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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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Date:	May 27, 2024

Summary

[1] The Applicant requested records from the Department of Health related to a privacy breach complaint. Health disclosed 85 pages of records, with redactions. Health declined under section 9(2) to confirm or deny it had additional responsive records. The Applicant requested review. The Commissioner finds that section 9(2) does not apply. There were 128 additional pages of records that should have been reviewed for redaction under section 23 rather than withheld entirely under section 9(2). The Commissioner provides guidelines for how section 23 applies to the additional records, and recommends further disclosure.

Nature of Review and Jurisdiction

[2] This is a request for review of disclosure by the Department of Health. 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 Health: ATIPPA, section 2, definition of “public body”.

Issues

[4] The issues in this review are:

a. Did Health correctly apply the exemption in section 14?
b. Did Health correctly apply the exemption in section 25.1?
c. Did Health correctly apply the exemption in section 23?
d. Did Health correctly apply section 9(2)?
e. Did Health properly exercise its discretion?

Facts

[5] The Applicant was, at the relevant times, a contract employee of the Department of Health. In late 2023, a patient at the health centre where the Applicant worked complained that the Applicant had viewed their medical records without authorization. In this decision, I will refer to the patient as "the complainant".

[6] The complainant was, as it happens, also a Health employee. The significance of that fact will become apparent later.

[7] On March 8, 2024, the Applicant filed an ATIPP request for records from Health. The exact wording of the request was as follows:

> I would like to gather information/emails/files that has my name attached. From the following people: [EMP1; EMP2; EMP3]. This also includes Human Resources.
>
> I would like all e-mails, investigation reports, former letters, patient relation emails. Anything that has my name.
>
> Time frame = August 2023 – current date.

I have redacted the names of the employees because their names are not relevant to this decision. It is however relevant to note that "EMP3" is the complainant.

[8] There followed some discussion between Health and the Applicant about the wording of the request. Health, for example, asked the Applicant what they

meant by “former letters”. The word “former” was dropped in subsequent correspondence.

[9] In all subsequent correspondence, Health restated the request as follows:

> I am [Applicant’s name] requesting all emails, including investigation reports, letters, patient relation emails, etc., anything that has my name included.
>
> I am requesting this information from [EMP1, EMP2, EMP3] for the time frame between August 1, 2023 and March 8, 2024.

[10] I note that the re-worded request is subtly different from the original request. For example, the description of the requested records was re-worded as “all emails, including investigation reports, etc.” rather than the original “all e-mail, investigation reports, etc.”.

[11] On April 4, 2024, Health disclosed 85 pages of records. There are some redactions. Health also cited section 9(2)(b) of the ATIPPA, saying it would not confirm or deny the existence of other responsive records.

[12] The Applicant applied for review of Health’s disclosure.

[13] Health transferred part of the Applicant’s request to the Department of Human Resources. Today I am issuing a companion decision about HR’s disclosure: *Department of Human Resources (Re)*, 2024 NUIPC 11 (CanLII), also known as Review Report 24-262-RR. For a more complete picture, the two decisions should be read together.

Law

[14] Health cites three exemptions: section 14(1)(b)(i), section 25.1(c), and section 23(1). Health also cites section 9(2)(b), which allows a public body to refuse to confirm or deny that certain records exist.

Section 14(1)(b)(i)

[15] Section 14(1)(b)(i) 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
>
> …
>
> (b) consultations or deliberations involving
>
> (i) officers or employees of a public body, ….

[16] The purpose of this exemption 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); see also *Department of Community and Government Services (Re)*, 2023 NUIPC 17 (CanLII) at paragraph 46.

[17] It is the public body's decisions and actions that are to be disclosed under the ATIPPA, not the internal consultations or deliberations that led there: *Department of Health (Re)*, 2021 NUIPC 12 (CanLII) at paragraph 43.

[18] Section 14 is a discretionary exemption. Even if it applies, a public body must turn its mind to whether records should be released anyway.

Section 25.1(c)

[19] Section 25.1(c) allows for HR advice to be withheld. It reads as follows:

> 25.1. The head of a public body may refuse to disclose to an applicant
>
> …
>
> (c) information that contains advice given by the employee relations division of a public body for the purpose of hiring or managing an employee.

[20] The term "the employee relations division of a public body" is broad enough to include the Department of Human Resources, which offers a wide range of employment-related advice across the GN, as well as a public body's internal HR division: *Department of Health (Re)*, 2022 NUIPC 8 (CanLII) at paragraph 24.

