ᓄᓇᕗᒻᒥ ᑐᓴᐅᒪᔪᓕᕆᓂᕐᒧᑦ ᑲᙳᓇᖅᑐᓕᕆᓂᕐᒧᓪᓗ ᑲᒥᓯᓇ
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

Report Number:	21-193
CanLII Citation:	Department of Health (Re), 2021 NUIPC 12
NUIPC File Number(s):	21-103
GN File Number(s):	1029-20-DH1249
Date:	March 12, 2021

Summary

[1] The Applicant requested documents related to security concerns at Nunavut's COVID-19 isolation hubs. The Department of Health released 262 pages of responsive documents, with extensive redactions. The Applicant seeks review of the claimed exemptions. The Commissioner finds that some exemptions were properly applied, but recommends further disclosure, especially in relation to the names of contractors and their officers and employees.

Nature of Review and Jurisdiction

[2] This is a review under s 28(1) of the *Access to Information and Protection of Privacy Act* (ATIPPA). The Applicant sought disclosure from the Department of Health of certain records. The department disclosed a number of documents, with numerous redactions. The Applicant requests that the Commissioner review the redactions made to see if the exemptions claimed have been properly applied.

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

Issues

[4] The issues in this review are:

a. Was the s 14(1)(a) exemption properly applied?
b. Was the s 14(1)(b)(i) exemption properly applied?
c. Were the s 15(1) exemptions properly applied?
d. Was the s 17(1)(a) exemption properly applied?
e. Was the s 24(1)(b)(i) exemption properly applied?
f. Was the s 23(1) exemption properly applied?

Facts

[5] As a result of the COVID-19 pandemic, the Government of Nunavut restricted travel into the territory beginning in early 2020. Before boarding a flight, most Nunavut-bound travellers were required to spend 14 days under close supervision in a designated hotel in one of three southern air gateways (Ottawa, Winnipeg, and Edmonton). These designated hotels were known as "isolation hubs".

[6] After a brief period of managing the hubs itself, the GN contracted the running of the isolation hubs to a private company ("the isolation hub contractor").

[7] In order to maintain the integrity of isolation, each isolation hub had to have security guards in place. The GN contracted security services to a private company, which itself sub-contracted some of the work to one or more other private companies.

[8] In August 2020 the Applicant applied for certain information related to security services at the isolation hubs. After discussion with the department, in September 2020 the Applicant amended their request to cover "concerns and complaints pertaining to the security services" at the isolation hubs. The department extended the time for responding to November 10, 2020.

[9] On December 7, 2020, the department disclosed to the Applicant 262 pages of responsive records. There were extensive redactions.

[10] On January 21, 2021, the Applicant requested a review by the Commissioner of the redactions. An extension of time to file was also requested by the Applicant, and granted.

Law

[11] The department has claimed exemptions under seven separate sections of the ATIPPA:

a. Section 14(1)(a)

b. Section 14(1)(b)(i)

c. Section 15(1)(a)

d. Section 15(1)(c)

e. Section 17(1)(a)

f. Section 23(1)

g. Section 24(1)(b)(i)

I will review the law applicable to each exemption in the appropriate section below. I will combine my analysis of the two s 15(1) exemptions.

Analysis

[12] Before turning to an examination of each of these exemptions, I will start with some general comments about discretionary exemptions and third party notification.

The process for claiming discretionary exemptions

[13] The first five exemptions relied upon by the department are discretionary. All are written to say that the public body "may" refuse to disclose the information. This can be contrasted with the mandatory exemptions in ss

23 and 24, which say that the public body "shall" refuse to disclose the information.

[14] The former Commissioner pointed out on numerous occasions that discretionary exemptions always involve a <u>two-step</u> process:

a. Do the factual requirements for the exemption exist?

b. If yes, should the public body exercise its discretion and release the information anyway?

If the Legislative Assembly intended the exemptions to be automatic, they would all be mandatory ("shall refuse to disclose"). But the majority of exemptions in the ATIPPA are discretionary ("may refuse to disclose"), and that is why the second step is necessary.

