

**NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER
Review Report 20-219**

Review File 19 117-4
March 27, 2020
Citation: 2020 NTIPC 12

BACKGROUND

The Applicant made a request for records related to his own personal information held by the Government of the Northwest Territories (GNWT) Department of Finance. More specifically, the Applicant requested records about himself related to a labour dispute.

The Applicant was provided with a large volume of records. However, a significant number of the records were withheld or partially withheld pursuant to sections 14(1)(a), 22 and 23(1) of the *Access to Information and Protection of Privacy Act* (ATIPPA).

The Applicant sought a review of the response he received pursuant to section 28 of the Act.

RELEVANT SECTIONS OF THE LEGISLATION

1. The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
 - (a) giving the public a right of access to records held by public bodies;
 - (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves held by public bodies;

- 9.(1) Subject to subsection (2), the applicant must be told, in a response under subsection 8(1),....
- (c) if access to the record or to part of the record is refused
 - (i) the reasons for the refusal and the provision of this Act on which the refusal is based,
- 14.(1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal
- (a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council;
22. The head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material compiled solely for the purpose of determining the applicant's suitability, eligibility or qualifications for employment or for the awarding of government contracts or other benefits when the information has been provided to the public body, explicitly or implicitly, in confidence.
- 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
- 28.(1) A person who makes a request to the head of a public body for access to a record or for correction of personal information may ask the Information and Privacy Commissioner to review any decision, act or failure to act of the head that relates to that request.

33.(1) On a review of a decision to refuse an applicant access to all or part of a record, the onus is on the head of the public body to establish that the applicant has no right of access to the record or part.

ISSUES

This review raised the following issues:

1. Was section 14(1)(a) properly applied to the responsive records?
2. Was section 22 properly applied to the responsive records?
3. Was section 23(1) properly applied to the responsive records?

DISCUSSION / RECOMMENDATIONS

Before I begin, I note that the Applicant has not asked our office to review all of the information withheld. He has identified and addressed only certain records and this report addresses only those records. If a record is not discussed, therefore, it is because there has been nothing withheld from the record or the Applicant has not identified that record as one he takes issues with.

1. Was section 14(1)(a) properly applied to the responsive records?

The Department of Finance has relied heavily on section 14(1)(a) to withhold information in the responsive records. This subsection allows the public body discretion to refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council.

The Department of Finance's Submissions

The Department of Finance's position with respect to this section is that section 14(1)(a) is a discretionary exception intended to maintain candor in the giving of advice, recommendations and related analytical alternatives for potential courses of action. They explained that the majority of the records where this exception was applied were in relation to the analysis and recommendations of labour relations analysts along with deliberations amongst officials in relation to this matter.

In looking at the application of this exception, the Department of Finance said it asked itself three questions. First, it asked whether the information requested qualified as an exception under the Act. The Department of Finance said that all the information redacted pursuant to section 14(1)(a) did meet the criteria for an exception to disclosure as outlined in the section. They submitted that the analysis and recommendations identified within the records was "clearly" advisory information, meant to assist Department of Finance officials in moving forward in investigating the matter and to provide advice in relation to employees.

Second, the Department asked itself whether the disclosure of the information would reasonably be expected to reveal the particular class of information involved. Again, they answered this question positively. They said that on a review of the analysis and recommendations related to the provision of labour relations information, they believed that disclosure of information that was advisory in nature would affect responses provided by labour relations analysts who are involved with the provision of frank advice and analysis to senior management in relation to personnel investigations and matters. They thought that the result of this would be that the Department would receive less candid and frank responses in the future, if disclosed.

Finally, the Department of Finance asked itself whether it should exercise its discretion to disclose or not disclose the requested records. In response, they said that in review of this matter, they determined that the provision of this advice from labour relations analysts must be protected in order to ensure the provision of frank and candid advice in the future.

The Applicant's Submissions

The Applicant helpfully set out fulsome submissions in the course of this review.

With respect to section 14(1)(a), the Applicant noted that it is a discretionary exemption and therefore a two-step process must be undertaken by a public body in relying on its application. The two step process is as follows:

1. The public body must establish that the information in question meets the criteria for the exception; and
2. If the answer to #1 above is "yes", then the public body must exercise its discretion and make a decision as to whether or not to disclose, based on all the relevant factors, including the public interest.

The Applicant referenced this office's decision in Review Report, 2018 NTIPC 1 with respect to paragraph 14(1)(b) of the ATIPP Act and which, he argued was equally applicable to all discretionary provisions of the legislation:

Because section 1 of the Act provides that access to information is a "right", the default position should always be disclosure. A refusal to disclose information pursuant to a discretionary exemption should only occur when there are good, considered reasons for the non-disclosure.

The Applicant referred to several orders of the Alberta Privacy Commissioner dealing with the equivalent section of Alberta's *Freedom of Information and Protection of Privacy Act* ("FOIPPA") (i.e., s. 24(1)(a)), where it has been stated that the "advice, proposals, recommendations, analyses or policy options" provision requires that the information in question:

1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
2. be directed toward taking an action,
3. be made to someone who can take or implement the action.

In Alberta Order F2013 13, the adjudicator stated that the third arm of the above test should be restated as "created for the benefit of someone who can take or implement the action".

Further, the Applicant said, it was stated by the Alberta Privacy Commissioner that the equivalent section to section 14(1)(a) of the ATIPP Act applies only to the records (or parts thereof) that reveal substantive information about which advice was sought. The section does not, however, justify the non-disclosure of a decision itself.

In Order F2004 026, former Commissioner Work clarified the scope of FOIPPA subsection 24(1) (including 24(1)(a) and (b)) as follows:

In my view, section 24(1) does not generally apply to records or parts of records that in themselves reveal only any of the following: that advice was sought or given, or that consultations or deliberations took place; that particular persons were involved in the seeking or giving of advice, or in consultations or deliberations; that advice was sought or given on a particular topic, or consultations or deliberations on a particular topic took

place; that advice was sought or given or consultations or deliberations took place at a particular time. There may be cases where some of the foregoing items reveal the content of the advice. However, that must be demonstrated for every case for which it is claimed.

