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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 Department of Executive and Intergovernmental Affairs commissioned an investigation report into the placement of eight Nunavut children in unlicensed care facilities in Alberta. The Applicant requested a copy of the report. EIA released the report, but with all analysis and recommendations redacted. The Applicant requested review. The Commissioner finds the redactions were correctly applied under section 14(1)(a) of the ATIPPA. The Commissioner recommends that EIA reconsider its exercise of discretion and release the report.

Nature of Review and Jurisdiction

[2] This is a review of disclosure by the Department of Executive and Intergovernmental Affairs (EIA). 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 Executive and Interdepartmental Affairs: ATIPPA, section 2, definition of "public body".

Issues

[4] The issues in this review are:

a. Did EIA correctly apply the exemption in section 23(1)?
b. Did EIA correctly apply the exemption in section 24(1)(b)(i)?
c. Did EIA correctly apply the exemption in section 24(1)(c)(ii)?
d. Did EIA correctly apply the exemption in section 14(1)(a)?
e. Did EIA properly exercise its discretion under section 14?

Facts

[5] In March 2023, news reports revealed that eight children from Nunavut, who were legally in the care of the Department of Family Services, had been placed in unlicensed group homes in Alberta.

[6] As a result of these revelations, the premier (who is also the Minister of EIA) said the GN would undertake "a full internal review". As part of that review, the GN engaged an external consultant to investigate and to make recommendations.

[7] The consultant's final report was delivered to the deputy minister of EIA on December 6, 2023.

[8] On December 14, the Applicant filed an ATIPP request with EIA for the consultant's report.

[9] On January 31, 2024, EIA sent a disclosure package to the Applicant. The report was released, but with substantial redactions. The disclosure package also included an "exemption rationale" that explained EIA's reasons for the redactions.

[10] The report consists of 133 pages in PDF format. The table of contents (labelled "Index") is not redacted, so I am able to say that the report breaks down as follows:

- Page 1: Cover page. [not redacted]
- Pages 2-3: Table of contents. [not redacted]

- Page 4: Mandate. [not redacted]
- Page 4: Executive summary. [redacted]
- Page 5: Investigative process. [not redacted]
- Pages 5-7: Background information. [information about the children is redacted; the remainder is not redacted]
- Page 8: Factual findings: Why the children were removed from Nunavut. [redacted]
- Pages 8-11: Factual findings: How the children were placed with the company. [redacted except for first paragraph]
- Pages 11-16: Factual findings: Policies and procedures. [not redacted]
- Pages 17-22: Analysis of whether policies and procedures were followed. [redacted except for headings and sub-headings]
- Pages 22-25: Recommendations. [redacted]
- Page 23: Appendix 1, Summary of recommendations. [redacted]
- Page 24: Appendix 2, List of interviews. [not redacted]
- Pages 28-45: Appendix 3, Documentation requested and received. [information in first column "Child's Name" and children's initials in other columns is redacted; the remainder is not redacted.]
- Pages 46-133: Appendix 4, Key policies, procedures and job descriptions. [not redacted]

[11] On February 16, the Applicant filed a request for review with this office. I received from EIA a copy of the unredacted investigation report. Both the Applicant and EIA have had the opportunity to make written arguments.

Law

[12] EIA cites three exemptions: section 23, section 24, and section 14(1)(a).

Section 23 – personal information

[13] Section 23 protects against the disclosure of personal information. The key provision is section 23(1):

> 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.

[14] Section 23 is long and its interpretation is complex. In this case, however, section 23 was used only to redact identifying information about the children placed in the residential facilities. That is a straightforward application of section 23. For purposes of this decision, nothing further need be said.

Section 24 – business information

[15] Section 24 protects against the disclosure of certain kinds of business information. In *Nunavut Housing Corporation (Re)*, 2022 NUIPC 5 (CanLII) at paragraph 27, I explained the purpose of section 24:

> Section 24 in general is intended to protect "informational assets" of a third party which would otherwise be closely held and not generally known by the public: *Review Report 18-144 (Re)*, 2018 NUIPC 9 (CanLII). The basic idea of section 24 is that a person dealing with the GN should not lose its business information, which would otherwise be confidential, through the back-door of the ATIPPA.