[15] In Review Report 06-22, the former Commissioner explains what it means to exercise discretion:

> *As I have said many times, where the Act provides a discretionary exception to disclosure, that discretion must be actively exercised. It is not enough to say simply "we have a discretion and we're using it to deny access." The discretion must not only be exercised, but it must be seen to be exercised. In my opinion, this means providing an explanation to the Applicant as to why a record is not being disclosed. Once exercised, it is not for the Commissioner to say whether or not the discretion was properly exercised. However, if the discretion has not been exercised in a manner which makes it obvious what considerations went into the decision, I will direct that specific reasons for the exercise of discretion be given to the Applicant in every case. In a situation such as this one, where the public body is relying on discretionary exemptions for refusing to disclose a large number of records, that discretion must be seen to be exercised for each record individually.*

This paragraph is reproduced in the current GN ATIPP Policy Manual, Volume 2, Section 1.7.

[16] In the fifteen years since those words were written, the former Commissioner reiterated the concept of discretion many more times. Nevertheless, and despite the words of the ATIPP Policy Manual, it is very rare indeed for this office to see a case in which the public body has turned its mind to the second step of the two-step process. The case before me is one more example.

[17] I suspect there is an administrative reason why the second step is so routinely missed. Public bodies, especially GN departments, are comfortable delegating to their ATIPP coordinators the first step of the ATIPP exemption analysis, and ATIPP coordinators are comfortable that they have the necessary authority to make the factual determination involved in the first step.

[18] But the second step is different: it requires judgment, and experience, and confidence, and knowledge of the wider interests of the public body. I suspect the heads and deputy heads of public bodies feel they don't have time to engage in that kind of contextual decision-making on every ATIPP file, and the ATIPP coordinators feel they don't have the authority.

[19] The result is that the second step just does not happen, at least in the cases that come before this office. When public bodies do not address their discretion, the result is, in effect, exactly what the former Commissioner said should not happen: access is denied.

[20] What is an Information and Privacy Commissioner supposed to do when public bodies <u>rarely or never</u> apply their discretion, which is an integral part of the ATIPPA? I have two main options. The first is <u>always</u> to recommend disclosure, because of the deficient decision-making process. The second is <u>always</u> to send files back to the public body, for a decision in accordance with the law. Neither option is satisfactory.

[21] The first option is not satisfactory because the public body may well have a legitimate interest in not disclosing the requested information. If I routinely recommend disclosure in cases where discretion has not been exercised, I will recommend disclosure close to 100% of the time. Inevitably that will cause public bodies to routinely reject my recommendations. That is a recipe for all-around frustration.

[22] The second option is not satisfactory because the ATIPP process already takes long enough. The timelines in the Act are quite precise, but when added up together (together with extensions that can be rather open-ended), the typical process takes many months from beginning to end. If I routinely recommend that a file be returned to the public body for the exercise of discretion, it could potentially add more months. The Act does not anticipate return to the public body as a potential outcome of the review process, so there is no set timeframe. The exercise of discretion would itself be subject to review, adding even more time.

[23] There is a better way, and that is for Nunavut's public bodies to equip themselves to follow the law, and explicitly exercise their discretion as part of their response to every ATIPP request. This may require some re-ordering with the GN, but it does not need to cost a cent. Perhaps ATIPP coordinators can be clothed with more authority; or perhaps they can be given easy access to a departmental official, such as a deputy minister or associate/assistant deputy minister, who is ready to exercise discretion in a timely way.

[24] The Department of Executive and Intergovernmental Affairs (EIA) has administrative responsibility for the ATIPPA. It is up to EIA to decide how to organize the ATIPP function so that discretionary decisions are made in accordance with law. The current system for applying discretion is not working. It is, in fact, a non-system. As a result, the statutory requirements of the ATIPPA are routinely unmet, as they were in this case.

Third-party exemptions: How it's supposed to work

[25] The process by which a third party can intervene in an ATIPP application is laid out in Part 1, Division C, of the Act. (The term "third party" means someone other than the public body and the Applicant.) The intervention process makes logical and procedural sense, when read carefully, but it is somewhat intricate and there are a couple of places where it is easy to get tripped up.

[26] In any application in which a public body is considering giving access to a record which may be an unreasonable invasion of a third party's personal privacy (s 23) or may affect the business interests of a third party (s 24), the public body is required to give notice to the third party: ATIPPA, s 26(1). This also triggers a notice to the Applicant, saying that a third-party notice has been given: s 26(4).

