

NORTHWEST TERRITORIES INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 10-086

File: 09-113-4

January 20, 2010

BACKGROUND

On August 12th, 2009, I received a request from the Applicant in this matter to review the response he had received to a request made by him to the Department of Human Resources. The request was for information about “the amount of bonus that was paid out to all senior government employees”. In addition, the Applicant asked for “the amount that was paid out to senior government employees in pay hikes and bonus”. He asked that these amounts be ‘broken down’.

In response to the request for information, the public body provided a document which outlined the “rolled up” information about how much was paid in total to Deputy Ministers as a group in each of the previous five (5) years. It also provided similar information with respect to merit increases. The information was prepared in the form of a chart but no specific information was provided about specific individuals.

The Applicant asked me to review the department’s failure to provide more specific information about monies paid to specific individuals.

DISCUSSION

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.

One of the most important aspects of open and accountable government is the question of how the taxpayer's money is spent. Because a significant portion of government expenditure is dedicated to its employees, it seems to me that the public has a right to know how the highest level bureaucrats are paid. In fact, many jurisdictions in Canada have moved toward a proactive disclosure process where the amounts paid to every employee who makes more than a stated base amount is publicly posted automatically.

In support of its decision not to disclose any more specific information, the public body has referred me to section 2(g) of the Act and, in particular, the definition of "personal information" which includes information about an identifiable individual, including information about the individual's educational, financial, criminal or employment history. If I understand their submissions correctly, their justification for refusing to disclose specific information about specific individuals is that this would reveal their financial or employment history, though this is not well set out as an argument.

A careful reading of the Act, however, makes it clear that the fact that information is the personal information about an individual does not, in and of itself, protect it from disclosure. In order for the public body to refuse access to personal information, section 23 requires that the public body reach the conclusion that such a disclosure would be an unreasonable invasion of the personal privacy of the individual.

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.

The public body has not referred me to section 23. This section sets out in some detail when the disclosure of information will and will not be presumed to be an unreasonable invasion of privacy. They have, instead, simply referred me to the definition of "personal information". That is not enough. In order to be protected from disclosure, the public body must also show that to disclose it would amount to an unreasonable invasion of the individual's privacy.

Section 23(2) sets out when the disclosure of personal information is **presumed** to be an unreasonable invasion of a person's privacy. Included in that is section 23(2)(g) as follows:

- (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

Also relevant, however, is section 23(4) which states that the disclosure of personal information will **not** be considered to be an unreasonable invasion of a person's privacy in certain circumstances as follows:

- (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where
 - (e) the personal information relates to the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council;

In this instance, it appears that the public body is taking the position that the disclosure of merit increases and bonuses for specific individuals is prohibited pursuant to section 23(3) (unreasonable invasion of privacy). They have not provided me with any background or argument as to how they came to this conclusion. I need more to be able to come to that conclusion.

It is clear that under the Act it is contemplated that some personal information can be disclosed. The intent of the Act is to help to make government more accountable to the general public. For that reason, section 23(4) contemplates that the disclosure of "salary ranges" and "discretionary benefits" would not constitute an unreasonable invasion of privacy. As noted above, most Canadian jurisdictions have begun to provide routine disclosure of this kind of information for all employees who make more than a certain amount of money each year. That information is posted and available publicly. The Government of the Northwest Territories, however, has been jealous of that information, particularly when it comes to the amount of bonuses paid to senior employees.

In this case, the Applicant was clearly not interested in knowing how much money the government paid, on an aggregate basis, by way of merit increases and bonuses to its senior employees. He was interested in receiving far more specific information. What the public body provided, however, was aggregate. The information provided was a short chart, listing the years 2004 through 2008 and providing the following information for each of those years:

- Salaries as of March 31
- Across the Board Increases
- Merit Increases
- Bonus payments

For each category, there was one number provided, which appears to reflect the aggregate number for the entire government for all Deputy Ministers.

Firstly, with respect to salaries, I agree that to disclose the specific salary paid to a specific Deputy Minister would most likely constitute an unreasonable invasion of the privacy of that individual and would, therefore, be a contravention of section 23(2) as it is currently written. However, that being said, I think that the public body could have been far more forthcoming and helpful in their response. Section 23(4) allows the disclosure of salary “ranges” for individuals. It would, therefore, have been appropriate, and would have come closer to complying with the Applicant’s request, to list each Deputy Minister (by position) and provide the “range” of his or her income. I would suggest that a “range” of between \$5,000.00 and \$7,500.00 would be appropriate.

Similarly, with respect to general increases and merit increases. These could be provided, again within a range. For these, however, the range would likely be smaller (for example, within a range of \$1,000.00).

With respect to bonus payments, I have reviewed the document provided to me by the public body entitled “Determination of Performance Pay for Executive Managers”, which appears to be the public body’s policy paper for bonus payments to Deputy Ministers. That record provides that an Executive Manager **may** earn an annual performance bonus. It goes on to say that the performance bonus **may** take the form of an incremental increase in accordance with certain stated parameters, or it could be paid as a lump sum or as a combination of the two. It talks about the kinds of things that a performance bonus would be based on, in a very general way (contributions to achievement of corporate results, contribution to achievement of ministry results, demonstration of sound management practices, and other contributions of an outstanding nature.)

The public body takes the position that these bonuses are not “discretionary benefits” because

a discretionary benefit would be considered “optional” whereas employees who meet the performance measures noted above are entitled to their performance bonus

I disagree with this assessment. The policy uses the word “may” in discussing the payment of performance bonuses, not “shall” or “will”. There is nothing in the document at all that makes the payment of any bonus mandatory, even if all of the performance measures are met. Furthermore, the performance measures listed are so vague and broad that they don’t really provide any measures at all. The policy does provide a process for evaluation of an Executive Manager’s performance, including the establishment of overall objectives and developing measurable performance measures. But again, nowhere does it say that if objectives are met a bonus will be paid or, if paid, how the specific amount will be determined (other than to say it will be in a specified percentage range of the individual’s salary). In my opinion, based on these factors, whether or not a bonus is paid is a discretionary matter, as is the specific amount paid by way of bonus.

RECOMMENDATIONS;

I would make the following recommendations:

- a) That the Applicant be provided with a list of Deputy Ministers (by position) for each of the years in question, along with a reasonable range of pay for that position, as well as a range of salary increases for that position for the year, and a range for the amount of merit increases in the year for that position.
- b) That the Applicant be provided with the specific bonus paid to each Deputy Minister (by position) for each year in question

- c) That the Legislative Assembly consider an amendment to the *Access to Information and Protection of Privacy Act* so as to provide for pro-active disclosure of the salaries and bonuses paid to employees earning more than \$80,000.00 per annum

Elaine Keenan Bengts
Northwest Territories Information and Privacy Commissioner