

Issues

- [4] The issues in this review are:
- a. Did Education correctly apply the exemption in section 23?
 - b. Did Education correctly apply the exemption in section 25.1(a)?
 - c. Did Education correctly apply the exemption in section 25.1(b)?
 - d. Did Education correctly apply the exemption in section 25.1(c)?
 - e. Did Education correctly apply the exemption in section 22?

Facts

[5] The Applicant in this case is the same as in *Department of Education (Re)*, 2024 NUIPC 19 (CanLII). The Applicant is a GN employee in the education system. In the latter half of 2023, their relationship with Education's senior management deteriorated. They went on leave from their position. They are, at the time of writing, still on leave.

[6] On January 18, 2024, the Applicant filed with Education a wide-ranging access application, asking for "all information that directly or indirectly pertains to me, from July 31, 2023" to the date of the application. The request named ten individuals whose records should be searched, plus two GN divisions that deal with staffing. The request also asked for records about a specific job competition in which the Applicant was an unsuccessful candidate.

[7] On March 18, Education transferred a portion of the request to the Department of Human Resources. This Review Report is about HR's response only.

[8] On May 16, HR sent to the Applicant a disclosure package of 489 pages, with redactions.

[9] On August 13, the Applicant filed a request for review with this office. The request was filed past the statutory 30-day deadline: section 29(1). However the Applicant has explained the delay to me and I am satisfied I should extend the deadline for filing a request for review: section 29(2).

Law

[10] Most of the redactions are made under section 23(1). The rest are made under section 25.1 or section 22.

Section 23(1) – Law

[11] 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.

[12] 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.

[13] 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).

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

Section 25.1 – Introduction

[15] Section 25.1 allows for certain kinds of employee-relations records to be withheld. It 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;
(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;
and
(c) information that contains advice given by the employee relations
division of a public body for the purpose of hiring or managing an
employee.

[16] The three paragraphs of section 25.1 are quite different from each other. I will consider the law for each of them separately.

Section 25.1(a) – Law

[17] 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; ...

[18] 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).

[19] 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.

Section 25.1(b) – Law

[20] In *Department of Education (Re)*, 2021 NUIPC 10 (CanLII) at paragraph 19, I explained how section 25.1(b) works:

The onus of establishing an exemption rests on the public body: ATIPPA, s 33(1). To correctly claim a s 25.1(b) exemption, a public body must (a) establish the information was created or gathered for the purpose of a workplace investigation, (b) identify who might suffer harm, (c) establish what harm that person might be expected to suffer, and (d) establish why the expectation of harm is reasonable.

[21] The onus is on the public body to bring forward evidence showing that the requirements of section 25.1(b) have been met. For section 25.1(b) to apply, the evidence of reasonable expectation of harm must be “clear and cogent” and must be linked to the disclosure: *Department of Health (Re)*, 2021 NUIPC 11 (CanLII) at paragraphs 15, 16 and 36.

Section 25.1(c) – Law

[22] Section 25.1(c) reads as follows:

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.

[23] The term “the employee relations division of a public body” is broad enough to include the Department of Human Resources, which offers a wide range of employment-related advice across the GN, as well as a public body’s internal HR division: *Department of Health (Re)*, 2022 NUIPC 8 (CanLII) at paragraph 24.

[24] As I wrote in *Department of Human Resources (Re)*, 2021 NUIPC 15 (CanLII) at paragraph 31, section 25.1(c) recognizes that the public service works best when managers can seek HR advice without worrying that their uncertainties, questions and thought processes will be exposed to public scrutiny. The exemption in s 25.1(c) helps to ensure that GN employees ask for and get good advice.

[25] For section 25.1(c) to apply, HR advice must be requested or received: *Department of Human Resources (Re)*, 2023 NUIPC 1 (CanLII) at paragraph 66. There must be genuine “advice”: *Department of Human Resources (Re)*, 2021 NUIPC 4 (CanLII) at paragraph 16. A direction or order, or the communication of factual information, is not “advice” and is not covered by section 25.1(c).

[26] Section 25.1 is a discretionary exemption. Even if it applies, a public body must turn its mind to whether records should be released anyway.

Section 22 – Law

[27] Section 22 of the ATIPPA reads as follows:

22. The head of a public body may refuse to disclose to an applicant personal information that

- (a) is evaluative or opinion material;
- (b) is compiled solely for the purpose of
 - (i) determining the applicant's suitability, eligibility or qualifications for employment, or
 - (ii) awarding government contracts or other benefits; and
- (c) has been provided to the public body, explicitly or implicitly, in confidence.

[28] In *Department of Human Resources (Re)*, 2021 NUIPC 14 (CanLII), also known as Review Report 21-195, I reviewed the law on section 22. I will not repeat that analysis here, but I adopt it in full for purposes of this decision.

