

[3] I have jurisdiction over NHC: ATIPPA, s 2, definition of “public body”; ATIPP Regulations, s 1(2) and Schedule A, column 1, item 9.

Issues

- [4]** The issues in this review are:
- a. Does NHC have a duty to assist the Applicant by reframing the ATIPP application as a request for records?
 - b. Did NHC conduct an adequate search for the information sought by the Applicant?
 - c. Did NHC correctly apply the exemption in s 17?
 - d. For the discretionary exemptions it applied, did NHC exercise its discretion to disclose?

Facts

- [5]** The Nunavut Housing Corporation (NHC) is a government-owned corporation with wide responsibility for housing in Nunavut. It owns and manages a substantial portfolio of residential properties throughout the territory.
- [6]** One initiative saw NHC purchasing four privately-owned apartment buildings in Iqaluit, in order to create a condominium program under which the units could be sold to Government of Nunavut employees. This was referred to as the GN Staff Condo Program.
- [7]** NHC is the developer of the condominium units, and thus is undertaking functions similar to any private-sector condominium developer. At all relevant times, NHC controlled the condominium corporation set up for the project, because none of the condominiums had yet been transferred to buyers.
- [8]** The Applicant was interested in buying one of the condominium units. The Applicant sought detailed information about the development. They tried

to get answers to that information by communicating directly with NHC. The Applicant was not satisfied with the response.

- [9]** The Applicant then filed an ATIPP application. The application consisted of a list of 24 items, some of which had sub-items. One item was phrased as a question, and the rest were phrased as topics on which the Applicant wanted information.
- [10]** NHC replied to the ATIPP request by letter. The letter contained some information on some of the topics. NHC's response did not include any records.
- [11]** The Applicant then applied to this office for review, on the basis that NHC had failed to provide the information requested in the ATIPP application, and had failed to search for responsive records.
- [12]** It was evident from their interactions that the parties had become somewhat frustrated with each other.
- [13]** On September 13, 2021, while this review was underway, NHC disclosed 818 pages of records to the Applicant.
- [14]** NHC treated the first four items in the ATIPP application as one item with four parts. As a result, NHC's response numbers the Applicant's request as 21 items. I will, for the sake of consistency, use the same numbering in this decision.
- [15]** With the additional disclosure, the Applicant stated they were now satisfied with NHC's response to items 1, 2, 4, 11, 12, 14-17, and 19-21 in the ATIPP application (email of September 26, 2021). That leaves items 3, 5-10, 13, and 18 to be addressed in this decision.
- [16]** NHC and the Applicant have had an opportunity to make submissions and to reply to the other party's submissions.

Law

- [17] The ATIPPA gives an applicant the right of access to “any record”: s 5(1). The word “record” is defined in s 2 as follows:

"record" means a record of information in any form and includes information that is written, photographed, recorded or stored in any manner, but does not include a computer program or other mechanism that produces records; ...

- [18] The word “information” is not defined in the ATIPPA. “Personal information” is defined, but not in a way that is relevant to the present case.

- [19] Section 7(1) of the ATIPPA imposes on public bodies a duty to assist applicants:

The head of a public body shall make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay.

- [20] This “duty to assist” has been the subject of many decisions both in Nunavut and elsewhere in Canada. To mention only the most recent decisions in Nunavut, the duty to assist includes the duty to conduct a diligent search (*Department of Health (Re)*, 2021 NUIPC 20, to give a full and clear explanation for any redactions (*Department of Human Resources (Re)*, 2021 NUIPC 15, to help an applicant consolidate multiple applications (*Department of Health (Re)*, 2021 NUIPC 7, and to work with an applicant to clarify a request (*Applicant (Re)*, 2020 NUIPC 15).

- [21] There is a threshold question that has to be answered in every “diligent search” case, and that is whether there is some basis for believing that the requested record exists at all: *Review Report 17-118 (Re)*, 2017 NUIPC 5 (CanLII), citing Order P2010-10 of the Alberta Information and Privacy Commissioner.

- [22] The “some basis” test is a low threshold. It requires some evidence, but not much, from which it is reasonable to conclude that the record

probably exists. For example, in *Department of Health (Re)*, 2021 NUIPC 20 (CanLII), the Applicant wanted performance appraisals going back some twenty years. They had a clear recollection of completing performance appraisals, and GN policy required that performance appraisals be done. There was therefore “some basis” for believing that the performance appraisals had been created.