[21] For section 25.1(c) to apply, HR advice be requested or received: *Department of Human Resources (Re)*, 2023 NUIPC 1 (CanLII) at paragraph 66. There must be something that is genuinely in the nature of “advice”: *Department of Human Resources (Re)*, 2021 NUIPC 4 (CanLII) at paragraph 16. A direction or order, or the communication of factual information, is not “advice” and is not covered by section 25.1(c).

[22] Section 25.1 is a discretionary exemption. Even if it applies, a public body must turn its mind to whether records should be released anyway.

Section 23(1)

[23] Section 23 allows for certain third-party personal information to be redacted. The key provision is subsection (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.

[24] I recognize that section 23 is probably the most difficult section in the whole ATIPPA. It is long, difficult to interpret, and requires careful consideration of all relevant circumstances. I will not repeat the whole legal analysis here, but it can be found in *Department of Human Resources (Re)*, 2021 NUPIC 4 (CanLII) at paragraphs 21 and 22. I adopt that statement of the law for purposes of this decision.

[25] The essence of it is that section 23(1) lays down the basic rule. Subsections (2), (3) and (4) provide guidance on how the rule in subsection (1) should be applied. Every decision under section 23 is, ultimately, a decision under section 23(1).

[26] If section 23 applies, the information must be withheld. There is no discretion.

Section 9(2)(b)

[27] Health also cites section 9(2)(b):

> (2) The head of a public body may refuse to confirm or deny the existence of a record
>
> …
>
> (b) containing personal information respecting a third party, where disclosure of the information would be an unreasonable invasion of the third party's personal privacy.

[28] Section 9(2) is rarely used. The only Nunavut precedent I could find is *Review Report 00-01 (Re)*, 2000 NUIPC 1 (CanLII), the first Nunavut ATIPP decision ever published.

[29] In that case, the former Commissioner adopted a statement of the law from an Ontario case (Order M-737, March 20, 1996, re Windsor Police Services Board). In the following passage, section 14(5) of the Ontario law is the equivalent of Nunavut's section 9(2):

> A requester in a Section 14(5) situation is in a very different position than other requesters who have been denied access under the Act. By invoking Section 14(5), the Police are denying the requester the right to know whether a record exists, even if one does not.
>
> For this reason, in relying on Section 14(5) the Police must do more than merely indicate that the disclosure of the records would constitute an unjustified invasion of personal privacy. The Police must establish that disclosure of the mere existence or non-existence of the requested records would convey information to the requester, and that the disclosure of this information would constitute an unjustified invasion of personal privacy.

The former Commissioner added "The circumstances in which this subsection will apply will be very narrow. It will depend largely on the circumstances of the request itself." In the end, the former Commissioner found that section 9(2) did apply, and the public body did not have to confirm or deny that it held responsive records.

[30] Like the former Commissioner, I adopt this statement of the law about the interpretation of section 9(2).

Analysis

[31] The context for the Applicant's request is important. It should be borne in mind throughout the analysis that follows.

[32] When the complainant filed their privacy breach complaint against the Applicant, the Applicant's professional life was turned upside-down. Multiple investigations were launched: one within Health, one with the Applicant's professional regulator, and one with this office. The Applicant, a contract employee, was not re-hired. The complaint has been devastating for the Applicant.

[33] In *Department of Health (Re)*, 2024 NUIPC 9 (CanLII), I concluded that the Applicant did not breach the complainant's privacy. I recommended that Health confirm, in writing, that it accepts that finding. As of the date of this Review Report, I have not yet received the Minister of Health's written decision in response to my recommendation. Under section 49.6 of the ATIPPA, the deadline for the minister's decision is August 1, 2024.

[34] The other key point to bear in mind is that the purpose of the ATIPPA is to make public bodies more accountable to the public: section 1. It is not a purpose of the ATIPPA to hold applicants or third parties to account: *Department of Family Services (Re)*, 2023 NUIPC 13 (CanLII) at paragraph 38; *Department of Health (Re)*, 2021 NUIPC 27 (CanLII) at paragraph 43; *Department of Health (Re)*, 2021 NUIPC 11 (CanLII) at paragraph 56. Nothing in this decision should be taken as a comment on or criticism of the complainant's actions.

[35] The context for the request, then, is that the Applicant wanted to know more about what was happening to them – why their employer was putting them through the HR wringer for something they were adamant they did not do. Within the limits of the ATIPPA, they are entitled to receive records relevant to how their employer handled the situation.

[36] I will start by looking at the exemptions claimed in the 85-page disclosure package. I will then move on to the much more difficult issue of whether Health was correct to use section 9(2) to refuse to confirm or deny the existence of other responsive records.