[27] The third-party notice also triggers a "waiting period" during which the third party is given an opportunity to make representations about whether the information should be released. The public body may not make an access decision until 61 days after notice is given, or until the third party responds, whichever is earlier: ATIPPA, s 27(1).

[28] Once the waiting period is over, the public body decides whether to give the Applicant access to the record: ATIPPA, s 27(1). Both the Applicant and the third party then have 30 days to ask for review of that decision: s 27(3) and s 27(4).

[29] It is implicit in this process that the third party's position on disclosure is not conclusive. The public body takes the third party's views into account, but still has to decide if s 23 and/or s 24 actually apply. If the third party is unhappy with the result, it may apply for review under s 28(2).

Third-party exemptions: How it worked in this case

[30] The third-party notification process was not correctly followed in this case. The department gave notice to the isolation hub contractor and one of the

security contractors, and asked for their input on the records proposed for disclosure. If the third party objected, the exemption was claimed. One of the security contractors was not contacted at all, despite the requirement in s 26(1).

[31] The department appears to have treated the third-party notification procedure simply as part of its regular exemption analysis. It did not inform the Applicant that third parties had been notified, as required by s 26(4) of the ATIPPA.

[32] The department received the third parties' comments and appears to have accepted them without question. If there was an objection, there was a redaction. The department did not inform the Applicant (or the third parties) that it had made a decision with respect to the third parties' response, as required by s 27(2). That meant, in return, that the Applicant was denied the opportunity to apply for review under s 27(4). When the department did disclose the redacted documents to the Applicant, there was no indication in the explanation of exemptions that there had been any third-party consultation.

[33] It is an error to apply third-party objections automatically. As I have noted above, the department must take into account the third party's views, but the department still needs to make its own decision as to whether the s 23 and/or s 24 exemption should be claimed. This is an important step, because it is my experience that third parties will almost always argue for less disclosure than the ATIPPA allows.

[34] Later in this report, I will have more to say about how s 23 and 24 were applied in this case. I turn now to an examination of the seven exemptions claimed by the department.

Was the s 14(1)(a) exemption properly applied?

[35] Section 14(1)(a) is a discretionary exemption for "advice, proposals, recommendations, analyses or policy options" that is produced in the course of the decision-making process within government. It reads:

14. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal

> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body, …*

[36] In Department of Human Resources (Re), 2021 NUIPC 4 (CanLII), I adopted the former Commissioner's statement of the law from Review Report 19-152, 2019 NUIPC 5 (CanLII):

> *Section 14(1) is intended to protect the decision making process within government and to allow public servants to provide "advice, proposals, recommendations, analyses and policy options" freely and without fear of being second-guessed or subjected to ridicule for the advice given. In Order 96-006, the former Information and Privacy Commissioner of*
>
> *Alberta established a test to determine whether information is "advice, recommendations, analyses or policy options" within the scope of the Alberta's equivalent to our section 14(1)(a). He said:*
>
> > *Accordingly, in determining whether section 23(1)(a) will be applicable to information, the advice, proposals, recommendations, analyses or policy options ("advice") must meet the following criteria.*
> >
> > *The [advice, proposals, recommendations, analyses and policy options] should:*
> >
> > *1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,*
> >
> > *2. be directed toward taking an action,*
> >
> > *3. be made to someone who can take or implement the action.*
>
> *This finding has been accepted and used in Alberta and in other Canadian jurisdictions, including Nunavut, consistently over the years and it is the test to be applied to assess whether information falls*

> *within the criteria for an exception pursuant to section 14(1)(a) of the Nunavut Act. Section 14(1)(a) does not apply so as to protect the final decision made, nor does it apply to information that is merely "factual" in nature. In Alberta Order 96-006 noted above, then Commissioner Clark noted:*
>
> > *In passing, I want to note that the equivalent section of the British Columbia Act (section 13) specifically states that "factual material" (among other things) cannot be withheld as "advice and recommendations". As I stated, I fully appreciate that our section differs significantly from that of our neighbours.*
> >
> > *However, I cannot accept that the bare recitation of facts, without anything further, constitutes either "advice etc" under [section 24(1)(a)] or "consultations or deliberations" under [section 24(1)(b)].*
>
> *This said, as noted in Alberta Order F2017-65,*
>
> > *In some circumstances, factual information can be conveyed that makes it clear a decision is called for, and what is recounted about the facts provides background for a decision that is to be made. Such a case involves more than merely "a bare recitation of facts". Rather, what is recounted about particular events or the way in which they are presented may be said to constitute part of the 'consultations or deliberations' a decision maker uses to develop a decision. This may be so whether the decision maker specifically requests the information, or it is provided unsolicited having regard to the responsibilities of both the provider and receiver.*