- [23] The purpose of the “some basis” test is to prevent the public body expending time and effort on searches based only on an applicant’s subjective belief that a document must exist or should exist or might exist.

Analysis

- [24] The Applicant is a diligent buyer. Before committing to purchase of the condo unit, which for anyone is a major purchase, there was a long list of topics on which the Applicant wanted information. Perhaps the Applicant is more diligent than most buyers, but there was nothing unusual about what the Applicant wanted to know.

- [25] NHC is a prudent seller. It wants to be careful about what it answers, how it answers, and when it answers. The *Condominium Act*, RSNWT 1988, c. C-15 (Nunavut), is silent on the issue of disclosure by a condo developer to a prospective buyer. There are not many condominiums in Nunavut. I have no information before me on the established practice in Nunavut, if there is one, about what a condo project developer is required to disclose to a prospective buyer. I note only that in other Canadian jurisdictions a real estate seller’s obligation to disclose information to a prospective buyer is a complex, evolving area of law.

- [26] What lifts this case out of the ordinary purchase-and-sale of real estate is that the condominium developer is a “public body” subject to the ATIPPA. When the Applicant could not get the requested information from NHC just by asking, they filed an application under the ATIPPA.

- [27] Because of the way the file was initially handled by NHC, there is one legal knot that needs to be unpicked before we can return to the core question

of what records the Applicant should receive. It involves the difference between “information” and “records”.

“Information” and “records”

- [28]** The ATIPP request filed by the Applicant begins with the words “I am seeking access to the following information with respect to [the building number]”, followed by a list with 24 bulleted items, some of which have sub-items.
- [29]** NHC responded with a letter giving some information on some of the listed topics. NHC’s response did not, however, include any records. Dissatisfied, the Applicant applied to this office for review.
- [30]** In my initial correspondence with NHC, I pointed out their response did not include any records. I noted that such a response was unusual, and I asked NHC to address this point in its submissions. I also asked NHC to address the relevance of *Saskatchewan Housing Corporation (Re)*, 2021 CanLII 3092 (SK IPC), a recent case from the Saskatchewan Information and Privacy Commissioner which had come to my attention and which I thought might be on point. I will return to this case later in these reasons.
- [31]** On August 30, 2021, NHC wrote to me with a detailed written submission, along with 818 pages of records. On September 13, 2021, NHC disclosed the 818 pages of records to the Applicant.
- [32]** NHC’s disclosure of records considerably narrowed the scope of this review. Out of the original 21 items, the Applicant is now dissatisfied only with NHC’s disclosure on items 3, 5-10, 13 and 18. Those items are:
- 3. Reasons why the tender to complete minor renovations to the units was revised and reissued in or around early March, 2019.
 - 5. Reasons why the occupancy agreement that I requested on January 15, 2020 has not yet been prepared (including email correspondence inside NHC respecting this request).

6. The amount of occupancy fees, in aggregate, that NHC has collected from condo program participants to date (actual collections, not just billings).
7. Reasons why the sales and purchase agreements that were sent to legal review in late May 2020 were not sent to purchasers.
8. When NHC currently expects to send purchasers sales and purchase agreements, and the reasons for that timeline.
9. When the condo board is anticipated to take over control of the building, and the reasons for that timeline.
10. The size of the reserve fund that NHC intends to establish for the condo corporations, and how the sufficiency of the reserve fund was calculated.
13. The month and year the utilidor lines for the building were last inspected, and the results of the inspection.
18. Information respecting the construction or state of the building that was provided to NHC by the developer.

[33] NHC maintains that items 3, 5, 7-10 and 13 do not have to be answered because (I am paraphrasing slightly) they are requests for information, not requests for records.

[34] Part 1 of the ATIPPA, which is the part on access, is premised on the concept of a “record”. An applicant applies for records, and if records exist, the public body must disclose them, unless one of the exemptions applies. There are very limited circumstances in which a public body must create a record that does not already exist: s 7(2). Those circumstances do not apply in this case.