Disclosure package: Section 23

[37] Health applied section 23 to redact information that identifies the complainant. In the circumstances of the case, the Applicant is already aware who the complainant is. There is therefore not much point in redacting the complainant's name, but Health was not wrong to do so.

[38] Health also applied section 23 to redact certain information about a vacancy for which the Applicant was being considered. The redacted information includes an individual's name and the reason they were going on leave. Health was correct to do so.

[39] Health also applied section 23 to redact a list of names in a document written by the Applicant. There is not much point in redacting this record, given that the Applicant is the one who wrote it. But since the Applicant obviously already has the information, I will not recommend now that it be disclosed to the Applicant.

[40] Finally, Health applied section 23 to redact most of an e-mail on page 84 of the disclosure package. The body of the e-mail is redacted in full. The name of the sender is also redacted, along with the footer (which is the "signature block" of the sender). All that is left is a portion of the header (date, recipient, subject).

[41] In my view, this e-mail should not have been redacted, whether under section 23 or otherwise. It does not contain the personal information of the sender or any other third party. Moreover, the definition of "personal information" does not include a person's opinions about someone else: section 2, paragraph (i) of the definition.

[42] Even if the e-mail contains personal information, disclosing it would not, in all the relevant circumstances, be an unreasonable invasion of the sender's

personal privacy: section 23(3). For the Applicant, the stakes are high. The Applicant should be able to see what is being said about them.

[43] I find that Health did not correctly apply section 23 to the e-mail on page 84. The information should be disclosed.

Disclosure package: Section 25.1(c)

[44] Health applied section 25.1(c) to redact an e-mail that appears twice, first on page 5 and again on page 8. This e-mail is the same one that I consider in the companion case: *Department of Human Resources (Re)*, 2024 NUIPC 11 (CanLII) at paragraphs 32 to 35.

[45] For the reasons given in that decision, I find that Health did not correctly apply section 25.1(c) on pages 5 and 8 of the disclosure package. The information should be disclosed.

Disclosure package: Section 14(1)(b)(i)

[46] Health applied section 14(1)(b)(i) to redact the body of an e-mail on page 83. The header and footer have (correctly) been left intact.

[47] The redacted e-mail is the last message in an e-mail chain. I have seen the unredacted e-mail. There is, in my view, nothing about the e-mail that is in the nature of "consultation" or "deliberation", which is what section 14(1)(b)(i) requires. The e-mail is intended by the sender to be a complete and final answer to the question asked in the e-mail that precedes it in the chain. It is a statement of a decision and who made it, which is precisely what should be released under the ATIPPA in order that the public body can be held accountable.

[48] I find that Health did not correctly apply section 14(1)(b)(i) on page 83 of the disclosure package. The information should be disclosed.

Section 9(2)(b)

[49] I now move on to a much more difficult issue. Health, citing section 9(2)(b), refuses to confirm or deny that it has responsive records other than those it has disclosed to the Applicant. Was it correct to do so?

[50] As noted in the Law section above, section 9(2) is rarely used. There is a good reason for that. It is a significant curtailment to an applicant's right to receive responsive records. As the former Commissioner wrote, its use will be appropriate in only "very narrow" circumstances.

[51] Section 9(2) does not, in my view, apply in the circumstances of this case. I can see what Health is trying to do, but section 9(2) is not the right way to do it.

[52] For section 9(2) to apply, Health must establish two things: (a) disclosure of the mere existence or non-existence of the requested records would convey information to the requester, and (b) disclosure of this information would constitute an unjustified invasion of personal privacy. That was the situation, for example, in *Review Report 00-01 (Re)*, 2000 NUIPC 1 (CanLII) and in *Edmonton Police Service (Re)*, 2024 CanLII 37859 (AB OIPC).

[53] Section 23 already protects against the disclosure of a third party's personal information if disclosure would be an unreasonable invasion of the third party's personal privacy. The correct application of section 23 will almost always be enough to protect personal information. In very rare cases, where the mere existence (or non-existence) of records provides privacy-invasive information, section 9(2) provides additional protection.

[54] As I understand Health's argument, Health believes the identity of the complainant may be revealed if it confirms or denies that it has responsive records from the third employee named by the Applicant.

[55] The flaw in Health's argument is that the Applicant already knows perfectly well who the complainant is. As noted in the Facts section, several investigative processes were launched in response to the privacy breach complaint. In accordance with the rules of natural justice, the Applicant was entitled to know the complaint against them so they could defend themselves. In the circumstances of the case, that included the complainant's identity. That is, after all, why the complainant is named in the Applicant's request for records.

