

Issues

- [4] The issues in this review are:
- a. Did Education correctly apply the exemption in section 25.1(a)?
 - b. If not, what is the appropriate remedy?

Facts

[5] On September 25, 2023, the Applicant filed an ATIPP request with the Department of Education. The request was for

All emails, texts, social media messages and texts contained on both government and personal communication or storage devices relating to complaints made against former [name of school] teacher [name of teacher].

I have left out the name of the school and the name of the teacher. They are not relevant to this decision, and I have a duty to keep information confidential except to the extent necessary to explain my decision: section 56(3)(b).

[6] There followed much confusion about how the Applicant would pay the \$25 application fee. Without going into detail about what the confusion was and who may have been at fault, the issue was not resolved until the Applicant paid the fee on December 5. In the Analysis section below, I will have more to say about this aspect of the case.

[7] On December 11, Education sent a letter to the Applicant. The letter said the requested records would be disclosed no later than January 23, 2024.

[8] On January 23, Education sent another letter to the Applicant, setting a new deadline of February 6. The letter says, as the reason for the extension, “we are currently consulting with the third party of this request”. In the file material given to me by Education, there is no record of third-party consultation.

[9] On February 6, Education sent another letter to the Applicant, setting a new deadline of February 8.

[10] On February 7, the ATIPP Coordinator at Education had a telephone conversation with a staff member in the Employee Relations division of the

Department of Human Resources. In the file material given to me by Education, there is no written record of that call. I am informed by Education that the ER staff member said there was an ongoing workplace investigation.

[11] The same day, Education sent another letter to the Applicant. The letter says “The department is refusing to disclose any information regarding your request”, and quotes section 25.1(a) of the ATIPPA. There is no further explanation.

[12] The same day, the Applicant filed a request for review. I then asked Education to send me their file material. That is a standard request in a review case.

[13] The file material that I got back consisted almost entirely of correspondence between Education and the Applicant about the fee payment issue. There were no responsive records, no file notes, and no internal correspondence.

[14] When I asked Education to explain the gaps, I was informed that no responsive records had been gathered because of the ongoing workplace investigation; that the discussion within Education was all verbal; and that the only communication with the Employee Relations division of HR had been the phone call on February 7.

[15] Later, someone else at Education told me there were, in fact, five responsive records in the file. They had been copied from a different ATIPP file. I asked for and received those records. In my view, three of the records were not responsive to the Applicant’s request. The other two records were only indirectly responsive. The gathering of these records did not amount to a diligent search.

Law

[16] Section 25.1(a) reads as follows:

25.1. The head of a public body may refuse to disclose to an applicant

(a) information relating to an ongoing workplace investigation; ...

[17] For Section 25.1(a) to apply, there must be an investigation that is ongoing at time ATIPP disclosures are being considered: *Department of Human Resources (Re)*, 2023 NUIPC 16 (CanLII) at paragraph 23; *Department of Justice (Re)*, 2022 NUIPC 17 (CanLII) at paragraph 21; *Department of Human Resources (Re)*, 2021 NUIPC 15 (CanLII) at paragraph 38. The onus of proof is on the public body: section 33(1).

[18] If the public body establishes that there is an ongoing workplace investigation, it may withhold records relating to that investigation in full: see, for example, *Department of Human Resources (Re)*, 2023 NUIPC 16 (CanLII) at paragraph 31; and *Department of Human Resources (Re)*, 2021 NUIPC 18 (CanLII) at paragraphs 28-29.

Analysis

[19] In the recent past, Education had some difficulty fulfilling its ATIPP obligations: *Department of Education (Re)*, 2023 NUIPC 4 (CanLII); *Department of Education (Re)*, 2022 NUIPC 11 (CanLII); *Department of Education (Re)*, 2021 NUIPC 22 (CanLII); *Department of Education (Re)*, 2021 NUIPC 21 (CanLII).

[20] I acknowledge that Education has recently taken steps to improve their ATIPP processing. They are committed to doing better. This case, however, represents a step backwards. The file was handled in a confusing way.

Delay in responding

[21] The Applicant filed their request on September 25. More than two months slipped by before Education received the \$25 ATIPP application fee.

[22] Education appears to have initially given the Applicant incorrect information about payment methods. The Applicant says they asked for information about alternative payment methods but never got a reply. Education says they left voicemail messages for the Applicant (of which there is no written record in the file) but never got a reply.

