

**NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER**

Review Recommendation 16-149

File: 16-125-4

August 22, 2016

BACKGROUND

This matter arises out of a complaint received from an employee of the Department of Education, Culture and Employment as a result of an incident in the workplace which resulted in a breach of the employee's privacy.

WHAT HAPPENED?

The Complainant says he was at work one day and started to experience a variety of symptoms which he associated with the likelihood of an oncoming migraine headache. He did not feel ill enough to leave work, but because he had fainted as a result of a migraine with similar symptoms in the past, felt it expedient to give the individual in the office responsible for first aid a "heads up" in case it happened again. Since he didn't know who that person was, he asked a manager. Rather than direct him to the appropriate person in the office, the manager called a meeting of the two first aid certified people, as well as the Complainant and the Complainant's immediate supervisor. The two first aiders listened to and acknowledged the Complainant's situation. The Complainant's immediate supervisor was judgmental and suggested that the Complainant should not be driving. The manager decided that the situation was a "health and safety" issue and insisted on calling a staff meeting for all employees in the office. At that quickly convened staff meeting, the Complainant says that the manager put him on the spot, saying to the gathering that the Complainant had "something to share with you". In the Complainant's words:

I was flabbergasted. What would I say? They are not health care providers! They won't understand! Things can only go wrong! I felt so trapped, humiliated and disrespected. I was cornered.

He says he explained, as briefly as he could, that he had simply wanted the first aiders in the office to know that he suffered from migraines and that he had, in the past, fainted as a result of the migraines. People in the office were invited to ask the Complainant questions about his ailment and he felt compelled to answer and “felt pressured to go in deeper details”. In order to address the questions asked, the Complainant says he tried to explain to his co-workers that migraines can take many forms, not just headaches, and sometimes people can faint. He told them that neurologically, it was “a bit like a seizure, but not quite”. This appeared to confuse at least some of his co-workers who apparently concluded that he was epileptic. One of them thanked him for “coming out”, even though he was providing this information under duress and did not feel that it was the business of any of his co-workers except those responsible for first aid in the office.

The Complainant advises that, as a result of this meeting, management decided they “needed a plan”. The Complainant indicated that he simply wanted to make sure that the first aiders in the office knew what to do if he (or anyone else in the office) fainted. He suggested that for any person who fainted, the individual should be laid on their side and someone should stay with them until the ambulance arrived. This plan, however, was not sufficient for management who decided that the Complainant had to report his trips to the washroom to another co-worker, who was tasked with going to look for him if he took more than five minutes. For the rest of the day, the Complainant says that he had to deal with strange questions and judgments such as “is this related to your sugar level” or “sharing your ‘secret’ with us must have lifted a weight off your shoulders”. He was humiliated.

The next day, he visited a physician outside of work hours, who provided him with a note that suggested that he be off work for an indefinite time period for a medical reason that was not disclosed. The Complainant notified his manager and his supervisor that he would be absent from work. Later the same day, he received a written request for a doctor to complete a medical prognosis. In the letter, the manager

suggested that the Complainant was epileptic, referring to the Complainant's "epileptic seizures" which the manager described as "episodic and brief". The letter noted that "We have confirmed that all staff have the telephone number to the ambulance on their desk and will ensure that you are not alone while at work". The letter asked the Complainant to ask his physician to answer a number of questions including:

Is there anything further the employer need (sic) to do to ensure the safety of [the Complainant] during an epileptic seizure?

and

Are there any triggers in the workplace that may cause [the Complainant] to have epileptic seizures?

and

When should the employer seek follow up medical information?

THE PUBLIC BODY'S SUBMISSIONS

The Department was asked to investigate these allegations and provide my office with their side of the story and any explanation that they might have for what appeared to be an egregious breach of the Complainant's privacy. The initial letter was dated February 22nd, 2016 and asked the department to conduct a thorough review of the situation and provide an explanation from the manager and the supervisor involved. I asked for the response by March 22nd. On March 17th, I received a telephone call from the Deputy Minister at the time who advised that they were doing an internal investigation through their Human Resources department and they wanted to be able to use that investigation report as their submissions to my office but that the report would not be completed by March 22nd. I agreed that they could use that report as their submissions, provided that it was completed within a reasonable period of time. On March 24th, the Deputy Minister confirmed our discussion in a letter in which he made the following statement:

A report on these matters specifically will be provided to you upon completion of the current investigation taking place.

