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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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Note: This version was revised by the Commissioner to correct an error in the original version. There are no changes to the conclusion or recommendations.

Summary

[1] The Applicant is a GN employee with a complex employment record. They applied broadly for information related to their employment. The request ultimately produced over 2000 pages of documents, released in four batches over nine months. The Applicant asked the Commissioner to review all redactions. The Commissioner recommends that portions of the first batch of documents be reconsidered by the department. The Commissioner upholds most other redactions, but makes some further recommendations for disclosure.

Nature of Review and Jurisdiction

[2] This is an access 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 Human Resources and the Department of Community and Government Services: ATIPPA, s 2, definition of "public body".

Issues

[4] The issues in this review are:

a. Did the public body correctly apply the exemption in s 21(1)?
b. Did the public body correctly apply the exemption in s 23?
c. Did the public body correctly apply the exemption in s 24?
d. Did the public body correctly apply the exemption in s 25.1(a)?
e. Did the public body correctly apply the exemption in s 25.1(c)?
f. Did the public body offer an adequate explanation for the exemptions it claimed?
g. If an adequate explanation was not offered, what is the appropriate disposition of the case?

Facts

[5] The Applicant is a Government of Nunavut (GN) employee. They applied for any records (a) mentioning the Applicant's name, initials or employee number, (b) to or from one of six named individuals, and (c) from January 2018 to October 2019. This request was amended, expanded, and reiterated numerous times, but that is the essence of it.

[6] Because the Applicant had a complex employment record, involving grievances, harassment complaints, leaves, re-entries, and sundry other matters, the number of responsive documents was large, adding up to more than 2000 pages. Some were from the Applicant's home department (Community and Government Services) and the rest were from the Department of Human Resources.

[7] The GN response to the Applicant's ATIPP request was affected first by the ransomware attack on the GN in November 2019, which had a long tail in terms of its impact on ATIPP operations, and then by the COVID-19 pandemic starting in March 2020, which for an extended period required most GN employees to work from home. The departments were unable to meet the statutory deadlines for a response. Along the way, this file has

generated three Review Reports on ancillary matters involving fees, extensions of time, and a privacy breach.

[8] The responsive records were released in four batches spread over nine months:

a. June 2020: Various documents from Human Resources (heavy redactions), but not including documents from HR officials Donna Andrews, Grant McMichael and Hilary Burns.

b. September 2020: Documents from Community and Government Services (no redactions).

c. January 2021: Most documents from Donna Andrews and Grant McMichael (no redactions).

d. February 2021: Remaining documents from Donna Andrews and Grant McMichael (no redactions), plus documents from Hilary Burns (light redactions).

[9] The foregoing narrative does not even begin to capture the processing swamp into which this file sank. To describe it all would fill a book.

[10] This review is a consolidated review of all redactions in all records disclosed to the Applicant in response to all iterations of the Applicant's ATIPP request. It was really all one request and one response, though along the way it has not always been handled as such by the Applicant, the GN, nor indeed by this office. For that reason, any necessary extension of time for the filing of a review request under s 29(2) of the ATIPPA is granted.

Law

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

[12] 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.

[13] Section 25.1 allows for certain information relating to human-resources matters to be withheld. The relevant parts of s 25.1 read as follows:

> *25.1. The head of a public body may refuse to disclose to an applicant*
>
> *…*
>
> *(b) information created or gathered for the purpose of a workplace investigation, regardless of whether such investigation actually took place, where the release of such information could reasonably be expected to cause harm to the applicant, a public body or a third party; and*
>
> *(c) information that contains advice given by the employee relations division of a public body for the purpose of hiring or managing an employee.*

Analysis

[14] I will being with some preliminary observations, then move on to the general principles most relevant to this case. I will then turn to the redactions in the fourth batch, because my analysis of it can be brief. The rest of this report will focus on the first batch, which was heavily redacted and raises the most issues.

The handling of the file on review

[15] The way the GN has handled some of the responsive records has made this file more difficult for me to handle than it should be. The following observations are intended to ensure smoother handling of future files.

[16] Documents need to be sequentially numbered. This function, sometimes called "Bates numbering", is built into the most common software used for ATIPP purposes, so there is no reason not to use it. In this case, I had to

spend too much time hunting for specific documents. I also realized eventually that certain documents were missing. Those problems would have been avoided with sequential numbering.