[23] There is no point trying to decide who was responsible for the miscommunication. Because of the “duty to assist” in section 7(1), responsibility for avoiding miscommunication rests primarily with the public body.

[24] Section 7(1) of the ATIPPA reads as follows:

7. (1) The head of a public body shall make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay.

[25] The “duty to assist” includes having correct information about payment methods, and doing everything reasonably possible to keep the file moving. In this case, Education did not meet that standard. As a result, more than two months were lost.

[26] But even after the Applicant’s payment was received, it is not apparent that Education did anything to move the file along. If they did, there is no documentation of it in the file.

[27] It was on February 7, says Education, that the ATIPP Coordinator had a telephone conversation with the Employee Relations division of HR. As a result of that conversation, Education concluded that all responsive records were exempt under section 25.1 of the ATIPPA.

[28] But what happened between December 5 (when the fee was paid) and February 7? According to the file material given to me by Education: nothing. Another two months were lost.

Section 25.1(a)

[29] When Education finally responded to the Applicant’s request, on February 7, the letter was brief: it said that no records would be released, and section 25.1(a) was quoted.

[30] There are three problems with Education’s response.

[31] First, I have written before that the bare recitation of an ATIPPA section is not an adequate response to an Applicant: *Nunavut Arctic College (Re)*, 2021

NUIPC 17 (CanLII) at paragraph 26. The duty to assist in section 7(1) and the duty to give reasons in section 9(1)(c)(i) requires a proper, detailed explanation. That is the only way an Applicant can know whether a public body's response makes sense.

[32] Second, Education never searched for responsive records. It will be a rare case in which a public body can claim an exemption in the absence of any search. Such an approach is permissible only where, in the circumstances of a case, it is plain and obvious that any responsive records would fall within an exemption. But this is not such a case.

[33] I can say with certainty, based on information obtained during my review, that there are responsive records "in the custody or under the control" of Education. Some are held at the school level, but for purposes of ATIPPA a school is deemed to be part of the Department of Education: *Education Act*, section 198. At least some of the complaints were known to Education staff at the regional level. It also seems likely that senior staff at Education headquarters in Iqaluit would have known about the complaints.

[34] (Records about the complaints were also definitely held at the district education authority level, but a DEA is not a "public body" within the meaning of the ATIPPA Act: *Review Report 15-094 (Re)*, 2015 NUIPC 7 (CanLII). That is a legislative gap that has been discussed in the Legislative Assembly in the past, but so far there has been no statutory amendment to include the DEAs.)

[35] So although responsive records exist, Education made no effort to locate them. Education seems to have assumed that all responsive records were wrapped up in the Employee Relations investigation. That assumption was, in my view, not justified. Education did not know the scope of the ER investigation, nor did it know which responsive records (if any) were in ER's file.

[36] The third problem with Education's reliance on section 25.1(a) is that the ongoing workplace investigation is not, in fact, about the teacher named by the Applicant, nor is it about complaints against that teacher. Complaints against the teacher are only indirectly involved.

[37] To put it another way: if every responsive record were released to the Applicant, the Applicant would still have no information “relating to” the workplace investigation that is ongoing.

[38] In these circumstances, I do not see how section 25.1(a) can apply. I find that Education erred in relying on that section to withhold all responsive records, and indeed to not bother searching for records at all.

[39] That does not, however, mean that the responsive records should be released to the Applicant. There are other parts of the ATIPPA, not considered by Education, that probably apply. But Education never considered them, partly because it never gathered responsive records, and partly because it believed that section 25.1(a) was a complete response.

Section 25.1(b) – reasonable expectation of harm

[40] Section 25.1(b) reads as follows:

25.1. The head of a public body may refuse to disclose to an applicant
...
(b) information created or gathered for the purpose of a workplace investigation, regardless of whether such investigation actually took place, where the release of such information could reasonably be expected to cause harm to the applicant, a public body or a third party;
....

This section is, in my view, more relevant than section 25.1(a).

[41] The difference between section 25.1(a) and section 25.1(b) is that the latter does not automatically result in records being withheld. The test is whether the records “could reasonably be expected to cause harm” to someone. In the case of complaints against a teacher, the “third party” could be the teacher, the complainant, or anyone else in the school community.

Section 23 – unreasonable invasion of personal privacy

[42] Section 23 is also relevant. The core provision of section 23 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.

