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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 records related to a private company's operation of one or more residential care facilities outside Nunavut. The Department of Justice disclosed records with redactions. The Applicant requested review of the redactions. The Commissioner finds that most redactions are justified under section 14(1)(b), which protects consultations or deliberations among GN employees. The Commissioner finds the exemption does not apply to e-mail headers and footers. The Commissioner also recommends that Justice actively exercise its discretion.

Nature of Review and Jurisdiction

[2] This is a review of disclosure by the Department of Justice. 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 Justice: ATIPPA, section 2, definition of "public body".

Issues

[4] The issues in this review are:

a. Did Justice correctly apply the exemption in section 14(1)(a)?
b. Did Justice correctly apply the exemption in section 14(1)(b)?
c. Did Justice properly exercise its discretion under section 14?

Facts

[5] The Applicant requested from the Office of the Public Guardian and Trustee (OPGT) records relating to a private company operating one or more residential care facilities outside Nunavut. The residents included Nunavummiut for whom the OPGT was legally responsible. The OPGT is a division of the Department of Justice.

[6] Justice provided the records in three disclosure packages. This review concerns only the third disclosure package. Justice redacted some of the records. The Applicant requests review of those redactions.

Law

[7] Justice has claimed exemptions under sections 14(1)(a) and 14(1)(b) of the ATIPPA.

Section 14(1)(a)

[8] Section 14(1)(a) is cited for the exemptions on pages 1, 2 and 4 of the disclosure package. The relevant portion of that exemption 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….

[9] 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.

Section 14(1)(b)

[10] Section 14(1)(b) is cited on 15 pages of the third disclosure package. The relevant portion of that exemption 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, ….

[11] 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).

Analysis

[12] I have, as usual, had the advantage of seeing the unredacted records. In my view, almost all redactions fit comfortably within section 14(1)(b) of the ATIPPA.

[13] The OPGT had directed the company to take certain actions with respect to the Nunavummiut in their care. The company objected. Senior officials from Justice, Family Services, and Health had to work together to formulate a response to the company's objections.

[14] Certainly Justice is accountable for the decisions it made and the actions it took. After the company objected, there was a brief flurry of consultation and deliberation within the GN. It is these sorts of consultations and deliberations that are protected under section 14(1)(b).

[15] I wrote in paragraph 12 that "almost all" of the redactions fit within section 14(1)(b). One type of redaction does not: the headers and footers of e-mails. Before discussing them, I will touch on a technical point concerning section 14(1)(a).

Section 14(1)(a)

[16] Justice claims an exemption under section 14(1)(a) for the body of two letters. The letters are on page 1 to 4 of the disclosure package.

[17] The letters are almost certainly attachments to e-mails that appear later in the disclosure package. I can guess which e-mails they belong to, but I should not have to guess. This technical issue, of e-mails and attachments becoming separated in Justice's disclosure packages, is something I have raised before: see *Department of Justice (Re)*, 2022 NUIPC 16 (CanLII) at paragraph 26. An attachment loses context when it becomes separated from the e-mail to which it belongs, and that makes my review more difficult.

[18] If I am correct that the letters were attachments to e-mails, then they were part of the "consultations or deliberations" under section 14(1)(b). It makes more sense to me to leave section 14(1)(a) aside, and consider only section 14(1)(b).

Draft letters

[19] The letter redacted on pages 1 and 2 of the disclosure package is, on its face, a draft. One paragraph shows the strikeouts and additions of a work-in-progress. This draft letter is part of the deliberations among GN staff about how to respond to the company's objections. Subject to what I say below about the exercise of discretion, it is exempt from disclosure under section 14(1)(b).

[20] Justice has also redacted the body of the letter on page 4. Unlike the letter on pages 1 and 2, this letter is not obviously a draft. The name of the file, if it

belongs to the e-mail I think it belongs to, has “final” in the file name. However the letter is not signed, so I cannot be certain this letter was in fact the final letter that was sent to the company. I asked Justice to explain what this letter is. The response was that this letter was not final and was not sent in this form. I am prepared to take Justice at its word. But if this letter was not the final response to the company, then where is the final response? Is it in one of the other disclosure packages? Wherever it is, it should be disclosed to the Applicant.

E-mail headers and footers

[21] Justice has redacted the headers and footers of most e-mails in the disclosure package. (By “header”, I mean the standard portion of an e-mail that shows “From”, “To”, “Subject”, and “Date”, as well as the file-name of any attachment. By “footer”, I mean the optional portion of an e-mail that typically shows the sender’s position and contact information.) The effect is to show that consultations or deliberations occurred, but not who was involved in them, or when.

