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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

<b>Report Number:</b>	23-246-RR
<b>CanLII Citation:</b>	Department of Family Services (Re), 2023 NUIPC 13
<b>NUIPC File Number(s):</b>	23-125
<b>GN File Number(s):</b>	1029-20-2324FS0630
<b>Date:</b>	June 19, 2023

### 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. The Applicant had, a year earlier, requested the same report but had been refused. Family Services again refused disclosure on the grounds that disclosure could prejudice a police investigation. The Commissioner finds that, given the passage of time and a change in the status of the investigation, there is no longer a reasonable possibility of prejudice to the investigation. The report should, with appropriate redactions under section 23, be disclosed. The Commissioner recommends that DFS begin the process of redaction under section 23 and recommends a timeline for disclosure.

### Nature of Review and Jurisdiction

[2] This is a review of a decision by the Department of Family Services (DFS) to withhold a record from the Applicant. The request was filed under section 28(1) of the *Access to Information and Protection of Privacy Act* (ATIPPA). I conducted my 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)*, 2023 NUIPC 14 (CanLII), which is being issued at the same time. The two Review Reports should be read together.

[4] The issues in this Review Report are also substantially the same as in *Department of Family Services (Re)*, 2022 NUIPC 18 (CanLII) and *Department of Finance (Re)*, 2022 NUIPC 19 (CanLII). I will refer to those decisions as, respectively, Review Report 22-227 and Review Report 22-228.

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

### Issues

- [6] The issues in this review are:
- a. Did DFS correctly apply the exemption in section 23(2)(b)?
  - b. Did DFS correctly apply the exemption in section 20(1)(a)?
  - c. If not, what is the appropriate remedy?

### Facts

[7] Except for what follows, the facts are the same as in Review Report 22-227: see *Department of Family Services (Re)*, 2022 NUIPC 18 (CanLII) starting at paragraph 6.

[8] On May 9, 2023, the Applicant submitted a fresh request for records. The request was essentially the same as in Review Report 22-227. As a result, DFS did not undertake a new search for responsive records. As in Review Report 22-227, DFS identified an external audit report as the sole responsive record.

[9] On May 30, 2023, DFS sent a refusal letter to the Applicant. The explanation for withholding the external audit report reads, in full, as follows:

Unfortunately, access to all the information which you requested is denied under Sections 20. (1)(a) and 23(2)(b) of the ATIPP Act. The investigation is still ongoing, and no decision has been announced. Disclosure of any information would prejudice the ongoing conviction process.

[10] On May 31, 2023, the Applicant requested that I review DFS’s refusal to disclose the report. As part of my review, I asked DFS to send to me all correspondence on the file. I received the correspondence on June 12.

[11] A minor note on spelling: In all of the relevant documents, the name of the non-profit entity is spelled “YWCA Agvik”. That is the spelling the entity used at the time. The entity has since corrected the Inuktitut-to-English orthography in its name and now goes by “YWCA Agvik”. In this decision, I use the latter spelling.

## **Law**

[12] The law is the same as in Review Report 22-227: *Department of Family Services (Re)*, 2022 NUIPC 18 (CanLII) at paragraphs 16 to 22.

[13] In sum: a record may be withheld under section 20(1)(a) if there is a “reasonable possibility” of prejudice to a law enforcement proceeding. A “reasonable possibility” is less than a probability but more than speculation.

## **Analysis**

[14] My analysis is substantially the same as in Review Report 22-227: *Department of Family Services (Re)*, 2022 NUIPC 18 (CanLII) starting at paragraph 23. I will not repeat the whole analysis here, but I adopt it for purposes of this decision.

[15] In Review Report 22-227, I concluded that DFS could continue to withhold the external audit report on the finances of YWCA Agvik. I accepted that there was a reasonable possibility of prejudice to the RCMP investigation, because release of the report could tip potential suspects to what precisely the RCMP was investigating. I wrote that this was not a “forever” exemption: *Department of Family Services (Re)*, 2022 NUIPC 18 (CanLII) at paragraph 58. The applicability of the exemption could change if the facts changed.

[16] A year later, the same Applicant has applied for the same report. The question that was before DFS, and that is now before me, is whether there were sufficient changes in the facts to change the result. For the reasons that follow, I conclude that the answer is Yes.

*Section 23(2)(b) – personal information*

**[17]** DFS cites section 23(2)(b) as a reason for withholding the external audit report. Section 23(2)(b) does not apply to this case. I explained why in Review Report 22-227: *Department of Family Services (Re)*, 2022 NUIPC 18 (CanLII) at paragraphs 45 to 47. I am disappointed that DFS is citing it again.

**[18]** To be clear, my finding is that section 23(2)(b) is not a stand-alone exemption under which the entire report can be withheld; and in any event, the criteria in section 23(2)(b) have not, on the facts of the case, been met. As I explained in Review Report 22-227, portions of the report may nevertheless need to be redacted under the rest of section 23: *Department of Family Services (Re)*, 2022 NUIPC 18 (CanLII) at paragraphs 49 to 51.

*Section 20(1)(a) – What is the test?*

**[19]** DFS also cites section 20(1)(a) as a reason for withholding the external audit report. That is the exemption on which this case turns.

**[20]** The legal test under the ATIPPA is not whether the RCMP investigation is taking too long. The fact that the investigation has now entered its seventh year may be cause for concern to citizens, but it is not directly relevant to a decision under the ATIPPA.

**[21]** The legal test is also not whether the RCMP investigation is still open. That is the test that DFS seems to have applied when it told the Applicant that “The investigation is still ongoing, and no decision has been announced.” If that were the legal test, section 20(1)(a) would have been written differently.

