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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

Report Number:	24-256-RR
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Summary

[1] The Applicant requested records from the Nunavut Liquor and Cannabis Commission related to the NULC's liquor pricing policy. Some 3400 pages of records were released over the course of a year. The Applicant requested review of a portion of the records. The Commissioner finds the NULC correctly applied the exemptions in section 13 (cabinet records), section 14 (advice from officials), and section 15 (solicitor-client privilege). The Commissioner finds the NULC did not correctly apply the exemptions in section 16 (information from another government) and recommends disclosure. The Commissioner finds the NULC did not correctly apply the exemptions in sections 23 (personal privacy) and section 25 (information to be released within six months), but the same records could have been properly withheld under sections 24 and 14 respectively. The Commissioner recommends the NULC exercise its discretion for all records falling under discretionary exemptions.

Nature of Review and Jurisdiction

[2] This is a review of disclosure by the Nunavut Liquor and Cannabis Commission (NULC). 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 NULC: ATIPPA, section 2, paragraph (b) of the definition of "public body"; ATIPP regulations, Schedule A, item 4.

[4] Although the NULC is legally a stand-alone entity, most of the back-office corporate functions of the NULC, including ATIPP processing, are performed by staff in the Department of Finance. I also have jurisdiction over Finance: ATIPPA, section 2, paragraph (a) of the definition of "public body". In this decision, "NULC" and "Finance" can be read almost interchangeably.

Issues

[5] The issues in this review are:

a. Did the NULC correctly apply the exemption in section 13?
b. Did the NULC correctly apply the exemption in section 14?
c. Did the NULC correctly apply the exemption in section 15?
d. Did the NULC correctly apply the exemption in section 16?
e. Did the NULC correctly apply the exemption in section 23?
f. Did the NULC correctly apply the exemption in section 25?
g. Did the NULC properly exercise its discretion?

Facts

[6] In November 2021, the Applicant submitted two ATIPP requests to the NULC. The requests were for records about the NULC's alcohol pricing policy. Discussion between the Applicant and the NULC ensued, which resulted in a re-worded request being submitted in February 2022.

[7] The NULC provided a fee estimate of slightly more than $30,000. The Applicant was unwilling to pay that much. Further discussion ensued, which resulted in a re-worded request being submitted on March 23, 2022. The fee was correspondingly reduced. That is the request that is at issue in this case.

[8] The NULC then took a series of time extensions. In *Nunavut Liquor and Cannabis Commission (Re)*, 2023 NUIPC 2 (CanLII), issued on February 9, 2023, I

found that the time extensions taken by the NULC were unreasonable, and recommended they speed up their response.

[9] The NULC then made additional efforts to respond to the Applicant's request. Nevertheless the volume of records, and the strain it put on the resources of Finance, meant that it took almost another year to complete disclosure. The sixth and final release occurred on January 31, 2024.

[10] Disclosure consisted of six packages or "binders" (these are digital PDF binders, not hard-copy binders). They were released as follows:

a. Binder 1: February 3, 2023

b. Binder 2: April 21, 2023

c. Binder 3: May 5, 2023

d. Binder 4: July 5, 2023

e. Binder 5: July 6, 2023

f. Binder 6: January 31, 2024

[11] On February 28, 2024, the Applicant requested review. There was some confusion about what exactly the Applicant wanted me to review, because the NULC and the Applicant were using different numbers for the binders. (In this decision, all references to binder numbers are to the numbers used by Finance.) In the end, I have reviewed only Binder 1. Depending on the results of this review, the Applicant may seek review of other binders.

[12] Binder 1 consists of 1031 pages of records from the (now former) deputy minister of Finance. They are sometimes referred to as "the Chown records". There are not 1031 unique records – there are many duplicate records and e-mail chains that repeat the same records. For the most part, duplicate records are redacted the same way each time.

[13] One other technical note: The PDF binder contains 1031 pages, but the binder's internal page numbering goes only to 1013. That is because there is a

nine-page insert, appearing twice, which is numbered differently. All references in this decision to page numbers are to Binder 1's internal page numbering, i.e. from 1 to 1013. That is the same numbering used in the Exemption Rationale document.

