

Nature of Review and Jurisdiction

[2] This is a review of disclosure by the Department of Family Services. 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 Family Services: ATIPPA, section 2, definition of “public body”, paragraph (a).

Issues

[4] The issues in this review are:

- a. Did Family Services correctly apply section 23 to Disclosure Packages 2 and 3?
- b. Did Family Services correctly withhold the records in Undisclosed Records Package 1?
- c. Did Family Services correctly withhold the records in Undisclosed Records Package 2?
- d. Did Family Services conduct a diligent search for responsive records?

Facts

[5] The Applicants are the parents of a minor child who was, for a time, placed in an out-of-territory facility under a voluntary services agreement with the Department of Family Services. In this decision, I will refer to this facility as “the OOT facility”. On February 20, 2024, the Applicants filed a wide-ranging request for records about the placement.

[6] There was then some discussion between the Applicants and Family Services about the scope of the request. The Applicants did not agree to narrow the request.

[7] Family Services released the first disclosure package (DP1) on April 5. There were 414 pages of records. There were no redactions. The department also took a time extension for the remaining records, citing the volume of records that needed to be found and reviewed.

[8] On April 25, 2024, the Applicants applied to this office for review. They alleged that relevant records were being withheld. Because disclosure was not complete, I suggested to the Applicants that we defer the review until disclosure was complete. The Applicants agreed.

[9] Family Services then released three more disclosure packages:

- a. Disclosure Package 2 (DP2): 50 pages released on May 2. There were only two redactions, both claimed under section 23 (unreasonable invasion of a third party's personal privacy).
- b. Disclosure Package 3 (DP3): 381 pages released on May 13. There was a modest number of redactions, all but one based on section 23. The other was based on section 24 (confidential business records of a third party).
- c. Disclosure Package 4 (DP4): 475 pages released on June 12. There were no redactions. This package was released in response to my query about missing e-mail attachments in DP2 and DP3.

[10] There were also two sets of records that were withheld in their entirety from the Applicants, but which were provided to me:

- a. Undisclosed Records Package 1 (URP1): Seven pages of records withheld under section 13 (cabinet records).
- b. Undisclosed Records Package 2 (URP2): Certain attachments to e-mails in DP3. These records were withheld under sections 23 and 24.

[11] I asked Family Services about a reference in an e-mail to the Applicants, dated April 5, to "third-party consultations". I was informed by Family Services that third-party consultations had been considered, but Family Services had concluded they were not necessary. There was therefore no requirement, under section 30(b) of the ATIPPA, for me to issue notice of this review to any third party.

Law and Analysis

[12] This file is large and complex. By my count, there are 1348 pages of records. Disclosure took about four months. Family Services released three disclosure packages, and release of a fourth was prompted by a query from me. Two more packages of records have been withheld from the Applicants in their entirety, but have been provided to me in unredacted form.

[13] Family Services has made a reasonably good effort to fulfill its ATIPP obligations, given the size and complexity of the file. The results, spread over six disclosure packages, are still somewhat confusing for all concerned.

[14] I will consider the issues in the following order:

- a. DP2 and DP3: Did Family Services correctly apply section 23?
- b. URP1: Was Family Services correct to withhold it in its entirety?
- c. URP2: Was Family Services correct to withhold it in its entirety?
- d. Did Family Services conduct a diligent search for records?

DP2 and DP3 – Section 23 – Law

[15] 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.

[16] 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.

[17] 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).

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

DP2 and DP3 – Section 23 – Analysis

[19] In all but one instance, section 23 is the exemption claimed by Family Services to support its redactions in DP2 and DP3.

[20] Some of the records in DP3 refer to more than one child. It goes without saying that all references to children other than the Applicants' child are exempt from disclosure under section 23(1) and must be withheld. In all these instances, Family Services was correct to apply section 23.

(i) DP2, pages 13 and 14

[21] On pages 13 and 14 of DP2, a sentence is redacted in two copies of the same e-mail.

