

**NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER
Review Report 20-223**

Citation: 2020 NTIPC 17

File: 19-158-4
April 1, 2020

1. BACKGROUND

On February 14th, 2019, the Applicant made a request to the Department of Finance for a copy of

a report prepared and issued by [third party organization] in or around November, December 2018 or January, February 2019 as a result of a bullying and harassment complaint filed by [the Applicant] with respect to his superior.

The public body initially responded to the Applicant acknowledging receipt of the request on February 15th. On March 18th, the Department extended the time for responding to the request for information for 30 days to April 15th, 2018 in order to “finish processing the requested records”. At this point the Department also requested the \$25.00 fee applicable to requests for non-personal information. The Applicant questioned both the extension of time and the fee. The parties were able to resolve the fee issue on their own. With respect to the delay, the Department indicated that the report requested had been received by both the Department of Finance and the Department with which the Applicant was employed and Finance needed to consult with the other department before disclosing the record. On April 15th, the Applicant received a “heavily redacted” copy of the requested report.

2. THE ISSUES

On May 9th, the Applicant requested that this office review:

- a) Whether the extension of time was taken in accordance with section 11
- b) Whether the request for information should have been transferred to the other public body which had custody and control of the records in question pursuant to section 12
- c) Whether the Department appropriately applied section 14
- d) Whether the Department appropriately applied section 23

3. 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". The **right** of access to information held by governments is quasi-constitutional in nature and the default position will, therefore, always be disclosure. Information should be withheld only where the information falls into one of the exceptions set out in sections 13 to 26 and those exceptions are to be interpreted narrowly.

The following sections of the Act have also been raised, either by the Applicant or the Department of Finance:

- 11.(1) The head of a public body may extend the time for responding to a request for a reasonable period where...
 - (c) more time is needed to consult with a third party or another public body before the head can decide whether or not the applicant is entitled under this Act to access to a requested record
- (2) Where the time for responding to a request is extended under subsection (1), the head of the public body must tell the applicant without delay
 - (a) the reason for the extension;

- (b) when a response can be expected; and
- (c) that the applicant may ask for a review of the extension under subsection 28(1)

12.(1) The head of a public body may transfer a request for access to a record and, if necessary, the record, to another public body where

- (a) the record was produced by or for the other public body;
- (b) the other public body was the first to obtain the record; or
- (c) the record is in the custody or under the control of the other public body

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

4. EXTENSION OF TIME PURSUANT TO SECTION 11 AND TRANSFER PURSUANT TO SECTION 12

The Department's Submissions with Respect to Extension and Transfer

With respect to the extension of time taken by the department to respond to the Applicant's request, the public body admitted that there were some missteps in relation to the extension. The letter sent to the Applicant was badly worded and unclear as to which subsection of section 11 was being relied on for taking the extension. There was also some confusion in that there were two copies of a report which met the parameters of the Request for Information. One was a report that the Department received on February 4th. This was the main report. The second was an "employee summary report" which indicated what information in the main report was shared through a routine disclosure mechanism with employees. This second report was not received by the public body until February 20th, after the Request for Information was received by the Department. There were, therefore, delays in their ability to review this responsive record for release. Further, they determined that in this case it would be appropriate to consult with a second public body, with whom the Applicant was employed, because the two departments had joint responsibility in relation to the subject matter of the reports. They also found it necessary to consult with the NWT Access and Privacy Office in relation to the appropriate disclosure in light of the sensitive information contained in the reports. In taking the extension, therefore, they relied on subsection 11(1)(c) of the Act which allows for an extension when more time is needed to consult with another public body before deciding whether or not to disclose the record and to what extent.

With respect to whether or not this request should have been transferred to the other public body, the Department of Finance indicated that while the reports were created "for" the other department, the Department of Finance handles contracts in relation to workplace assessment reviews. Both departments received the reports at the same time. Additionally, it is the role of the Labour Relations, Accommodation, Bargaining and Investigation unit in the Department of Finance to provide advice and assistance with

workplace assessment reviews and the Department of Finance is responsible for oversight of workplace assessments for all GNWT departments. As such, it was determined that the Department of Finance should process the request, but in consultation with the other department. In this case, because of the nature of the information involved, the Department of Finance also decided to ask for the assistance of the GNWT Access and Privacy Office. This office provides assistance and advice to all GNWT public bodies in responding to access requests and has considerable expertise that is not available in all public bodies. The final decisions with respect to the disclosure, however, were made by the Department of Finance after consultation with the Access and Privacy Office and based on the advice provided by that office. These needed consultations were the reason the Department claimed that it was necessary to take an extension of time.