[17] Digital records of e-mails need to be collated into one continuous, sequentially-numbered file. Some of the disclosure in this case consists of e-mail files that have to be opened individually, which is tedious when there are almost a hundred e-mails for just one person.

[18] The public body has to explain any redactions it has made. The onus is generally on the department to justify why information is being withheld: s 33(1). The duty to assist in s 7, and the duty to tell an applicant "the reasons for the refusal and the provision of this Act on which the refusal is based" in s 9(1)(c)(i), require that a full and clear explanation be given at the time of disclosure. In this case, that did not happen for the first and fourth batches. (An exemption rationale for the fourth batch was provided only after I requested it.)

[19] The GN can do better than this when processing an ATIPP file, even a complex one, and I am sure it will in future.

The variability of redactions

[20] The documents were released in four batches, and each batch had a different person applying the redactions. Interestingly, the four batches show very different styles and approaches to the task of ATIPP redaction. The first batch is heavily redacted. The second and third batches have no redactions at all, even though the second batch includes some of the same documents as the first batch. The fourth batch is lightly redacted.

[21] Reasonable people may disagree on how the ATIPPA applies to a particular document. Good ATIPP redaction requires knowledge, judgment and experience, and often the exercise of discretion. But the range of redaction styles in this case is stark. In some cases, the same document has been heavily redacted by one person, and left entirely unredacted by another.

[22] Such variability in the way exemptions are applied is not likely to increase public confidence in ATIPPA administration. I am encouraged by steps recently taken by the Territorial ATIPP Manager in the Department of Executive and Intergovernmental Affairs aimed at improving consistency and quality.

General principles – section 23

[23] The application of s 23 seems to present the most difficulty for ATIPP Coordinators, so I will go over again the correct principles. The following explanation was also given in *Department of Executive and Intergovernmental Affairs (Re),* 2021 NUIPC 13.

[24] 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.

[25] 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.*

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

[27] With those s 23 principles in mind, I turn now to consideration of the redactions in the fourth batch of documents.

The fourth batch

[28] The fourth and last batch of documents was released to the Applicant on February 23, 2021. Apart from a few documents that had not, due to technical difficulties, been released with the third batch, all of the fourth batch consists of e-mails (plus attachments) to or from Hilary Burns. At the relevant times Ms Burns was the Acting Director of Employee Relations and Job Evaluation in the Department of Human Resources.

[29] The person who applied the redactions to the fourth batch has used a light touch. There are not many redactions, given the volume of documents, and they are limited in scope.

[30] About half of the redactions to the Burns documents are claimed under s 25.1(c), which says that a public body may withhold "information that contains advice given by the employee relations division of a public body for the purpose of hiring or managing an employee."

[31] Section 25.1 was added to the ATIPPA in 2017. I take it to be an expression of the Legislative Assembly's desire that the public service works best when managers are able to seek HR advice without worrying that their

uncertainties, questions and thought processes will be exposed to public scrutiny. The exemption in s 25.1(c) helps to ensure that GN employees ask for and get good advice. It is analogous to the better-known and long-entrenched protection for legal advice: ATIPPA, s 15(1).

[32] The phrase "employee relations division of a public body" in s 25.1(c) is not defined in the ATIPPA. The GN organizes itself such that a typical department has a human resources division. In addition, the Department of Human Resources provides certain human-resources functions for all public bodies, as well as providing advice and leadership on human resources matters throughout the GN. In my view, both the human resources division of a department and the Department of Human Resources are covered by the phrase "employee relations division of a public body" in s 25.1(c).

[33] Ms Burns was a senior official in the Department of Human Resources. The Applicant's case was complex, and Ms Burns was frequently consulted by the Applicant's managers and by other HR employees who were involved in one way or another in management of the Applicant's situation. I have reviewed all of the fourth-batch redactions claimed under s 25.1(c). All involve the giving, receiving and/or discussion of advice by Ms Burns. All fall comfortably within the scope of s 25.1(c). Apart from the failure to exercise discretion, which I will discuss below, the department has correctly applied s 25.1(c).

