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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 filed a request for records about harassment complaints filed by members of a certain occupational group. The Department of Human Resources at first refused any disclosure. Later, HR agreed to release a table listing some information about the responsive complaints. The Applicant asked the Commissioner to review whether more information should be released. The Commissioner finds that HR properly withheld information under sections 23 and 25.1(a), and that HR does not have an obligation under the ATIPPA to create any further summary or categorization of the complaints. The Commissioner concludes with some comments and recommendations concerning ATIPP processing issues within HR.

Nature of Review and Jurisdiction

[2] This is a review of an access decision by the Department of Human Resources. 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).

[3] I have jurisdiction over the Department of Human Resources: ATIPPA, section 2, definition of "public body".

Issues

[4] The issues in this review are:

a. Did HR correctly apply the exemption in section 25.1(a)?
b. Did HR correctly apply the exemption in section 23?
c. Does HR have an obligation to create a more detailed summary or categorization of the responsive records?

Facts

[5] On June 30, 2023, the Applicant filed an ATIPP request for records of harassment complaints filed by a particular group of GN workers. The exact wording of the request is as follows:

> …copies of all formal harassment complaints filed by [occupational group] between the dates of June 30, 2021, and June 30, 2023 (the past two years). I am also looking for outcomes: of files that are closed, how many resulted in action taken, and what sort of action was taken? How many files are still open?

[6] On July 4, 2023, HR's ATIPP Coordinator sent a lengthy e-mail to the Applicant. The e-mail is difficult to summarize, but the gist of it is that HR would not respond to the request as written because it would require too much work. The e-mail concluded by asking the Applicant to withdraw their request. If the request was not withdrawn (said the e-mail) HR would apply under section 53 to disregard the request.

[7] The e-mail also said HR was transferring the request to Health, but that does not appear to have happened.

[8] In any event, the Applicant had already sent a similarly-worded request to Health (though for a slightly shorter period) and had received a reply. The reply listed the responsive files and whether they had been sent for investigation under the GN's harassment policy. Health's reply said that the files were held by HR. This reply meant that the Applicant had a good estimate of how many files would be responsive to the HR request. The number was not large.

[9] Given the response from Health, the Applicant was puzzled by the response from HR. The Applicant requested that I review HR's refusal to disclose any records.

[10] As part of my review, I assessed the likelihood that I might be able to mediate a mutually-acceptable response to the Applicant's request. I met with HR's ATIPP Coordinator, sketched out the problems with their response, and outlined the kind of response that might better meet HR's obligations under the ATIPPA. HR agreed to work on it.

[11] The Applicant was prepared to wait for HR's response. I therefore put my review on hold, pending HR's response to the mediation.

[12] On August 16, HR sent a new disclosure letter to the Applicant. Attached to the letter was a table listing sixteen responsive files. The files fit within the occupational group and date range specified by the Applicant.

[13] After further discussion with the Applicant, an amended table was issued by HR on August 18. That was HR's final disclosure. The column headings are:

a. Summary: This column lists the date of the complaint, plus either "HRM 1010 against supervisor" or "HRM 1010 against colleague". (HRM stands for Human Resources Manual. The HRM 1010 policy is the policy on Respectful and Harassment Free Workplace.)

b. Open/Closed: Seven files are listed as Closed, and nine are listed as Open.

c. Investigation: All sixteen files have the word "Yes" in this column.

d. Outcomes: Eight of the Open files have the word "Ongoing" in this column. One Open file has "Unable to continue – critical person unavailable". All the Closed files have "Did not meet HRM 1010 criteria – No Prima Facie Met" in this column.

[14] The Applicant was happy to have received more information than before, but thought they should be able to receive still more. The Applicant put their position this way, in an email to HR on August 16:

> My hope was that it would include summaries of the nature of the complaints with non-identifying details such as: was it verbal harassment such as swearing or name-calling? (What types of namecalling?) elements of racism? constructive dismissal? micromanagement? targeted chart audits? etc.
> …
> I am not looking for any personal, potentially identifying information. But I do believe there is some room for a high-level summary of the nature of these complaints beyond what is already given.

[15] After its amended disclosure of August 18, HR declined to release any more information. The Applicant and I agreed that I should recommence my review.

Law

[16] HR says that almost all the information in the requested records is exempt from disclosure under sections 23 and 25.1(a) of the ATIPPA.

Section 23

[17] Section 23(1) 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.

[18] I have repeated the proper interpretation of section 23 in so many Review Reports that I hope it is, by now, familiar to all public bodies. I will not repeat the whole analysis here, but it can be found in *Department of Human Resources (Re)*, 2021 NUIPC 4 (CanLII).

[19] I recognize that section 23 is probably the most difficult section in the whole Act. The essence of it is that section 23(1) lays down the basic rule. Every decision under section 23 is a decision under section 23(1). Subsections (2), (3) and (4) provide guidance on how the rule in section 23(1) should be applied in a given case.