Law and Analysis

[14] Finance has relied on exemptions in six different sections of the ATIPPA: sections 13, 14, 15, 16, 23 and 25. For each exemption, I will state the law and then analyze whether Finance correctly applied the exemption.

Section 13: Cabinet records – Law

[15] Section 13 of the ATIPPA exempts cabinet records from disclosure. The core exemption is in section 13(2):

> (2) The head of a public body shall refuse to disclose to an applicant
>
> (a) a cabinet record; or
>
> (b) information in a record other than a cabinet record that would reveal the substance of deliberations of the Executive Council or any of its committees.

Section 13(2) uses the word "shall". It is therefore a mandatory exemption. If a record is covered by section 13(2), the public body has no choice – it must refuse disclosure.

[16] The phrase "cabinet record" is defined in section 13(1). NULC cites, for different redactions, paragraphs (a), (c), (d), (f) and (g) of section 13(1). Those provisions read as follows:

> 13. (1) In this section, "cabinet record" means
>
> (a) advice, proposals, requests for decisions, recommendations, analyses or policy options submitted or prepared for submission to the Executive Council or any of its committees;
>
> …
>
> (c) a discussion paper, policy analysis, proposal, advice or briefing material prepared for the Executive Council or any of its committees, excluding the sections of these records that contain factual or background material;

> (d) an agenda, minute or other record of the Executive Council or any of its committees recording deliberations or decisions of the Executive Council or any of its committees;
> …
> (f) a record created for or by a minister for the purpose of briefing that minister on a matter for the Executive Council or any of its committees;
> (g) a record created during the process of developing or preparing a submission for the Executive Council or any of its committees; ….

[17] Section 13 was added to the ATIPPA in 2017 by S.Nu. 2017, chapter 26, section 7. It repealed and replaced a differently-worded exemption for cabinet records.

[18] There has not been any substantive consideration in Nunavut of the current version of section 13. It has been mentioned only twice in Review Reports:

a. In *Review Report 19-152 (Re)*, 2019 NUIPC 5 (CanLII), the former Commissioner mentions section 13 but finds the record for which the section 13 exemption was claimed should have been excluded altogether because it was not responsive to the Applicant's request.

b. In *Nunavut Housing Corporation (Re)*, 2020 NUIPC 7 (CanLII) the former Commissioner mentions section 13 but finds no evidence on which to conclude that the record fits within section 13. Any exemption, suggests the former Commissioner, should have been claimed under section 14 instead.

[19] In a very recent decision, the Supreme Court of Canada interpreted the "cabinet records" provision of the Ontario access law: *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 (CanLII). I will refer to this decision as *Mandate Letters*.

[20] The Ontario "cabinet records" provision is worded rather differently than Nunavut's. For example, the entire Ontario provision turns on the phrase "would reveal the substance of deliberations". That phrase is thus the focus of *Mandate Letters*.

[21] In Nunavut, the phrase "would reveal the substance of deliberations" now appears only in section 13(2)(b), which is a subsidiary provision after what I would call the main exemption in section 13(2)(a). The "cabinet records" inquiry in Nunavut is therefore primarily a factual one – whether the records fit within the descriptions in section 13(1) – rather than the more qualitative inquiry in Ontario.

[22] We therefore have to pay close attention to the Supreme Court's explanation in *Mandate Letters* of what the "cabinet records" exemption is intended to achieve, while being alert to differences in legislative wording.

[23] Karakatsanis J., writing for the majority in *Mandate Letters*, explained the balancing required in a case like this one (at paragraphs 2 to 4):

