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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**

<b>Report Number:</b>	24-276-RR
<b>CanLII Citation:</b>	Department of Human Resources (Re), 2024 NUIPC 25
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<b>GN File Number:</b>	1029-20-2425HR1271
<b>Date:</b>	October 31, 2024

### **Summary**

[1] The Applicant is a GN employee, holding a middle management position. They filed a complaint of workplace harassment against their manager. At roughly the same time, two employees managed by the Applicant filed a complaint of workplace harassment against the Applicant. The Department of Human Resources referred both complaints to investigation. The Applicant filed an access request for both investigation reports. HR disclosed the two reports to the Applicant, with heavy redactions. The Commissioner finds HR erred in its application of section 23 (unreasonable invasion of third party’s personal privacy) and recommends the reports be disclosed without redaction.

### **Nature of Review and Jurisdiction**

[2] This is a review of disclosure by the Department of Human Resources. The request for review was filed by the Applicant under section 28(1) of the *Access to Information and Protection of Privacy Act* (ATIPPA). I conducted my review under section 31(1).

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

## Issues

[4] The only issue in this review is whether HR correctly applied the exemption in section 23.

## Facts

[5] The Applicant is a GN employee, holding a middle management position. They filed a complaint of workplace harassment against their manager. At roughly the same time, two employees managed by the Applicant filed a complaint of workplace harassment against the Applicant.

[6] The Department of Human Resources referred both complaints to investigation. The investigations were conducted by an investigator from outside the GN. The investigator wrote a report for each complaint. The Applicant filed an access request for both reports.

[7] HR disclosed the two reports to the Applicant, but with heavy redactions. The Applicant requests review of the redactions.

## Law

[8] All of HR's redactions are made under section 23 of the ATIPPA. 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.

[9] 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.

**[10]** 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. The first part of section 23(3) is especially important:

(3) In determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances...

(Emphasis added)

**[11]** Every decision under section 23 is, ultimately, a decision under section 23(1). Unless something falls within the conclusive presumptions in section 23(4) – and in this case nothing falls within section 23(4) – there are no hard-and-fast rules. All the relevant circumstances must be considered.

**[12]** I have issued two detailed Review Reports that are directly relevant to this case. In *Department of Executive and Intergovernmental Affairs (Re)*, 2021 NUIPC 13 (CanLII), also known as Review Report 21-194, I explained how to redact harassment investigation reports. Almost the entire analysis in that case could be applied to this case. The same is true of *Department of Human Resources (Re)*, 2023 NUIPC 1 (CanLII), also known as Review Report 23-234.

**[13]** The key takeaways from those Review Reports, which I urge HR to re-read, are:

- a. A harassment investigation report can be a life-altering document. It can touch deeply a person's sense of worth and accomplishment in the workplace. It is little wonder that the parties usually want to know, in detail, what a harassment investigation report says.
- b. A sensitive balancing of all relevant circumstances under section 23 is the best way to balance the Applicant's right of access while ensuring that privacy and confidentiality values are respected. This sensitive balancing does not lend itself to hard-and-fast rules. Everything depends on the context.

- c. A harassment investigation report is inevitably going to include a great deal of personal information about the people involved. The personal information will be woven together into a story that makes redaction next to impossible, and which has the potential to affect personal and working relationships if disclosed. But when redaction is next to impossible, it is disclosure that should be favoured, not redaction.
- d. In the context of a high-quality investigation report (which this one was) it is difficult to see how disclosure of the report to a complainant is an unreasonable invasion of a third party's personal privacy.
- e. When an applicant was personally involved in the events being discussed in an investigation report, there is not much point in redacting the investigator's statement of the facts.
- f. The ATIPPA lays down a rule about opinions that seems counterintuitive: if someone else has an opinion about us, that opinion is our personal information and we have a right to see it. This rule can be problematic in the case of internal workplace disputes, but that is what the ATIPPA says.
- g. There are limits to disclosure, even to a complainant who was personally involved in events covered by an investigation report. There need not be disclosure when harm can reasonably be expected to result, but there must be evidence to support the expectation of harm.

## **Analysis**

**[14]** The GN continues to struggle with the release of harassment investigation reports. That is not surprising. As I have written before, the ATIPPA is a “blunt instrument” for dealing with the nuances of the GN workplace. The ATIPPA was not designed with these kinds of records in mind.

**[15]** Nevertheless, we must try. Harassment investigation reports are not exempt from disclosure. The tools for fashioning what can be released are in the ATIPPA, but the work must be done with care and finesse.