The Department of Finance also addressed the question of whether this request should have been transferred to the other department pursuant to section 12 of the Act. They noted that:

- a) while the record was produced for the other public body, contracts for workplace assessment reports are administered by the Department of Finance and Finance therefore had a significant role in the administration of this assessment;
- b) the Department of Finance had custody and control of the record;
- c) the Department of Finance received the reports at the same time as the other department.

The Applicant's Submissions with Respect to Extension and Transfer

The Applicant in this case was concerned about the amount of apparent "consultation" involved in responding to this Request for Information. He suggests that if the Department of Finance felt that it had to consult with the other department before disclosing the record, it should have, instead, transferred the request to the other

department to deal with rather than engaging in consultations.

He also pointed out that the duty to respond to a request for information lies with the “head” of a public body as defined in the *Access to Information and Protection of Privacy Act* and suggests that it is inappropriate for the head of any public body to defer his/her decisions under the Act to another department or another public body. He indicated that in this case he was particularly concerned because it appeared from the submissions of the public body that the Manager of the Access and Privacy Office had, in fact, been the one who decided what was disclosed.

Discussion and Recommendations with Respect to Extension and Transfer

Section 11 of the *Access to Information and Protection of Privacy Act* allows a public body to extend the time for responding to a request for information where one of four circumstances applies. One of those is where “more time is needed to consult with a third party or another public body before the head can decide whether or not the applicant is entitled to a requested record”. In this case the Department of Finance felt it necessary and appropriate to consult with another department as well as the Access and Privacy Office in order to inform its decisions with respect to disclosure. While consultations are not always appropriate, where, as here, there is some joint responsibility in relation to a record, consultation is not inappropriate and, in fact, may serve to both expedite a response and save both the Applicant and other public servants time and money. Furthermore, it will always be appropriate for a public body to seek out the expertise in the Access and Privacy Office. The GNWT is relatively small and not every department will be able to support the necessary expertise to address complex access issues. That is why there is an Access and Privacy Office, where the staff has focussed expertise in responding to complex access to information requests.

I am satisfied that the extension of time to respond to this request to properly consult with other public bodies was reasonable in the circumstances. The letter sent to the Applicant, however, was not in accordance with the requirements of section 11(2). The

reason for the extension was not properly or fully articulated nor was the Applicant advised that he could request a review of the extension decision to my office.

Section 12 of the *Access to Information and Protection of Privacy Act* contemplates situations in which an Applicant has made a request to one public body which would be better addressed by a different public body. In particular, this section gives a public body discretion to transfer a request to another public body where:

- a) the record was produced by or for the other public body;
- b) the other public body was the first to obtain the record; or
- c) the record is in the custody or under the control of the other public body.

It is to be noted that this is a discretionary provision. The existence of one or more of the situations outlined does not require a mandatory transfer. In this case, while the record was produced for the other public body, both the Department of Finance and the other public body had “custody” and “control” of a copy of the record in question and both were provided with a copy at the same time. By all accounts, both had a degree of responsibility with respect to the subject matter of the report. The Department of Finance determined, perhaps in consultation with the other department, that it was best equipped to respond to the request. I have no concerns about the approach taken in this case in terms of responding. If the Applicant wishes to receive the records with redactions from the point of view of the other department, another access to information request can be made. However, the Applicant chose to make the request of the Department of Finance and the department’s decision to take responsibility for responding to it was a completely reasonable one.

In terms of who made the decisions with respect to the redactions, again I am satisfied that, in the end, the decision with respect to redactions was made by the Department of Finance. I am not convinced that all the recommendations of the Access and Privacy Officer were followed, but even if they were this is not prohibited by the Act. The Access and Privacy Office is mandated to assist public bodies and provide expert advice when

there is uncertainty in relation to how exceptions should be applied. While the Department of Finance may have accepted all of the advice it received, I am satisfied that it was the Department of Finance and not the Access and Privacy Office that made the final decision with respect to what was disclosed.

With respect to the consultations with the other public body, in some circumstances consultations would not be appropriate, but such consultations are, as noted above, contemplated in section 11. Because of the dual responsibility for the subject matter of the reports, it makes some sense in this case that the Department of Finance would make inquiries of the other department to determine if they had any specific concerns about the proposed disclosure. In this case, it appears there were none.

