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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 was a GN employee. They filed a harassment complaint against a co-worker. Later, they applied for a copy of the investigation report. The report was disclosed with extensive redactions. The Commissioner finds that there was insufficient evidence of reasonable expectation of harm, which is required to withhold information under s 25.1(b). The s 23 exemption requires consideration of all relevant circumstances. Too much weight was put on a single factor. The Commissioner recommends that redactions based on the identity of the respondent should be disclosed. The names of witnesses should also be disclosed, though not the statements they made to the investigator if that would indirectly identify who made the statement.

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).

[3] The Commissioner has jurisdiction over the Department of Executive and Intergovernmental Affairs, as well as the Applicant's home department: ATIPPA, s 2, definition of "public body", clause (a).

Issues

[4] The issues in this review are:

a. Were the s 23 exemptions properly applied?
b. Were the s 25.1(b) exemptions properly applied?

Facts

[5] The Applicant is a former employee of the Government of Nunavut (GN). In July 2019, the Applicant filed a harassment complaint against a co-worker. The GN hired an outside expert to investigate and report on the complaint. The report was submitted to the deputy minister of EIA in December 2019. The Applicant was given a high-level summary of the investigator's findings, but not the report itself.

[6] At some point after that, the Applicant's employment with the GN ended. There appears to be disagreement between the Applicant and the GN over when and how the Applicant's employment was ended. The details are not relevant to this review.

[7] On December 9, 2020, the Applicant filed an ATIPP request for a copy of the harassment investigator's report. On February 17, 2021, the Applicant received a copy of the report with extensive redactions. The Applicant also received an explanation of EIA's rationale for its redactions.

[8] On February 19, 2021, the Applicant filed a Request for Review with the Office of the Information and Privacy Commissioner, asking that the redactions be reviewed to determine if the exemptions claimed were properly applied.

[9] In this Review Report, I will use the word "Applicant" (with an initial capital) to refer to the person who made the ATIPP request and is now applying for review. I will use the word "respondent" (without an initial

capital) to refer to the person against whom the Applicant filed the harassment complaint. The Applicant was the complainant in the harassment complaint.

Law

[10] "Personal information" means information about an identifiable individual: ATIPPA, s 2.

[11] Section 23(1) says that 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." I will discuss the interpretation of s 23 in more depth later, in the Analysis section.

[12] Section 25.1(b) says that a public "may refuse to disclose to an applicant…information created or gathered for the purpose of a workplace investigation…, where the release of such information could reasonably be expected to cause harm to the applicant, a public body or a third party; ….". I will discuss the interpretation of s 25.1(b) in more depth later.

Analysis

[13] The document sought by the Applicant is an external investigator's report into the Applicant's harassment complaint. There are eleven other documents referred to in the report, and they are attached as Tabs 1-11. I will use the word "Tabs" to refer to these attachments.

[14] Although the Applicant worked for a different department, this particular investigation was overseen by the Department of Executive and Intergovernmental Affairs (EIA). That was in accordance with "Directive 1010: Respectful and Harassment Free Workplace" in the GN's Human Resources Manual. It was therefore also EIA to which the ATIPP request was directed, and it was EIA that decided what to release.

Failing to link redactions to exemptions

[15] A preliminary issue is the fact that EIA has not attempted to link each redaction with a specific section of the ATIPPA. According to EIA, ss 23 and 25.1(b) apply to all redactions.

[16] The normal practice in Nunavut (and elsewhere in Canada) is that a redaction includes, in the blank space, a reference to the section number of the exemption. Alternatively, a "table of redactions" is compiled, linking each redaction (usually by page number) to a specific exemption, together with an explanation for why the exemption is claimed. Neither happened in this case. The blank spaces are just blank. The table of redactions says that ss 23 and 25.1(b) apply to all redactions.

