

**NORTHWEST TERRITORIES  
INFORMATION AND PRIVACY COMMISSIONER**

Review Recommendation 09-084

File: 09-198-4

December 14, 2009

**BACKGROUND**

This case arises out of the circumstances outlined in my Recommendations 09-080 and 09-080.1, both issued earlier this year. Those recommendations involved a case in which the Applicant had been seeking a copy of “any minutes or other record” kept of a meeting between the Head of the public body, its Personnel Manager, and an unnamed fellow employee at which the subject of discussion was the Applicant’s attendance at the workplace while on an extended sick leave. The public body had conceded that such a meeting took place, but had indicated that no minutes or other record had been kept of the meeting. The Applicant was not satisfied with the response received and asked me to review the matter. On that review, I asked the public body to confirm, once again, whether or not there were any records matching the description of those sought by the Applicant. They assured me that they had done a thorough review and that there were no such records.

The responses to both the initial Request for Information from the Applicant and to my review in this case were prepared by the ATIPP Co-ordinator for the public body, who appears to have relied on answers he received from those in the public body who were close to the matter and who would have had knowledge of the circumstances surrounding the Applicant’s request.

My recommendations were made based on the advice received from the public body that they had done a thorough search and had been unable to find any records responsive to the request.

Several months later, the Applicant sent me a letter and attached to that letter was a copy of hand written notes which appeared, on their face, to be notes made by someone who was, in fact, in attendance at the meeting. He advised me that these notes had been produced by counsel for the public body in an arbitration hearing concerning his employment status and that they had been identified by counsel for the public body as being notes taken by the Personnel Manager at the meeting in question. The Applicant accused the public body, including the ATIPP Co-Ordinator, of acting disrespectfully, unprofessionally and unethically in successfully convincing me, as Information and Privacy Commissioner, that there was no record which was responsive to the Applicant's request when, in fact, there was. He further accused the public body of knowingly misleading me and allowing me to make my recommendations based on their false response to me.

#### THE RELEVANT SECTION OF THE ACT

Section 59(2) of the *Access to Information and Protection of Privacy Act* provides for sanctions against any person who willfully misleads or attempts to mislead the Information and Privacy Commissioner in the performance of her duties. Specifically, that section reads:

(2) Every person who willfully

(a) obstructs the Information and Privacy Commissioner or any other person in the exercise of the powers or performance of the duties or functions of the Information and Privacy Commissioner or other person under this Act,

(b) fails to comply with any lawful requirement of the Information and Privacy Commissioner or any other person under this Act, or

(c) makes any false statement to, or misleads or attempts to mislead, the Information and Privacy Commissioner or any other person in the exercise of the powers or performance of the duties or functions of the Information and Privacy Commissioner or other person under this Act,

is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding \$5,000.

## THE PUBLIC BODY'S EXPLANATION

The public body did not deny that they had not responded accurately to my office when they provided their response to my inquiries concerning the Applicant's Request for Information. In fact, they confirmed that there was a two page hand written record of the meeting in question which should have been identified as being responsive to the Applicant's request, but that it had not been discovered in their searches. The ATIPP Co-Ordinator assured me that his failure to discover the record was not willful as he was relying on others who provided him with the information which he used to respond to me.

The ATIPP Co-Ordinator outlined the steps he had taken to provide his response to my review. He indicated that when he received my letter asking for the public body's input on the initial Request for Review, he met with the Head of the public body to discuss the issues raised by the Applicant. He says that the Head of the public body, who was new in his position, searched his files to see if his predecessor had left any minutes of the meeting but that he could not locate any. The ATIPP Co-Ordinator also met with the Personnel Manager in her office to discuss the request and to determine from her if minutes had been taken of the meeting. He says he was advised by the Personnel Manager that there were no minutes or other official record of the meeting. The Head of the public body also spoke with the Personnel Manager and confirmed with her that there was no official record of the meeting. It was based on these affirmations that the ATIPP Co-Ordinator advised me that no such record existed.

When the ATIPP Co-Ordinator of the public body received my correspondence indicating that I had received a copy of hand written notes which appeared to be responsive to the Applicant's request for information, notwithstanding his previous assertion to the contrary, he says he was shocked. He immediately contacted the Head of the public body. Together they determined that the notes were, in fact, the hand written notes of the Personnel Manager, taken during or immediately after the meeting. By this time, however, that individual was no longer employed by the public body. An explanation was requested of her. She responded as follows:

as you will see below, the ATIPP request was for “minutes”. There were no minutes from the meeting. The document presented at the arbitration hearing was a copy of my personal notes, which do not constitute minutes. They were not reviewed by anyone and are not minutes. I was not asked to provide notes.

