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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] A teacher applied for disclosure of certain documents related to their employment.[1] One part of the request was for a professional development document, which the parties agreed had once existed but the department could not now find. The Commissioner finds that the department's search did not meet the standard of a "diligent search", and makes recommendations to complete the search. Another part of the request was for records related to a harassment complaint that had been filed against the Applicant. The department disclosed the records, but with redactions based on certain exemptions. The Commissioner finds the exemptions were properly applied.

Nature of Review and Jurisdiction

[2] This is an access review under s 28(1) of the *Freedom of Information and Protection of Privacy Act* (ATIPPA).

[1] For the purpose of anonymization, it is the Commissioner's practice not to name complainants, GN employees, other individuals or communities unless the names are relevant to an understanding of the issues; and also to use the pronouns "they/them" even when referring to an individual.

[3] The Commissioner has jurisdiction over the Department of Education: ATIPPA, s 2, definition of "public body".

Issues

[4] The issues in this review are:

a. Did the department conduct a diligent search for the specific document requested by the Applicant?
b. Did the department correctly apply the exemptions it claimed when redacting the other documents?

Facts

[5] The Applicant is a teacher. They applied under the ATIPPA for certain documents, in four parts, related to their employment.

[6] One of the four parts was transferred to the Department of Human Resources. It is not part of this review. Another of the four parts was really a question, not a request for records, and the Department of Education answered the question in the cover letter to its disclosure. That answer is not part of this review.

[7] Of the two remaining parts, one was for a specific document, or to be precise, a specific set of documents, namely the Applicant's completed "Professional Development Framework" documents for 2018-19.

[8] The Professional Development Framework consists of professional standards and a professional development toolkit. The toolkit includes a professional development plan and a self-reflection. This set of documents is often referred to as if it were a single document. I will refer to it in the singular, as "the PDF document". (I am aware that the acronym PDF has another, much more common usage in relation to document formats, but in this report it refers only to the Professional Development Framework document.)

[9] Both the Applicant and the department agree that the Applicant's PDF document for 2018-19 did exist at one time. The department undertook a search for the document but says it cannot now be found.

[10] The fourth part of the Applicant's request was for a copy of a harassment complaint, with supporting documents, filed against the Applicant by a school staff member. The department released 26 pages of responsive documents, with redactions, in response to this part of the request.

[11] The Applicant now seeks review of (a) the department's professed inability to find the PDF document for 2018-19, and (b) the redactions claimed by the department.

Law

The duty to assist

[12] An applicant has "a right of access to any record in the custody or under the control of a public body": ATIPPA, s 5(1).

[13] The head of a public body "shall make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay": ATIPPA, s 7(1). This is often referred to as "the duty to assist".

[14] There is nothing else in the ATIPPA itself about what "every reasonable effort" means, but there is legal precedent from other Canadian jurisdictions. In the Analysis section below, I will discuss what the precedents tell us about a public body's duty to conduct a diligent search.

The Section 23(1) exemption

[15] 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": ATIPPA, s 23(1).

[16] "Personal information" means information about an identifiable individual: ATIPPA s 2. That may include (among many other things) an individual's name, their medical and psychological history, and their personal opinions.

[17] In *Department of Human Resources (Re),* 2021 NUIPC 4 (CanLII), I explained how s 23 analysis proceeds:

> *[21] I start with some general observations about a s 23 analysis. The core idea is in s 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." The rest of s 23 provides guidance on how to make the determination required by s 23(1):*
>
> > *a. Subsection (2) lists circumstances in which an unreasonable invasion of personal privacy may be presumed.*
> >
> > *b. Subsection (3) directs the head of the public body to consider "all the relevant circumstances", and gives some examples.*
> >
> > *c. Subsection (4) lists circumstances in which a disclosure is deemed not to be an unreasonable invasion of personal privacy.*
>
> *[22] Any s 23 analysis, then, must consider all relevant factors. A presumption raised by s 23(2) is not conclusive; it can be rebutted by contrary circumstances of greater weight. Section 23(4), in contrast, directs a conclusion if the case falls within one of the listed circumstances.*

The Section 25.1(b) exemption

[18] Section 25.1 was added to the ATIPPA in 2017. It provides an exemption for certain information connected to employee relations. Section 25.1(b) is the only portion that the department claims:

> *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; ….*

[19] 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.

