

# NORTHWEST TERRITORIES INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 10-085

File: 09-148-4  
January 5, 2010

## BACKGROUND

The Complainant in this case (who will be referred to in this report as “A.B.”) asked me to review a possible breach of his privacy and to provide my recommendations with respect to same. A.B. was at one time an employee with a public body. He worked for approximately 2 years in a casual position before being appointed to a permanent, full time position, on a probationary basis. Several months into his probationary term, a letter (hereinafter referred to as the “Letter”) was written to A.B. advising him that there were concerns with his performance and that A.B. was in jeopardy of being dismissed because of his unsatisfactory performance. The Letter, by all accounts, was hand delivered to A.B. and there was a notation on it that a copy of it was to go to his “Personnel File”. A.B.’s employment with the public body was, in fact, terminated for “unsuitability and misconduct” prior to the end of his probationary term.

In early 2009, A.B. was participating as a witness in an administrative tribunal hearing. While being cross examined by counsel for one of the parties, the Letter was presented to him and counsel attempted to use it to discredit him as a witness. A.B. objected to the Letter being admitted as evidence and was successful in having it declared inadmissible. Notwithstanding that, A.B. was upset that the Letter, which should never have been disclosed to anyone, had ended up in the hands of counsel for one of the parties involved in the tribunal hearing. As a result he filed a complaint and request for review to this office under the *Access to Information and Protection of Privacy Act*. A.B. maintains that the only person he shared a copy of the Letter with had been his lawyer at the time of his dismissal, more than five years previous to the hearing. He believed that the Letter had been obtained from his Personnel File, most likely by a

specific employee of the Government of the Northwest Territories (who will be referred to in this report as “C.D.” ) who was the daughter of one of the parties involved in the administrative tribunal hearing.

The public body was asked to provide me with their comment and an explanation with respect to A.B.’s allegation that the Letter had been improperly accessed, used and disclosed and, if the allegation proved true, to advise how that might have happened and who might be responsible.

In response, the public body hired an outside consultant to do an investigation and that consultant prepared a detailed and lengthy report. The consultant visited the regional office involved and conducted an on-site investigation, including reviewing A.B.’s Personnel File and a number of other files for employees whose employment had been terminated at about the same time as A.B. She was assisted by the Manager of the regional office of the Department of Human Resources. She obtained the names of all employees who were known to have had access to the room in which the records were kept during the relevant time period. She also obtained information about departmental practices for filing and distributing correspondence from the department for which A.B. had worked.

She did not, however, conduct any other interviews as she had been directed not to do so unless she unveiled credible evidence of wrongdoing.

The following is an outline of the highlights of the observations of the investigator about the file storage for the personnel files in the office:

- a) inactive human resources files for the region in question are stored in a file storage room in the basement of a building housing GNWT offices. Outside of the storage area is an office area with two desks. Both the door to the office and to the store room are outfitted with locks but there is no evidence that either door was kept closed or locked.

- b) the file storage room has four unlocked, unmarked filing cabinets containing inactive employee files. The room also has open shelving which contains casual employee files and boxes of files that have been packaged and marked for storage under the ARCs system. The investigator described the room as being “somewhat disorganized with boxes and files stacked on the floor”.
- c) no record is kept of who enters the file storage room or who accesses employee files for what purpose. There is nothing in or on any file that indicates who had custody of each file when it was active, when or who authorized the file to be moved to the storage room or whether anyone had accessed the file after arriving in the storage room.
- d) the personnel files are filed alphabetically by last name. Most personnel files actually consist of more than one file, held together with an elastic band or filed within one another. These “sub files” contain documents relating to pay and benefits, casual employment and other employment related correspondence.
- e) A.B.’s personnel file was located in the bottom drawer of a filing cabinet close to the door to the file storage room. There were no annotations on the file other than A.B.’s name. The file contains a sub-file relating to A.B.’s casual employment, GNWT identification cards and documents dealing with pay and benefits in the probationary position.
- f) it was apparent, when comparing A.B.’s file to other personnel files from the same time period that several documents, or perhaps an entire file of documents are missing from A.B.’s file. In particular, the Letter was not on the file, nor was any other correspondence relating to his employment (e.g. offer of employment, notice of termination, performance reviews).

