

Issues

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

Facts

[5] The Applicant was an employee of the Department of Health. They filed with Health three requests for records about their employment. These three requests were given file numbers DH0816, DH1127 and DH1435, 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 the Department of Human Resources. This Review Report is about the Health requests only. The Review Report for the HR requests is being issued at the same time: *Department of Human Resources (Re)*, 2024 NUIPC 21 (CanLII), also known as Review Report 24-272. For a more complete picture, the two decisions should be read together.

[7] Health's disclosures for the three requests were, respectively, 229 pages, 508 pages, and 78 pages. All had redactions.

[8] Some records for DH0816 required third-party consultation. The consultation was completed and an additional disclosure package, with redactions, was sent to the Applicant on August 21, 2024.

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 Health performed a diligent search for responsive records.

Scope of this review

[20] All redactions are made under section 23. The vast majority of the redactions are (a) statistics on disease incidence in Nunavut communities, or (b) the names and personal information of employees other than the Applicant.

[21] Whether or not these exemptions were correctly applied, the Applicant agrees that information falling within those two categories is not relevant to the purposes of their ATIPP requests. I will therefore not review these exemptions. I thank the Applicant for narrowing the scope of my review. It has saved considerable time.

DH0816 – Analysis

[22] In DH0816, there is only one redaction, on page 147, that is relevant to the Applicant's purposes.

[23] The record is an e-mail from one Health manager to another. The writer is responding to written complaints made by the Applicant. The first full paragraph contains seven sentences. The first and last sentences are unredacted. The middle five sentences are redacted.

[24] I must be careful, in my analysis, not to reveal the redacted information. I will say only that the redacted information is the manager's account of why another employee was not re-hired.

[25] Section 23(3) of the ATIPPA requires that all relevant circumstances be taken into account. In favour of disclosure, I note that the redacted passage is a direct response to an allegation made by the Applicant. In favour of non-disclosure, I note that the redacted passage contains personal information about the other employee, which in any other circumstances the Applicant would not be entitled to know. The reason given is entirely different from the Applicant's allegation.

[26] Weighing these competing considerations, I conclude that the redaction on page 147 is a proper application of section 23(1). The redacted information is

about a third party, and disclosing it to the Applicant would, in my view, be an unreasonable invasion of the third party's personal privacy.

DH1127 – Analysis

[27] In DH1127, the only redactions outside the categories listed in paragraph 20 above are the same record discussed above under DH0816. That record is found on pages 10, 13, 14, 21, 27, 473 and 498. In each case, the same redaction is made. For the reasons given in paragraphs 23 to 26 above, I find Health correctly applied the exemption in section 23(1).

DH1435 – Analysis

[28] In DH1435, there are no redactions outside the categories listed in paragraph 20 above.

Diligent search

[29] The real issue in this case is whether Health performed a diligent search for records. The Applicant believes that responsive records have been hidden or deleted.

[30] Health has provided a narrative of its search for responsive records. It is one of the best I have seen, and easily meets the criteria for a "diligent search" outlined in the Law section above. The Applicant has seen the narrative and acknowledges the search was thorough. The Applicant maintains, however, that some responsive records must have been hidden from Health's ATIPP Coordinator, or else deliberately deleted.

[31] As noted in the Law section above, an Applicant must provide "some basis" for believing that additional responsive records exist. This belief must be objectively reasonable. The Applicant's subjective belief is not sufficient.

[32] The Applicant's belief is, in my view, grounded mainly in the deep mistrust they feel towards a former colleague (COLL1) and a former manager (MGR1). I do not question the sincerity of that belief, but an Applicant's mistrust is not, by itself, enough for me to recommend a further search for responsive records: see,

for example, *Department of Family Services (Re)*, 2024 NUIPC 18 (CanLII) at paragraphs 72 to 75.

[33] The Applicant offers two main arguments why they believe records are missing:

- a. MGR1 responded in writing to the Applicant's complaints, but there is no record of MGR1 receiving the complaints.
- b. There are exchanges of e-mails between COLL1 and the Applicant that should have shown up in the disclosure packages, but did not.

[34] With respect to the first argument, I find the Applicant is mistaken. Records in the disclosure package for DH1127, pages 10 to 15, do show the route by which the Applicant's complaints were sent to MGR1. The Applicant sent their e-mail to a manager. That e-mail passed successively through the hands of three other managers, the last of whom sent it to MGR1 for a response (page 11). This all took place on November 7, 2023.

[35] The Applicant acknowledges that the e-mail containing the complaints were not a formal complaint of harassment under the GN's HRM1010 policy. There was therefore nothing untoward about the e-mail being forwarded to MGR1 for a response. The records are there in the disclosure package.

[36] With respect to the second argument, I am not persuaded that the e-mails identified by the Applicant as missing are, in fact, within the scope of any of the three ATIPP requests the Applicant sent to Health. I acknowledge that the Applicant no longer has access to their GN e-mail account, so they cannot, from their end, verify what e-mails passed between them and COLL1. That is unfortunate.

[37] In any event, Health's narrative of its search shows that COLL1's e-mails were searched by Health's ATIPP Coordinator, not by COLL1. This provides some assurance that the search was carried out properly.

[38] I have also verified, in discussion with the Information Management/- Information Technology (IM/IT) division of the Department of Community and

Government Services that an e-mail search for ATIPP purposes includes all e-mails, even those that have been “double-deleted” by a user. In other words, even if COLL1 had attempted to purge some of their e-mails (an allegation for which we have no evidence) those e-mails would not have disappeared. Under current GN policy, those e-mails are retained and remain searchable.

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

[39] There is one other issue that is relevant, though not raised directly by the Applicant’s ATIPP requests to Health.

[40] In the companion decision to this one, I recommend that the Department of Human Resources disclose to the Applicant whether there is a “Do Not Hire” and/or a “Hire with Caution” list, and if so, whether the Applicant’s name is on one of those lists: see *Department of Human Resources (Re)*, 2024 NUIPC 21 (CanLII) at paragraphs 35 to 39 (analysis) and paragraph 53 (recommendation).

[41] As noted in that decision, the lists may in fact be maintained by Health and not by HR. Health and HR should work together to respond to my recommendation. The Applicant should be able to receive a definitive answer to the question of whether “Do Not Hire” and “Hire with Caution” lists exist, where those lists are kept, and whether the Applicant’s name is on those lists.

Conclusion

[42] Health correctly applied section 23 to the three disclosure packages.

[43] Health performed a diligent search for responsive records.

Recommendations

[44] **I recommend** that Health work with the Department of Human Resources in its response to the recommendation in *Department of Human Resources (Re)*, 2024 NUIPC 21 (CanLII) at paragraph 53.

Graham Steele

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