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Nunavut Information and Privacy Commissioner
Nunavunmi Tuhaqtauyukhaliqinirmun Kanngunaqtuliqinirmun Kamisina
Commissaire à l'information et à la protection de la vie privée du Nunavut

Commissioner's Final Report

Report Number:	22-229-RR
CanLII Citation:	Department of Education (Re), 2022 NUIPC 20
NUIPC File Number:	22-126
Date:	August 15, 2022

Summary

[1] The Complainant works in a school and is a union member. They filed a harassment complaint against their supervisors. Their supervisors called the Complainant to a meeting, and indicated they were aware of the harassment complaint. The Complainant filed a privacy breach complaint. The Commissioner finds that a privacy breach review is not warranted in the circumstances. The question of who was told about the harassment complaint, and what exactly they were told and when, is better handled through the grievance process under the collective agreement.

Nature of Review and Jurisdiction

[2] This is a preliminary decision on a privacy breach review involving the Department of Education. The request for review was filed under section 49.1(1) of the *Access to Information and Protection of Privacy Act* (ATIPPA). I am conducting my review under section 49.2(1).

[3] The Commissioner has jurisdiction over the Department of Education: ATIPPA, s 2, definition of “public body”. For purposes of the ATIPPA, a school and its operations are deemed to be part of the Department of Education: *Education Act*, S.Nu. 2008, c. 15, section 198.

Issues

[4] The only issue in this review is whether a review of the alleged privacy breach is “warranted in the circumstances”.

Facts

[5] Because this is a preliminary decision, most of the factual background was obtained from the Complainant, who I interviewed and who also provided a copy of e-mail exchanges with officials from the Department of Education. I have also corresponded with the deputy minister of Education. With the Complainant’s permission, I have also corresponded with the Complainant’s union representative.

[6] The Complainant works in a school in Nunavut. The Complainant is a member of the Nunavut Employees Union (NEU). The community, school, and job title of the Complainant are not relevant to this decision, and are omitted because they would tend to identify the Complainant.

[7] The Complainant filed a complaint under Policy 1010 of the Government of Nunavut Human Resources Manual. That is the policy on “Respectful and Harassment Free Workplace”. In this decision, I will refer to this complaint as “the 1010 [ten-ten] complaint”. A 1010 complaint is, essentially, a complaint of workplace harassment.

[8] In accordance with the 1010 policy, the Complainant filed the 1010 complaint with the deputy minister of the Department of Education. (There was some suggestion from the department that the Complainant filed the 1010 complaint with the district school organization, but the Complainant is adamant that they filed the complaint with the deputy minister.) The complaint was against the Complainant’s supervisors.

[9] A few weeks later, the Complainant was called to a meeting with the supervisors. During the meeting, no specific reference was made to the 1010 complaint, but the Complainant says it was clear that the supervisors were aware that the Complainant had filed a 1010 complaint against them.

[10] Soon afterwards, the Complainant filed a privacy breach complaint with this office. The basis of the complaint is that someone must have told the supervisors about the 1010 complaint. That, says the Complainant, was a breach of their privacy.

Law

[11] Section 49.2(1) of the ATIPPA sets the threshold for a privacy breach review by this office:

49.2. (1) The Information and Privacy Commissioner may conduct a review under section 49.1 if he or she is of the opinion that a review is warranted in the circumstances.

[12] This provision was added to the ATIPPA in 2012. There is similar wording in the ATIPPA of the Northwest Territories. In neither jurisdiction, however, has there been any analysis of what that threshold means.

[13] In my view, section 49.2(1) is intended to give the Commissioner discretion as to which privacy breach cases to review. The analogous provision in Part 1 of the ATIPPA, section 31(1), does not give the Commissioner any similar discretion with respect to access reviews.

[14] Further, the “warranted in the circumstances” standard must mean something different, and broader, than the situations enumerated in section 49.2(2). Otherwise section 49.2(1) would be redundant. In other words, the Commissioner may decide that a review is not “warranted in the circumstances” even if the complaint is not covered by section 49.2.(2).

