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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

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Summary

[1] The Applicant is a contract health worker. It became apparent they were not being re-hired, but they could not find out why. They applied for records that would show the reason. Health disclosed 19 pages of records. The records revealed there had been an allegation of misconduct, but the records were redacted in such a way that the Applicant could not tell what the allegation was or who had made it. The Commissioner finds that Health erred in its application of section 23(1) (unreasonable invasion of a third party's personal privacy). Disclosure of the records without redaction would not be an unreasonable invasion of a third party's personal privacy.

Nature of Review and Jurisdiction

[2] This is a review of disclosure by the Department of Health. 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 Health: ATIPPA, section 2, definition of "public body".

Issues

[4] The only issue in this review is whether Health correctly applied the exemption in section 23(1).

Facts

[5] The Applicant is a contract health worker. Through an agency, they are hired for short-term contracts in Nunavut communities.

[6] At a certain point in 2024, it became apparent to the Applicant that they were not being hired to work in Nunavut, even though they were available. They or their agency contacted Health to ask why. They could not get a clear answer, other than that the reason was confidential.

[7] The Applicant filed an ATIPP request for "information on why I am apparently not eligible to work in Nunavut so I can hopefully rectify whatever the issue may be".

[8] On August 12, Health released 19 pages of records to the Applicant. There were redactions under section 23(1) (unreasonable invasion of a third party's personal privacy). The records allowed the Applicant to see there had been an allegation of misconduct, but the redactions prevented the Applicant from seeing what the allegation was or who had made it.

[9] On September 2, the Applicant filed a request for review.

Law

[10] 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.

[11] 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.

[12] 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).

[13] In this case, I do not see any part of section 23(2) or (4) that is applicable, but section 23(3) is relevant. Leaving out the parts that are obviously inapplicable, it reads as follows:

> (3) In determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
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> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Nunavut or a public body to public scrutiny;
>
> …
>
> (c) the personal information is relevant to a fair determination of the applicant's rights;
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> …
>
> (e) the third party will be exposed unfairly to financial or other harm;
>
> (f) the personal information has been supplied in confidence;
>
> (g) the personal information is likely to be inaccurate or unreliable; and
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

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

Analysis

[15] The Applicant is in a Kafkaesque situation. They have been accused of something, but Health will not tell them what the accusation is. There may or may not be an investigation underway, but it is not clear who is doing it, what the scope is, or when it might be finished. Meanwhile, the Applicant has lost their ability to work in Nunavut.

[16] The Applicant filed an ATIPP request for relevant records. Health disclosed 19 pages of records, but redacted what the Applicant really wanted to know: what is the allegation?

[17] In accordance with the usual practice, I have received from Health an unredacted copy of the disclosure package. I know what the allegation is, and who made it. I am however bound to reveal in this Review Report only what is necessary to explain my findings and recommendations: section 56(3)(b).

[18] Health relies solely on section 23(1) for the redactions. In a nutshell, Health wants to protect the identity of the person who made the allegation against the Applicant. To do that, Health has not only redacted the person's name, but the allegation itself.

[19] Often it is possible to separate an allegation from the person making it. For example, if a health professional is alleged to have fallen below professional standards in patient care, it usually does not matter who brings the allegation forward. Either the care was substandard or it was not. The identity of the complainant is not relevant.

[20] This is not such a case. I accept that it is not possible, because of the nature of the allegation, to separate the allegation from the person making the allegation. To put it another way: the allegation does not make much sense without knowing who made it.

[21] I also accept that it is important, in principle, to have a safe space where a person may bring forward an allegation of wrongdoing without fear of negative consequences such as retaliation.

[22] Nevertheless, I find that Health erred in applying section 23(1) the way it did. I say that for two principal reasons.

Section 25.1(b) – Harm to the complainant

[23] First, the possibility of harm to a complainant is explicitly part of a different exemption, namely section 25.1(b). It 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;
>
> ….

[24] The key point is that section 25.1(b) requires evidence that supports a reasonable expectation of harm. The burden of proof is on the public body. For section 25.1(b) to apply, the evidence 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.

[25] There is only one Nunavut case in which the public body did present some evidence and the exemption in section 25.1(b) was upheld: *Department of Education (Re)*, 2021 NUIPC 10 (CanLII). In all other cases, the section 25.1(b) redactions have been rejected for insufficiency of evidence.

