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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

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Summary

[1] The Applicant requested certain records from the Department of Justice. Justice disclosed some records, with redactions. Most of the redactions were based on section 15(1), which permits an exemption for solicitor-client privilege. The Commissioner finds that Justice correctly applied the section 15(1) exemption. The Commissioner makes no recommendation for further disclosure.

Nature of Review and Jurisdiction

[2] This is a review of disclosure by the Department of Justice. The request for review was filed under section 28(1) of the *Access to Information and Protection of Privacy Act* (ATIPPA). I am conducting this review under section 31(1).

[3] There is some overlap between this decision and Review Report 22-226-RR, which is available publicly as *Department of Justice (Re)*, 2022 NUIPC 17 (CanLII). The Applicant is the same in both cases and the subject-matter is related, but there were two separate requests and two separate disclosures, and therefore there are two separate decisions.

[4] I have jurisdiction over the Department of Justice: ATIPPA, section 2, definition of “public body”.

Issues

- [5] The issues in this review are:
- a. Did Justice correctly apply the exemptions in section 15(1)?
 - b. Did Justice correctly apply the exemption in section 23?
 - c. Did Justice correctly conclude that records from the Minister of Justice did not have to be searched or disclosed?
 - d. Did Justice properly exercise its discretion to disclose?

Facts

[6] The Applicant is a former employee of the Department of Justice who was dismissed from their employment. They filed a wrongful dismissal suit against the GN. At the time of this decision, the lawsuit is unresolved. I will not be more precise with the details since they would tend to identify the Applicant.

[7] On February 17, 2022, the Applicant wrote to the Territorial ATIPP Manager with a request for records. The full text of the request would identify the Applicant, so I will summarize it by saying that the requested records relate to the Applicant's termination and request records ("email communications, meeting notes, text messages") about the Applicant and involving the Minister of Justice, the deputy minister of Justice, or a certain Justice lawyer.

[8] The ATIPP Manager, who has oversight of ATIPP processing within the GN but does not himself process ATIPP applications, sent the Applicant's request to the Department of Justice.

[9] On May 10, 2022, Justice sent a time-extension letter to the Applicant. Justice said it needed extra time because "Your request involves a large number of records that must be searched". The letter noted that the request for text messages was "the most challenging aspect of this search".

[10] By letter dated May 11, 2022, Justice sent a partial disclosure package to the Applicant. The package consisted of 92 pages of records, with redactions.

[11] On June 30, 2022, the Applicant filed a request for review with this office. The request was filed outside the statutory 30-day period: ATIPPA, section 29(1).

However the Applicant has explained the delay to me and I am satisfied I should extend the deadline for filing a request for review: section 29(2).

Law

[12] The Department of Justice claims three exemptions from disclosure. There are two other legal issues: whether records from the Minister of Justice are outside the scope of the ATIPPA, and the exercise of discretion to disclose.

Sections 15(1)(a) and 15(1)(c)

[13] Section 15(1) protects information that is “privileged”, which is a technical legal term. Section 15(1) reads 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;
 - (b) information prepared by or for an agent or lawyer of the Minister of Justice or a public body in relation to a matter involving the provision of legal services; 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.

[14] The best-known category of privilege is solicitor-client privilege, which is mentioned in paragraph 15(1)(a). Paragraphs (b) and (c) are further explanations of what is covered by solicitor-client privilege. For that reason, nothing turns on whether an exemption is claimed under paragraph (a), (b) or (c) of section 15(1).

[15] In *Nunavut Arctic College (Re)*, 2021 NUIPC 17 (CanLII) at paragraph 14, I summarized the law in this way: “...a confidential communication between a lawyer and the lawyer’s client, that relates to seeking, formulating, or giving legal advice, is exempt from disclosure.”

Section 23

[16] Section 23(1) lays down the general rule about the disclosure of personal information:

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.

[17] Generally, disclosing personal information about GN employees going about their work is not an unreasonable invasion of their personal privacy: *Department of Health (Re)*, 2021 NUIPC 12 (CanLII) at paragraph 78; *Nunavut Arctic College (Re)*, 2021 NUIPC 17 (CanLII) at paragraph 31. This is not an ironclad rule. It depends on all the circumstances: ATIPPA, section 23(3); *Department of Justice (Re)*, 2021 NUIPC 23 (CanLII) at paragraph 73.

[18] However, personal information about GN employees that is incidental to a record's subject-matter will usually be exempt under section 23: *Department of Health (Re)*, 2021 NUIPC 15 (CanLII) at paragraph 57. A GN employee's cell phone number may be protected, even if it is a work phone: *Department of Justice (Re)*, 2021 NUIPC 23 (CanLII) at paragraph 72. That is because cell numbers tend not to be publicized as much as desk numbers, and are potentially more intrusive. Again, this is not an ironclad rule. It depends on all the circumstances.

Records of the Minister of Justice

[19] The ATIPPA applies to "all records in the custody or under the control of a public body": section 3(1).

[20] The definition of "public body" in section 2 "does not include ... the office of a member of the Legislative Assembly or a member of the Executive Council".

Exercise of discretion

[21] Section 15 is a discretionary exemption. Even if it applies, a public body must ask itself one more question: "Should we release it anyway?" The difference between section 15 and other discretionary exemptions is that a special

procedure, set out in subsections 15(2) and (3), must be followed before records can be disclosed.