[22] Normally, headers are not redacted. My counterpart in Saskatchewan wrote the following in *Saskatchewan Government Insurance (Re)*, 2018 CanLII 5083 (SK IPC) at paragraphs 30 and 31:

> [30] …SGI has also withheld email headers and signature lines on pages P018, P112 and P170. I am of the view that the names of authors or correspondents, dates, and subject lines are not exempted from disclosure under subsection 17(1)(b) of FOIP. A number of court decisions, previous Review Reports by my office and other Information and Privacy Commissioners in other jurisdictions are of the same view.
>
> [31] The fact that a person consults or was consulted cannot, in my view, be withheld under subsection 17(1)(b)(i) of FOIP unless this fact also reveals the substance of the consultation. The exemption embraces the substantive parts of the communications that seek an opinion as to the appropriateness of particular proposals or courses of action. This includes any background materials that inform the advisors and are inextricably interwoven with the questions being asked.

I note that section 17(1)(b) of the Saskatchewan legislation is almost identical to section 14(1)(b) of the Nunavut legislation. I agree with the Saskatchewan Commissioner's analysis, and adopt it for purposes of this decision.

[23] As the Saskatchewan Commissioner says, there may be situations in which the information in the header will reveal the substance of the deliberations. That is not the situation in the present case, and I will wait for a proper case before exploring this exception any further.

[24] Once we accept that e-mail headers are not normally exempt under section 14(1)(b), there is no reason to redact the footers, because they merely show "business card" details about the sender. Business-card information about GN employees is not exempt from disclosure: *Nunavut Housing Corporation (Re)*, 2022 NUIPC 5 (CanLII) at paragraph 20; *Department of Health (Re)*, 2021 NUIPC 12 (CanLII) at paragraph 78.

[25] In a recent decision, I wrote that certain e-mails might have been exempt under section 11(1)(b), and if they were, CGS could have withheld "the entire exchange": *Department of Community and Government Services (Re)*, 2023 NUIPC 17 (CanLII) at paragraph 48. Justice cites this decision to support its redaction of the headers and footers. But my words in the CGS case were not intended to be taken so broadly. They were an aside at the end of a decision in which I recommended disclosure, and in which the subject e-mails had the headers and footers intact. My reference to "the entire exchange" was to the substance (i.e. the bodies) of the e-mails.

[26] I do understand that the Applicant is mainly interested in the substance of the e-mails. Unfortunately, that information is covered by section 14(1)(b). Nevertheless, e-mail headers and footers can give important contextual information about who was involved in deliberations and when. They are not, except in rare cases, exempt from disclosure.

Exercise of discretion

[27] There is one more issue: the exercise of discretion under section 14.

[28] The former Commissioner and I have reminded public bodies that there is one last step in most exemption claims. 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, including sections 14, 15 and 25.1. Section 23 is a mandatory exemption.
>
> [50] For the discretionary exemptions, a public body is required to consider whether to disclose information that it could withhold. To put it another way, the ATIPPA says what the minimum disclosure is, and a public body can choose to release more than the minimum. 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.

[29] Since section 14 is a discretionary exemption, Justice is required to consider whether to exercise its discretion in favour of disclosure. They need to go beyond the question "Can we withhold this information?" to "Should we disclose this information, even though we could withhold it?"

[30] The legislature has made section 14 discretionary, so Justice cannot automatically refuse disclosure: *Department of Justice (Re)*, 2022 NUIPC 16 (CanLII) at paragraph 33. They must at least turn their minds to the question of whether to exercise their discretion in favour of disclosure, and then explain to the Applicant why they exercised their discretion as they did.

[31] As long as Justice addresses in good faith the exercise of its discretion, I will not second-guess their decision: *Department of Human Resources (Re)*, 2021 NUIPC 14 (CanLII) at paragraph 74. For what it is worth, I see nothing in the e-mails that should cause Justice the least concern about "being wrong, 'looking bad' or appearing foolish": see paragraph 11 above. I am sure Justice will, when exercising its discretion, consider the importance of the public-policy issue raised by the Applicant's request for records.

Conclusion

[32] Justice did not correctly apply the exemption in section 14(1)(a) to the draft letters on pages 1, 2 and 4. Those redactions are, however, justified under section 14(1)(b).

[33] Justice correctly applied the exemption in section 14(1)(b) to the bodies of the e-mails on pages 5, 6, and 13 to 25. It did not correctly apply the exemption to the headers and footers of the e-mails.

[34] Justice did not properly exercise its discretion under section 14.

Recommendations

[35] **I recommend** that Justice disclose the headers and footers of the e-mails on pages 5, 6, and 13 to 25 of the third disclosure package. The bodies of those e-mails may, subject to the exercise of discretion, continue to be withheld.

[36] **I recommend** that Justice actively exercise its discretion under section 14 with respect to all redactions in the third disclosure package. In other words, Justice should consider whether to disclose the redacted information, and should provide the Applicant with a reasoned explanation of why it has exercised its discretion the way it has.

Graham Steele
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