[37] In this case, s 14(1)(a) has been applied to redact portions of a three-page document that appears twice in the disclosure (pages 111-113 and 245-247).

[38] The document can be characterized as an exit report, written by people who were responsible for isolation hub management, and written to senior leaders in the Department of Health. It is mostly a backward-looking report on experiences to the date of the report.

[39] After careful consideration, I have concluded that the larger redacted portions fall into the category of analysis. The authors are analyzing what went well and what did not go well, with an implicit recommendation about what their superiors should do next. I conclude that s 14(1)(a) was correctly applied.

[40] However, the names of the authors should be disclosed. Nowhere is it clearly stated what position the authors hold, or whether they are GN employees or contractors, but I believe they are GN employees. The onus for establishing an exemption is on the public body: ATIPPA, s 33. There is insufficient information for me to discern why these names are redacted. For that reasons, and also for the reasons given below in the analysis of s 23(1), these names should be disclosed.

[41] Other redactions in this three-page document are the names of contractors. For reasons given below in the analysis of s 23(1), this information should be disclosed.

Was the s 14(1)(b)(i) exemption properly applied?

[42] Section 14(1)(b)(i) is a discretionary exemption. It reads:

> *14. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal*
>
> *…*
>
> *(b) consultations or deliberations involving*
>
> *(i) officers or employees of a public body, …*

[43] The rationale for this exemption is roughly the same as for s 14(1)(a): to allow the frank exchange of views among civil servants as they work their way towards making decisions and taking actions. It is the decisions and actions that are to be disclosed under the ATIPPA, not the consultations or deliberations that led there.

[44] Portions of pages 214, 216, 219, 220 and 249 are redacted under s 14(1)(b)(i). All are e-mail exchanges between senior GN officials, in which the officials are keeping each other informed of events and discussing possible responses. In my view, all fit within the ordinary meaning of "consultations" or "deliberations". Apart from the exercise of discretion, discussed earlier in this report, they need not be disclosed.

Were the s 15(1) exemptions properly applied?

[45] Section 15 exempts from disclosure certain information under the umbrella of "legal advice". They are discretionary exemptions. The relevant parts read as follows:

> *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;*
> >
> > …
> >
> > *(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.*

[46] These are two different exemptions, though obviously there is some 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. I will consider these exemptions together.

[47] Portions of pages 116, 120-125, 183, 214, 215, 221, 223, 234-237, 249 and 255 are redacted under s 15(1).

[48] On pages 116 and 255, which are the same document, the redacted portion is not legal advice. It is a statement of why someone was copied on an e-mail. It should be disclosed.

[49] On page 183, the e-mail does not involve a lawyer, and the redacted portion is an instruction from one GN employee to another. The unredacted phrase "We have a legal opinion on this" is too vague to ground a redaction under s 15(1). It should be disclosed.

[50] On pages 214-215, there is a long redacted passage. The provenance of it is not clear. Only a small portion (in the first indented paragraph) is legal advice. The rest is not, and should be disclosed.

[51] The rest of the redactions are written to or from a GN lawyer, and legal advice is sought or given or discussed. There are a few e-mails in which a lawyer is not directly involved, but legal advice is stated or discussed. Apart from the issue of discretion, discussed earlier in this report, these passages fall under s 15(1) and need not be disclosed.

Was the s 17(1)(a) exemption properly applied?

[52] Section 17(1)(a) is intended to protect the disclosure of a public body's trade secrets. It reads:

> *17. (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the economic interest of the Government of Nunavut or a public body or the ability of the Government to manage the economy, including the following:*
>
> > *(a) trade secrets of the Government of Nunavut or a public body; …*

[53] The information redacted under this clause on pages 9, 207, 208 and 213 is an e-mail address within the gov.nu.ca domain. The only explanation offered by the department is that this e-mail address "is still not made

public". I have no information about what the e-mail address is used for, who sees it, or why it is or should be confidential.

