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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. An investigation report into allegations of wrongdoing was redacted almost in its entirety under section 25.1(a). The Commissioner finds that section 25.1(a) does not apply because the investigation is not ongoing. The Commissioner recommends that Justice reconsider its redaction of the investigation report, apply section 23, and disclose whatever does not have to be withheld under section 23.

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 22-225-RR, which is available publicly as *Department of Justice (Re)*, 2022 NUIPC 16 (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 apply the exemption in section 25.1(a)?
d. Did Justice correctly conclude that records from the Minister of Justice did not have to be searched or disclosed?
e. Did Justice 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 March 2, 2022, the Applicant wrote to the Territorial ATIPP Manager with a request for records. The request referred to a particular document that had come to the Applicant's attention during pre-trial disclosure ("discovery") proceedings in the lawsuit. The Applicant was looking for background information about how that document was produced.

[8] The request for records included "all communications", including text messages, from a list of named individuals. The list includes the Minister of Justice, the Deputy Minister of Justice, a Justice lawyer, a Department of Human Resources manager, and "any other Government of Nunavut employees, who may have contributed" to the document.

[9] The Territorial 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.

[10] By letter dated June 21, 2022, Justice sent a partial disclosure package to the Applicant. The package consisted of 76 pages of records, with redactions.

[11] On June 30, 2022, the Applicant filed a request for review with this office.

Law

[12] The Department of Justice claims four 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] The rest of section 23, which is lengthy, provides guidance about how to make the decision under section 23(1). It is a difficult section to apply correctly. In the present case, I do not need to get into all the intricacies of section 23. It is enough to say that there is no automatic rule that the name or the e-mail address of a third party must be redacted. It depends on all the circumstances: ATIPPA, section 23(3).

Section 25.1(a)

[18] Section 25.1 of the ATIPPA reads as follows:

> 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.

[19] A workplace investigation report is not automatically exempt from disclosure: see, for example, *Department of Health (Re)*, 2021 NUIPC 7 (CanLII), in which an investigation report had been disclosed to the applicant, and the only question was whether the investigator’s notes should also be disclosed; and *Department of Executive and Intergovernmental Affairs (Re)*, 2021 NUIPC 13 (CanLII), in which the only question was what could be properly redacted.

[20] That result is apparent from the words of section 25.1, which was added to the ATIPPA in 2017. The phrase “workplace investigation” appears in both sections 25.1(a) and (b), and both include a condition that must be met if information is to be withheld.

[21] The condition in section 25.1(a) is that the workplace investigation must be “ongoing”. The word “ongoing” means “ongoing at the time ATIPP disclosure is being considered”: *Department of Human Resources (Re)*, 2021 NUIPC 15 (CanLII) at paragraph 38. It does not mean “ongoing at the time the document was written”, because that would exclude every report.

[22] An example of a case in which a workplace investigation was truly “ongoing” is *Department of Human Resources (Re)*, 2021 NUIPC 18 (CanLII) at paragraphs 27 to 29. If a workplace investigation is finished, section 25.1(a) does not apply.

[23] The condition in section 25.1(b) is that releasing the information “could reasonably be expected to cause harm to the applicant, a public body or a third party”. The onus of bringing forward evidence of harm is on the public body: ATIPPA, section 33(1).

Records of the Minister of Justice

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

[25] 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

[26] Sections 15 and 25.1 are discretionary exemptions. Even if they apply, 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)

[27] A few 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.

[28] As noted in the Facts section above, the disclosure package consists of 76 pages of records.

[29] On pages 5 to 7, almost all of an e-mail is redacted. From the header, which is unredacted, we can see that the e-mail is from a Justice lawyer to the GN's external lawyer. This e-mail is exempt under section 15(1).

[30] On pages 21 and 22, a two-page letter is almost entirely redacted. From the unredacted portion, we can see that it was written on the letterhead of a Yellowknife law firm, and is addressed to two GN deputy ministers. The letter is copied to various senior GN officials, including a Justice lawyer.

[31] It appears Justice believed this document was written by a lawyer working for the GN. In fact, it was written by the Applicant's lawyer and sent to the GN. It is therefore not subject to solicitor-client privilege. Section 15(1) does not apply. This document should be disclosed without redaction.

Section 23

[32] On pages 30 to 32, Justice has redacted the e-mail addresses of two private citizens, along with detailed contact information for one of them. There is not much point making these redactions, since the Applicant was the recipient of the e-mails in question and already has this information. However Justice was not wrong to make the redactions, and the information need not be disclosed.

[33] On page 73, Justice has redacted under section 23 two e-mail addresses associated with the law firm used by the GN. Again, there is not much point in making these redactions. One is the e-mail address of a machine, not a person, so

it cannot be covered by section 23. The other is for a lawyer whose name is not redacted and whose email address is readily available on the internet. The redacted information is so insignificant that I will not recommend disclosure. I will simply note that there is no ironclad rule that an external e-mail address must be redacted under section 23. As section 23(3) says, it depends on all the relevant circumstances.