Finally, although the “head” of a public body is responsible for various aspects of the administration of the *Access to Information and Protection of Privacy Act*, section 69(1) of the Act allows the head of a public body to “authorize any person to exercise or perform a duty or function of the head under this Act.” The “head” of the public body is, in the case of a ministry, the Minister responsible for that ministry. However, in most, if not all ministries, the Minister has appropriately delegated responsibility for responding to access to information requests to a Deputy Minister or, in some cases, to the ATIPP Coordinator for the Department. In this case, the Department of Finance advised that the decisions with respect to the redactions were, in fact, made by the Deputy Minister. The fact that these decisions were made based on advice received from available experts does not change the fact that the decision was made by the Deputy Minister.

5. SECTION 14

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;

This is a discretionary exception which means that there are two steps that the public body must take in making the decision as to whether to disclose the record, or portions of the record. Firstly, it must assess and determine whether the record meets the criteria set out in section 14(1). If so, 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, which went into the making of the decision.

The Department’s Submissions with Respect to Section 14(1)(a)

The Department advised that the primary purpose of the report in question was to provide the Deputy Minister with a full assessment of the management of the area in which the Applicant was employed in relation to all staff, including contractors, and within the legislative framework which applied to the office. They indicated that:

The majority of the sections where this specific exception was applied were in relation to the analysis of the contractors on what their assessment was of different program areas and of key staff in those programs as they impacted on the operations of....the office. This exception was applied to Consultant’s analysis and in some instance (sic) to some areas of the recommendations.

With respect to the exercise of their discretion, they advised that it was their belief that the analysis/advice/recommendations that were produced from the report must continue to be protected and that the protection of the information “is critical to ensuring that any

future workplace assessment situations will continue to include the frank and candid (sic) necessary to address a broader workplace situation”. Their concern, in this case, was that disclosure of the information in question would “affect future responses for participants tasked with undertaking a workplace management assessment”.

The Applicant’s Submissions with Respect to Section 14(1)(a)

The Applicant points out that section 14(2)(b) must also be considered in relation to this exception. This subsection says that 14(1) does **not** apply to information that is:

- b) a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function;
- f) is an instruction or guideline issued to officers or employees of a public body.

He further argues that the Alberta Information and Privacy Commissioner has held in orders F2004-26 and F2012-10 that Alberta’s equivalent to section 14(1)(a) applies only to records (or parts of records) that reveal “substantive” information about which advice was sought and that a public body must not refuse to disclose:

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

Discussion / Recommendations with Respect to Section 14(1)(a)

Section 14(1) is intended to protect the decision making process within government and to allow public servants to give and receive “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 Applicant has asked me to address the following redactions pursuant to section 14(1)(a):

Page 5 - A significant part of this page has been redacted pursuant to section 14(1)(a). The information is contained in a section of the report under the heading “Background”. Having read the redacted portions of this page it is clear that the redacted information is a compilation of information received in a general way from those in the workplace. It appears to summarize facts/opinions heard by the person who wrote the report in the course of his discussions with employees. None of the information is identified with any particular employee - it is general in nature and outlines some of the factors that were identified as contributing to dissatisfaction in the workplace, without ascribing a source for any of the facts/opinions. There is nothing in the information withheld pursuant to section 14(1)(a) that can be said to be “advice, proposals, recommendations, analyses or policy options”. Nor is there anything on this page which is directed toward taking any action - it is, rather, background facts, conclusions and underpinnings for the report, nothing more.

I **recommend** that the items redacted from this page pursuant to section 14(1)(a) be disclosed.

Page 6 - Part of one sentence in the paragraph immediately following the heading “What is Working Well” has been redacted pursuant to section 14(1)(a). Again, the redacted information is a summary of facts/opinions heard by the person who wrote the report or a conclusion reached by him. With the possible exception of the first seven

words in line five of the paragraph, there is nothing that would reveal advice, analysis, recommendations or policy options, nor is there anything on this page which is directed toward taking any action. With the exception of the seven words indicated, I **recommend** that this paragraph be disclosed. I will address the seven words excepted under section 23, below.

Page 9 - Two sentences were redacted on this page pursuant to section 14(1)(b), in particular two sentences at the end of the fourth full paragraph on the page. These two sentences, once again contain facts and conclusions reached by the person writing the report. There is nothing in the way of advice, analysis, recommendations or policy options included in these conclusions. Nor is there any action suggested or anticipated arising from the statements in these two sentences. With the exception of the eight words on line 8 of this paragraph after the comma, I **recommend** that these two sentences be disclosed. I will address the eight words excepted under section 23, below.

