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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 disclosure of an audit report that had been commissioned by the Department of Family Services in the wake of allegations of financial misconduct at a non-government service provider. Family Services consulted with the RCMP, and refused disclosure on the grounds that the audit report was compiled as part of an investigation and that disclosure could prejudice the investigation. The Commissioner finds the audit report may be withheld. There is a reasonable possibility that the RCMP investigation could be prejudiced by disclosure.

Nature of Review and Jurisdiction

[2] This is a review of a decision by the Department of Family Services to withhold a record from the Applicant. 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) of the ATIPPA.

[3] The issues in this Review Report are substantially the same as in *Department of Finance (Re)*, 2022 NUIPC 19 (CanLII), which is being issued at the same time. The two Review Reports should be read together.

[4] I have jurisdiction over the Department of Family Services: ATIPPA, section 2, definition of "public body".

Issues

[5] The issues in this review are:

a. Did the Department of Family Services correctly apply the exemption in section 20(1)(a) regarding prejudice to a law enforcement matter?
b. Did the Department of Family Services correctly apply the exemption in section 23 regarding unreasonable invasion of a third party's personal privacy?

Facts

[6] YWCA Agvvik is a charitable organization based in Iqaluit. At the times relevant to this review, it operated two crisis shelters for women and children. This activity was funded largely by grants from the Government of Nunavut, mainly through the Department of Family Services.

[7] In 2017, an anonymous whistleblower delivered a document package to the GN, the RCMP, and the media. The package contained a list of allegations, with supporting documents, about financial misconduct at YWCA Agvvik.

[8] As a result of the allegations package, the Department of Family Services undertook an audit of YWCA Agvvik. The audit was carried out by a private accounting firm. The audit produced a report which I will refer to as "the external audit report". Later, the Department of Finance undertook another audit of YWCA Agvvik. That audit was carried out by the GN's internal audit division. The audit produced two reports. I will refer to these reports as "the internal audit reports".

[9] At some point, the RCMP began a criminal investigation based on the allegations package. The details of that investigation are not, of course, a matter of public record. As of the date of this Review Report, the RCMP has made no public announcement about whether charges will be laid. The RCMP has recently confirmed to the Applicant, to DFS and Finance, and to me that there is an active investigation.

[10] On May 11, 2022, the Applicant filed an ATIPP application with Finance for disclosure of "the report of the audit into the YWCA Agvvik Nunavut". The Applicant also requested "all records … related to the investigation into the YWCA Agvvik Nunavut, from May 1, 2017, to May 11, 2022".

[11] Because Finance knew that DFS also had responsive records, Finance transferred part of the request to DFS on May 18, 2022.

[12] Finance concluded that the only responsive records it had were the internal audit reports. DFS concluded that the only responsive record it had was the external audit report. However, neither was ready to disclose the audit reports to the Applicant. There was another step they wanted to take first.

[13] In June 2022, DFS and Finance jointly consulted with the RCMP, seeking their opinion on whether release of the audit reports could interfere with the police investigation. Following that consultation, DFS and Finance both refused disclosure of the audit reports, citing sections 20(1)(a) and 23(2)(b) of the ATIPPA.

[14] On June 23, 2022, the Applicant filed two Requests for Review with this office, one for the refusal from DFS, and the other for the refusal from Finance.

Law

[15] DFS and Finance cite two sections of the ATIPPA to support withholding the entire audit reports: section 20(1)(a) and section 23(2)(b).

Section 20(1)(a)

[16] Section 20(1)(a) reads as follows:

> 20. (1) The head of a public body may refuse to disclose information to an applicant where there is a reasonable possibility that disclosure could
>
> (a) prejudice a law enforcement matter; ….

[17] The phrase “law enforcement” is defined in section 2:

> "law enforcement" includes
>
> (a) policing, including criminal intelligence operations,
>
> (b) investigations that lead or could lead to the imposition of a penalty or sanction, or
>
> (c) proceedings that lead or could lead to the imposition of a penalty or sanction; ….