Regarding factual information, including opinions about factual situations, the adjudicator in Alberta Order F2012 10 found the following commencing at paragraph 44:

That an employee offers an opinion regarding a factual situation does not, in and of itself, support a finding that the information is subject to either section 24(1)(a) or (b). Recently, in Order F2012 06, I rejected the argument that an objective evaluation or assessment of factual information constitutes information that is subject to section 24(1)(a), if that information reveals only a state of affairs, rather than advice or analysis directed at taking an action.

Similarly, in Order 97 007, former Commissioner Clark rejected the argument that a collection of facts, without evidence that the facts were collected and presented in order to influence a decision, is subject to section 24(1)(a).

Upon reviewing the briefing notes, I note that there is no reference to a possible course of action for the Minister. In short, the briefing notes appear to be a narration or a status report. The authors of the briefing notes were not advising the Minister as to what he should do or not do, nor were they providing an analyses of the events using their expertise. "Analyses" is defined in the Concise Oxford Dictionary, 9th edition, (New York: Oxford, 1995) as:

a detailed examination of the elements or structure of a substance etc.; a statement of the result of this.

While there is some discretion exercised in choosing which facts are gathered, without more, a compilation of facts is not an [analysis].

Gathering pertinent factual information is only the first step that forms the basis of an [analysis]. It is also the common thread of "advice, proposals, recommendations, or policy options" because they all require, as a base, a compilation of pertinent facts.

In Order 96 012, I stated that I took section 23(1)(a) to contemplate the protection of information generated during the decision making process.

In sum, the Applicant argued, a public body may, pursuant to section 14(1)(a) of ATIPPA, refuse to disclose to an applicant information where the disclosure could reasonably be expected to reveal:

- substantive information about which advice was sought; or
- an analysis directed at taking an action.

However, a public body must not refuse to disclose the following information pursuant to section 14(1)(a):

- records or parts of records that in themselves reveal only that
 - advice was sought or given;
 - particular persons were involved in the seeking or giving of advice;
 - advice was sought or given on a particular topic or at a particular time
- objective evaluations or assessments of factual information if that information reveals only a state of affairs;
- a collection of facts, without evidence that the facts were collected and presented in order to influence a decision;
- a narration or a status report;
- a decision

In addition, the Applicant submitted that in order for section 14(1)(a) to apply, the advice, proposals, recommendations, analyses or policy options must:

- (i) be sought or expected, or be part of the responsibility of a person by virtue of that person's position;
- (ii) be directed toward taking an action;
- (iii) be created for the benefit of someone who can take or implement the action.

As is evident from the above, the Applicant submitted that the type of information that falls within section 14(1)(a) is narrow. In addition, he said, the Department offered no good, considered reasons for the non-disclosure.

Findings and Recommendations with Respect to Section 14(1)(a)

I thank the Applicant for setting out the appropriate tests and case law. Overall, I have accepted in many previous reviews that the criteria noted above as being necessary to bring section 14(1)(a) into play the information must:

1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
2. be directed toward taking an action,
3. be made to someone who can take or implement the action.

Before going further, I would address the Department of Finance's submissions with respect to the issue of the exercise of discretion as I do not agree with much of their reasoning. Here, the Department appeared to have exercised its discretion to refuse disclosure in every instance in which they found that the information met the criteria for the exception. It is not, however, sufficient to identify the information as meeting the

necessary criteria and apply a blanket decision to refuse disclosure. Each item redacted must be individually assessed and dealt with.

The Department of Finance said that this section is meant to maintain candor in the giving of advice, recommendations and related analytical alternatives and that the provision of labour relations analyst advice must be protected in order to ensure that provision of frank and candid advice in future. They asserted, without supporting evidence or background material, that if the information in question was disclosed, departmental staff dealing with personnel matters would receive less candid and frank responses from labour relations specialists in the future. With respect, I disagree. Saying that disclosing this information would prevent full and candid advice in the future is nothing more than speculation. As I have said in previous reviews, I do not accept that the disclosure of advice received from labor relations advisors will inevitably affect the advice given in the future. These employees are paid to give expert advice and guidance and, except in rare circumstances, their advice should be as open to scrutiny as any other employee's. Thus, advice as to process, for instance, should rarely, if ever, be withheld.

The Act requires the public body to consider ALL relevant circumstances in exercising its discretion to refuse disclosure and for each item withheld. To do this, the Department must weigh both reasons for withholding the information as well as reasons for disclosure, starting with the fact that access to information is a **right** and is the default position in ATIPPA, as set out in section 1. Part of the consideration should also be whether the information relates directly to the Applicant and whether the disclosure "is relevant to a fair determination of the applicant's rights" (section 23(3)(c)). What would the specific harm be in disclosing the information? What would be the benefits? Has the Applicant already seen the documents or written them himself? Would the Applicant be entitled to receive the records in another forum (i.e. in a grievance proceeding or a court action) in un-redacted form? Is this a discussion about substantive issues, or only about

logistics and/or process? Every item redacted pursuant to a discretionary exception must be individually assessed and, where the decision is to refuse disclosure, the public body must be in a position to explain the factors considered in making that decision for that item redacted. Clearly, that was not done here.

I therefore **recommend** that for each of the items for which there is a finding below that the redacted information meets the criteria for an exception pursuant to section 14(1)(a), the department actively exercise its discretion for each item individually and provide the Applicant with the specific reasons for their decision to withhold access where that continues to be the decision.

Given the volume of the redactions made, I will go through each redaction questioned by the Applicant on a page by page basis.