[17] In my view, both the "duty to assist" in s 7 and the specific duty in s 9(1)(c)(i) to identify "the provision of this Act on which the refusal is based" require a statement of the specific exemption claimed for each redaction. Otherwise both the Applicant and the Commissioner are left to guess the public body's thought process. That is not in keeping with the spirit or the letter of the law.

[18] EIA's position appears to be that since ss 23 and 25.1(b) apply to every redaction, there is no need to label each redaction. That is not a permissible move. I have not seen it before, and I hope not to see it again.

[19] Certainly there will be situations in which more than one exemption can apply to a given redaction, and the public body is entitled to say so when appropriate. But it will be the rare case indeed in which the same two exemptions apply to every one of hundreds of redactions.

[20] The problems created by this conflation of s 23 and s 25.1(b) are compounded by the fact that s 23 is a mandatory exemption and s 25.1 is discretionary. The analytical process for mandatory and discretionary exemptions is different: see *Department of Health (Re),* 21 NUIPC 12 (CanLII) at paras 13-24. They need to be analyzed separately.

Workplace harassment and the ATIPPA – some general comments

[21] Investigation of harassment complaints poses very challenging problems for the access to information system.

[22] In Directive 1010 of the GN Human Resources Manual, "personal harassment" is defined as "unwanted conduct including through email and/or social media, that can be reasonably considered to have the purpose or effect of violating an individual's dignity and can reasonably be considered to result in creating an intimidating, hostile, degrading, humiliating or offensive environment."

[23] Because personal harassment is about "environment", the investigation can cover a wide range of incidents, a long period of time, and many witnesses. It can cover everything from large group meetings to a fleeting personal interaction. It can cover what is said and unsaid, written and unwritten, committed and omitted. It can cover different treatment of similarly situated employees, or similar treatment of differently situated employees. It can delve into personalities and deeply personal circumstances and whether individual reactions are reasonable in the circumstances.

[24] Moreover, harassment investigations depend on people being willing to speak fully and honestly without fear of repercussions or reprisal from management or co-workers or anyone else. As I wrote in *Department of Health (Re),* 2021 NUIPC 11 (CanLII) at para 35, "There must be adequate space created for complaints and whistleblowing [within the workplace] without harm ensuing."

[25] An investigation report into a harassment complaint about a negative environment, when written by an experienced investigator (as this one was), is therefore inevitably going to include a great deal of personal information about all the people involved (as this one did). The personal information of the complainant, the respondent, the witnesses, and others will be woven together into a story that makes redaction next to

impossible, and which has the potential to affect personal and working relationships if disclosed.

[26] For dealing with such complexity, the ATIPPA is a blunt instrument. The two sections of the law at issue in this case are ss 23 and 25.1(b). I will deal with s 25.1(b) first because I can dispose of it more quickly. The analytical heart of this case is in s 23.

Section 25.1(b) – general principles

[27] Section 25.1(b) is a relatively new part of the ATIPPA. It was added in 2017. It has been considered in a number of NUIPC decisions over the past few months. Some of the legislative background, including debate in the Nunavut Legislative Assembly, is traced in *Department of Health (Re)*, 2021 NUIPC 11 (CanLII).

[28] In *Department of Education (Re),* 2021 NUIPC 10 (CanLII), I laid out the necessary conditions for s 25.1(b) to apply:

> *[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.*

[29] In *Department of Human Resources (Re),* 2020 NUIPC 13 (CanLII), the former Commissioner made the following comments about the requirement of a reasonable expectation of harm:

> *Section 33 provides that the onus is on the public body to establish that an applicant has no right to access to a record or part of a record. Therefore, the onus to establish, on a balance of probabilities, that information meets the criteria for the exception claimed lies with the Department. Section*

> *25.1 requires, in particular, that there be a reasonable expectation of harm that will result from disclosure.*
>
> *Case law from across the country acknowledges fairly consistently that to meet this requirement for the exception, there must be clear and cogent evidence which points to the harm and there must be a direct link between the disclosure and the anticipated harm and if the public body is unable to establish this reasonable expectation, the exception does not apply.*

[30] In the result, the former Commissioner found that the criteria for applying s 25.1(b) had not been met. There was only speculation of harm, which fell short of the "clear and cogent" standard. Similar conclusions were reached in *Review Report 21-182 (Re),* 2021 NUIPC 1 (CanLII); *Department of Health (Re),* 2021 NUIPC 7 (CanLII); and *Department of Health (Re),* 2021 NUIPC 11 (CanLII).