[16] In this case, some information is redacted under section 24(1)(b)(i) and some information is redacted under section 24(1)(c)(ii). Those provisions read as follows:

24. (1) Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant

…

(b) financial, commercial, scientific, technical or labour relations information

(i) obtained in confidence, explicitly or implicitly, from a third party, …

…

(c) information the disclosure of which could reasonably be expected to

…

(ii) prejudice the competitive position of a third party,

….

[17] With respect to section 24(1)(b)(i), there are various tests for confidentiality. In *Order 331-1999; Vancouver Police Board*,[1999] B.C.I.P.C.D. No. 44, the British Columbia Information and Privacy Commissioner gave a list of seven factors to aid in determining whether information was received in confidence:

> What are the indicators of confidentiality in such cases? In general, it must be possible to conclude that the information has been received in confidence based on its content, the purpose of its supply and receipt, and the circumstances in which it was prepared and communicated. The evidence of each case will govern, but one or more of the following factors - which are not necessarily exhaustive - will be relevant in s. 16(1)(b) cases:
>
> 1. What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the supplier or recipient?
> 2. Was the record prepared for a purpose that would not be expected to require or lead to disclosure in the ordinary course?
> 3. Was the record in question explicitly stated to be provided in confidence? (This may not be enough in some cases, since other evidence may show that the recipient in fact did not agree to receive the record in confidence or may not actually have understood there was a true expectation of confidentiality.)
> 4. Was the record supplied voluntarily or was the supply compulsory? Compulsory supply will not ordinarily be confidential, but in some cases there may be indications in legislation relevant to the

> compulsory supply that establish confidentiality. (The relevant legislation may even expressly state that such information is deemed to have been supplied in confidence.)
> 5. Was there an agreement or understanding between the parties that the information would be treated as confidential by its recipient?
> 6. Do the actions of the public body and the supplier of the record - including after the supply - provide objective evidence of an expectation of or concern for confidentiality?
> 7. What is the past practice of the recipient public body respecting the confidentiality of similar types of information when received from the supplier or other similar suppliers?

[18] In *Chesal v. Attorney General of Nova Scotia*, 2003 NSCA 124 (CanLII), the Nova Scotia Court of Appeal said this list was "helpful" (at paragraph 72) though not "determinative or exhaustive" (at paragraph 73). I take the same approach: the seven-point list is helpful, but not determinative or exhaustive. On that basis, I adopt it for purposes of this decision.

[19] With respect to section 24(1)(c), I explained the meaning of the phrase "could reasonably be expected" in *Nunavut Housing Corporation (Re)*, 2021 NUIPC 25 (CanLII) at paragraphs 116 and 117. It occupies a middle ground between that which is probable and that which is merely possible. Speculation is not sufficient. Evidence is required and the onus is on the public body to provide it: section 33(1). To support a redaction under section 24(1)(c)(ii), a public body must provide evidence "well beyond" a mere possibility of harm.

Section 14(1)(a) – advice etc.

[20] Section 14(1)(a) reads as follows:

> 14. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal
>
> > (a) advice, proposals, recommendations, analyses or policy options developed by or for a public body….

[21] The former Commissioner stated the law on section 14(1)(a) in *Review Report 19-152 (Re)*, 2019 NUIPC 5 (CanLII):

> Section 14(1) is intended to protect the decision making process within government and to allow public servants to provide "advice, proposals, recommendations, analyses and policy options" freely and without fear of being second-guessed or subjected to ridicule for the advice given. In *Order 96-006*, the former Information and Privacy Commissioner of Alberta established a test to determine whether information is "advice, recommendations, analyses or policy options" within the scope of the Alberta's equivalent to our section 14(1)(a). He said:
>
> > Accordingly, in determining whether section 23(1)(a) will be applicable to information, the advice, proposals, recommendations, analyses or policy options ("advice") must meet the following criteria.
> >
> > > The [advice, proposals, recommendations, analyses and policy options] should:
> > > 1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
> > > 2. be directed toward taking an action,
> > > 3. be made to someone who can take or implement the action.
>
> This finding has been accepted and used in Alberta and in other Canadian jurisdictions, including Nunavut, consistently over the years and it is the test to be applied to assess whether information falls within the criteria for an exception pursuant to section 14(1)(a) of the Nunavut Act. Section 14(1)(a) does not apply so as to protect the final decision made, nor does it apply to information that is merely "factual" in nature. In *Alberta Order 96-006* noted above, then Commissioner Clark noted:
>
> > In passing, I want to note that the equivalent section of the British Columbia Act (section 13) specifically states that "factual material" (among other things) cannot be withheld as "advice and recommendations". As I stated, I fully appreciate that our section differs significantly from that of our neighbours. However, I cannot accept that the bare recitation of facts, without anything further, constitutes either

> "advice etc" under [section 24(1)(a)] or "consultations or deliberations" under [section 24(1)(b)].

