ᓄᓇᕗᒻᒥ ᑐᓴᐅᒪᔪᓕᕆᓂᕐᒧᑦ ᑲᙵᓇᖅᑐᓕᕆᓂᕐᒧᓪᓗ ᑲᒥᓯᓇ
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:	21-192
CanLII Citation:	Department of Health (Re), 2021 NUIPC 11
NUIPC File Number(s):	20-184-5
GN File Number(s):	1029-20-DH0839
Date:	March 2, 2021

Summary

[1] The Applicant applied to the Department of Health for disclosure of one specific e-mail.[1] The e-mail was released with certain redactions, which were challenged by the Applicant. The Commissioner finds s 25.1(b) was not correctly applied. Even if there was a "workplace investigation", there is insufficient evidence of a reasonable expectation of harm. The Commissioner also finds that a name and a description of a third party should, in the circumstances, be disclosed. The Commissioner reiterated that government business should not be conducted on private e-mail, and doing so does not shield it from disclosure.

Nature of Review and Jurisdiction

[2] This is an access review pursuant to s 28(1) of the ATIPPA. The Applicant applied for and received a three-page document from the Department of Health. There were some redactions on the first page of the document. At the applicant's request, this is a review of the claimed exemptions.

[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 Department of Health: ATIPPA, s 2, definition of "public body".

Issues

[4] The issues in this review are:

a. Did the department correctly apply the exemptions claimed under s 25.1(b), concerning the existence of a workplace investigation and a reasonable expectation of harm?
b. Did the department correctly apply the exemptions claimed under s 23(1), concerning an unreasonable invasion of a third party's personal privacy?

Facts

[5] In early 2019, two health-centre employees discussed with a third party some personal medical information of the Applicant's child.

[6] In August 2019, the Applicant filed an ATIPPA request for information. The department's disclosure, sent to the Applicant on September16, 2019, consisted of 26 pages. Within those 26 pages was a three-page document, consisting of a one-page e-mail and a two-page attachment. Some of the document's first page was redacted. Exemptions were claimed under s 23(1) (unwarranted invasion of personal privacy) and s 25.1(b) (workplace investigation combined with reasonable expectation of harm).

[7] The Applicant did not file a review request at that time. They did, however, file a privacy breach complaint referred to above, and that was the basis on which the previous Commissioner proceeded.

[8] In Report 20-171, *Complainant (Re)*, 20 NUIPC 8 (CanLII), the former Commissioner concluded there had been an unauthorized breach of privacy, and made certain recommendations.

[9] On August 4, 2020, the Applicant filed another request for information, this time asking for the three-page document, identified by date and sender, that had already been disclosed (with redactions) the previous September.

[10] On October 9, 2020, the Department of Health sent to the Applicant its response. The response consisted of the same three pages that had been released earlier, with the same redactions as before, with the same rationale for the claimed exemptions.

[11] On November 8, 2020, the Applicant wrote to this office to request a review, pursuant to s 28(1) of the Act.

Law

[12] Section 23 requires the head of a public body to refuse disclosure if disclosure would be an unreasonable invasion of a third party's personal privacy.

[13] In Review Report 21-185, *Department of Human Resources (Re),* 2021 NUIPC 4 (CanLII), paras 21-22, I set out the following outline of how to apply s 23:

> *[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.

[14] Section 25.1 of the ATIPPA was added in 2017:

25.1. The head of a public body may refuse to disclose to an applicant

(a) information relating to an ongoing workplace investigation;

(b) information created or gathered for the purpose of a workplace investigation, regardless of whether such investigation actually took place, where the release of such information could reasonably be expected to cause harm to the applicant, a public body or a third party; and

(c) information that contains advice given by the employee relations division of a public body for the purpose of hiring or managing an employee.

[15] This new provision, and specifically paragraph (b), was considered by the former Commissioner in *Department of Human Resources (Re),* 2020 NUIPC 13 (CanLII):

This is, once again, a discretionary provision so that the starting point is disclosure of the information in the record. There are also a number of criteria for information to qualify for an exception under this provision. Firstly, the information must have been

- *created or gathered for the purpose of a workplace investigation and*
- *the release of the information could be reasonably expected to cause harm to the applicant, a public body or a third party.*

Section 33 provides that the onus is on the public body to establish that an applicant has no right to access to a record or part of a record. Therefore, the onus to establish, on a balance of probabilities, that information meets the criteria for the exception claimed lies with the Department. Section 25.1 requires, in particular, that there be a reasonable expectation of harm that will result from disclosure.

Case law from across the country acknowledges fairly consistently that to meet this requirement for the exception, there must be clear and cogent evidence which points to the harm and there must be a direct link between the disclosure and the anticipated harm and if the public body is unable to establish this reasonable expectation, the exception does not apply.