[18] In *Department of Justice (Re)*, 2021 NUIPC 23 (CanLII) at paragraphs 13 to 21, I discussed how the “reasonable possibility” test should be interpreted. I adopt that entire analysis for this decision. I summarized the law at paragraph 21:

> For s 20(1)(a), the public body does not have to prove that prejudice to a law enforcement matter is more likely than not, but it does have to show more than a speculative possibility.

In that case, I found that section 20(1)(a) could not be applied because the public body presented no evidence to establish a reasonable possibility of prejudice.

Section 23(2)(b)

[19] DFS and Finance also cite section 23(2)(b) as a reason not to disclose the entire audit reports. Together with section 23(1), it reads 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
>
> …
>
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible contravention of law, except to the extent that disclosure is necessary to prosecute the contravention or continue the investigation; ….

[20] I have, in previous Review Reports, laid out the proper method of interpreting and applying section 23: see especially *Department of Human*

Resources (Re), 2021 NUIPC 4 (CanLII) at paragraphs 21 and 22, and *Nunavut Arctic College (Re)*, 2021 NUIPC 17 (CanLII) at paragraphs 28 and 29.

[21] I will not repeat the whole analysis here. I will summarize it by saying that every decision under section 23 is a decision under section 23(1). Subsections (2), (3) and (4) provide guidance on how to make the decision under subsection (1). Unless subsection (4) applies, no single factor is decisive.

[22] I especially want to emphasize that the paragraphs of section 23(2) are not stand-alone exemptions. Even if one of those paragraphs applies, the presumption thereby created must be weighed against the rest of the evidence, and it may be rebutted.

Analysis

[23] The Applicant's requested review of both the DFS refusal and the Finance refusal. This is my decision on the DFS portion of the request. The Finance portion of the request is issued at the same time as Review Report 22-228-RR. It is publicly available as *Department of Finance (Re)*, 2022 NUIPC 19 (CanLII).

Accountability and the GN

[24] It is important to keep in mind, throughout the analysis that follows, that the objective of the ATIPPA is to hold public bodies to account: section 1. Although there are allegations about financial irregularities at YWCA Agvvik, the ATIPPA does not operate to hold YWCA Agvvik or anyone associated with it to account. There are other mechanisms to do that.

[25] In this case, the purpose of the ATIPPA is to hold the Department of Family Services and the Department of Finance to account. During the period in question, millions of dollars were given by DFS to YWCA Agvvik. Finance has overall responsibility for financial management within the GN. There are allegations that some of the YWCA Agvvik money was misspent. Are the allegations true? If they are, why did DFS and Finance not catch it earlier? What oversight mechanisms did DFS and Finance have in place? What lessons have

been learned by DFS and Finance? Those are the sorts of questions that can be addressed by disclosure of records under the ATIPPA.

Section 20(1)(a)

[26] The events at YWCA Agvvik came to a head in 2017, when the allegations package was delivered to the GN, the RCMP, and the media. As of the date of this decision, no criminal charges have been laid.

[27] Despite the passage of time, DFS and Finance refuse disclosure of the audit reports on the basis of section 20(1)(a). That section creates an exemption if there is a reasonable possibility that disclosure could prejudice a law enforcement proceeding. Although the term "law enforcement proceeding" is broader than a police investigation, in this case DFS and Finance are thinking of the RCMP investigation into the events at YWCA Agvvik.

[28] From an ATIPP perspective, the difficulty is that the RCMP has made no public statement about the status of their investigation, nor about when or if they expect that criminal charges will be laid. I addressed this problem in *Department of Justice (Re)*, 2021 NUIPC 23 (CanLII) at paragraphs 53 and 54:

> [53] The RCMP does not always confirm that an investigation is underway. Even if they do, the public does not know when, if ever, charges will be laid. … The RCMP does not routinely give updates on its investigations, nor does it routinely announce when an investigation is concluded. And that is to say nothing about a possible trial and appeal, which might also be "law enforcement matters".
>
> [54] Suspending ATIPP disclosure until a "law enforcement matter" is concluded could delay disclosure for years. That would be a "black hole" into which too much information could disappear: see *Canada (Information Commissioner) v. Canada (Minister of National Defence),* 2011 SCC 25 (CanLII) at paragraphs 51-54; *Department of Health (Re)*, 2021 NUIPC 7 (CanLII) at paragraph 42. It would effectively defeat the purpose of the ATIPPA.