[20] Even then, s 25.1 is a discretionary exemption. Discretionary exemptions involve a two-step process. Even if the factual conditions for an exemption are met, the public body may choose to release the information. If it does not, it must give a rational explanation as to why.

Analysis

What is a "diligent search"?

[21] The Applicant asked for their PDF document for 2018-19. This is not a case in which an applicant has given a vague or unfamiliar description of a

document they are seeking. The department acknowledges that it knew precisely which document the Applicant wanted.

[22] Neither is this a case in which an applicant believes a document exists, but is unable to provide "some basis" to show that it actually does: *Review Report 17-118 (Re)*, 2017 NUIPC 5 (CanLII), citing Order P2010-10 of the Alberta Information and Privacy Commissioner. We know the document existed because this very document, or at least the self-reflection part of it, was the subject-matter of *Complainant (Re),* 2020 NUIPC 9 (CanLII), a recent Review Report by the former Commissioner. In that case the Complainant complained of a privacy breach because of the manner in which the document was handled.

[23] Although the ATIPPA does not stipulate exactly how a public body is to go about looking for requested records, the duty to assist includes a requirement to use every reasonable effort to find the documents. I have found reference in case reports to "diligent search", "reasonable search", "thorough search", "full search", "comprehensive search" and "exhaustive search", and various combinations of these adjectives. I prefer the term "diligent search" and that is the term I will use in this report.

[24] 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.

[25] A similar but more detailed explanation is given by an adjudicator for the Alberta Information and Privacy Commissioner: *University of Lethbridge (Re)*, 2016 CanLII 92076 (AB OIPC). This case is especially pertinent because the language of Alberta's "duty to assist" is the same as

Nunavut's, and because the case involves the search for a specific document that had definitely existed, but could not now be found.

[26] The adjudicator in *University of Lethbridge* gives this explanation of the source of the public body's duty, and the kind of evidence required to show "reasonable efforts":

> *[para 7] A public body's obligation to respond to an applicant's access request is set out in section 10, which states in part:*
>
> > *10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*
>
> *[para 8] The duty to assist includes responding openly, accurately and completely, as well as conducting an adequate search. The Public Body bears the burden of proof with respect to its obligations under section 10(1), as it is in the best position to describe the steps taken to assist the Applicant (see Order 97-006, at para. 7).*
>
> *[para 9] In Order F2007-029, the Commissioner described the kind of evidence that assists a decision-maker to determine whether a public body has made reasonable efforts to search for records:*
>
> > *In general, evidence as to the adequacy of a search should cover the following points:*
> >
> > - *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*

[27] 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".

Did the department conduct a diligent search?

[28] The department gives this explanation as to where the PDF document should have been:

a. The PDF document is completed by the teacher and then discussed with the principal. Both the teacher and the principal are supposed to keep a copy.

b. The PD plan and self-reflection are then sent supposed to be sent by the principal to the school district office and placed in the teacher's personnel file there.

c. In addition, the principal is supposed to send the PD plan to the Educator Development division of the Department of Education, where the plans are filed in a shared email account.

[29] The department states the following steps were taken, in late September to mid-October 2020, to try to locate the document:

a. The department's ATIPP coordinator contacted the department's human resources division, which directed them to the school district office.

b. The ATIPP coordinator contacted the school district office. The HR officer there was unable to locate the document, and directed the ATIPP coordinator to the school.

c. The ATIPP coordinator contacted the school principal, who was unable to locate the document. (The principal was new to the position. The principal who would have handled the 2018-19 PDF document was no longer at the school, and in fact was no longer employed by the Government of Nunavut. It appears that no attempt was made to contact the former principal.)

d. The ATIPP coordinator contacted the Director of Educator Development. The Director was unable to locate the document in the shared email drive because, according to the department, "the contents of the email folder have yet to be restored following ransomware." (The GN was hit by a disruptive ransomware attack in early November 2019.)