[31] In the last-mentioned case, I reviewed Hansard from the Nunavut Legislative Assembly for the debate on the bill that enacted s 25.1. I wrote:

> *[34] These passages are rather general but I take from them that the legislative intent behind the enactment of s 25.1(b) was to ensure that GN employees feel safe to participate in workplace investigations, without worrying about repercussions arising from an ATIPPA disclosure.*
>
> *[35] I note in particular the deputy minister's example of a case in which employees might fear "reprisal" if they participated in a workplace investigation. That is, I believe, the sort of "harm" contemplated by s 25.1(b). It is a serious concern. Information prepared for purposes of an ongoing or potential workplace investigation may, in certain cases, give rise to threats, intimidation, coercion, or harassment if it is disclosed prematurely, or at all. There must be adequate*

> *space created for complaints and whistleblowing without harm ensuing. In some cases, as alluded to by the deputy minister, the very fact that there is an investigation may itself give rise to harm.*
>
> *[36] Nevertheless, 25.1(b) must, like other exemptions, be limited: ATIPPA, s 1. There must be cogent evidence of harm, and that harm must be linked to the disclosure. In addition, the expectation of harm cannot be speculative or fanciful. It cannot be something merely imaginable. It must be reasonable in the circumstances.*

[32] The only Nunavut case in which a redaction under s 25.1(b) has been upheld is *Department of Education (Re),* 2021 NUIPC 10 (CanLII). That case also involved a harassment complaint. The ATIPP request was for a copy of the complaint itself, along with supporting documents.

[33] I was careful to state in that case that my conclusion to uphold the s 25.1(b) redactions flowed from "the specific context of the case". Part of the specific context of that case was that the ATIPP applicant was the respondent to the harassment complaint. The department had made a separate submission to this office, in which it stated specifically who might suffer harm if the complaint were released, what harm those persons might be expected to suffer, and why the expectation of harm was reasonable in the circumstances. The department's submissions on s 25.1(b) were not disclosed to the Applicant, and were not discussed in the Review Report.

[34] In that case, I found that the Department of Education had met the standard of proof:

> *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.*

I turn now to consider whether the standard of proof has been met by EIA in this case.

Section 25.1(b) – specific application to this case

[35] I find that s 25.1(b) does not apply to any of the redactions in this case. The legal test is that the evidence must be "clear and cogent" or "detailed and convincing" to meet the evidentiary standard. In this case, EIA has fallen far short of meeting that standard.

[36] To repeat a key passage from *Department of Education (Re),* 2021 NUIPC 10 (CanLII) at paragraph 57,, the necessary conditions for s 25.1(b) to apply are as follows:

> *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.*

[37] In this case, the first condition is met, but the other three are not. EIA's submissions do not specify who might suffer harm, nor what harm that person might be expected to suffer, nor why the expectation of harm is reasonable in the circumstances. If the public body will not supply details, I will not speculate. The answers to those questions are not self-evident.

[38] For future cases, I suggest to EIA (and through EIA, all ATIPP Coordinators) that if s 25.1(b) is going to be claimed as an exemption, the public body should make a separate submission to this office on the reasonable expectation of harm. The public body may ask that their submission not be shared with the Applicant. That is what happened in *Department of Health (Re)*, 2021 NUIPC 11 (CanLII) and *Department of Education (Re),* 2021

NUIPC 10 (CanLII). The s 25.1(b) submission needs to be detailed, and must include evidence, not just assertions or speculation. For example, the submission might include witness statements, information about related proceedings, or details of any actual threats or attempts at intimidation, or all of these things.

