

Issues

- [4] The issues in this review are:
- a. Did the department breach the Complainant's privacy by requiring a twice-daily check-in?
 - b. Did the department breach the Complainant's privacy by asking the Complainant, during the fact-finding meeting, to recount their work-from-home routine?
 - c. Did the department breach the Complainant's privacy by collecting information from the Complainant's social media?

Facts

- [5] The Complainant was, at all relevant times, an employee of the Government of Nunavut (GN). They worked for the Department of Economic Development and Transportation (EDT), doing a certain kind of office work in Iqaluit. For the sake of anonymization, I will not identify the specific EDT unit in which the Complainant worked.
- [6] A global pandemic started in late December 2019 and swept around the world in 2020 and 2021. In Canada, the pandemic was experienced in waves. Twice during the pandemic, the GN closed its offices to the public for extended periods and directed its non-essential employees to work from home, to the extent it was possible to do so. For purposes of this decision, we are interested in the second shutdown, which ran from the middle of April to early June of 2021.
- [7] After the second shutdown went into effect, the Complainant's work unit continued to operate, but with less than a full staff complement. The plan was to rotate staff through the office. For staff not scheduled to be in the office, there was some work that could be done from home. Working from home, however, required a computer and an internet connection. According to the Complainant, they were offered a laptop but not an office-funded internet connection. Internet connections in Nunavut are slow and expensive. The Complainant declined to pay personally for the

internet connection. As a result, there was no work the Complainant could do when at home.

- [8]** On May 6, 2021, the Complainant called in sick. At some point that day or the next day, the Complainant's supervisor became aware of a photograph that the Complainant posted to Facebook. It appeared to show the Complainant outdoors, engaged in vigorous physical activity.
- [9]** Staff in the Complainant's work unit who were working from home were asked to "check in" twice each day. A check-in consisted of a phone call to the main office. During the week of May 17-21, 2021, the Complainant did not check in.
- [10]** On May 27, 2021, the Complainant was summoned to a fact-finding meeting (FFM). An FFM is an employee-relations technique used by the Government of Nunavut (GN) when management has concerns about an employee's conduct. The purpose of an FFM is for management to lay out its concerns, and for the employee to give their side of the story. This FFM was held by teleconference on May 28, 2021. The attendees were the Complainant, a union representative, the Complainant's supervisor, and a human resources manager at EDT.
- [11]** During the FFM, the supervisor asked the Complainant a series of questions covering several different topics. The questions had been developed by EDT's HR manager, who received advice from the Employee Relations division of the Department of Human Resources. The questions relevant to this Review Report are reproduced in Appendix 1.
- [12]** On May 31, 2021, the Complainant called my office to initiate the process of filing a privacy breach complaint. The complaint was based on the questions asked during the FFM.
- [13]** On June 9, 2021, the Complainant received a disciplinary letter from their supervisor. The facts on which the discipline was based are unrelated to any of the matters raised by the Complainant in their complaint to this office.

[14] On the same day, the Complainant received a second letter, this one from EDT’s HR manager. This letter says “it has been determined that your absence from May 17-21, 2021, shall be recorded as AWOL [absent without leave] as you did not notify your supervisor of your absence in advance or follow up in a timely manner with a leave form as was outlined in your letter of expectation that was issued on February 15, 2021.” The rest of the letter is unrelated to any of the matters raised by the Complainant in their complaint to this office.

Law

[15] A public body may collect, use, and disclose personal information only in the circumstances authorized by the ATIPPA. The ATIPPA rules on collection, use, and disclosure are all in Part 2 of the ATIPPA. Together they constitute the statutory privacy code.

[16] The present case concerns the collection of personal information. The relevant portions of the ATIPPA are therefore in Division A of Part 2.

[17] Section 40 is the key section on collection of personal information. It reads as follows:

40. No personal information may be collected by or for a public body unless
- (a) the collection of the information is expressly authorized by an enactment;
 - (b) the information is collected for the purposes of law enforcement;
 - (c) the information relates directly to and is necessary for
 - (i) an existing program or activity of the public body, or
 - (ii) a proposed program or activity where collection of the information has been authorized by the head with the approval of the Executive Council; or
 - (d) the collection of the information for research or statistical purposes is authorized by or under the Statistics Act.

