

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

Nunavunmi Tuhagtauyukhaliqinirmun Kanngunaqtuliqinirmun Kamisina

Commissaire à l'information et à la protection de la vie privée du Nunavut

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Summary

Nature of Review and Jurisdiction

[3] I have jurisdiction over the Department of Justice: ATIPPA, section 2, definition of “public body”.

Issues

- [4] The issues in this review are:
- a. Did Justice correctly apply the exemption in section 13?
 - b. Did Justice correctly apply the exemption in section 15(1)?
 - c. Did Justice correctly apply the exemption in section 23(1)?

Facts

[5] The Applicant, a former GN employee, filed an access request with the Departments of Human Resources and Justice. This decision deals only with the request to Justice.

[6] Justice sent a partial disclosure package on June 10, 2025, consisting of 38 pages of records. There were heavy redactions, mostly under section 15 (solicitor-client privilege). The Applicant requested that I review these redactions.

[7] The original Exemption Rationale cited sections 13(1), 15(2)(a) and 23(1). The explanations were not informative. When I wrote to Justice about the review, I invited them to re-do the Exemption Rationale, and they did. The new Exemption Rationale is more informative and cites sections 13(1), 15(1)(a) and (c), and 23(1).

[8] I also invited both the Applicant and Justice to make a written submission. Both made excellent submissions, for which I thank them.

Law

Section 13(1)

[9] Section 13 is the exemption for cabinet records. The key provision is section 13(2):

- (2) The head of a public body shall refuse to disclose to an applicant
 - (a) a cabinet record; or
 - (b) information in a record other than a cabinet record that would reveal the substance of deliberations of the Executive Council or any of its committees.

[10] Section 13(1) is a long definition of “cabinet record”. I will not cite it here because it is not relevant. None of the redacted records in this case is a “cabinet record”. The relevant portion is section 13(2)(b).

[11] In a recent decision, the Supreme Court of Canada interpreted the “cabinet records” provision of the Ontario access law: *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 (CanLII). The Ontario cabinet records provision is worded differently from Nunavut’s. We therefore must pay close attention to the Supreme Court’s explanation of what the cabinet records exemption is intended to achieve, while being alert to differences in legislative wording. My broad takeaway from the Supreme Court’s decision is that there is a constitutional dimension to cabinet confidentiality, and the cabinet records exemption should not be narrowly interpreted.

Section 15(1)

[12] Section 15(1) is the exemption for privileged information. The relevant provisions are paragraphs (a) and (c):

15. (1) The head of a public body may refuse to disclose to an applicant
- (a) information that is subject to any type of privilege available at law, including solicitor-client privilege; [or]
 - ...
 - (c) information in correspondence between an agent or lawyer of the Minister of Justice or a public body and any other person in relation to a matter involving the provision of advice or other services by the agent or lawyer.

These are two different exemptions, though obviously there is overlap between them. In the circumstances of this case, I do not believe that anything turns on the difference between them. The essence is the same. A public body is entitled to seek and receive legal advice without having to disclose that advice:

Department of Justice (Re), 2022 NUIPC 16 (CanLII) at paragraph 36; *Department of Health (Re)*, 2021 NUIPC 12 (CanLII) at paragraph 46.

[13] In *Nunavut Arctic College (Re)*, 2021 NUIPC 17 (CanLII) at paragraph 14, I summarized the law on section 15 in this way: “...a confidential communication

between a lawyer and the lawyer's client, that relates to seeking, formulating, or giving legal advice, is exempt from disclosure". Solicitor-client privilege is "fundamental to the proper functioning of our legal system": *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII) at paragraph 20.

[14] The privilege in section 15(1) is broad enough to include discussions of the legal advice, even if the lawyer is not directly involved in the discussion: *Department of Health (Re)*, 2021 NUIPC 12 (CanLII) at paragraph 51. I would add that these discussions can be both before the legal advice is sought, if it is about what to ask the lawyer and what background information to provide, and after the legal advice is received.

Analysis

[15] Most redactions are made under section 15(1). I will deal first with sections 13 and 23, because they are, at least in this case, more straightforward.

Section 13 – Analysis

[16] The exemption for cabinet records (section 13) has been applied to some emails on pages 35 and 36 of the disclosure package.

