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Nunavut Information and Privacy Commissioner
Nunavunmi Tuhaqtauyukhaliqinirmun Kanngunaqtuliqinirmun Kamisina
Commissaire à l’information et à la protection de la vie privée du Nunavut

Commissioner’s Final Report

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Summary

[1] The Applicant requested disclosure of CGS e-mails about a new tank farm in Arviat. The disclosure included an exchange of e-mails between two CGS employees. Three passages from the reply e-mail were redacted. The Applicant requested review of the redactions. The Commissioner finds that the exemptions claimed by CGS do not apply, and recommends the redacted words be disclosed.

Nature of Review and Jurisdiction

[2] This is a review of a disclosure decision by the Department of Community and Government Services (CGS). The request for review 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 Community and Government Services: ATIPPA, section 2, definition of “public body”.

Issues

[4] The issues in this review are:

a. Did CGS correctly apply the exemption in section 23(2)(h)(i) to the e-mail of April 21, 2023?
b. Did CGS correctly apply the exemption in section 14(1)(a) to the e-mail of April 21, 2023?

Facts

[5] Communities in Nunavut have bulk fuel storage facilities, commonly known as "tank farms". A tank farm is a cluster of large tanks, with a different tank for each kind of fuel used in the community, such as diesel or aviation fuel. Tank farms are owned and operated by the Petroleum Products Division of the Department of Community and Government Services (CGS).

[6] The tank farm in Arviat is too small for the community's current needs. Arviat needs an expansion of its fuel-storage capacity.

[7] If an expansion of storage capacity is to be achieved by building a new tank farm, the decision about where to put it belongs to the Arviat hamlet council. Most other decisions about the tank farm, such as design and construction, belong to CGS.

[8] In 2022, the Arviat hamlet council chose a particular site for the new tank farm. There was some controversy in the community about the chosen site and the process that council followed to select it. The controversy continued into 2023.

[9] On May 3, 2023, the Applicant filed a request for records, specifically for e-mails from CGS for the period April 10 to April 28 related to the Arviat tank farm site decision.

[10] CGS responded that the request would produce a very large number of responsive records. The Applicant and CGS discussed how to narrow the request.

[11] By May 9, the request had been narrowed as follows:

> All e-mail correspondence between April 10 and 28, 2023, involving the Director of Planning and Lands regarding the Arviat tank farm site selection.

[12] CGS then identified and processed responsive records. Some third-party consultation was required. CGS also requested a processing fee. There was additional discussion between the Applicant and CGS about narrowing the request. They reached agreement, and the Applicant paid a processing fee based on the revised scope. CGS also notified the Applicant of a time extension.

[13] CGS released records in four disclosure packages, spaced over a period of several months. As of the date of this decision, there is a fifth disclosure package still to come. This decision deals only with the fourth disclosure package.

[14] The fourth package was released to the Applicant on September 22. The package consists of 15 records covering 32 pages. Some of the information was redacted. The Applicant does not take issue with the redaction of names and email addresses of concerned citizens. The only remaining redactions, and those which the Applicant has asked me to review, are three redactions in one e-mail dated April 21, 2023.

[15] In June 2023, Arviat hamlet council rescinded its site selection decision. Arviat still needs expanded fuel-storage capacity, but the decision-making process has started afresh.

Law

[16] The redactions claimed by CGS are in sections 14(1)(a) and 23(2)(h)(i) of the ATIPPA.

Section 14(1)(a)

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

> 14. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal

> (a) advice, proposals, recommendations, analyses or policy options developed by or for a public body, a member of the Executive Council or a member of a municipal council of a municipality that is designated as a public body in the regulations;
>
> ….

[18] A full statement of the law on section 14(1)(a) can be found in *Department of Human Resources (Re)*, 2021 NUIPC 4 (CanLII) at paragraph 13; see also *Review Report 06-22 (Re)*, 2006 NUIPC 1 (CanLII). I adopt that statement of the law for purposes of this decision. Essentially, information may be exempt under section 14(1)(a) if it meets three criteria:

a. The advice etc. should be sought or expected, or be part of the responsibility of a person, by virtue of that person's position.

b. The advice etc. should be directed towards taking an action.

c. The advice etc. should be made to someone who can take or implement the action.

[19] I would also note that no municipality has been designated as a public body in the ATIPP regulations, so the latter part of section 14(1)(a) does not apply.

