IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Avoledo* v. *The Commissioner of the Yukon Territory and Government of Yukon as represented by the Public Service Commission,* 2003 YKSC 10

Date: 20030130
Docket: 02-AP0001
Registry: Whitehorse

Between:

HILLARY AVOLEDO

Appellant

And:

THE COMMISSIONER OF THE YUKON TERRITORY
AND
GOVERNMENT OF YUKON AS REPRESENTED BY THE PUBLIC SERVICE COMMISSION

Respondents

Appearances:
Mr. John Phelps — Counsel for the Appellant
Ms. Penelope Gawn — Counsel for the Respondents

Before: Mr. Justice Veale

REASONS FOR JUDGMENT

INTRODUCTION

[1] Ms. Avoledo seeks the disclosure of a report, entitled *Workplace Review*, involving her work unit under the *Access to Information and Protection of Privacy Act*, SY 1995, c. 1 (ATIPP Act). The report was prepared at the request of her Deputy Minister pursuant to the Workplace Harassment Policy of the Government of Yukon. The

Information and Privacy Commissioner (IPC) decided that the report should be disclosed to the parties subject to the deletion of certain personal information that was considered to be an unreasonable invasion of a third party's personal privacy.

[2] The Public Service Commissioner (PSC) agrees with the IPC in part. The PSC has added a small number of references for deletion that it considers to be personal information. In addition, the PSC requires that Ms. Avoledo sign a confidentiality agreement prohibiting her from sharing or discussing the contents of the report with anyone.

ISSUES

[3] There are three issues to be considered:

1. **Was the report prepared under the Workplace Harassment Policy?**
2. **Are the deletions of personal information authorized by section 19 or section 25 of the ATIPP Act?**
3. **Does the ATIPP Act authorize the PSC to require a confidentiality agreement prohibiting Ms. Avoledo from sharing or discussing the report with anyone?**

THE FACTS

[4] I find the following facts:

a) Ms. Avoledo was employed by the federal government from 1974 to 1997 when her unit was transferred to the Government of Yukon.

b) On March 10, 1998, the Director of Health Programs informed the employees in the unit by memorandum that he had requested the Workplace Harassment Prevention Coordinator to conduct an investigation under the Workplace Harassment Policy. The Director stated in the memorandum that:

> The conduct of a workplace harassment investigation is confidential, and it is my clear expectation that no employee will discuss his or her information … with fellow employees.

c) There was never a complaint under the Workplace Harassment Policy. The investigation did not involve sexual harassment, but rather administrative and supervisory issues. The Deputy Minister requested the investigation based on his suspicion that "there may be possible occurrences of workplace harassment."

d) The memorandum also attached a copy of Policy 3.47: Workplace Harassment (Workplace Harassment Policy), which became effective on October 27, 1994. It contains the following statement on confidentiality:

> **2.7 Confidentiality**
>
> All complaints under this policy both formal and informal and any information and materials related to the complaints will be treated as confidential and will not be divulged to any unauthorized persons.
>
> All records of complaints and findings received by the Planning and Research Branch will be maintained in a confidential file within that branch.
>
> No records of any kind related to a harassment complaint may be kept on file in departments once the matter is resolved. All such records will be turned over to the Planning and Research Branch.

e) The harassment investigation was authorized under the Informal Resolution section of the Workplace Harassment Policy, as follows:

> **2.6.1 Informal Resolution**
>
> . . .
>
> When a deputy head suspects the possible occurrence of workplace harassment he/she may request the appointment of a Harassment Review Committee to conduct an independent investigation.

f) On April 15, 1999, the Workplace Harassment Prevention Coordinator confirmed that a Harassment Review Committee was appointed to conduct an investigation, prepare a report and provide a copy of the report to the Deputy Minister.

g) On September 22, 2000, the employees of the unit attended a mandatory meeting with representatives from their department, the Public Service Commission and the Yukon Employees Union. They were told by the Workplace Harassment Prevention Coordinator that the investigation was no longer a workplace harassment investigation but a *Workplace Review*. The Workplace Harassment Policy does not contain any reference to a W*orkplace Review*. The purpose of the change of wording was to de-escalate the anxiety of the employees in the unit about the investigation.