[39] By enacting s 25.1(b) in 2017, the Nunavut Legislative Assembly has acknowledged the special challenges posed by workplace investigations. It has tried to strike a balance between what can be disclosed and what can be withheld. It has set the standard that must be met if information is to be withheld. In this case, that standard was not met. The information therefore cannot be withheld under s 25.1(b).

Section 23 – general principles

[40] That leaves s 23 as the only possible basis for the exemptions claimed by EIA.

[41] Section 23 is probably the most complex provision of the entire ATIPPA. In *Department of Human Resources (Re),* 2021 NUIPC 4 (CanLII), I explained how the different parts of s 23 fit together:

> *[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.

[42] In the same Review Report, I explained the basis on which personal information could be severed from a document that the Applicant had already seen:

[25] …Even where a document is the Applicant's own "personal information", disclosure may be withheld where (and only to the extent) that the document also includes the personal information of a third party, and disclosure of that information would be an unreasonable invasion of the third party's personal privacy: Department of Human Resources (Re), 2020 NUIPC 13 (CanLII). I do not lay this down as a general rule, but rather as a matter of weighing all the relevant circumstances. Section 23 does not forbid all invasions of personal privacy, only those that would be unreasonable in the circumstances.

[26] I think there is a distinction to be made between the two redacted phrases on this page.

[27] The first redaction on this page is the deputy's account of something the Applicant said to them. As it turned out, this statement became relevant to the Applicant's termination.

> *Disclosure of exactly what the deputy alleges was said is, in my view, necessary for a fair determination of the Applicant's rights: ATIPPA, s 23(3)(c). In my view, disclosure of the first redaction would not be an unreasonable invasion of a third party's personal privacy. It should be disclosed.*
>
> *[28] The second redacted phrase on page 50 is different. It is a statement of fact that includes personal information about another, identifiable GN employee. The second redacted statement is not about the Applicant, was not connected to the Applicant's termination, and is not necessary for a fair determination of the Applicant's rights. It would be an unreasonable invasion of a third party's personal privacy to disclose this statement, and it may be withheld.*

[43] In that case, the allowable redactions were few, and related to extraneous, personal information about other GN employees.

The special problem of opinions

[44] Nunavut's ATIPPA, like a number of access and privacy laws across Canada, treats opinions about people in a surprising way. The definition of "personal information" includes the following:

> *"personal information" means information about an identifiable individual, including*
>
> *…*
>
> *(h) anyone else's opinions about the individual,*
> *(i) the individual's personal opinions, except where they are about someone else; ….*

[45] If someone else has an opinion about us, <u>it belongs to us</u>. If we have an opinion about another person, <u>it belongs to that person</u>. That may be counterintuitive, but that is what the ATIPPA says.

[46] The treatment of opinions in the definition of "personal information" makes sense when a government employee has an opinion about someone outside government that is relevant to the exercise of the employee's job. For example, if a government employee is processing an application for a benefit or contract payment, and the employee expresses an opinion about the applicant, it makes sense that the applicant should be able to know what that opinion is, and how it might have affected the application for payment.

[47] But it makes less sense – or creates more potential for unintended negative consequences – when the employee's opinion is about a co-worker. A government employee with a concern about misconduct or harassment by a co-worker should be able to approach a colleague, a manager, or human resources professional to express that concern and to seek guidance. But if they do so, any opinion they express about the co-worker and that is put into writing belongs to the co-worker for ATIPP purposes. The same is true when an employee agrees to be a witness if someone else raises a concern or files a complaint.

[48] At best, this treatment of opinions might discourage government employees from raising a legitimate workplace concern, or from assisting in resolving one. At worst, it could lead to a poisoned work environment, intimidation, or reprisal.

