information and Privacy Commissioner on October 5th.

The question posed by the public body is whether the time for requesting a review started running from the date that the Applicant had notice that he was not going to be receiving certain records or from the date that the records were actually received by him.

I note that section 9(2) of the Act requires that where an applicant has asked for a copy of a record, the copy must be provided with the response or the applicant must be given reasons for the delay in providing the copy. This suggests to me that a response is not complete until it is backed up by copies of the responsive records if, any. As I noted in my preliminary response to the public body on this issue, it seems to me that the reason for allowing 30 days within which to request a review is to allow the Applicant the time necessary to review the records and to assess the completeness of the response. It may be that in addition to records to which access is simply refused, there may be missing records or incomplete records or records from which certain information has been edited or masked. In my opinion, the way the Act is structured suggests that the Applicant should be entitled to review all of the responsive materials before having to make a decision whether or not to request a review.

In the circumstances of this case, it is my opinion that the review period did not start to run until the Applicant had received the disc containing the responsive records which was September 6th. The review request was delivered exactly 30 days later and was, therefore, within the time frame contemplated by the Act.

2. Section 14

Out of over 500 pages of responsive records, the public body exercised their discretion to deny access to 9 pages. It is their position that the content of the records in question (which consist of a series of 4 e-mail "chains" between various parties) would compromise advice and recommendations on the internal decision making process between the Minister and his Deputy Minister. It is their position that section 14 was intended to protect the deliberative process between senior officials and ministers, their staff, as well as among officials themselves. At the time of the Request for Information, the public body judged that the disclosure of this advisory information would affect the public body's ability to carry on similar internal decision making processes in the future.

The public body's response does not specify which part of section 14(1) they rely on, but it appears from the context that they are basing their position on 14(1)(a) which gives the public body a discretion to refuse access to a record where the disclosure could reasonably be expected to reveal advice developed by or for a public body or a member of the Executive Council.

I have had the benefit of reviewing the records in question. There are, indeed, small parts of these e-mail exchanges which include "advice" or "recommendations". Most of them, however, are comprised largely of copies of e-mail correspondence from the Applicant to an individual or individuals within the public body. Insofar as that is the case, these records constitute the Applicant's own personal information and those parts of the records contain no information that might be considered "advice" developed by or for a public body.

The page identified by the public body as page "56A" consists of three "links" of an email chain of correspondence. The first (chronologically) is an e-mail from the Applicant to a Job Evaluation Officer within the public body and to the Deputy Minister. That part of the chain contains no "advice" and should be disclosed.

The second link in the chain consists of an exchange between the Job Evaluation Officer and the Deputy Minister. In the first paragraph of the e-mail, the employee cites section 14 of the *Access to Information and Protection of Privacy Act*. The second paragraph contains an inquiry on a policy question. The first paragraph contains nothing except a statement of fact. It cannot be considered "advice" and should be disclosed. Likewise, the second paragraph asks a question about policy, but contains no advice about that policy. I see no reason that this part of the e-mail chain should not be disclosed.

Finally the third part of this e-mail chain is a response to the inquiry made in the second paragraph of the second e-mail referred to above. It would be a stretch to call the response "advice" but an argument might be made that it is. It seems to me that too, should be disclosed.

The second page which has been withheld (57A) contains an e-mail communication from the Deputy Minister to the Job Evaluation Officer with advice as to how to deal with the Applicant's request. This e-mail does contain advice and was properly excluded from disclosure pursuant to section 14(1)(a).

The next record (64A) which the public body chose not to disclose is a four page e-mail chain. The first part of this chain (again, chronologically) consists of an e-mail from the Executive Assistant of the Minister Responsible for Persons with Disabilities to the Applicant. The content of this e-mail outlines the government policy on issues surrounding the employment of persons with disabilities. The Applicant then forwarded that e-mail to the Deputy Minister of Human Resources and others, including an MLA. In that e-mail, the Applicant argues his case for accommodation as a person with a

disability, relying on the information received from the Minister Responsible for Persons with Disabilities. The third and last part of this e-mail chain is also from the Applicant and addressed to the Deputy Minister of Human Resources as well as an MLA. It is noted to be by way of "follow up" to the previous e-mail. This e-mail was then forwarded, without comment, by the Deputy Minister to the Job Evaluation Officer.

There is nothing in this four page record that could in any way be said to be advice or recommendation made by or for a member of the public body or of the Executive Council. It is, in my opinion, not protected from disclosure under section 14 of the Act.

Finally, there is a three page e-mail chain (67A) which is the same e-mail chain contained in record 64A, but with the absence of the last link in the chain. Again, there is nothing in this record that could be considered "advice" or "recommendations" provided by or for a member of the public body or the Executive Council. It is not protected from disclosure under section 14(1)(a) of the Act.

SUMMARY AND RECOMMENDATION

Based on the above discussion it, is my recommendation that the public body should allow access to all of the pages which were withheld from the Applicant with the exception of Record 57A which does constitute advice or recommendations as contemplated in section 14(1)(a) of the *Access to Information and Protection of Privacy Act*.

Elaine Keenan Bengts
Information and Privacy Commissioner