[22] I find that section 23 does not apply. The sentence does not contain any "personal information" about a third party. It is a statement of what a prospective service provider decided, and why they decided it. The fact that a couple of names are mentioned is not enough to exempt these sentences under section 23.

(ii) DP3, page 64

[23] On page 64 of DP3, the subject line of an e-mail is redacted, apparently on the basis that it contains a third party's name.

[24] Given the context – the third party's name, unredacted, appears several times in the body of the record – I do not understand the basis on which the third party's name has been redacted in the subject line. In any event, no "personal information" about the third party is given. This information should be disclosed.

(iii) DP3, page 278

[25] This record, written by a staff member from the OOT facility, states the projected cost for placing the Applicants' child at the facility.

[26] To the extent there is personal information, it is about the Applicants' child. An estimate of cost for the provision of public services is not a third party's "personal information", so section 23 cannot apply. This information should be disclosed.

(iv) DP3, pages 369-380

[27] On pages 369 to 380 of DP3, there is a series of e-mails passing between Family Services staff in Nunavut and their counterparts in the jurisdiction where the OOT facility is located. Within those e-mails, all identifying information (names, e-mail addresses, job titles) for the non-GN employees has been redacted.

[28] In my view, the redacted information should be disclosed.

[29] It is well-established that the "business card" information of GN employees (name, contact information, job titles) is not exempt under section 23. That extends also to GN contractors: *Department of Health (Re)*, 2021 NUPC 12 (CanLII) at paragraphs 78 to 85.

[30] The employees of another government are not, of course, GN employees nor GN contractors. For the purposes of the ATIPPA, they are "third parties". But that is not the end of the analysis.

[31] To be exempt under section 23, information in a record must be an "unreasonable invasion of a third party's personal privacy". All relevant circumstances must be considered: section 23(3). In this case, it is relevant that the non-GN employees are working with GN employees on an OOT placement. This sort of mutual aid is a routine and integral component of an OOT placement. The non-GN employees are performing the same coordination and oversight functions that GN employees would be performing if the placement were in Nunavut. In these circumstances, disclosing the business-card information of the

non-GN employees is not an unreasonable invasion of their personal privacy. They are just doing their jobs.

URP1 – Sections 13 and 14 – Law

[32] Undisclosed Records Package 1 (URP1) consists of seven pages of records. The records are a briefing note prepared by departmental officials for the Minister of Family Services, and associated correspondence between officials and the Minister. Family Services claims an exemption under section 13, which is the exemption for Cabinet records, for the entire package.

[33] None of the records in URP1 is a “Cabinet record”, as that term is defined in section 13(1). Section 13 applies to records connected to the Cabinet or one of its committees. It does not apply to routine communications between departmental officials and their minister.

[34] Although I do not normally try to “correct” a public body’s claim for an exemption, it is obvious that section 14 – and specifically sections 14(1)(a) and 14(1)(b) – is the exemption Family Services probably should have claimed:

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;
 - (b) consultations or deliberations involving
 - (i) officers or employees of a public body,
 - (ii) a member of the Executive Council, [or]
 - (iii) the staff of a member of the Executive Council;

[35] 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.

[36] 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).

[37] There have been several Review Reports dealing with briefing notes to ministers: see, for example, *Nunavut Housing Corporation (Re)*, 2022 NUIPC 5 (CanLII); *Review Report 17-133 (Re)*, 2017 NUIPC 20 (CanLII); *Review Report 16-103 (Re)*, 2016 NUIPC 7 (CanLII). The gist of these decisions is that a briefing note for a minister is not automatically exempt from disclosure. Factual statements in a briefing note should be disclosed. Portions of a briefing note can be redacted only if they fall within the three criteria listed in paragraph 35 above.