[35] In most ATIPP cases, the distinction between “information” and “record” does not matter. Of course it is the word “information” that appears in the title of the ATIPPA and in the title of Part 1. Technically, though, the legal right is to a “record”, as stated in s 5(1). So although the two words are often used interchangeably, they are not synonyms. The word “information” is broader. Every record contains information, but there may be information that is not in a record.

- [36] To give an everyday example, if someone asks “What did you have for lunch yesterday?” you could give them information by telling them what you ate, but there probably is no record of it. There might be a record – for example, a restaurant bill, a photograph, or a social media post. You will not always know if a record exists until you search for it. Even if you do not remember creating a record yourself, you may have done so but forgotten, or someone else may have created a record of which you were not previously aware.
- [37] All of the items in the Applicant’s list are topics on which the Applicant wants information. None is explicitly phrased as a request for records.
- [38] NHC argues that the duty to assist, which is explained in the Law section above, “cannot be said to extend to the reformulation of requests where the requestor is seeking disclosures that fall outside the scope of the ATIPPA” (letter of August 30, 2021, page 3).
- [39] It is true enough that an applicant is not entitled to disclosure that falls outside the scope of the ATIPPA. But a public body cannot know if a request falls outside the scope of the ATIPPA until after it has tried to reframe or reformulate the request as a request for records.
- [40] In my view, the duty to assist does extend to reframing or reformulating requests for information as requests for records. Usually that can be done, without needing to go back to the applicant, simply by adding the words “Records showing...” or “Records containing...” or a similar phrase in front of the topic named by the applicant. For example, if an applicant writes “What was the cost of repair?” then the request can be reframed as a request for “records showing the cost of repair”.
- [41] It will not always be that easy to reframe a request. In some cases it will be necessary to work with the applicant to reformulate the request. Sometimes it will be impossible to reframe or reformulate a request for information as a request for records. Sometimes an applicant will refuse

to reframe or reformulate their request, and in those cases there is only so much a public body can do.

- [42]** To be clear, assisting an applicant to reframe or reformulate a request is not, in itself, intended to make search and disclosure more convenient or otherwise acceptable to the public body. The purpose of assisting an applicant is to help more fully realize the goals of the ATIPPA, as set out in section 1.
- [43]** In sum: As long as an applicant is acting in good faith and is reasonably clear about what information they want, the public body has a duty to reframe or reformulate the request so that it works as a request for records.
- [44]** Once that is done, the public body may make a preliminary determination as to whether the request falls within the scope of the Act. Occasionally it will be obvious, on the face of the request, that it falls outside the scope of the Act. In most cases, however, the public body must undertake a diligent search to determine if responsive records exist. If the diligent search produces records, they must be disclosed, subject to any applicable exemptions. If the diligent search produces no records, the public body should so inform the Applicant.
- [45]** In the present case, NHC followed a different logical path. At first, it did not search for records at all. Instead it supplied some information, in letter form, on the topics named by the Applicant. Later, after the Applicant filed for review, it did disclose 818 pages of records.
- [46]** There are still seven items (3, 5, 7-10 and 13) that NHC says fall outside the scope of the Act. NHC's argument is summed up this way (letter of October 7, 2021, page 3):

“Reasons” why a decision was made or why something was done or not done is not a record under the Act. Nor is a timeline of prospective or retroactive decision-making.

[47] The Applicant responds with the following argument (email of September 26, 2021):

...a timeline is information; reasons are information; the size of a reserve fund is information; a method of calculation is information; a date is information; the results of an inspection is information. If NHC has records that contain these elements of information they have an obligation to release them under the original request. (Emphasis in original.)

[48] On this point, I agree with the Applicant. Any piece of information may be in a record. Even though certain kinds of information are not typically written down, a public body cannot rule out looking for them on that basis alone. Where there is “some basis” for believing the records exist, the public body must conduct a diligent search.

[49] My reasoning and conclusion is broadly similar to the reasoning and conclusion of the Information and Privacy Commissioner of Saskatchewan in the recent case of *Saskatchewan Housing Corporation (Re)*, 2021 CanLII 3092 (SK IPC).

[50] In that case, the applicant filed an ATIPP request asking for information about a certain land transaction. The SHC, a public body similar to NHC, responded with a letter containing some information, but with no records. In fact the SHC had not searched for records, instead relying on a particular employee’s knowledge of the file.