[49] This issue has been the subject of comment during recent statutory reviews of access legislation. For example, the federal government recently made the following statement in a discussion paper on modernization of the federal *Privacy Act*:

> ***Introducing a balancing approach where personal information reflects the views and opinions of one individual regarding another:*** *Currently, the definition of "personal information" identifies individual A's stated views or opinions about individual B as individual B's personal information, not just individual A's. This means individual B has, subject to*

> *some exceptions, a right to access individual A's views or opinions about him or her and to know the identity of the individual who made those statements. This is an important right in many situations, especially where one person's opinions can negatively impact another's rights. However, in some circumstances, it might be more important to protect the confidentiality of a person's opinion about someone else – for example, in the context of harassment allegations and investigations. The Act could include a provision outlining a more nuanced and flexible balancing approach to apply in such cases, rather than the current fixed and firm rule.*
>
> (Modernizing Canada's Privacy Act: Online Public Consultation, at 9)

[50] In my view, an amendment to Nunavut's ATIPPA may not be required in order to introduce the kind of sensitive balancing required in a case of workplace conflict. Section 23(1) already sets reasonableness as part of the test for disclosure. Section 23(3) already directs that "all the relevant circumstances" must be taken into account. In my view, this statutory language introduces sufficient flexibility into s 23 to deal with the special problems posed by workplace harassment investigations.

EIA's application of s 23 to the investigation report

[51] EIA has applied hundreds of redactions to the main body of the report. Moreover, ten of the eleven Tabs are redacted in full, even though the Applicant is the author of the first four Tabs, and three other Tabs are e-mails on which the Applicant was the recipient or was copied.

[52] There are two main reasons for the large number of redactions:

a. EIA has redacted every reference to the respondent. That includes the respondent's name, title and pronouns, along with any other word or passage that would tend to identify them indirectly.

b. EIA has redacted the name of every witness, along with every statement by a witness that would tend to identify them indirectly.

Should the respondent's identity be redacted?

[53] EIA has redacted the respondent's identity throughout the document. Since the harassment complaint was filed against the respondent, and since the very purpose of the investigation report is to examine the environment fostered by the respondent in the workplace, that has led to a very large number of redactions.

[54] The attempt to erase the respondent's identity goes far. It includes, for example, fully redacting the harassment complaint written by the respondent and attached to the investigation report as Tab 1. According to EIA, the Applicant is not entitled to see any part of the complaint that she wrote herself, or the supporting documents she submitted.

[55] In my view, EIA has gone much too far in this case. There is no legal basis for redacting the respondent's identity to this extent. I reach that conclusion for three reasons.

[56] First, it goes without saying that the Applicant knows who the respondent is. The Applicant filed the harassment complaint that led to the investigation report. No purpose is served, except to frustrate the Applicant, by cutting out every direct or indirect reference to the very person that the Applicant complained about. That does not mean the Applicant is entitled to see everything; we will get to that later.

[57] Second, it is, in the circumstances, blazingly obvious who the respondent is. The harassment complaint is premised on a certain power relationship between the Applicant and the respondent. That relationship, and the position the respondent must have held, is implicit in every line of the investigation report. It does the ATIPP process no credit when extensive redactions are made to a document in an attempt to disguise something that by its nature cannot be disguised.

[58] Third, EIA has put too much weight on a single factor in s 23. Section 23(3)(h) says that one of the relevant circumstances in determining whether there would be an unreasonable invasion of personal privacy under s 23(1) is whether "the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant."

[59] Although EIA cites s 23(3)(h) as a reason for the extensive redactions, it does not ever say explicitly which person's reputation may be unfairly damaged. Should we assume they are thinking of the respondent? Perhaps, but I should not have to guess. If it is the respondent whose reputation is at stake, how might release of the report to the Applicant damage the respondent's reputation? If there may be damage to the respondent's damage, why would it be unfair? There is the same lack of evidence about reputational damage that there was about reasonable expectation of harm in s 25.1(b).