[38] There is one final important difference between sections 13 and 14. Section 14, unlike section 13, is a discretionary exemption (because it uses “may” instead of “shall”). That means a public body can choose to release records even if those records fall within the exemption. A public body must think about whether to release the records, and must explain to the applicant why it made the decision to release or not to release.

URP1 – Section 14 – Analysis

[39] I have had the advantage of seeing the unredacted records in URP1. There is a briefing note prepared for the Minister; an update to the briefing note; and some incidental discussion about the briefing note.

[40] The briefing note and update prepared for the Minister are, in my view, entirely factual. They inform the Minister about the facts of the case. These

records do not contain “advice, proposals, recommendations, analyses or policy options”. The former Commissioner and I have consistently recommended that factual statements in ministerial briefing notes should be disclosed.

[41] On page 4 of URP1, however, there is a back-and-forth discussion between departmental officials and a member of the Minister’s staff. That discussion is a “consultation or deliberation” under section 14(1)(b). It may be withheld, subject to the exercise of discretion.

URP2 – Analysis

[42] Undisclosed Records Package 2 (URP2) consists of five documents that were attached to e-mails in Disclosure Package 3 (DP3) but which were withheld from the Applicants in their entirety. (Technically there were six documents, but Family Services has combined two of them into one.)

[43] URP2 was provided to me by Family Services on June 19, after I had written to ask about missing e-mail attachments. The rest of the e-mail attachments from DP3 were provided to the Applicants, without redaction, as Disclosure Package 4 (DP4).

[44] In DP3, even the names of the five withheld documents were redacted. The reason why Family Services redacted the names is a technical one having to do with hyperlinks. I do not understand it. The important point is that Family Services was not claiming an ATIPPA-based exemption for the document names. For that reason, I list the document names here:

- a. Monthly client tracking (DP3, page 29)
- b. Briefing note for [a DFS manager] August 31, 2023 (DP3, page 29)
- c. [Client number] Current statement and invoices (DP3, page 30)
- d. Investigative report – [OOT facility] – March 2024 (DP3, page 111)
- e. Role and description of worker [OOT facility] (DP3, page 111)

[45] I will deal briefly with the records in URP2 that are withheld under section 23 (the first three). Then I will consider in more detail the records withheld under section 24 (the last two).

(a) Monthly client tracking (DP3, page 29)

[46] This document is an Excel spreadsheet with details of various Family Services clients. One of them is the Applicants' child. Family Services has withheld the full document under section 23.

[47] A public body must release non-exempt information if it can reasonably be severed from exempt information: ATIPPA, section 5(2). In this case, Family Services was right to withhold information about other children, but it should release the portion of the document that is about the Applicants' child.

(b) Briefing note (DP3, page 29)

[48] This document is a briefing note prepared for a DFS manager about various Family Services clients. One of them is the Applicants' child. Family Services has withheld the full document under section 23.

[49] For the same reason given in paragraph 47 above, Family Services was right to withhold information about other children, but it should release the portion of the document that is about the Applicants' child.

(c) Current statement and invoices (DP3, page 30)

[50] This document is a statement of outstanding balances (1 page) and invoices (3 pages) for services rendered by the OOT facility. The statement and invoices cover more than one client, but one of them is the Applicants' child. Family Services has withheld the entire document under section 23. According to the Exemption Rationale, that was "to protect the third party from unnecessary financial disclosures that might be detrimental to its operations".

[51] Section 23 applies only to the "personal information" of individuals. Section 23 does not apply to a legal person such as a corporation: *Legislation Act*, section 1(8). Section 23 therefore cannot apply to the statement and invoices.

[52] Family Services may have intended to claim an exemption under section 24, which protects certain confidential business information, but I do not believe it applies either. A routine statement and invoice for services rendered to the GN is not the sort of confidential business information contemplated by section 24(1)(b). If it was Section 24(1)(c) that Family Services meant to claim, it requires evidence “well beyond” a mere possibility of harm. There is no such evidence.