64651524 - This record does not appear to have been provided to my office in an un-redacted version so it is impossible to assess whether section 14(1)(a) has been appropriately applied. The onus to establish that an applicant does not have the right to access any particular record lies with the public body. They have not met that onus in this case and I therefore **recommend** that the redacted portion of this document be disclosed.

64654325 - Again, this record does not appear to have been provided to my office in an un-redacted version so it is impossible to assess whether section 14(1)(a) has been appropriately applied. As the onus to establish that an applicant does not have the right to access any particular record and they have not met that onus in this case, I **recommend** that the redacted portion of this document be disclosed.

64655590 - This is a long record, containing 54 pages. On page 2, in an email dated August 24, 2017 (5:31 pm) a paragraph has been redacted. It is unclear on the face of

the document who the parties to the conversation are, which is relevant to the analysis. The sender is currently listed on the GNWT website as working with the Department of Finance, Labour Relations Division. The primary recipient appears to be an official with the department with whom the Applicant was employed. The information redacted is in relation to an assessment of issues in relation to the Applicant and includes analyses, advice and proposals. I am satisfied that it meets the criteria for redaction pursuant to section 14(1)(a) based on the face of the record.

On page 9 of the record, most of the first paragraph and all of the second paragraph of an email dated September 6, 2017, 10:38 am has been withheld. Looking at the first paragraph, it seems to me that everything in this email, with the exception of the six words at the beginning of the fourth line are statements of fact or reasons why certain steps cannot be taken. It appears to be an explanation of existing policy. The six words at the beginning of the fourth line contain a clear recommendations and these words meet the criteria for an exception pursuant to section 14(1)(a). I **recommend** that the balance of this paragraph be disclosed.

The first four sentences of the second paragraph outline the current factual situation. They contain no advice, recommendations, analysis or other attributes that would bring them within section 14(1)(a). I **recommend** that these sentences be disclosed. The balance of this paragraph does, however, contain advice, analysis and recommendations and meets the criteria for an exception pursuant to section 14(1)(a).

The first paragraph in an email dated December 4, 2017, 12:09 pm, on page 15 of the record has been redacted in full. This paragraph is in the nature of a briefing or update with respect to the current state of affairs. It contains no recommendations, advice or analysis and does not meet the criteria for a section 14(1)(a) exception. I **recommend** this paragraph be disclosed.

On page 16, in an email dated January 19, 2018, 11:42 am, the entire email, but for the greeting and the salutation, has been redacted. The first paragraph redacted does contain advice, analysis and recommendations and meets the criteria for an exception under section 14(1)(a). The second paragraph, however is simply a direction with respect to next steps. There is no advice or analysis involved. I **recommend** this paragraph be disclosed.

At the end of this page and continuing on page 17, in an email dated January 19, 2018, 11:32 am, the second full paragraph of the email has been redacted. The first sentence is a statement of fact and does not meet the criteria for an exception pursuant to section 14(1)(a). I **recommend** it be disclosed. The balance of this paragraph, however, does contain advice, analysis and recommendations and it does, therefore, meet the criteria for an exception pursuant to section 14(1)(a).

In an email which begins on page 40 and continues on page 41 (June 19, 2018, 7:52 am), the public body has redacted the entire body of the email. The first three paragraphs constitute a recitation of facts and do not contain any recommendations, analysis or advice. I **recommend** that these paragraphs be disclosed. The same holds true for the first three sentences of paragraph 4, and I **recommend** that these too, be disclosed. The balance of this paragraph does contain advice, analysis and recommendations and does, therefore meet the criteria for an exception pursuant to section 14(1)(a). The final paragraph once again contains statements of fact that do not involve analysis or recommendations and I **recommend** it be disclosed.

On page 53, in an email dated June 26, 2018, 8:44 am, the body of the email has been redacted. It contains none of the elements that would qualify it for an exception pursuant to section 14(1)(a) and I **recommend** it be disclosed.

64656292 - This record does not appear to have been provided to my office in an un-redacted version so it is impossible to assess whether section 14(1)(a) has been appropriately applied. The onus to establish that an applicant does not have the right to access any particular record lies with the public body. They have not met that onus so in this case and I therefore **recommend** that the portion of this record redacted pursuant to section 14(1)(a) be disclosed.

64656383 - While the Applicant has listed this as one of the records from which information was redacted pursuant to section 14(1)(a), the Department has only section 23(1) listed as a reason for non-disclosure in this record. I did receive a "redacted" and an "un-redacted" copy of this record, but both were partially redacted, one more than the other. To the extent that the Department has relied on section 14(1)(a) for any of the redactions in this record, I **recommend** that the information be disclosed, as they have not met the onus of establishing that the exception applies.

64656408 - There are two documents with this number on them. Both are hand written meeting notes and both have been provided to my office in redacted form only. Again, while the Applicant has listed this as one of the records from which information was redacted pursuant to section 14(1)(a), the Department has only section 23(1) listed as a reason for non-disclosure in this record. To the extent that the Department has relied on section 14(1)(a) for any of the redactions in this record, I **recommend** that the information be disclosed, as they have not met the onus of establishing that the exception applies.

64656611 - This record contains 61 pages in total. The first item redacted pursuant to section 14(1)(a) is on page 24 in an email dated June 15, 2017, 1:48pm. The information redacted is factual in nature, outlining something that has happened and something the writer is going to do. There is nothing in the email that qualifies it for an exception pursuant to section 14(1)(a) and I **recommend** it be disclosed.

The next item redacted is on page 29 in an email dated June 26, 2017, 12:03 pm. I am satisfied that the information redacted from this email does meet the criteria for an exception pursuant to section 14(1)(a).

Page 30 contains an email dated June 19, 2017, 3:30 pm from which the first paragraph of the body of the email has been withheld. There is nothing in this paragraph that qualifies it for an exception to disclosure pursuant to section 14(1)(a) and I **recommend** that it be disclosed.

