



## Issues

- [4] The issues in this review are:
- a. Did Health correctly apply the exemption in section 14(1)(a)?
  - b. Did Health correctly apply the exemption in section 15(1)?
  - c. Did Health correctly apply the exemption in section 23?
  - d. Did Health correctly apply the exemption in section 25.1(c)?
  - e. Did Health exercise its discretion for the discretionary exemptions?

## Facts

[5] The Applicant worked as a contract employee for the GN. Their contract expired. After the Applicant left Nunavut, a former co-worker made certain accusations concerning the Applicant. The details of the accusations, and the processes by which they were addressed, are not relevant to this review. In this decision, I refer to the former co-worker as “the complainant”.

[6] The Applicant was interested in further contract work with the GN, but was unable to secure any additional contracts.

[7] On December 21, 2021, the Applicant applied under the ATIPPA for all communications “between or about myself from any one of the following (7) seven people from the time frame of January 2020 to present.” Although the Applicant refers to “the following seven people”, only six people are listed.

[8] The Applicant also requested their personnel file, both from the Human Resources division of Health and the Department of Human Resources. It is common practice in the GN for there to be a separate personnel file in the Department of Human Resources and in the employee’s department.

[9] On January 6, 2022, Health transferred to the Department of Human Resources the portion of the Applicant’s request dealing with the HR personnel file. It was handled by HR as a separate ATIPP request and does not form any part of this review.

[10] On February 7, 2022, Health extended the time for its response.

**[11]** On March 11, 2022, Health disclosed 503 pages of records to the Applicant. The disclosure included some redactions. Health also provided an “exemptions rationale” explaining the redactions.

**[12]** On March 14, 2022, the Applicant requested that I review Health’s disclosure, to ensure the exemptions had been correctly applied.

## **Law**

**[13]** The redactions applied by Health were based on section 14 (advice, recommendations, etc.), section 15 (solicitor-client privilege), section 23 (unreasonable invasion of personal privacy), and section 25.1 (employee relations).

### *Section 14(1)(a)*

**[14]** Section 14(1) protects certain kinds of discussions among officials:

14. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal  
(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body... ;

....

**[15]** A full statement of the law on section 14(1)(a) can be found in *Department of Human Resources (Re)*, 2021 NUIPC 4 (CanLII) at paragraph 13. Section 14(1)(a) does not protect the final decision made, nor does it apply to purely factual information: *Review Report 19-152 (Re)*, 2019 NUIPC 5 (CanLII).

### *Section 15(1)(a) and (c)*

**[16]** Section 15(1) protects legal advice passing between a GN employee and their legal counsel. The relevant parts read as follows:

15. (1) The head of a public body may refuse to disclose to an applicant  
(a) information that is subject to any type of privilege available at law, including solicitor-client privilege;  
... [or]

(c) information in correspondence between an agent or lawyer of the Minister of Justice or a public body and any other person in relation to a matter involving the provision of advice or other services by the agent or lawyer.

**[17]** The principles of solicitor-client privilege are well-known. In brief, a confidential communication between a lawyer and the lawyer's client, that relates to seeking, formulating, or giving legal advice, is exempt from disclosure: *Nunavut Arctic College (Re)*, 2021 NUIPC 17 (CanLII) at paragraph 14.

### *Section 23*

**[18]** Section 23 protects some personal information of a third party from disclosure. It is a long section, but section 23(1) contains the core idea:

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.

**[19]** I have said before that section 23 is probably the most difficult section to interpret in the entire ATIPPA. That is particularly the case where, as here, most of the records relate to internal workplace matters: *Department of Executive and Intergovernmental Affairs (Re)*, 2021 NUIPC 13 (CanLII) at paragraphs 21 to 26; *Department of Human Resources (Re)*, 2021 NUIPC 19 (CanLII) at paragraph 23.

**[20]** I have also previously outlined the correct interpretive approach to section 23: *Department of Human Resources (Re)*, 2021 NUIPC 4 (CanLII). The key is to weigh all the relevant circumstances, as required by section 23(3), and keeping in mind the rebuttable presumptions in section 23(2). No single factor is decisive.

### *Section 25.1(c)*

**[21]** Section 25.1(c) protects certain employee-relations advice:

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

...

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

**[22]** The exemption in section 25.1(c) helps to ensure that GN employees ask for and get good advice. Added in 2017, it is analogous to the better-known and long-entrenched exemption in section 15(1) for legal advice: *Department of Human Resources (Re)*, 2021 NUIPC 15 (CanLII) at paragraph 31.