[29] To put it plainly, the key question in this case is: How long does the Applicant have to wait before there is no longer a "reasonable possibility" of prejudice to a law enforcement proceeding?

[30] There can be no fixed answer to that question. The legal test in section 20(1)(a) – reasonable possibility of prejudice to the investigation – does not change. But as time marches on and extends to years, the possibility of prejudice becomes less reasonable.

[31] After the Applicant requested the audit reports, DFS and Finance approached the RCMP to get its input. That was the appropriate thing to do. I have had the advantage of seeing all of the e-mail correspondence passing between DFS, Finance and the RCMP. The RCMP confirmed there is an active investigation and gave the opinion that disclosure of the audit reports could prejudice the investigation. On that basis, DFS and Finance refused disclosure.

[32] Unfortunately, DFS and Finance did not go the necessary next step by asking the RCMP to explain how disclosure of the audit reports could prejudice the investigation. Without that information, DFS and Finance could not come to a valid conclusion on the "reasonable possibility" of prejudice. Therefore, as part of this review, I contacted the RCMP myself and dug deeper into the possibility of prejudice.

[33] In accordance with the ATIPPA, my review is conducted in private: section 32(1). No one is entitled as of right to have access to or to comment on representations made to me as part of a review: section 32(3). Further, I am required not to disclose any information that comes to my knowledge in the course of a review: section 56(1). The major exception is I may disclose, in a Review Report, any matter that is necessary to establish the grounds for my findings and recommendations: section 56(3)(b).

[34] I therefore will not, in this review, disclose detailed information about my dialogue with the RCMP. I will say, however, that the RCMP advanced four "reasonable possibilities" of prejudice to a law enforcement proceeding if the audit reports are disclosed publicly: (1) tainting of the RCMP's own auditors; (2) tainting of the jury pool; (3) tainting of potential witnesses; and (4) tipping any likely suspects to precise details of the RCMP investigation.

[35] In order to meet the test for exemption under section 20(1)(a), it is enough for me to find that any one of these possibilities of prejudice is "reasonable". As noted in the Law section above, that standard is less than a probability but more than speculation.

[36] I find that the fourth possibility advanced by the RCMP meets the legal test in section 20(1)(a).

[37] The RCMP would not be able simply to introduce the GN audit reports into evidence at a criminal trial. It would have to build its own forensic audit. Assuming the RCMP has undertaken or will undertake its own forensic audit, that forensic audit would inevitably cover the same ground as the GN audit reports. That is particularly the case for the internal audit reports, which are meticulously detailed and which meet, in my view, the definition of a true forensic audit. The external audit report, which was completed first, is not properly speaking a forensic audit. In some areas it used a sampling methodology. Its conclusions are mostly tentative. The external audit report serves more to point to areas for further investigation. Despite its more tentative nature, I find that the external audit report contains enough factual details that there is a reasonable possibility that it, too, could prejudice the police investigation by tipping possible suspects to what exactly the RCMP is investigating.

[38] I am not persuaded that the other possibilities advanced by the RCMP meet the test in section 20(1)(a). But since I have found there is one reasonable possibility of prejudice to the investigation, the section 20(1)(a) exemption may correctly be applied.

[39] In my view, the exemption in section 20(1)(a) supports, at least in this case, withholding the entire audit report.

Section 23 analysis

[40] Because of my conclusion on section 20(1)(a), it is not strictly necessary for me to reach a firm conclusion on the exemption claimed under section 23. I offer the following comments as guidance for DFS and Finance, in the event that, at

some point in the future, the section 20(1)(a) exemption can no longer be claimed.