[54] The term "trade secret" has a specific meaning in law, and is in any event defined in s 2 of the ATIPPA. The redacted information is not a trade secret. It should be disclosed.

Was the s 24(1)(b)(i) exemption properly applied?

[55] Section 24(1)(b)(i), along with s 24(2) to which the opening clause of s 24(1) refers, reads as follows:

> *24. (1) Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant*
>
> …
>
> *(b) financial, commercial, scientific, technical or labour relations information*
>
> *(i) obtained in confidence, explicitly or implicitly, from a third party, ….*
>
> *(2) A head of a public body may disclose information described in subsection (1)*
>
> *(a) with the written consent of the third party to whom the information relates; or*
>
> *(b) if an Act or regulation of Nunavut or Canada authorizes or requires the disclosure.*

[56] The redactions under s 24(1)(b)(i) are on pages 104, 260 and 261.

[57] The document on page 104 is an e-mail among three GN employees. Most of it is unredacted, so the topic of the conversation is known: there is an allegation by a third party that the GN's security contractor has not paid an amount claimed to be owed to the third party. The only item redacted under s 24(1)(b)(i) is the dollar amount allegedly owed. I cannot find that

this one piece of information is intended to be covered by the exemption in s 24(1)(b)(i). If the rest of the allegation can be disclosed, then so can the dollar amount. The same analysis applies to a dollar figure redacted on page 260.

[58] Pages 260 and 261 are part of a longer document, most of which is unredacted. The unredacted portions are sufficient to make known what the document is about: one security company is expressing concerns about another. The remaining portions redacted under s 24(1)(b)(i) relate to a specific concern. It is definitely not "scientific, technical or labour relations information", and it is a stretch to consider it "financial" or "commercial" information. It is more in the nature of an allegation made by one company about another. I cannot find that s 24(1)(b)(i) is broad enough to cover the subject under discussion. It should be disclosed.

Were the s 23(1) exemptions properly applied?

[59] We come now to what is by far the most frequently claimed exemption – the mandatory exemption under s 23(1) for an "unreasonable invasion of personal privacy".

[60] In *Department of Human Resources (Re),* 2021 NUIPC 4 (CanLII), I outlined how s 23 analysis works:

> *[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.*

[61] In the present case there are many hundreds of redactions based on s 23(1). I therefore propose to deal with these redactions in categories, rather than word by word.

[62] I believe that all of the s 23(1) exemptions fall into one of the following categories:

a. The names of individual citizens, sometimes with their e-mail address, telephone number, or other identifying information

b. The dates of security incidents, and/or the room numbers of the people involved in security incidents

c. A description of individual citizens, but not including their name (e.g. "Toronto man", "a family of five", "a teacher")

d. The name of companies under contract to the GN (including sub-contractors)

e. The names of individuals working for a GN contractor or sub-contractor, sometimes with their e-mail address, telephone number, or other identifying information

f. The names of the hotels hosting the isolation hubs

g. The names of individuals working for the hotels, sometimes with their e-mail address, telephone number or other identifying information

h. Contact information for the isolation security operations centre

i. Social media posts by individual citizens

I now turn to consider each of these categories.

Names of citizens

[63] The Applicant acknowledges that the names of individual citizens, as well as their identifying information such as telephone numbers and e-mail addresses, are properly withheld under s 23(1). I agree, and appreciate the Applicant's willingness to narrow the scope of this review to that extent.

[64] I do want to underline, however, for the purpose of future reviews, that the ATIPPA does not give a blanket exemption for a person's name. Like everything else in s 23, it depends on all the relevant circumstances.

Room numbers and incident dates

[65] I do not agree, however, that room numbers and incident dates should be redacted. This is not "information about an identifiable individual", as required by the ATIPPA. Knowing this information helps to weave together different parts of the security story.

[66] The Department of Health obviously knows who was in which room on which date, but those outside the department do not. Without this other data that is not publicly available (and that would be a breach of the ATIPPA if it were released), it is not reasonably possible for room numbers and incident dates, by themselves, to be tied back to an identifiable individual. They should be disclosed.