*Preliminary issue: HR's approach to redaction*

**[16]** In the present case, HR's approach to redacting the investigation reports does not follow the words of the ATIPPA, nor does it follow the advice I gave in Review Reports 21-194 and 23-234.

**[17]** HR's "Exemption Rationale" in the present case starts with a long explanation of its approach. I have reproduced it in the Appendix to this Review Report. I cannot understand it, even after reading it maybe a dozen times. I have not seen it before. It is not a correct statement of the law.

**[18]** I have written before, and I will say again, that HR is not free to make up its own processing rules: *Department of Human Resources (Re)*, 2022 NUIPC 13 (CanLII); see also *Department of Education (Re)*, 2023 NUIPC 4 (CanLII) at paragraph 68. That is what it is doing in this case.

**[19]** HR appears to be assuming that an applicant may misuse disclosed records, and therefore HR must use the redaction process to prevent any possible misuse by anyone. But that is not what the ATIPPA says. I have already considered this assumption, and rejected it, in *Department of Executive and Intergovernmental Affairs (Re)*, 2021 NUIPC 13 (CanLII) at paragraphs 61 and 62. I am disappointed to see it resurface here. Among other things, it has led HR to waste a great deal of time, making hundreds of unnecessary redactions.

*Names and pronouns*

**[20]** The great majority of the redactions in the disclosure package are the names of the complainants and respondents. For each name, HR has substituted a symbol. Because the names are redacted, so are the gender pronouns associated with those names. I agree with the Applicant that, when all these names and pronouns are removed, the reports become very hard to read. The Applicant can

probably deduce who is being referred to under each of the hundreds of redactions, but they should not have to.

**[21]** It goes without saying that the Applicant knows the name and gender of the manager against whom they filed a harassment complaint. The Applicant also knows the names and genders of the employees who filed a harassment complaint against the Applicant. No purpose is served by redacting them.

**[22]** The names and genders of the witnesses are also redacted throughout the reports. Certainly there will be instances in which it is appropriate to redact the identity of a witness. For example, I have written before that there needs to be a safe space for witnesses and whistleblowers to come forward with allegations of wrongdoing without fear of repercussion: *Department of Human Resources (Re)*, 2023 NUIPC 1 (CanLII) at paragraphs 55 and 56. But that is not even remotely what is happening this case. Furthermore, there needs to be evidence to support a reasonable expectation of harm, and HR offers none.

**[23]** Redaction of witnesses' names cannot be automatic. Like everything else in section 23, the decision to redact depends on consideration of all relevant circumstances.

**[24]** In this case, HR has overlooked the most important part of the context, which is that all the witnesses (besides the applicants and respondents themselves) are senior officials in the Applicant's home department. They have absolutely no fear of retribution from the Applicant. They are credible witnesses giving forthright statements to an experienced investigator. The essential issue in both complaints is management style, not anything personal to the witnesses. The GN's senior officials are not, one would hope, going to shade their statements merely because an applicant might read what they say. We can assume they are made of sterner stuff.

#### *Other redactions*

**[25]** In my view, none of the other redactions made by HR would, when all the relevant circumstances are considered, be an "unreasonable invasion of a third

party's personal privacy". I do not propose to look at each individual redaction, but I will mention a few categories that cover most of them.

**[26]** Employment history: the investigator introduces each witness with a one- or two-sentence summary of their background in the GN. HR has redacted all these statements on the grounds that they are "employment history" under section 23(2)(d). These redactions go so far as to redact a statement that the department's deputy minister is the deputy minister. That is not at all what section 23(2)(d) is getting at. In any event, a capsule summary of a GN employee's background and position is not an unreasonable invasion of their personal privacy.

**[27]** Opinions: A few of the redactions are statements of a witness's opinion about someone else. These statements are redacted on the basis that they are a "personal evaluation" or a "personnel evaluation" under section 23(2)(g). They are neither. That is not at all what section 23(2)(g) is getting at. In any event, an opinion is not automatically exempt from disclosure. (And as noted in the Law section above, an opinion is deemed to be the personal information of the person the opinion is about.) In the context of an investigation in which management style is the key allegation, it is not an unreasonable invasion of anyone's privacy to disclose a witness's opinion about management style.

**[28]** Investigator's conclusions: In each report, a portion of the investigator's conclusion is redacted, again citing section 23(2)(g). But an investigator's conclusion, which applies the law to the facts, inevitably will contain some element of opinion about what facts are true and what the law means. That is not at all what section 23(2)(g) is getting at. Except in unusual circumstances that do not apply here, an investigator's conclusions should not be redacted.