**[23]** To correctly claim the section 25.1(c) exemption, there must be something that is genuinely in the nature of “advice”: *Department of Human Resources (Re)*, 2021 NUIPC 4 (CanLII) at paragraph 16. There is not much precedent on the interpretation of section 25.1(c) since it is relatively new, but the word “advice” is also found in section 14(1)(a) and so the precedents on that section are helpful.

**[24]** The term “employee relations division of a public body” is broad enough to cover the Department of Human Resources, which offers a wide range of employment-related advice across the GN, as well as a public body’s internal HR division: *Department of Human Resources (Re)*, 2021 NUIPC 4 (CanLII) at paragraph 18; *Department of Human Resources (Re)*, 2021 NUIPC 15 (CanLII) at paragraph 32.

## **Analysis**

**[25]** Generally speaking, Health has done a good job applying the exemptions to the requested records. The touch is light and consistent. There are only a few small points on which I disagree and recommend disclosure. I will start with the points of agreement, and then move to the points of disagreement.

### *Section 15(1) – solicitor-client privilege*

**[26]** Information has been redacted under section 15(1)(a) on pages 169-171, 181, 183-185, 218-220, 222, 224-229, 247 and 426, and under section 15(1)(c) on pages 386-387.

**[27]** I have looked at all of these redactions, and I find that they comfortably fit within section 15(1)(a) or (c), as the case may be. Subject to what I say below about the exercise of discretion, this information need not be disclosed.

*Section 25.1(c) – employee relations advice*

**[28]** Information has been redacted under section 25.1(c) on pages 4, 5, 377, 378, 399-401 and 403.

**[29]** I note that the redacted document on pages 4 and 5 of the disclosure package has neither a listed author nor a date. It is a poor practice, for any number of reasons, for a public body to create anonymous, undated documents. The lack of a named author or creation date makes evaluation of certain exemptions under the ATIPPA, such as section 15 and section 25.1, more difficult.

**[30]** In the exemptions rationale, Health say the document was “received from the Employee Relations”. I am prepared to accept that as a fact in this case, because the contents of the document are such that it had to come from someone with expertise in employee relations. However this should not be taken as a precedent for future cases.

**[31]** Subject to what I say below about the exercise of discretion, this information need not be disclosed.

*Section 14(1)(a)*

**[32]** There is one e-mail with a sentence partly redacted under section 14(1)(a). The e-mail is on page 416 of the disclosure package, and repeated on page 503.

**[33]** As discussed in the Law section above, an exemption under section 14(1)(a) has to have the character of advice. In my view, the redacted words, taken in the whole context of the e-mail exchange, do not have that character. They are more in the nature of a command. This conclusion is reinforced by the fact that the writer holds a more senior position within Health than the recipient. I find the redacted words should be disclosed.

## Section 23

**[34]** As discussed in the Law section above, section 23 protects personal information in some circumstances. It is a difficult section and requires a careful weighing of the circumstances. I have sorted the section 23 redactions into five categories.

### (i) *Personal information about the complainant*

**[35]** The name and contact information of the complainant are redacted on pages 6 and 7, and the same information is repeated and redacted on pages 156 and 157, and again on pages 165 and 166. The Applicant is aware of who the complainant is, and there are other documents in the disclosure package in which the complainant's name is not redacted. Redaction of the complainant's name on these six pages therefore seems pointless. I do not think anything turns on it, so I will not recommend disclosure. This case is not quite the same as *Department of Executive and Intergovernmental Affairs*, 2021 NUIPC 13 (CanLII), in which I found that a GN employee's identity should not have been redacted to the extent it had been.

**[36]** Redaction of the complainant's contact information, on the other hand, is proper. This information should not be disclosed.

### (ii) *Irrelevant personal information about GN employees*

**[37]** It is to be expected in a GN office environment that some records will mix business and personal information. Personal details of GN employees such as information about family, home, leave and medical conditions can normally be redacted: *Department of Health (Re)*, 2021 NUIPC 12 (CanLII) at paragraph 79.

**[38]** It is also to be expected that some records will be about more than one individual. Section 23 can properly be applied to redact this irrelevant personal information.

**[39]** On this basis, redactions have been properly applied to personal information on pages 219, 245, 268, 383, 448, 449, 453, 455-457, 459, 461, 462, 496 and 497. This information should not be disclosed.