Section 23(2)(h)(i)

[20] Section 23(2)(h)(i) only makes sense in the context of section 23(1), so I will quote both together:

> 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.
>
> (2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where
>
> …
>
> (h) the personal information consists of the third party's name where
>
> (i) it appears with other personal information about the third party, ….

[21] I have repeated the proper interpretation of section 23 in so many Review Reports that I hope it is, by now, familiar to all public bodies. I will not repeat the whole analysis here, but it can be found in *Department of Human Resources (Re)*, 2021 NUIPC 4 (CanLII).

[22] I recognize that section 23 is probably the most difficult section in the whole ATIPPA. 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 section 23(1) should be applied in a given case.

[23] In previous decisions, I have written that the clauses in section 23(2) are not stand-alone exemptions: *Department of Human Resources (Re)*, 2023 NUIPC 1 (CanLII) at paragraph 30; *Department of Family Services (Re)*, 2022 NUIPC 18 (CanLII) at paragraph 22; *Department of Human Resources (Re)*, 2022 NUIPC 15 (CanLII) at paragraph 29. They are circumstances that create a rebuttable presumption. Nothing is automatic. As stated in section 23(3), every relevant circumstance must be weighed. Every decision under section 23 is, ultimately, a decision under section 23(1).

Analysis

[24] It is worth saying, at the outset, that this decision deals with a small piece of a much larger access file. Although I find that CGS erred in its redactions of the April 21 e-mail, overall it handled the file very well.

[25] There were many hundreds of pages of responsive records. CGS and the Applicant worked collaboratively to narrow the scope of the original request, so that it was manageable for CGS and affordable but still useful for the Applicant. CGS carefully worked its way through third-party notices and with attention to details and deadlines. There were four rounds of disclosure, with a fifth still to come. The Applicant has been thoughtful about which redactions to accept and which to contest. I want to compliment both CGS and the Applicant for their approach to the file.

[26] All that is left for me to consider are three redactions in one e-mail.

[27] On the morning of April 21, a CGS employee (who I will refer to as Employee 1) wrote an e-mail to three CGS managers. The subject-matter was a letter received earlier that morning from a group of concerned citizens. The citizens' letter was attached to Employee 1's e-mail.

[28] Employee 1's e-mail was not redacted by CGS. I can therefore say that Employee 1, in the e-mail, advocates a pause in the site decision. A meeting of the hamlet council was scheduled to be held four days later. The site decision was on the agenda of that meeting. CGS representatives, including Employee 1, were scheduled to be in attendance to provide technical support.

[29] Less than two hours later, one of the e-mail's recipients replied. I will refer to the author as "Manager 1". The three redactions are all in Manager 1's reply. From the unredacted portions, we can see that Manager 1 disagrees with Employee 1's assessment.

[30] As usual, I have had the advantage of seeing the unredacted record. When discussing these redactions, I must be careful to disclose only as much as necessary to establish grounds for my findings and recommendation: section 56(1) and 56(3)(b).

First redaction

[31] The first redaction is approximately one line of text. The redaction is claimed under section 23(2)(h)(i), which I have quoted in the Law section above.

[32] Section 23(2)(h)(i) does not, in my view, apply to the redacted words. I say that for several reasons.

[33] First, section 23(2)(h)(i) is not intended to be a catch-all for pieces of personal information that do not fit anywhere else. CGS is interpreting it too broadly.

[34] Second, the clauses in section 23(2) are not stand-alone exemptions anyway: see paragraph 23 above. Even if a clause in section 23(2) applies, only a rebuttable presumption is created. The public body is still required to "consider all the relevant circumstances": section 23(3).

[35] Third, disclosing personal information about GN employees going about their work is not usually going to be an unreasonable invasion of their personal privacy: *Department of Health (Re)*, 2021 NUIPC 12 (CanLII) at paragraph 78; *Nunavut Arctic College (Re)* 2021 NUIPC 17 (CanLII) at paragraph 31. This is not an ironclad rule. It depends on all the circumstances, such as whether the personal information is relevant to the subject-matter of the record. In this case, the redacted words are relevant to the subject-matter.