Most of the body of an email that starts on page 44 and continues on page 45 (July 14, 2017, 11:34 am) has been redacted. The information in the email is factual, setting out facts about the Applicant and things that have happened. There is nothing in this email that meets the criteria for an exception pursuant to section 14(1)(a) and I **recommend** that the redacted paragraphs be disclosed.

Most of the body of an email dated July 19, 2017, 10:56 am on page 50 of this record has been withheld. The first paragraph contains only statements of fact and policy reasons as to why certain steps cannot be taken. There is nothing in the paragraph that qualifies it for an exception to disclosure pursuant to section 14(1)(a). I **recommend** that this paragraph be disclosed. The balance of the email does meet the criteria for an exception pursuant to section 14(1)(a).

On page 51, most of the body of the email dated July 18, 2017, 8:30 am, has been redacted. The first paragraph contains factual information about the Applicant's situation and a conclusion about how it will affect him. I therefore **recommend** that it be disclosed. The second paragraph asks a question about a possible step that might be taken. It does not amount to analysis or recommendations and does not, therefore, meet the criteria for a section 14(1)(a) exception. I **recommend** it be disclosed.

64657177 - This record does not appear to have been provided to my office in an un-redacted version so it is impossible to assess whether section 14(1)(a) has been appropriately applied if at all. It appears from the redacted version that most, if not all, of the information withheld has been withheld pursuant to section 23 (discussed below). That said, the onus to establish that an applicant does not have the right to access any particular record lies with the public body and, insofar as section 14(1)(a) is concerned, they have not done so with respect to this record. I therefore **recommend** that any portion of this record redacted pursuant to section 14(1)(a) be disclosed.

64657183 - This record does not appear to have been provided to my office in an un-redacted version so it is, again, impossible to assess whether section 14(1)(a) has been appropriately applied. I therefore **recommend** that any portion of this record redacted pursuant to section 14(1)(a) be disclosed.

64657277 - The public body indicates that the only redactions from this 36 page record have been done pursuant to section 23. There is, however, an email on page 12 (February 6, 2017, 2:05 pm) which does not in any way engage section 23. It asks a question and makes a statement. I am assuming, therefore, that it has been redacted pursuant to section 14(1)(a). It does not, however, meet the criteria and I therefore **recommend** that it be disclosed.

Similarly, there is an email on page 24 (April 25, 2017, 4:17 pm) from which most of the first and all of the second paragraphs have been withheld. I am assuming (it is not clear from the Department's submissions) that they are relying on Section 14(1)(a) for this exclusion. The information withheld, however, is factual - a report to another employee about a meeting held with the Applicant and suggestions made to the Applicant in that meeting. There is nothing in the way of analysis or recommendations. I **recommend** that these paragraphs be disclosed. In another email on the same page (April 25, 2017, 9:53 am) the entire body of the email has been redacted. I am satisfied that the

information redacted from this email does meet the criteria for an exception pursuant to section 14(1)(a).

Also, page 26 of this record includes an email dated April 6, 2017, 5:59 pm, from which the first paragraph has been redacted. The first two sentences of that email contain nothing that would bring them under section 14(1)(a) and I **recommend** that these sentences be disclosed. The next sentence appears to contain advice or recommendations and therefore meets the criteria for a section 14(1)(a) exception. The last sentence of this paragraph simply asks for confirmation as to facts and I **recommend** it be disclosed.

On page 31 one paragraph in an email dated May 02, 2017, 4:38 has been redacted, again apparently pursuant to section 14(1)(a). It contains instructions for reviewing a document. There is nothing in the email that would reveal the substance of a advice or recommendations given. I **recommend** that this paragraph be disclosed.

Much of an email on page 33 (May 2, 2017, 12:14 pm) has been redacted, again apparently pursuant to section 14(1)(a). With the exception of the first two sentences of the email, I am satisfied that the balance of this email fits the criteria under section 14(1)(a). I **recommend** that the first two sentences be disclosed.

Page 34 contains emails discussed above as part of page 24 (April 25, 2017, 4:17 pm and April 25, 2017, 9:53 am) and should be treated accordingly.

The department has redacted an entire email from page 36 which was only partially redacted in an earlier version (see page 26, April 6, 2017, 5:59). I **recommend** that this version of the email be treated in accordance with the discussion above.

64877787 - The information in the email of February 06, 2017, 11:53 am is correspondence between two GNWT employees confirming information about the

Applicant. The writer is asking for clarification about factual background information about the Applicant. It does not contain any analysis, recommendations or advice and I **recommend** it be disclosed.

64877788 - The emails from which information was redacted in this record have been discussed as part of record 64656611 and should be treated accordingly.

64877789 - The emails from which information was redacted in this record have been discussed as part of record 64657277 and should be treated accordingly.

64877790 - The information redacted on this page is a description of an attachment. It is certainly not advice, proposals or recommendations and it should have been provided to the Applicant. I **recommend** that the information redacted on this page be disclosed.

64880018 - The information redacted on this email sets out a hope for clarification in the Applicant's prognosis. It is speculation about a document. It is not advice, proposals or recommendations and I **recommend** that it be disclosed.

64880019 - Two emails in this record (February 6, 2017, 2:11 pm and February 6, 2017, 2:05 pm) both also appear on page 12 of record 64657277. The redaction in the second of these has been commented on above and this email should be treated accordingly. The first of these has been more extensively redacted than it was in 64657277. There is no reason to treat it differently than it was in the previous record and I therefore **recommend** that the redaction on the second line of this email be disclosed.

64880022 - The redacted paragraph on this page is the writer's summary of the Applicant's capabilities at work. It is the writer's opinion about the Applicant and is thus the Applicant's personal information. The context of the record suggests that this

summary was at some point disclosed to the Applicant through his union representative in any event. I **recommend** that this paragraph be disclosed.

64880234 - This email chain is discussed as part of pages 50 and 51 of record 64656611 and should be treated accordingly.