Other descriptive information

[67] Sixteen pages of the disclosed records are a detailed log of emails received concerning the isolation hubs. Any descriptive information has been redacted. There are many hundreds of redactions on these sixteen pages. On one page alone I count 59 separate redactions. The department has obviously invested a great deal of time in vetting these documents.

[68] Generally speaking, too broad a brush has been applied to the redactions. I would repeat that the ATIPPA defines "personal information" to mean information about an "identifiable individual". Very little of the information in the log is about an identifiable individual, and in fact it appears that the keepers of the log were deliberately trying to write non-identifying descriptions. Nevertheless, descriptions such as "Ottawa man", "Toronto woman", "teacher", "medical traveller", "husband and wife" and "mother" have all been redacted. There is no reasonable means by which anyone could identify the people involved. The number of people fitting these descriptions, even if we add "travelling to Nunavut", is large. This information should be disclosed.

[69] There are a few exceptions that I find are properly withheld. For example, one person is described by their specialized occupation, of which there is exactly one in Nunavut. Revealing this person's occupation is equivalent to revealing their name. Similarly, descriptive information that likely applies to very few individuals (to use a made-up example, "family of five from Mittimatalik") may also properly be withheld, as may the name of the Nunavut community where a person resides.

The names of contractors

[70] The GN has overall supervision of the isolation hub program, but it has contracted out much of the day-to-day operational work.

[71] Management of the isolation hubs has been contracted out to a company I refer to as "the isolation hub manager". Security for the isolation hubs has been contracted out separately, and the security contractor has sub-

contracted some of that work. I will refer to these private security companies as “the security contractors”. The hotels themselves are privately owned, and are making their rooms available under contract to the GN.

[72] The isolation hub manager, when asked by the Department of Health for its comments on s 23 and s 24, requested that its corporate name not be disclosed. I am mystified as to why they thought that was a legitimate exemption, or why the department accepted it. There is no exemption in the ATIPPA for the name of an entity holding a contract with the GN.

[73] Only one security contractor was asked for its comments on the application of s 23 and s 24. It did not object to the disclosure of documents in which it or its employees were mentioned.

[74] The other security contractor was not asked for its comments on the application of s 23 and s 24. This was a surprising omission, given that the documents contain perhaps several hundred references to the company, its managing director, or its employees. The contractor was notified by this office under s 30 of the ATIPPA, and chose not to make a submission.

[75] Despite having not notified or sought the views of this security contractor, the department redacted throughout the documents both the name of the contractor and the name of anyone working for the contractor, including its managing director.

[76] There is no basis in the ATIPPA for redacting the name of a company holding a contract with the GN. In Review Report 20-243, 2020 NTIPC 47 (CanLII), the NWT Commissioner said, in the face of similar redactions and similar legislation, “I recommend disclosure of the name of the contracting company throughout.” Confidential corporate information may be withheld if it fits within one of the categories enumerated in s 24. The company’s name, in and of itself, is not confidential corporate information. The names of the corporate contractors should be disclosed.

The names of officers and employees of contractors

[77] The same analysis is generally true for the officers and employees of contractors. In the same NWT decision just cited, the NWT Commissioner went on to write:

> *Further, to the extent that names which have been redacted in several places are the names of employees of either NTHSSA or a contracting company, there is no exception that would apply to authorize withholding the name. Section 23(4)(e) provides that a disclosure of personal information is not an unreasonable invasion of privacy where the personal information relates to the individual's "employment responsibilities" as a GNWT employee. The term "employee" as defined in the Act includes a person who performs a service under contract. I therefore recommend that this name also be disclosed.*

The language in Nunavut's ATIPPA is almost identical. It is also worth noting that the NWT report was written by the person who was, until very recently, also the Information and Privacy Commissioner for Nunavut.

[78] It is well-established that it is not an unreasonable invasion of the personal privacy of GN employees to disclose their "business card" information (name, title, contact information). Records revealing what GN employees said or did while on the job are also generally disclosed, unless another exemption applies. Knowing who did what helps to make public bodies more accountable to the public, which is one of the key purposes of the ATIPPA: s 1.

[79] It is impossible to separate strictly work from non-work, so sometimes personal details do creep into work-related records. It is well-established that personal details of GN employees such as information about family, home, leave and medical conditions can normally be redacted.

