

Commissioner's Final Report

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Summary

[1] The Applicant was a contract employee with the Department of Health. They filed a series of requests for records about the non-renewal of their contract. The Department of Human Resources disclosed some records, with redactions. The Applicant requested review of the redactions. The Commissioner finds HR erred in its application of section 23 (unreasonable invasion of third party's personal privacy) and recommends the records be disclosed without redaction.

Nature of Review and Jurisdiction

[2] This is a review of disclosure by the Department of Human Resources. 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 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. Should HR disclose the appendices to the investigation report?

Facts

[5] The Applicant was a contract employee of the Department of Health. They worked a series of contracts. The Applicant was then not offered any further contracts even though they were available and willing to work. The Applicant could not get a satisfactory explanation from Health as to why.

[6] The Applicant filed a series of access-to-information requests with Health and HR. Those requests were the subject of two previous Review Reports: *Department of Human Resources (Re)*, 2024 NUIPC 21 (CanLII) and *Department of Health (Re)*, 2024 NUIPC 22 (CanLII).

[7] The Applicant followed up with more ATIPP requests to Health and HR. This Review Report concerns one follow-up request filed with HR in August 2024.

[8] On September 20, HR sent 143 pages of records to the Applicant. There were significant redactions, most of them in a harassment investigation report that formed part of the disclosure package. On October 7, the Applicant requested that I review the redactions. Both the Applicant and HR have had an opportunity to make a written submission in support of their position.

Law

[9] This case is very similar to *Department of Human Resources (Re)*, 2024 NUIPC 25 (CanLII), also known as Review Report 24-276. Both involve the redaction of a harassment investigation report prepared by an outside investigator for the Department of Human Resources.

[10] For purposes of this case, I adopt in full the Law portion of Review Report 24-276, at paragraphs 8 to 13.

Analysis

[11] My analysis in this case is largely the same as in Review Report 24-276. I will not repeat the whole analysis here.

[12] I note that HR did not, because of timing, have the benefit of Review Report 24-276 before the disclosure package was issued in this case. I also note that the Minister of Human Resources accepted the recommendations in Review Report 24-276 and released the unredacted report to the applicant.

[13] For the reasons given in that case, I find that HR erred in applying almost the redactions in the disclosure package. That applies, for example, to the investigator's opinions about the witnesses' evidence and credibility; the investigator's conclusions; and other witness's opinions about the Applicant.

[14] There are, however, a few factual differences in this case about which I wish to comment. They do not necessarily lead to a different result, but they are relevant to the analysis under section 23, and they may be helpful in future cases.

Some witnesses were co-workers

[15] In Review Report 24-276, the witnesses (other than the complainants) were all senior managers in the Applicant's department. In this case, the witnesses are a mixture of managers and non-managers.

[16] Certainly there will be instances in which it is appropriate to redact the identity of a witness. For example, I have written before that there needs to be a safe space for witnesses and whistleblowers to come forward with allegations of wrongdoing without fear of repercussion: *Department of Human Resources (Re)*, 2023 NUIPC 1 (CanLII) at paragraphs 55 and 56. Co-workers may have more to fear than a manager. Nevertheless, there needs to be evidence to support a reasonable expectation of harm: ATIPPA, section 25.1(b). HR offers none.

[17] There are two instances over whom I have hesitated. Both involve non-managers.

[18] The first instance is a witness suggested to the investigator by the Applicant. The Applicant therefore knows the witness's identity but not necessarily what they said to the investigator. The investigator notes that the witness was reluctant to speak with the investigator (page 127), which is relevant to the question of whether the witness's statements should be redacted.

[19] But only part of one sentence of this witness's evidence is redacted under section 23, and it is not the witness's "personal information". Section 23 cannot apply. Nor is there any evidence of reasonable expectation of harm under section 25.1(b), so section 25.1(b) cannot apply.

[20] The second instance is a potential witness who was not interviewed. On page 116, two partial sentences are redacted. The redactions cover the investigator's reasons for not interviewing the witness. Except for one fact which I will consider in the next section, the redacted information is not the witness's "personal information". It is the investigator's assessment of whether an interview is likely to produce useful information. Section 23 cannot apply because it is not anyone's "personal information". Nor is there any evidence of reasonable expectation of harm under section 25.1(b), so section 25.1(b) cannot apply.

Personal relationship

[21] HR has redacted any mention of a personal relationship between two GN employees (e.g. pages 110, 111, 116) even if it is the Applicant being quoted about the relationship (page 111). The fact of this relationship was well-known to the Applicant. Indeed it was the Applicant who raised it in their harassment complaint. In these circumstances, no purpose is served in redacting the mere mention of the relationship.

[22] Certainly there are other scenarios in which a personal relationship might be irrelevant, or revealing it might be (taking into account all relevant circumstances) an unreasonable invasion of the personal privacy of the parties. This is not such a case.

Supporting documents

[23] In *Department of Human Resources (Re)*, 2024 NUIPC 25 (CanLII) at paragraph 29, I noted that HR had not disclosed any of the supporting documents that were attached to the investigator's reports. (In that case, the investigator referred to them as "Tabs". In this case, the investigator refers to them as "Appendices".) I recommended that HR go back to its file, review the supporting documents, and release to the Applicant what can be released.

[24] I make the same recommendation in this case, for the same reasons.

Records other than the investigation report

[25] The disclosure package in this case contains some records, on pages 1 to 97, other than the harassment investigation report. There are only a few redactions.

[26] All redactions except one are in a supplementary report written by the same investigator who wrote a report on the Applicant's complaint under the GN's "disclosure of wrongdoing" policy. The supplementary report is on pages 10 to 14 of the disclosure package, and there are redactions on pages 11, 12 and 13.

[27] The supplementary report reconsiders the issue of whether the Applicant was an "employee" for purposes of the policy. As part of this reconsideration, the investigator interviewed the Applicant's manager. HR has redacted the name of the manager, their gender pronouns, the period during which they were the Applicant's manager, and some of what they told the investigator. The redactions are all made under section 23.

[28] Section 23(1) of the ATIPPA says that personal information can be redacted if disclosing it would be an unreasonable invasion of a third party's personal privacy. Section 23(3) says that, when making that determination, "all the relevant circumstances" must be considered.

[29] In my view, HR erred in its application of section 23 on pages 11, 12 and 13. The Applicant knows perfectly well the name of their manager, the manager's

gender, and the period during which the manager managed the Applicant. No purpose is served by redacting this information.

[30] HR has also redacted, on page 12, the manager's statement of who made a certain decision about the Applicant's employment. As I have written before, information about GN employees going about their business is not their "personal information" and releasing it is not, in all but rare circumstances, an unreasonable invasion of their personal privacy. This information should be disclosed.

[31] The only other redaction on pages 1 to 97 is on page 7. The name of a GN employee is redacted in an e-mail from the Applicant's union representative to an HR employee. Considering all the relevant circumstances, as required by section 23(3), I find that disclosing this name is not an unreasonable invasion of anyone's privacy.

Conclusion

[32] HR did not correctly apply the exemption in section 23.

[33] The appendices to the investigation report should be reviewed for disclosure.

Recommendations

[34] **I recommend** that HR release the disclosure package to the Applicant without redactions.

[35] **I recommend** that HR review the supporting documents (the "Appendices") attached to the investigation report and release to the Applicant what can be released. Any redactions should be in accordance with this decision.

Graham Steele

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