

NORTHWEST TERRITORIES INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 09-081

File: 09-122-4

September 2, 2009

BACKGROUND

On February 12th, 2009, I received a letter from the Complainant in this matter asking me to investigate his allegations that his personal information had been improperly used and disclosed by a fellow worker (who will be referred to in this recommendation as "AB"). The Complainant is a professional employed by the Government of the Northwest Territories. AB was his supervisor. He alleges that AB gathered information about him during the course of their mutual employment, including information with respect to his work schedules, time off and other matters of a completely personal nature, and improperly disclosed that information to a Third Party professional governing body without his consent or the authorization of the public body. The Complainant provided me with a copy of a letter (which I will refer to in these recommendations as the "cover letter") which AB sent to the Third Party. In that letter appears the following statement:

I am [here he stated his position within the Government of the Northwest Territories] however I am submitting this complaint as a member of the public....

The cover letter went on to outline why AB was filing the complaint against the Complainant. The cover letter included certain personal information about the Complainant which would have been available to AB only as a result of his position within the Government of the Northwest Territories, in particular information which alleges previous investigations involving the Complainant. Presumably, AB attached a separate page or pages outlining his specific complaints against the Complainant in more detail.

The Complainant alleges that in addition to the personal information that was contained in the cover letter, AB enclosed other documents, including excerpts from the Complainant's "PeopleSoft" page showing the Complainant's employee number and the hours that the Complainant had worked during a specific time period. "PeopleSoft" is the software used by the Government of the Northwest Territories to manage and administer personnel. It shows work schedules, holidays available, holidays taken and other administrative information about each employee's employment status. The information in this system is available to the employee with an appropriate password and, I understand, to certain supervisors, as well as to those who keep employment records for the purpose of pay.

The Complainant indicated that he was unable to provide us with any further documentation to support his case because he had "signed a contract of confidentiality" with his professional governing body agreeing that he would not disclose the information he had received as a result of the investigation launched against him and he had been required to return the documents he had received in conjunction with their investigation to the professional governing body after he had been given the opportunity to review them.

During the course of my review of this matter, I attempted to obtain a copy of the records which AB had sent to the professional governing body relevant to this case so as to enable me to confirm the allegations of the Complainant and to determine whether other personal information obtained by AB in the course of his employment had been used to file the complaint against the Complainant. Unfortunately, the professional governing body refused to co-operate in my investigation. They refused even to release the Complainant from his confidentiality agreement to the extent necessary to provide my office with further documentation. Furthermore, I was unable to get AB's side of the story, as by the time I requested that input, AB was no longer employed with the Government of the Northwest Territories.

Unfortunately, the *Access to Information and Protection of Privacy Act* does not give the Information and Privacy Commissioner the power to subpoena Third Party witnesses in an investigation of a breach of privacy and without such power there was nothing that I could do to compel production of the records I required to do a thorough investigation of the Complainant's allegations or to require the necessary parties to provide their response to the allegations made. These recommendations are, therefore, based solely on the document which I do have, which is the cover letter. That having been said, I am fairly certain that the information contained in the cover letter was just the tip of the iceberg in terms of the personal information disclosed to the professional governing body by AB. I am further concerned that it may not only be the Complainant's information that was provided by AB to the professional governing body, but also the personal information and records of other individuals. There is no way, however, for me to confirm that without the co-operation of the professional governing body.

The public body which employed both the Complainant and AB provided me with an outline of what had transpired to the best of their understanding, but they were unable to address the allegations directly or explain why AB chose to insist that his complaint be treated as having been made by AB as a private citizen and not in his capacity as an employee of the Government of the NWT.

In its submissions, the public body first clarified what "PeopleSoft" was. They indicated that all Government of the Northwest Territories employees have access to their own personal employment information held on "PeopleSoft" through a self service module. In addition, direct supervisors have access to their employees' information in relation to leave and timekeeping.

The public body was also able to give me some additional information about the relationship between the Complainant and AB. They advised that their investigation provided them with the following details:

- a) AB lodged a complaint against the Complainant to the Complainant's professional governing body in the fall of 2008
- b) The cover letter submitted by AB with the complaint, as indicated above, includes allegations that there had been previous workplace investigations involving the Complainant
- c) AB made 27 specific allegations of professional misconduct against the Complainant in the complaint;
- d) AB denied that he provided the professional governing body with any information from the Complainant's "PeopleSoft" application
- e) AB confirmed that he had filed the complaint as a private citizen, not as an employee of the Government of the Northwest Territories
- f) AB did not discuss the subject matter of the complaint with his Deputy Minister as required by section 95 of the GNWT Code of Conduct;
- g) AB did not seek authorization to disclose information accessible to him through the performance of his services with the Government of the Northwest Territories.

The public body went on to advise that they did not intend to take any position with respect to this review. They pointed out, however, that the context in which the disclosure took place was in relation to a complaint to a professional body, designated by law to receive, investigate and determine complaints, pursuant to court order or subpoena and that in appropriate circumstances, the public body could disclose relevant information to professional bodies of this nature.