h) The Harassment Review Committee had no further involvement in the investigation which was carried out by the Workplace Harassment Prevention Coordinator. Under a formal complaint, the investigation is not considered complete until the Harassment Review Committee has approved the report.

i) By December 15, 2000, the *Workplace Review* report had been prepared and provided to the Deputy Minister. The Deputy Minister, in a memorandum dated December 15, 2000, stated:

> I have received correspondence … requesting that I release the *Operational Review Report* which I commissioned last year and was conducted on my behalf by … There seems to be some confusion about the conditions I have set for the release of the report as well as what conditions will surround its usage by parties if it is released.

j) The *Workplace Review* report and the *Operational Review* report are one and the same, and I will use the title "*Workplace Review* report". The conditions referred to by the Deputy Minister were confidentiality requirements that were more stringent than the present position of the PSC. In addition to not being copied, distributed, shared or discussed with anyone outside the unit, the report had to be returned in 30 days for destruction.

k) The Deputy Minister also required all employees in the work unit to consent to a release of personal information. The unanimous consent was not obtained.

l) The Deputy Minister went on to say that:

> From the Department perspective, this document has served the purpose intended. It will not be used for disciplinary or grievance matters or retained in any individual's personnel files. Any copies currently in the Department will be destroyed. The record will be managed in accordance with Public Service Commission's schedule covering documents of this type.

m) The report was given to the Deputy Minister and a union representative. There is no evidence that confidentiality conditions were placed upon these individuals nor does the Workplace Harassment Policy authorize distribution to the union representative.

n) Ms. Avoledo had requested a copy of the *Workplace Review* report on October 4, 2000 without any confidentiality conditions. On December 12, 2000, she made an application for disclosure under the ATIPP Act. On January 9, 2001, the request for access was denied by the territorial archivist.

o) Ms. Avoledo applied under section 48(1)(a) for the IPC to review the refusal to grant access to the report.

p) The IPC granted disclosure of the report to Ms. Avoledo subject to certain deletions of personal information pursuant to sections 25(1), (2) and (4) of the ATIPP Act by way of a Commissioner's Report After Review dated January 15, 2002.

q) By letter dated February 25, 2002, the PSC accepted the finding of the Commissioner's Report After Review that Ms. Avoledo and others were parties to the investigation that resulted in the *Workplace Review* report. However, the PSC maintained its position that the *Workplace Review* report was not required to be released under the ATIPP Act and required Ms. Avoledo to sign a confidentiality agreement agreeing to keep the report strictly confidential and not to share or discuss its contents with anyone. The confidentiality agreement stated that breach of the agreement

could lead to disciplinary action. The PSC requires some additional deletions which are not significant.

r) Ms. Avoledo appealed the PSC decision to this court on the basis that she accepts the deletions of the IPC, but not the deletions of the PSC. She also opposes the confidentiality requirements.

s) The *Workplace Review* report has been provided to me under section 60(1)(b) of the ATIPP Act and remains in the court file in a sealed envelope. It has not been disclosed to Ms. Avoledo or her counsel.

THE ATIPP ACT

[5] The purpose of the ATIPP Act is set out in section 1 as follows:

> **Purposes of this Act**
>
> **1**.(1) 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 the right of access to records; and
>
> (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves; and
>
> (c) specifying limited exceptions to the rights of access; and
>
> (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. [Underlining mine]

[6] Thus, it is the stated purpose of the ATIPP Act to give the public the right of access to records while specifying limited exceptions.

[7] Pursuant to section 54, the PSC has the onus to prove that Ms. Avoledo has no right of access to the parts of the report proposed to be deleted. The third party onus in section 54(2) does not apply as there is no identifiable third party.

[8] Counsel for the PSC concedes that there is no specific section of the ATIPP Act dealing with the right of a public body to require a confidentiality agreement. However, the PSC relies on the confidentiality section of the Workplace Harassment Policy and certain sections of the ATIPP Act.