This said, as noted in *Alberta Order F2017-65*,

> In some circumstances, factual information can be conveyed that makes it clear a decision is called for, and what is recounted about the facts provides background for a decision that is to be made. Such a case involves more than merely "a bare recitation of facts". Rather, what is recounted about particular events or the way in which they are presented may be said to constitute part of the 'consultations or deliberations' a decision maker uses to develop a decision. This may be so whether the decision maker specifically requests the information, or it is provided unsolicited having regard to the responsibilities of both the provider and receiver.

[22] I adopted this statement of the law in *Department of Health (Re)*, 2021 NUIPC 12 (CanLII) at paragraph 36, and *Department of Human Resources (Re)*, 2021 NUIPC 4 (CanLII) at paragraph 13. I do so again in the present case.

Analysis

[23] The first two exemptions claimed by EIA – under sections 23 and 24 – are relatively easy to deal with, so I will consider them first. Then I will turn to section 14(1)(a), which is the heart of the case.

Section 23(1)

[24] EIA has redacted all instances in which the children are referred to by name or initials, and any information about a specific child. The Applicant agrees these are appropriate redactions.

[25] In my view, EIA correctly applied the section 23(1) exemption.

Section 24(1)(b)(i)

[26] Section 24(1)(b)(i) exempts business information that was obtained in confidence from a third party. In this case, the third party is the company at whose facilities the children were placed.

[27] EIA's argument on section 24(1)(b)(i), which applies to the redactions on page 9 of the disclosure package, runs as follows:

> The redacted section contains information provided by [the company] in their successful proposal to the [Request for Proposals] which meets the criteria for sections 24(1)(b)(i).

[28] In the Law section above, at paragraph 17, I have laid out a helpful, seven-part test for whether something is confidential. In my view, the test is not met in this case.

[29] The business information on page 9 of the investigation report was provided by the company in response to an RFP. The company won the contract. In these circumstances, I do not see on what basis the company or EIA could reasonably believe the information was provided in confidence.

[30] For example, the RFP said that the contractor had to be "provincially licensed and accredited". In response to this requirement, the company submitted some documents, and those documents are discussed by the investigator on page 9. Either the company was provincially licensed and accredited, or it was not. Documents submitted to the GN by the company to establish licensing and accreditation are not, by their nature, confidential. The whole point of licensing and accreditation is to establish compliance with public standards.

[31] I find that EIA did not correctly apply the section 24(1)(b)(i) exemption.

Section 24(1)(c)(ii)

[32] Section 24(1)(c)(ii) exempts business information that could reasonably be expected to prejudice the competitive position of a third party. Again, the third party is the company at whose facilities the children were placed.

[33] EIA's argument on section 24(1)(c), which applies to redactions on pages 10 and 11 of the disclosure package, runs as follows:

> The redacted sections contains excerpts from the contract with [the company] in conjunction with observations from the investigator that could reasonably be expected to compromise the third party's competitive position… and could result in undue financial loss… .

[34] I have read and re-read pages 10 and 11 of the disclosure package and I simply do not see what information is supposed to be exempt under section 24(1)(c)(ii). EIA has simultaneously claimed exemptions under section 23, section 24 and section 14, without distinguishing between them. That approach is leaves me guessing which information is supposed to fall under which exemption. Something similar occurred in *Department of Executive and Intergovernmental Affairs (Re)*, 2021 NUIPC 13 (CanLII) at paragraphs 16 to 19. It is not a desirable practice.

[35] In any event, a distinction can be drawn between revealing information from a bid while the competitive process is underway, and disclosing the details of contracts that have actually been signed: *Department of Community and Government Services (Re)*, 2022 NUIPC 23 (CanLII) at paragraphs 61 to 63, and especially the Ontario decision cited in paragraph 62. The former may often fall within section 24(1)(c)(ii), but the latter usually will not.

[36] Moreover, section 14(1)(c)(ii) requires evidence "well beyond" a mere possibility of harm. In this case, EIA offers no evidence of harm at all. For that reason alone, section 24(1)(c)(ii) is inapplicable.