[34] The department did not provide sequential page numbering in the fourth batch of documents, so unfortunately I can refer to specific documents only by description.

[35] The first partly-redacted document is a "Workplace Interventions Services Report". It is a record by an external service provider of a mediation in which the Applicant was involved. All of the redactions relate directly to personal matters involving the other party to the mediation. Considering all of the relevant circumstances, as required by s 23, I find that the redactions to this document were correctly applied.

[36] The next partly-redacted document is an e-mail from an external service provider who was asked for an opinion related to the service provider's investigation of a harassment complaint involving the Applicant. Most of the redactions contain personal information about third parties, and considering all the relevant circumstances, I agree that it would be an unreasonable invasion of their privacy to disclose that information.

[37] I have, however, previously found that a list of witnesses interviewed for a harassment complaint should normally be disclosed: *Department of Executive and Intergovernmental Affairs,* 2021 NUIPC 13 (CanLII) at paragraphs 65-71. In that case I wrote:

> *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.*

The present case is not quite the same as the EIA case, because the Applicant in this case was the respondent to the harassment complaint. That brings the situation closer to *Department of Education (Re),* 2021 NUIPC 10 (CanLII), in which (under a different ATIPPA section) certain information was not disclosed to the Applicant. But unlike the Education case, there is no information in the record before to suggest why the witnesses' names should not be disclosed.

[38] The department also cites s 25.1(a) to support the redaction of the witnesses' names. That section allows the public body to withhold "information relating to an ongoing workplace investigation". That section cannot be used in these circumstances. The word "ongoing" means ongoing at the time that ATIPP disclosure is being considered, not ongoing at the time the document was written. There was no "ongoing" investigation of the harassment complaint in February 2021 when the document was disclosed to the Applicant.

[39] In the next partly-redacted document, which is an e-mail exchange between HR employees, a redaction has been made on the basis that it is "labour relations" information of a third party. It is difficult to talk about this redaction without revealing who made the statement and what they said. All I can say is that the redacted statement is not at all the sort of thing that s 24 was intended to cover. Moreover, the statement was not explicitly made in confidence, and there is nothing about it suggesting it was implicitly made in confidence. The conditions for applying s 24(1)(b)(i) are not met. This statement should be disclosed.

[40] The last partly-redacted document in the fourth batch is an e-mail exchange on July 30, 2019, between HR officials and the person with whom the Applicant was involved in mediation. There are various redactions made for various reasons. In my view, all of the redacted passages are properly redacted under s 23 (unreasonable invasion of personal privacy) since they primarily concern the third party and contain personal information that is not relevant to the Applicant. Section 21(1) (disclosure harmful to another individual's safety) has also been claimed in support of one redaction on this page. All I need say is that s 21(1) does not apply here. The information may be withheld anyway under s 23.

The first batch

[41] The first batch of documents consists of documents from three people:

a. Sheila Kolola, Deputy Minister, Department of Human Resources.

b. Alfred Blondin, Employee Relations Consultant, Department of Human Resources.

c. Margaret Pellerin, Dispute Resolution Consultant, Department of Human Resources.

Sheila Kolola

[42] There are only a few documents from Sheila Kolola. There are only two redactions, and a specific exemption is claimed for each, so I can deal with the Kolola documents quickly.

[43] The first redaction is claimed under s 25.1(c). That is the section, discussed above, that gives an exemption for human-resources advice. The document is an e-mail from the Applicant's home department to the deputy minister of HR. Advice is sought. It falls within s 25.1(c).

[44] The second redaction is a few words from a document written by the Applicant to the deputy minister. The redacted words are an opinion about another GN employee, plus that other employee's personal pronouns. An exemption is claimed under s 23(2)(g) and s 23(2)(j).

[45] Section 23(2)(g) creates a presumption of an unreasonable invasion of privacy if personal information about a third party consists of "personal recommendations or evaluations… character references or personnel evaluations". The words written by the Applicant, which are merely an offhand comment about a co-worker, do not fit within s 23(2)(g).

[46] In any event, s 23 analysis requires consideration of all the relevant circumstances. Considering that the document was written by the Applicant, and also considering the context in which the words appear, disclosing the words <u>to the Applicant</u> is not an unreasonable invasion of the third party's personal privacy. The whole sentence should be disclosed.