> [2] Access to information promotes transparency, accountability, and meaningful public participation. Without adequate knowledge of what is going on, legislators and the public can neither hold government to account nor meaningfully contribute to decision making, policy formation, and law making. In this way, FOI legislation is intended not to hinder government but to "improve the workings of government" by making it "more effective, responsive and accountable" to both the legislative branch and the public (*Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 S.C.R. 403, at para. 63).
>
> [3] However, in our Westminster system of government, the executive — like the judicial and legislative branches — also requires certain spheres of confidentiality to fulfill its constitutional role. Each of the executive, legislative branch, and judiciary play "critical and complementary roles in our constitutional democracy" and "each branch will be unable to fulfill its role if it is unduly interfered with by the others" (*Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 29). Thus, constitutional conventions flow from the separation of powers and protect the spheres of confidentiality needed for a government institution "to perform its constitutionally-assigned functions" (*British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20, [2020] 2 S.C.R. 506 (*B.C. Judges*), at para. 66). … Cabinet confidentiality grants the executive the necessary latitude to govern in an effective, collectively responsible manner (*Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3, at para. 15). Cabinet secrecy is "essential to good government" (*ibid.*), as it promotes deliberative candour, ministerial solidarity, and governmental

> efficiency by protecting Cabinet's deliberations (*B.C. Judges*, at paras. 95-97; *Carey v. Ontario*, 1986 CanLII 7 (SCC), [1986] 2 S.C.R. 637, at pp. 658-59).
>
> [4] All FOI legislation across Canada balances these two essential goals through a general right of public access to government-held information subject to exemptions or exclusions — including those for Cabinet records or confidences.

[24] My broad takeaway from the Supreme Court of Canada's decision is that there is a constitutional dimension to cabinet confidentiality, and the "cabinet records" exemption should therefore not be narrowly interpreted: see *Mandate Letters*, paragraph 7.

[25] The final matter of law I will mention relevant to section 13 is that the Financial Management Board (FMB) is created by section 3(1) of the *Financial Administration Act*, C.S.Nu. chapter F-70. It is a committee of the Executive Council. Almost all of the records for which the section 13 exemption is claimed involve the FMB.

Section 13: Cabinet records – Analysis

[26] Broadly speaking, I find that the NULC has correctly applied the exemption in section 13(2). .

[27] I do not necessarily agree with the NULC's categorization of each instance within the definition of "cabinet record" in section 13(1). But I find each instance fits somewhere in section 13(1) – which brings the information within the exemption in section 13(2)(a) – or is captured by the residual exemption in section 13(2)(b).

Section 14: Advice from officials – Law

[28] Section 14 of the ATIPPA exempts from disclosure certain kinds of advice from officials. The relevant provisions read 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

…
(b) consultations or deliberations involving
(i) officers or employees of a public body,
(ii) a member of the Executive Council, [or]
(iii) the staff of a member of the Executive Council, …
….
(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Nunavut or a public body, or considerations that relate to those negotiations; ….

[29] The purpose of the exemption in section 14(1)(b) is to allow civil servants some space to develop ideas for the consideration of decision-makers, "without fear of being wrong, 'looking bad' or appearing foolish if their frank deliberations were to be made public": *Order 96-012*, Alberta Information and Privacy Commissioner, as cited in *Review Report 06-22 (Re)*, 2006 NUIPC 1 (CanLII).

[30] In *Nunavut Housing Corporation (Re)*, 2020 NUIPC 7 (CanLII), the former Commissioner explained the interpretation of section 14(1)(c):

> For this exception to apply there must be some indication that the information was "developed for the purpose of" negotiations. There must be a clear indication that the negotiations were in mind when the record was developed. If relying on the second part of the exception – considerations that relate to those negotiations – the public body must be able to identify the information as relating to a specific negotiation. … Again, the intent of section 14(1)(c) is the same as it is for section 14(1) generally and that is to protect information generated during the decision-making process, but not to protect the decision itself.

[31] The phrase "could reasonably be expected to" in section 14(1) – which also occurs in sections 16(1) and 24(1)(c) – occupies a middle ground between that which is probable and that which is merely possible: *Nunavut Housing Corporation (Re)*, 2021 NUIPC 25 (CanLII) at paragraphs 116 and 117. 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 14(1) – or section

16(1) or section 24(1)(c) – a public body must provide evidence "well beyond" a mere possibility of harm.

[32] Finally, for section 14(1)(c) to apply there must be a nexus between the redacted information and a specific negotiation: *Nunavut Housing Corporation (Re)*, 2022 NUIPC 5 (CanLII) at paragraph 46. If the redacted information is about a contractual arrangement already in place, section 14(1)(c) does not apply: *Nunavut Housing Corporation (Re)*, 2020 NUIPC 7 (CanLII).

