

Issues

- [4]** The issues in this review are:
- a. Did NAC correctly apply the exemption in section 15 (solicitor-client privilege)?
 - b. Did NAC correctly apply the exemption in section 23 (unreasonable invasion of personal privacy)?
 - c. Did NAC correctly apply the exemption in section 25.1 (employee relations)?
 - d. Did NAC correctly apply its discretion to the redactions under sections 15 and 25.1?

Facts

- [5]** The Applicant is an employee of Nunavut Arctic College. A situation developed in the workplace that might be neutrally described as a deteriorating working relationship between the Applicant and two students. The details are not relevant to this review.
- [6]** The deteriorating working relationships with the students then led to, or fed into, deteriorating working relationships between the teacher and their colleagues and supervisors.
- [7]** The Applicant went on leave from the workplace. NAC started proceedings that could result in discipline against the teacher. In this review, I offer no opinion on the rights or wrongs of the situation. There are other processes in place to deal with that.
- [8]** The Applicant applied under the ATIPPA for information about the situation. They applied to both NAC and the Department of Human Resources, which provides employee-relations support to NAC. Most of the relevant documents (520 pages) were held by NAC, but HR did have some relevant documents (98 pages). There is overlap between the two sets of documents.

- [9] The ATIPP Coordinators for NAC and HR consulted each other on the response, but responded to the Applicant separately. Both NAC and HR redacted portions of the documents, and provided reasons for the redactions. The Applicant requested that I review all redactions in both sets.
- [10] I asked for and received from NAC and HR unredacted versions of all documents. This Review Report covers the NAC disclosure. Review Report 21-199-RR, *Department of Human Resources (Re)*, 2021 NUIPC 18 (CanLII), deals with the HR disclosure. It is a close companion to this Review Report and the two reports should be read together.

Law

- [11] The ATIPPA provides for disclosure of government records to applicants, with some exceptions. The exceptions are sometimes referred to as exemptions. When information is exempted from disclosure, it is “redacted” (typically, by blacking-out the exempted material).
- [12] The redactions in this case are based on the exceptions set out in sections 15(1)(c), 23, and 25.1(c) of the ATIPPA.
- [13] Section 15(1)(c) allows a public body to withhold legal advice:
15. (1) The head of a public body may refuse to disclose to an applicant
- ...
- (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.
- [14] The former Commissioner considered s 15(1)(c) and solicitor-client privilege on numerous occasions: see, for example, *Review Report 17-135 (Re)*, 2017 NUIPC 22 (CanLII); *Review Report 18-138 (Re)*, 2018 NUIPC 3 (CanLII). The principles are well-known. In brief, a confidential communication between a lawyer and the lawyer’s client, that relates to seeking, formulating, or giving legal advice, is exempt from disclosure.

[15] Section 23 requires that information be withheld if disclosing it would be an unreasonable invasion of personal privacy. I have previously outlined the correct interpretive approach to s 23: *Department of Human Resources (Re)*, 2021 NUIPC 4 (CanLII) at paragraphs 21 and 22.

[16] Section 25.1(c) allows a public body to withhold human-resources advice:

25.1. The head of a public body may refuse to disclose to an applicant

...

(c) information that contains advice given by the employee relations division of a public body for the purpose of hiring or managing an employee.

[17] In *Department of Human Resources (Re)*, 2021 NUIPC 15 (CanLII), I considered the interpretation of s 25.1(c):

[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).

Analysis

[18] NAC's ATIPP Coordinator has done a very good job of applying the exemptions to the responsive documents. I make no recommendations for further disclosure, but I do recommend that NAC turn its mind to

discretionary disclosure under sections 15(1)(c) and 25.1(c). In the rest of this section, I will explain how I reached that conclusion.

Section 15

- [19] Two of the 407 redactions are based on section 15(1)(c). In the Law section above, I have briefly reviewed the wording of that section and its interpretation. It protects from disclosure the giving and receiving of legal advice.
- [20] In the present case, both uses of s 15(1)(c) are for the same passage, which is repeated in the e-mail accounts of two NAC employees. It is an e-mail from a lawyer in the territorial Department of Justice, giving legal advice in response to a question from an NAC employee. The passage fits squarely within the boundaries of s 15(1)(c). I am satisfied the exemption has been correctly applied.
- [21] Section 15 is, however, a discretionary exception. The former Commissioner wrote about the GN's failure to consider discretionary release of information too many times to count, starting in 2004 and continuing to her retirement in 2021. I too have written about the proper approach to discretionary exceptions: *Department of Health (Re)*, 2021 NUIPC 12 (CanLII) at paragraphs 13 to 24.
- [22] When there is a discretionary exception, there should be a two-step analytical process. The first step is to determine if the facts fit within one of the paragraphs of the exception (in this case, s 15). If so, the second step is to for the public body to ask itself it should release the information anyway. Section 15, which deals with legal privilege, has its own special procedure for waiving the privilege.
- [23] In this case, the first step has been done correctly, but I see no indication that NAC has turned its mind to the second step, which is the exercise of its discretion. NAC's "exemption rationale" merely recites the section under which the exception is claimed. There is no further explanation. The

law says that NAC must at least consider whether to apply its discretion to release the information.