[80] Generally, the same rules should apply to GN contractors. Like GN employees, they are providing services on behalf of the GN to Nunavummiut (and others), and they are paid from the GN budget. The fact that the GN has contracted out a particular service should not make a difference in the way that ATIPP disclosure is handled: see *Department of Health (Re),* 2021 NUIPC 7 (CanLII) at paragraphs 42-43.

[81] This conclusion is reinforced by the definition of the word "employee" in the ATIPPA:

> *2. In this Act,*
>
> *…*
>
> > *"employee", in relation to a public body, includes a person retained under contract to perform services for the public body; ….*

[82] This definition is not a substantive rule, but it is an indication that the Legislative Assembly intends that GN employees and GN contractors be treated the same way under the ATIPPA.

[83] Perhaps allowance can be made for the fact that contractors sometimes operate differently and organize themselves differently compared to GN employees. The legal test under s 23(1) does not change for contractors, but the weighing of "all the relevant circumstances" may produce slightly different conclusions for contractors than for GN employees. Like everything else in s 23, it depends on all the relevant circumstances.

[84] For example, employees of contractors are more likely to use personal e-mail accounts. In this case, some of the front-line security staff appear to have sent or received e-mail from a non-corporate e-mail account (e.g. Hotmail, Gmail). I suspect that is because they are not long-term employees, and likely are never given a corporate e-mail account. The fact that they use a personal e-mail account for work should not, in itself, be a reason to disclose that e-mail address. The same consideration does not

apply to GN employees, who should be using their GN e-mail address to conduct government business: see *Department of Health (Re),* 2021 NUIPC 11 (CanLII) at paras 47-49.

[85] In my view, the names of officers and employees of contractors should be disclosed everywhere in the documents that they occur. An exception may be made for private e-mail addresses of front-line staff.

Contact information for the isolation security operations centre

[86] Section 23(1) has also been used to redact the contact information (telephone number, e-mail address) of something called the "isolation security operations centre" (ISOC).

[87] I have little or no information about what this ISOC is. What I can say is that it is not an "identifiable individual", so s 23(1) cannot apply. This information should be disclosed.

[88] I want to underline that I am not finding that information about a government security operation must always be disclosed. There are other exemptions, especially s 20, that are more carefully designed for security settings. Perhaps these exemptions are broad enough to include an unusual situation like isolation hubs in the midst of a pandemic, though it would stretch them far. It is not for me to say whether a different exemption is available or ought to have been claimed by the department. What I can say is that the redacted information is not protected by s 23(1), which applies only to the personal information of identifiable individuals.

The names of the hotels used as isolation hubs

[89] Hotel names have been redacted wherever they appear in the disclosure package. The hotel names are redacted under s 23(1), which is intended to protect the personal information of identifiable individuals. A hotel name is not, obviously, the personal information of an identifiable individual.

[90] But the department offers an interesting reason for citing s 23(1) as the reason for redaction: they argue the privacy of individuals staying in the

hubs <u>in future</u> is better protected if the locations are not known. At the date that this Review Report is released, the isolation hubs are still in operation, and likely will be for months to come.

[91] The department has never publicly confirmed which hotels are being used as isolation hubs. In its written guidelines for hub guests, which I have seen, the GN suggests that the name of the hotel not be revealed. But this is only one of a long list rules and suggestions. No special emphasis is placed on it, and it is not enforced.

[92] The reality is that the names of hub hotels are widely and easily available from news stories and social media posts. I believe it would be a matter of a few minutes on Google to compile an accurate list.

[93] Nevertheless, I am prepared to accept that the GN has a legitimate interest in not disclosing <u>officially</u> the names of the hotels still being used as isolation hubs, and that interest outweighs other relevant circumstances. I would have reached a different conclusion if the isolation hubs were no longer in operation.

[94] The isolation hubs are an extraordinary response to the pandemic. Although no-one is physically forced to stay in a hub, staying in a hub is a pre-condition for travelling to Nunavut. Effectively, travellers are required to live under close government supervision, in a defined location, for 14 days. Some travellers may in this way be exposed to influences or abuses to which they might not otherwise be exposed. Official confirmation of their (probable) location, when combined with public or private knowledge that an identifiable individual is in an isolation hub, may result in an unreasonable invasion of their personal privacy.