On May 5th, I wrote to the Department once again asking for the Department's submissions, pointing out that the *Access to Information and Protection of Privacy Act* required that I complete my report and recommendations within six months. I received no answer.

On June 10th, I wrote to the Department again asking for their input and indicating that if I did not receive their submissions, I would proceed based only on the information provided by the Complainant.

On June 15th, I spoke to a senior employee with the Department to follow up, but was unable at that time to connect with the new Deputy Minister. I was advised that there would be follow-up and someone would get back to me.

On June 17th, I received a letter from the new Deputy Minister indicating as follows:

I wanted to inform you that our separate investigation in collaboration with the Department of Health and Social Services in relation to the aforementioned complainant is still taking place. Once the investigation is complete, we will provide you with a report that includes the information you have requested in relation to the privacy complaint you received.

On June 27th, I wrote again to the Department requesting their submissions by July 3rd. I reiterated the urgency of the department providing me with their submissions. On July 6th, I received a telephone call from the Department indicating that there should be something to me on the matter by the following day.

On July 8th, I received a letter from the Deputy Minister indicating that their investigation would not be completed until July 28th. The letter noted:

I can assure you that once the investigation is complete, we will provide you with a report that includes the information you have requested in relation to the privacy complaint you received.

On August 19th, having still not received anything further from the Department, I wrote to them again advising them that I had no option but to proceed to complete my report and provide my recommendations without their input. Within minutes of having emailed that letter to the Department, I received a letter dated August 17th (two days earlier) in which the Department indicated that they had completed their investigation and that the parties had been informed separately as to the outcome. The letter further indicated that it was reviewing its processes with respect to how it handles similar situations in the future to ensure awareness and compliance with privacy legislation. No further submissions were included.

DISCUSSION

I begin my discussion with the Department's response to this review. It took the Department just two days short of six months to provide me with its "input", which essentially amounted to a letter saying that the Department was going to review its processes. There was no review of the facts. There was no indication as to whether or not the public body agreed with the Complainant's recollection of what happened. There was no reference to policies and procedures in place. There was no reference to what health and safety issue the Complainant's situation created for the workplace. There was no indication as to the outcome of the internal investigation or any recommendations made by the investigator. There was no statement about what, in particular, they were going to change about their procedures, or whether they considered it appropriate in any way, at any time, to share an employee's personal health information with co-workers against the employee's wishes. Nothing. And this after nearly six months of stringing my office along and providing assurances that they would provide their submissions when their internal report was completed.

Section 49.1 of the *Access to Information and Protection of Privacy Act* gives any individual the right to request my office to review a privacy issue:

An individual may request the Information and Privacy Commissioner to review whether a public body has collected, used or disclosed the individual's personal information in contravention of this Part.

Section 49.2 gives the Information and Privacy Commissioner the authority to conduct a review of such a complaint if she is of the opinion that a review is warranted. I obviously determined that a review was warranted in this case. In fact, I made it clear to the department that if the Complainant's statements were true, there had been a very serious breach of his privacy.

Section 59(2) of the *Access to Information and Protection of Privacy Act* provides that:

Every person who wilfully

- (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.

A review by the Information and Privacy Commissioner is not an “either/or” proposition. The fact that an internal investigation was done and that the Department is satisfied, from its perspective, that the matter has been dealt with does not negate the necessity to comply with the requests of the Information and Privacy Commissioner or allow the Department to ignore the process provided for under the Act. Nor does it absolve the public body from dealing with the privacy complaint under the Act. My review is a separate process with a different focus than the internal investigation would have had. The department’s final letter of August 17th, coming on the heels of six months of assurances that they would respond to the allegations made by the Complainant, is disrespectful of the Act and the Office of the Information and Privacy Commissioner, not to mention the Complainant who has been waiting for his privacy complaint to be addressed.

The Supreme Court of Canada has held on a number of occasions that access and privacy legislation is quasi-constitutional in nature and it therefore demands to be treated with due respect. The Department in this case treated the review callously and in the end simply did not participate. But for the fact that there was a change in Deputy Ministers half way through the process, making it difficult to apportion blame, I would be recommending that the Department of Justice consider prosecuting this refusal to participate and for obstruction pursuant to section 59. The lack of departmental response to the very serious issues raised is simply not acceptable.

