

Commissioner's Final Report

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Summary

- [1] The Applicant applied for certain information related to their employment with the Government of Nunavut.¹ There were redactions of the disclosure, seven of which were challenged by the Applicant. The Commissioner finds that some of the exemptions were not correctly claimed and recommends further disclosure.

Nature of Review and Jurisdiction

- [2] This is the Final Report of an access review conducted pursuant to s 31(1) of the ATIPPA. The Applicant applied for certain information from the Department of Human Resources, a portion of which was transferred to the Department of Health. The Health portion of the file was dealt with by the previous Commissioner in Review Report 20-176, 2020 NUIPC 13. This Final Report deals with the disclosure from the Department of Human Resources. The Applicant applies pursuant to s 28(1) of the ATIPPA for review of seven redactions in the 149 pages of disclosure.

¹ For the purpose of anonymization, it is the Commissioner's practice not to name complainants, GN employees, other individuals or communities unless the names are relevant to an understanding of the issues; and also to use the pronouns "they/them" even when referring to an individual.

[3] The Commissioner has jurisdiction over the Departments of Human Resources and Health: ATIPP, s 2, definition of “public body”.

Issues

[4] The issues in this review are:

- a. Did the Department of Human of Resources correctly apply exemptions for the documents it redacted?
- b. Did the department correctly apply the exemption in s 14(1)(a) concerning advice, etc., to a public body?
- c. Did the department correctly apply the exemption in s 25.1(c), concerning advice from an employee relations division?
- d. Did the department correctly apply the exemption in s 23, concerning an unreasonable invasion of a third party’s personal privacy?
- e. Did the department correctly apply the exemption in s 22, concerning evaluative or opinion material supplied in confidence?

Facts

[5] The Applicant is a former employee of the Government of Nunavut. In early 2020, shortly after being notified of the termination of their employment, they applied to the Department of Human Resources for documents containing certain keywords related to the Applicant’s employment and termination, as well as all documents in their personnel file. Soon after, the Applicant asked to amend the request. A portion of the amended request was transferred to the Department of Health.

[6] On April 8, 2020, the Applicant received the first set of documents. The reply came from the Manager of the Territorial ATIPP Office. It included 149 pages of responsive records. Some of those records had been redacted. The Manager’s letter was accompanied by a 3-page table explaining the rationale for each redaction that had been claimed.

- [7] The Applicant applied for review of seven of the redactions.
- [8] The Commissioner requested from the department, and received, copies of the redacted and unredacted versions of the documents.

Law

- [9] “Personal information” means any information about an identifiable individual, including information about their employment history: ATIPPA, s 2.
- [10] An Applicant has a right of access to information held by the Government of Nunavut: ATIPPA, s 5(1). The right of access does not extend to information within Division B of Part 1: ATIPPA, s 5(2). If disclosable information can be reasonably be severed from non-disclosable information, it should be: ATIPPA, s 5(2). Any exceptions to a citizen’s right of access are limited: ATIPPA, s 1.
- [11] There are several different exemptions that have been claimed by the department. I will review the law applicable to each in my analysis below.

Analysis

First redaction

- [12] The first challenged redaction is on page 24. A discretionary exemption was claimed under s 14(1)(a), which permits the head of a public body to refuse disclosure if disclosure could reasonably be expected to reveal “advice, proposals, recommendations, analyses or policy options developed by or for a public body, [or] a member of the Executive Council...”.
- [13] The previous Commissioner had occasion to consider s 14(1)(a) on a number of occasions. I adopt this statement of the law from Review Report 19-152, 2019 NUIPC 5 (CanLII):

Section 14(1) is intended to protect the decision making process within government and to allow public servants to provide “advice, proposals, recommendations, analyses and policy options” freely and without fear of being second-guessed or subjected to ridicule for the advice given. In Order 96-006, the former Information and Privacy Commissioner of Alberta established a test to determine whether information is “advice, recommendations, analyses or policy options” within the scope of the Alberta’s equivalent to our section 14(1)(a). He said:

Accordingly, in determining whether section 23(1)(a) will be applicable to information, the advice, proposals, recommendations, analyses or policy options (“advice”) must meet the following criteria.

