



## Issues

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

## Facts

- [5] Review Report 21-198-RR, *Nunavut Arctic College (Re)*, 2021 NUIPC 17 (CanLII) is a close companion to this Review Report. The two reports should be read together. I have stated the facts in the companion case, and I will not repeat them here. The companion case covers the disclosure by Nunavut Arctic College. This Review Report covers the disclosure by the Department of Human Resources.

## Law

- [6] 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).
- [7] The redactions in this case are based on the exceptions set out in section 15(1)(c), 23, and 25.1(c) of the ATIPPA. The law applicable to these sections is the same as in the companion case, *Nunavut Arctic College (Re)*, 2021 NUIPC 17 (CanLII) at paragraphs 13 to 17. I will not repeat that analysis here.
- [8] In addition, some redactions in this case are based on s 25.1(b). It reads 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;

....

- [9]** Section 25.1(b) is a relatively new section of the ATIPPA, but there have already been several decisions in which it has been applied.
- [10]** In *Department of Education (Re)*, 2021 NUIPC 10 (CanLII) at paragraph 19, I explained what s 25.1(b) requires:
- To correctly claim a s 25.1(b) exemption, a public body must (a) establish the information was created or gathered for the purpose of a workplace investigation, (b) identify who might suffer harm, (c) establish what harm that person might be expected to suffer, and (d) establish why the expectation of harm is reasonable.
- [11]** In *Department of Executive and Intergovernmental Affairs (Re)*, 2021 NUIPC 13 (CanLII) at paragraphs 29 and 30, I reviewed and adopted the former Commissioner’s analysis of the level of proof that s 25.1(b) requires. There must be “clear and cogent” or “detailed and convincing” evidence of the harm, and a direct link between the disclosure and the anticipated harm.
- [12]** So far, 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). In all other cases, the s 25.1(b) redactions have been rejected for insufficiency of evidence.

## Analysis

- [13] My analysis of ss 15(1)(c) and 23 is the same as in the companion case, *Nunavut Arctic College (Re)*, 2021 NUIPC 17 (CanLII) at paragraphs 19 to 34. I will not repeat that analysis here.
- [14] HR's "exemption rationale" is done very well. It is in an easy-to-read table format. The last column is headed "justification" and in this column the ATIPP Coordinator presents a narrative reason for each redaction.
- [15] The results of the ATIPP Coordinator's analysis are also generally good. With only a few exceptions, the redactions are light and consistent. I turn now to consideration of the places where I find the ATIPP Coordinator's analysis has gone off course. They all involve the application of s 25.1(b).

### *Section 25.1(b) – General comments*

- [16] The ATIPP Coordinator has cited s 25.1(b) for four redactions. (There are a couple of apparent errors in the exemptions rationale table, but in the end I see four documents to which s 25.1(b) was applied.) In my view, s 25.1(b) has been incorrectly applied each time.
- [17] As I have explained in the Law section above, s 25.1(b) requires "clear and cogent" or "detailed and convincing" evidence of harm. The public body must show who might suffer harm, what harm the person might be expected to suffer, and why the expectation of harm is reasonable. Properly claiming a s 25.1(b) exemption requires real evidence, not speculation.
- [18] For each time that s 25.1(b) is cited, HR has brought forward no evidence of harm to anyone. It has not come anywhere close to meeting the evidentiary threshold. Section 25.1(b) cannot apply.
- [19] Nevertheless, for reasons I will now explain, the information in three of the four documents may be withheld under a different exemption.

*Draft questions for fact-finding meeting (pages 3-6)*

- [20]** The document at pages 3-6 of the HR disclosure has been redacted almost in full. The introductory information is unredacted (and properly so) so we know that the document was prepared by HR for purposes of a “fact-finding meeting” between NAC management and the Applicant.
- [21]** A fact-finding meeting (commonly referred to as an FFM) is a stage in the GN’s employee-management process. The purpose of the meeting is to put management’s specific concerns to the employee, and to give the employee an opportunity to respond. Depending on what happens in the FFM, the matter can be dropped, moved further down the path towards discipline, or diverted into other processes for resolution.
- [22]** The document at pages 3-6 are questions drafted for NAC’s fact-finding meeting with the Applicant. At the time of disclosure, the FFM had not yet been held. The document is redacted almost in full, citing ss 23(2)(h)(ii) and 25.1(b). In my view, neither s 23(2)(h)(ii) nor s 25.1(b) apply to this document.
- [23]** As for s 23(2)(h)(ii), it reads as follows:
- (2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where
    - (h) the personal information consists of the third party's name where
      - (i) it appears with other personal information about the third party, or
      - (ii) the disclosure of the name itself would reveal personal information about the third party; ....
- [24]** I cannot make out why HR believes that s 23(2)(h) applies to the document in question. It appears to be cited when someone else’s name appears, though not in every case. If so, there are other parts of s 23 better suited to the task.
- [25]** For the reasons I have already given, s 25.1(b) also cannot apply to this document. It is difficult to imagine how releasing draft FFM questions

could cause the kind of harm contemplated by s 25.1(b). Releasing the FFM questions might put a crimp in HR's approach to the FFM, but that is not at all the kind of harm contemplated by s 25.1(b).

**[26]** Normally I would leave my analysis of s 25.1 there. It is not my practice to raise other discretionary exemptions that the public body might have claimed, but did not. In this case, however, the document so obviously fits within s 25.1(a) that I feel bound to address it.