[18] Section 41 says that a public body must, where reasonably possible, collect personal information directly from the individual the information relates to. Then there is a list of exceptions, one of which is paragraph (j):

“...the information is collected for the purpose of hiring, managing or administering personnel of the Government of Nunavut or a public body.”

- [19] The ATIPPA is not explicit about where the onus of proof lies in a privacy case, as it is in s 33 about an access case, or in s 38(2) on an access appeal. In my view, it only makes sense that the onus should be on the public body. Preventing the unauthorized collection, use or disclosure of personal information by public bodies is one of the overarching purposes of the ATIPPA: s 1(d). Moreover, the public body is typically in a better position to bring forward relevant evidence.
- [20] Therefore if there is a collection, use, or disclosure of personal information, the public body must show on a balance of probabilities that it is authorized to do so.

Analysis

- [21] This privacy review is about the dividing line between work life and personal life. When an employee is working from home, it is easy for the line to be blurred or obliterated. Nevertheless, there has to be a limit to how far the GN can peer into what an employee is doing while at home. But where is that limit? And did the GN cross it in this case?
- [22] The ATIPPA lays down the rules for the collection, use and disclosure of personal information by the GN. Those rules were designed with ordinary citizens in mind, but they apply equally to GN employees.
- [23] In a recent decision, I wrote that the ATIPPA has, in practice, become a “proxy battleground” for labour relations issues within the GN: *Department of Human Resources (Re)*, 2021 NUIPC 19 (CanLII) at paragraph 31. The majority of review requests to this office are filed by present or former GN employees and touch on some aspect of the employee’s work.
- [24] By undertaking this review, I do not wish to suggest that I am inquiring into the GN’s management of its employees. This decision is not, directly

or indirectly, an appeal of any of the GN's decisions regarding the Complainant. If the Complainant is unhappy with the GN's decisions, there are processes for the Complainant to pursue under the collective agreement.

[25] The issue raised by the Complainant that is squarely within my jurisdiction is whether the GN violated the Complainant's privacy. To put it in statutory language: Did the GN collect the Complainant's personal information in a way not authorized by the ATIPPA?

[26] The Complainant makes three separate allegations of a privacy breach:

- a. Requiring the Complainant to "check in" to work twice daily, even though there was no work for the Complainant to do at home.
- b. Asking the Complainant during the FFM to account for how he spent his days at home, even though there was no work for the Complainant to do at home.
- c. Looking through the Complainant's social media, and asking the Complainant during the FFM to explain what he posted.

Collection of personal information

[27] Corresponding to the three privacy breaches alleged by the Complainant, there are three ways in which the department collected the personal information of the Complainant:

- a. Keeping records of whether the Complainant made the twice-daily check-in call; and when the call was not made, calling the Complainant and keeping records of the results of those calls.
- b. Keeping records of the Complainant's answers to the question asked during the FFM about their work-from-home routine (Question 9 in the Appendix).
- c. Collecting information from the Complainant's social media.

The check-in call

- [28] The Department of Human Resources has confirmed to me that the twice-daily check-in call for employees working from home was not a GN-wide policy. There were therefore no GN-wide guidelines about when a daily check-in might be appropriate, or how it should be conducted. This appears to have been an initiative of EDT, or possibly of the Complainant's work unit.
- [29] As explained in the Law section above, the onus of proof is on EDT. EDT has not offered a justification for the twice-daily check-in, and on that ground alone I am not prepared to find that it fits within s 40.
- [30] I can imagine that a check-in call could be justified in certain circumstances. For example, a check-in might make sense if an employee is "on call", and the check-in serves as assurance to management that the employee is indeed available; but that was not the situation here. It is conceivable that a check-in call could aid a manager in ensuring that employees are "on task" while working from home, though it is a weak form of assurance and involves many assumptions.
- [31] But the legal test for the collection of information is not what can be imagined or what is conceivable. It is whether the collection of the information fits, on a balance of probabilities, within s 40 of the ATIPPA. In the circumstances of this case, the collection of information about the Complainant via a twice-daily check-in does not fit within any of the allowable circumstances in s 40.
- [32] In my view, the decisive factor is that there was no work for the Complainant to do from home. In the Complainant's situation, the twice-daily check-in served no purpose. Whether the Complainant made the call or not, or whether the Complainant was at home or not, it could make no difference to the operation of the Complainant's work unit. In ATIPPA terms, the information did not "relate directly to" nor was it "necessary for" program administration. In my view, requiring purposeless calls and