This section is relevant because records responsive to the Applicant's request almost certainly contain "personal information" about the teacher, the complainant, and maybe others.

[43] Section 23 is the most complicated section in the entire ATIPPA, and I will not go into details here about how it should be interpreted. It requires careful weighing of "all the relevant circumstances": section 23(3). The balancing required by section 23(3) means that different applicants may receive different disclosure: *Department of Executive and Intergovernmental Affairs (Re)*, 2021 NUIPC 13 (CanLII) at paragraph 61. In the present case, the Applicant is an "outsider" to the complaints, and so may receive only a heavily-redacted set of responsive records, if they receive any records at all.

[44] The point is that Education needed to consider how section 23 might apply, and it could do that only with all the responsive records in front of it.

Section 26 – third-party notification

[45] When section 23 is engaged, a public body must consider whether any third party should be notified: section 26. The purpose of notification is to give the third party an opportunity to be heard in the ATIPP process.

[46] In this case, the teacher named by the Applicant is obviously a "third party". Many of the responsive records will contain the teacher's personal information. Depending on how Education moves forward with this file, it may have to contact the teacher in accordance with section 26.

[47] (I note in passing that the responsive records almost certainly contain personal information about students. That sort of personal information must be redacted under section 23: *Nunavut Arctic College (Re)*, 2021 NUIPC 17 (CanLII) at paragraphs 30-34; *Department of Education (Re)*, 2021 NUIPC 10 (CanLII) at paragraph 55. Therefore the students, and their parents or guardians, do not need to be notified under section 26.)

[48] As noted in paragraph 8 above, Education’s letter to the Applicant of January 23 said that “we are currently consulting with the third party of this request”. Education must have been thinking of its communications with the Employee Relations division of HR. Consultation with another public body is fine, of course, but it is not a third-party consultation. There is no record in the file materials given to me by Education of any communication with a third party under section 26.

Appropriate remedy

[49] I find that Education did not correctly apply the exemption in section 25.1(a). That still leaves the question of the appropriate remedy.

[50] Normally I make recommendations designed to resolve a case as quickly as possible. That is especially true where, as in this case, five months have passed since the Applicant filed their request.

[51] Unfortunately, that is not possible in this case. Since Education never attempted to gather responsive records, we have no way to know what records there are, or how the ATIPPA might apply to them. The best I can do is send the file back to Education and recommend they start again.

[52] I am sure this recommendation will be disappointing to the Applicant. They have a right to be disappointed. Five months after filing their request, they have received nothing. It will be at least another month, and perhaps longer, before Education is able to process the file correctly. Furthermore, there is no guarantee the Applicant will ever receive responsive records. That will always be a risk when an applicant is an “outsider” and asks for records about a specific individual.

[53] Education should refund the \$25 application fee to the Applicant, and it should not impose any additional fee when it re-processes the file. The Applicant deserved a better, faster answer than they got in this case.

A final comment

[54] My final comment is about public accountability. At the root of the Applicant's request for requests is their assertion that Education "has failed to keep public stakeholders informed".

[55] Complaints about the teacher named by the Applicant have been the subject of stories in the news media, so the substance of the complaints is already known. The allegations are serious. The allegations may or may not be true. It is unclear by what process, if any, the validity of the complaints was assessed within the education system.

[56] But there appears to be no mechanism – in the *Education Act*, the *Education Staff Regulations*, or otherwise – for a school community to learn how its complaints have been dealt with and to hold education officials to account if the complaints were mishandled. The ATIPPA, for the reasons given in this decision, is not likely to satisfy the community's understandable desire for answers.

[57] As I recently wrote in a different context that also involved children, the GN should consider whether are ways to promote accountability without taking away from confidentiality: *Department of Family Services (Re)*, 2023 NUIPC 15 (CanLII) at paragraphs 36 to 41.

Conclusion

[58] Education did not correctly apply the exemption in section 25.1(a).

[59] The appropriate remedy is to send the file back to Education.

Recommendations

[60] I recommend that Education start again from the beginning with its processing of the Applicant's request for records, in accordance with the guidelines in this decision.

[61] I recommend that Education refund the application fee to the Applicant.

[62] I recommend that Education review its procedures for ATIPP processing, especially about putting written documentation in the file so that it contains a complete account of all steps taken, including telephone calls, messages left, and verbal conversations.

Graham Steele

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