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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 an Education employee. Their relationship with senior management deteriorated. They filed with the Department of Human Resources an application for records relating to their employment. HR's disclosure was 846 pages, with redactions. The Commissioner finds that HR erred in not including attachments and other documents referred to in the disclosure package, and recommends that HR search for those additional records and prepare them for disclosure. The Commissioner also finds HR erred in some applications of sections 23(1) (unreasonable invasion of personal privacy) but that it correctly applied section 25.1 (employee relations).

Nature of Review and Jurisdiction

[2] This is a review of disclosure by the Department of Human Resources (HR). 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 perform a diligent search for records?
b. Did HR correctly apply the exemption in section 23?
c. Did HR correctly apply the exemption in section 25.1(b)?
d. Did HR correctly apply the exemption in section 25.1(c)?

Facts

[5] 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] The Applicant filed a series of wide-ranging access-to-information applications. An application to Education was the subject of *Department of Education (Re)*, 2024 NUIPC 19 (CanLII). The disclosure package in that case was close to 1500 pages. An application to HR was the subject of *Department of Human Resources (Re)*, 2024 NUIPC 23 (CanLII). The disclosure package in that case was 489 pages.

[7] In August 2024, the Applicant filed a follow-up ATIPP application with HR. On September 20, HR sent to the Applicant a disclosure package of 846 pages. There were redactions. The Applicant requested review of the redactions and review of HR's search for records.

Law

[8] All redactions in the disclosure package are made under section 23, section 25.1(b) or section 25.1(c).

Section 23 – Law

[9] Section 23 is the most frequently used – and the most frequently misapplied – exemption in the ATIPPA. The portions of section 23 relevant to this case are 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.

(2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

…

(d) the personal information relates to employment, occupational or educational history;

(e) the personal information was obtained on a tax return or gathered for the purpose of collecting a tax;

…

(h) the personal information consists of the third party's name where

(i) it appears with other personal information about the third party, or

(ii) the disclosure of the name itself would reveal personal information about the third party; [or]

…

(j) the personal information indicates the third party's race, religious beliefs, colour, gender, age, ancestry or place of origin.

(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

(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;

…

(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.

I leave out sections 23(4), (5) and (6) because they do not apply in the circumstances of this case.

[10] Section 23 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.

[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.

Section 25.1(b) – Law

[13] Section 25.1(b) 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;
>
> ….

[14] 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.

[15] 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

[16] 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.

[17] 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.

[18] 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.

[19] 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).

[20] 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.

Diligent search

[21] One part of a public body's duty under the ATIPPA is to undertake a "diligent search" for responsive records: *Department of Health (Re)*, 2021 NUIPC 20 (CanLII) at paragraphs 12 to 15; *Department of Education (Re)*, 2021 NUIPC 10 (CanLII) at paragraphs 24 to 27; *Department of Education (Re)*, 2021 NUIPC 22 (CanLII); *Nunavut Housing Corporation (Re)*, 2021 NUIPC 26 (CanLII).

[22] 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.

[23] 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

[24] 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".

[25] 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.

[26] 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

[27] I have written before that the ATIPPA is frequently being used as a "proxy battleground" for the GN's human-resources issues: *Department of Education (Re)*, 2022 NUIPC 20 (CanLII) at paragraph 18. There ought to be a better way for GN employees to get records about their employment, but there is not, so employees turn to the ATIPPA.

[28] The problem is that the ATIPPA is a blunt and unsuitable instrument for dealing with complex HR matters and the nuances of the GN workplace: *Department of Executive and Intergovernmental Affairs (Re)*, 2021 NUIPC 13 (CanLII) at paragraph 26. That is especially true when, as here, the workplace issues are about a general environment and not a specific incident. It is doubly true when, as here, the Applicant is a senior administrator who worked on a wide variety of HR and other sensitive issues.

