

**NORTHWEST TERRITORIES  
INFORMATION AND PRIVACY COMMISSIONER  
Review Report 20-222**

File: 19-155-4  
March 30, 2020  
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**BACKGROUND**

The Applicant made a request from the Department of Health and Social Services for “any and all documents - including emails and written correspondence - about Managed Alcohol Programs dating from January 2015 to present”. The Department responded to the request and provided the Applicant with 38 pages of responsive records. A number of those records were, however, redacted in whole or in part with the Department relying on sections 13(1), 14(1) and 23 of the *Access to Information and Protection of Privacy Act* to justify the withholding of information. The Applicant sought a review of the response pursuant to section 28 of the Act.

**THE RELEVANT SECTIONS OF THE ACT**

Section 1 of the *Access to Information and Protection of Privacy Act* outlines the purposes of the legislation. Those purposes include to make public bodies more accountable to the public and to protect personal privacy by... “giving the public a right to access to records held by public bodies” subject to specified “limited exceptions”.

Section 5 provides that:

- 5.(1) A person who makes a request under section 6 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

- (2) The right of access to a record does not extend to information excepted from disclosure under Division B of this Part, but where that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.

Division B of Part I of the Act (sections 13 to 25) sets out the specific and limited exceptions to disclosure contemplated in section 1. These include:

- 13.(1) The head of a public body shall refuse to disclose to an applicant information that would reveal a confidence of the Executive Council, including
  - (a) advice, proposals, requests for directions, recommendations, analyses or policy options prepared for presentation to the Executive Council or the Financial Management Board; ...
  - (c) consultations among members of the Executive Council or the Financial Management Board on matters that relate to the making of government decisions or the formulation of government policy;
- 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;
- 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.
  - (2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where...

- (h) the personal information consists of the third party's name where
  - (i) it appears with other personal information about the third party

## **THE DEPARTMENT'S SUBMISSIONS**

The department originally withheld information from two pages on the basis of section 13(1), pages 24 and 34. In making their submissions to this office, however, the Department determined that they had improperly applied this section to page 34. With respect to the application of this section on page 24, their submissions were as follows:

This page contained consultations with an Executive Council member in relation to the proposed Alcohol Management Program

They applied section 14(1) to pages 3 through 7, and 12 through 15. With respect to pages 3 through 7, they provided the following analysis:

[The] redacted information contained in this document was prepared to advise DHSS Senior Management and ultimately the Minister of Health and Social Services on the feasibility of opening a Managed Alcohol Program. The proposed program is currently still under discussion and no decisions have yet been made on whether the proposal will proceed. The DHSS felt that releasing this information at the stage would harm internal decision making processes and reveal or forecast information that would interfere in future planning.

In relation to pages 12 through 15, they submitted only that "[t]his information was redacted as it would reveal policy options that were prepared for DHSS Senior Management and the Minister and would cause harm by interfering in the decision making process.

Section 23(2)(h)(i) was applied to redactions on pages 21, 22, 26, 28, 29, 30, 33 and 34. They argued that “[t]hese pages contained third personal information and access was denied to the name of the individual(s), home and business addresses and telephone numbers”.

## **DISCUSSION AND RECOMMENDATIONS**

### Section 13

This is one of only a few mandatory exceptions to disclosure under the *Access to Information and Protection of Privacy Act*. If the disclosure would reveal a confidence of the Executive Council, it cannot be disclosed. This exception from disclosure is intended to protect the ability of the executive to discuss policy options, to give and receive advice, and discuss policy direction among themselves in confidence.

Of note is that section 13 applies to information that would reveal “a confidence of the Executive Council”. The term “Executive Council” is not defined in the ATIPP Act. It is, however, defined in the *Legislative Assembly and Executive Council Act* (LAECA) at section 61 which reads:

- 61.(1) The Executive Council of the Northwest Territories is composed of the following members:
- (a) a Premier chosen by the Legislative Assembly;
  - (b) persons appointed by the Commissioner on the recommendation of the Legislative Assembly.

LAECA goes on to provide that Ministers are to be appointed from those sitting on the Executive Council. In other words, the Executive Council is made up of the Premier and the Ministers. The Financial Management Board, which also has protections under this section, is a committee of the Executive Council, established by the *Financial*

*Administration Act* and is comprised of the Minister of Finance and such other Ministers as may be designated by the Executive Council.

In order to qualify for an exception under Section 13(1)(a), the information withheld must be:

- a) advice, proposals, requests for directions, recommendations, analyses or policy options
- b) prepared for presentation to the Executive Council or the Financial Management Board

or

- c) consultations among members of the Executive Council or the Financial Management Board

The email redacted on the basis of section 13(1) in this case (page 24, email dated March 1, 2018) appears to be an exchange between an MLA and a Minister. It does not contain any advice of any kind “prepared for presentation to the Executive Council” nor can it be said to consist of “consultations among” members of the Executive Council. The exchange does involve a Minister as one of the parties, but that does not bring it under section 13(1). The section contemplates only consultations between two or more members of the Executive Council. Section 13(1) does not, therefore, apply in this case, but section 14, as discussed below, might.