[60] In any event, the investigation report is a detailed and careful dissection of the Applicant's allegations of harassment. Witnesses are interviewed, evidence is weighed, credibility is judged, findings are explained. In the context of a thorough, professional investigation report, it is difficult to see how anyone's reputation may be unfairly damaged if it is released to the Applicant (the complainant in the harassment case). It might be different if the document in question were a mere allegation, or an anonymous complaint; but that is not what we are dealing with in this case.

[61] Possibly EIA is worried that if it releases information touching on the respondent's identity to the Applicant, it would have to do the same for any other ATIPP applicant. It would not. It is implicit in the ATIPPA, especially but not solely because of s 23, that different disclosures may be made to different applicants. For example, if the Applicant, respondent and a third party (for example, a journalist) were all to file an ATIPP request for this investigation report, each would receive a different

version of it. An outsider, in particular, would receive only a heavily-redacted version of the report, if they received the report at all.

[62] If EIA is worried what the Applicant might do with the investigation report, I can only say that is not their concern. An applicant is entitled to what Part 1 of the ATIPPA allows, and a public body has no right to try to exercise prior restraint over what the applicant does with that information, except perhaps when the applicant is still employed by the GN.

[63] In summary: All information concerning the identity of the respondent should be disclosed to the Applicant. That includes all information (such as Tabs 1-4 in their entirety) that has been redacted because it would indirectly identify the respondent.

[64] In case there is any remaining doubt, I will repeat that giving this information to the Applicant does not mean that it needs to be given to any other ATIPP applicant. The Applicant, as the complainant in the harassment proceeding, is in a unique position with respect to personal information and disclosure.

Should the witnesses' identities and statements be redacted?

[65] The other large group of redactions concern the names of the witnesses and what they told the investigator. For these people, consideration of "all the relevant circumstances" produces a different result than it did for the respondent.

[66] Section 23(3) directs the decision-maker to consider "all the relevant circumstances", and offers eight examples. The examples that most apply to this case include:

> *(c) the personal information is relevant to a fair determination of the applicant's rights;*
>
> *…*

(f) the personal information has been supplied in confidence;

….

[67] With respect to paragraph 23(3)(c), it is relevant that the Applicant's employment with the GN has now ended. The Applicant is not a union member and so does not have recourse to any of the dispute-resolution mechanisms under a collective agreement, nor to any other mechanism or resources that might be available to a GN employee. If the Applicant is now to have a fair determination of their employment rights, it would have to be through the courts. The Applicant may currently be considering the likelihood of success of a court proceeding, and the contents of the investigation report could be a factor. In the event that a lawsuit is filed, the Applicant would likely have a right to disclosure of much more information than is available under the ATIPPA.

[68] It is also helpful to a fair determination of the Applicant's rights, in my view, for the Applicant to know who was interviewed by the investigator. I do not lay this down as a general rule, because there may be cases in which there is a legitimate reason, such as personal safety, not to disclose a witness's name. That is not a consideration in this case.

[69] The list of witnesses on page 4 of the report has been redacted in full, except for the Applicant's own name. Yet most of the witnesses were suggested by the Applicant, so it is hardly giving anything away to disclose their names. A witness added by the investigator should also be disclosed, as should the names of two witnesses suggested by the Applicant but not interviewed by the investigator. In the circumstances of this case, it is not an unreasonable invasion of their personal privacy to do so.