[17] As noted in the Law section above, there are no cabinet records in the disclosure package. If the section 13 exemption applies, it would be under section 13(2)(b) because the records "would reveal the substance of deliberations" of cabinet.

[18] I have seen an unredacted copy of the records. As noted in the revised Exemption Rationale, the discussion is on the topic of direct appointments. ("Direct appointments" is GN jargon for public service appointments that do not go through a normal job competition.) I am satisfied that the redacted portions relate to a cabinet priority and would reveal details of a future agenda item for the cabinet. Justice correctly applied the exemption in section 13. Section 13 is a mandatory exemption.

Section 23 – Analysis

[19] The exemption for an unreasonable invasion of a third party’s personal privacy (section 23) has been applied on pages 23, 29, 32 and 38 of the disclosure package.

[20] The redaction on page 23 is claimed under both section 15 and section 23. I think it is best to deal with it under section 15, so I will say no more about it here.

[21] The records on pages 29 to 33 are an email chain. It is about a workplace incident in 2017 involving someone other than the Applicant. The Applicant is copied at the beginning of the chain, which is presumably the reason this email chain was included in the disclosure package.

[22] Section 23(1) has been applied to redact a GN employee’s name on pages 29 and 32. In the context of the email chain, I do not understand Justice’s reasoning. The redacted name appears elsewhere in the chain. In context, it is obvious whose name has been redacted. Moreover, I have written previously that the name of a GN employee 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: *Department of Health (Re)*, 2024 NUIPC 26 (CanLII) at paragraph 30. This information should be disclosed if the Applicant wants it.

[23] Page 38 is the first page of a directory of GN staff, including the Applicant, from 2016. A portion has been redacted. After discussion with Justice, it appears this page was included in the disclosure package in error. It was provided to Justice by the Applicant, so the Applicant already has it. In any event, it would not be an unreasonable invasion of anyone’s personal privacy to disclose a GN staff directory from nine years ago. This information should be disclosed if the Applicant wants it.

Section 15(1) – Analysis

[24] Most redactions are under section 15(1), and have been applied to all or part of pages 1 to 28. As usual, I have received an unredacted copy of the records so that I can verify for myself the claim of privilege.

[25] In my view, the exemption applies straightforwardly to the records sent to or from a Justice lawyer. All involve the giving or receiving of advice.

[26] The Applicant does not really take exception to those redactions. Rather, the Applicant objects to the privilege exemption being applied to the supporting records sent by HR to Justice. The Applicant can see all the email headers and footers, even if the body of the email has been redacted, and so can see that some records were created before the conversation with the lawyer.

[27] (As an aside, I think it is a good ATIPP practice for headers and footers to be unredacted: *Department of Justice (Re)*, 2023 NUIPC 18 (CanLII). This gives an applicant a better understanding of what exactly has been redacted.)

[28] The Applicant argues that privilege should not apply to records created before advice was sought from Justice. Justice argues that privilege applies to all documents sent to one of its lawyers for the purpose of receiving advice.

[29] After consideration of the written submissions, and after page-by-page review of the unredacted disclosure package, I agree with Justice's position. In my view, the section 15(1) exemption has been correctly applied in all instances.

[30] In context, it is clear that all records from pages 1 to 28 are either a conversation between HR and a Justice lawyer, or documents prepared by HR to support that conversation. The only reason pages 1 to 28 are in Justice's files at all are because HR needed to get legal advice from Justice. The records are covered by section 15(1).

Conclusion

[31] Justice correctly applied the exemption in section 13 in all instances.

[32] With respect to the exemption in section 23(1):

- a. The redaction on page 23 is covered by the exemption in section 15(1). I do not need to analyze it under section 23.
- b. Justice did not correctly apply the exemption on pages 29 and 32. If the Applicant wants to see the redacted information, Justice should disclose it.
- c. Justice appears to have included page 38 in error. The Applicant already has this record. In any event, Justice did not correctly apply the exemption on this page. If the Applicant wants to see the redacted information, Justice should disclose it.

[33] Justice correctly applied the exemption in section 15(1) in all instances.

Recommendations

[34] **I recommend** that Justice continue to withhold the information redacted under sections 13 and 15(1).

[35] **I recommend** that Justice consult with the Applicant about whether the Applicant wishes to receive the information redacted under section 23(1) on pages 29, 32 and 38, and if so, disclose it to the Applicant.

Graham Steele

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