The [advice, proposals, recommendations, analyses and policy options] should:

- 1. be sought or expected, or be part of the responsibility of a person by virtue of that person’s position,*
- 2. be directed toward taking an action,*
- 3. be made to someone who can take or implement the action.*

This finding has been accepted and used in Alberta and in other Canadian jurisdictions, including Nunavut, consistently over the years and it is the test to be applied to assess whether information falls within the criteria for an exception pursuant to section 14(1)(a) of the Nunavut Act. Section 14(1)(a) does not apply so as to protect the final decision made, nor does it apply to information that is merely “factual” in nature. In Alberta Order 96-006 noted above, then Commissioner Clark noted:

In passing, I want to note that the equivalent section of the British Columbia Act (section 13) specifically states that “factual material” (among other things) cannot be withheld as “advice and recommendations”. As I stated, I fully appreciate that our section differs significantly from that of our neighbours. However, I cannot accept that the bare recitation of facts, without anything further, constitutes either “advice etc” under

[section 24(1)(a)] or “consultations or deliberations” under [section 24(1)(b)].

This said, as noted in Alberta Order F2017-65,

In some circumstances, factual information can be conveyed that makes it clear a decision is called for, and what is recounted about the facts provides background for a decision that is to be made. Such a case involves more than merely “a bare recitation of facts”. Rather, what is recounted about particular events or the way in which they are presented may be said to constitute part of the ‘consultations or deliberations’ a decision maker uses to develop a decision. This may be so whether the decision maker specifically requests the information, or it is provided unsolicited having regard to the responsibilities of both the provider and receiver.

- [14]** I have looked at the unredacted page 24 in light of this statement of the law. One sentence was redacted. It is a statement of fact, and does not have the quasi-advisory character described in Alberta Order F2017-65. It does not fit within s 14(1)(a). I recommend it be disclosed.

Second redaction

- [15]** The second challenged redaction is on page 48. A discretionary exemption was claimed under s 25.1(c), which permits the head of a public body to refuse disclosure if the information “contains advice given by the employee relations division of a public body for the purpose of hiring or managing an employee.”
- [16]** Section 25.1 was added to the ATIPPA in 2017 and paragraph 25.1(c) has not, as far as I can tell, been previously considered. However the key word is “advice” and so my interpretation of it is broadly similar to my

interpretation of s 14(1)(a). To correctly claim the exemption, there must be something that is genuinely in the nature of “advice”,

- [17] I have looked at the unredacted page 48. The document is an e-mail from the deputy minister of Human Resources to the deputy minister of Health. Three phrases in two sentences are redacted.
- [18] The Department of Human Resources offers a wide range of employment-related advice across the GN. I find that it is “the employee relations division” for the Department of Health, and so satisfies the first criterion for the application of s 25.1(c).
- [19] However, I have a hard time understanding how s 25.1(c) could otherwise apply to these redactions. The redacted phrases are a statement of fact and a request. There is no advice involved, and the phrase does not have the quasi-advisory character described in Alberta Order F2017-65. The redactions do not fit within s 25.1(c). I recommend they be disclosed.

Third and fourth redactions

- [20] The third challenged redaction is on page 50, and the fourth is on page 54. A mandatory exemption for both was claimed under ss 23(1) and 23(2)(d), which requires the head of a public body to refuse disclosure where the disclosure would be an unreasonable invasion of a third party’s personal privacy. Section 23(2)(d) says that an unreasonable invasion is presumed where the information is about the third party’s “employment, occupational or educational history”.
- [21] I start with some general observations about a s 23 analysis. The core idea is in s 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 rest of s 23 provides guidance on how to make the determination required by s 23(1):
- a. Subsection (2) lists circumstances in which an unreasonable invasion of personal privacy may be presumed.

- b. Subsection (3) directs the head of the public body to consider “all the relevant circumstances”, and gives some examples.
- c. Subsection (4) lists circumstances in which a disclosure is deemed not to be an unreasonable invasion of personal privacy.