[41] I have written previously that section 23 is probably the most difficult section in the entire ATIPPA. I have tried in several Review Reports to explain how to apply it correctly. Public bodies continue to struggle with it, as DFS and Finance did in this case.

[42] In every section 23 case, the core question is taken from the words of subsection (1): would disclosure of personal information be an unreasonable invasion of a third party's personal privacy? If so, the personal information must be withheld. Otherwise, the information can be disclosed.

[43] The rest of section 23 provides guidance about how to make the decision required by section 23(1):

a. Section 23(2) lists circumstances that create a presumption that disclosure is an unreasonable invasion of a third party's personal privacy. This presumption is rebuttable. That means it can be outweighed by the rest of the evidence.

b. Section 23(3) says what to take into consideration when making the decision under section 23(1) – "all the relevant circumstances" – and then gives examples of what is relevant.

c. Section 23(4) lists circumstances that create a presumption that disclosure is <u>not</u> an unreasonable invasion of a third party's personal privacy. This presumption is not rebuttable. That means that, if one of these circumstances exists, the decision under section 23(1) is in favour of disclosure.

[44] One point that trips up many public bodies, including DFS and Finance in this case, is that the paragraphs of section 23(2) are <u>not</u> stand-alone exemptions. Even if the facts of a case fit within one of the paragraphs of section 23(2), the public body <u>must go on</u> to consider "all the relevant circumstances". The presumption created by section 23(2) can be rebutted.

[45] In any event, I find that section 23(2)(b) does not apply in this case. The audit reports were commissioned to determine what happened to the GN's contribution to YWCA Agvvik. The personal information in the reports was not "compiled … as part of an investigation into a possible contravention of law". Neither the external nor the internal auditors had the authority to determine whether there had been a "contravention of law".

[46] Every government audit report is, in some sense, intended to ensure compliance with "the law", including accounting standards, procurement rules, and the government's financial administration rules. It is too broad an interpretation to suggest that section 23(2)(b) covers every audit report, or even every forensic audit report. Exemptions to disclosure should be "limited exceptions": ATIPPA, section 1(c).

[47] The internal audit report was delivered to DFS with the following main recommendation: "…we recommend that corrective action be taken to address the weaknesses noted in this report, which led to the mismanagement of funds contributed by the Department of Family Services." That is an appropriate conclusion for an internal audit. The focus is on the management of GN funds, and on corrective action. The authors of the report did not see themselves as investigating "a possible contravention of law". It was not what they were asked to do. It is not what they did. The same goes even more so for the external audit report, which is less detailed in its analysis and more tentative in its conclusions than the internal audit reports. Section 23(2)(b) does not apply.

Section 23(1)

[48] I have found that the presumption in section 23(2)(b) does not apply in this case, but that is not the end of the section 23 analysis.

[49] Even without the aid of the presumption in section 23(2)(b), section 23 may still support redactions to the audit reports. That is because the reports contain a substantial amount of personal information about individuals both inside and outside YWCA Agvvik.

[50] DFS and Finance took the position that there was so much personal information in the audit reports that the personal information could not realistically be severed. I do not agree. It will be the rare case where the section 23 exemption justifies withholding an entire document. As the former Commissioner liked to say, "every record must be assessed page by page, line by line, and even word by word": *Review Report 18-136 (Re)*, 2018 NUIPC 1 (CanLII); see also *Nunavut Housing Corporation (Re)*, 2022 NUIPC 5 (CanLII) at paragraph 37. The work can at times be tedious but that is what the scheme of the Act requires.

[51] *Review Report 15-088 (Re)*, 2015 NUIPC 1 (CanLII) was another situation involving a GN internal audit report. In that case, the former Commissioner concluded that the section 20(1)(a) exemption did not apply, but that "most of the content of the audit reports" would fall under section 23. She did list, however, the portions of the audit reports that could be disclosed without breaching anyone's privacy. The same could, if and when necessary, be done in this case.

Third party consultation

[52] There is one other detail that I wish to bring to the attention of DFS and Finance, in the hope it will assist them in any similar future case.