[16] I adopt this statement of the law.

Analysis

[17] The Applicant applied for a single document: an e-mail and its attachment. The attachment had already been released, without redaction, in response

to an earlier access request. Therefore the only document at issue in this case is the e-mail itself.

Was the s 25.1(b) exemption correctly claimed?

[18] Most of the redactions are claimed under s 25.1(b), which has been quoted above. For s 25.1(b) to apply, there must be a workplace investigation; the information must be created or gathered for the purpose of the investigation; and there must be a reasonable expectation that disclosure will cause harm to the applicant, the public body, or a third party.

Was there a workplace investigation?

[19] The first question is whether the e-mail was "created or gathered for the purpose of a workplace investigation". I cannot find that it was.

[20] The e-mail is between two Health employees. I say that even though the name of the recipient in the "To:" field has been redacted under s 23(1). (I will discuss below whether that exemption is correctly claimed.) The department's rationale for the exemption, provided in response to the first ATIPPA request, acknowledges that the recipient is also a Health employee, and in any event, the unredacted portion of the e-mail makes plain who the recipient is.

[21] These two Health employees were the ones who attended a meeting with a third party at which personal medical information of the Applicant's child was discussed. The Applicant was upset about the breach of privacy, and appears to have complained to the employees' superior(s). The e-mail that is the subject of this review was written by one of the Health employees to the other. It is evident even from the unredacted portion of the e-mail that the writer is offering the recipient some advice on how to frame their response to the Applicant's complaint.

[22] On a review of this kind, the onus for refusing disclosure is on the public body: ATIPPA, s 33(1). There is no indication, either in the e-mail itself or

in the department's response, to suggest that there was a "workplace investigation" underway or contemplated within the GN, or that the employees thought they might later be engaged in one. At most—and in the absence of evidence, I can only surmise—that the two employees had been asked to provide their account of an incident that resulted in a citizen complaint to their superiors. Those sorts of customer-service or patient-relations complaints are, for better or worse, a regular feature of working with the public, and responding to them is not, in my view, the kind of "workplace investigation" contemplated by s 25.1(b).

[23] I cannot find that s 25.1 was intended to cast so wide a net as to cover the facts of this case. An interpretation of s 25.1(b) that broad would not, in my view, be in keeping with the purposes of the Act: ATIPPA, s 1. The purpose of the access law is, among other things, to make public bodies more accountable to the public. That is achieved by giving the public a right of access, and specifying limited exceptions. And again, the onus of proof is on the public body.

[24] There has been some suggestion by the department that a "workplace investigation" is or may be underway at the Applicant's place of work into the Applicant's conduct, and it is that investigation that engages s 25.1(b).

[25] The Applicant's place of work is not subject to ATIPPA. I am not persuaded that s 25.1 was intended to cover workplace investigations external to a public body covered by ATIPPA. I have reviewed Hansard for the debate on the bill that enacted s 25.1 and the only examples given in the Legislative Assembly pertained to investigations internal to the GN.

[26] I do not have to make a final decision on that point because, again, there is insufficient evidence of a "workplace investigation" happening elsewhere. Perhaps there is; perhaps there is not. The onus is on the public body to prove it. In the file there is only hearsay and supposition. There is no cogent information about the existence, nature, scope or duration of that investigation. An ATIPPA disclosure cannot be held up because of something that may or may not be happening elsewhere.

Was there a reasonable expectation of harm?

[27] Section 25.1(b) has an additional requirement: the release of the information "could reasonably be expected to cause harm to the applicant, a public body or a third party". This additional requirement may be contrasted with s 25.1(a).

[28] As stated in the Law section above, a reasonable expectation of harm requires "clear and cogent evidence which points to the harm and there must be a direct link between the disclosure and the anticipated harm and if the public body is unable to establish this reasonable expectation, the exception does not apply."

[29] I begin with some general observations about the requirement of a reasonable expectation of harm.

[30] The words "harm" or "harmful" occur many times throughout the ATIPPA, in a variety of contexts, as does the concept of reasonable expectation. But s 25.1(b) is the only place with the specific formulation "could reasonably be expected to cause harm".

[31] What was the legislative intent behind s 25.1(b)? I have reviewed Hansard for the bill that enacted s 25.1 to see if there is helpful guidance. The sponsoring minister was the then-premier. On second reading, the premier said nothing in connection with the proposed s 25.1.

[32] In Committee of the Whole House, the premier noted that the bill would "provide appropriate protections for personal information related to human resources for the government" (Hansard, September 19, 2017, page 4923). I take that to be a reference to the proposed s 25.1, but it is not helpful in gleaning legislative intent.