Section 25.1(a)

[34] On pages 41 to 72, almost an entire investigation report is redacted. This is by far the most significant redaction in the disclosure package. Justice cites section 25.1(a) to support the redaction. For the reasons that follow, this blanket redaction was an error.

[35] The only unredacted portions of the report are the letterhead (an Ottawa law firm), the title (“Investigation Report”), and the page numbers. I have had the advantage of seeing the unredacted report. It is relevant to add that the date on the title page is April 4, 2018.

[36] As noted in the Law section above, a workplace investigation report is not automatically exempt from disclosure. Section 25.1(a) carries a condition: the workplace investigation must be “ongoing”.

[37] In this case, there was no workplace investigation at the time of the Applicant’s request for records. The investigation report was completed more than four years ago. The Applicant’s employment was terminated shortly afterwards. Section 25.1(a) does not apply.

[38] Very late in the review process, Justice agreed that section 25.1(a) does not apply, but put forward the argument that the investigation report is exempt under section 25.1(b). That section is quoted in the Law section above.

[39] Section 25.1(b) creates an exemption for any records associated with a workplace investigation, but it also carries a condition: the exemption applies only “where the release of such information could reasonably be expected to cause

harm to the applicant, a public body or a third party”. Since there is no evidence of harm in this case, section 25.1(b) cannot apply.

[40] Justice does not cite section 15 in relation to the investigation report, but I will touch on it briefly. Section 15 is the exemption for records that are privileged at law, including records protected by solicitor-client privilege. An investigation report prepared by a lawyer may or may not be subject to solicitor-client privilege. It depends on whether the lawyer’s retainer is more in the nature of fact-finding or legal advice. I note that that the Law Society of Nunavut issued a Notice to the Profession in June 2020 on this topic.

[41] The investigation report was compiled while the Applicant was still employed by the GN. There was at that point no termination and no lawsuit. Indeed, the Applicant was one of the key witnesses interviewed by the investigator. Without revealing the substantive contents of the report, I note that within the report the investigator describes himself as a “neutral fact finder.”

[42] In all the circumstances, I find that the section 15 exemption cannot be claimed for the investigation report. The report is not protected either by solicitor-client privilege or litigation privilege.

Section 23 (reprise)

[43] I have concluded that sections 15 and 25.1 cannot be applied to the investigation report, but that does not mean that the investigation report has to be disclosed. There remains the question of how section 23 (unreasonable invasion of a third party’s personal privacy) might apply. It is a mandatory exemption.

[44] I have had the advantage of seeing an unredacted copy of the investigation report. There is a substantial amount of personal information in the report, but it is mostly about the Applicant. To the extent that there is personal information about third parties, that information can be reviewed by Justice and, if the criteria of section 23 are met, it can be redacted. The rest of the investigation report should, in my view, be disclosed to the Applicant.

Records of the Minister of Justice

[45] For the reasons given in *Department of Justice (Re)*, 2022 NUIPC 16 (CanLII) at paragraphs 29 and 30, Justice concluded correctly that records held by the minister need not be searched or disclosed.

Exercise of discretion

[46] Section 15 is a discretionary exemption. For the reasons given in *Department of Justice (Re)*, 2022 NUIPC 16 (CanLII) at paragraphs 31 to 33, Justice's "discretion explanation" is not satisfactory.

[47] There is, however, 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.

[48] Section 25.1 is also a discretionary exemption, and again the "discretion explanation" is not satisfactory. It is a conclusion, not an explanation. In any event, I have found that sections 25.1(a) and 25(1)(b) do not apply to the investigation report, so the point may be moot. But if Justice rejects my recommendation and maintains its position under sections 25.1(a) or 25.1(b), it must at least consider how to exercise its discretion.

[49] If Justice accepts my recommendation and reconsiders disclosure of the investigation report in light of section 23, discretion does not come into play. Section 23 is a mandatory exemption. Any information covered by section 23 must be withheld.

[50] 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

[51] Justice correctly applied the exemptions in section 15(1) to pages 5 to 7. The exemption was not correctly applied to pages 21 and 22.

[52] Justice correctly applied the exemption in section 23 to pages 30 to 32. The exemption was not correctly applied on page 73, but the redacted information is so insignificant I will not recommend disclosure.

[53] Justice did not correctly apply the exemption in sections 25.1(a) and 25.1(b) to the investigation report at pages 41 to 72.

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

[55] Justice did not exercise its discretion to disclose under sections 15 and 25.1. With respect to section 15, the existence of an unresolved lawsuit brought by the Applicant against the GN makes it inevitable that discretion would be exercised against disclosure. With respect to section 25.1, Justice should, if it rejects my recommendation not to apply section 25.1 to the investigation report, consider how to exercise its discretion to disclose.

Recommendations

[56] **I recommend** that the Department of Justice disclose pages 21 and 22 to the Applicant without redaction.

[57] **I recommend** that the Department of Justice (a) reconsider its redaction of pages 41 to 72, (b) apply section 23 and not section 25.1, and (c) disclose to the Applicant whatever is not required to be redacted under section 23.

Graham Steele
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