My first **recommendation**, therefore, is that the Department offer an apology to the Complainant in this matter for creating serious unnecessary delay and for failing to address his privacy complaint in accordance with his rights under the *Access to Information and Protection of Privacy Act*.

My second **recommendation** is that, within three months, the Deputy Minister and her senior staff be required to participate in formal training with respect to the department’s responsibilities under the *Access to Information and Protection of Privacy Act* and report back to this office once that training has been completed.

Dealing with the Complaint itself, there was clearly a serious breach of the Complainant's privacy. Part 2 of the *Access to Information and Protection of Privacy Act* provides for when personal information about an individual, including an employee, can be collected, used and disclosed. These are not guidelines or suggestions. These are legislated provisions. Among the many sections of the Act which are applicable to this situation are the following:

- 42. 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.

- 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.

There was no reason for the entire staff to be told that the Complainant suffered from serious migraines which sometimes caused him to faint. Much less was there a need to make such a big deal about it that at least some of those staffers jumped to the conclusion that the Complainant suffered from epilepsy. Even if the Complainant did suffer from epilepsy, this is not something the entire staff needs to know.

I accept that the Complainant's version of events is accurate, as I have nothing from the public body that suggests that his recollection is not true. What the Complainant experienced was completely and without question a serious breach of his privacy. An employee's medical condition is not a matter for general office sharing unless the employee chooses, of his own free will, to share. Being put on the spot in a meeting of all staff clearly made the Complainant feel extremely uncomfortable. This was a public humiliation for no purpose whatsoever. The Complainant simply wanted to give someone with responsibility for first aid within the office a precautionary heads up, which was a prudent thing to do in the circumstances. But that is all he wanted to do.

Instead, it turned into a situation in which the Complainant was forced to reveal personal health information to all of his co-workers, at least some of whom, in turn, jumped to conclusions about the nature of his condition which was completely exaggerated and erroneous. I can only imagine how awkward this must have been, not only for the Complainant, but also for his co-workers, who were compelled to receive information about the Complainant that they did not need in order to perform their duties and most likely did not really want to know.

That the manager and supervisor did not think that this was inappropriate is, frankly, appalling and concerning.

Once done, a privacy breach cannot be undone. In this case, however, a small portion of the damage might be corrected. The obvious first **recommendation** in this case is that the supervisor and the manager provide the Complainant with an apology for putting him in the situation of having to disclose to his co-workers, against his will, information about his personal health situation.

Secondly, and subject to the consent of the Complainant, I **recommend** that the manager and supervisor have another meeting of the staff and

1. apologize to them for putting them in the awkward position of having to receive the personal health information of a co-worker which they had no need to know;
2. clarify that the Complainant does **not** suffer from epilepsy, but from migraines which sometimes cause him to faint.

I make this recommendation subject to the Complainant's consent because I do not want to exacerbate an already difficult and humiliating situation for him.

Thirdly, I **recommend** that the manager and supervisor in this situation be required to immediately undertake privacy training to assist them in understanding the provisions of

the Act insofar as they relate to the collection, use and disclosure of any personal information which they receive as a result of their employment, whether from a member of the public or from an employee.

Fourthly, I **recommend** that the department establish clear written policies for managers and supervisors with respect to the use and disclosure of personal health information within the workplace which recognize the provisions of the *Access to Information and Protection of Privacy Act* and clarify that, except in very unusual circumstances, the personal health of any one employee is not a “health and safety” issue that requires the information to be shared with all staff. I **recommend** that these policies be shared with my office for input and comment before they are finalized.

Finally, I **recommend** that the Minister reinforce to all managers and supervisors that the *Access to Information and Protection of Privacy Act* is a quasi-constitutional piece of legislation which requires that all employees have a general understanding of their obligations under the Act and that these obligations must be respected - that they cannot hide behind an “internal investigation” in the face of an investigation being undertaken by the Office of the Information and Privacy Commissioner and that they must fully co-operate with and provide full explanations to the Information and Privacy Commissioner in the course of an investigation by her office.

Elaine Keenan Bengts

Information and Privacy Commissioner