In analyzing the information she obtained, the investigator observed that the missing

records suggests that the Letter might well have been improperly used and/or disclosed. However, she also observed that there were other factors which would suggest otherwise, specifically:

- a) the Letter produced at the hearing had no date stamps on it. However, a review of other inactive personnel files in the storage room from the same time period were all stamped with “received” and “entered” stamps.
- b) the copy of the Letter produced at the hearing appears to be a copy of the originally signed letter to A.B.. Other personnel files from the same time period contained only copies of letters clearly marked as “file” copies which had the signatory’s name stamped on the letter or a stamp indicating who the original was signed by. The investigator confirmed with the department that the normal procedure for dealing with correspondence during the time frame in question would not have included any copies of correspondence with signatures being placed on any file, either in the originating department or in the Personnel File held by Human Resources.
- c) the only copy of the Letter which could be found on any file was in the records of the originating department. That copy was clearly marked as a “file” copy and was not on letterhead. It did not contain a signature but only a stamp indicating who had signed the original. The copy of the Letter produced at the hearing was on letterhead and had a signature.

The conclusion reached by the investigator was as follows:

The fact that the Letter is missing from [A.B.’s] personnel file is evidence (through negative implication), that this Letter may have come from [A.B.’s] personnel file. Without a “personnel file” copy to compare to the Letter, without any identifying markings on the Letter and in light of the evidence provided by [the originating department], it is impossible to find,

even based on the balance of probabilities standard, however, that the Letter presented to [A.B. at the hearing] did come from [A.B.'s] personnel file.

In response to my question about who would have had access to A.B.'s personnel file, the investigator indicates that at least 21 GNWT employees had access to the file storage room, and therefore the file, between the time the Letter was written and the date of the hearing. One of those individuals was C.D., the individual who A.B. suggested was likely the person who improperly used or disclosed the Letter. However, the investigator concluded that as there is no record kept of who enters the file room, there was no way to confirm whether C.D., or any other person for that matter, had access to A.B.'s file. It was noted that C.D. had not had access to the file room for approximately four years immediately prior to the tribunal hearing at which a copy of the Letter was produced. The investigator concluded that if C.D. was responsible for the inappropriate use or disclosure of the Letter, she would have had to have taken it while she had ready access to the file. The investigator concluded that it was unlikely that C.D. would have taken the Letter on speculation and kept it for that long.

The investigator concluded as follows:

In this situation, although [A.B.] has made an allegation that his "rights were blatantly violated by the [GNWT]", I have not found any compelling evidence that would lead to this conclusion. While it is *possible* that the Letter came from [A.B.'s] personnel file, and [C.D.] did have access to this file until 2005, I did not have enough evidence to conclude that the source of the Letter was the personnel file, and found that there was no evidence that C.D. (or any other individuals) accessed the file for an improper purpose.

A.B. was provided with a copy of the investigator's report and was invited to respond, which he did. He indicated that he was not satisfied with the findings in the report and pointed out that there were many unanswered questions with respect to the situation.

He pointed out, for instance, that the report did not address my question with respect to what, if any, audit process are in place to record when an employee reviews a personnel file. Nor was there any discussion in the investigation report about how those policies and protocols are enforced and monitored. Nor did the investigator interview any of the individuals who might have had access to the files. In particular, C.D. was not interviewed and asked about whether she had access to the file.

A.B. points out that, although the investigator could not find any evidence to support his allegation that someone improperly accessed, used and disclosed his personal information, there is also no evidence which would exonerate either C.D. or any other GNWT employee and it could not be said for certain his file had not been compromised. Another question raised by A.B. was why C.D. would have had access to his personnel file when C.D.'s position was a finance position and not a personnel position.