64880237 - The information redacted in this record are simple requests for information and/or updates. Section 14(1)(a) does not apply and I **recommend** this record be disclosed without edits.

64880330 - The Department of Finance redacted information in the email of February 22, 2018, 11:20 am pursuant to section 14(1)(a). The first redacted paragraph sets out an analysis that I am satisfied meets the criteria for an exception pursuant to section 14(1)(a). However the remainder of the redacted information is factual information about the Applicant. I **recommend** it be disclosed. There is also information redacted from an email dated February 21, 2018, 2:12 pm. This information is in the nature of advice or recommendations and I am satisfied that section 14(1)(a) applies.

64880767 - The information on this page sets out analyses by a Labour Relations Specialist with regards to the Applicant and in comparison with a precedent. I am satisfied that it meets the criteria for an exception pursuant to section 14(1)(a).

64880965 - This record is a duplicate of the emails discussed at pages 16 and 17 of record 64655590 and should be treated accordingly.

64880969 - This is an email from a lawyer advising the Labour Relations specialist on how to proceed with respect to legal proceedings related to the Applicant. It is advice and I am satisfied that it meets the criteria for an exception pursuant to section 14(1)(a).

While not claimed by the department, it might also qualify for an exception pursuant to section 15.

64881284 - The redacted email on this page was discussed in connection with record 64655590 at page 2 and should be treated accordingly.

64882059 - The redacted information in the email of July 5, 2018, 10:46 am sets out a request about process regarding communication in the grievance process. It is directive in nature. It does not contain analysis or advice. I **recommend** it be disclosed to the Applicant.

64882064 - The information redacted from this page is factual and should not have been withheld. I **recommend** it be disclosed.

64882065 - The information redacted from this record has been largely disclosed via record 64656611, pages 52 through 54. There is, therefore, no valid reason to withhold it in this iteration. I **recommend** that the portions redacted pursuant to section 14(1)(a) in this record be disclosed accordingly.

64883655 - The information redacted from this record has been largely disclosed via record 64656611, pages 33 through 36. There is, therefore, no valid reason to withhold it in this iteration. I **recommend** that the portions redacted pursuant to section 14(1)(a) in this record be disclosed accordingly.

64883657 - The redacted email on this page was discussed in connection with record 64655590 at page 9 and should be treated accordingly.

64883659 - The redacted emails on this page were discussed in connection with record 64657277 at page 24 and 26 and should be treated accordingly.

65098544 - The document from which information has been redacted from this record was also a part of 64880767. The same considerations apply and the record should be treated accordingly.

65098547 - The information redacted from the email dated May 11, 2017, 2:00 pm is instructions related to the approval of time entries for the Applicant. It is instructive in nature and not analyses or recommendations. I **recommend** it be disclosed to the Applicant.

In the emails of May 9, 2017, 9:18 am, May 4, 2017, 2:06 pm, and May 4, 2017, 1:35 pm, the information redacted is background information on instructions already given in the past or a simple question about the approval of a time entry. It is factual information and does not meet the required criteria for an exception. I **recommend** these emails be disclosed.

65098549 - The redacted email on this page was discussed in connection with record 64657277 at page 26 and should be treated accordingly.

65098557 - Information has been redacted from an email dated July 11, 2017, 5:19 pm which is a summary of meetings and options presented to the Applicant. It is factual and does not contain any advice or recommendations. I **recommend** it be disclosed.

Redactions have also been made to the email dated July 11, 2017, 2:26 pm. The information redacted from this email makes a statement, and asks for background information. There are no recommendations or advice. I **recommend** it be disclosed.

65098619 - Three emails have been redacted in this record. In the first one, dated September 20, 2016, 2:06 pm, a discussion about an employee's (not the Applicant) leave is being discussed. I am assuming, therefore that this was withheld pursuant to

section 23. I will address it in that discussion. This applies to the information in the emails of September 20th, 2016, 1:48 pm and September 20th, 2016, 10:22 am as well.

65098620 - The entire body of an email dated September 22nd, 2016, 4:45 pm has been redacted from this record. The email sets out a summary of information regarding a meeting the writer had with the Applicant. It is factual information. While there is a single question about process, the fact that a question has been asked does not, in itself, meet the criteria for an exception pursuant to section 14(1)(a). I **recommend** this email be disclosed.

65098673 - The information redacted from the email dated January 30th, 2017, 11:40 am is factual information about the status of the Applicant's grievance. I **recommend** it be disclosed.

65098680 - In an email dated June 26, 2017, 12:03 pm, information has been redacted that outlines a proposed course of action and the reasoning behind it. It asks for comments on the proposed course of action. I am satisfied that it meets the criteria for an exception pursuant to section 14(1)(a).

65098772 - The email dated May 4, 2017, 1:35 pm was discussed in relation to record 65098547. The same considerations apply and the record should be treated accordingly. The material redacted from the email dated May 4, 2017, 1:39 pm is simply an answer to a question about process. I **recommend** it be disclosed.

65098980 - The entire body of an email dated May 2, 2017, 12:14 pm has been redacted. This email sets out background information related to the giving of advice. It sets out proposals and analyses. I am satisfied that it meets the criteria for an exception pursuant to section 14(1)(a).

The emails dated April 25, 2017, 4:17 pm, April 25, 2017, 9:53 am and April 6, 2017, 5:59 pm have all been discussed in the context of record 64657277 and should be treated accordingly.

65099171 - In the email dated September 7, 2016, 8:07 am, the first sentence is simply background information on process. I **recommend** it be disclosed. However the second sentence is a recommendation from a Labour Relations specialist and I am satisfied that it meets the criteria for an exception pursuant to section 14(1)(a).

Information redacted from the email dated September 6th, 4:18 pm is in the nature of a briefing about the current state of affairs in regard to the Applicant and a request for advice. A request for advice, on its own, does not meet the criteria for an exception pursuant to section 14(1)(a). I **recommend** that this email be disclosed.