The second email redacted pursuant to section 13(1) is on page 34 in which an email dated October 18, 2016 has been redacted. During the course of this review, the Department acknowledged that section 13(1) had been improperly applied. I therefore **recommend** that this email be disclosed, subject to the discussion with respect to personal information below.

#### Section 14(1)(a)

Section 14(1)(a) of the Act gives public bodies the discretion to refuse to disclose

information to an Applicant where the disclosure “could be reasonably expected to reveal”:

advice, proposals, recommendations, analyses or policy options  
developed by or for a public body or a member of the Executive Council;

Unlike section 13, section 14(1) is a discretionary exception, which means that there are two steps that the public body must take in making the decision as to whether or not to disclose the record, or portions of the record. Firstly, it must assess and determine whether or not the record meets the criteria set out in section 14(1). If the assessment is that the information fits within the criteria, the public body must then take the second step of actively exercising its discretion as to disclosure. Because section 1 of the Act provides that access to information is a “right” under the Act, the default position is always disclosure. A refusal to disclose information that arises as a result of a discretionary exception should only happen when there are good, considered reasons for non-disclosure. In such circumstances, the public body should provide the Applicant with a summary of the considerations both for and against disclosure which went into the making of the decision.

Section 14(1) is intended to protect the decision making process within government and to allow public servants to provide “advice, proposals, recommendations, analyses and policy options” freely and without fear of being second-guessed or subjected to ridicule for the advice given. In Order 96-006, the former Information and Privacy Commissioner of Alberta established a test to determine whether information is “advice, recommendations, analyses or policy options” within the scope of the Alberta’s equivalent to our section 14(1)(a). He said:

Accordingly, in determining whether section 23(1)(a) will be applicable to information, the advice, proposals, recommendations, analyses or policy options (“advice”) must meet the following criteria.

The [advice, proposals, recommendations, analyses and policy options] should:

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.

This finding has been accepted and used in Alberta and in other Canadian jurisdictions, including the Northwest Territories, consistently over the years and it is the test to be applied to assess whether information falls within the criteria for an exception pursuant to section 14(1)(a) of the NWT Act. Section 14(1)(a) does not apply so as to protect the final decision made, nor does it apply to information that is merely "factual" in nature. In Alberta Order 96-006 noted above, then Commissioner Clark noted:

In passing, I want to note that the equivalent section of the British Columbia Act (section 13) specifically states that "factual material" (among other things) cannot be withheld as "advice and recommendations". As I stated, I fully appreciate that our section differs significantly from that of our neighbours. However, I cannot accept that the bare recitation of facts, without anything further, constitutes either "advice etc" under [section 24(1)(a)] or "consultations or deliberations" under [section 24(1)(b)].

This analysis must be applied to each item redacted.

The first item redacted pursuant to section 14 begins on page 3 and ends on page 5. Everything on these three pages has been withheld. The redacted material includes information under two headings - "Rationale" and "Proposal". I am satisfied that the redacted material fits the criteria for an exception pursuant to section 14(1)(a) as analysis, recommendations and proposals. Further, it would appear that the Department exercised its discretion in relation to this material, and provided rationale for that decision in its submissions to my office. I make no further recommendations with

respect to this redaction other than to **recommend** that the public body include such rationale when responding to the Applicant's request for information, rather than waiting until the review process to articulate the considerations involved in the exercise of its discretion.

The second item redacted pursuant to this section of the Act is on pages 12 through 15 of the package. Again, these pages have been redacted in full. As is noted from the unredacted heading for this section, it outlines various options under consideration for the implementation of a Managed Alcohol Program in the Northwest Territories. Again, this section clearly outlines options, provides analysis, and identifies challenges for discussion purposes. I am satisfied that it meets the criteria for an exception pursuant to section 14(1)(a). I am also satisfied that the Department has exercised some discretion in relation to this information. I therefore make no recommendations.

The information on page 24 discussed above under section 13 does not, in my opinion, contain the necessary elements to bring it under section 14. It contains no analysis, recommendations, advice or policy options. I **recommend** that the redacted part of page 24 be disclosed.

### Section 23

All of the remaining redactions relate to section 23 which prohibits the disclosure of personal information where that disclosure would amount to an unreasonable invasion of a third party's privacy. In order to determine whether a disclosure will amount to an unreasonable invasion of privacy, public bodies must consider all of the circumstances, including whether the information was received (collected) in the context of a business relationship. Where the name and contact information is all related to an active business relationship, with services being provided under contract to the GNWT, for instance, there is a much higher bar for when the disclosure of such information might amount to an unreasonable invasion of privacy. Companies doing business with the GNWT do not enjoy the protection of section 23 and disclosing the names and business contact



information of individuals acting as agents for these companies will not, therefor, always amount to an unreasonable invasion of privacy.

On pages 21 and 22, the first name of an individual as well as an email address have been redacted from an email dated November 28, 2017. It is an email from the public body reaching out to a third party who has no apparent existing relationship with the Department. I agree that this information has been properly redacted. The same applies to the personal information redacted on pages 26, 28, 29, 30, and 33. However, on page 34 the name of an organization is redacted. This is not personal information and I **recommend** that it be disclosed.

Elaine Kennan Bengts  
**Information and Privacy Commissioner**