[30] I assume the Applicant did not keep a copy of the PDF document, because otherwise there would have been no need for them to file an ATIPPA request for it. The department does not know what the former principal did with the document.

[31] The department can only say that the PDF document is not in the place(s) that it should have been, and in the case of the Educator Development division, it cannot currently be recovered due to the lingering effects of the November 2019 ransomware attack.

[32] In my view, the search conducted by the department was reasonably good, but does not meet the criteria for a "diligent search". I see two aspects that could have been done better.

[33] First, the school principal plays a key role in the PDF process, but it does not appear any attempt was made to contact the principal who was in place at the time the 2018-19 PDF document was created. The department advises that the principal is no longer a GN employee. In my view, the fact that someone has left the GN should not automatically mean that they cannot or should not be contacted. The department may well have reasons for not doing so in this case, but I am not prepared to make that assumption. A "diligent search" may, depending on the circumstances, include attempting to contact a former employee who is likely to have useful information about the location of a record.

[34] Second, the department appears not to have followed up with the Educator Development division after the first, unsuccessful attempt to obtain the PD plan from them. The initial contact was in mid-October 2020. The answer given was "the contents of the email folder have yet to be restored following ransomware".

[35] The department's submissions to this office are dated December 1, 2020. There does not appear to have been any follow-up between mid-October and December 1 to determine, either from the Educator Development division or the Department of Community and Government Services (which manages the GN's computer systems), whether the shared e-mail folder would ever be restored, or when, or whether an individual document could be restored in priority to the entire folder.

[36] It was a source of some frustration to my predecessor, who retired in mid-January 2021, that "ransomware" was cited repeatedly by various public bodies, long after the attack itself, as a reason for not being able to fulfil ATIPPA requests. For example, in *Department of Human Resources (Re)*,

2020 NUIPC 13 (CanLII), which is dated November 30, 2020, the former Commissioner wrote:

> *As noted, I have already written to the Minister responsible for Community and Government Services to register my concerns about the effect that the ransomware attack seems to be having on access to information even a year after the attack. This is simply an unacceptable situation that must be addressed.*

[37] In *Complainant (Re),* 2020 NUIPC 9 (CanLII), which is dated October 11, 2020, the former Commissioner wrote:

> *I would also take this opportunity to address the apparent inability of the GN to recover email records created before the ransomware attack experienced by the [GN] at the end of October of last year. This is becoming a recurring theme when dealing, in particular, with access to information requests. In this case, it is being used on two fronts to justify a failure to respond to questions asked by this office - once to suggest that the supervisor could not confirm whether or not he responded to the Complainant's email in which the breach was confirmed in writing and again as the reason that it could not be determined if the Deputy Minister responded in any way to the Complainant's emails about his concerns. This excuse was being relied on some six months or more after the attack and months after I had been advised that all historical records were to have been restored. I gave the Department several opportunities to provide the requested records but received no response. I do not accept the ransomware attack as a valid reason for not being able to show steps taken to address the privacy breach complaint. In the future if public bodies are unable to respond to this office because of*

> *problems arising out of the ransomware attack, I will require confirmation of that from those responsible for the electronic systems within the GN, as well as an explanation for the inability to access the records.*

[38] On August 17, 2019, the deputy minister of CGS wrote to the former Commissioner to say "…we can confirm that all emails have been recovered and are able to be accessed. A backup of GN network drives was completed … on the night before the incident. These network drives … are now online and operational as the file repository for the GN." (The only reference to further delay is for "expired user accounts", which were expected to be archived "by the end of the year". I have no reason to believe that the shared email folder at the Educator Development division of the Department of Education counts as an "expired user account". Even if it were, we are now past the end of the year.)

[39] There is no doubt that CGS worked long and hard to restore services after the November 2019 ransomware attack. They should be congratulated for that. Restoration of services across the GN was complex and expensive. A certain amount of delay and backlog was to be expected. But the ransomware attack is now fifteen months behind us, and the deputy minister of CGS indicated six months ago that almost everything was back in operation.