[33] Later in the same proceedings, questions about the proposed s 25.1 were raised by the member for Iqaluit-Niaqunnguu. The full exchange is at pages 4927-4930. The reply was given, at the premier's request, by the

deputy minister of the Department of Executive and Intergovernmental Affairs. The most relevant portions are these:

> *…it can be difficult to perform an investigation if a person isn't able to speak frankly and candidly to a person who is undertaking an investigation, an employee relations consultant or a staff member. It can be difficult if people are feeling that there could be some kind of reprisal against them. It's quite important, we believe, to be able to get to the bottom of things to protect the individual and to also protect the government.*
>
> *I certainly have personal knowledge of a case where an employee may have suggested that they would seek reprisals if somebody spoke against them. I also have personal knowledge and the committee may remember that the Information and Privacy Commissioner was not particularly happy with me in particular when we refused to disclose an investigation that was ongoing because we believed and we knew that if that ATIPP request were granted, it would certainly not bode well for the government itself. I can't speak about any more specifics than that, but it was quite a difficulty. (page 4927)*

And later in the same passage:

> *There's no intention to particularly withhold information. We just want to ensure that in the area of employee relations, we can do a thorough job for all people. (page 4928)*

[34] These passages are rather general but I take from them that the legislative intent behind the enactment of s 25.1(b) was to ensure that GN employees feel safe to participate in workplace investigations, without worrying about repercussions arising from an ATIPPA disclosure.

[35] I note in particular the deputy minister's example of a case in which employees might fear "reprisal" if they participated in a workplace investigation. That is, I believe, the sort of "harm" contemplated by s 25.1(b). It is a serious concern. Information prepared for purposes of an ongoing or potential workplace investigation may, in certain cases, give rise to threats, intimidation, coercion, or harassment if it is disclosed prematurely, or at all. There must be adequate space created for complaints and whistleblowing without harm ensuing. In some cases, as alluded to by the deputy minister, the very fact that there is an investigation may itself give rise to harm.

[36] Nevertheless, 25.1(b) must, like other exemptions, be limited: ATIPPA, s 1. There must be cogent evidence of harm, and that harm must be linked to the disclosure. In addition, the expectation of harm cannot be speculative or fanciful. It cannot be something merely imaginable. It must be reasonable in the circumstances.

[37] When a public body invokes s 25.1(b) to refuse disclosure, there may be instances on an ATIPPA access review that the public body wishes to make a confidential submission to the Commissioner. The purpose of s 25.1(b) might otherwise be defeated. The parties are not entitled as of right to see or comment on a representation made to the Commissioner: ATIPPA, s 32(3). Nevertheless, it is the practice of this office to share submissions between parties, and that will continue to be the normal practice except where the facts of the case dictate otherwise.

[38] In this case, the former Commissioner advised the department that it could make a confidential submission on s 25.1(b) if it wished, and the department did so. That submission has not been shared, except in general outline, with the Applicant.

[39] After reviewing the department's submissions, and putting it in the context of the other evidence on file, I find the department has fallen far short of establishing, on a balance of probabilities, a reasonable expectation that disclosure of the e-mail could cause harm to anyone.

A comment on the exercise of discretion

[40] Section 25.1(b) is a discretionary exemption. Even if the factual conditions for its application are met, the head of the public body "may" disclose the information if they choose. When the legislative assembly intends non-disclosure to be mandatory, the exemption is written as "shall" rather than "may".

[41] The previous Commissioner has written, on numerous occasions, that a discretionary exemption requires a two-step process: first, an explanation of why the exemption has been applied; and then, assuming an exemption has been claimed, why the head is exercising their discretion to refuse disclosure.

[42] In this case, the department claimed the s 25.1(b) exemption but was silent on the question of discretion. That, too, is an error.

[43] I recommend that all the information redacted under s 25.1(b) be disclosed.

Was there an unreasonable invasion of personal privacy?

[44] There are three redactions claimed under s 23(1), as being an unreasonable invasion of a third party's personal privacy. I have outlined the applicable principles in the Law section above.

The first s 23(1) redaction

[45] The first redaction is the e-mail address of the person to whom the e-mail is written.

[46] The recipient of the e-mail is a GN employee who presumably has a GN e-mail address. It is not clear why one GN employee is sending government business to another GN employee's personal e-mail address. Perhaps the sender wanted to keep the communication private, and forgot they were themselves using a GN e-mail account. Perhaps the sender thought a message sent to a private e-mail address is not subject to ATIPPA

disclosure. Perhaps there is another reason of which I am unaware. Sometimes a person subject to ATIPPA may have sincerely-held though misguided reasons for using a personal e-mail, e.g. *Review Report 19-157 (Re),* 2019 NUIPC 10 (CanLII).