[9] Section 5 of the ATIPP Act sets out the right to information as follows:

> **Rights to information**
>
> **5.**(1) A person who makes a request under section 6 has a right of access to any record in the custody of or under the control of a public body, including a record containing personal information about the applicant.
>
> (2) The right of access to a record does not extend to information that is excepted from disclosure under this Part, but if that information can reasonably be separated or obliterated from a record an applicant has the right of access to the remainder of the record.

[10] Reading sections 1 and 5 together, the ATIPP Act sets out a scheme for access to information that grants a person the right of access to information in the custody of a public body. However, the right of access does not extend to information excepted from disclosure in Part 2 of the ATIPP Act.

[11] The sections of Part 2 of the ATIPP Act that are relevant in this case are:

> **Disclosure harmful to law enforcement**
>
> **19.**(1) A public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to …

(m) unfairly damage the reputation of a person or organization referred to in a report prepared in the course of law enforcement; or …

Disclosure harmful to personal privacy

25.(1) A public body must refuse to disclose personal information about a third party to an applicant if the disclosure would be an unreasonable invasion of the third party's personal privacy.

(2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

…

(b) the personal information was compiled and is identifiable as part of an investigation into or an assessment of what to do about, a possible violation of law or a legal obligation, except to the extent that disclosure is necessary to prosecute the violation or to enforce the legal obligation or to continue the investigation; or

…

(d) the personal information relates to the third party's employment or educational history; or

…

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations; or

…

(4) Before refusing to disclose personal information under this section, a public body must consider all the relevant circumstances, including whether

(a) the third party will be exposed unfairly to financial or other harm; or

(b) the personal information is unlikely to be accurate or reliable; or

> (c) the personal information has been supplied in confidence; or
>
> (d) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant; or
>
> (e) the personal information is relevant to a fair determination of the applicant's right; or
>
> (f) the disclosure is desirable for the purpose of subjecting the activities of the Government of the Yukon or a public body to public scrutiny; or
>
> (g) the disclosure is likely to promote public health and safety.

[12] I note that section 26(1) of the ATIPP Act provides for notice to be given to a third party before giving access. In this case, there is no identifiable third party, so it was not practicable to give any third party notices.

[13] Once the application for access to information is refused by the public body or archivist, the person may request the IPC to review the refusal under section 48 of the ATIPP Act. Ms. Avoledo did so, and the Commissioner's Report After Review was given on January 15, 2002 pursuant to section 57.

[14] The public body pursuant to section 58 of the ATIPP Act decides what, if any, recommendations of the IPC will be followed. The PSC, without referring to any specific sections of the ATIPP Act, maintained that the *Workplace Review* report was not required to be disclosed. The PSC relied upon the confidentiality section of the Workplace Harassment Policy and the "normal confidentiality requirements under that Policy" in requiring a confidentiality agreement letter to be signed before release with deletions.

[15] Ms. Avoledo has appealed the decision of the PSC under section 59(1)(a). Pursuant to s. 60(1)(a), this court has conducted a new hearing and may consider any matter that the IPC could have considered. The powers of this court on the appeal are:

> **Disposition of an appeal**
>
> **61.** On an appeal to it, the Supreme Court must decide whether the public body is required or authorized to refuse access and may
>
> (a) order that the public body give the applicant access to all or part of the record, if the court determines that the public body is not authorized or required to refuse the access; or
>
> (b) confirm the public body's refusal to give access to all or part of the record, if the court determines that the public body is required or authorized to refuse the access.

THE WORKPLACE HARASSMENT POLICY

[16] The Workplace Harassment Policy is found in the Yukon Government's General Administration Manual. The Workplace Harassment Policy was developed to be consistent with the *Human Rights Act*, SY 1987, c. 3, which provides:

> 13(1) No person shall
>
> (a) harass any individual or group by reference to a prohibited ground of discrimination;
>
> (b) retaliate or threaten to retaliate against an individual who objects to this harassment.
>
> (2) In subsection (1), "harass" means to engage in a course of vexatious conduct or to make a demand or sexual solicitation or advance that one knows or ought reasonably to know is unwelcome.

