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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 applied for records related to their employment with the Department of Education. Education disclosed 301 pages of records, with redactions. The Applicant requested review of the redactions. The Commissioner finds many of the redactions under section 23 (unreasonable invasion of personal privacy) were unnecessary, because they were in records written or received the Applicant. Some redactions under section 23 are upheld. The Commissioner also finds Education correctly applied section 25.1(b) to redact a record related to a workplace investigation.

Nature of Review and Jurisdiction

[2] This is a review of disclosure from the Department of Education. The Applicant's 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 Education: ATIPPA, section 2, definition of "public body". For purposes of the ATIPPA, a school and its operations are deemed to be part of the Department of Education: *Education Act*, section 198.

Issues

[4] The issues in this review are:

a. Did Education correctly apply the exemption in section 21(1)?
b. Did Education correctly apply the exemption in section 23?
c. Did Education correctly apply the exemption in section 25.1(b)?

Facts

[5] The Applicant is an employee of the Department of Education. In early April 2025 they were informed by Education that their probationary contract would not be renewed.

[6] The Applicant filed two requests for records related to their employment. This Review Report is only about the first request. Education received the request by email on April 17, 2025.

[7] The same day, Education wrote to the Applicant to say that some of the records would not be provided – or "they will likely be heavily redacted" – because they were about other people. Education started working on the rest of the request.

[8] On May 23, Education wrote to the Applicant, saying that a time extension was being taken to July 27, 2025. The Applicant requested that I review the time extension.

[9] On June 9, before I had completed my time-extension review, Education sent a disclosure package to the Applicant. The package was broken into two parts. Part 1 has 153 pages of records and Part 2 has 148 pages, for a total of 301 pages. There were redactions. The disclosure package also includes an explanation of the redactions ("Exemption Rationale").

[10] On June 10, I informed the Applicant that I would be closing my time-extension file because it was now moot. The same day, the Applicant requested that I review the redactions in the disclosure package.

[11] Meanwhile, in early June, Education rescinded its decision about the Applicant's contract. By agreement, the Applicant will return to the same school for the next school year, though still on probation. The relevance of this fact will become apparent in the Analysis section below.

[12] I invited both the Applicant and Education to make a written submission for this review. They did so. I thank them for their assistance.

[13] In this Review Report, I will use "1/" to refer to Part 1 of the disclosure package, and "2/" to refer to Part 2. For example, "2/78" means page 78 of Part 2.

Law

[14] Education cites four sections of the ATIPPA to support its redactions: section 21(1), section 23(1), section 23(2)(h)(ii) and section 25.1(b).

Section 21(1) – Law

[15] Section 21(1) reads as follows:

> 21. (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, where the disclosure could reasonably be expected to endanger the mental or physical health or safety of an individual other than the applicant.

[16] Section 21(1) is rarely used in Nunavut. I am aware of only three Review Reports that mention it: *Review Report 13-065 (Re)*, 2013 NUIPC 4 (CanLII); *Department of Education (Re)*, 2024 NUIPC 19 (CanLII) at paragraphs 45 to 48; and *Workers' Safety and Compensation Commission (Re)*, 2025 NUIPC 3 (CanLII) at paragraphs 28 to 30.

[17] In the first case, the former Commissioner said she was "extremely puzzled" about why the public body was citing section 21(1). I had the same reaction in the other two cases. There was nothing in the circumstances of any of the three cases, and no evidence, that anyone's "mental or physical health or safety" would be endangered by disclosure.

[18] There is therefore no precedent in Nunavut on the interpretation of section 21(1). I will have more to say about this exemption in the Analysis section below.

Section 23 – Law

[19] Section 23 is probably the most difficult section in the whole ATIPPA. It is long and difficult to interpret. I will not repeat the whole legal analysis here, but it can be found in *Department of Human Resources (Re)*, 2021 NUIPC 4 (CanLII) at paragraphs 21 and 22. I adopt that statement of the law for purposes of this decision.

[20] In summary, section 23(1) lays down the basic rule:

> 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.