[53] DFS and Finance jointly contacted the RCMP. They wanted to establish whether there was still an active investigation, and they wanted to obtain the RCMP's opinion about whether releasing the reports could interfere with the investigation. As I noted above, that was the appropriate thing to do.

[54] The request to the RCMP was, however, framed as a third-party consultation under section 26 of the ATIPPA. That was not the correct framing. A consultation under section 26 applies only to section 23 (personal information) or section 24 (commercial information). The GN audit reports were not the RCMP's personal information or commercial information. If anyone should have been consulted under section 26, it was the individuals named in the reports.

[55] In reality, what DFS and Finance were doing was simply gathering information to make a decision under section 20(1)(a). It was not a third-party consultation under section 26.

[56] This distinction matters because the third-party consultation process in the Nunavut ATIPP has its own statutory deadlines and appeal rights. The third-party consultation process is difficult to follow correctly and can add lengthy delays to the process.

[57] In this case, the RCMP responded to the query from DFS and Finance fairly quickly, but if it had truly been a section 26 consultation, they could have taken up to sixty days. If it had truly been a section 26 consultation, DFS and Finance should have formally notified the Applicant under section 26(4), given the Applicant notice of the decision with reasons under section 27(2), and given the Applicant notice of the right to request review under section 27(3). That is why section 26 should not be invoked except in a proper case.

A few final comments

[58] I find that the audit reports may be withheld in their entirety under section 20(1)(a). This is not, however, a "forever" exemption. It is based on the current facts. As the facts continue to evolve, the result may change.

[59] If criminal charges are laid, the possibility of tipping possible suspects to the details of the RCMP investigation becomes less reasonable. That is especially the case after the Crown makes full disclosure to the accused, as they are required to do by law. At that point, the section 20(1)(a) exemption will no longer have the same force.

[60] If the RCMP states publicly that charges will not be laid, that is another indicator that the section 20(1)(a) exemption no longer has the same force. Section 20(1)(a) does not necessarily require a specific on-going investigation or proceeding: *Ontario (Community Safety and Correctional Services)*, 2007 CanLII 46174 (ON SCDC) at paragraph 72; *Monkman v. Serious Incident Response Team*, 2015 NSSC 325 (CanLII) at paragraph 47. But if a record is going to continue to be

withheld after conclusion of an investigation, the "reasonable possibility of prejudice to a law enforcement matter" test must still be met.

[61] The worst-case scenario, from an ATIPPA perspective, is if substantially more time passes without a definite conclusion, one way or the other, to the RCMP investigation. The RCMP is generally reluctant to say that any investigation is over, because there is always the possibility of fresh evidence. At some point, however, the balance will shift in favour of disclosure under the ATIPPA. We have not reached that point yet, but eventually we will.

[62] The allegations of wrongdoing at YWCA Agvvik came to light in 2017. If the allegations are true, public money was diverted for improper purposes. The case has implications for financial management across the GN. Nunavummiut still know little about what really happened. The ATIPPA gives priority to the integrity of the criminal investigation, and properly so. But there has yet to be any public accountability by DFS and Finance for what is alleged to have happened at YWCA Agvvik. As the RCMP investigation drags into its sixth year, section 20(1)(a) must not become a permanent sinkhole for GN accountability.

Conclusion

[63] The Department of Family Services correctly applied the exemption in section 20(1)(a). That exemption supports withholding the external audit report in its entirety.

[64] Because of my conclusion on section 20(1)(a), it is not necessary to reach a firm conclusion on section 23. For purposes of guidance, the Department of Family Services did not correctly interpret section 23(2)(b). Section 23 may still support redaction of personal information in the audit reports, but not the entire report.

Recommendations

[65] **I recommend** that the Department of Family Services continue to withhold the external audit report.

[66] I recommend that the Department of Family Services revisit its decision to withhold the external audit report if (a) criminal charges are laid in connection with the subject-matter of the report, or (b) the RCMP states publicly that criminal charges will not be laid.

Graham Steele
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