*Last issue: Supporting documents*

**[29]** As I was reviewing the file material, I realized that HR had not disclosed any of the supporting documents that were attached to the investigator's reports. (The investigator refers to them as "Tabs".) These supporting documents are referred to in the reports, and are an integral part of the reports.

**[30]** I remind HR that supporting documents attached to a record (just like attachments to an e-mail record) are also responsive records and should be reviewed for disclosure.

**[31]** At this late stage, I do not want to recommend disclosure of the supporting documents. HR has not reviewed them for possible redactions, and I have not seen them. I will, however, recommend that HR go back to its file, review the supporting documents, and release to the Applicant what can be released. The redactions, if any, should be consistent with this Review Report.

### **Conclusion**

**[32]** HR did not correctly apply the exemption in section 23.

### **Recommendations**

**[33]** I recommend that HR release the body of the investigation reports to the Applicant without redaction.

**[34]** I recommend that HR review the supporting documents (the “Tabs”) attached to the investigation reports and release to the Applicant what can be released.

Graham Steele

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### **Appendix: Excerpt from HR’s “Exemption Rationale”**

You have requested Investigation Reports to which you were the complainant and the respondent. The exemptions for this request must balance your right to access your personal information and the privacy afforded to potentially affected individuals. To be open and transparent regarding our own ATIPP practices, below you will find a detailed account of the redaction strategy.



Key relevant circumstances considered and Human Resources' (HR) general approach:

1. The responsive record(s) are investigation report(s) – As an employer, the GN has a duty to ensure its employees have balanced and well thought out policies and processes for resolving interpersonal relations at work. Investigations into allegations between employees must be founded in fairness and must not further disturb what may be already tense work environments. Therefore, space to provide information must be granted fairly and equally to complainants, respondents, and witnesses. This can only be achieved if discretion and privacy are paramount to this process. ATIPP Offices must be considerate of this, when determining what constitutes as an unreasonable invasion of privacy. The HR ATIPP Office recognizes that it would be difficult for HR to ask people to participate openly and freely in investigations if the records can leave the GN with out this being considered.

2. Access to information throughout internal investigation process compared to access through ATIPP – Through out the investigation process, relevant parties are involved as need be and information is shared with them through various means. Documents shared with complainants and respondents may contain the personal information of third parties. However, confidentiality of these records is expected as per the GN's policies, terms of employment and investigation procedures. The same expectations of confidentiality and non-disclosure are not applicable to records released through ATIPP. The redactions applied take this into account.

3. ATIPP Offices can only exercise discretion based on the information known to them – You may have relevant circumstances for why third-party personal information should be released to you that has been redacted. Upon release, you may make representations to the Information and Privacy Commissioner (IPC), who may then recommend we alter our redaction strategy for this request. If the GN does alter the redactions, and the release of a third party's personal information is being considered, the GN will need to go through a consultation period with the individuals who may be affected. This period serves to notify

individuals of their information that may be released by the GN and gives them an opportunity to respond to both the GN and the IPC. For an example, the GN would not release any employee relations investigation with the names of participants intact unless it obtained their consent, there is a court order or, at the least, they have been notified with a chance to respond.

4. HR's approach to redacting third party personal information, without affecting readability – Investigations, by nature, amalgamate the personal information of many third parties. HR's strategy is to prioritise the release of your own personal information while minimizing the release of irrelevant, unnecessary, or redundant details that could identify third parties. For instance, while you are provided information said about, or regarding yourself, and/or the allegations, information that explicitly reveals who provided the information may be redacted and replaced with general indications of who provided it (i.e. names replaced with indicators such as: respondent, complainants, witness, or other) even if it is known to yourself or could be deduced. The indications are directly in the overlay text and are meant to help maintain readability. In general, balance is what HR looks for – details per each redaction are within the table below.

5. HR's approach to balance – As per the above, HR must reasonably balance the release and protection of information. Some information that could be considered as workplace history and that normally would constitute as an unreasonable invasion of privacy, is necessary to leave unredacted, because within the context it provides clear origins for the allegations which you the applicant are entitled to since you are the respondent. However, some information, could reasonably be expected to be known by yourself and the explicit details around them might only serve as a risk to unreasonably invade privacy. Therefore, these details would be redacted. As mentioned, all decisions can be reviewed by the IPC, per your request.