**[22]** The legal test in section 20(1)(a) is the reasonable possibility of prejudice to a legal proceeding. As in Review Report 22-227, I do not see any indication that DFS turned its mind to that question.

**[23]** I have cautioned, in several different contexts, of creating a “black hole” into which GN records (and therefore GN accountability) can disappear: *Department of Health (Re)*, 2021 NUIPC 7 (CanLII) at paragraph 42; *Department of Justice (Re)*, 2021 NUIPC 23 (CanLII) at paragraph 54; *Department of Health (Re)*,

2022 NUIPC 4 (CanLII) at paragraph 109; *Department of Health (Re)*, 2022 NUIPC 6 (CanLII) at paragraph 61.

**[24]** If section 20(1)(a) is interpreted too loosely, it can become just that sort of black hole. That is, in my view, what DFS has done in this case. The RCMP told DFS there would be prejudice, and DFS took the RCMP's word for it. But the RCMP are not the ones processing the ATIPP request. As one would expect, the RCMP is being ultra-cautious. DFS has a different job. It needed to go further and ask itself how, exactly, release of the report would create a reasonable possibility of prejudice.

*Section 20(1)(a) – What is the possibility of prejudice?*

**[25]** In Review Report 22-227, at paragraph 34, I summarized the possibilities of prejudice advanced by the RCMP:

[34] ...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.

I went on to say that I was not persuaded that the first three scenarios were a reasonable possibility. They were speculative. I accepted, at the time, that the fourth scenario was a reasonable possibility. In this decision, I will continue to focus only on that fourth scenario.

*Section 20(1)(b) – What has changed?*

**[26]** Between the Applicant's two ATIPP requests, a year passed. DFS concluded that its decision in 2023 should be the same as its decision in 2022. After all, that conclusion (if not the reasoning behind it) had been endorsed by me in Review Report 22-227.

**[27]** But DFS was required to consider whether, in the year between requests, the underlying facts had changed. I see no indication that they considered that

question. They did contact the RCMP again, and again accepted the RCMP's conclusion at face value. DFS did not stop to evaluate what they were being told.

**[28]** I have, for purposes of this review, also been in touch again with the RCMP. 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).

**[29]** I therefore will not, in this review, disclose detailed information about my dialogue or DFS's dialogue with the RCMP. There are two points, however, that I feel I may mention under section 56(3)(b), to establish the grounds for my findings and recommendations.

**[30]** First, the RCMP told DFS and I, in separate communications, that the status of the file has changed in the past year. I regret that I must be cryptic on this point, but the status of the file is distinctly different now than it was a year ago. In my view, the current status of the file makes prejudice caused by ATIPP disclosure much less likely than it was a year ago.

**[31]** Second, the RCMP's advice to DFS was based on an assumption about the identity of the Applicant that was obviously incorrect. I see no indication that DFS noticed or thought through the implications of that incorrect assumption.

**[32]** In my view, the reasonable possibility of prejudice to the investigation that I accepted in Review Report 22-227 has been lessened to the point where it is now merely speculative. That is not sufficient to meet the test in section 20(1)(a).

### *Remedy*

**[33]** That leaves me with the question of remedy.

**[34]** Sooner or later, DFS will have to disclose the external audit report. The only question is when. Some parts of the report may have to be redacted under

section 23. In order to avoid further delay, DFS should begin the process of reviewing the report for redactions under section 23.

**[35]** DFS has previously argued that there is so much personal information in the external audit report that the entire document may be withheld. I do not agree. I addressed this point in Review Report 22-227:

[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.

If exempt information can reasonably be severed, it should be, and an applicant has a right to the remainder: ATIPPA, section 5(2).

**[36]** I recognize that DFS – and perhaps also the RCMP – may need some time to consider its next steps. In my view, three months is a fair balance between the rights of the Applicant and the needs of the public body.

**[37]** Therefore if a public announcement about charges has been made before September 19, 2023, the report (with appropriate redactions under section 23) should be disclosed to the Applicant on that day or as soon as possible thereafter. If no public announcement has been made by the RCMP before September 19, 2023, about whether charges will be laid, DFS should on that date disclose the report (with appropriate redactions under section 23) to the Applicant.

### *A final comment*

**[38]** The access provisions of the ATIPPA exist to make it possible for Nunavummiut to hold their government to account. The purpose of Nunavut's ATIPPA is not to hold private entities like YWCA Agvik to account, nor is it to hold federal entities like the RCMP or the PPSC to account. There are other processes for that. Nothing in this decision should be taken as a comment on, or criticism of, anyone in those organizations. But there are legitimate questions about how the GN oversaw the public funds it gave to YWCA Agvik. Those questions have, for over six years, gone unaddressed in any public forum. That is long enough.

### **Conclusion**

**[39]** DFS did not correctly apply section 23(2)(b).

**[40]** DFS did not correctly apply section 20(1)(a).

**[41]** DFS should release the external audit report. DFS will, however, need some time to review the report for redactions under section 23. That work should start now so that the report is ready for release in accordance with paragraph 37.

### **Recommendations**

**[42]** **I recommend** that the Department of Family Services immediately start reviewing the external audit report for redactions under section 23.

**[43]** **I recommend** that the Department of Family Services release the external audit report, with appropriate redactions, to the Applicant on the earliest of the following three dates: (a) the date the RCMP announces it has laid charges in connection with the YWCA Agvik investigation; (b) the date the RCMP announces it will not lay charges in connection with the YWCA Agvik investigation; and (c) September 19, 2023.

Graham Steele

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