THE RELEVANT SECTIONS OF THE ACT

Section 2 of the Act contains a definition of “personal information” 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,
- (d) an identifying number, symbol or other particular assigned to the individual,.....
- (g) information about the individual's educational, financial, criminal or employment history....

Perhaps most applicable to this case is 47.1 which says:

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.

Section 48(n) allows a public body to disclose the personal information of an individual

(n) for the purpose of complying with a subpoena or warrant issued or an order made by a court, person or body that has the authority to compel the production of information or with a rule of court that relates to the production of information;

DISCUSSION

I am satisfied that the cover letter that AB sent to the Complainant's professional

governing body contained the Complainant's personal information. Statements made in the letter indicated that the Complainant had been involved in a number of previous workplace investigations. This is information about the Complainant's work history. Although I was unable to confirm it, I think it would be safe to assume that the documents which accompanied the cover letter most likely contained additional personal information about the Complainant and, perhaps, others as well. This latter possibility concerns me greatly. Unfortunately however, without the co-operation of the Complainant's professional governing body who received the complaint, or the co-operation and input of AB, I am not in a position to confirm this.

Focusing, then, only on the information contained in the cover letter, I am also satisfied that AB would not have had knowledge of the information which he included in that letter relating to the Complainant's work history but for his employment with the public body. Furthermore, there is no suggestion here that AB had authorization from either the Complainant or his employer to use or disclose the personal information of the Complainant in the cover letter to the professional governing body.

There is no allegation and no evidence that the public body itself disclosed any personal information nor would it appear that the disclosure was a result of any specific deficiency in the public body's systems or policies. It appears that what happened in this case was a result of AB making a conscious and deliberate choice to disregard all policies in place with respect to the use of information garnered as a result of his employment, and to disclose the information as he thought best. He made a very clear statement in his cover letter to the professional governing body that he was submitting the letter and the information as a private citizen and not as an employee of the public body. Section 48(n) cannot, therefore, apply to justify the use or disclosure.

Based on the information which I have, I conclude that AB disclosed personal information received by him in the performance of his services to the Government of the Northwest Territories without authorization and is therefore in breach of Section 47.1 of the Act.

RECOMMENDATIONS

Unfortunately, once information is disclosed, it is rarely possible to recover it or undo any harm that may already have been caused. In this particular case, it is possible and perhaps even likely, that the information disclosed by AB to the professional governing body would have eventually have been disclosed legally through the proper channels. Notwithstanding that possibility, there was no legal basis upon which AB was entitled to disclose the information in the manner or at the time that he did so. AB clearly breached section 47.1 of the *Access to Information and Protection of Privacy Act*. The breach appears to have been deliberate and, apparently, without concern for the Act or for government policies with respect to such matters. There were avenues open to AB which would have allowed him to register his concerns about the Complainant with the Complainant's professional governing body without breaching either the Act or government policies. He chose not to do so.

This kind of a breach is, in my opinion, egregious and needs to be addressed with a strong message. I therefore recommend that the Government of the Northwest Territories take steps to prosecute AB for breach of section 47.1 of the *Access to Information and Protection of Privacy Act*. If AB had continued to be an employee of the public body, I would be recommending, as well, disciplinary proceedings and dismissal.

I further recommend that steps be taken by the Department of Justice to consider amendments to the *Access to Information and Protection of Privacy Act*, to provide the Information and Privacy Commissioner with the power to compel production of records from Third Parties in a review of an alleged breach of privacy. In this case, I am truly concerned that AB not only disclosed the Complainant's employment history information, but that he may also have disclosed the sensitive personal information of other third party individuals without their knowledge or consent. I was unable to investigate that possibility because the Third Party professional governing body refused to co-operate in my investigation and I had no power under the Act to force that co-operation. The Act does give the Information and Privacy Commissioner the power to

summons witnesses and require any person to give evidence under oath in the context of a review of an Access to Information matter. That same power is not given to her for the purpose of doing an investigation of privacy breach. This lack of ability to obtain the information I needed to fully and completely investigate matters, together with the refusal of the Third Party to co-operate left me unable to determine the extent of the breach or whether the personal information of other third parties has been compromised. I therefore recommend changes to the legislation which would give the Information and Privacy Commissioner the powers necessary to compel the co-operation of not only government agencies in such circumstances, but any other person who might be able to shed light on the allegations made.

The courts do have authorization to subpoena documents and it may be that in the prosecution of AB, the professional governing body will be served with a subpoena and be required to disclose the rest of the information provided to them by AB. If this happens and if, as I suspect, it appears that the personal information of other third parties was improperly disclosed, I would recommend that those third parties be contacted and advised of the breach. Although nothing can be done to undo an unlawful disclosure of information, the third party individuals have the right to know what has happened and what steps have been taken to minimize any consequences which might result from the unlawful disclosure.

Elaine Keenan Bengts

Northwest Territories Information and Privacy Commissioner