[47] Let me be crystal clear: The use of private e-mail does not, by itself, shield communication from disclosure. It is a poor practice, from the point of view of both access, privacy, and data security. The GN should discourage it in all but exceptional cases, e.g. in cases of true emergency when GN mail is not reasonably available.

[48] I rather suspect the sender intended their e-mail to be hidden from ATIPPA disclosure, but slipped up by sending it from their GN account. The lesson I would like GN employees to learn is not that they should do a better job of hiding potentially embarrassing e-mails. The lesson I would like GN employees to learn is that if an e-mail is potentially embarrassing and needs to be kept off GN servers, perhaps it should not be written at all.

[49] But should the recipient's private e-mail address be disclosed? I have concluded, after considering all the circumstances as required by s 23(3), that it may be withheld. The identity of the recipient is clear enough from the unredacted portion of the e-mail. Nothing new is gained by disclosing the recipient's personal e-mail address. The recipient may not have asked or intended that the conversation be carried on via their private e-mail. I am prepared to extend the benefit of the doubt. My recommendation might have been different if the recipient had responded from the same e-mail address.

The second s 23(1) redaction

[50] The second redaction is a few words describing someone consulted by the writer of the e-mail. The full sentence reads: "[Redacted] says [the Applicant] should & could be reprimanded for going to such lengths to try

to hurt us & our careers ! He said he could make some phonecalls to put some heat on [the Applicant] but I've told him not to do anything yet."

[51] The person whose name is redacted is a third party, outside the GN, with no involvement in or authority over the matter. That would point to the name being withheld under s 23(1). Other factors pointing towards non-disclosure are that we don't know how much the third party really knew about the situation, or whether the conversation reported in the e-mail is an accurate reflection of what the third party said. It is hearsay. The circumstances of the conversation between the third party and the writer of the e-mail are such that the third party had, in my view, a reasonable expectation of confidentiality. (I do not feel I can say more on this last point without revealing indirectly who the third party is.)

[52] But there are two factors that point in the opposite direction, and I think they are stronger.

[53] First, there may well have been an additional breach of privacy. If the GN employee had a conversation with the third party, how much of the story was the third party told? We have to remember that this whole situation is grounded in a privacy breach involving the Applicant's child: *Complainant (Re)*, 20 NUIPC 8 (CanLII). The GN employee appears to have responded to the consequences of that privacy breach by attempting to marshal outside support, which would have involved disclosing at least some of the Applicant's story. The Department of Health does not seem to have picked up on this thread, but the Applicant has. The Applicant cannot do anything about the potential new breach of privacy, or even have their fears put to rest, if they don't know who the third party is.

[54] Second, the third party is reported to have said that could "put some heat" on the Applicant. We don't know if that's what the third party actually said; or if the third party has any ability to follow through on that statement, or if they did follow through; or if the GN employee later changed their instruction "not to do anything yet". Again, the Applicant

cannot do anything about this potential retaliation, or have their fears put to rest, if they don't know who the third party is.

[55] I have concluded, taking into account all the relevant circumstances, that the information behind the second redaction should be disclosed.

[56] I wish to emphasize that the purpose of this disclosure is not to hold the third party to account. The third party does not come under the umbrella of the ATIPPA. The purpose of the disclosure is to hold the Department of Health accountable for the actions of its employee.

The third s 23(1) redaction

[57] The third redaction is a person's name. The full sentence reads: "I don't trust [redacted] & don't think she did us any favors after the meeting……actually she threw us under the bus!"

[58] In its submission to me, the department says the name has been redacted because it is the name of a third party, and "the information if disclosed would be an unreasonable invasion of the third party's personal privacy."

[59] As previously discussed, a name, in and of itself, does not warrant an exemption under s 23(1). All relevant circumstances have to be taken into account, and there is no indication the department tried to balance the various factors.

[60] In this case, the person is not a GN employee, but nevertheless was involved in the case for work-related reasons. The context of the sentence makes it clear who the writer is talking about anyway. Disclosing the name is not, in all the circumstances, an unreasonable invasion of that person's privacy.

Conclusion

[61] The department did not correctly apply s 25.1(b) to the e-mail. The e-mail was not written for purposes of a workplace investigation, whether actual or possible. In addition, a reasonable expectation of harm was not established.

[62] The department did correctly apply s 23(1) to the first redaction, although its analysis could have been more complete. There is no general rule that a private e-mail address should be withheld.

[63] The department did not correctly apply s 23(1) to the second and third redactions. In the specific circumstances of this case, any invasion of privacy would not be unreasonable.

Recommendations

[64] **I recommend** that all the information redacted under s 25.1(b) should be disclosed.

[65] **I recommend** that the information behind the second and third redactions be disclosed.

Graham Steele

Nunavut Information and Privacy Commissioner