[51] The Saskatchewan Information and Privacy Commissioner found that the SHC had failed to conduct a search for records. Moreover, the SHC had failed in its duty to assist the applicant. The Commissioner recommended that the SHC adjust its processes so that it communicates with ATIPP applicants at an early stage and throughout the processing of an access request so that it can have a more accurate understanding of the request.

[52] I will now apply this general analysis to the specific items which are characterized by NHC as requests for information rather than requests for records.

Item 3

[53] Item 3 asks for “Reasons why the tender to complete minor renovations to the units was revised and reissued in or around early March, 2019.”

[54] Item 3 can easily be reframed as “Records showing the reasons why the tender to complete minor renovations to the units was revised and reissued in or around early March, 2019.”

[55] NHC’s initial response was “An engineering firm was hired to perform inspections on all the units and revised the work scope. The new scope of work required more renovations.” The Applicant is dissatisfied with this response, saying that there must be reasons why the engineering firm was hired.

[56] NHC argues that it does not have to respond further to this item because “This is not a request for a record. This is a request for a justification of a decision and decision-making process. The resultant revised and reissued tender document is a record.” The Applicant argues that the reasons may be in a record, and if they are, must be disclosed.

[57] On this item, I agree with the Applicant. Somebody in NHC decided to revise and reissue the tender. They must have had reasons for doing so. The procurement process within the GN is carefully circumscribed by the *Financial Administration Act*, RSNWT 1988, c. F-4 (Nunavut), the *Government Contract Regulations*, R-002-2011, and policy. There is therefore “some basis” for believing those records exist.

[58] The reasons might be in an email or a note to a file or a memo, or somewhere else. We cannot know for sure until NHC has done a diligent search. NHC may think it unlikely that such records exist, but that does not absolve them of the duty to look.

[59] I therefore recommend for item 3 that NHC conduct a search for records containing the information sought by the Applicant.

Item 5

[60] Item 5 asks for “Reasons why the occupancy agreement that [the Applicant] requested on January 15, 2020 has not yet been prepared (including email correspondence inside NHC respecting this request).”

[61] This item can easily be reframed as “Records showing the reasons why the occupancy agreement that [the Applicant] requested on January 15, 2020, has not yet been prepared (including email correspondence inside NHC respecting this request).”

[62] NHC has disclosed some records on this item, including four email threads and a template agreement. The Applicant is still not satisfied with the disclosure.

[63] NHC argues that it does not have to respond further to this item because reasons are not records. The Applicant argues that the reasons may be in a record, and if they are, they must be disclosed.

[64] On this item, I agree with NHC. Unlike item 3, the Applicant is here looking for records showing the reasons why something did not happen. It is notoriously difficult to compile evidence about a negative. It is not enough to posit that such records could conceivably exist. In the absence of any statutory, policy or operational reason suggesting “some basis” to believe such records exist, I am not willing to recommend a further search, over and above the search that has already been conducted.

[65] I therefore make no recommendation with respect to item 5.

Item 7

[66] Item 7 asks for information about “Reasons why the sales and purchase agreements that were sent to legal review in late May 2020 were not sent to purchasers.”

- [67] Item 7 can easily be reframed as “Records showing reasons why the sales and purchase agreements that were sent to legal review in late May 2020 were not sent to purchasers.”
- [68] NHC has disclosed two template purchase-and-sale agreements. NHC argues that it does not have to respond further to this item because it is not a request for records. The Applicant argues that the reasons may be in a record, and if they are, they must be disclosed.
- [69] My analysis for this item is similar to my analysis for item 5. The Applicant is looking for records showing reasons why something did not happen. In the absence of any statutory, policy or operational reason suggesting “some basis” to believe such records exist, I am not willing to recommend a further search.
- [70] I therefore make no recommendation with respect to item 7.

Item 8

- [71] Item 8 asks for information about “When NHC currently expects to send purchasers sales and purchase agreements, and the reasons for that timeline.”
- [72] This item can easily be reframed as “Records showing when NHC currently expects to send purchasers sales and purchase agreements, and the reasons for that timeline.”
- [73] I note in passing that the word “currently” in the request should be understood as equivalent to “as of the date of this request”. Although there are some exceptions, the typical “as-of” date for ATIPP disclosure is the date on which the ATIPP application was filed.
- [74] In its initial response, NHC wrote “Now that public health restrictions are easing in Iqaluit, NHC expects to start meeting with each purchaser in person for signing the purchase and sales agreements between the first 2 weeks of August 2021.”