Analysis

Section 15(1)

[22] Almost all of the exemptions claimed by Justice are based on section 15(1). That section protects from disclosure documents subject to legal privilege, which is explained in the Law section above. The best-known privilege is solicitor-client privilege, but there are others.

[23] As noted in the Facts section above, the disclosure package consists of 92 pages of records.

[24] Pages 1 to 26 are redacted in their entirety, citing section 15(1)(c). The same records are redacted again on pages 33-58. I am not giving away anything important by saying these pages are printouts of bank statements.

[25] It is not obvious, from the disclosure package itself, where these bank statements came from. In response to my question, Justice explained that the bank statements were attached to the exchange of e-mails at pages 74-77 of the disclosure package, which are e-mails to or from GN lawyers. Justice further explains that the bank statements got out of order because of the way that responsive documents are delivered to the ATIPP Coordinators who are assembling the disclosure package.

[26] I have looked at the e-mails at pages 74-77 and it is still not clear that these bank statements are associated with that exchange. However I do not believe that anything turns on these bank statements, and I am prepared to accept Justice's explanation of where they came from and why the section 15 exemption has been applied to them. In future, however, it would be advisable to ensure that documents that belong together are next to each other in the disclosure package, or are otherwise identified as being connected. Without that context, it becomes difficult or impossible for me to assess, on review, whether a record is subject to solicitor-client privilege.

[27] Apart from the bank statements, the rest of the section 15 redactions fit comfortably within the parameters of section 15. They are legal discussions involving the deputy minister (himself a lawyer), another GN lawyer, and the GN's external lawyer. All are directed towards the provision of legal advice or other legal services, within the context of the lawsuit between the Applicant and the GN. They need not be disclosed.

Section 23

[28] In this case, Justice has redacted the cell phone number of a GN employee. The same number is redacted four times. In my view, this number is incidental to the records' subject-matter. No purpose is served by disclosing it. It may properly be withheld.

Records of the Minister of Justice

[29] The Minister of Justice, as a member of the Executive Council, is not a "public body" for purposes of the ATIPPA. Justice concluded correctly that records held by the minister need not be searched or disclosed.

[30] To avoid any misunderstanding, however, I do wish to be crystal clear that this rule applies to records held by a minister. A record is not exempt from disclosure merely because it is to, from, or about a minister. If such records are "in the custody or under the control of" a public body, then they must be processed like any other records. The only difference is that they might be subject to exemptions that apply specifically to members of the Executive Council, such as may be found in sections 13 and 14 of the ATIPPA.

Exercise of discretion

[31] The Exemption Rationale prepared by Justice includes a column labelled "Discretion explanation". Unfortunately, what Justice has written in that column is a conclusion, not an explanation. For section 15(1)(a), it says: "This information is legal advice and is subject to solicitor client privilege. The Department of Justice will not be considering waiver of this privilege at this time." For section 15(1)(c), the only difference is that "legal documents" replaces "legal advice".

[32] As I noted in *Department of Justice (Re)*, 2021 NUIPC 23 (CanLII) at paragraph 41, “if that is intended to address the question of discretion, it is not sufficient. It is a conclusion, not a reason. We already know the department is refusing to release the document. What we need to know is why.”

[33] The requirement to exercise discretion cannot be satisfied with a rote phrase such as “The Department of Justice will not be considering waiver of this privilege at this time”. More is needed. For example, if waiver will not be considered “at this time”, that implies it might be considered later. When? Under what circumstances? Since the Legislative Assembly has chosen to make section 15 a discretionary exemption, it is not open to Justice to refuse waiver in every instance as a matter of policy.

[34] I mention this point as guidance for Justice in future. In the present case, there is unresolved litigation between the GN and the Applicant. In these circumstances, the GN cannot reasonably be expected to consider waiving its solicitor-client privilege, and I will not recommend that it consider doing so.

A few final comments

[35] From my correspondence with the Applicant, I know they will be disappointed with this decision.

[36] But the Applicant must keep in mind that the GN, like any other person, is entitled to seek and receive legal advice without worrying that its legal discussions will be disclosed publicly. Solicitor-client privilege is a cornerstone of our legal system. These conversations are protected from disclosure, both in the litigation process and in the ATIPP process.

[37] Given the way the ATIPP request was worded, it was inevitable that most of the responsive records would be subject to solicitor-client privilege. The Applicant cannot sue the GN and then expect to see, through ATIPP, the legal advice the GN is developing in response to the lawsuit.

[38] Because this is a review of partial disclosure, the Applicant may, if they wish, file a request for review of Justice's final disclosure package. I will not, however, reconsider any matters dealt with in this decision.

Conclusion

[39] Justice correctly applied the exemptions in section 15(1).

[40] Justice correctly applied the exemption in section 23.

[41] Justice correctly concluded that records held by the Minister of Justice did not have to be searched or disclosed.

[42] Justice did not exercise its discretion to disclose under section 15, but given the existence of an unresolved lawsuit brought by the Applicant against the GN, it is inevitable that discretion would be exercised against disclosure.

Recommendation

[43] **I recommend** that the Department of Justice continue to withhold the redacted records in the disclosure package.

Graham Steele

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