Section 14: Advice from officials – Analysis

[33] Section 14 is the most frequently claimed exemption in Binder 1. Broadly speaking, I find that the NULC has correctly applied the exemption in section 14.

[34] I do not necessarily agree with the NULC's categorization of each exemption within section 14, but I find each instance (with two exceptions) fits somewhere within section 14.

[35] The first exception is the records on pages 802 and 803. Those pages are a two-page appendix to a memo that is released in full. The appendix is redacted in full. An exemption is claimed under section 14(1)(c). I do not see what there is in the appendix that would fit within that exemption. The Exemption Rationale does not offer any useful explanation. In my view, if the body of the memo can be released, so can the appendix.

[36] The second exception is the document at pages 917 to 921. The redactions are on pages 918 to 920. An exemption is claimed under section 14(1)(b). These records are about cannabis, not liquor. I do not see how they are responsive to the Applicant's request. They should not, in my view, have been included in the disclosure package at all. If I am wrong and the records are responsive, the redactions were correctly applied.

[37] I also do not necessarily agree with every detail of NULC's redactions. To give just one example, there is an e-mail with an innocuous sign-off: "I'm available for any questions or clarification. Have a great weekend and stay safe". The e-mail is duplicated multiple times in the disclosure package. Each time, the sign-off

phrase is redacted. It should not have been. Portions of the rest of the e-mail are properly redacted under section 14.

[38] As I wrote in *Nunavut Arctic College (Re)*, 2021 NUIPC 17 (CanLII) at paragraph 36:

> There are a few places where I thought slightly fewer words could have been redacted, and a few places where I thought slightly more words could have been redacted. But the test is not "what would the Commissioner have done?" but rather "what does the law require?", and there is some small room for differing opinions on the latter question. The ATIPP Coordinator has approached the task thoughtfully and the results are well within the range of what is acceptable.

[39] The disagreements which I have with the NULC about the precise contours of the redactions – slightly more here, slightly less there – do not cover any matter of substantive importance. These are insignificant differences of opinion in a complex file covering almost 3400 pages of records. I therefore make no recommendation about them.

Section 15(1)(b): Legal advice – Law

[40] Section 15 of the ATIPPA exempts from disclosure information that is privileged. Section 15(1)(b) reads as follows:

> 15. (1) The head of a public body may refuse to disclose to an applicant
>
> …
>
> (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; ….

[41] In *Nunavut Arctic College (Re)*, 2021 NUIPC 17 (CanLII) at paragraph 14, I summarized the law on section 15 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". Solicitor-client privilege is "fundamental to the proper functioning of our legal system": *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII) at paragraph 20.

[42] The privilege in section 15(1) is broad enough to include discussions of the legal advice, even if the lawyer is not directly involved in the discussion: *Department of Health (Re)*, 2021 NUIPC 12 (CanLII) at paragraph 51. That is because the discussion itself reveals the legal advice.

Section 15(1)(b): Legal advice – Analysis

[43] The NULC has used the section 15 exemption on pages 41 and 42 to redact a discussion among officials of a legal opinion received from a lawyer at the territorial Department of Justice. The same information is also redacted under section 14(1)(b)(i).

[44] I have reviewed pages 41 and 42. The application of section 15(1)(b) is straightforward. A legal opinion was received from a Justice lawyer and discussed among officials. Section 15(1)(b) is correctly used in the e-mail headers to redact the subject-matter of the legal opinion. Application of the exemption to the officials' discussion of the legal opinion is also correct, whether under section 14(1)(b)(i) or section 15(1)(b).

Section 16(1)(c): Information from another government – Law

[45] Section 16(1)(c), along with related parts of section 16, reads as follows:

> 16. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to
>
> (a) impair relations between the Government of Nunavut and any of the following or their agencies:
>
> (i) the Government of Canada or a province or territory,
>
> …
>
> (c) reveal information received, explicitly or implicitly, in confidence from a government, local authority or organization referred to in paragraph (a) or its agency.