[17] Section 35 of the *Human Rights Act*, SY 1987, c. 3, makes the Act binding upon the Government of the Yukon Territory and its corporations, boards and commissions. A complaint under the Workplace Harassment Policy is not a complaint under the *Human Rights Act*. However, it is the stated purpose of the policy to establish a workplace that does not tolerate harassment and to maintain a work environment free from harassment. This is, in part, a response to section 32 of the *Human Rights Act*, which makes employers responsible for the discriminatory conduct of their employees unless it is established that the employer did not consent to the conduct and took care to prevent the conduct.

[18] The Government of Yukon employs a full-time Workplace Harassment Prevention Coordinator to foster and maintain initiatives under the Workplace Harassment Policy, as well as conducting investigations.

[19] The Workplace Harassment Policy provides for the appointment of a Harassment Review Committee comprised of three individuals from a roster. One of the members conducts the investigation.

[20] The PSC considers confidentiality to be of the greatest importance during investigations, and consequently section 2.7, set out above, is rigorously adhered to. Counsel for the PSC has submitted that harassment investigations are highly sensitive and surrounded by an atmosphere of heated and volatile debate.

[21] Counsel advocates for a zone of confidentiality to be applied to harassment investigations for two reasons. First, to ensure a process that preserves people’s dignity and second, to ensure that no stigma attaches to either the victim or the accused

person. It is feared that without such a zone of confidentiality there may be a chilling effect that discourages victims from coming forward.

[22] The PSC submits a case-by-case approach to the disclosure of information forces a case-by-case defence to disclosure. In their view, a zone of confidentiality is the preferred policy approach because:

i. there is a negligible public interest in the disclosure of these records;

ii. the parties have a strong privacy interest; and

iii. there is a significant legal obligation on the employer to address harassment and not be hampered by the prospect of a case-by-case battle over the disclosure of records.

THE COMMISSIONER'S REPORT

[23] The Commissioner's Report After Review is a lengthy decision which covers the submissions raised by the PSC. The following findings were made:

(a) Section 25(2)(b) applies to the personal information collected in the course of the workplace investigation based on the possible violation of a legal obligation. Thus, the disclosure of such personal information is presumed to be, and was found to be, an unreasonable invasion of the third party's personal privacy. This aspect of the IPC report dealt with personal information about a third party, that is any personal information about any employee in the unit that could be identified in the *Workplace Review* report.

(b) As to the PSC submission that section 25 of the ATIPP Act could be applied to exclude the entire report, the IPC ruled that the report enjoys no greater protection by being the product of a workplace investigation. In other words, the refusal to disclose relates to personal information, which must be addressed on an exception-by-exception basis.

(c) The IPC found that the general factual information about a group of employees in the report could not be considered personal information because it is not information about an identifiable person or that could be associated with a specific individual.

(d) The IPC then proceeded to highlight those parts of the report that he considered personal and should be deleted from the report pursuant to section 5(b) of the ATIPP Act.

(e) The IPC found that the employees were parties and not merely witnesses.

(f) The IPC did not consider section 19(1)(m) of the ATIPP Act.

ANALYSIS

Issue 1: Was the report prepared under the Workplace Harassment Policy?

[25] This issue is important because the PSC claims there should be a zone of confidentiality arising from the Workplace Harassment Policy.

[26] Counsel for Ms. Avoledo submits that the workplace harassment investigation of Ms. Avoledo's unit was initially commenced under the Workplace Harassment Policy. However, counsel submits that the unilateral action of the Deputy Minister and Workplace Harassment Prevention Coordinator to conduct a *Workplace Review* resulted

in taking the investigation out of the Workplace Harassment policy. There are three reasons supporting this position. Firstly, there was never a complaint or a complainant to invoke the policy.

[27] Secondly, the Harassment Review Committee that was appointed never proceeded to act in the matter. It did not review the report of the Workplace Harassment Prevention Coordinator and, in fact, one of the members of the committee never heard about the matter again beyond the fact of her appointment.

[28] Thirdly, despite the PSC reliance upon the confidentiality requirement of the Workplace Harassment Policy, the confidentiality was breached by giving the report to the Deputy Minister and the union representative. Counsel submits that these two individuals are not “authorized persons.”

