

Issues

- [4] The issues in this review are:
- a. Did HR correctly apply the exemption in section 23?
 - b. Did HR correctly apply the exemption in section 25.1?
 - c. Did HR 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] 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.

[7] On March 11, 2024, Health transferred a portion of the request to HR. In its transfer letter, Health re-worded 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 the Department of Human Resources for the time frame between August 1, 2023 and March 8, 2024.

[8] On April 17, 2024, HR disclosed 69 pages of records (plus a cover sheet, so that the disclosure package is 70 pages). There were some redactions.

[9] The Applicant applied for review of HR's disclosure.

[10] As noted above, HR received the request as a transfer from Health. Today I am issuing a companion decision about Health's disclosure: *Department of Human Resources (Re)*, 2024 NUIPC 10 (CanLII), also known as Review Report 24-261-RR. For a more complete picture, the two decisions should be read together.

Law

[11] HR cites two exemptions: section 23(1) and section 25.1(c).

Section 23(1)

[12] 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.

[13] 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 NUPIIC 4 (CanLII) at paragraphs 21 and 22. I adopt that statement of the law for purposes of this decision.

[14] 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).

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

Section 25.1(c)

[16] 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.

[17] 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.

[18] For section 25.1(c) to apply, HR advice must 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).

[19] 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.

Analysis

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

[21] When the complainant filed their privacy breach complaint against the Applicant, the Applicant’s professional life was turned upside-down. The Applicant, a contract employee, was not re-hired. The complaint has been devastating for the Applicant.

[22] 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.

[23] 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.

Section 23

[24] HR applied section 23 to redact two categories of information:

- a. Information that identifies the complainant.
- b. 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.

[25] 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 HR was not wrong to do so.

[26] Some of the redactions are in e-mails on which the Applicant was a recipient. Again, there is not much point in redacting this information since the Applicant already has it. But for the same reason – the Applicant already has it – I will not now recommend that it be disclosed to the Applicant.

[27] Other than those minor comments, I find that HR correctly applied section 23.

Section 25.1(c)

[28] HR has applied section 25.1(c) to redact information on pages 59, 66 and 70 of the disclosure package.

[29] In each case, the substance of an e-mail is redacted, but HR has correctly left intact the header and footer: see *Department of Justice (Re)*, 2023 NUIPC 18 (CanLII). We therefore know the sender, recipient(s), date, and subject.

[30] The e-mail exchange on page 59 is between two HR employees. They are discussing how to respond to an e-mail from the Applicant’s union representative. In my view, this exchange fits comfortably within section 25.1(c). One employee is asking for advice, and the other employee is giving it. Subject to what I have to say below about the exercise of discretion, HR correctly applied section 25.1(c).

[31] The e-mails redacted on pages 66 and 70 are different. The key word in section 25.1(c) is “advice”. As noted in the Law section above, for information to fall within section 25.1(c), there must be something that is genuinely in the nature of advice. In my view, pages 66 and 70 contain direction rather than advice.

[32] The redacted e-mail on page 66 is part of an e-mail chain that started two weeks earlier. Other than the very last e-mail, everything in the chain has been released to the Applicant. (Some minor details have been redacted under section 23, but they are not relevant to this issue.)

[33] The chain starts with a request from the director of the Applicant’s work unit to re-hire the Applicant. Another Health manager – presumably the manager who must approve the request – then writes to an HR employee to ask for “direction”. The following day, the Health manager writes to a different HR employee, saying “I need direction whether to re-sign this or not”. The manager continues, “If you can send me recommendation today, that would be appreciated”.

[34] So what exactly is the manager asking for – is it “direction” or “recommendation”? The difference matters. A recommendation is advice and may be covered by section 25.1(c). The recipient can take a recommendation into account, but is still free to make a different decision. A direction, on the other hand, is not advice. The recipient must follow the direction. It is not covered by section 25.1(c).

[35] In my view, the redacted e-mail on page 66 is more in the nature of a direction, not a recommendation. Even though it is phrased as a recommendation, the surrounding context suggests that both the Health manager and HR understood it to be a decision to be implemented:

- a. The manager twice asks for “direction” from HR.
- b. As is normal in an access review, I have seen the unredacted e-mail. I cannot reveal the substance of it, but I can say that its overall phrasing is in the nature of a direction.
- c. The manager treated HR’s reply as a final decision. This conclusion is confirmed by e-mails disclosed in the companion case of *Department of Health (Re)*, 2024 NUIPC 10 (CanLII) at page 8 of Health’s disclosure package. Those e-mails show the direction from HR was implemented by Health without further discussion.

[36] The redacted e-mail on page 70 is from one HR employee to another. Even more clearly than the redacted e-mail on page 66, it is a direction. Advice is neither sought nor received. Section 25.1(c) does not apply.

[37] For these reasons, I find that HR did not correctly apply section 25.1(c) on pages 66 and 70. The information should be disclosed.

Exercise of discretion

[38] Section 25.1(c) says that the head of a public body “may” refuse to disclose certain information. It is a discretionary exemption. Even if section 25.1(c) applies to certain information, the public body can choose to release the information anyway.

[39] 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.

[40] HR has not properly exercised its discretion. In its Exemption Rationale document, there is a column headed “Discretion explanation”, but it appears HR does not understand what it is supposed to do in this column. The explanations that are given merely restate the words of the ATIPPA or restate the decision not to disclose. They do not help the reader understand why the department’s discretion was exercised the way it was.

[41] As long as HR 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.

[42] In my view, HR has little to lose by disclosing the redacted information on pages 59, 66 and 70. 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 HR, strongly in the Applicant’s favour.

Conclusion

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

[44] HR correctly applied the exemption in section 25.1(c) on page 59 of the disclosure package, but not on pages 66 and 70.

[45] HR did not properly exercise its discretion.

Recommendations

[46] **I recommend** that HR disclose the redacted information on pages 66 and 70 of the disclosure package.

[47] **I recommend** that HR exercise its discretion regarding the redacted information on page 59 of the disclosure package.

[48] If the Minister does not accept my recommendation in paragraph 46, I **recommend** that HR exercise its discretion regarding the redacted information on pages 66 and 70 of the disclosure package.

Graham Steele

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