[21] Subsections (2), (3) and (4) provide detailed guidance on how the rule in subsection (1) should be applied. The first part of section 23(3) is especially important:

> (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 <u>all the relevant circumstances</u>….
>
> (Emphasis added)

[22] Every decision under section 23 is, ultimately, a decision under section 23(1). If something falls within one of the conclusive presumptions in section 23(4), there is no unreasonable invasion of personal privacy. In all other cases, there are no fixed rules. All the relevant circumstances must be considered.

[23] It follows that section 23(2)(h)(ii) is not a stand-alone exemption. I will have more to say about it in the Analysis section below.

Section 25.1(b) – Law

[24] 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;
>
> ….

[25] 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.

[26] 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.

Analysis

[27] The Applicant was informed by Education that their employment contract would not be renewed. Because the Applicant was on probation, the employer was not legally required to offer reasons, and did not.

[28] The Applicant naturally wanted to find out more. They filed two access requests. This decision is about Education's response to the first request. My decision on the second request, also released today, is *Department of Education (Re)*, 2025 NUIPC 11 (CanLII), also known as Review Report 25-292.

The need for an information-sharing protocol

[29] I have written before that the ATIPPA is being used as a proxy battleground for the GN's human-resources issues: see *Department of Human Resources (Re)*, 2021 NUIPC 19 (CanLII) at paragraph 31; *Department of Education (Re)*, 2022 NUIPC 20 (CanLII) at paragraph 18. This case is another example.

[30] The ATIPPA is not designed to be used this way. This case was especially challenging for Education because the records requested by the Applicant were essentially about anything happening in the broader school community that touched on the Applicant. The records involve Education management, certainly, but also the District Education Authority, staff, parents, students, and other community members. The ATIPPA is a blunt and unsuitable instrument for dealing with all the privacy issues at stake.

[31] It would be better if there were a protocol, embedded in the collective agreement, for Education to share information with its employees when a human-resources issue arises. In the meantime, employees turn to the ATIPPA, because that is the only avenue they have to try to find out what is happening behind the scenes in Education.

Accountability of public bodies

[32] Another key point to bear in mind is that the purpose of the ATIPPA is to make public bodies more accountable to the public: section 1. It is not a purpose of the ATIPPA to hold applicants or third parties to account: *Department of Family Services (Re)*, 2023 NUIPC 13 (CanLII) at paragraph 38; *Department of Health (Re)*, 2021 NUIPC 27 (CanLII) at paragraph 43; *Department of Health (Re)*, 2021 NUIPC 11 (CanLII) at paragraph 56.

[33] So although the Applicant submits that they have a "right to know … the … identity of those who triggered the fact finding investigation initiated by the employer against him (colleague, students and/or parents)", that is not the purpose of the ATIPPA.

Natural justice

[34] The Applicant argues that they have a right, as a matter of natural justice, to see all the redacted information. In fairness to the Applicant, I will quote their argument in full:

> The requestor submits that the mere fact that the information he sought to be released which information was seriously redacted by the employer either pursuant to s.21(1) and 23(1) of ATIPP, because it can be unreasonable or harmful to a third party, cannot trump the requestor's right to know either the case the employer had against him or identity of those who triggered the fact finding investigation initiated by the employer against him (colleague, students and/or parents), without letting him know that he was in any shape or form under investigation and for what reason or reasons, and given him the opportunity to defend himself as required by natural justice, but also because same information had been used and/or relied upon by the employer to terminate him employment.
>
> It follows there exists a compelling public interest in the disclosure of the record that clearly outweighs the purpose underlying the personal privacy of any third party or parties.

[35] "Natural justice" is a common-law term that (to cut a long story short) imports the most basic notions of procedural fairness. One of the elements of natural justice is a person's right to know the case against them. Without that right, a person cannot know what evidence to bring or what arguments to make.

[36] This basic idea is imported into the ATIPPA in section 23(3)(c). It says that one relevant factor, when weighing the application of section 23(1), is "whether…the personal information is relevant to a fair determination of the applicant's rights". I have applied section 23(3)(c) in a number of previous decisions: see, for example, *Nunavut Arctic College (Re)*, 2025 NUIPC 5 (CanLII) at paragraph 30; *Department of Health (Re)*, 2024 NUIPC 24 (CanLII) at paragraph 30; *Department of Health (Re)*, 2022 NUIPC 8 (CanLII) at paragraph 44.