**[27]** Section 25.1(a) reads as follows:

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

(a) information relating to an ongoing workplace investigation; ....

**[28]** In all previous Commissioner decisions involving an FFM, the FFM was finished prior to ATIPP disclosure. In this case, the FFM had not yet been held. NAC had not yet formally presented its allegations to the Applicant, and the Applicant had not yet formally responded with their side of the story. In other words, NAC's investigation was still ongoing. It was still, with HR's help, in the process of shaping its approach to the FFM.

**[29]** In my view, the draft questions at pages 3-6 fit squarely within s 25.1(a) and on that basis, subject to the exercise of discretion, may be withheld.

*E-mail from Applicant (pages 86-87)*

**[30]** Another document that is heavily redacted is part of an "incident report" covering pages 82 to 87 of the HR disclosure. Most of the incident report is lightly redacted, but the two e-mails at the end, on pages 86 and 87, are redacted in full.

**[31]** The redactions cite ss 23(2)(h) and 25.1(b), but there is no other explanation. For some reason, these two pages are not included in the "exemptions rationale" document.

**[32]** As with the draft FFM questions, I cannot make out why the department believes that s 23(2)(h) or s 25.1(b) apply to the document in question. If s

23(2)(h) applies at all – and in my view, it does not – it would apply only to a name and associated personal information, not to the entire e-mails. As for s 25.1(b), no attempt is made to meet the evidentiary threshold.

**[33]** I also take into account the fact that the two redacted e-mails were written by the Applicant. It is difficult to see the point of withholding these e-mails from the person who wrote them. To the extent that the e-mails contain personal information about others, they could have been redacted with the same light and consistent touch that was applied to the rest of the documents. Redacting all of the two e-mails goes much too far.

*E-mails involving Jade Arsenault (pages 88-91)*

**[34]** The last two uses of s 25.1(b) are on pages 88-91 of the HR disclosure. I will deal with them together because my analysis is the same for both. They are e-mails from Jade Arsenault, an HR consultant with NAC. The e-mails are directed to advisers at the Department of Human Resources, and to an HR manager at NAC. There is also a redacted reply from one of the advisers at HR, but that redaction is claimed under s 25.1(c).

**[35]** For the reasons I have already given, s 25.1(b) cannot apply to the Arsenault e-mails. There is no evidence of harm. No attempt is made to meet the evidentiary threshold.

**[36]** Once again, however, the documents so obviously fit within another exemption – in this case, s 25.1(c) – that I feel bound to address it.

**[37]** Section 25.1(c) reads as follows:

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.

**[38]** 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).

**[39]** Jade Arsenault is an HR consultant at NAC, and the e-mails are part of a consultation between HR professionals at NAC and the Department of Human Resources. The e-mails fit squarely within s 25.1(c) and on that basis, subject to the exercise of discretion, may be withheld.

#### *Application of discretion*

**[40]** Sections 15 and 25.1 are discretionary exceptions. The comments I made about discretion in the companion case, *Nunavut Arctic College (Re)*, 2021 NUIPC 17 (CanLII) at paragraphs 21-23 and 39, apply here too. There is no indication that HR turned its mind to the application of its discretion. The law requires that they do so.

#### *A concluding comment*

**[41]** There is one other matter that I wish to address. The Department of Human Resources has recently had considerable difficulty in staffing its permanent ATIPP Coordinator position. The Coordinator who handled this file was doing so as "relief" Coordinator, meaning that they were



performing the role temporarily, in addition to their regular job duties within the department.

- [42] But the relief Coordinator was also directly involved in the Applicant's file as an HR adviser, and some of the documents were written to or from the relief Coordinator in their role as adviser. That means the relief Coordinator was, at times, reviewing and redacting their own work. That is not a desirable position in which to place anyone. There is at least the appearance of a conflict of roles.
- [43] I know that the department has struggled to staff the permanent ATIPP Coordinator position, but the situation that arose in this case is to be avoided. It is one more reason why the department needs to redouble its hiring efforts.
- [44] Nothing in the three preceding paragraphs should be taken as a criticism of the relief Coordinator. They have done a good job on this file. They are doing their best to help a department that struggles to manage its ATIPP workload, which can be among the most complex in the entire GN. The problem I have identified is for the department to solve, not the individual.

## **Conclusion**

- [45] HR correctly applied the exemption in section 15 (solicitor-client privilege).
- [46] For the most part, HR correctly applied the exemption in section 23 (unreasonable invasion of personal privacy). Some of the errors are moot because the information can be withheld under a different exemption. HR did not correctly apply s 23 to the two e-mails at pages 86-87.
- [47] HR did not correctly apply the exemption in section 25.1(b) in any of the four instances in which that exemption is claimed. Nevertheless, the information may be withheld in three of the four instances, because the information plainly falls within another exemption. The e-mails at pages 86 and 87 do not fall within any exemption.

**[48]** HR did not consider how to exercise its discretion under sections 15 and 25.1.

### **Recommendations**

**[49]** I recommend that HR disclose the two e-mails at pages 86-87 of the disclosure package.

**[50]** I recommend that HR consider how to apply its discretion under sections 15 and 25.1 of the ATIPPA to the information withheld under those sections.

Graham Steele

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