Section 23 – Overview

- [24] Section 23 is probably the most commonly-cited exemption in Nunavut ATIPPA cases, and it is also the most difficult to interpret. In this case, 397 of the 407 redactions are made under s 23.
- [25] NAC’s ATIPPA Coordinator has provided an “exemption rationale” in spreadsheet format. The first column is the page number; the second column is the ATIPPA section number; the third column is “provision of this Act on which the refusal is based”; and the fourth column is “the reasons for the refusal”. Despite the title of the fourth column, it consists for the most part of more statutory language, and so is essentially a continuation of the third column.
- [26] The former Commissioner wrote on many occasions, and I will repeat, that the mere recitation of words from the ATIPPA is not sufficient explanation of the public body’s thought process. It leaves the Applicant, and also the Commissioner on review, guessing. It does not meet the duty to provide “the reasons for the refusal”: ATIPPA, s 9(1)(c)(i).
- [27] I have previously outlined the correct interpretive approach to s 23: *Department of Human Resources (Re)*, 2021 NUIPC 4 (CanLII) at paragraphs 21 and 22:

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.

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.

- [28] There is a tendency by ATIPP Coordinators to pick out one piece of s 23, especially from subsection (2), and cite that one piece as the reason for redaction. That is what happened in the present case. But that is not how s 23 works.
- [29] Subsections (1), (2) and (3) always have to be read together. There is no one circumstance that can be conclusive. All relevant circumstances have to be considered. It is only subsection (4) that can be applied on its own.

Section 23 in an educational setting

- [30] The underlying dispute in this case is between a teacher and two students. Many of the responsive documents include the name of one or both of the students. I will therefore address the preliminary question of whether the students' names, and other personal information about the students, should be redacted.
- [31] I have previously found that the names of GN employees who are going about their business as GN employees should generally be disclosed: *Department of Health (Re)*, 2021 NUIPC 12 (CanLII) at paragraph 78. That is especially the case if the Applicant is the author of the document in question: *Department of Human Resources (Re)*, 2021 NUIPC 15 (CanLII) at paragraph 57. The exception is where there is personal information about another employee, and that information is of "little or no relevance to the matter being discussed". An example would be an extraneous comment about a co-worker's health status or family situation.
- [32] I have also previously found that the names of K-12 students should not be disclosed, even if the Applicant is a teacher and is well aware of who

the students are: *Department of Education (Re)*, 2021 NUIPC 10 (CanLII) at paragraph 55. The students are minors and the disclosure of their names will rarely, if ever, be justified.

- [33] In the present case, the students are adult learners, so on which side of the disclosure line do they fall? In my view, this case is much closer to *Department of Education (Re)*, 2021 NUIPC 10 (CanLII) than it is to *Department of Human Resources (Re)*, 2021 NUIPC 15 (CanLII). Adult students are still students. There is a power imbalance favouring the school and its staff. Adult learners are in school voluntarily, which is different from a K-12 setting, but they are still vulnerable. Taking into account all relevant factors, as required by s 23(3), an adult student's personal information should not normally be disclosed to an applicant. That is true even if the applicant is the teacher, and even if the applicant is the author of the document or would have already seen the document in the workplace.
- [34] The considerations might change if the ATIPP applicant is the student, or if the disclosure of the student's identity is somehow essential, taking all relevant circumstances into account. But generally speaking, a student's name and other personal information (e.g. medical conditions, educational progress) may properly be withheld from disclosure.

Section 23 – Application to this case

- [35] As I have already mentioned, the ATIPP Coordinator's "exemption rationale" is insufficient, in that it does not adequately explain the thought process behind the redactions.
- [36] Nevertheless, the results of the ATIPP Coordinator's analysis are very good. The redactions are light and consistent. There are a few places where I thought slightly fewer words could have been redacted, and a few places where I thought slightly more words could have been redacted. But the test is not "what would the Commissioner have done?" but rather "what does the law require?", and there is some small room for differing

opinions on the latter question. The ATIPP Coordinator has approached the task thoughtfully and the results are well within the range of what is acceptable. It would have been helpful for the ATIPP Coordinator to put more of their thought process down on the page, but I make no recommendations for further disclosure based on s 23.

Section 25.1

- [37]** Eight of the 407 redactions are based on s 25.1(c). In the Law section above, I have briefly reviewed the wording of this section and the purpose behind it.
- [38]** In the present case, all eight uses of s 25.1(c) are for the same passage, which is repeated in different e-mail user accounts. It is an e-mail from a consultant in NAC's HR division, relaying HR advice from a senior employee of the Department of Human Resources. The passage fits squarely within the boundaries of s 25.1(c). I am satisfied the exemption has been correctly applied.
- [39]** Section 25.1 is, however, a discretionary exception. The comments I made about discretion under s 15 apply here too. There is no indication that NAC turned its mind to the application of its discretion. The law requires that they do so.

Conclusions

- [40]** NAC correctly applied the exemption in section 15 (solicitor-client privilege).
- [41]** NAC correctly applied the exemption in section 23 (unreasonable invasion of personal privacy).
- [42]** NAC correctly applied the exemption in section 25.1 (employee relations).
- [43]** NAC did not consider how to exercise its discretion under sections 15 and 25.1.

Recommendation

- [44]** I recommend that NAC consider how to apply its discretion under sections 15 and 25.1 of the ATIPPA to the information withheld under those sections.
- [45]** I make no other recommendation for further disclosure.

Graham Steele

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