[40] In the present case, it was mid-October when the department's ATIPP coordinator asked the Educator Development division to look for the PD plan document. That was almost a year after the ransomware attack, and two months after the deputy minister of CGS assured my predecessor that all e-mails were recovered and accessible and network drives were online and operational.

[41] In my view, a "diligent search" in late 2020, or anytime thereafter, requires more than a one-time request and a reference to "ransomware" as a reason why nothing could be found. It will require:

a. A specific description of the network or other locations where the ATIPP coordinator reasonably expects the responsive document(s) to be found.

b. Based on the answer to (a), a specific description of the network or other locations that have actually been searched; the specific dates and times of those searches; the name(s) of the person(s) who carried out those searches; and details of the search strategies they employed.

c. Based on the answer to (a), a specific description of the network or other locations that are not accessible to a search, and why the ATIPP coordinator believes they are not accessible.

d. Based on the answer to (c), verification in writing by an experienced and knowledgeable employee of the IT division of CGS (or for other public bodies not running on the GN system, the equivalent IT resource) that the specified network or other locations are indeed not accessible, and the detailed technical reasons why they are not accessible.

e. Based on the answer to (d), a statement by the same IT employee as to when, if ever, the network or other locations are expected to be accessible.

[42] In short: the time for accepting the response "ransomware" as a reason for not fulfilling an ATIPP request is over. The law requires better. Nunavummiut deserve better.

Did the department correctly claim certain exemptions?

[43] In response to the request for the harassment complaint, the department disclosed to the Applicant 26 pages of responsive records.

[44] It is not surprising, in the circumstances, that there are extensive redactions. All of the claimed exemptions fall under two sections of the ATIPPA: s 23(1) (unreasonable invasion of a third party's personal privacy) and s 25.1(b) (workplace investigation with reasonable expectation of harm). Some redactions are claimed under both s 23(1) and s 25.1(b).

[45] I do not propose to deal with each redaction, one by one. To do so might lead to this report ballooning to a hundred pages or more. I propose to deal with categories of redactions, and then determine if the exemptions were properly applied to those categories. First, however, I must deal with the department's request to withhold some of its submissions from the Applicant.

The department's request to withhold submissions

[46] The department made submissions to this office that it asked not be shared with the Applicant. The submissions are related to the "reasonable expectation of harm" criterion in s 25.1(b).

[47] In *Department of Community and Government Services (Re),* 2021 NUIPC 8, I gave two reasons why withholding information from one of the parties is generally undesirable:

> *[19] First, it means the Complainant will not see, and will not have a chance to respond to, the department's submissions to me. No one is entitled as of right to have access to, or to comment on, representations made to this office by any other person: ATIPPA, s 32(3). Nevertheless, it is a good practice, and one which this office generally follows.*

> *[20] The second reason for my hesitation is that this report will have to be more oblique than I would like. One purpose of a Commissioner's report is to educate government staff and the general public. Another purpose is to be transparent in ATIPPA administration. Those purposes are not well served if important facts are omitted.*

[48] Nevertheless, I am usually prepared in a case under s 25.1(b) to consider withholding a public body's submissions. Disclosing the source and nature of potential harm may itself create a risk of harm. Workplace harassment is a serious issue with potentially wide-ranging and pernicious effects, and I would not wish the ATIPPA review process to contribute, directly or indirectly, to worsening those effects.

[49] At the same time, s 25.1(b) is not a free pass: it still requires proof commensurate with the occasion. The nature and extent of the proof required may vary with the circumstances of the case. The onus is on the public body.

[50] Here, the very document requested by the Applicant is a harassment complaint in which they are the respondent. There are other legal processes in place designed to get to the bottom of this sort of complaint. I am in no position to judge the merits of the complaint, and I explicitly do not do so. Therefore, and for purposes of s 25.1(b) of the ATIPPA, I am prepared to <u>assume</u> that the harassment allegations are true (while emphasizing again that I am no position to say if they are true or not).

[51] Based on that assumption, I find that the department's submissions on reasonable expectation of harm may be withheld from the Applicant.

Were the exemptions properly claimed?