Alfred Blondin and Margaret Pellerin

[47] The rest of the first batch is not nearly as straightforward. There are 325 pages of Pellerin documents, and 307 pages of Blondin documents. The volume of documents is due to the fact that both were heavily involved in management of the Applicant's employment issues.

[48] Within the ATIPP process, the Blondin and Pellerin documents were handled like the documents under review in *Department of Executive and Intergovernmental Affairs (Re),* 2021 NUIPC 13. The reviewer in that case and this one has followed the same interpretation of the ATIPPA, with the same result: very extensive redactions. In both case, the redactions even extend to documents written by the Applicant.

[49] In both the EIA case and this one, the department did not provide the usual "exemptions rationale", in which each redaction is linked to one or more sections of the ATIPPA. Instead, the department explains why it is not possible to provide the usual sort of rationale.

[50] The explanation provided to the Applicant then quotes the following sections of the ATIPPA:

- Portions of the definition of "personal information"
- Section 16 (disclosure prejudicial to government relations)
- Section 22 (confidential evaluations)
- Section 23 (personal privacy of third party)
- Section 25.1 (employee relations)

There is no indication of how the department interprets those sections, or how they were applied to produce any particular redaction. The sections are merely quoted.

[51] The Applicant and I are therefore left to guess the department's thought process. That is not in keeping with the letter or the spirit of the law. There are many redactions where I simply cannot discern what the department might have been thinking. I cannot detect patterns in the redactions, much less patterns that I can trace back to the ATIPPA.

[52] To put the same point in legal terms, the onus of proof is generally on the department: ATIPPA, s 33(1). If the department does not make a case for what it has done, I must decide in the Applicant's favour.

[53] That does not mean, however, that I will recommend that everything in the Blondin and Pellerin documents be disclosed: see *Department of Health (Re),* 2021 NUIPC 12 (CanLII) at paragraph 21. The department may well have a legitimate interest in not disclosing the requested information. Two examples: the personal information provided by Ms Pellerin at pages 251-252 of the Pellerin documents in response to an allegation made by the Applicant plainly fits within s 23; and the legal opinion written by a Department of Justice lawyer at pages 142-147 of the Blondin documents plainly fits within s 15(1)(a).

[54] But sending a matter back to the department also has drawbacks: see *Department of Health (Re),* 2021 NUIPC 12 (CanLII) at paragraph 22. The biggest drawback is further delay in an already much-protracted case.

[55] Although I would prefer that this Review Report produce a definite conclusion, I find that the only fair outcome is for the department to reconsider the Blondin and Pellerin portions of the first batch of documents, but this time applying correct principles. That is what I recommend.

[56] I also recommend the department have a different person review the Blondin/Pellerin documents and apply the redactions. In addition to the guidelines in the next section, I am prepared to offer the reviewer whatever advice and guidance is needed. After such a long and winding road, we all owe it to the Applicant to bring this file to its conclusion.

Applying ss 23 – guidelines for this case

[57] My analysis of s 23 leads me to offer the following guidelines, which I trust will be helpful to the department if the minister accepts my recommendation to reconsider the Blondin and Pellerin documents:

a. Documents written by the Applicant should not be redacted. (Example: The e-mail at page 239 of the Blondin documents.) The only exception is for personal information about another GN employee, where that information is of little or no relevance to the

matter being discussed. (Example: In the e-mail at page 243 of the Blondin documents, the words after "The same employee also happens to…".)

b. Documents which the Applicant would have seen (e.g. e-mails on which the Applicant was a recipient) should not be redacted, except where there is personal information about another GN employee and that information is of low relevance to the matter being discussed.

c. A person's name should not be automatically redacted just because it is a name. The requirement in s 23 is that the invasion of privacy must be "unreasonable" if the information is to be withheld. All relevant circumstances must be considered: s 23(3). Occasionally it is unreasonable invasion of privacy to disclose a name, but often it is not. For example, the Applicant knows who their managers were, who they went to mediation with, and who they worked with. There is no point in redacting those names. Similarly, there is no point in redacting the names of course instructors.

d. The harassment investigation report sat pages 6-39 of the Pellerin documents should be analyzed in accordance with the guidelines in my Review Report 21-194: see *Department of Executive and Intergovernmental Affairs (Re),* 2021 NUIPC 13 (CanLII).

e. The Applicant's current employment status with the GN is a "relevant circumstance" in the application of s 23. It is also relevant to the application of s 25.1(b).