[29] Counsel for PSC submits that the application for the Workplace Harassment Policy is not exclusively complaint driven and section 2.6.1 provides an informal resolution if a deputy head “suspects” the possible occurrence of workplace harassment. Thus, there was never a formal resolution process involved under the policy and no formal complaint to investigate.

[30] Counsel for PSC further submits that the Workplace Harassment Policy is remedial under section 2.1.3. Managers and supervisors are responsible for:

> (a) Putting an end to any harassment that they are aware of, whether there is a complaint or not;
>
> (b) Ensuring compliance with the policy within their branch/unit; and
>
> …

[31] In answer to the breach of confidentiality allegation, counsel for PSC relies upon the fact that the report was not made public in any way. Further, even if the disclosures to the Deputy Minister and the union representative were in breach of the confidentiality requirement, counsel submits it should not result in a declaration that the Workplace Harassment Policy did not apply to the investigation.

[32] I am satisfied that the *Workplace Review* report was prepared under the Workplace Harassment Policy. Although it did not follow the policy as closely as it should have, the investigation was initiated under the policy and the confidentiality of the investigation was stressed. The investigation was also undertaken by the Workplace Harassment Coordinator, who produced the *Workplace Review* report. It would not be appropriate to ignore the fact that the investigation was initiated under section 2.6.1 of the Workplace Harassment Policy.

Issue 2: Are the deletions of personal information authorized by section 19 or section 25 of the ATIPP Act?

[33] Counsel were in agreement that the IPC deletions of personal information were authorized under section 25 (2)(b) of the ATIPP Act. In my view, both categories of “a possible violation of law or a legal obligation” were engaged. The possible violation of law is found in section 13 of the *Human Rights Act* and the legal obligation of the employer in section 32. While Ms. Avoledo was unable to review any of the deletions, I was able to review them. I find that the deletions of both the IPC and the PSC were reasonable in that the employee unit in question is very small and references to some events or incidents could be identified by employees in the unit as referring to a specific person and thereby constitute an unreasonable invasion of the third party’s personal

privacy. I attach great importance to the fact that the personal information was given in confidence.

[34] As I indicated earlier, the bulk of the deletions were initiated by the IPC, and the PSC simply added a few references that were justifiable. There has been no attempt to use section 25 of the ATIPP Act to suppress information that could prove embarrassing or controversial to the Government of Yukon.

[35] It should also be noted that section 25(1) could stand alone in prohibiting the disclosure in this case on the grounds that such disclosure would be an unreasonable invasion of a third party's personal privacy. In other words, it is not necessary to rely on the presumptions in section 25(2) as long as the relevant circumstances set out in section 25(4) are considered. In this case, section 25(4)(c), where the personal information has been supplied in confidence, strongly supports the refusal to disclose the deleted items.

[36] I am also of the view that the refusal to disclose the personal information could be justified under sections 25(2)(d) and (g).

[37] Counsel for the PSC also submits that section 19(1)(m) of the ATIPP Act can be applied to refuse to disclose the personal information in the *Workplace Review* report.

[38] I note that the IPC dismissed this ground on the basis that the PSC did not exercise its discretion under section 19(1)(m) when it claimed confidentiality. However, I am prepared to consider whether section 19(1)(m) can be invoked to support a zone of confidentiality.

[39] I must first address the question of whether the workplace harassment investigation and the *Workplace Review* report was "prepared in the course of law

enforcement.” “Law enforcement” is defined in section 3(b) as “investigations that could lead to a penalty or punishment being imposed or an order being made under an Act of Parliament or of the Legislature.” I have no doubt that this investigation could lead to a person being found responsible for harassment, which is an offence under the *Human Rights Act*. It could also lead to some punishment being imposed in an employment context, which would have to be pursuant to public service legislation.

[40] As a result, I find that section 19(1)(m) could be applied to refuse disclosure of the personal information in the *Workplace Review* report.

Issue 3: Does the ATIPP Act authorize the PSC to require a confidentiality agreement prohibiting Ms. Avoledo from sharing or discussing the report with anyone?