[95] For these reasons, the names of the hotels used as isolation hubs need not be disclosed in this set of documents. The same rationale extends to the names, e-mail addresses and other contact information of hotel employees, because revealing their names and contact information will indirectly identify the hotel where they work.

Should social media posts be redacted?

[96] A few of the disclosed documents consist of, or have attached to them, social media posts from isolation hub guests. These social media posts have been redacted almost in their entirety, leaving only insignificant details like emojis or the time.

[97] The Applicant argues that social media posts are inherently public, and should be disclosed on that basis. Although the Applicant did not refer to specific sections of the ATIPPA, the disclosure of social media posts would fall to be decided under s 23 (unreasonable invasion of personal privacy) or s 48(t) (public body may disclose information “otherwise available to the public”) or both.

[98] Social media posts create new issues for our access to information system. Governments are certainly watching social media posts from citizens, because it is a useful way to gauge public opinion and to spot emerging issues the government may need to address. Sometimes social media posts are collected into government policy files. When an ATIPP request is made for the contents of the file, the question arises whether the social media posts should be disclosed, in whole or in part, even though they were authored by private citizens and may contain personal information. In the words of s 48(t), how “available to the public” are social media posts?

[99] Closer analysis of this interesting issue will have to wait for a different case. I have seen all of the unredacted social media posts. In this case, the GN was not collecting social media posts on their own initiative. All of the posts in the file were sent to the GN, either by e-mail or direct message, by a citizen who was thereby attempting to draw a problem to the GN’s attention. Therefore, in my view, the social media posts in this set of documents should be analyzed exactly like any other written document, such as an e-mail, under s 23 of the ATIPPA.

[100] On that basis, there is no reason to redact the content of the Facebook post on page 52. It describes an incident involving a security guard. The name of the user, and the name of those who responded to the post, need not be disclosed.

[101] There is similarly no reason to redact the content of the direct messages on pages 55-56, or the texts on pages 61-63, or the photos on pages 69-70. These documents each tell a story about a security concern. The name of the sender need not be disclosed, but the content should be disclosed.

The issue of "over-redaction"

[102] The Applicant raised one other issue in their Request for Review. There were three pages in the disclosure where it appeared the redacted area was larger than it needed to be. These "over-redactions" resulted in neighbouring words being obscured. When I brought this issue to the department's attention, the department promptly sent corrected pages to the Applicant. I thank them for doing so. I need not address this issue further.

Conclusion

[103] The result in this case is a mixed bag. The 262 pages of documents contain many hundreds of redactions, probably over a thousand in total. Many of the exemptions were properly applied, but many were not.

[104] In particular, I have concluded that there are very few instances where there is a valid reason to redact the name of a contractor, their officers, or their employees.

[105] There are far too many redactions for me to give direction on each one, word by word and line by line. I trust the guidance I have provided in these reasons is sufficient for the department, if it accepts my recommendations, to take another pass through the documents and release more information to the Applicant.

Recommendations

[106] **I recommend** that the department revise its redactions in accordance with this report.

[107] Assuming the department accepts my recommendations for revision, **I recommend** that the department exercise its discretion with respect to the information that I have found may be withheld under sections 14(1)(a), 14(1)(b)(i) and 15(1). This may or may not result in further information being disclosed.

[108] Assuming the department accepts my recommendations for revision, **I recommend** that the department try to complete its revision within two weeks of the date of this report.

[109] If the department is in any doubt about how these reasons apply to a specific redaction, **I recommend** that the department seek my guidance as soon as possible.

[110] My remarks in this report on the exercise of discretion relate to ATIPP administration generally. **I recommend** that the Department of Health share this report with the Department of Executive and Intergovernmental Affairs, which has oversight of ATIPPA administration.

[111] **I recommend** that EIA review paragraphs 14 to 24 of this report, and consider analyzing the reasons why public bodies are not exercising their discretion under the ATIPPA, and consider reforms to the ATIPP system that would foster the exercise of discretion in accordance with law. Because this systemic issue is in the purview of EIA, the Minister of Health need not respond to this recommendation in the written response required under section 36 of the ATIPPA.

Graham Steele
ᑲᒥᓯᓇ / Commissioner / Kamisina / Commissaire