- [75] The Applicant pointed out (correctly) that this response did not fully answer the question. They asked for the date the agreements would be sent out, not the date on which NHC expected the agreements would be signed. They also point out that “typically” an agreement would be sent to a purchaser “well in advance” of signing, to give the purchaser time to review the agreement.
- [76] After NHC’s initial response, there were further public health restrictions in Iqaluit. I surmise, though I have not been told explicitly by either party, that the meetings anticipated for August 2021 did not occur, and that the purchase-and-sale agreements were not signed that month.
- [77] In its disclosure package of September 13, 2021, NHC disclosed two template purchase-and-sale agreements. NHC argues that it does not have to respond further to this item because it is not a request for records. The Applicant argues that NHC’s expectations and the reasons for them may be in a record, and if they are, they must be disclosed.
- [78] This item is, I think, a good example of why the two sides became frustrated with each other. The Applicant asked a reasonable question. NHC responded with information that was helpful, but not quite a complete answer to the question. NHC says it has already gone beyond what the ATIPPA requires. NHC is trying to be practical, and believes an actual search for records is a waste of time either because the records probably do not exist, or because they would contain the same information that has already been disclosed. The Applicant, on the other hand, wants to know why the answer is not complete and why no search for records has been done.
- [79] On this item, I agree with NHC. The Applicant is here looking for information about what NHC expects to happen in future, and the reasons for that expectation. Expectations are fluid things. They may be vague or concrete. They can change day by day. Expectations, even significant ones, may be entirely in someone’s head. In the absence of any statutory, policy

or operational reason suggesting “some basis” to believe such records exist, I am not willing to recommend a further search.

[80] I am also mindful of the fact that any responsive records containing the information sought by the Applicant as of the date of the ATIPP application have been superseded by subsequent events. The original target date has come and gone. That is not, strictly speaking, a legal consideration, but it is a practical consideration when considering whether to send a public body on a search for records whose existence is at best theoretical.

[81] I therefore make no recommendation with respect to item 8.

Item 9

[82] Item 9 asks for information about “When the condo board is anticipated to take over control of the building, and the reasons for that timeline.”

[83] This item can easily be reframed as “Records showing when the condo board is anticipated to take over control of the building, and the reasons for that timeline.”

[84] In its reply submission, NHC writes “We would like to clarify that NHC as the current Condominium Board will transfer the condo corporation to the owners after the sale of 60 percent of the units as per the GN Staff Condominium Program Guidelines.”

[85] My analysis for this item is the same as item 8, and so is my conclusion. I make no recommendation with respect to item 9.

Item 10

[86] Item 10 asks for information about “The size of the reserve fund that NHC intends to establish for the condo corporations, and how the sufficiency of the reserve fund was calculated.”

- [87]** This item can easily be reframed as “Records showing the size of the reserve fund that NHC intends to establish for the condo corporations, and how the sufficiency of the reserve fund was calculated.”
- [88]** This request for records has two parts: the amount of the reserve, and the method of calculation. This is an important piece of information for a prospective condo buyer. If a reserve fund is insufficient, there is a risk of unexpected increases in monthly fees, or a special levy to make up the shortfall. That is the sort of surprise that a diligent condo buyer wants to avoid.
- [89]** NHC’s initial response was “The size of the reserve fund is calculated as a percentage of the condominium fees. The calculation is in line with standard condominium guidelines.” The Applicant argued this response was incomplete.
- [90]** In its September 13, 2021, disclosure package, NHC disclosed the condominium corporation’s By-Law No. 1. Schedule A is the corporation’s budget for the period commencing on the date of registration (which appears to be March 11, 2020) and ending on December 30, 2019. (Those dates, which are chronologically inconsistent, are taken from the document. I surmise that registration took longer than anticipated, and the budget was not revised to take into account the actual registration date.)
- [91]** NHC’s submission says that it disclosed to the Applicant a copy of the budget that set the reserve fund contributions, and adds “The record establishing the reserve fund is this budget and has been provided.” NHC adds “the ‘manner in which’ this reserve fund contribution was calculated is not a record under the Act.”
- [92]** I have carefully reviewed the budget document disclosed by NHC to the Applicant. The budget identifies nine capital items under “replacement reserves” (roof, siding, etc.), gives a figure for “cycle” (which appears to be the expected life of the capital item, in years), and an estimated

replacement figure. Then the “Annual” column shows the replacement cost divided by the number of years. The Annual column is then totalled, divided by 12 for a per-month cost, and equally divided among the 36 units. The final column is “average unit fee” per month.