[41] Counsel for the PSC submits that all records, including a final report created during a workplace harassment investigation, should be subjected to a stricter standard of release and generally be protected from public release under the ATIPP Act. It is submitted that a zone of confidentiality is critical to protect the fundamental dignity and self-respect of workers in workplace harassment investigations which are highly personal and very sensitive. It is suggested that failure to maintain a zone of confidentiality surrounding the investigation and final report will deter individuals from pursuing complaints in a small jurisdiction like the Yukon, where there is a significant danger of harming reputations and careers. Thus, the PSC submits that disclosure to the parties should only be done on a confidential basis and that the report be kept strictly confidential and not shared or discussed with anyone. I am persuaded that there are very strong and valid policy reasons to have a zone of confidentiality covering all

workplace harassment investigations, particularly where they involve sexual harassment. However, the issue is not the validity of the zone of confidentiality advocated by the PSC, but rather, whether the zone of confidentiality can be supported by the provisions of the ATIPP Act.

[42] I note that the restrictions now sought by the PSC are less stringent than those sought by the Deputy Minister. However, they would still prevent a party from sharing or discussing the report with another employee, a friend, legal counsel or a psychologist or social worker.

[43] Counsel for PSC acknowledges that the ATIPP Act does not create a special exception for maintaining confidentiality and prohibiting public release of records relating to workplace harassment investigations. The Act does not address the issue of requiring confidentiality agreements.

[44] Counsel for PSC also concedes that the Workplace Harassment Policy does not have any legal authority in the context of the ATIPP Act. However, counsel maintains that the Workplace Harassment Policy is a factor to be considered in the exercise of discretion under the ATIPP Act. It is significant to note that even the confidentiality section 2.7 of the Workplace Harassment Policy refers only to “all complaints” and “any information and materials related to the complaints.”

[45] Counsel for PSC relies upon section 19(1)(m) of the ATIPP Act to support the concept of a zone of confidentiality. I repeat this section:

> **19.**(1) A public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> …

> (m) unfairly damage the reputation of a person or organization referred to in a report prepared in the course of law enforcement; or
>
> …

[46] I am of the view that the ATIPP Act makes no provision for non-disclosure on a blanket basis for a particular type of record or information. Section 5(1), in fact, creates a right of access to any record unless it can be excepted from disclosure under section 5(2). Section 5(2) is quite explicit in stating that if such excepted information can be reasonably separated or obliterated from the record, the applicant has a right of access to the remainder of the record. In my view, section 5 sets out the procedure to be followed in any of the sections of Part 2 of the ATIPP Act, which includes both sections 19 and 25.

[47] What is required, then, is a case-by-case analysis of either sections 25(2)(b), (d), (g) or section 19(1)(m) in the context of Ms. Avoledo's request for access. The result in this case is that certain personal information has been deleted. The remaining information in this case is not personal information and therefore must be disclosed according to section 5(2) of the ATIPP Act. This is also supported in the purposes of the Act, where section 1(a) gives the public a right of access subject to section 1(c) specifying limited exceptions. I reiterate that none of the specified exceptions to the right of access can be interpreted to justify a blanket non-disclosure for an entire record premised on the zone of confidentiality policy ground. While I am of the view that section 19(1)(m) could be invoked to prevent disclosure of all or part of a record in a sexual harassment situation, facts of that nature are not before me.

[48] If it is the view of the Government of Yukon that a zone of confidentiality should be placed over all workplace harassment investigations without regard to whether it is a complaint or an administrative review conducted under the Workplace Harassment Policy, that should be explicitly stated in the ATIPP Act. Until then, in my view, the ATIPP Act must be applied on a case-by-case basis after considering all the relevant circumstances.

[49] In this case, there is no complaint and no person accused of harassment. The references to personal information, even though they do not name any individual, have been deleted as required under the ATIPP Act. I therefore order that the *Workplace Review* report prepared by the Workplace Harassment Prevention Coordinator be disclosed to Ms. Avoledo with the deletions made by the IPC and PSC, but without any other confidentiality requirements.

[50] The sealed envelope containing the *Workplace Review* report shall be returned to counsel for the PSC.

[51] Ms. Avoledo shall have her costs on scale 4.

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VEALE J.