[52] The 26 pages of responsive records consist of the complaint itself, supported by an extensive record, almost a journal one might say, of e-

mails, conversations, and incidents covering a lengthy period. This record deals almost exclusively with events occurring in and around the school at which the complainant and respondent worked.

[53] Generally speaking, the department has claimed a s 23(1) exemption for the following categories of information:

a. The names of students.

b. The names of other school staff, where the name is only incidental to the harassment complaint.

c. Expressions by the complainant of their own psychological or medical reaction to the alleged harassment.

I agree that these are proper categories for a s 23(1) exemption. They are "personal information" within the meaning of the ATIPPA.

[54] Generally speaking, the department has claimed a s 25.1(b) exemption for

a. The names of potential witnesses to the alleged harassment.

b. The names of people with whom the staff member consulted about what to do in response to the alleged harassment.

c. Expressions of a fear of harm, either to the staff member or to a third party.

I agree that, in the specific circumstances of this case, there are proper categories for the s 25.1(b) exemption.

[55] As I stated above, to correctly claim a s 23(1) exemption, all relevant circumstances must be taken into account: ATIPPA, s 23(3). In that respect, I take note of the following factors:

a. With respect to student names, the students are entirely incidental to the alleged harassment. They are minors. Their specific identities

are of no relevance to the harassment complaint or to the ATIPPA process. Disclosing their names would, in the circumstances, be an unreasonable invasion of their personal privacy.

b. With respect to the names of other staff, their appearance in the documents is (apart from potential witnesses) incidental to the alleged harassment. Disclosing their names would, in the circumstances, be an unreasonable invasion of their personal privacy.

c. With respect to the complainant staff member's psychological or medical reaction to the alleged harassment, ATIPPA s 23(2)(a) creates a rebuttable presumption that medical and psychological information is an unreasonable invasion of personal privacy. I see nothing in the file material that would rebut this presumption.

d. ATIPPA s 23(3) says that one relevant factor is "whether…the personal information is relevant to a fair determination of the applicant's rights". As I have noted above, there are other legal processes in place to determine if a harassment complaint is well-founded. The Applicant is, for example, a member of a union, and operating under a collective agreement with a well-entrenched dispute-resolution process. These other legal processes are available to fairly determine the Applicant's rights, and the Applicant may, in those other processes, be entitled to fuller disclosure (e.g. the names of possible witnesses) than under the ATIPPA.

[56] I have carefully examined every word of the redactions. For the reasons in the previous paragraph, and taking into account all relevant circumstances, I find that the department has properly claimed the exemptions under s 23(1).

[57] 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 specifically 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.

[58] I find the first criterion is met. Besides the harassment complaint form itself, the 26 pages of documents are a detailed compilation of incidents. In context, it is evident that the staff member was building a dossier of evidence that was likely eventually to form the basis for a complaint.

[59] In its submissions, the department has been reasonably specific about the other three criteria: who might suffer harm if the information is released, the nature of that harm, and why the expectation of harm is reasonable. It could be more detailed, but it is not merely speculative. This is the portion of the department's submissions that I have agreed may be withheld from the Applicant.

[60] Again, I have carefully examined every word of the redactions. For the reasons in the previous two paragraphs, I find that the department has properly claimed the exemptions under s 25.1(b).

Conclusion

[61] The department has fallen short of the criteria for a "diligent search" for the Professional Development Framework document.

[62] Under s 23(1) and s 25.1(b) of the ATIPPA, and in the specific context of this case, the redacted information is properly withheld.

Recommendations

[63] **I recommend** that the Department of Education consider contacting the former principal (the one in place when the Applicant's PDF document for 2018-19 was created) to seek their assistance in locating the PDF document.

[64] **I recommend** that the Department of Education contact the Director of the Educator Development division again to determine if that division's shared email folder is now accessible.

[65] If the shared email folder is now accessible, **I recommend** that the department obtain the Applicant's PDF document for 2018-19 and disclose it to the Applicant.

[66] If the shared email folder is still not accessible, **I recommend** that the Department of Education consult with CGS about if and when the shared email drive will be accessible. I **recommend** that the result of that consultation be shared with this office.

Graham Steele
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