[58] My analysis of s 23 leads to the conclusion that the following categories of information may normally be withheld:

a. Witnesses' observations that would tend to identify, with a reasonable degree of certainty, who the witness is (assuming the Applicant does not already know, or it is not otherwise obvious from the context). Otherwise the witness's observation should be disclosed, but the witness's name may be withheld.

b. Witnesses' observations about incidents not raised by the Applicant.

c. Witnesses' opinions about someone other than the Applicant.

d. Statements about former or current GN employees in which the information is personal and of low relevance to the investigation.

[59] I do not wish to prejudge the outcome of the department's revision. I recommend, however, that the reviewer's style and approach be much closer to the style and approach that was applied to the fourth batch of documents. If that happens, the result of the reconsideration should be a significantly reduced number of redactions.

The failure to exercise discretion

[60] Finally, I would like to remind the department that most exemptions contain a discretionary element. Discretion means that the department may disclose information, even if the factual preconditions for non-disclosure are met. The department has a duty to "actively exercise" its discretion: see *Department of Health (Re),* 2021 NUIPC 12 (CanLII) at paragraph 15.

[61] A few of the exemptions are mandatory, meaning that the information must be withheld if the factual preconditions are met. The most prominent of the mandatory exemptions is 23.

[62] When exercising its discretion, the department should take into account the fact that the second batch of documents, which overlaps significantly with the first, was released by CGS with no redactions at all.

Conclusion

[63] In the fourth batch of documents, the department correctly applied the exemption in s 23 in some cases: see paragraphs 35, 36 and 40. This information should not be disclosed. It did not correctly apply the s 23 exemption in one case: see paragraph 37. This information should be disclosed.

[64] In the fourth batch of documents, the department did not correctly apply the exemption in s 24 or s 25.1(a): see paragraphs 38 and 39. This information should be disclosed. The department also did not correctly apply the exemption in s 21(1): see paragraph 40. However, this information should not be disclosed because it is exempt under s 23.

[65] In the fourth batch of documents, the department correctly applied the exemption in s 25.1(c). This information need not be disclosed, subject to the exercise of discretion.

[66] In the Kolola portion of the first batch of documents, the department correctly applied the exemption in s 25.1(c). This information need not be disclosed, subject to the exercise of discretion.

[67] In the Kolola portion of the first batch of documents, the department did not correctly apply the exemption in s 23. This information should be disclosed: see paragraphs 44-46.

[68] In the Blondin/Pellerin portion of the first batch of documents, the department did not offer an adequate rationale for the exemptions it claimed. This is of particular concern because the redactions were extensive. It is impossible to discern what the department's thought process was.

[69] The appropriate disposition is to send the Blondin/Pellerin portion of the first batch of documents back to the department for reconsideration.

Recommendations

[70] **I recommend** that, from the fourth batch of documents, the department make the further disclosures stated in paragraphs 37-39 of this report.

[71] **I recommend** that the department actively apply its discretion to the remaining discretionary redactions in the fourth batch of documents, to determine if there is anything else it is willing to disclose.

[72] **I recommend** that the Department of Human Resources reconsider the redactions in the Blondin/Pellerin documents in the first batch of documents, apply correct principles, and follow the guidelines in paragraphs 57-59.

[73] If the minister accepts my recommendation to reconsider the Blondin/Pellerin documents, **I recommend** that the reconsideration be carried out by someone other than the person who redacted the documents the first time.

[74] If the minister accepts my recommendation to reconsider the Blondin/Pellerin documents**, I recommend** that the person carrying out the reconsideration contact me as necessary, as the reconsideration process unfolds, with any questions about interpretation and application of the ATIPPA.

[75] If the minister accepts my recommendation to reconsider the Blondin/Pellerin documents, **I recommend** that the reconsideration be completed as quickly as possible, and in any case no later than one month after the date of the minister's decision.

Graham Steele
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