65099199 - The emails from which information has been redacted from this record are the same as those discussed as part of 65098980. The same considerations apply and the record should be treated accordingly.

65099293 - The public body has not provided this office with a clean copy of this record. It appears, however, that the redacted email also appears in record 65126524 discussed below and I do have a clean copy of that record. The information redacted from the email dated November 10th, 2016, 12:02 pm should be treated in accordance with the recommendations with respect to that record.

65099305 - The email from which information has been redacted in this record was discussed as part of 65098673. The same considerations apply and the record should be treated accordingly. I note that more information was redacted on this copy of the email than was redacted on 65098673. This copy of the record was more heavily

redacted than it was in the previous record. Any information already disclosed in the previous iteration should, of course, also be disclosed here.

65099320 - The email from which information has been redacted from this record (July 11, 2017, 5:20 pm) is the same as the one discussed as part of record 65098557. The only difference is the time of the email (5:20 in this record and 5:19:47 in the previously discussed version). It is, however, the same email, with the same information and involving all the same employees. This email should be treated in accordance with my recommendations for the previous version.

65099322 - The information redacted is information about the internal process of filing a grievance. It contains analysis and instructions about taking certain action. I am satisfied that it meets the criteria for an exception pursuant to section 14(1)(a).

65124272 - Nothing in this record appears to have been redacted pursuant to section 14(1)(a).

65125309 - This office did not receive any record with this number on it, in either an original or redacted format, nor does the file number appear in the Department's index of responsive records. I **recommend** that the Department locate this record and disclose it to the Applicant with any applicable exceptions applied. Should the Applicant seek a review of this record, he will have leave to do so in accordance with section 28 of the ATIPP Act.

65125668 - There are two emails in this record which have been partially or wholly redacted. The first is an email dated January 30, 2018, 10:32 am in which information about process and speculation about why something was done is voiced has been withheld. It does not contain advice, recommendations or analysis. I **recommend** it be disclosed. The second (January 30, 2018, 9:53 am) contains a simple inquiry about why a particular step had been taken. I **recommend** it be disclosed.

65125669 - The information redacted in this record has all been discussed in record 64655590, pages 16 and 17 and this record should be treated accordingly.

65125696 - The first email from which information has been redacted from this record (September 7, 2016, 8:39 am) is the same as the one discussed as part of record 65099171. The only difference is the time of the email (5:39 in this record and 5:40 in the previously discussed version). It is, however, the same email, with the same information and involving all the same employees. This email should be treated in accordance with my recommendations for the previous version. This copy of the record was more heavily redacted than it was in the previous record. Any information already disclosed in the previous iteration should, of course, also be disclosed here.

Similarly, the emails of September 7, 2016, 8:07 and September 6, 2016, 4:18 pm were discussed as part of record 65099171. The same considerations apply and the record should be treated accordingly.

65125698 - The emails dated April 25, 2017, 4:17 pm, April 25, 2017, 9:53 am and April 6, 2017, 5:59 pm have all been discussed in the context of record 64657277 and should be treated accordingly. I note that with respect to the last of these, the redactions in this version are different than in previous versions. For the sake of clarity, anything that has been disclosed as part of any version of this, or any other email record, should be disclosed in all copies or iterations of that email.

65125701 - Part of this record appears to have been redacted pursuant to section 23 as it relates to a third party's situation and contains sensitive personal information about that person. I will address that portion of this record below. With the exception of the first sentence, the first paragraph of the email dated January 11, 2017, 11:52 am discusses a proposed course of action and contains a recommendation. I am satisfied that it meets the criteria for an exception pursuant to section 14(1)(a). I **recommend**,

however, that the first sentence be disclosed. The first two lines of the paragraph redacted from the email dated January 6, 2017, 9:25 am simply ask for a clarification of next steps. These lines contain no elements required for an exception pursuant to section 14(1)(a) and I **recommend** they be disclosed.

65126082 - The redacted emails dated January 18, 2018, 11:42 am, and January 19, 2018, 11:32 am, are copies of emails contained in record 64655590 discussed above. The same considerations apply and the records should be treated accordingly.

Information has been redacted from two emails (January 18, 2018, 1:46 pm and January 18, 2018, 1:21 pm), both of which were included as part of record 64655590 without edits (pages 18 and 19). As noted above, anything that has been disclosed as part of any version of a record should be disclosed in all copies or iterations of that record.

65126089 - The emails dated June 19, 2018, 8:28 am and June 19, 2018, 7:52 am have both been discussed at pages 40 and 41 of record 64655590 and should be treated accordingly.

65126105 - The information redacted on the email dated November 10, 2015, 12:20 pm is factual. There is nothing in this email that meets the criteria for an exception pursuant to section 14(1)(a). I **recommend** it be disclosed.

65126218 - The email dated June 19, 2018, 7:52 am has been discussed at pages 40 and 41 of record 64655590 and should be treated accordingly. Once again, however, the records have been redacted differently. Anything that has been disclosed as part of any version of a record should be disclosed in all copies or iterations of that record.

65126238 - The email dated April 6, 2017, 5:59 pm has been discussed in the context of record 64657277 and should be treated accordingly.

65126524 - In an email dated November 10, 2016, 12:02 pm, three paragraphs have been withheld. The information redacted is really a statement of facts about events that had transpired and a request for information. The information redacted does not meet the criteria for an exception pursuant to section 14(1)(a) and I **recommend** it be disclosed.

65126896 - The email from which there have been redactions in this record (June 19, 2018, 7:52 am) has been discussed at pages 40 and 41 of record 64655590 and should be treated accordingly.

65126921 - In an email dated January 16, 2017, there have been several items or points which have been redacted. They appear to be in the context of advice being given with respect to next steps and they do, therefore, meet the criteria for an exception to disclosure pursuant to section 14(1)(a).