[20] Records relating to harassment complaints are especially difficult. As I wrote in *Executive and Intergovernmental Affairs (Re)*, 2021 NUIPC 13 (CanLII) at paragraph 23:

> Because personal harassment is about "environment", the investigation can cover a wide range of incidents, a long period of time, and many witnesses. It can cover everything from large group meetings to a fleeting personal interaction. It can cover what is said and unsaid, written and unwritten, committed and omitted. It can cover different treatment of similarly situated employees, or similar treatment of differently situated employees. It can delve into personalities and deeply personal circumstances and whether individual reactions are reasonable in the circumstances.

This passage was about harassment investigations, but the same could, in my view, be said about the harassment complaints that start the process.

[21] The balancing of all relevant circumstances, as required by section 23(3), means that different applicants may receive different disclosure: *Executive and Intergovernmental Affairs (Re)*, 2021 NUIPC 13 (CanLII) at paragraph 61. As I wrote in that case,

> It is implicit in the ATIPPA, especially but not solely because of [section] 23, that different disclosures may be made to different applicants. For example, if the Applicant, respondent and a third party (for example, a journalist) were all to file an ATIPP request for this investigation report, each would receive a different version of it. An outsider, in particular, would receive only a heavily-redacted version of the report, if they received the report at all.

That passage, too, was about a harassment investigation report, but the same could, in my view, be said about the harassment complaints that start the process. In the present case, the Applicant is an "outsider", i.e. neither complainant nor respondent in any of the responsive files.

Section 25.1(a)

[22] Section 25.1(a) 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; …

[23] Section 25.1(a) is not a blanket exemption for records associated with an investigation. It contains a condition that must be met before records can be withheld – namely, there must be an investigation that is ongoing at the time ATIPP disclosure is being considered: *Department of Human Resources (Re)*, 2021 NUIPC 15 (CanLII) at paragraph 38; *Department of Justice (Re)*, 2022 NUIPC 17 (CanLII) at paragraph 21.

Analysis

[24] This file is a good example of the processing problems that can arise when an applicant asks a public body for a mixture of records and information.

[25] Despite its name, the ATIPPA grants a right of access to records, not information. If there is information that is not in a record, a public body has only a limited obligation to create new records: section 7(2); *Department of Health (Re)*, 2022 NUIPC 7 (CanLII). A public body has no obligation under the ATIPPA to do research or analysis for an applicant. It does have an obligation to search for and produce records in accordance with the ATIPPA.

[26] When a public body receives a request for information that is not in a record, or that would require some research or analysis to produce, the public body has a choice about whether to provide that information or to perform that research or analysis. For example, the GN regularly receives non-ATIPP questions from journalists. The GN's daily decisions about what questions to answer, and when and how, is not subject to review under the ATIPPA.

[27] In this case the Applicant did file a formal ATIPP request. Unfortunately the request quickly went off the rails. HR's e-mail of July 4 did not reflect a correct understanding of the ATIPPA, and it took a while to get the file moving in the right

direction again. There was also some resistance within HR to releasing the information to HR's ATIPP Coordinator, which did not help. I will return to this point later.

[28] Eventually HR understood that it had two choices: invest a lot of time in combing through the relevant files and then redacting the responsive records; or invest a much smaller amount of time to create a new record summarizing the responsive records. Wisely, HR chose the second option. The result, after some additional back-and-forth with the Applicant, was the amended table of disclosure attached to HR's letter of August 18.

[29] The only question now before me is whether the table of disclosure should include more information than it does.

Did HR correctly apply section 25.1?

[30] As noted in the Law section above, section 25.1(a) is a discretionary exemption for "information relating to an ongoing workplace investigation".

[31] At the time of the Applicant's request, nine of the sixteen harassment files listed in the disclosure table were open. HR cited section 25.1(a) to refuse disclosure of any further information about these nine files. They were correct to do so.

Did HR correctly apply section 23?

[32] At the time of the Applicant's request, seven of the sixteen responsive files were listed as closed. The table indicated that there had been an investigation on each file, and the outcome for each file was "Did not meet HRM 1010 criteria". Three of the seven files were described as "HRM 1010 against supervisor", and the other four were described as "HRM 1010 against colleague". For all sixteen files in the table, the filing date was given. HR cited section 23 to refuse disclosure of any additional information about the seven closed files.

[33] I have written previously that it will be a rare case in which section 23 justifies the redaction of an entire document: *Department of Family Services (Re)*, 2022 NUIPC 18 (CanLII) at paragraph 50. Where exempt information can be

severed, an applicant has a right to the remainder: section 5(2). As the former Commissioner liked to say, “every record must be assessed page by page, line by line, and even word by word”. The work can at times be tedious but that is what the scheme of the Act requires.

[34] If the Legislative Assembly had intended to exempt HR records, or any particular type of HR record, it would have been easy for them to say so. There is no blanket exemption for HR records: *Department of Human Resources (Re)*, 2023 NUIPC 11 (CanLII) at paragraph 28. As required by section 23(3), all the relevant circumstances must be considered before a decision can be made to refuse disclosure under section 23(1).