- [22] Any s 23 analysis, then, must consider all relevant factors. A presumption raised by s 23(2) is not conclusive; it can be rebutted by contrary circumstances of greater weight. Section 23(4), in contrast, directs a conclusion if the case falls within one of the listed circumstances.
- [23] I have looked at the unredacted page 50. It is an e-mail from the deputy minister of Health to the Applicant, while the Applicant was still working for the GN. It is a record, written from the deputy’s perspective, of what transpired in a meeting between the deputy and the Applicant. Two sentence fragments touching on a GN employee (not the Applicant) are redacted, along with that person’s personal pronouns.
- [24] Insofar as page 50 is an e-mail to the Applicant, and it is about the Applicant (as opposed to some other work-related matter), I would be inclined to find that the e-mail is the Applicant’s own “personal information” and should be disclosed. In any event, the Applicant has already seen everything in this document when it was first e-mailed to them.
- [25] Nevertheless, the redacted portions do touch on other GN employees. Even where a document is the Applicant’s own “personal information”, disclosure may be withheld where (and only to the extent) that the document also includes the personal information of a third party, and disclosure of that information would be an unreasonable invasion of the third party’s personal privacy: *Department of Human Resources (Re)*, 2020 NUIPC 13 (CanLII). I do not lay this down as a general rule, but rather as a matter of weighing all the relevant circumstances. Section 23 does not forbid all invasions of personal privacy, only those that would be unreasonable in the circumstances.

- [26] I think there is a distinction to be made between the two redacted phrases on this page.
- [27] The first redaction on this page is the deputy's account of something the Applicant said to them. As it turned out, this statement became relevant to the Applicant's termination. Disclosure of exactly what the deputy alleges was said is, in my view, necessary for a fair determination of the Applicant's rights: ATIPPA, s 23(3)(c). In my view, disclosure of the first redaction would not be an unreasonable invasion of a third party's personal privacy. It should be disclosed.
- [28] The second redacted phrase on page 50 is different. It is a statement of fact that includes personal information about another, identifiable GN employee. The second redacted statement is not about the Applicant, was not connected to the Applicant's termination, and is not necessary for a fair determination of the Applicant's rights. It would be an unreasonable invasion of a third party's personal privacy to disclose this statement, and it may be withheld.
- [29] The other redactions on page 50 concern the personal pronouns of the third party employee. Anonymization is to be encouraged, though it may be pointless here since unredacted portions of the disclosure are sufficient to identify the person involved. Nothing turns on whether the pronouns are disclosed or not.
- [30] I have also looked at the unredacted page 54. The document is an e-mail from the Applicant to the deputy minister of Health, while the Applicant was still working for the GN. The redaction is the title of another GN employee about whom the Applicant had spoken with the deputy on a previous occasion, along with that person's personal pronouns.
- [31] Especially in an e-mail that the Applicant wrote, I do not believe it is an unreasonable invasion of a third party's personal privacy to disclose the job title of a person about whom the sender and recipient of the e-mail had been speaking on a previous occasion. Unlike the second redaction on

page 50, no personal information is revealed. Disclosing this information would not, taking into account all the relevant circumstances, be an unreasonable invasion of the third party's personal privacy. It should be disclosed.

Fifth redaction

- [32]** The fifth challenged redaction is on page 62. A mandatory exemption was claimed under ss 23(1) and 23(2)(h)(i), which requires the head of a public body to refuse disclosure where the disclosure would be an unreasonable invasion of a third party's personal privacy. Section 23(2)(h)(i) says that an unreasonable invasion is presumed where the information consists of the person's name along with other personal information about the third party.
- [33]** My analysis of s 23 has been stated above. All relevant circumstances must be taken into account.
- [34]** I have looked at the unredacted page 62. The document is an e-mail from a senior official in the Department of Human Resources to the deputy minister. Some of the e-mail is about the Applicant, and those portions have been disclosed. The redacted portions are about other GN employees, either by name or by position.
- [35]** I am satisfied, having considered all of the relevant circumstances, that disclosing the redacted passages on page 62 would be an unreasonable invasion of the personal privacy of the GN employees mentioned or alluded to in those passages.