6512702 - There seems to be an error in relation to this record number. It is only seven digits and all other records have 8 digit identifiers. No record has been provided that has this seven digit identifier. I am, therefore, unable to comment with respect to this record.

2. Was section 22 properly applied to the responsive records?

Section 22 reads as follows:

The head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material compiled solely for the purpose of determining the applicant's suitability, eligibility or qualifications

for employment or for the awarding of government contracts or other benefits when the information has been provided to the public body, explicitly or implicitly, in confidence.

The Department of Finance's Submissions

The Department of Finance provided no submissions on the application of section 22 of the Act. This is troubling. Section 9(1)(c) of ATIPPA requires the public body to provide the reasons for its refusal if it is denying access to information. The Department of Finance did not do so with respect to its application of section 22 of ATIPPA. Furthermore, as the onus is on the public body to establish that an exception applies, their failure to provide any submissions by default results in a failure to meet that onus.

The Applicant's Submissions

With respect to the application of section 22, the Applicant said that, like section 14(1)(a) of the Act, it is a discretionary exemption. The Applicant said that the two step process set out above with respect to section 14(1)(a) also applies to section 22.

The Applicant submitted that the approach I set out in Review Report 2018 NTIPC 1 with respect to section 14(1)(b) of the Act equally applies to section 22 given its discretionary nature, that is:

Because section 1 of the Act provides that access to information is a "right", the default position should always be disclosure. A refusal to disclose information pursuant to a discretionary exemption should only occur when there are good, considered reasons for the non disclosure.

The Applicant argued that to exercise its discretion properly, a public body must show that it considered the objects and purposes of ATIPPA and did not exercise its discretion for an improper or irrelevant purpose.

The Applicant pointed me to my decision in Review Report 04-42 which says:

Should it [section 22] apply to the record in question, the Department still has to show that it exercised the discretion given to it to refuse access. This would usually be shown by indicating the reasoning behind the refusal.

In Review Report 04-42, this office cited, with approval, Order #F 2003-20 of the Alberta Privacy Commission in which Adjudicator Dave Bell set out the following test applicable to section 23 of the FOIPPA, the language of which is identical to section 22 of the ATIPP Act:

In Order 98 021, the Commissioner said that in order for section 19(1) to apply, all three parts of the following three part test must be met:

- (1) The information must be personal information that is evaluative or opinion material;
- (2) The personal information must be compiled solely in order to determine the applicant's suitability, eligibility or qualifications for employment, to award a government contract, or to award other benefits; and
- (3) The personal information must have been provided, explicitly or implicitly in confidence.

The Applicant submits that the result of a public body not applying the correct test must be a finding that the public body did not properly apply its discretion to refuse to disclose

to the applicant the information requested.

As to the meaning of "evaluative or opinion material" in section 22, the Applicant noted that I went on to write the following in Review Report 04- 42:

An opinion is a subjective belief or assessment based on grounds short of proof. An opinion is based on perception. Evaluative material is material that assesses or appraises, based either on a specific criteria or otherwise.

In Alberta Privacy Commission Order F2006 025, Adjudicator Wade Riordan Raaflaub, in considering the FOIPPA equivalent (i.e., s. 19(1)) to section 22 of ATIPPA, wrote the following:

While I recognize the competing interpretations, I do not believe that the reference to "employment" in section 19(1) of the Act was intended to refer to employment in a position already occupied by an applicant.

Adjudicator Wade Riordan Raaflaub also found that section 19(1) was "not intended to apply to reference letters or evaluations provided in the context of existing or continuing employment".

Adjudicator Riordan Raaflaub went on say the following:

Given the distinctions that others have made between new and current employment when applying section 19(1) of the Act or a comparable provision, I believe that it is generally understood that the phrase "suitability, eligibility or qualifications for employment" in section 19(1)

refers to new employment. Having said this, the phrase can also apply to a new position with the same employer (Order F2002 008 at para. 15).

The Applicant noted that no reasons behind any of the section 22 redactions, which are not evident on the face of each record in any event, were provided by the Department of Finance.

Findings and Recommendations with Respect to Section 22

It is difficult, if not impossible, to assess the application of section 22 to the records for several reasons, the most notable of which is that the public body provided no explanation whatsoever with respect to the application of the exception.

I have always interpreted section 22 to apply to opinions provided to the GNWT in the hiring process - reference checks. The section requires that the information to be "evaluative or opinion material" which has been compiled "**solely**" for the purpose of determining the Applicant's "suitability, eligibility or qualifications for employment". This implies that the individual is not already employed. In this case, the Applicant had been employed for a long period of time when this information was collected. It was not about his "suitability, eligibility or qualifications for" that employment. Furthermore, to qualify for an exception pursuant to section 22, the information has to be demonstrated, in some fashion, to have been provided explicitly or implicitly in confidence. Without some explanation about the nature of the records in question, including whose record they are (many of the records which appear to have been withheld under section 22 are hand written notes with no title, date or author indicated) it is impossible to determine whether the information was provided implicitly in confidence. Clearly there is no indication that the information was collected explicitly in confidence.

It should be noted as well that the definition of “personal information” in section 2, includes information about an identifiable individual, including “anyone else’s opinions about the individual”. Except in narrow circumstances, an individual is entitled to receive information about him/herself.

Having said all this, none of the records which the Applicant has asked me to review appear to have been withheld on the basis of section 22. I therefore make no recommendations with respect to those records withheld pursuant to section 22.

3. Was section 23(1) properly applied to the responsive records?

Subsection 23(1) reads as follows:

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 Department of Finance's Submissions

With respect to section 23 of ATIPPA, the Department of Finance pointed out that section 23 is not discretionary. When considering disclosure of a third party's personal information, a public body is not allowed to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.

