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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

Report Number:	24-272-RR
CanLII Citation:	Department of Human Resources (Re), 2024 NUIPC 21
NUIPC File Number:	24-166
GN File Numbers:	1029-20-2425HR0429, HR0530, HR0631
Date:	August 27, 2024

Summary

[1] The Applicant was an employee of the Department of Health. They filed with the Department of Human Resources three requests for records about their employment. HR disclosed records, with redactions. The Application requested review of the redactions and the search for records. The Commissioner finds the exemptions were correctly applied, with one exception. The Commissioner also finds two deficiencies in HR’s search for records. The Commissioner recommends that HR, in cooperation with Health, disclose whether there are “Do Not Hire” and “Hire with Caution” lists, where those lists are kept, and whether the Applicant’s name is on those lists.

Nature of Review and Jurisdiction

[2] This is a review of three requests for records from the Department of Human Resources. 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 Human Resources: ATIPPA, section 2, definition of “public body”.

Issues

- [4] The issues in this review are:
- a. Did HR correctly apply the exemption in section 23?
 - b. Did HR perform a diligent search for responsive records?

Facts

[5] The Applicant was an employee of the Department of Health. They filed with the Department of Human Resources three requests for records about their employment. These three requests were given file numbers HR0429, HR0530 and HR0631, respectively. The requests are highly detailed and I cannot quote them without revealing the Applicant's identity.

[6] The Applicant also filed three different (but related) requests for records from Health. This Review Report is about the HR requests only. The Review Report for the Health requests is being issued at the same time: *Department of Health (Re)*, 2024 NUIPC 22 (CanLII), also known as Review Report 24-273. For a more complete picture, the two decisions should be read together.

[7] HR's disclosure for HR0429 was 95 pages, without redactions. The other two disclosures were 69 pages and 66 pages, respectively, with redactions.

[8] The disclosure for HR0530 is not yet complete. According to HR, there is an investigation report still outstanding. When it is completed and submitted to HR by the external investigator, HR will release it to the Applicant, subject to any applicable exemptions. There is no timeline for the release of that investigation report. I therefore decided to go ahead with my review of the rest of the disclosure.

Law

Section 23 – Law

[9] All redactions were made under section 23(1), which reads as follows:

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.

[10] 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 NUJIC 4 (CanLII) at paragraphs 21 and 22. I adopt that statement of the law for purposes of this decision.

[11] 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).

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

Diligent Search – Law

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

[14] 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.

[15] 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

[16] 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”.

[17] 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.

[18] 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.

Analysis

[19] I will start by considering whether the redactions were correctly applied. I will then consider whether HR performed a diligent search for responsive records.

HR0530 – Analysis

[20] In HR0530, there are redactions on pages 41, 62 and 66.

[21] The record on page 41 is an exchange of e-mails between two HR employees. The portion that is redacted is about a case other than the Applicant's, followed by the expression of an opinion connected to that other case. This information has no bearing on the Applicant's case. I find that HR correctly applied section 23(1).

[22] The redaction on page 62 is a reference by HR staff to the status of an employee other than the Applicant. This reference has no bearing on the Applicant's case. I find that HR correctly applied section 23(1).

[23] The redaction on page 66 is different. The record is an e-mail from an HR employee. The name of the addressee, the subject (other than the Applicant's name), and the body of the e-mail are all redacted.

[24] In my view, HR erred in applying section 23 to this e-mail.

[25] Regarding the name of the addressee, I have consistently found that the name and e-mail address of GN employees going about their business should be disclosed. The only time that the name of an addressee should be redacted is if the name itself reveals something that the public body is entitled to redact. I see no reason for this addressee's name to be redacted. To do so would not be an unreasonable invasion of their personal privacy.

[26] The rest of the redacted information is not "personal information" and so section 23 cannot apply.

[27] I do not normally try to correct a public body's claim for an exemption, but I feel bound to do so when it seems obvious that an applicable exemption has been overlooked: *Department of Family Services (Re)*, 2024 NUIPC 18 (CanLII) at paragraph 34; *Department of Human Resources (Re)*, 2023 NUIPC 1 (CanLII) at paragraph 62; *Department of Human Resources (Re)*, 2021 NUIPC 18 (CanLII) at paragraphs 26 and 36.

[28] In this case, it seems obvious that the redacted information on page 66 (other than the name of the addressee) falls under section 25.1(c):

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

...

(c) information that contains advice given by the employee relations division of a public body for the purpose of hiring or managing an employee.

[29] I have previously found that the Department of Human Resources offers a wide range of employment-related advice across the GN, and therefore counts as the “employee relations division” for the Department of Health: *Department of Human Resources (Re)*, 2021 NUIPC 4 (CanLII) at paragraph 18.

[30] I find that the redacted information on page 66 (other than the name of the addressee) may correctly be redacted under section 25.1(c).

[31] Since section 25.1(c) is a discretionary exemption, HR now needs to exercise its discretion. That means it needs to think about whether to disclose the information on page 66 even though it is covered by the exemption in section 25.1(c), and explain to the Applicant why it has exercised its discretion the way it has.

HR0631 – Analysis

[32] In HR0631, there are redactions on pages 56, 57 and 61. Each is a reference by HR staff to the status of employees other than the Applicant. These references have no bearing on the Applicant’s case. I find that HR correctly applied section 23(1).

Diligent search

[33] The real issue in this case is whether HR performed a diligent search for records. The Applicant believes that responsive records have been missed.

[34] Generally, I find that HR has performed a diligent search for responsive records. There are, however, two items on which I find there is “some basis” for believing additional records exist, and for which HR’s search was insufficient.