[37] Finally, I note the fact that the facilities at which the Nunavut children were placed were unlicensed. A company with unlicensed facilities should not be awarded this or any other contract. In these circumstances, the idea that releasing information from the investigation report could affect the company's "competitive position" rings hollow.

[38] I find that EIA did not correctly apply the section 24(1)(c)(ii) exemption.

Section 14(1)

[39] Most of the investigation report is redacted under section 14(1)(a). In each case where a section 24 exemption is claimed, a section 14(1)(a) exemption is also claimed. The same is true of section 23 exemptions, except on pages 5 and 6, and in Appendix 3. So the whole case turns, essentially, on section 14(1)(a).

[40] After careful consideration, I find that the section 14(1)(a) exemption does apply to the redacted portions of the investigation report.

[41] Section 14(1)(a) does not protect purely factual information. EIA, to its credit, has not redacted information that could be described as purely factual – for example, the investigator's mandate; the investigative process; descriptions of policy and procedure; the list of interviewees; and the list of documents requested and received.

[42] The investigation report does, of course, contain many other factual statements, but the selection and analysis of these facts is inextricably bound up with the consultant's expertise. The consultant is an experienced, reputable lawyer. They have interviewed witnesses and examined documents. They have weighed the evidence, explained conclusions they drew from the evidence, and made recommendations.

[43] I find the redacted portions of the investigation report qualify as "analyses" and "recommendations" on any reasonable interpretation of those words.

[44] My conclusion is reinforced by the fact that a number of other Canadian jurisdictions have amended their access laws so that this kind of investigation report would not be exempt.

[45] For example, in British Columbia the equivalent to Nunavut's section 14(1) is section 13(1) of the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, chapter 166. Section 13(2)(k) says that section 13(1) does not apply to "a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body".

[46] In Ontario, the equivalent to Nunavut's section 14(1) is section 13(1) of the *Freedom of Information and Protection of Privacy Act*, RSO 1990, chapter F.31. Section 13(2)(j) says that section 13(1) does not apply to "a report of an interdepartmental committee task force or similar body, or of a committee or task force within an institution, which has been established for the purpose of preparing a report on a particular topic, unless the report is to be submitted to the Executive Council or its committees".

[47] In Newfoundland and Labrador, the equivalent to Nunavut's section 14(1) is section 29(1) of the *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, chapter A-1.2. Section 29(2)(j) says that section 29(1) does not apply to "a report of an external task force, committee, council or similar body that has been established to consider a matter and make a report or recommendation to a public body".

[48] If Nunavut's access law had a similar provision, I would find that section 14(1) does not apply to this investigation report. But Nunavut's access law does not have such a provision.

[49] I find that EIA correctly applied the exemption in section 14(1)(a).

[50] That is not, however, the end of the ATIPP analysis. There is one more step – the exercise of discretion.

Exercise of discretion

[51] Sections 23 and 24 are mandatory exemptions. They contain the word "shall". If information falls within those sections, a public body must withhold it. For example, information in the internal report that identifies the children falls under section 23. EIA has no choice – that information must be withheld.

[52] Section 14 is different. It contains the word "may". It is a discretionary exemption. EIA may choose to release the investigation report, even though it does not have to.

[53] The wording of the ATIPPA means that EIA must think about whether to disclose more than the minimum, and explain to the applicant why a choice has

been made to disclose or not to disclose: *Department of Health (Re)*, 2022 NUIPC 8 (CanLII) at paragraphs 49 and 50; *Department of Justice (Re)*, 2023 NUIPC 18 (CanLII) at paragraphs 28 to 30. I have written that as long as EIA addresses in good faith the exercise of its discretion, I will not second-guess their decision: *Department of Human Resources (Re)*, 2021 NUIPC 14 (CanLII) at paragraph 74; *Department of Justice (Re)*, 2023 NUIPC 18 (CanLII) at paragraph 31.

[54] So what exactly did EIA say about its exercise of discretion? In its "release letter" to the Applicant, dated January 31, 2024, EIA wrote the following:

> • The release was reviewed at the Deputy Minister level by both the Department of Executive and Intergovernmental Affairs and The Department of Family Services.
> • The Government of Nunavut intends to provide a transparent account and next steps regarding the findings.
> • The largest influences affecting the redactions include the recency of the report and protection of privacy provisions. More information could be released at a future date through ATIPP or at the discretion of the Government of Nunavut.