- [93] I note in passing that the budget appears to have been created in a spreadsheet program, although it is of course a printed-out version that is Schedule A to the by-law. If I am correct that Schedule A was created in a spreadsheet program, the original spreadsheet exists as a record somewhere in NHC. The mathematical relationship of the columns to each other seems obvious, but whether they are or not, the formulas embedded in a spreadsheet are part of a record and should be disclosed.
- [94] I note also that the budget has three key inputs: the list of capital items, the expected life-cycle of each item, and the estimated replacement cost. If there is a material error in any of these inputs, a condo buyer might be in for an unpleasant surprise. There is no explanation in the budget of where those inputs came from. There is also no inflation factor, even for items with an expected life-cycle of thirty years. There is also no indication of when each of the capital items will first have to be replaced, given that these are not new buildings.
- [95] NHC is a sophisticated organization. It has long experience in owning and managing buildings in Nunavut. I am not suggesting that its budget calculations are wrong. To the contrary, it is reasonable to expect that a sophisticated organization like NHC will have a reasonable basis for all of its financial projections. The numbers are surely not plucked out of the air. There is therefore “some basis” for believing that somewhere in NHC there are records of where the key inputs came from. Perhaps the inputs are based on the experience of NHC employee who created the budget, and the numbers came out of that employee’s head, but NHC will not know if there are responsive records until it looks for them.
- [96] The parties have put forward arguments about what the *Condominium Act* and the Cabinet-approved Condo Program Policy say about a reserve fund.

In my view, these background documents do not assist, one way or the other, in analyzing item 10. The ATIPP request was for information and records about a specific fund.

[97] I therefore recommend for item 10 that NHC conduct a search for records containing the information sought by the Applicant. That includes records, if any, showing where the inputs came from. It also includes the spreadsheet, complete with embedded formulas, on which Schedule A is based.

Item 13

[98] Item 13 asks for information about “The month and year the utilidor lines for the building were last inspected, and the results of the inspection.”

[99] This item can easily be re-framed as “Records showing the month and year the utilidor lines for the building were last inspected, and records showing the results of the inspection.”

[100] I note in passing, primarily for non-Nunavut readers, that the word “utilidor” is short for utility corridor, and refers to a conduit containing multiple utility services such as water, sewer, electricity, and fuel. Utilidors are in common use in Arctic climates, and the word “utilidor” is a common part of the vocabulary.

[101] NHC says that the utilidor lines have not been inspected since it took possession of the building. That is only a partial answer to the Applicant’s request for information. In its written submission on this review, it added “Any such records should be in the possession of the City of Iqaluit or which ever entity is responsible for providing and maintaining the utilidor lines.” In its reply submission, NHC says it “does not have any records respecting the inspection of the utilidor lines.”

[102] The Applicant says (correctly) that NHC budget for the project indicates an amount for utilidor replacement, and “therefore, there is a part of the

utilidor that is the responsibility of the condo corporation. It is these lines that this request pertains to.”

- [103]** The Applicant wants to know, very reasonably, about inspections of the utilidor lines. NHC says it has no responsive records. Then the Applicant turns to a different question – why is there a budget item to replace something for which NHC says it is not responsible? The implication is that NHC must be responsible after all, at least for part of the utilidor, and therefore should have responsive records. Again, it is a reasonable question for a diligent purchaser to ask. But NHC has already said it does not have any utilidor inspection records.
- [104]** The Applicant is, in effect, challenging NHC’s position on ownership of the utilidor. Or perhaps it is a semantic question about where exactly the utilidor becomes a building system. These are interesting questions, and I can understand why the Applicant is pursuing them, but they are not going to be resolved under the ATIPPA.
- [105]** I accept NHC’s assertion that it has looked for records of utilidor inspections and has found none. I therefore make no recommendation for further search or disclosure by NHC with respect to this item.
- [106]** The foregoing discussion, which focused on the difference between “information” and “records”, disposes of items 3, 5, 7-10 and 13. There are two items remaining: items 6 and 18. These are both items on which NHC applied an exemption.