[46] The phrase "could reasonably be expected to" appears in section 16(1). I have already explained how that phrase should be interpreted (see paragraph 31 above).

Section 16(1)(c): Information from another government – Analysis

[47] The NULC has used this exemption on pages 316, 333 and 350 of Binder 1 to redact an e-mail about information received from another jurisdiction about their liquor mark-ups. The three pages are copies of the same e-mail. The unredacted portions of the e-mail state that the information is from the NULC's counterpart in Yukon.

[48] The redacted e-mail was received from a government agency referred to in section 16(1)(a)(i), so the first condition of section 16(1)(c) is met. But there is another condition in section 16(1)(c): the information must have been "received, explicitly or implicitly, in confidence". The redacted e-mail does not, in my view, meet that condition.

[49] The information in the redacted e-mail is factual. It is one jurisdiction saying to another jurisdiction "Here is what we do". Some of the information is contained in, or can be derived from, the unredacted and public "Markup Structure: Yukon Liquor Corporation" document attached to the e-mail. Some of the information is about small brewers operating in Yukon, but the information would be available to anyone who walked into those brewers' public outlets. The NULC offers no evidence to support the e-mail's confidentiality. There is no internal evidence in the e-mail to suggest that the information in it is, or was expected to be, confidential.

Section 23: Invasion of personal privacy – Law

[50] Section 23 is a long and complex section, but the core idea is in 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.

[51] The rest of section 23 provides guidance about how to make the decision under subsection (1). All relevant circumstances have to be taken into account: section 23(3).

Section 23: Invasion of personal privacy – Analysis

[52] The NULC has applied section 23 on sixteen pages of Binder 1 to redact the name of companies and certain information about them. In each case, that is an error. Section 23 applies only to "personal information", which is defined in section 2 of the ATIPPA to mean "information about an identifiable individual". The word "individual" does not include a legal person such as a corporation: *Legislation Act*, section 1(8).

[53] The NULC agrees that its application of section 23 to corporate information was an error. It asks, however, that I apply section 24 instead. I do so in the next section of this decision.

[54] Section 23 is also used to redact a short e-mail on pages 863 and 865. (The two pages are copies of the same e-mail.) According to the Exemption Rationale, the e-mail was redacted because a third party's name is mentioned.

[55] I have written before that there is no automatic exemption for a third party's name: *Department of Justice (Re)*, 2022 NUIPC 17 (CanLII) at paragraph 17; *Department of Human Resources (Re)*, 2021 NUIPC 15 (CanLII) at paragraph 57. All the relevant circumstances have to be taken into account: section 23(3).

[56] In this case, the NULC offers no evidence to show why disclosing the e-mail would be "an unreasonable invasion of a third party's personal privacy". There does not appear to be anything sensitive about the name or the context in which it appears. It should be disclosed.

Section 24: Business interests of third party – Law

[57] The NULC did not cite section 24 in its disclosure package. But as I noted above, the NULC mistakenly cited section 23 and now asks that I consider section 24 instead.

[58] The most relevant parts of section 24 are 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, or
>
> (ii) that is of a confidential nature and was supplied by a third party in compliance with a lawful requirement;
>
> (c) information the disclosure of which could reasonably be expected to
>
> …
>
> (ii) prejudice the competitive position of a third party,
>
> ….

[59] Section 24 is a mandatory exemption. That means that if information fits within section 24, the public body has no choice – the information must be withheld.

[60] The phrase "could reasonably be expected to" occurs in section 24(1)(c). I have already explained how that phrase should be interpreted (see paragraph 31 above).

Section 24: Business interests of third party – Analysis

[61] The NULC applied section 23 to redact information, on fourteen different pages, relating to the pricing components of two specific brands of beer (four pages) and the pricing components of all alcohol products sold by the NULC (ten pages). As I have noted above, the NULC's redactions should have been under section 24.

[62] During this review, I contacted the NULC to ask what specifically about the redacted information is commercially confidential. The NULC replied that the redactions were intended to protect the supplier's price, which is provided in confidence to the NULC. To protect the supplier's price, certain other information had to be redacted too; otherwise calculating the supplier's price would be a matter of simple arithmetic. The supplier's price is commercially sensitive and is not otherwise publicly available.