The Department of Finance also pointed out section 23(2) of the Act which sets out that particular types of personal information for which disclosure is presumed to be an unreasonable invasion of that third party's privacy. They used section 23(2)(h)(i) which prohibits disclosure where the personal information consists of the third party's name

where it appears with other personal information about the third party. They said that these exceptions to access are mandatory and were applied to a portion of the information requested. In relation to section 23(2)(h)(i), they said access was denied to those portions of the records which respectively pertain to the personal employment information of individuals as well as the names of the individuals.

The Applicant's Submissions

The Applicant pointed out that subsection 23(2) of the ATIPP Act sets out various examples ((a) to (j)) of personal information that are "presumed" to be an unreasonable invasion of a third party's personal privacy.

Subsection 23(3) of the ATIPP Act compels the head of a public to consider "all the relevant circumstances" including the enumerated list ((a) to (h)) set out therein in determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy or not.

Subsection 23(4) of ATIPPA sets out various circumstances ((a) to (i)) that do not constitute an unreasonable invasion of a third party's personal privacy.

The Department did not identify any of the numerous subparagraphs of the above noted subsections on which they relied in applying the redactions to the disclosed records or in excepting other records from disclosure. Nor did the Department provide any information regarding the considerations it undertook in making its decisions to withhold information.

The Applicant noted that there are a substantial number of decisions that have been rendered by this office and other Privacy Commissioners/Adjudicators regarding section 23 or its equivalent. He argued that to set out the jurisprudence rendered for each of the

numerous subsections and subparagraphs of section 23 that must be considered in applying subsection 23(1) is unreasonably onerous given the way in which the records were disclosed by the Department to the Applicant.

Findings and Recommendations with Respect to Section 23

The Department of Finance's submission on the application of section 23 were sparse and incomplete. They did not set out which subsections they were relying on. Nor did they provide a rationale for applying those subsections. Section 9(1)(c) of ATIPPA mandates that they must do so. The Department of Finance did not meet its obligations in this regard. In addition, the onus of establishing that an exception applies lies with the public body, as set out in section 33 of ATIPPA. The submissions received from the Department of Finance with respect to section 23 did not meet that onus.

Nevertheless, section 23 of ATIPPA is a mandatory exception and therefore its application must be considered. If the disclosure of the information would constitute an unreasonable invasion of a third party's personal privacy, it cannot be disclosed.

I have held in many reviews that the sole presence of the name or business address of an individual is not sufficient to prohibit disclosure. The disclosure of the information in question needs to also amount to an unreasonable invasion of privacy. In assessing whether this is the case, a public body must consider all of the relevant circumstances. Section 23(2) sets out situations in which there will be a presumption that disclosure would amount to an unreasonable invasion of privacy but, even in these circumstances, the presumption is rebuttable.

For the most part, the names of GNWT employees engaged in or connected to their employment duties are not protected from disclosure. The exception to this would be

where the information relates to personnel or labor relations issues involving that employee.

In this case, the Department of Finance redacted names of the Applicant's health care providers. These persons are employees of the GNWT and their name is mentioned in the context of providing a government service to the Applicant. Their names should not have been redacted as such disclosure would not amount to an unreasonable invasion of a third party's privacy.

As observed by the Applicant, much of the information redacted pursuant to section 23 consisted of the names and business addresses of Union of Northern Worker (UNW) employees. Furthermore, these were union members speaking for and on behalf of the Applicant. In these circumstances, the disclosure of the information cannot result in an "unreasonable invasion" of the privacy of those UNW members.

I **recommend** that the disclosure of all items redacted pursuant to section 23 where the information redacted is the name or business contact information of:

- a) a UNW employee acting for or on behalf of the Applicant
- b) a GNWT employee acting in his/her capacity as a GNWT employee (this does not include information in relation to personnel and/or labour relations information about third party employees)
- c) reference to medical personnel who have provided health services to the Applicant

There are some limited circumstances in the records where section 23 has been properly employed. For example, in at least one instance (record 65098620) it appears that a personal phone number has been withheld. I agree that this was properly withheld. Similarly, references to other employees' disciplinary or personnel issues has

been properly withheld. There are several emails (repeated several times) that refer to the names and personal circumstances of first aid instructors. It does not appear that these individuals are GNWT employees but to the extent that they are contractors providing services to the GNWT, disclosure of their names would not amount to an unreasonable invasion of privacy and the names should be disclosed. In record 65098980 there is reference to the personal circumstances of a GNWT employee which has been properly withheld.

MISSING INFORMATION

The Applicant has pointed out eight records in which there appears there should have been an attachment or in which an embedded screen shot is not visible. These records are:

65124523	65098543
65098772	64652925
65098953	65126108
65098963	64125702

I **recommend** that these attachments be disclosed and that the embedded screen shots be provided, subject to any applicable exceptions properly applied. The Applicant will have the right to seek a review of any exceptions applied to these records in accordance with section 28.

CONCLUSION

The Department of Finance's handling of this access to information request does not reflect well on the Department. As one of the public bodies which receives numerous requests for information from employees or former employees relating to personnel

issues, they should by now understand the Act and the way in which the exemptions should be applied. Furthermore, they should be able to organize the responsive records in a way that is clear and easy to compare the original with the redacted record. In this case, many many records were missing either in their original rendition or as edited, or both. This office had to go back to the Department while writing this report to obtain these records. The submissions received from the Department were lacking, particularly with respect to their application of section 22 and 23. They did not meet their section 9(1)(c) obligations to set out the reasons for their refusal to disclose various pieces of information or meet their onus pursuant to section 33 to establish that an exemption, in fact, applied. And, while tempting to do so, particularly in a request involving thousands of pages of records, such as this one, it is inappropriate to apply blanket discretion to a group of records from which information has been withheld based on the same exception. There must be a true exercise of discretion for each instance in which the exception discretionary, such as with section 14.

Elaine Keenan Bengts
Information and Privacy Commissioner