[70] With respect to paragraph 23(3)(f), I do not have much information about the terms on which the witnesses participated in the investigation. I surmise that they did so voluntarily, and they may have been asked to sign a promise of confidentiality. Directive 1010 of the GN Human Resources Manual, section 19(a), says "All matters and material relating to a workplace harassment complaint are to be treated with the utmost

confidentiality by all participants involved and are subject to a strict need-to-know basis." There is nevertheless a limit to how much confidentiality the GN can enforce. Section 19(b) of the same directive states correctly that "Information provided during an investigation may be disclosed in the event of an arbitration; a court proceeding, or an information request under the *Access to Information and Protection of Privacy Act.*"

[71] If there is any conflict between Directive 1010 and the ATIPPA, there is no doubt that the ATIPPA prevails, but I do not find any real conflict exists. Part of "all the relevant circumstances" required in a s 23 analysis is the circumstance that workplace investigations can be complex and sensitive, and that confidentiality is an important and necessary value if an investigation is to succeed, and that it is reasonable to expect that all involved will be respectful of the process and of each other.

Applying ss 23 – guidelines for this case

[72] Because of the large number of redactions – there are hundreds – I do not intend to go over them word by word. Assuming that EIA accepts my recommendations, it is my expectation that EIA will take the following guidelines and apply them to the investigation report.

[73] My analysis of s 23 leads me to the conclusion that the following redactions should be lifted and the information disclosed:

a. The identity of the respondent. This includes name, title, and pronouns, as well as any other information redacted because it indirectly identifies the respondent. (Examples: All of Tabs 1-4.)

b. The respondent's observations concerning the Applicant or incidents raised by the Applicant. (Examples: The redacted sentence in paragraph 28, the first part of the long redaction in paragraph 48.)

c. Names of witnesses interviewed, as well as names of potential witnesses not interviewed. (Page 4.)

d. Any passage that records something that the Applicant said to the investigator, even if it includes the name of another GN employee. (Examples: The redactions in the first three sentences of paragraph 85, the longer redaction in paragraph 99.)

e. Statements of fact about administrative matters such as job duties, reporting structure, and office layout.

[74] My analysis of s 23 leads to the conclusion that the following categories of information should be withheld:

a. The respondent's observations about themselves or their employment history, or observations concerning incidents not raised by the Applicant.

b. Witnesses' observations that would tend to identify, with a reasonable degree of certainty, who the witness is. (Example: The long redaction in paragraph 206.) Otherwise the witness's observation should be disclosed, but the witness's name should be withheld. (Examples: The redacted sentences in paragraphs 39 and 42.)

c. Witnesses' observations about incidents not raised by the Applicant. (Example: Paragraphs 106, 107, and 244.)

d. Witnesses' opinions about someone other than the Applicant. (Example: Most of paragraphs 174-182.)

e. Statements about former or current GN employees in which the information is personal and of low relevance to the investigation. (Example: The redacted sentence in paragraph 22, the long redaction in paragraph 137.)

[75] I would also observe that EIA in this case has applied a redaction almost every time any non-witness's name is mentioned in the investigation report. I have said before, and I will say again, that there is no general rule that a person's name must be redacted. Even assuming that having one's

name mentioned in a document is an invasion of privacy, the requirement in s 23 is that the invasion of privacy must be "unreasonable" if the information is to be withheld. Occasionally it would be unreasonable to disclose a name, but often it is not. Like everything else in s 23, it depends on all the circumstances.

Conclusion

[76] Harassment investigation reports pose special challenges for the ATIPP system. A sensitive balancing of all relevant circumstances under s 23 is the best way to balance the Applicant's right of access while ensuring that privacy and confidentiality values are respected.

[77] The standard of proof has not been met for any exemption under s 25.1(b).

[78] Under s 23, too much weight has been put on a single factor (potential damage to reputation), rather than consideration of all relevant circumstances. In any event, there is no evidence pointing to whose reputation may be damaged, or how, or why it would be unfair.

Recommendations

[79] **I recommend** that EIA revise its redactions of the investigation report in light of the findings in this report, and in particular the guidelines I have offered in paragraphs 73 and 74.

[80] **I recommend** that EIA make its best efforts to deliver a revised version of the report to the Applicant within two weeks of the date of this report.

Graham Steele
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