Item 6

- [107]** Item 6 asks for information about “The amount of occupancy fees, in aggregate, that NHC has collected from condo program participants to date (actual collections, not just billings).”
- [108]** In its initial response to the Applicant, NHC relied on s 24(1)(b)(i) to refuse disclosure:

24. (1) Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant

...

(b) financial, commercial, scientific, technical or labour relations information

(i) obtained in confidence, explicitly or implicitly, from a third party.

- [109]** NHC did not produce any records responsive to item 6. Normally when an exemption is claimed, I receive the original records from the public body. That helps to give an evidentiary basis for my decision. In this case, there are no original records for me to review. I surmise that NHC has not searched for these records, because of its position that any such records are exempt from disclosure.
- [110]** NHC's argument on the s 24(1)(b)(i) exemption is not easy to follow, but it appears to be that the condominium corporation (which it wholly controlled) is a third party whose financial information was obtained in confidence by NHC. NHC added that this information would be made available to the condominium corporation members once control of the corporation passed from NHC to the unit owners.
- [111]** In its reply submission on this review, NHC no longer relied on s 24(1)(b)(i), citing instead s 17. That was probably wise, since I think it unlikely that section 24(1)(b)(i) could properly be applied to this item.
- [112]** Before proceeding further, I will deal with the Applicant's objection to the fact that NHC has switched the statutory basis for the exemption.
- [113]** A public body is entitled to apply any applicable exemption. Indeed, if an exemption is mandatory (e.g. section 23), the public body is required to apply it. A public body's analysis of an application may evolve over time, perhaps after receiving legal advice, or simply having thought the matter through in more detail. That may lead to claiming a new exemption, switching the basis for an exemption, or withdrawing a previously-claimed exemption. Changing the basis of an exemption is not a reason to disallow

the exemption. In this case, the Applicant had adequate notice of the new exemption claimed by NHC and a fair opportunity to respond. In my view, that is sufficient.

[114] I now turn back to section 17. It is useful to reproduce NHC's argument in full (letter of August 30, 2021, page 9):

This information is exempt from disclosure under section 17 as it constitutes confidential financial information the disclosure of which would cause competitive harm to NHC. Owners will be entitled to see the financials once the condominium corporation is transferred to the owners. Non-owners will not have access to these financials. Condo fees may vary and increase, sometimes substantially, especially in the years right after turnover.

[115] Section 17 is a long section. It appears to me that NHC is referring specifically to s 17(1)(c), the relevant parts of which read as follows:

17. (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the economic interest of ... a public body ... , including the following:

...

- (c) information the disclosure of which could reasonably be expected to
 - (i) result in financial loss to,
 - (ii) prejudice the competitive position of, or
 - (iii) interfere with contractual or other negotiations of,... a public body;

[116] Section 17(1) permits an exemption where the information in a record "could reasonably be expected to harm" NHC's economic interests. This phrase is used extensively in the ATIPPA and indeed in freedom of information legislation across Canada, and has been part of Canadian access law for a long time. It has been interpreted by courts up to and including the Supreme Court of Canada.

[117] In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), [2014] 1 SCR 674, at paragraph 54, the Supreme Court found that "reasonable

expectation” stakes out a middle ground between the possible and the probable:

This Court in *Merck Frosst* adopted the “reasonable expectation of probable harm” formulation and it should be used wherever the “could reasonably be expected to” language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”: *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40.

[118] In this case, NHC has offered no evidence or argument as to how section 17(1)(c) applies to information requested by the Applicant. What is the harm? Where is the competition? How could disclosure of the occupancy fees collected create a reasonable expectation of prejudice to NHC’s competitive position? In the absence of evidence, it goes without saying that NHC has not provided evidence “well beyond” or “considerably above” a mere possibility of harm. The onus is on NHC: ATIPPA, s 33(1). It has not discharged the onus.

[119] I therefore recommend that the information sought by the Applicant under item 6 be disclosed. Since I have not seen the responsive records, I do not know what they consist of, but due to financial administration rules we can be certain that responsive records exist somewhere within NHC.