[37] The argument from natural justice is important in the right context, but in the circumstances of this case it is not a trump card that overrides all other considerations in the ATIPPA. I say that for the following reasons:

a. Section 23(3) says that all relevant circumstances must be considered. The paragraphs that follow, including 23(3)(c), is only one factor. It must be balanced against other relevant factors.

b. A probationary contract can, as a matter of employment law, be terminated without reasons being offered. Education did not offer reasons. There is no specific incident or complaint that can be said to constitute "the case the employer had against him".

c. The Applicant is a member of a union. The employment relationship is governed by a collective agreement with a well-entrenched dispute-resolution process, which the Applicant has already used. This legal process is, in my view, the best process available to fairly determine the Applicant's rights. An arbitrator can, if necessary, decide what disclosure the Applicant is entitled to and impose any necessary conditions on the disclosure.

d. There is no current dispute between Education and the Applicant. The dispute over non-renewal of the Applicant's contract was resolved by mutual agreement.

[38] In the written submission quoted above, the Applicant refers to "a compelling public interest in the disclosure of the record that clearly outweighs the purpose underlying the personal privacy of any third party or parties". These words, or similar words, are found only in section 48(s) of the ATIPPA. That section is in Part 2 of the ATIPPA, and is part of a list of circumstances in which disclosure of personal information by a public body is authorized. It has no application to the present case. It does not serve to override the access-to-information rules in Part 1.

[39] I turn now to consideration of the specific exemptions cited by Education.

Section 23(2)(h)(ii)

[40] Education cites section 23(2)(h)(ii) for a number of exemptions. In each case, this is an error.

[41] In previous decisions, I have written that section 23(2)(h)(ii) is not meant to be a catch-all for names: see, for example, *Workers' Safety and Compensation Commission (Re)*, 2025 NUIPC 3 (CanLII) at paragraph 95; *Department of Human Resources (Re)*, 2025 NUIPC 1 (CanLII) at paragraph 47.

[42] I have also previously written that the paragraphs in section 23(2) are not stand-alone exemptions: *Department of Human Resources (Re)*, 2023 NUIPC 1 (CanLII) at paragraph 30; *Department of Family Services (Re),* 2022 NUIPC 18 (CanLII) at paragraph 22; *Department of Human Resources (Re),* 2022 NUIPC 15 (CanLII) at paragraph 29. They are circumstances that create a rebuttable presumption. Nothing is automatic. As stated in section 23(3), every relevant circumstance still must be weighed. And every decision under section 23 is, ultimately, a decision under section 23(1), never a decision solely under section 23(2).

[43] Although I find that Education's citation of section 23(2)(h)(ii) is an error, that does not mean the redacted information should be disclosed. I will consider the section 23(2)(h)(ii) redactions as if Education had instead cited section 23(1).

Section 23 – general comments

[44] Almost all of Education's redactions are made under section 23(1).

[45] In my view, Education has over-used the section 23(1) exemption. The problem is the same as in a number of recent decisions involving the Department of Human Resources: see *Department of Human Resources (Re)*, 2025 NUIPC 1 (CanLII) at paragraph 44, and the decisions cited there.

[46] The problem is that most of the section 23 redactions serve no real purpose: *Department of Education (Re)*, 2024 NUIPC 19 (CanLII) at paragraph 29. The Applicant was either the sender or receiver of many of the redacted records, and so is already in possession of the unredacted records.

[47] Nevertheless, I will not now recommend that Education go back and release the information redacted from records the Applicant already has. That, too, would serve no real purpose.

Redaction of names

[48] There are 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. Education says that it redacted names of people who are not GN employees, but that is not what section 23(1) says. For section 23(1) to apply, there must be an "unreasonable" invasion of personal privacy. All relevant circumstances must be considered: section 23(3). The relevant circumstances include what the person's role is and what is being discussed.