[29] The Applicant's ATIPP requests have resulted in production of close to 3000 pages of records. That is not the most records I have handled in a review file over the past four years, but it is at the high end. All of this consumes a great deal of time within the GN and within my office, yet many of the records are irrelevant to

the Applicant's purposes. As we will see later in this decision, other documents that are relevant have not been produced, so there is more work yet to be done.

[30] In civil litigation, the production of documents occurs within a well-established framework. There are very few exemptions. There is an implied undertaking of confidentiality. There are potential cost consequences and other sanctions available against any non-compliant party. Documentary production can be supplemented with oral discovery and interrogatories. The court can provide interlocutory rulings on any questions that arise.

[31] The ATIPP process lacks most of these guardrails. It was meant to be used primarily to help citizens know what their government is up to. When ATIPP applications are used as a form of pre-litigation or exploratory discovery, as they often are in HR cases involving senior officials, the ATIPP system groans under the strain.

[32] But the ATIPPA is the tool we have been given. Until the Legislative Assembly amends the ATIPPA so that records about HR cases are handled in a way that works better for everyone, we have to do the best we can.

Missing records – the need for good record-keeping

[33] The main issue raised by the Applicant is that responsive records are missing.

[34] The first part of the Applicant's submission is that their HR file has not been properly documented. The Applicant points to gaps in the records where there ought to be records – for example, minutes of important meetings.

[35] If there are gaps in the record, one possibility is that the records exist but the public body has not conducted a diligent search. The other possibility, and in my view the more common one around the GN, is that the records never existed.

[36] There has been some discussion in Canada about amending access laws to add a "duty to document" – a duty on the part of civil servants to adhere to a minimum standard of record-keeping. But no Canadian jurisdiction has adopted a

duty to document, nor is it clear how such a duty could be implemented or enforced.

[37] The Applicant may be making a good point, but there is no "duty to document" in the ATIPPA. That is an issue for the Legislative Assembly. It is not something I can pursue on review.

Missing records – internal evidence

[38] The Applicant also points to numerous records in the disclosure package that refer to attachments (or other documents) that are not themselves included in the disclosure package.

[39] I do not necessarily agree with every instance cited by the Applicant. For a few, the internal evidence is unclear. For a few others, the Applicant is asking a question about HR's document management rather than pointing to a missing record. But in most instances, I agree with the Applicant that this internal evidence shows that responsive records are missing.

[40] In two recent Review Reports, I have raised with HR the issue of attachments being left out of a disclosure package: *Department of Human Resources (Re)*, 2024 NUIPC 26 (CanLII) at paragraphs 23 and 24; *Department of Human Resources (Re)*, 2024 NUIPC 25 (CanLII) at paragraphs 29 and 30.

[41] Since this is not the first time the issue has arisen, I need to state the rule plainly: If a record is a responsive record, then any attachment to that record is also a responsive record. If a responsive record refers to another record in a substantive way, that other record is likely also a responsive record.

[42] I agree with the Applicant that attachments or other documents have been overlooked in at least the following instances:

a. Page 51: "Attached are documents for your review…". The documents are not included in the disclosure package.

b. Page 275 (this record is repeated on pages 389, 392 and 739): "I have attached the [meeting] notes…". The meeting notes are not included.

c. Page 601: “Please see attached compressed (ZIP) folder…”. The ZIP folder is not included.

d. Pages 693 and 694: “…please see the [records] in the attached email I sent to you earlier today.” The records are not included.

e. Pages 697: “As per my text, please see [records] for your review.” The text and records are not included.

f. Page 699: “…please see attached.” The attached records are not included.

g. Page 731: “Please see the attached information…”. The attached information is not included.

h. Page 731: “…some texts that were exchanged which I will send screenshots of in a moment”. No texts are included.

i. Page 733: “Please see the attachment…”. The attachment is not included.

j. Page 737: “Please see some other docs…”. The documents are not included.

The foregoing list is not exhaustive. Some instances cited by the Applicant are ambiguous, and there may be others I have missed. If the Minister accepts my recommendation to undertake a further search, HR should consult with the Applicant about other instances that I have not listed in this paragraph.