[26] Evidence to support a reasonable expectation of harm might include witness statements, information about related proceedings, or details of any threats or attempts at retaliation or intimidation, whether currently or in the past. Other kinds of evidence are also possible.

[27] Health has chosen not to claim the exemption under section 25.1(b). There was no "workplace investigation" by the Employee Relations division of the Department of Human Resources, nor by the human resources division of Health. It appears from the records that any investigation is being done at the community level, but there is little indication of who is doing the investigation, what the scope is, or when it might be finished. The Applicant has not been contacted.

[28] In this case, Health offers no actual evidence that would support a reasonable expectation of harm to the complainant. The best they can say is that there "might" be retaliation. That is speculative, and speculation does not meet the standard of section 25.1(b). If section 25.1(b) does not apply, Health cannot

then rely on section 23(1) as if it applies a different, weaker standard of harm than section 25.1(b).

Section 23(3) – All relevant circumstances

[29] The second reason I believe Health erred is that it relied too much on a single factor, namely the possibility of harm to the complainant. Section 23(3) says that "all the relevant circumstances" must be considered.

[30] In my view, the following circumstances are relevant but have not been given adequate consideration by Health:

a. The GN should be accountable for its decision not to hire someone: section 23(3)(a). By redacting the allegation itself, Health has made itself unaccountable for the decision not to re-hire the Applicant.

b. The records show that the allegation is second-hand (i.e. what somebody told somebody). There is a corresponding risk it is unreliable.

c. The records do not show any direct evidence that the allegation is true. There is discussion about obtaining corroborating evidence, but as of the date the disclosure package was compiled, none had been obtained.

d. Disclosure of the allegation is relevant to a fair determination of the applicant's rights: section 23(3)(c). The Applicant's ability to earn a livelihood has been affected, and the Applicant should have a fair chance to address the allegation.

e. If a complaint were made to the Applicant's professional regulatory body, the Applicant would be entitled to know the details of the allegation. The Applicant is not aware of any complaint having been made to the regulatory body.

f. There are various practical, meaningful steps Health could take to protect the complainant while still providing details of the allegation

> to the Applicant. For example, Health could require non-contact with the complainant as a condition of re-hiring, or assign the Applicant to a different community, or check in periodically with the complainant. Instead of taking any steps in mitigation, Health has taken the disproportionate step of refusing disclosure of the allegation.

[31] Taking into consideration all relevant circumstances, I find that disclosing the allegation (and by implication the name of the person making it) would not be an unreasonable invasion of a third party's personal privacy. Section 23(1) does not apply.

[32] There are a few places in the disclosure package where personal information about other people is redacted under section 23(1): the third redaction on page 6; the last redaction on page 9; the two redactions on page 18. These redactions are appropriate and are, in any event, not relevant to the Applicant's purposes. Health should continue to withhold this information.

A final comment

[33] This case is the fourth recent Review Report in which the issue of a "Do Not Hire" list or "Hire With Caution" list has come up: see also *Department of Health (Re)*, 2024 NUIPC 22 (CanLII); *Department of Human Resources (Re)*, 2024 NUIPC 21 (CanLII); *Department of Health (Re)*, 2024 NUIPC 10 (CanLII).

[34] This is not just a Nunavut issue. My counterpart in Saskatchewan has recently issued a trio of decisions on the same topic: *Saskatchewan Health Authority (Re)*, 2024 CanLII 80320 (SK IPC); *Saskatchewan Health Authority (Re)*, 2024 CanLII 79974 (SK IPC); *Saskatchewan Health Authority (Re)*, 2024 CanLII 71542 (SK IPC).

[35] These lists create a number of privacy and access issues: How does someone get on the list? How does someone get off the list? How does someone know if they are on the list? Who gets to see the list?

[36] Whether there are formal lists or not – and in the present case the "Do Not Hire" decision was made without formal HR/ER involvement, so it appears to have been made informally – a decision by the GN not to re-hire someone is a serious one with potentially career-limiting or career-ending consequences for the person concerned. When the GN makes such a decision, it should be prepared to release relevant records under the ATIPPA.

Conclusion

[37] Health did not correctly apply the exemption in section 23(1).

Recommendations

[38] **I recommend** that Health disclose the records in full, leaving only the redactions listed in paragraph 32.

Graham Steele
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