[15] The Legislative Assembly has left the discretion in section 49.2(1) fairly open-ended. It is not useful to try to define precisely the boundaries of that discretion. I would suggest, however, that relevant factors might include the nature of the alleged privacy breach, whether it is systemic or specific, whether the subject-matter of the complaint is already being considered or has been addressed in an earlier review, and whether there is a more appropriate forum for investigating or adjudicating the complaint.

Analysis

[16] The Complainant was surprised and distressed to be called to a meeting by the very people against whom he had filed the harassment complaint. Their actions suggested they knew about the 1010 complaint. He thought the 1010 complaint was supposed to be confidential. Somebody must have told them.

[17] For the reasons that follow, I have concluded that a privacy breach review is not “warranted in the circumstances”. But I want to stress that it is not because I do not believe the Complainant. I do. My decision not to move forward with this complaint is based primarily on my finding that there is a more appropriate forum for the issue to be aired and resolved.

[18] I have written elsewhere that the ATIPPA in Nunavut has become a proxy battleground for labour relations issues within the GN: *Department of Human Resources (Re)*, 2021 NUIPC 19 (CanLII) at paragraph 31; see also *Department of Economic Development and Transportation (Re)*, 2021 NUIPC 24(CanLII) and *Department of Human Resources (Re)*, 2022 NUIPC 12 (CanLII).

[19] GN employees are entitled to use the ATIPPA if they want to. But the ATIPPA is sometimes a blunt instrument for dealing with the nuances of the workplace: *Department of Executive and Intergovernmental Affairs (Re)*, 2021 NUIPC 13 (CanLII).

[20] ATIPP files in the HR context are especially difficult when they involve internal workplace issues: *Department of Health (Re)*, 2022 NUIPC 8 (CanLII) at paragraph 19; *Department of Executive and Intergovernmental Affairs (Re)*, 2021 NUIPC 13 (CanLII) at paragraphs 21 to 26; *Department of Human Resources (Re)*, 2021 NUIPC 19 (CanLII) at paragraph 23.

[21] In this case, the factual question of who within the Department of Education or the district school organization told the supervisors about the 1010 complaint, and what exactly the supervisors were told, and when, is a tiny piece of a much broader, longstanding workplace issue between the Complainant and school management.

[22] Complaints under the 1010 Policy are always complex. As I wrote in *Executive and Intergovernmental Affairs (Re)*, 2021 NUIPC 13 (CanLII) at paragraph 23:

Because personal harassment is about “environment”, the investigation can cover a wide range of incidents, a long period of time, and many witnesses. It can cover everything from large group meetings to a fleeting personal interaction. It can cover what is said and unsaid, written and unwritten, committed and omitted. It can cover different treatment of similarly situated employees, or similar treatment of differently situated employees. It can delve into personalities and deeply personal circumstances and whether individual reactions are reasonable in the circumstances.

[23] It is not productive, in my view, for this office to inset itself into complex labour relations scenarios, just because a sliver of the situation may fall under Part 2 of the ATIPPA. The supervisors would eventually have had to learn of the 1010 complaint, in order to be able to respond to it; so the question in this case is not whether they should have been told about it, but rather the fine details of when they should have been told, and what, and by whom.

[24] There is a much better forum for this issue to be aired and resolved, and that is the grievance procedure under the collective agreement between the GN and the NEU. The Complainant has in fact filed a grievance that is broad enough to cover the subject-matter of the privacy breach complaint.

A few final comments

[25] Although I will not be pursuing a privacy breach review, it goes without saying that the proper handling of 1010 complaints is an important issue.

[26] Where, as here, it appears that knowledge of the 1010 complaint was relayed through several people before getting to the Complainant’s supervisors, it is important that each person in the chain be aware of the sensitivity of the process. There is a reason why the 1010 policy says that complaints should be made to the deputy minister, and it is precisely to avoid having the complaint pass through multiple hands. For every new person added to the chain, there is a risk of inappropriate disclosure or premature disclosure.

Conclusion

[27] A privacy breach review is not warranted in the circumstances. The substance of the privacy breach complaint is better handled within the grievance process under the collective agreement.

Recommendations

[28] Given my conclusion, I make no recommendation to the Department of Education.

Graham Steele

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