[49] I have written previously that District Education Authorities have a special role in Nunavut's education system: *Department of Education (Re)*, 2024 NUIPC 19 (CanLII) at paragraphs 34 and 35; *Department of Human Resources (Re)*, 2024 NUIPC 23 (CanLII) at paragraph 34(f). DEAs are not covered by the ATIPPA and their members and employees are not GN employees, but the public function of DEAs is a relevant factor when applying section 23. There is a substantial difference between a private citizen corresponding with Education and a DEA member or employee corresponding with Education. Education erred in applying section 23(1) to redact this information.

[50] The only DEA wrinkle is on pages 2/72-79. Some of the communication from a DEA member, written from a DEA email, was plainly about their own personal situation. It would be nice to have a clean separation between personal business and DEA business, but I accept that is not always going to be possible. Education correctly redacted portions of these pages under section 23(1).

[51] Similarly, union officials play a special role in the relationship between the GN and its employees. Education has redacted the names of all union officials, even though they were the Applicant's representatives. That was not necessary. Education erred in applying section 23(1) to redact this information.

[52] There is one big exception to what I have just written about the redaction of names. I have previously found that the names of K-12 students should not be disclosed, even if the Applicant is an Education employee and is aware of who the students are: *Department of Education (Re)*, 2021 NUIPC 10 (CanLII) at paragraph 55. The students are minors and the disclosure of their names will rarely, if ever, be justified. In every instance, Education was correct to redact the names of students.

Section 21(1)

[53] Education cites the exemption in section 21(1) for the redactions on pages 1/130-132 and 2/10-13, 2/67 and 2/71.

[54] Section 21(1) reads as follows:

> 21. (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, where the disclosure could reasonably be expected to endanger the mental or physical health or safety of an individual other than the applicant.

[55] As noted in the Law section above, section 21(1) is rarely cited in Nunavut, and its use has never been upheld. We therefore do not have a precedent for how this exemption should be applied.

[56] I tentatively suggest the following criteria:

a. The onus of proof is on the public body: section 33(1).

b. A "reasonable expectation requires evidence that is clear and cogent: *Department of Health (Re)*, 2021 NUIPC 11 (CanLII) at paragraph 15, 16 and 28. It is more than the "reasonable possibility" in section 20(1).

c. The word "endanger" implies putting at risk to a greater degree than is to be expected from the stresses of daily living. An anticipation of discomfort or awkwardness in future social interactions, for example, does not rise to the level of endangerment.

d. The harm must be causally linked to the disclosure.

[57] In my view, the facts of the case do not justify the application of section 21(1). Education, on whom the onus lies, has brought forward little or no evidence to support the section 21(1) exemption. Some people in the school community are uncomfortable around the Applicant, but it does a disservice to all concerned to suggest that anyone was in danger.

[58] In my view, Education should have cited section 23(1) instead. The records redacted under section 21(1) contain a great deal of personal information about the writers, including their subjective states of mind after certain interactions with the Applicant. I also find it obvious from the context that the personal information provided by the writers to Education was supplied in confidence, which is one of the "relevant circumstances" stipulated in section 23(3). I am satisfied that the writers would never have written what they did if they thought the Applicant was going to see it.

[59] So although Education erred in applying section 21(1), I find that all the information redacted under that section could correctly have been redacted under section 23(1).

Section 25.1(b)

[60] Education cites the exemption in section 25.1(b) for the redactions on pages 2/2-4. The criteria for section 25.1(b) are in the Law section above.

[61] From the unredacted portions of the record, we can see that pages 2/2-4 are the record of an interview conducted by two Education employees. The context indicates that the person being interviewed is a student, and the topic is an incident involving the Applicant. The unredacted portion of page 2/1 shows that the interview record was emailed by one of the interviewers to the Employee Relations division of the Department of Human Resources.

[62] In these circumstances, I find that the record was "created or gathered" for the purpose of a workplace investigation. That satisfies the first part of section 25.1(b).

[63] But that is not enough. Section 25.1(b) also requires that releasing the information "could reasonably be expected to cause harm to the applicant, a public body or a third party". Education has not made explicit who might suffer harm, what harm they might suffer, or why the expectation of harm is reasonable.

