



## Issues

- [4] The issues in this review are:
- a. Did Human Resources correctly apply the exemption in section 25.1(c) to pages 4 and 5 of the disclosure package?
  - b. Did Human Resources correctly apply the exemptions in sections 23 and 25.1(b) to pages 8 to 11 of the disclosure package?

## Facts

[5] This Review Report is a follow-up to Review Report 22-221-RR, which is publicly available as *Department of Human Resources (Re)*, 2022 NUIPC 12 (CanLII). In the course of that review, the department found a file that had been missed in its original search for records. I recommended that the department process this new file, and disclose what it could to the Applicant.

[6] The department did process the file, applied some redactions, and disclosed the remainder to the Applicant. The Applicant now requests that I review the redactions for compliance with the ATIPPA.

[7] It is also relevant to note that this case involves the same Applicant, and indeed the same request for records, as my Review Report 22-217-RR, which is publicly available as *Department of Health (Re)*, 2022 NUIPC 8 (CanLII). The Applicant's original request went to Health, which responded with 503 pages of records. Health transferred a portion of the request to Human Resources.

[8] Other than the new facts stated in paragraphs 5 and 6, the facts are the same as in Review Reports 22-217-RR and 22-221-RR. I will not repeat them here.

## Law

[9] Section 25.1 was added to the ATIPPA in 2017. The relevant parts read as follows:

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

...

(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.

[10] In *Department of Human Resources (Re)*, 2021 NUIPC 18 (CanLII) at paragraphs 9 to 12, I explained the law on section 25.1(b):

[9] Section 25.1(b) is a relatively new section of the ATIPPA, but there have already been several decisions in which it has been applied.

[10] In *Department of Education (Re)*, 2021 NUIPC 10 (CanLII) at paragraph 19, I explained what s 25.1(b) requires:

To correctly claim a s 25.1(b) exemption, a public body must (a) establish the information was created or gathered for the purpose of a workplace investigation, (b) identify who might suffer harm, (c) establish what harm that person might be expected to suffer, and (d) establish why the expectation of harm is reasonable.

[11] In *Department of Executive and Intergovernmental Affairs (Re)*, 2021 NUIPC 13 (CanLII) at paragraphs 29 and 30, I reviewed and adopted the former Commissioner's analysis of the level of proof that s 25.1(b) requires. There must be "clear and cogent" or "detailed and convincing" evidence of the harm, and a direct link between the disclosure and the anticipated harm.

[12] So far, the only Nunavut case in which a redaction under s 25.1(b) has been upheld is *Department of Education (Re)*, 2021 NUIPC 10 (CanLII). In all other cases, the s 25.1(b) redactions have been rejected for insufficiency of evidence.

At paragraph 17 of the same decision, I wrote that “Properly claiming a section 25.1(b) exemption requires real evidence, not speculation.”

**[11]** In *Department of Health (Re)*, 2022 NUIPC 8 (CanLII) at paragraphs 22 to 24, I explained the law on section 25.1(c):

[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.

**[12]** Finally on section 25.1, I note that it is a discretionary exemption. A public body must turn its mind to whether records should be released, even if a section 25.1 exemption otherwise applies: *Department of Health (Re)*, 2021 NUIPC 12 (CanLII) at paragraphs 14 and 15.

**[13]** Some of HR’s redactions are based on sections 23(2)(i) and (5). Along with section 23(1), those sections read as follows:

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.

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

...

(i) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation;

....

(5) On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body shall give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.

**[14]** 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.

**[15]** 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). Unless section 23(4) applies – and in this case it does not – no single factor is decisive.

### **Analysis**

**[16]** As it turns out, the records redacted by HR in this case were also in the disclosure package given to the Applicant in *Department of Health (Re)*, 2022 NUIPC 8 (CanLII). In the latter case it was pages 1 to 9 of the disclosure package, and in this case it is pages 1 to 5 and 8 to 11 of the disclosure package.