“Do Not Hire” and “Hire with Caution” lists

[35] The first item is the question of whether a decision has been made not to hire the Applicant again, or to use the Applicant’s word, whether they have been “blacklisted”. In file HR0530, the Applicant asked for (among other things) the following:

All communications to/from/or within GN Human Resources with regards to my termination, non-renewal, and/or blacklisting...

[36] The issue of a “Do Not Hire” list and a “Hire with Caution” list has come up in several recent files in my office. Moreover, the Applicant has presented to me some evidence for believing that they have been blacklisted. I will say no more about the evidence provided to me by the Applicant because it would identify the source. Finally, there is the simple fact that the Applicant has not, in fact, been re-hired since the end of their last contract. The Applicant has previously been hired on a series of contracts and would, in the normal course, have expected to be re-hired by now.

[37] To be clear, the GN is entitled to keep a “Do Not Hire” and a “Hire with Caution” list. That is a reasonable human-resources practice. But if the lists exist, they are records held by the GN. If someone’s name is on this sort of list, they are entitled under the ATIPPA to receive a copy of that record. I note that my counterpart in Saskatchewan, in a very recent decision, has considered the same issue and appears to have come to the same conclusion: *Saskatchewan Health Authority (Re)*, Review Report 010-2024 (August 19, 2024).

[38] Assuming the two lists exist, the next question is where they are kept. It is possible that the lists are kept by the Department of Human Resources, or the human-resources division of Health, or both.

[39] In this case, under file HR0530, the Applicant has specifically asked for records related to their being “blacklisted”. HR’s disclosure package contains no records responsive to that request, nor has HR provided a narrative of its search. I am therefore unable to determine if there are no responsive records because (a) the Applicant has not been blacklisted, (b) the Applicant has been blacklisted but

the records of the blacklist are kept by Health and not HR, or (c) HR did not look for responsive records about blacklisting.

[40] HR, working with Health, needs to do more work to search for responsive records concerning “Do Not Hire” and “Hire with Caution” lists, and whether the Applicant’s name is on those lists.

HRM1010 assessment

[41] The second item on which HR needs to do more work involves its assessment of the Human Resources Manual Policy 1010 complaint that the Applicant filed in 2022. Policy 1010 is the GN’s policy on a harassment-free workplace. The policy is commonly referred to as “HRM1010” and a complaint is commonly referred to as a 1010 (“ten-ten”) complaint.

[42] In file HR0631, the Applicant asked for

...discussion with/amongst the HRM 1010 intake panel, minutes taken in relation to my HRM1010 being deemed to not meet the threshold for harassment, and communications in regards to my attempt at having that matter reassessed.

[43] There are three parts to this request. HR’s disclosure package contains some records relevant to the third part (communications about the Applicant’s attempt to have the matter reassessed) but I see nothing relevant to the first or second part (discussion among members of the intake panel or minutes of the intake panel).

[44] The HRM1010 policy is an important piece of the GN’s management of its human resources. The GN receives a substantial number of 1010 complaints every year: see “GN revamps its harassment policy”, *Nunatsiaq News*, March 12, 2024. The GN has a committee that screens these complaints, to decide if they should be further investigated. In 2023-24, for example, there were 50 complaints received, and the committee decided that 29 should proceed to investigation.

[45] The Applicant filed a 1010 complaint in August 2022. It did not proceed to investigation. The Applicant has requested records showing why the complaint

did not proceed to investigation. They have asked for records of discussion and minutes of meetings.

[46] HR's disclosure package does not contain any records of discussions involving the HRM 1010 intake panel nor records of meetings. There is also no narrative record of HR's search. I am therefore unable determine if there are no responsive records because (a) the records do not exist, (b) the records do exist but have been withheld by HR, or (c) HR did not look for responsive records on that topic.

[47] The records requested by the Applicant may not provide the information the Applicant wants. Minutes of a meeting, for example, may capture only what was decided, and not the discussion that led there. The discussions themselves may have been verbal. I do not know what records exist, nor do I want to prejudge whether an ATIPPA exemption applies to those records. My finding is simply that it is implausible there are no records touching on how the decision was made on the Applicant's HRM1010 complaint. That is why HR needs to take another look.

Conclusion

[48] HR did not correctly apply the section 23 exemption on page 66 of the disclosure package for HR0530. The redactions in the subject line and in the body of the e-mail may nevertheless be withheld under section 25.1(c). The name of the addressee should be disclosed.

[49] In all other instances in files HR0530 and HR0631, HR correctly applied the section 23 exemption.

[50] HR performed a diligent search for records, with the following exceptions:

- a. Records pertaining to whether the Applicant has been "blacklisted" from employment with the GN.
- b. Records pertaining to HR's decision in 2022 not to advance the Applicant's HRM1010 complaint to the investigation stage.

Recommendations

[51] I recommend that HR disclose the name of the addressee on page 66 of the disclosure package for file HR0530. (see paragraph 25)

[52] I recommend that HR exercise its discretion with respect to the other information redacted on page 66 of the disclosure package for file HR0530. (see paragraphs 26 to 31)

[53] I recommend that HR, working with the Department of Health, undertake a further search for records pertaining to whether the Applicant has been “blacklisted” from employment with the GN. HR, with the cooperation of Health, should disclose whether there are “Do Not Hire” and “Hire with Caution” lists, where those lists are kept, and whether the Applicant’s name is on those lists. (see paragraphs 35 to 40)

[54] I recommend that HR undertake a further search for records pertaining to HR’s decision in 2022 not to advance the Applicant’s HRM1010 complaint to the investigation stage. (see paragraphs 41 to 47)

Graham Steele

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