[55] The "exemption rationale" document contains the following passage about the exercise of discretion:

> [Section 14(1)(a)] is pertinent to the recent investigation report, which includes critical analyses and recommendations on government policies. Given its recent receipt in December 2023, the Government of Nunavut (GN) requires sufficient time for thorough review and consideration, underscoring the need for temporary withholding of some of the information. Recognizing the public's interest, the GN commits to future transparency, ensuring public insights and updates on the received advice and forthcoming actions. This approach is vital for ensuring a comprehensive and well-informed government response given the sensitive context and helps prevent potential misinterpretations or incomplete understandings of the intricate issues addressed in the report.

[56] The "exemption rationale" document also contains the following passage in the column headed "Discretion explanation":

> Relevant to the section being withheld, the public body considered the following after internal conversations at the executive level:

> 1. Presences of Analyses and Recommendations: Since the summary includes analyses and recommendations, revealing them prematurely could undermine the ability of the government to effectively consider and implement these changes.
> 2. Need for Deliberation: The report was requested by the Premier in the spring of 2023 and only recently submitted to the GN in December of 2023. The government requires time to deliberate on the findings without external pressure or influence. Premature disclosure could lead to misinterpretation or politicization of the findings.
> 3. Integrity of Policy Process: Withholding the summary temporarily protects the integrity of the policy-making process, allowing the government to assess and respond to the recommendations in a measured and comprehensive manner.
> 4. Public Interest: The objectives of the ATIPPA prefer immediate disclosure which are in line with the intent of the GN's executives to be transparent with the details of the recommendations and next steps in the near future.

[57] The essence of these passages, as I understand them, is that EIA exercised its discretion against disclosure because it felt it needed some time to consider its response to the investigation report. There will be disclosure, says EIA, but not yet.

[58] As noted in paragraph 53 above, I will not normally second-guess a public body's exercise of discretion. In this case, however, I see three problematic elements in EIA's explanations.

[59] First, EIA appears to be conflating the application of a redaction and the exercise of discretion. The release letter says, for example, "The largest influences affecting the redactions include the recency of the report…". But the recency of a record is not relevant to the application of a redaction. It can be relevant only to the exercise of discretion.

[60] Second, EIA appears to be taking into account impermissible factors. The exemption rationale refers to the need to prevent "potential misinterpretations or incomplete understandings" and "misinterpretation or politicization" of the report's findings. But it is not the business of a public body to refuse disclosure because they believe an applicant may misunderstand or misrepresent the records they have received. If context is needed to understand responsive

records, the public body may choose to supply more context along with the records.

[61] Third, three months have now passed since EIA received the investigation report. More than a month has passed since the Applicant received the exemption rationale. Although EIA says that it intends to release more information, its commitment and its timetable are vague: "more information could be released at a future date", "the GN commits to future transparency", "the intent of the GN's executives to be transparent … in the near future", "temporary withholding of some of the information".

[62] Finally, I note that the subject-matter of the investigation report is a matter of high public interest. As I wrote in *Department of Family Services (Re)*, 2023 NUIPC 15 (CanLII) at paragraph 37:

> It is no secret that Nunavut's child protection system is in crisis. On May 30, 2023, the Auditor General of Canada tabled a report in the Legislative Assembly on child and family services in Nunavut. The report can only be described as devastating. It is the Auditor General who uses the word "crisis". The report echoes concerns raised repeatedly, over a period of years, by Nunavut's Representative for Children and Youth. DFS's "inability to meet its responsibilities" (again, the words of the Auditor General) cries out for more accountability.

[63] For all of these reasons, I recommend that EIA should reconsider the exercise of its discretion. I would go even further and say that, in all the circumstances of the case, EIA should exercise its discretion in favour of disclosing the investigation report. The only exception, of course, is information that would identify the children and which must be withheld under section 23.

[64] My decision can be summed up simply: EIA is not required to release the investigation report, but it should.

Conclusion

[65] EIA correctly applied the exemption in section 23(1).

[66] EIA did not correctly apply the exemption in section 24(1)(b)(i).

[67] EIA did not correctly apply the exemption in section 24(1)(c)(ii).

[68] EIA correctly applied the exemption in section 14(1)(a).

[69] EIA did not properly exercise its discretion under section 14.

Recommendations

[70] **I recommend** that EIA reconsider its exercise of discretion.

[71] **I recommend** that EIA exercise its discretion to release the investigation report, with the exception of information in the report falling under section 23(1).

Graham Steele
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