[53] For the same reason given in paragraph 47 above, Family Services should sever the portion of the document that is about the Applicants’ child and disclose it to the Applicants.

URP2 – Section 24(1)(b)(ii) – Law

[54] There are two documents in Undisclosed Records Package 2 (URP2) for which an exemption is claimed under section 24(1)(b)(ii): an investigation report, and an e-mail about job descriptions at the OOT facility.

[55] Family Services withheld the documents in their entirety, citing section 24(1)(b)(ii). That section reads as follows:

24. (1) Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant

...

(b) financial, commercial, scientific, technical or labour relations information

...

(ii) that is of a confidential nature and was supplied by a third party in compliance with a lawful requirement;

[56] For this exemption to apply, three criteria must be met:

- a. The information must be financial, commercial, scientific, technical or labour relations information.
- b. The information must be of a confidential nature.
- c. The information must have been supplied by a third party in compliance with a lawful requirement.

[57] There are a several recent Review Reports about what it means for something to be “confidential”: *Department of Health (Re)*, 2024 NUIPC 13 (CanLII) at paragraphs 12 to 14; *Department of Executive and Intergovernmental Affairs (Re)*, 2024 NUIPC 3 (CanLII) at paragraphs 17 and 18; *Department of Health (Re)*, 2022 NUPC 6 (CanLII). I adopt the same analysis for purposes of this decision.

URP2 – Investigation Report -- Analysis

[58] The investigation report is the end-product of an investigation commissioned by Family Services into how the OOT facility handled the placement of the Applicants’ child. The commissioning of the investigation was the direct result of the concerns raised by the Applicants.

[59] I find that section 24(1)(b)(ii) does not apply to the investigation report. That section applies only to “financial, commercial, scientific, technical or labour relations information”. The investigation report does not fit any of these descriptions. It is not, in any sense, the kind of confidential business information contemplated by section 24(1)(b). The report was commissioned by Family Services, and delivered to Family Services by the investigator.

[60] If there is anything in the investigation report that is exempt from disclosure, it would be under section 23. I have read the report and I do not see anything that would be exempt under section 23. To the extent there is personal information, it is about the Applicants’ child. There are references to staff members at the OOT facility and what they told the investigator, but those references are not the “personal information” of the staff members. Even if they were, releasing the information in the investigation report to the Applicants would not, in all the circumstances of the case, be an unreasonable invasion of any third party’s personal privacy.

[61] Of all the responsive records held by Family Services, the investigation report is probably the most central to the Applicants’ quest for accountability. Accountability is one of the core purposes of the ATIPPA: section 1. The investigation report should be disclosed without redaction.

URP2 – Role descriptions – Analysis

[62] The withheld document is an e-mail dated March 12, 2024, from the OOT facility to Family Services staff. Attached to it were four “role descriptions” for workers at the OOT facility.

[63] I note in passing that the four role descriptions were not actually included in URP2. I suspect that was because they were attachments to an attachment, and Family Services overlooked them. I have not seen the four documents themselves, but I assume they are generic job descriptions.

[64] If that assumption is correct, I find that section 24(1)(b)(ii) does not apply. Job descriptions are not, except in unusual cases, the sort of confidential business information contemplated by section 24(1)(b). Even if they were, there is no evidence that the OOT facility considered these job descriptions to be confidential. The e-mail to which the documents are attached makes no mention of confidentiality. The documents were sent to Family Services because Family Services asked for them, not “in compliance with a lawful requirement”, which is the criterion set out in section 24(1)(b)(ii).

[65] The role descriptions should be disclosed without redaction.

Diligent search – Law

[66] A public body has a duty to undertake a “diligent search” for responsive records: *Department of Health (Re)*, 2021 NUIPC 20 (CanLII) at paragraphs 12 to 15; *Department of Education (Re)*, 2021 NUIPC 10 (CanLII) at paragraphs 24 to 27; *Department of Education (Re)*, 2021 NUIPC 22 (CanLII); *Nunavut Housing Corporation (Re)*, 2021 NUIPC 26 (CanLII).