**[17]** Both Health and HR disclosed pages 1 to 3. They were correct to do so.

**[18]** Health redacted pages 4 and 5 of its disclosure package, on the grounds that it was employee-relations advice protected by section 25.1(c). Here is what I wrote about those pages in my Review Report, at paragraphs 29 and 30:

[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.

**[19]** For the same reasons, I find that Human Resources correctly redacted pages 4 and 5 of their disclosure package.

**[20]** Health disclosed everything on pages 6 and 7 of its disclosure package (which are pages 8 and 9 of the Human Resources package) except for the complainant’s name and contact information. Here is what I wrote about those pages in my Review Report, at paragraphs 35 and 36:

[35] The name and contact information of the complainant are redacted on pages 6 and 7 .... 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.

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

**[21]** Human Resources, in contrast, disclosed nothing on pages 8 and 9 of its disclosure package except for the header and footer.

**[22]** I prefer Health's approach, which properly balanced all the relevant circumstances under section 23 and recognized that section 25.1(b) did not apply because there was no evidence of harm to the complainant.

**[23]** Nevertheless, I will not recommend that Human Resources make further disclosure of pages 8 and 9. That is only because the Applicant has already received those pages, correctly redacted, from the Department of Health. No purpose is served by having one department go through the process of preparing and disclosing records if another department has already handed them over.

**[24]** Health disclosed everything on pages 8 and 9 of its disclosure package (which are pages 10 and 11 in the Human Resource package). Human Resources, in contrast, disclosed nothing on pages 10 and 11 except for the header and footer.

**[25]** Again, I prefer Health's approach. And again, I will not recommend further disclosure by HR only because the Applicant has already received those pages, unredacted, from Health.

**[26]** Although that is enough to dispose of the issues in this case, I wish to add a few comments on HR's approach to redactions in this case. I am hopeful these remarks will provide some guidance to HR in future cases.

**[27]** As outlined in the Law section above, the section 25.1(b) exemption requires real evidence, grounded in the facts of the case, showing why it is reasonable to expect that disclosure would cause harm. An example of a case in which evidence of harm was presented is *Department of Education (Re)*, 2021 NUIPC 10 (CanLII).

**[28]** In this case, HR presented a generic argument for harm, but no evidence. If the Legislative Assembly had intended that every workplace complaint should be exempt from disclosure, it could have said so. Instead, it wrote in section 25.1(b) that certain conditions have to be met before the exemption can be claimed. Those conditions cannot be met without evidence.

**[29]** With respect to the section 23 exemption, it requires consideration of all the relevant circumstances: see section 23(3). The paragraphs of section 23(2) are not stand-alone exemptions which override every other consideration.

**[30]** HR cited section 23(2)(i) as the reason for the redaction, but that section does not apply in this case. The complainant did not supply “a personal recommendation or evaluation, character reference or personnel evaluation”. Even if that section did apply, the presumption thereby created still needed to be weighed against the rest of the evidence.

**[31]** I am concerned that Health and HR looked at the same records, and came to very different conclusions about what should be redacted. They agreed that the first three pages should be released. After that, Health redacted almost nothing, and HR redacted almost everything.

**[32]** There is plenty of room for debate about how the ATIPPA applies to the facts of a given case. There is often a range, though perhaps a narrow range, of acceptable answers: *Nunavut Arctic College (Re)*, 2021 NUIPC 17 (CanLII) at paragraph 36. It is unrealistic to expect that different ATIPP Coordinators will always come to identical conclusions. But public confidence in the ATIPP process will likely be improved if the conclusions of different ATIPP coordinators were closer than they were in this case.

## **Conclusions**

**[33]** The Department of Human Resources correctly applied the exemption in section 25.1(c) to pages 4 and 5 of the disclosure package.

**[34]** The Department of Human Resources did not correctly apply the exemptions in sections 23 and 25.1(b) to pages 8 to 11 of the disclosure package.



## **Recommendation**

**[35]** Despite my conclusion in paragraph 34, I recommend that the Department of Human Resources disclose no further records from the disclosure package. The Applicant has already received the identical records, correctly redacted, from the Department of Health.

Graham Steele

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