[36] Fourth, I do not believe that any invasion of privacy could meet the "unreasonable" threshold, as required by section 23(1). Manager 1 offers a certain opinion about Employee 1. That makes the opinion the co-worker's "personal information": section 2, definition of "personal information", clause (h). But that is not enough, by itself, to satisfy section 23(1). Releasing the personal information must also be an "unreasonable invasion of a third party's personal privacy". Any impact on Employee 1 would, in my view, be minimal to zero. I cannot say more without revealing what Manager 1 wrote.

Second redaction

[37] The second redaction is approximately half a line of text. The redaction is claimed under section 14(1)(a), which I have quoted in the Law section above.

[38] Section 14(1)(a) does not, in my view, apply to the redacted words. The words are a comment phrased in the past tense. Manager 1 is explaining something to Employee 1. To be frank, it is not clear to me what Manager 1 is trying to say. But whatever the author meant by the redacted comment, the redacted words are not "advice, proposals, recommendations, analyses or policy options" developed for the consideration of decision-makers.

Third redaction

[39] The third redaction is the sentence that concludes the e-mail. This redaction, like the first redaction, is claimed under section 23(2)(h)(i).

[40] Section 23(2)(h)(i) does not, in my view, apply to the redacted words. The redacted words are phrased in the future tense. They are about possible next

steps. The words are not information "about" an individual and are therefore not "personal information".

The concept of harm

[41] In their written submissions to me, both CGS and the Applicant address the concept of "harm". CGS explains why releasing the redacted words, especially the second redaction, may cause harm to its relations with the community of Arviat. The Applicant, who has not seen the redacted words and therefore must argue in more general terms, explains why any harm is outweighed by the importance of the issue to the citizens of Arviat.

[42] The concept of harm appears frequently in the ATIPPA, especially in Part 2 dealing with privacy. In Part 1, which is the part dealing with access to records, the concept of harm (or prejudice or damage) appears in sections 6.1(5)(a), 17(1), 19, 20(1)(b), 21, and 25.1(b), among others.

[43] The concept of harm is not a free-floating exemption. Any assessment of harm must be grounded in the words of a particular exemption. For the reasons I have given, the exemptions claimed by CGS do not apply. There is not an additional step at which we consider what harm, if any, might be caused by disclosing the redacted words.

[44] For these reasons, I have not tried to weigh or assess the parties' competing arguments about harm.

A final comment: section 14(1)(b)

[45] I would be remiss if I failed to note that my analysis might have been different if CGS had cited section 14(1)(b)(i) to withhold the entire e-mail exchange between Employee 1 and Manager 1. 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, ….

[46] 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).

[47] CGS's concerns about the redacted words fit more easily within the framework of section 14(1)(b). Employee 1 recommends a pause in the site decision, and explains why. Manager 1 says the decision-making process needs to continue as planned, and explains why. These two civil servants are discussing what to do next, in light of the citizens' letter. These are "deliberations involving … employees of a public body". Certainly the exchange is frank. Everybody at CGS was under time pressure because of the impending hamlet council meeting. Maybe some things were phrased indelicately. Protecting that sort of exchange within the civil service is why section 14(1)(b) is in the ATIPPA.

[48] So if CGS had withheld the entire exchange of e-mails under section 14(1)(b), I would likely have found it was correct to do so.

[49] But CGS did not withhold the entire exchange under section 14(1)(b). I am reluctant now to apply an exemption that was never claimed by CGS, especially when the unclaimed exemption is discretionary. To do so would, in my view, be unfair to the Applicant, who has had no opportunity to make a submission on section 14(1)(b). I am also mindful that the Applicant filed their original request for records almost six months ago. It is too late, in my view, to introduce a significant new wrinkle that might create further delay in bringing this file to a conclusion.

[50] I do not want to leave the impression that CGS did anything wrong by releasing information it likely could have withheld under section 14(1)(b). To the

contrary, CGS's work on the file – and bearing in mind that this review deals with a small piece of a much larger disclosure – has been commendable. The scheme of the ATIPPA leans in favour of as much disclosure as possible. And given the importance to Arviarmiut of the tank-farm siting decision, maximum disclosure is to be encouraged.

Conclusion

[51] CGS did not correctly apply the exemption in section 14(1)(a) to the e-mail of April 21.

[52] CGS did not correctly apply the exemption in section 23(2)(h)(i) to the e-mail of April 21.

Recommendations

[53] I recommend that the redacted words in the e-mail of April 21 (page 24 of the fourth disclosure package) be disclosed.

Graham Steele
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