[64] Normally, I would not allow a section 25.1(b) exemption if the public body does not put forward evidence of a reasonable expectation of harm: see, for example, *Department of Human Resources (Re)*, 2024 NUIPC 26 (CanLII) at paragraphs 16 to 20; *Department of Human Resources (Re)*, 2023 NUIPC 1 (CanLII). In fact there is only one Nunavut case in which a public body did present some evidence of reasonable expectation of harm: *Department of Education (Re)*, 2021 NUIPC 10 (CanLII). In that case, the redactions under section 25.1(b) were upheld.

[65] I have not, however, previously dealt with a case in which the person potentially harmed by disclosure is a minor child. As I wrote in *Department of Education (Re)*, 2021 NUIPC 10 (CanLII) at paragraph 49, section 25.1(b) "requires proof commensurate with the occasion. The nature and extent of the proof required may vary with the circumstances of the case." The onus always rests with the public body, but I find that the necessary evidence may be a little lower where a minor is concerned.

[66] In this case, there is internal evidence in the redacted document that the student is distressed by the situation. (I will say no more about it, so as not to reveal the contents of the record or the nature of the situation.) I also consider the fact that the Applicant is an adult authority figure in the school, and that the Applicant will be returning to the same school in the fall.

[67] I find that Education correctly applied the section 25.1(b) exemption. For future cases, I would like to see Education (and other public bodies) work harder to satisfy the evidentiary requirement of section 25.1(b).

Exercise of discretion

[68] In its Exemption Rationale, Education says that sections 21(1) and 25.1(b) are mandatory exemptions. That is an error. They are discretionary.

[69] I remind Education that the distinction between mandatory and discretionary exemptions is simple. If an exemption says the head of a public body "shall" refuse disclosure, it is mandatory. If it says the head of a public body "may" refuse disclosure, it is discretionary.

[70] As the former Commissioner and I have explained in dozens of decisions stretching over almost 20 years, a public body must at least think about whether to release information covered by a discretionary exemption, and explain its decision to the applicant. That is what it means to "exercise discretion": see, for example, *Department of Education (Re)*, 2024 NUIPC 12 (CanLII) at paragraph 24; *Department of Education (Re)*, 2021 NUIPC 10 (CanLII) at paragraph 20.

[71] If that discretion is exercised according to the guidelines re-affirmed in *Department of Health (Re)*, 2021 NUIPC 12 (CanLII), I do not believe I can or should second-guess the way the discretion is exercised.

[72] In this case, I have re-classified the section 21(1) exemptions as being properly claimed under section 23(1), which is a mandatory exemption. That still leaves the record on pages 2/2-4 that has been redacted under section 25.1(b), which is discretionary. Education now needs to think about how it will exercise its discretion, and explain its decision to the Applicant.

Conclusion

[73] Education did not correctly apply the exemption in section 21(1). However all the information redacted under section 21(1) could correctly be redacted under section 23(1).

[74] Education correctly applied the exemption in section 23(1) in some instances, but in most instances it did not.

[75] Education correctly applied the exemption in section 25.1(b).

Recommendations

[76] I recommend that Education should, under section 23(1), continue to withhold the personal information redacted on pages 1/121-129, 1/141-142 and 1/151, and on pages 2/1, 2/19, 2/21 (bottom only), 2/50-52, 2/54-56, 2/59, 2/61-62 (personal email addresses only), 2/70, and 2/72-81. This is a mandatory exemption.

[77] I recommend that Education should, under section 23(1) rather than section 21(1), continue to withhold the personal information redacted on pages 1/130-132, and 2/10-13, 2/67 and 2/71. This is a mandatory exemption.

[78] I recommend that Education should, under section 23(1), continue to withhold the names of students wherever they occur.

[79] I recommend that Education may, under section 25.1(b), continue to withhold the personal information redacted on pages 2/2-4. This is a discretionary exemption, however, so **I recommend** that Education think about how to exercise its discretion and then explain its decision to the Applicant.

Graham Steele
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