A previous e-mail appears to confirm that the only thing that the ATIPP Co-Ordinator had formally requested of the Personnel Manager in responding to the initial Request for Information was “minutes”. There is no reference in the written request to her for anything else.

When it became clear that there had been an error and that the public body had not disclosed a relevant record, the Head of the public body wrote to the Applicant acknowledging that there had been an error, that the record had not been intentionally withheld from him, and offering an apology.

## DISCUSSION

This case demonstrates the need for ATIPP Co-Ordinators to be thorough and aggressive in exercising their responsibilities under the Act.

Let me start by saying that in this case, based on the information provided to me, including e-mails and other records, I am satisfied that the ATIPP Co-Ordinator genuinely did not know about the record in question. Furthermore, I am satisfied that the current Head of the public body was similarly ignorant of the existence of the record, which was created before he came into the position. His predecessor was in attendance at the meeting, but he was not.

I am not as ready to accept that the Personnel Manager acted unintentionally. I know enough history about this office from the previous reviews done to know that

relationships in this office between the Applicant and his co-workers were dysfunctional to the point that the Applicant felt (whether justified or not) that his co-workers were actively working to have him dismissed from his employment. The Personnel Manager was certainly aware of the concerns on both sides of the matter and may, in fact, have been one of the people in direct conflict with the Applicant. In such circumstances, it is vital for the public body to be completely open and honest with someone like the Applicant, who is already suspicious of everyone's motives. For the Personnel Manager not to disclose that she had taken notes at or of the meeting when asked for minutes was, in my opinion, at the very least disingenuous, if not an outright and deliberate mis-statement. The spirit and intention of the *Access to Information and Protection of Privacy Act* is to encourage openness. To rely on semantics in not disclosing the existence of a record is not in compliance with that spirit. The public has the right to expect complete honesty from its public servants. To the general public, the notes kept by the Personnel Manager would be considered to be "minutes" of the meeting, even if they were not "official minutes". At the very least, they absolutely constitute a "record" of the meeting and they were, therefore, directly responsive to the Applicant's request for information.

That being said, I have to consider whether the evidence is sufficiently strong to establish that the Personnel Manager **willfully** misled me in my investigation by not revealing the existence of her notes from the meeting. The answer to that question, in this case, is no. There is no direct and unequivocal evidence that she was being deceitful in her answer to the ATIPP Co-Ordinator's inquiries. I cannot, therefore, recommend that the Personnel Manager be prosecuted pursuant to section 59 (2) of the Act in this instance.

Although I have found that both the ATIPP Co-Ordinator and the Head of the public body were not aware of the existence of the record in question when they responded to me, that does not let them entirely off the hook. All ATIPP Co-Ordinators should learn from this. It is not always enough simply to ask one question. Sometimes, you will have to ask the same question in several ways, or to search the records yourself. It is important to be thorough and to fully canvass the specifics of the records being sought.

It is not always sufficient to rely on the answers being provided by those who might have an interest in the outcome of the review. It is the obligation of the ATIPP Co-Ordinator to ensure that responses to both access requests and reviews are complete and accurate. I cannot help but feel that in this case, had the Co-Ordinator been a little more aggressive in his approach, or even if he had properly phrased his inquiries to include “minutes or other notes” of the meeting, the record would have been produced in the first instance. Finally, as the Head of the public body pointed out in his letter of apology to the Applicant, the ultimate responsibility rests with him to ensure that both the spirit and the letter of the law, in this case the *Access to Information and Protection of Privacy Act*, are enforced. As I have said many times in my Annual Reports to the Legislative Assembly, leadership is a top/down thing and the Head of a public body must lead by example. In this case, the Head was new in his position and he could not have known that notes of the meeting had been kept. It stands, however, as a lesson to all, that it is important to be thorough and look at all the possibilities when responding to an access request.

## RECOMMENDATIONS

In the circumstances, for the reasons set out above, I am not recommending at this point that the Personnel Manager or any other person be prosecuted pursuant to section 59(2) of the Act as I do not believe that the evidence is such that it can be shown that the Personnel Manager’s failure to disclose the existence of the notes she kept of the meeting was **willful**. Furthermore, I am satisfied that the failure of the ATIPP Co-Ordinator and the head of the public body to disclose the record was not willful, but was because they were genuinely not aware that it existed. This should not be taken as an excuse for not producing a record in the future. The circumstances of this case are unique and, although I do not think that there is enough evidence to support a finding that the Personnel Manager was willful in not providing the record in question, my intuition tells me that she was. The circumstances of this case as a whole bother me tremendously and I urge the public body to take steps to improve their performance in responding to requests. My sole recommendation arising out of this review, therefore, is that the public body provide all of its employees with ATIPP

training so to avoid future incidents in which members of the public receive the records to which they are entitled under the Act.

Elaine Keenan Bengts  
Northwest Territories Information and Privacy Commissioner