[29] In summary:

- a. For section 22 to apply, all three conditions must be met.
- b. It is a question of fact, in any given case, whether the three conditions have been met.

[30] Section 22 is a discretionary exemption (“...may refuse...”). Even if it applies, the public body may choose to release the record anyway.

Analysis

Section 23(1) – Analysis

[31] As I noted in *Department of Education (Re)*, 2024 NUIPC 19 (CanLII) at paragraph 29, most of the section 23 redactions applied by HR serve no real purpose. The Applicant was either the sender or receiver of many of these records, and so already knows what has been redacted. Nevertheless, I will not ask HR to redo this work. Most of the records, especially records of HR issues in which the Applicant was involved as an administrator, are not relevant to the Applicant's purposes.

[32] There are a number of other instances where section 23(1) has been applied, usually to redact a third party's name, but in circumstances where any invasion of privacy would be minor or non-existent. I remind HR that a name, by itself, is not enough to invoke section 23(1). For section 23(1) to apply, there must be an "unreasonable" invasion of personal privacy. All relevant circumstances must be considered: section 23(3).

[33] Given the large number of redactions, the most efficient way for me to proceed is to list the instances where I disagree with HR's application of section 23(1) and the record appears relevant to the Applicant's purposes. If a redaction is not listed below, the reader can assume I agree with it.

[34] In the following instances, I disagree that section 23(1) applies, nor do I see any other exemption that would obviously apply:

- a. Page 136: The e-mail recipient is a GN employee going about their business. It would not be an unreasonable invasion of their personal privacy to disclose their name.
- b. Page 273 (repeated on page 328): In context, the name that appears under the first two redactions would not be an unreasonable invasion of personal privacy. The third redaction is unnecessary in this context, but it is irrelevant to the Applicant's purposes so I will not recommend disclosure.

- c. Pages 337-338: The redacted information is not a third party's "personal information". Considering all relevant circumstances, there is no unreasonable invasion of anyone's personal privacy.
- d. Page 341 (repeated on page 388): It is not an unreasonable invasion of personal privacy to reveal who sat on a job interview panel. In any event, the Applicant already knows who was on that panel.
- e. Page 346 (repeated on page 348): The redacted information is not a third party's "personal information".
- f. Page 409: Like pages 341 and 388, it is not an unreasonable invasion of personal privacy to reveal who sat on a job interview panel. The rest of the redacted information is not a third party's "personal information", nor would it be an unreasonable invasion of anyone's personal privacy to release it. As I wrote in *Department of Education (Re)*, 2024 NUIPC 19 (CanLII) at paragraph 34, the public function of the Coalition of Nunavut District Education Authorities (CNDEA) is a relevant factor when applying section 23.
- g. Pages 410-411: It is not an unreasonable invasion of anyone's personal privacy to disclose the information behind the three redactions.

[35] In the following instances, I disagree that section 23(1) applies, but I find that the exemption in section 25.1(c) does apply: pages 322-327, 340, 345, 347, 366-371, 375 and 387-388. Because section 25.1 is a discretionary exemption, HR now needs to exercise its discretion, and decide whether to release the redacted information to the Applicant even though it could be withheld under section 25.1(c).

Section 25.1(a)

[36] Section 25.1(a) is cited only twice in the disclosure package, on pages 62 and 147.

[37] Section 25.1(a) does not apply to the redacted text on page 62. The record in question is an e-mail within HR about a complaint filed by the Applicant. For section 25.1(a) to apply, there must be an investigation ongoing at the time ATIPP disclosure is being considered: *Department of Human Resources (Re)*, 2021 NUIPC 15 (CanLII) at paragraph 38. HR's assessment of the Applicant's complaint was long over by the time HR sent the disclosure package.

[38] For the same reason, Section 25.1(a) does not apply to the redacted text on page 147. In any event, the investigation is irrelevant to the Applicant's purposes. The only reason it is in the disclosure package at all is that the Applicant was the recipient of the e-mail.

Section 25.1(b)

[39] Section 25.1(b) is cited only twice in the disclosure package, on pages 100 and 102, to redact the same paragraph.

[40] Section 25.1(b) does not apply to the redacted text, but section 25.1(c) does. The e-mail is from an Education employee to an HR employee, looking for advice. It fits squarely within section 25.1(c). In any event, the e-mail is irrelevant to the Applicant's purposes. The only reason it is in the disclosure package at all is that the e-mail was copied to the Applicant.

Section 25.1(c)

[41] As noted in the Law section above, section 25.1(c) allows GN employees to seek and receive HR advice, without worrying that their questions and thought processes will be exposed to public view.

[42] The Applicant's situation was complex, and a good many of the records do involve the seeking or receiving of HR advice. I find that, in all instances in which section 25.1(c) is cited, HR correctly applied it.