A.B. is clearly still convinced that the Letter originated from some place within the Government of the Northwest Territories. Furthermore, he is concerned that there may be other parts of his personnel file still in circulation, particularly in light of the fact that a large portion of his file is missing from the file room where it should be.

He made a number of suggestions about how the matter should be addressed further:

- a) the Department of Human Resources should provide frequent seminars to their staff regarding the importance of the *Access to Information and Protection of Privacy Act*.
- b) the Department of Human Resources should develop strict policies to protect all information in personnel files.
- c) the Department of Human Resources should immediately implement a record for each individual's personnel file revealing who has reviewed the file (much like what is done for patient files in a medical office or hospital) so that when an issue such as this arises, it can be easily determined who

has had access to the file.

- d) The Department of Human Resources should immediately implement a record of who enters any storage room where personnel files are kept and the purpose of the entry.
- e) A.B. seeks an apology from the Department of Human Resources for the fact that his personal information was breached. He remains convinced that the only way that the Letter could have found its way into the hands of counsel for one of the parties in the tribunal hearing was because someone from the Government of the Northwest Territories improperly used and/or disclosed the Letter.
- f) A.B. suggests that a protocol should be put in place for future investigations of the kind done by the investigator in this case to ensure that it is thorough and that essential information is not overlooked. A.B. is particularly concerned because the investigator did not question any of the people who might have had access to his personnel file, even though such interviews were suggested by the Privacy Commissioner

## DISCUSSION

I would begin my comments by applauding the Department of Human Resources for taking this matter seriously enough to hire an independent investigator to undertake an investigation into A.B.'s allegations. I also appreciate that the investigator visited the offices and made sure that she looked not only at the Complainant's files, but also at other similar files for comparison purposes.

I accept without reservation the investigator's observations. I am not, however, bound by her conclusions. In fact, the investigator's focus in reaching her conclusions is somewhat different than mine.

Section 1 of the *Access to Information and Protection of Privacy Act* sets out the purposes of the legislation as follows:

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.

Access and privacy legislation in Canada has been said by the courts at all levels and in every jurisdiction in the country, to be quasi constitutional in nature. In other words, it is considered a fundamental cornerstone of democratic government and must be interpreted so as to reinforce the principals outlined.

The investigator in this case undertook her investigation with a view to determining if there were evidence that information from A.B.'s personnel file had been improperly used or disclosed. Her focus was on finding "evidence" of misconduct and she came to the conclusion that there was not sufficient evidence to support a finding along those lines. Based on what she found, that is an entirely accurate conclusion. There is no specific evidence that anyone improperly accessed A.B.'s personnel file, or used or disclosed any of it's contents.

My question, however, is why there is no evidence on which one can determine whether or not there was unauthorized access to, use or disclosure of the information in A.B.'s personnel file? The investigator made several observations which suggest the answer.

It had been a long time since the Letter was written (approximately 6 years). There had been a large number of people who had had official access to the records for the purposes of their employment responsibilities since the Letter had been written. There is no audit system of any kind which would allow us to track who had access to the files or the purpose of such access. There are no locks on the doors or other visible security for the files. The investigator looked at these circumstances and correctly concluded that, because of them, there was insufficient evidence to determine whether the Letter was improperly used and disclosed. I look at these circumstances and conclude that the public body did not comply with its responsibilities under the Act to ensure that A.B.'s personal information was not improperly used or disclosed. Although there is no evidence to point to if and how the Letter came to be in the possession of counsel for a third party, there is significant evidence that the public body has not met its obligations under the Act to protect the information in A.B.'s personnel file, or any of the other files in the file room in question. If the public body had appropriate practices and protocols in place, they could say with near certainty that none of their employees had inappropriately accessed, used or disclosed information from A.B.'s file. As it is, although there is no evidence that there was inappropriate access, use or disclosure, there is also no evidence that there was not.

There is a positive duty on public bodies to ensure that personal information is appropriately secure from unauthorized use and disclosure. Section 42 states as follows:

The head of a public body shall protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or disposal.