keeping records of them is not an authorized collection of personal information under the ATIPPA.

- [33]** To be clear, I am not deciding that a daily check-in call is always a breach of a work-from-home employee’s privacy. The GN is a big, complex entity. No doubt there are work units and personal situations in which a daily check-in call “relates directly to and is necessary for” program administration. The current case is not one of them.

Question 9 from the FFM

- [34]** Question 9 from the FFM reads as follows: “Please explain your daily work from home routine?” This question, more than any other, illustrates the privacy issues at stake in this case.
- [35]** When non-essential GN employees were sent home, the GN workplace became exponentially more complex. Instead of working in environments largely controlled and supplied by the GN, employees were working in circumstances as varied as Nunavut itself.
- [36]** Housing is a perennial issue in Nunavut, and GN employees were now working in a wide variety of housing situations, including overcrowded housing, housing with poor lighting or ventilation, housing without work-conducive furniture, even homelessness. Schools and daycares were closed too, so GN employees with children were simultaneously caring for children. The GN worked hard to supply employees with appropriate office technology, including phones, laptops, and internet connections, but that does not mean everyone had the right equipment and connections immediately, or all the time, or at all.
- [37]** The GN did try to be empathetic about the circumstances in which its employees would be working. For example, the Department of Human Resources issued a document titled “Tips for Employees Working from Home”. The document included the following:

SELF-CARE

- Self-care is essential for both mental and physical wellbeing. Consider doing things like listening to uplifting music, eating a nourishing snack, taking a few moments to practice deep breathing or meditation, going outside for fresh air, etc.
- Call the Employee and Family Assistance Program at 1-800-663-1142 for additional supports, including short-term counselling and online resources.

FLEXIBILITY

- Be flexible and patient with yourself, your family, and your managers and team members. Everyone is adjusting to working from home and everyone has different home arrangements.

From this document, and based on everything I have seen and heard during the shutdown, I find that the GN generally was alive to the challenges and pressures created by the work-from-home directive.

- [38]** During the second shutdown, the Complainant's personal housing situation was difficult. To protect their privacy, that is all I will say about it.
- [39]** At the FFM, the Complainant immediately objected to Question 9 as being invasive of their privacy. It is not hard to see why. In the Complainant's circumstances, a question about their "daily work routine" was, essentially, a question about how they spent their day.
- [40]** Despite their objection to the question, the Complainant did attempt an answer by naming some activities in which they engaged on a typical day. I will not repeat those answers here. They are personal to the Complainant. They have nothing to do with work. How could they? There was no work for the Complainant to do from home, so the Complainant, when at home, could only be engaged in personal activities.
- [41]** In the circumstances of this case, Question 9 went too far. Question 9 should not have been asked.

[42] Again, I wish to be clear that I am not deciding that a question about an employee's work-from-home routine is always a breach of an employee's privacy. The GN is a big, complex entity. No doubt there are work units and personal situations in which a daily check-in call "relates directly to and is necessary for" program administration. The current case is not one of them.

Collecting information from social media

[43] The Complainant called in sick on May 6, 2021. He agrees that, on that day, he posted a picture to Facebook. The picture shows a person outdoors and doing something strenuous. Although the face is covered, the Complainant acknowledges it is them.