Sixth redaction

- [36]** The sixth challenged redaction is on pages 70-72. A discretionary exemption was claimed under s 22(c), which permits the head of a public body to refuse disclosure where personal information has been provided, explicitly or implicitly, in confidence.

[37] I begin by noting that it is incorrect to claim s 22(c) as a standalone exemption. Section 22 has three parts, and they are joined by the word “and”. All three parts must be satisfied for a s 22 exemption to be engaged. Section 22, in full, reads as follows:

22. The head of a public body may refuse to disclose to an applicant personal information that

(a) is evaluative or opinion material;

(b) is compiled solely for the purpose of

(i) determining the applicant's suitability, eligibility or qualifications for employment, or

(ii) awarding government contracts or other benefits; and

(c) has been provided to the public body, explicitly or implicitly, in confidence.

[38] The document comprising pages 70-72 is a letter, on GN letterhead, written by the deputy minister of Health to the deputy minister of Human Resources. The letter is a detailed explanation of why the deputy minister of Health recommends the termination of the Applicant’s employment. Most of the letter has been redacted.

[39] The first part of the s 22 three-part test is met. The letter is the deputy minister’s evaluation or opinion of the Applicant’s job performance.

[40] I am prepared to assume that the second part of the s 22 test is also met. The wording of s 22 is more naturally suited to employment references or character references for applicants applying to work for a public body. I am nevertheless prepared to assume, without deciding, that the wording is broad enough to cover continued employment (not just prospective employment) and internal documents (not just documents prepared by someone outside the public body).

[41] However, I do not believe the third part of the s 22 test is met in this case. The Applicant was on probation. A probation period will normally

conclude with an evaluation of the probationer's performance, followed by a decision about the probationer's employment status. If there is any dispute, it is inevitable that the probationer's performance evaluations will be made known to them. I do not accept that the deputy minister of Health had a reasonable expectation that the letter, which forms the core of the GN's case for termination, was prepared in confidence.

- [42] Before leaving this topic, I note that the letter has the words "Personal and Confidential" written at the top of the first page. I think it is well-established that writing those words on a document do not make it so. If it were otherwise, documents could be subtracted from a public body's ATIPPA disclosure obligations merely with a pro-forma stamp of confidentiality. A document marked "Personal and Confidential" may be disclosed if it otherwise meets the criteria for disclosure: see e.g. *Department of Human Resources (Re)*, 2020 NUIPC 13 (CanLII), which is the companion report to this one.

The seventh redaction

- [43] The seventh challenged redaction is on pages 95-96. Like the fifth challenged redaction, a mandatory exemption was claimed under ss 23(1) and 23(2)(h)(i). My analysis here is similar to the fifth redaction.
- [44] I have looked at the unredacted pages 95-96. The document is an e-mail from a senior official in the Department of Human Resources to the deputy minister. The e-mail is a record, from the official's perspective, of a meeting between the official and the Applicant. The redactions include only one full sentence, and the rest of the redactions are words and phrases scattered through the document. All of the redactions concern other GN employees, some of whom are named, and others of whom are referred to by position.
- [45] I am satisfied, considering all the relevant circumstances, that disclosing the redacted passages on pages 95-96 would be an unreasonable invasion

of the personal privacy of the GN employees mentioned or alluded to in those passages.

Conclusion and Recommendations

- [46]** The Department of Human of Resources correctly applied some exemptions and incorrectly applied others.
- [47]** Page 24: The department did not correctly apply the exemption in s 14(1)(a) concerning advice, etc., to a public body. **I recommend** the redacted information be disclosed.
- [48]** Page 48: The department did not correctly apply the exemption in s 25.1(c). **I recommend** the redacted information be disclosed.
- [49]** Pages 50, 54, 62, 95-96: The department did correctly apply the exemption in s 23 to the second redacted phrase on page 50, to the redacted portions of page 62, and to the redacted portions of pages 95-96. The department did not correctly apply the exemption in s 23 to the first redacted phrase on page 50 or the redacted portion of page 54. **I recommend** the latter information be disclosed.
- [50]** Pages 70-72: The department did not correctly apply the exemption in s 22 to this three-page document. **I recommend** the redacted information be disclosed.

Graham Steele

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