The Department of Human Resources maintains all personnel records. These can be sensitive records with sensitive personal information in them. The department should be aware of their responsibilities under the Act, perhaps more aware than many other departments who do not deal as much with personal information on a day to day basis.

I was quite surprised and somewhat concerned about what the investigator did find (or did not find, as the case may be). She found an unorganized file room without even the basic security of a locked door. She could find no one individual responsible for the security of the information in the personnel files. She found no policies or procedures for recording who had access to the files in the file room, or for what purpose. She found that A.B.'s personnel file was not complete and that there are certainly some records missing from the file, perhaps an entire subfile.

Once personal information is improperly disclosed, it cannot be "recovered". The damage is done. It is true that in this case there is no way to determine with certainty whether the Letter came from A.B.'s personnel file. The best we can say is that maybe it did, and maybe it didn't. In my opinion, however, the Department of Human Resources should be able to do better than that. There must be changes to the way in which records, active and inactive, are handled and stored by the public body so that the next time someone feels that there has been inappropriate access to, or use or disclosure of personal information, there will be evidence which will assist in determining exactly what happened or did not happen. Only in this way can the Government of the Northwest Territories be fully accountable to its employees. If they can't figure out what happened, there is something wrong with the system.

#### RECOMMENDATIONS;

I would, in the circumstances, make the following recommendations:

- a) Specifically with respect to the Complainant, I recommend that steps be taken immediately to locate and retrieve that part of A.B.'s personnel file that has been identified as being missing. The Complainant should be advised of what steps have been taken to find the file. If the file is not found, a notation should be placed on the existing file indicating that there appear to be missing records and the steps that have been taken to find them.

- b) If the missing records are recovered, I recommend that the public body complete the investigation started by the investigator in this case to attempt to determine whether A.B.'s personal information was improperly accessed, used or disclosed.
- c) I recommend that the Department of Human Resources take immediate steps to ensure the basic security of **all** personnel files, active and inactive, in all regions. Security should include, **as a minimum**, lockable and locked doors and/or filing cabinets.
- d) Personnel files should be available to employees to review on a "need to know" basis only. If not already in place, the Department should be developing a list of those employees (by position) who absolutely require access to personnel files and limit access to the files to those employees only, allowing access to others on a case by case basis only or only in the company of a designated employee. Those designated as having the right to access personnel records should be tasked with the additional formal obligation to ensure the security of those records as part of their job descriptions. One person in each region should be identified as having the ultimate responsibility for security of personnel records in the region as part of their job description and the Deputy Minister should specifically be given the ultimate responsibility for security of records for the Government of the Northwest Territories as a whole.
- e) There should be some way to determine who has had access to any file on any given day and for what purpose. Although it might take some time to devise a system like this, and some time to fully implement it, it can and should be done and as soon as possible. The Department could look to the Department of Health for assistance in establishing such a system.
- f) I agree with the Complainant that ALL employees of the Department of Human Resources should be required as a condition of their employment to undertake

training with respect to their obligations to protect the privacy of individuals employed by the Government of the Northwest Territories, and that there should be a requirement for regular refresher courses. The Department should make such training available on a regular basis, at least quarterly.

As a final comment, I note that the investigator hired to conduct the investigation into the allegations made by A.B. was specifically instructed not to interview C.D. or anyone else unless there was some credible evidence that there had been an inappropriate use or disclosure of A.B.'s personal information. I find this direction difficult to understand. Since the Complainant specifically named C.D. as the person who may have improperly used or disclosed the information, I think that a complete investigation would require that C.D. be interviewed if possible. Again I point out that the purpose of doing an investigation of this kind is probably more about determining how to address security issues so that future problems can be avoided than about assigning blame for something that can't be undone. It seems to me that C.D. may well have been able to shed some light on the situation and that the investigation would have been more complete and provided a better picture if she (and others) had been interviewed.

Elaine Keenan Bengts  
Northwest Territories Information and Privacy Commissioner