[44] The Complainant's supervisor obtained the picture. Exactly how is not clear. Perhaps the supervisor was looking through the Complainant's social media. Perhaps someone else gave it to the supervisor. It does not matter. For ATIPPA purposes, what matters is that the Facebook post was personal information about the Complainant and it was collected into a government file for employee-management purposes.

[45] At the FFM, the Complainant was asked a series of questions about the Facebook post (see Appendix 1, Questions 5–8). The implication from the questions was that the activity shown in the photograph was incompatible with being sick.

[46] The Complainant's explanation was that the picture had been taken the previous year, and they posted (or re-posted) it on May 6, 2021. In other words, the picture did not show what the Complainant was doing on May 6, 2021. That explanation must have been accepted by EDT, because the incident is not mentioned in either of the two follow-up letters sent to the Complainant on June 9.

[47] The question that remains is whether the collection of the Facebook post is authorized by s 40 of the ATIPPA.

[48] Any government program or activity requires staff to run it. Program managers can collect information that allows them to hire, manage and administer the staff, and the collection does not have to be directly from the employees concerned. Section 41(1)(j), though technically about how information is acquired, acknowledges that human resources is a legitimate subject on which a public body may collect personal information.

[49] In this case, paragraphs (a), (b) and (d) of section 40 have no application. The statutory dividing line between what is permissible and what is impermissible therefore lies in s 40(c): personal information may be collected if it “relates directly to and is necessary for” program administration. I have substantial doubts about whether those criteria are satisfied in this case.

[50] Section 1306 of the GN Human Resources Manual offers guidance to managers on how to manage sick leave. The most relevant paragraphs are as follows:

9. To be granted sick leave, employees must satisfy the employer that they are unable to perform the duties of their position because of illness or injury. Senior managers should verify (in general terms) the need for sick leave before authorizing it.

...

11. The employee's signed statement, on the application for leave form, is usually acceptable as proof of illness where the period of illness is three days or less.

...

19. Senior managers should reconsider granting sick leave if the employee has been involved in activities incompatible with an illness (e.g., partying, participating in rigorous sports, or working elsewhere). Documentation should be kept of these activities. ...

[51] Paragraph 19 explicitly encourages managers to collect personal information (“documentation should be kept...”) if the employee has engaged in “activities incompatible with an illness”. I will make four

observations about paragraph 19, which alone or together suggest that paragraph 19 needs to be revised to bring it into conformity with the ATIPPA.

- [52] First, the GN does not generally require a medical note for sick leave of short duration. Paragraph 11 of the sick leave policy says so. (In any event, the requirement for a medical note was waived by the GN during the pandemic period.) A manager therefore usually has no information about the nature of the sickness for which the employee has taken short-term sick leave.
- [53] Second, the policy assumes the manager has an accurate understanding of what activities are “incompatible” with a given illness. Except in very obvious cases, the manager is unlikely to have an accurate understanding of the nature and course of an illness, and so is not likely to judge accurately what activities are compatible or incompatible with a given illness.
- [54] Third, the GN recognizes the concept of a “mental health day” as a legitimate reason to call in sick. (This point was confirmed to me by the Department of Human Resources.) The phrase “mental health day” is not a medical term with a fixed definition, but I think its meaning is well-known to employees: it is a sick day for the purpose of relieving mental pressure, such as stress or anxiety. This is an enlightened policy of the GN and it should be encouraged. If an employee takes a “mental health day”, there is no particular activity that is incompatible with it.
- [55] Fourth, there may be a role here for Inuit Piqqusingginnik (Inuit societal values) and Inuit Qaujimajatuqangit. I have previously touched on what those concepts are, how they relate to each other, and the role they might play in interpretation of the ATIPPA: *Department of Human Resources (Re)*, 2021 NUIPC 14 (CanLII) at paragraphs 76 to 93. This is an area that requires thoughtful reflection and where a decision-maker should be careful not to overstep proper bounds: *R v Itturiligaq*, 2020 NUCA 6 (CanLII).