[43] At this late stage, I do not want to recommend disclosure of the supporting documents listed in the preceding paragraph. HR has not reviewed them for redactions, and I have not seen them. I will, however, recommend that HR go back and find the missing records, review them for any applicable exemptions, and release to the Applicant what can be released. The redactions, if any, should be consistent with this Review Report.

Section 23

[44] HR has over-used the exemption in section 23, as it has in several recent cases, including *Department of Human Resources (Re)*, 2024 NUIPC 26 (CanLII); *Department of Human Resources (Re)*, 2024 NUIPC 25 (CanLII); and *Department of Human Resources (Re)*, 2024 NUIPC 23 (CanLII).

[45] The last of these Review Reports involved the same Applicant. My comments in that case, at paragraphs 31 and 32, apply equally in the present case:

> [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).

[46] 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 and/or that it relates to a matter that is irrelevant to the Applicant's purposes.

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

a. Pages 9, 58, 83, 97, 110, 111, 126 and 331: The redacted passages do not contain personal information, so section 23 cannot apply. These passages are brief internal emails. They are minor, but they do give

the Applicant some information about how the responsive records were compiled.

b. Pages 271, 325 and 326: The name of an Education administrator is redacted. In context, there is no unreasonable invasion of personal privacy.

c. Pages 271, 325, 326 and 594: References to Education administrators being on leave are redacted. Usually references to GN employees' leave can be redacted, but in the context of this specific case, there is no unreasonable invasion of personal privacy.

d. Page 742: A name is redacted. It is not clear whose name it is, or why it should be redacted. HR cites section 23(2)(h)(ii), but that section is not meant to be a catch-all exemption for names. In context, there is no unreasonable invasion of personal privacy.

e. Page 773: Dates when an Education employee was in an acting position are redacted. Positions held by GN employees, and the dates during which they held those positions, are not usually a matter of personal privacy.

Section 25.1(b)

[48] Section 25.1(b) has been used to redact a passage that is repeated on pages 98 and 100.

[49] Section 25.1(b) does not apply to these records. The passage in question is a draft public statement about an issue involving a school staff member. It was not "created or gathered for the purpose of a workplace investigation", as required by section 25.1(b).

[50] Although section 25.1(b) does not apply, I will not now recommend the passage be disclosed. The passage is irrelevant to the Applicant's purposes. Besides, the Applicant has already seen it. It is included in the disclosure package only because the Applicant was, as part of their work duties, copied on the e-mail.

There was no point in redacting it, but there is also no point in making HR go back and do the work of disclosing it to the Applicant.

Section 25.1(c)

[51] 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.

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

[53] For greater certainty, my finding on section 25.1(c) applies to redactions on pages 275, 276, 320-325, 338, 343, 345, 364-369, 373, 385, 386, 390, 392, 412, 746 and 829.

[54] However I remind HR that section 25.1 is a discretionary exemption. That means HR now needs to think about whether to disclose some of or all the information it has redacted 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.

Conclusion

[55] HR did not perform a diligent search for records, in that it did not include attachments and other documents referred to in the disclosure package.

[56] In most cases, HR correctly applied the exemption in section 23. In some cases, HR erred in applying section 23 and the information should be disclosed.

[57] HR did not correctly apply the exemption in section 25.1(b), but the redacted passages are irrelevant and need not be disclosed.

[58] HR correctly applied the exemption in section 25.1(c) but did not exercise its discretion to disclose.

Recommendations

[59] I recommend that HR undertake a search for the records listed in paragraph 42, review them for exemptions, and disclose to the Applicant what can be disclosed. The redactions should be consistent with this Review Report.

[60] I recommend that HR consult with the Applicant about whether there are any other instances of attachments or other records substantively referred to in the disclosure package but not disclosed.

[61] I recommend that HR disclose the information listed in paragraph 47.

[62] I recommend that HR exercise its discretion and consider whether to disclose some of or all the information redacted under section 25.1(c).

Graham Steele
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