Item 18

[120] Item 18 asks for “information respecting the construction or state of the building that was provided to NHC by the developer”.

[121] NHC has disclosed some documents to the Applicant, with redactions. The Applicant challenges only the redaction of information that NHC says is

confidential financial information of NHC, “the disclosure of which would reasonably be expected to harm the economic interest of NHC (i.e. disclosure of estimated plumbing replacement costing).”

- [122] Although NHC does not cite a section number, I assume this is another reference to s 17(1)(c), which I have quoted and analyzed in the preceding section on item 6. The same analysis applies to the exemption claimed for item 18.
- [123] In this case, I have had the advantage of seeing the original document. The document in question is an unsigned memo dated February 12, 2016. It is titled “Re: Brookfield Iqaluit Residential Portfolio Technical Review” and is, in general terms, a summary of technical issues for a portfolio of five buildings, including the two buildings involved in the condominium development.
- [124] NHC has redacted information about the non-condo buildings, the names of the third-party employees, and certain statements made by the third party’s employees. The Applicant does not take issue with those redactions.
- [125] In passing, I will say I am puzzled why the employee statements are redacted. NHC says they are “assumptions”, but there is no exemption in the Act for assumptions. These assumptions may be right or wrong, but they are what they are. Normally I would recommend disclosure. But the Applicant does not take issue with these redactions so I will not belabour the point.
- [126] In this case, NHC has offered no evidence or argument as to why section 17(1)(c) applies to the plumbing replacement estimate. Therefore it goes without saying that NHC has not provided evidence “well beyond” or “considerably above” a mere possibility of harm. The onus is on NHC: ATIPPA, s 33(1). It has not discharged the onus.
- [127] Even if it were useful to speculate, I cannot imagine what economic interest of NHC could reasonably be expected to be harmed by disclosure

of the plumbing replacement estimates. The record in question is nearly six years old. The redacted numbers are a ballpark estimate by a third party. NHC has confirmed, in a different part of its response to the Applicant, that all Kitec plumbing was removed before NHC took possession of the buildings.

[128] I therefore recommend for item 18 that the information withheld from the Applicant under s 17 be disclosed.

Failure to exercise discretion

[129] There is one last legal issue that must be mentioned: the failure to exercise discretion.

[130] Some exemptions in the ATIPPA are discretionary. They contain the words “may refuse to disclose”. When an exemption is discretionary, that means the public body can choose to release the information even if the conditions for exemption have been met. The public body has a duty to “actively exercise” its discretion: *Department of Health (Re)*, 2021 NUIPC 12 (CanLII) at paragraph 15. To apply an exemption, it is not enough simply to cite a section of the ATIPPA. If discretion is not actively exercised, then a public body is turning a discretionary exemption (“may refuse to disclose”) into a mandatory exemption (“shall refuse to disclose”) by administrative policy. That is a legal error. I have made this point repeatedly in previous Review Reports, and in my 2020-21 Annual Report to the Legislative Assembly.

[131] In this case, NHC has failed to actively exercise its discretion for items 6 and 18. Although I have found that the exemptions do not apply, NHC is not required to accept that finding. If it does not, then it should at least exercise its discretion, and consider explicitly whether to release the information anyway.

Conclusion

- [132] NHC has a duty to assist the Applicant by reframing the ATIPP application as a request for records.
- [133] NHC did not conduct an adequate search for the information requested by the Applicant in items 3 and 10. It is not required to conduct any search, or any further search, for the information requested in items 5, 7, 8, 9 and 13.
- [134] For items 6 and 18, NHC did not correctly apply the exemption in s 17.
- [135] For items 6 and 18, NHC did not exercise its discretion with respect to the information it withheld.

Recommendations

- [136] For items 3 and 10, I recommend NHC search for records responsive to the Applicant's request for information. If responsive records are found, they should be disclosed to the Applicant.
- [137] For items 5, 7, 8, 9 and 13, I make no recommendations.
- [138] For items 6 and 18, I recommend NHC disclose the information withheld under s 17.
- [139] If NHC does not accept the recommendation in the preceding paragraph, I recommend that it should at least exercise its discretion as to whether the information withheld under s 17 should be disclosed.

Graham Steele

ᑲᑦᑦᑦ / Commissioner / Kamisina / Commissaire