[35] As part of my review, I asked HR to send to me any two of the sixteen responsive complaints. They did so. I wanted to assess the extent to which it might be possible to extract more information from the complaints without running afoul of section 23. I am prepared to assume that these two complaints are representative of the sixteen responsive complaints.

[36] The reporting form used by HR (headed “Appendix A – Harassment Submission Form”) is a single page, but the complainant may use additional pages and may also attach supporting documents. The core of the form is the “Describe allegations” section. The form does not ask the complainant to try to summarize or categorize the alleged harassment.

[37] The first complaint I looked at has five pages attached. The first two are an e-mail explaining the facts behind the complaint. The other three pages are supporting documents. The allegations consist of a pattern of conduct occurring over a period of a few years. After careful consideration, I do not see a practical or meaningful way for the complaint to be redacted under section 23.

[38] The second complaint I looked at has six pages attached. The attachment is a letter retelling, in dense detail, a series of events occurring over three months in one of Nunavut’s smaller communities. After careful consideration, I do not see a practical or meaningful way for the complaint to be redacted under section 23.

[39] I find that HR correctly concluded, under section 23, that it could not release the complaints, even in redacted form. Or to be more precise: the table of disclosure contains the few details from the complaints that might be left unredacted, e.g. the date on which the complaint was filed and the relationship of the complainant to the alleged harasser.

Is there an obligation to summarize?

[40] I do not believe the Applicant would seriously dispute anything I have said so far. From the beginning, the Applicant has acknowledged that they did not expect to receive any personally-identifying information, nor did they expect to receive records relating to complaints that were still under investigation.

[41] But the Applicant believes they should be able to get more information about the closed complaints, without violating anyone's privacy. That brings us to the heart of the case: what obligation, if any, does HR have to create a more detailed summary of what the harassment complaints are about?

[42] The HRM 1010 complaint form does not ask the complainant to summarize or categorize the complaint. The two sample complaints do not include a summary or categorization of the complaints. HR does not create a summary or categorization of complaints.

[43] It would certainly be possible to create a summary or categorization of complaints. Based on my review of the two sample complaints, I can say that it would not be easy, and it might be misleading. The two complaints that I looked involved a complex series of events covering months (in one case) or years (in the other case). I would be hard-pressed to try to summarize the nature of the complaints, whether in the ways suggested by the Applicant (see paragraph 14 above) or otherwise. As I noted in paragraph 20 above, that is the nature of workplace harassment complaints.

[44] HR does not have an operational need to summarize or categorize harassment complaints. To create such a summary or categorization would require careful analysis and careful writing by HR staff. A public body has only a

limited obligation to create new records: section 7(2). That obligation does not apply in this case.

Processing issues within HR

[45] HR provided to me a copy of their internal correspondence related to this file. (I should note that I routinely ask public bodies for their internal correspondence about ATIPP file processing, and it is routinely provided to me.) The internal correspondence in this case reveals two processing issues that I wish to draw to the attention of HR's senior management.

[46] First, there was some resistance, within HR, to providing the ATIPP Coordinator with the records they requested. This is not the first time I have seen or heard of this kind of resistance within HR. I will be blunt: this resistance needs to stop.

[47] The ATIPP Coordinator has a job to do. They are following legislated rules and deadlines. They are acting as a delegate of the Minister of Human Resources, who is the "head" of the public body for ATIPP purposes and who is ultimately answerable for ATIPP compliance. If the ATIPP Coordinator asks to see certain records, they should receive them, fully and promptly. Then they can do their job of assessing what can be released and what must be withheld, and completing the disclosure within the statutory deadline.

[48] Sending records <u>to HR's own ATIPP Coordinator</u> is not the same as releasing them to the Applicant. Any argument or delay in transmission merely makes it harder for the department to comply with its legislated ATIPP obligations. This is an issue that needs to be addressed by HR's senior management.

[49] Second, it is apparent to me that everyone involved in the file within HR knew who the Applicant was, and this knowledge contributed to the resistance.

[50] I would like to remind HR that the ATIPPA stipulates that an applicant has a right of anonymity. In other words, the name of an applicant must <u>not</u> be circulated within the public body, except in limited circumstances that do not apply here: section 6.1. An applicant's name should, in most cases, be known <u>only</u>

to HR's ATIPP Coordinator. That is the law of Nunavut. Again, this is an issue that needs to be addressed by HR's senior management.

Conclusion

[51] HR correctly applied the exemption in section 25.1(a).

[52] HR correctly applied the exemption in section 23.

[53] HR does not have an obligation to create a more detailed summary or categorization of the responsive records.

Recommendations

[54] **I recommend** that HR continue to withhold information from the responsive records, other than the information that has already been disclosed to the Applicant.

[55] **I recommend** that senior management in the Department of Human Resources remind all HR staff of their obligation to co-operate fully and promptly with the department's ATIPP Coordinator.

[56] **I recommend** that senior management in the Department of Human Resources remind all HR staff of their obligations under section 6.1 of the ATIPPA regarding the anonymity of ATIPP applicants.

Graham Steele
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