[56] I asked Health for a further submission on this point, and they provided one. I still have trouble understanding their argument. The argument appears to

be that the Applicant should not be allowed to see records from the complainant because the records include the complainant's personal information. That is a valid argument under section 23, but I do not see how to connect that argument to the requirements of section 9(2).

[57] There is another issue hidden below the surface of this case. It is better, in my view, that we deal with the hidden issue head-on, rather than trying to avoid it through an overbroad application of section 9(2).

[58] The hidden issue is that the complainant is a Health employee, and used their GN e-mail account for all correspondence related to their privacy breach complaint. All the complainant's e-mails about the privacy breach complaint are on GN servers. Everything to or from the complainant is therefore "in the custody or under the control of" a public body: section 3(1). The Applicant has a right of access to any record "in the custody or under the control" of a public body: section 5(1). That right is, of course, subject to any applicable exemptions: section 5(2).

[59] The question in this case, then, is whether Health is required to produce the records generated by the complainant merely because the complainant used their GN e-mail account to pursue their personal concerns about a possible breach of privacy.

The additional records

[60] The complainant used their GN e-mail address for all purposes associated with this matter. That included filing a request under the ATIPPA for their own medical records (and receiving the disclosure); asking questions of Health officials about what those records showed (and receiving the answers); filing a privacy breach complaint with Health (and discussing it with various Health employees); and corresponding with me, the Information and Privacy Commissioner.

[61] There is, in short, a substantial correspondence to and from the complainant's e-mail account about the case. Health gathered 128 pages of records from the complainant because those records were responsive to the Applicant's request. These 128 pages were in addition to the 85 pages of other

records that were, with redactions, disclosed to the Applicant. In this decision, I will call these 128 pages "the additional records".

[62] Many of the additional records contain the complainant's personal medical information. Some of them are about the Applicant. There is no question that these latter records are responsive to the Applicant's request (see paragraphs 7 and 9 above): they are within the date range specified by the Applicant; they mention the Applicant's name; and they are to or from one of the three named Health employees. But do they have to be disclosed?

[63] It is well-established that records from personal communication channels (e.g. personal e-mail, direct messages, texts) are subject to disclosure under the ATIPPA if they are used to conduct GN business: *Department of Health (Re)*, 2021 NUIPC 11 (CanLII) at paragraph 47.

[64] Although less common, the converse is also true: records from GN communication channels are not subject to disclosure under the ATIPPA if they are used for personal matters. Usually that is because they are irrelevant to an applicant's request for records. But sometimes it is because they are exempt under section 23.

Additional records: Section 23

[65] Section 23 is the only exemption that can properly be applied to withhold the additional records. But how to do it?

[66] The best approach to the section 23 issue is to ask a hypothetical question: what would have happened if the complainant had used a personal e-mail address for their correspondence about the case? Assuming the complainant was at no time conducting GN business, the answer would be something like the following:

a. None of the records in <u>the complainant's</u> e-mail account are subject to the ATIPPA.

b. If the complainant corresponded with a public body, the records of the correspondence in the public body's e-mail accounts are subject to the ATIPPA.

c. The public body's records of correspondence with the complainant must be disclosed, subject to any applicable exemptions.

These are the guidelines that I will apply to the additional records.

[67] I have written before that it will be a rare case in which section 23 justifies the redaction of an entire document: *Department of Human Resources (Re)*, 2023 NUIPC 16 (CanLII) at paragraph 33; *Department of Family Services (Re)*, 2022 NUIPC 18(CanLII) at paragraph 50. This is, however, one of those rare cases in which certain categories of documents are exempt in full under section 23.

[68] Applying paragraph (a) of the guidelines, the complainant's correspondence with a third party (i.e. someone not part of a "public body") is not subject as a category to the ATIPPA. That includes correspondence with the Applicant's professional regulator (pages 86 to 90) and with me (pages 110-113, 208-213).

[69] Correspondence with third parties about a personal matter is the complainant's personal information, and disclosure would be an unreasonable invasion of the third party's personal privacy.

[70] Applying paragraph (b) of the guidelines, all the complainant's correspondence with GN employees is subject to the ATIPPA. I note that the Applicant's request for records named, apart from the complainant, two specific Health employees. I refer to these two employees as EMP1 and EMP2.

[71] Any correspondence the complainant had with EMP1 and EMP2 should have been available from EMP1's and EMP2's e-mail accounts. It should, with appropriate redactions, have been included in the disclosure package sent to the Applicant. It was not.