- [56] In my view, it is relevant to note that the Complainant is an Inuk and their supervisor is not. It is possible that the Complainant's conception of activities that are compatible with physical health and mental health, especially activities *nunami*, out on the land, are different from their supervisor's. The Facebook picture collected by the supervisor shows the Complainant out on the land.
- [57] In summary: Section 1306, paragraph 19, of the HR Manual encourages managers to collect personal information about employees, namely what they are doing when not at work. For the four reasons I have given above, there is a substantial risk that the net will be cast too widely, and that personal information will be collected that is unrelated to, and unnecessary for, employee management. This risk is especially acute when many employees are working from home. An unauthorized collection of personal information is a breach of privacy.

Conclusion

- [58] The Complainant's privacy was breached when their supervisor required a twice-daily check-in, even though there was no work for the Complainant to do from home.
- [59] The Complainant's privacy was breached when their supervisor asked the Complainant during the fact-finding meeting to recount their work-from-home routine (Question 9), even though there was no work for the Complainant to do from home.
- [60] The Complainant's privacy was breached when their personal information posted to social media was collected by their supervisor, in circumstances where the personal information was unlikely to have any relevance to employee management. This collection of personal information was, however, consistent with Section 1306, paragraph 19, of the GN Human Resources Manual.
- [61] Section 1306, paragraph 19, of the GN Human Resources Manual is, as currently written, incompatible with s 40(c) of the ATIPPA. It creates a

substantial risk that managers will collect personal information about employees that does not relate directly to, and is not necessary for, program administration.

- [62] One final note: EDT and the Department of Human Resources have been helpful and cooperative throughout the review process. They have answered every question I asked, and produced every document I requested. I thank them for their assistance.

Recommendations

- [63] **I recommend** that the Department of Human Resources consider adding a policy to the Human Resources Manual concerning the management of employees working from home. Such a policy should conform to the privacy requirements in the ATIPPA.
- [64] **I recommend** that the Department of Human Resources, when advising public bodies on questions for a fact-finding meeting, consider whether a given question is an unauthorized collection or use of the employee's personal information.
- [65] **I recommend** that Section 1306, paragraph 19, of the GN Human Resources Manual be reviewed and revised to reduce the substantial risk of collection of personal information about employees that does not relate directly to, and is not necessary for, program administration.
- [66] Since the first three recommendations are directed to the Department of Human Resources, which is not a party to this review, **I recommend** that EDT bring these recommendations to the attention of the Department of Human Resources.
- [67] This is not an appeal of the discipline imposed by EDT, but nevertheless I have found that one aspect of the discipline imposed on the Complainant (i.e. that the Complainant was absent without leave because of their failure to "check in") flowed from a breach of the Complainant's privacy. **I**

recommend that EDT consider whether the disciplinary letter of June 9 should, insofar as it relates to being AWOL, be revised accordingly.

Graham Steele

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Appendix 1: FFM Questions

[Questions 1 to 4 omitted.]

5. On May 6, 2021, you were scheduled to work in the office, on a rotational basis due to current public health restrictions. Your supervisor has stated that you booked off with the reasoning that you were sick on this date, is this correct?

6. On May 7, 2021, the following screenshot was obtained from social media. Please confirm that you made this post on May 6, 2021?

7. Can you please tell us when (date) the above posted picture was taken?

8. Are you aware that [Human Resource Manual] 1306, point 19 states that “Senior managers should reconsider granting sick leave if the employee has been involved in activities incompatible with an illness (e.g. partying, participating in rigorous sports, or working elsewhere)”?

9. Please explain your daily work from home routine?

10. You were informed that while working from home, you are expected to [be] available and check in twice daily. Can you please explain why you did not respond to daily attempts to contact you between 16-21 May 2021?

[Questions 11 and 12 omitted.]

13. It has been reported that you have been seen to have been breaking the [Chief Public Health Officer] Orders, breaching the Non-Workplace Behavior expectations of the Code of Values & Ethics, and not working from home during the period from 10-XX May 2021. Can you explain what you were doing this period that could have lead to these concerns being raised?

[Questions 14 and 15 omitted.]

16. Are there any particular problems within your home life that affect your behavior at work or affect your ability to attend work?

[Questions 17 and 18 omitted.]