[63] I accept the NULC's explanation, and find that the redactions made under section 23 could have correctly been made under section 24(1)(b)(i). The redactions might also fit under section 24(1)(c)(ii), but the evidence of competitive prejudice is thin and so it is better to rely on section 24(1)(b)(i).

Section 25: Information otherwise available – Law

[64] Section 25 of the ATIPPA reads as follows:

> 25. (1) The head of a public body may refuse to disclose to an applicant information that is otherwise available to the public or that is required to be made available within six months after the applicant's request is received, whether or not for a fee.
>
> (2) Where the head of a public body refuses to disclose information under subsection (1), the head shall inform the applicant where the information is or will be available.

[65] This provision applies only if the information has already been released, or if there is a statutory requirement that the information be released within six months: *Review Report 12-059 (Re)*, 2012 NUIPC 5 (CanLII); *Review Report 12-060 (Re)*, 2012 NUIPC 6 (CanLII); see also *Department of Health (Re)*, 2022 NUIPC 7 (CanLII) at paragraphs 29 to 33 and paragraphs 40 to 43.

Section 25: Information otherwise available – Analysis

[66] The NULC has used section 25 to support the redaction of the NULC's draft financial statements for 2019. The Exemption Rationale document contains a link to where the NULC's 2019-20 annual report, as tabled in the Legislative Assembly on November 6, 2019, is available. The annual report contains the final version of the financial statements. The link was apparently intended to meet the requirement under section 25(2).

[67] Strictly speaking, the NULC erred in applying section 25, but the error is a technical one. The result would have been the same if the NULC had applied section 14(1)(a).

[68] The draft financial statements, as such, were never made available to the public. Draft financial statements and approved financial statements are different documents, even if the only difference between them is the fact of approval. Draft financial statements may be withheld from disclosure under section 14(1)(a).

[69] A record may be withheld under section 25 only if the condition in section 25 is met, i.e. the record has already been published elsewhere or it will be published within six months after the applicant's request is received. In this case, neither condition was met for the draft financial statements. They were marked "draft" and were the subject of internal discussion and amendment prior to final approval. Section 25 does not apply, but section 14(1)(a) does.

Exercise of discretion

[70] That brings us to the end of the exemptions claimed by the NULC. But there is still one more step in the ATIPP analysis – the exercise of discretion.

[71] What is the exercise of discretion? I put it this way in *Department of Health (Re)*, 2022 NUIPC 8 (CanLII) at paragraphs 49 and 50:

> [49] The ATIPPA includes some discretionary exemptions ("…may refuse to disclose…") and some mandatory exemptions ("…shall refuse to disclose…"). Most exemptions are discretionary….
>
> [50] For the discretionary exemptions, a public body is <u>required</u> to consider whether to disclose information that it could withhold. To put it another way, the ATIPPA says what the <u>minimum</u> disclosure is, and a public body can choose to release <u>more than the minimum</u>. That's what it means to "exercise discretion": to think about disclosing more than the minimum, and then explaining to the Applicant why a choice has been made to disclose or not to disclose.

[72] Since sections 14, 15, 16 and 25 are discretionary exemption, the NULC is required to consider whether to exercise its discretion in favour of disclosure. They need to go beyond the question "<u>Can</u> we withhold this information?" to "Should we disclose this information, even though we <u>could</u> withhold it?"

[73] The NULC appears to have been aware that it had discretion. There are 54 pages in the Exemption Rationale marked "Decision made to disclose". I take this to mean that the NULC believes some information on the page falls within an exemption, but that no redaction has been made. That is commendable.

[74] Unfortunately, the Exemption Rationale is otherwise silent about the exercise of discretion. That does not meet the legal requirement to explain why discretion has been exercised the way it has.