(iii) *Information about a GN employees at work*

**[40]** The references to other GN employee on page 452, 469 and 470 are different.

**[41]** The redacted reference to a GN employee on page 452 is about an employee going about their GN business, which is information that should generally be disclosed: *Department of Health (Re)*, 2021 NUIPC 12 (CanLII) at paragraph 78. Besides, I do not see how disclosing it could be an “unreasonable” invasion of personal privacy.

**[42]** There is also a redaction of a GN employee’s personal e-mail address on page 470. If a GN employee is using a personal e-mail for GN business, it is not necessarily exempt from disclosure: *Department of Health (Re)*, 2021 NUIPC 11 (CanLII) at paragraphs 47 and 48. In this case, however, I find the personal e-mail address may be withheld, for the same reasons given in *Department of Health (Re)*, 2021 NUIPC 11 (CanLII) at paragraph 49.

**[43]** There are redacted references to three other GN employees on pages 469 and 470. The e-mail exchange concerns an apparent dispute over the assignment of overtime shifts. The names of the GN employees who left and arrived in the community, creating the need for additional overtime, are irrelevant and should be withheld.

**[44]** But the overtime dispute itself was between the Applicant and the third employee. It seems certain that the Applicant already knows who the third employee is, and so redacting the name seems pointless. In any event, this incident may be “relevant to a fair determination of the applicant’s rights”: ATIPPA, section 23(3)(c). In all the circumstances, I find that disclosing the third employee’s name (three occurrences on page 469, one occurrence on page 470) is not an unreasonable invasion of personal privacy.



*(iv) Personal information about a support person*

[45] On pages 454 and 487, the name of a GN employee attending an employee-relations meeting as support for the complainant is redacted. In my view, this is an appropriate application of section 23.

*(v) Opinions about the complainant*

[46] Pages 484 and 488 are two copies of an e-mail in which an opinion about the complainant is redacted. According to the definition of “personal information” in section 2 of the ATIPPA, an opinion about an individual is that individual’s personal information. But that is not enough to redact under section 23. There is an additional requirement, namely that disclosure of the information would, in all the circumstances, be an unreasonable invasion of personal privacy. I find that test is not met for these redactions.

[47] On page 487, a different person expresses a different opinion about the complainant. Again, this is the complainant’s personal information, but more is required in order to redact under section 23. In all the circumstances, I find that disclosing this information is not an unreasonable invasion of personal privacy.

*Exercise of discretion*

[48] Although Health’s handling of this request is generally very good, I am disappointed to see no indication that it has actively exercised its discretion. Starting in 2006 and continuing up to the present case, the former Commissioner and I have pointed out this error too many times to count, but it continues.

[49] The ATIPPA includes some discretionary exemptions (“...may refuse to disclose...”) and some mandatory exemptions (“...shall refuse to disclose...”). Most exemptions are discretionary, including sections 14, 15 and 25.1. Section 23 is a mandatory exemption.

[50] For the discretionary exemptions, a public body is required to consider whether to disclose information that it could withhold. To put it another way, the ATIPPA says what the minimum disclosure is, and a public body can choose to release more than the minimum. That’s what it means to “exercise discretion”: to

think about disclosing more than the minimum, and then explaining to the Applicant why a choice has been made to disclose or not to disclose.

[51] There is no indication, whether in the cover letter to the Applicant or in the exemptions rationale, that Health exercised its discretion in this case. That is an error.

### **Conclusion**

[52] Health did not correctly apply the exemption in section 14(1)(a).

[53] Health correctly applied the exemption in section 15(1).

[54] Health correctly applied the exemption in section 23 in most cases, but with a few exceptions.

[55] Health correctly applied the exemption in section 25.1(c).

[56] Health did not exercise its discretion for sections 14, 15 and 25.1.

### **Recommendations**

[57] **I recommend** the redacted words on pages 416 and 503 be disclosed.

[58] **I recommend** the redacted name on page 452 be disclosed.

[59] **I recommend** the redacted name of the third employee (three occurrences on page 469, one occurrence on page 470) be disclosed. For greater certainty, the other two names redacted on page 469, and the personal e-mail address on page 470, should not be disclosed.

[60] **I recommend** the redacted words on page 484 and 488 be disclosed.

[61] **I recommend** the redacted words in the second paragraph of the e-mail on page 487 be disclosed. For greater certainty, the redacted words in the first paragraph should not be disclosed.

**[62] I recommend** that Health exercise its discretion with respect to the discretionary exemptions.

Graham Steele

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