[72] In my view, Health erred when it omitted from the 85-page disclosure package all correspondence involving the complainant, even correspondence that included one or both of EMP1 or EMP2. I have already explained why that

omission was not justified under section 9(2). The omission of the complainant's correspondence as a category was not justified under section 23 either.

[73] In my view, Health can correctly apply section 23 to information about other Health employees:

a. Any record about an employee other than the Applicant is non-responsive and does not have to be disclosed.

b. Some of the records about the Applicant are also about other employees. For example, a manager might send an e-mail about two or more unrelated HR situations, of which only one is the Applicant. In these cases Health may redact the names and other personal information of the other employees: *Department of Health (Re)*, 2022 NUPC 8 (CanLII) at paragraph 38.

[74] In my view, Health can also correct apply section 23 to records of correspondence between the complainant and Health's ATIPP Coordinator (pages 100-102, 108, 176-179, 181-186, 192). Apart from the fact that this correspondence contains a great deal of the complainant's personal information, I think it is reasonable for an ATIPP applicant to assume that their correspondence with a public body about an ATIPP request will be confidential. To release that information would, in all the circumstances, be an unreasonable invasion of the complainant's personal privacy.

Additional records: Summary

[75] Correspondence between the complainant and the Applicant's professional regulator are exempt as a category under section 23: pages 86-90, 94.

[76] Correspondence between the complainant and the Information and Privacy Commissioner is exempt as a category under section 23: pages 110-113, 208-213.

[77] Correspondence between the complainant and Health's ATIPP coordinator about the complainant's ATIPP request is exempt as a category under section 23: pages 100-102, 104-106, 108, 176-179, 181-186 and 192.

[78] Correspondence between the complainant and Health employees that does not include EMP1 or EMP2 is non-responsive to the Applicant's request and does not need to be disclosed: pages 91-93 and 140.

[79] Meditech logs about the complainant's care and the complainant's personal notes about their medical history are exempt as categories under section 23: pages 114-139, 141-165 and 204-207. The only exception is the Meditech logs showing the Applicant's activity within the Meditech system.

[80] The remaining pages, all of which include EMP1 or EMP2 as sender or recipient, are 95-99, 103, 107, 109, 166-175, 180, 187-191 and 193-203. These records should have been included in the disclosure package sent to the Applicant. Health should now review them for redaction under section 23. Where exempt information can be severed, the 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".

Exercise of discretion

[81] I have found that section 25.1(c) does not apply to the information on pages 5 and 8, and that section 14(1)(b)(i) does not apply to the information on page 83. I am therefore recommending that this information be disclosed.

[82] If the Minister does not accept those recommendations, there is one more issue that Health will have to consider: the exercise of discretion.

[83] Sections 14 and 25.1 say that the head of a public body "may" refuse to disclose certain information. They are discretionary exemptions. Even if they apply the public body can choose to release the information anyway.

[84] A public body is required to actively exercise its discretion. That means it must think about whether to disclose the information, and provide to the Applicant a meaningful explanation why it has decided to exercise its discretion the way it has.

[85] As long as Health 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); but for an exception see *Department of Executive and Intergovernmental Affairs (Re)*, 2024 NUIPC 3 (CanLII) at paragraphs 58 to 63.

[86] In my view, Health has little to lose by disclosing the redacted information on pages 5, 8 and 83. The Applicant, on the other hand, has suffered the loss (or at least the substantial diminution) of their employment prospects. The equities in favour of disclosure are, I would respectfully suggest to Health, strongly in the Applicant's favour.

Conclusion

[87] Health did not correctly apply the exemption in section 14(1)(b)(i) on page 83 of the disclosure package.

[88] Health did not correctly apply the exemption in section 25.1(c) on pages 5 and 8 of the disclosure package.

[89] Health correctly applied the exemption in section 23 in most cases. The only exception is on page 84 of the disclosure package.

[90] Health did not correctly apply section 9(2).

Recommendations

[91] **I recommend** that Health disclose the information on page 83 of the disclosure package that was redacted under section 14(1)(b)(i).

[92] **I recommend** that Health disclose the information on pages 5 and 8 of the disclosure package that was redacted under section 25.1(c).

[93] If the Minister does not accept the recommendations in paragraphs 91 and 92, **I recommend** that Health properly exercise its discretion.

[94] **I recommend** that Health disclose the e-mail on page 84 of the disclosure package that was redacted under section 23.

[95] I recommend that Health review the records listed in paragraph 80 of this Review Report, and release to the Applicant the records (or parts of records) from that list that are not exempt under section 23.

Graham Steele
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