[75] The exercise of discretion in this case is more complicated than usual. When it is exercising its discretion, the NULC should keep the following points in mind:

a. Section 13 (cabinet records) is a mandatory exemption. My finding is that section 13 correctly applies to some records. There is no discretion. Those records must be withheld.

b. Section 14 (advice from officials) is a discretionary exemption. My finding is that section 14 correctly applies to some records, so the NULC must explain how it has exercised its discretion for those records.

c. Section 15 (privileged information) is a discretionary exemption. However it has a special procedure that must be followed before disclosure can occur: section 15(2) and (3). My finding is that section 15 correctly applies to some records, so the NULC must explain how it has exercised its discretion for those records.

d. Section 16 (prejudice to intergovernmental relations) is a discretionary exemption. It, too, has a special procedure that must be followed before disclosure can occur: section 16(2) and (2.1). My finding is that section 16 does not apply to any records. If the minister does not accept my finding, and continues to withhold records under section 16, the NULC must still explain how it has exercised its discretion for those records.

e. Sections 23 and 24 are mandatory exemptions. My finding is that section 23 does not apply to any records, but section 24 does apply to some records. There is no discretion. Those records must be withheld.

f. Section 25 (information that is or will be available to the public) is a discretionary exemption. My finding is that section 25 does not apply to any records, but section 14 applies instead. Like other records withheld under section 14, the NULC must explain how it has exercised its discretion.

[76] To be clear, I am not suggesting that the NULC must exercise its discretion in favour of disclosure. Much of the information redacted under the discretionary exemptions appears innocuous to me, especially with the passage of 5-6 years since the records were created, but the NULC may have reasons for withholding all or some of the records. That is their decision to make, not mine.

[77] What the NULC owes to the Applicant is to think about disclosure and to explain why it made the discretionary decision it did.

[78] The Legislative Assembly has decided which exemptions are mandatory and which are discretionary. A public body cannot, through administrative policy, turn a discretionary exemption into a mandatory exemption: *Department of Justice (Re)*, 2021 NUIPC 23 (CanLII) at paragraph 43; see also *Department of Human Resources (Re)*, 2021 NUIPC 14 (CanLII) at paragraph 72. To put it simply: a blanket refusal is not allowed.

[79] As long as the NULC addresses in good faith the exercise of its discretion, I am not likely to 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; but see *Department of Executive and Intergovernmental Affairs (Re)*, 2024 NUIPC 3 (CanLII) at paragraphs 58 to 63.

A final comment

[80] Responding to this ATIPP request has strained Finance's resources to and beyond its breaking point. It has taken Finance almost two years to complete its disclosure. And yet the Applicant has a right, under the ATIPPA, to the requested records.

[81] This file is evidence, if any more were needed, that the GN needs to get on with the job of re-organizing its ATIPP function: see *Nunavut Liquor and Cannabis Commission (Re)*, 2023 NUIPC 2 (CanLII) at paragraph 49. In a small government in a small jurisdiction, a small public body like the NULC and a small department like Finance simply cannot be expected to handle, on their own, requests for records of this magnitude.

[82] Finance has, in the end, done a creditable job of organizing and processing this mountain of material. Relative to the number of records in Binder 1, my recommendations for further disclosure are minimal.

Conclusion

[83] The NULC correctly applied the exemption in section 13.

[84] The NULC correctly applied the exemption in section 14.

[85] The NULC correctly applied the exemption in section 15.

[86] The NULC did not correctly apply the exemption in section 16.

[87] The NULC did not correctly apply the exemption in section 23, but the same result could have been achieved under section 24.

[88] The NULC did not correctly apply the exemption in section 25, but the same result could have been achieved under section 14.

[89] The NULC did not properly exercise its discretion under section 14, 15, 16 and 25.

Recommendations

[90] I recommend the NULC disclose the records on pages 802 and 803 (see paragraph 35 above).

[91] I **recommend** the NULC disclose the records on pages 316, 333 and 350 (see paragraphs 47 to 49 above).

[92] I recommend the NULC disclose the records on pages 354 and 356 (see paragraphs 54 to 56 above).

[93] I recommend the NULC exercise its discretion for each of the records redacted under a discretionary exemption (see paragraph 75 above) and explain to the Applicant why it made the discretionary decision it did.

Graham Steele
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