[67] In Ontario, the search required of a public body is described this way: “A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request”: *Municipality of Chatham-Kent (Re)*, 2019 CanLII 108986 (ON IPC) at paragraph 15; *Health Professions Appeal and Review Board (Re)*, 2018 CanLII 74224 (ON IPC) at paragraph 11.

[68] A similar but more detailed explanation is given by an adjudicator for the Alberta Information and Privacy Commissioner in *University of Lethbridge (Re)*, 2016 CanLII 92076 (AB OIPC). The adjudicator in *University of Lethbridge* quotes from an earlier Order listing the kinds of evidence that a public body should put forward to show it made reasonable efforts in its search:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced

[69] I adopt this explanation of the ATIPPA search requirement, along with the stipulation from the Ontario cases that the search should be conducted by “an experienced employee knowledgeable in the subject matter of the request”.

[70] There is a threshold question in every “diligent search” case, and that is whether there is some basis for believing that undisclosed records exist at all: *Nunavut Housing Corporation (Re)*, 2021 NUIPC 26 (CanLII) at paragraph 64; *Review Report 17-118 (Re)*, 2017 NUIPC 5 (CanLII), citing Order P2010-10 of the Alberta Information and Privacy Commissioner; *Department of Health (Re)*, 2021 NUIPC 20 (CanLII) at paragraph 19.

[71] The purpose of the “some basis” test is “to prevent the public body expending time and effort on searches based only on an applicant’s subjective belief that a document must exist or should exist or might exist”: *Department of Health (Re)*, 2021 NUIPC 20 (CanLII) at paragraph 19.

Diligent search – Analysis

[72] The Applicants believe strongly that relevant records are being withheld from them or were destroyed. That belief is grounded in their lack of trust in the department. The relationship between the Applicants and the department is, to say the least, strained.

[73] I have asked the Applicants if they have evidence of missing or deleted records. They do not.

[74] The Applicants have heard certain stories about the OOT facility. They believe the stories are true. Since the disclosure packages do not contain any records about those stories, they conclude that the records are being withheld or were destroyed. They appear reluctant to consider the other possible conclusion – the stories they have heard may be untrue.

[75] It is not for me to tell the Applicants what they should believe. They are fiercely advocating for their child's welfare. For purposes of an access review, however, I need "some basis" for concluding that a public body has not produced all responsive records. That requirement has not been met.

Conclusions

[76] Family Services correctly applied section 23 to Disclosure Packages 2 and 3, with some exceptions.

[77] Family Services did not correctly apply section 13 to Undisclosed Records Package 1. Family Services may, subject to the exercise of discretion, withhold page 4 of Undisclosed Records Package 1 under section 14.

[78] Family Services did not correctly withhold the records in Undisclosed Records Package 2, except for references to children other than the Applicants' child.

[79] Family Services conducted a diligent search for responsive records.

Recommendations

[80] I **recommend** that Family Services continue to withhold all references in the responsive records to children other than the Applicants' child. (see paragraph 20)

[81] Subject to paragraph 80, I **recommend** that Family Services disclose the redacted portions of

- a. Disclosure Package 2, pages 13 and 14. (see paragraphs 21 and 22)
- b. Disclosure Package 3, page 64. (see paragraphs 23 and 24)
- c. Disclosure Package 3, page 278. (see paragraphs 25 and 26)
- d. Disclosure Package 3, pages 369 to 380. (see paragraphs 27 to 31)

[82] I **recommend** that Family Services disclose all of Undisclosed Records Package 1, except for page 4, and that Family Services exercise its discretion with respect to page 4. (see paragraphs 39 to 41)

[83] Subject to paragraph 80, I **recommend** that Family Services disclose all of Undisclosed Records Package 2. (see paragraphs 46 to 53 and 58 to 65)

Graham Steele

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