Section 22

[43] The Applicant asked for records about a specific job competition in which they were an unsuccessful candidate.

[44] HR appears to have interpreted the request as being for records about how the Applicant's own application was handled. There are no records in the disclosure package about any other candidates, or about how the successful candidate was chosen. The Applicant has not questioned this restriction, and may not be entitled anyway to see information about other candidates: see *Review Report 14-085 (Re)*, 2014 NUIPC 15 (CanLII). Like the former Commissioner in that case, I will leave that issue to be decided another time.

[45] The records disclosed to the Applicant were heavily redacted. Most of the redactions were on the "score sheets" filled out by the members of the interview panel. The following information was redacted:

- a. Names of the interview panel members.
- b. Any scores assigned by the panel members.
- c. The panel members' summaries of the Applicant's answers to the interview questions.

[46] After careful consideration, I find HR erred in its application of section 22. As noted in the Law section above, section 22 has three separate conditions. It is a question of fact whether each condition has been met. Since HR consistently cites only section 22(b)(i), it appears they considered only one of the three conditions. That is an error.

[47] In any event, I am doubtful that section 22 applies at all to records produced by GN job interview panels.

[48] Section 22 applies to personal information provided "to" the public body. This language appears designed to apply to information coming from outside the panel, such as reference letters. The interview panel was composed of two senior Education managers, a GN staffing manager, and a representative of the Coalition of Nunavut District Education Authorities (CNDEA). (The CNDEA role in interview panels is provided for in the *Education Act*.) It is difficult to think of this interview panel as providing information "to" the Department of Education.

[49] Moreover, section 22 applies only to personal information that has been provided “explicitly or implicitly, in confidence”. Education argues that records from the interview panel are confidential because of section 22, but on this point their argument is circular. More analysis is needed of what it takes for something to be confidential.

[50] In *Department of Health (Re)*, 2024 NUIPC 13 (CanLII) at paragraphs 13 and 14, I set out a helpful seven-part test for whether something has been supplied in confidence. I will not repeat the test in full here, but I adopt it for purposes of this decision.

[51] It is not obvious to me that records of interview panels are, or need to be, confidential, at least if the records relate to an ATIPP applicant.

[52] In my view, the following factors tend to point in favour of non-confidentiality:

- a. The Applicant met the interview panel and knows who was on it.
- b. All panel members are senior and experienced, as is fitting for a panel searching for a senior administrator. It is implausible that people of this calibre will be inhibited in future cases if they know their evaluations may be disclosed. I would like to think that senior officials are made of sterner stuff.
- c. Applicants should be able to learn from job competitions in which they are unsuccessful. They cannot learn if the process is a closed book. As I have written in the context of other HR cases, I believe there is room here for the sensitive application of Inuit Qaujimajatuqangit (traditional knowledge) and Inuit Piqqusingginnik (societal values): *Department of Education (Re)*, 2024 NUIPC 12 (CanLII) at paragraph 31; *Department of Economic Development and Transportation (Re)*, 2021 NUIPC 24 (CanLII) at paragraph 55; *Department of Human Resources (Re)*, 2021 NUIPC 14 (CanLII).

- d. The primary purpose of the ATIPPA is to promote accountability: section 1. Accountability for hiring decisions is unlikely if records of interview panels are, as a category, exempt from disclosure.

[53] For the foregoing reasons, I find that the names of the panel members and the scores they assigned to the Applicant should be disclosed.

[54] Furthermore, the Applicant's answers to the interview questions, as summarized by the panel members, are not "evaluative or opinion material". They are simply a record of what the Applicant said in the interview. The first condition of section 22 is not met. I find that everything under "Candidate's Response" on the evaluation sheets should be disclosed.

Conclusion

[55] In most cases, Education correctly applied the exemption in section 23. In some instances Education erred in applying section 23, but the information may be withheld under section 25.1(c). In other instances Education erred in applying section 23 and the information should be disclosed.

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

[57] Education did not correctly apply the exemption in section 25.1(b), but the information exempted under section 25.1(b) may be withheld under section 25.1(c).

[58] Education correctly applied the exemption in section 25.1(c).

[59] Education did not correctly apply the exemption in section 22.

Recommendations

[60] For the redactions listed in paragraph 34, **I recommend** that HR disclose the information.

[61] For the redactions listed in paragraph 35, **I recommend** that HR exercise its discretion under section 25.1(c). That means HR should consider whether to

release the redacted information, and explain to the Applicant why it is choosing to release or not release the information.

[62] For the redactions discussed in paragraphs 37 and 38, **I recommend** that HR disclose the information.

[63] **I recommend** that HR disclose all information redacted under section 22.

Graham Steele

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