Page 13 - The first item redacted from this page pursuant to section 14(1)(a) (end of the first paragraph on the page) is a conclusion reached by the writer of the report. Once again, there is nothing in the way of advice, analysis, recommendations or policy options included in this conclusion. I **recommend** that it be disclosed.

A second redaction pursuant to section 14(1)(a) on this page starts on the first line of the second paragraph under the heading “Regional Leadership” and ends on the second line of that paragraph. Once again, I am not satisfied that the redacted material meets the criteria for an exception pursuant to section 14(1)(a). I am, however, concerned that section 23 might apply and I will address it further in my discussion of that section of the Act.

Page 21 - Most of the paragraph immediately before the title “Workload of the Regional Projects Office” has been redacted pursuant to section 14(1)(a). Again, while I see factual conclusions and observations on the part of the writer, there is nothing in the

redacted material that meets the criteria for an exception pursuant to section 14(1)(a). I **recommend** that this paragraph be disclosed.

Page 25 - There are two items redacted pursuant to section 14(1)(a) on this page. The first is a few words on the fifth line of the second paragraph on the page. These words describe the feelings of workers as assessed by the report writer. The words represent a conclusion but do not suggest a solution. They do not meet the criteria for an exception under section 14(1)(a). I **recommend** that these words be disclosed.

The last sentence on this page, which continues onto the next page (first two lines) has been redacted as well. It is, basically, a statement about limitations with respect to the writer's conclusions. It does not offer advice, recommendations or analysis or otherwise meet the criteria for an exception pursuant to section 14(1)(a). I **recommend** that this sentence be disclosed.

Page 26 - On this page, several lines have been redacted from two paragraphs under the sub-heading "Management of Departmental Change". This portion of the report comes under the main heading "Analysis and Recommendations" which suggests far more strongly that it may contain material that will meet the criteria for an exception pursuant to section 14(1)(a). While there is no advice or recommendations in the redacted information, it constitutes part of the writer's analysis of what he heard and clearly informs his recommendations. I am satisfied that these paragraphs meet the criteria for an exception pursuant to section 14(1)(a).

Page 28 - The last line of the paragraph immediately following "Recommendation One" has been redacted and I am satisfied that this line meets the criteria for an exception pursuant to section 14(1)(a).

Similarly, the Department redacted the last paragraph on page 28. Again, while there is no advice or recommendations in the redacted information, it constitutes the writer's analysis of what he heard, with a view to influencing decisions to be made. I am

satisfied that this paragraph met the criteria for an exception under section 14(1)(a).

Page 29 - Most of the third paragraph on this page has been withheld pursuant to section 14(1)(a). As with the information on pages 26 and 28, this information is part of the writer's analysis of the information gathered, outlining issues and weaknesses identified by him in the course of his review of the workplace and is geared toward the taking of action to address the gaps identified and general directions for changes that need to be made. I am satisfied that this information meets the criteria for an exception pursuant to section 14(1)(a).

Page 30 - Part of one sentence in the middle of the second paragraph on this page has been withheld pursuant to section 14(1)(a). That sentence begins on line two of the second paragraph. This section was also applied to the last two lines on the page. The redacted information is analysis aimed at changes that need to be made. I am satisfied that it meets the necessary criteria.

Page 32 - There are two redactions pursuant to section 14(1)(a) on this page - one on lines 7 and 8 and one at the end of the third paragraph. Once again, I am satisfied that the information in these redacted items meet the criteria for the exception.

Page 33 - The following have been redacted from this page pursuant to section 14(1)(a):

- a) the first three lines on the page
- b) two lines contained in "Recommendation 7" and
- c) five lines in the paragraph after "Recommendation 8".

Once again I am satisfied that the information in these redacted items meet the criteria for the exception.

Page 34 - The last five lines of this page have been redacted pursuant to section 14(1)(a). I am satisfied that the information in these lines meet the criteria for the

exception.

Page 35 - All the information redacted from this page, with the exception of the redactions from "Recommendation Nine" and "Recommendation Ten" are justified by the public body under section 14(1)(a). I am satisfied that all of these redactions meet the criteria for the exception.

Page 36 - Parts of two paragraphs have been redacted on this page pursuant to section 14(1)(a) - three lines at the top of the page and two lines toward the bottom of the page. I am satisfied that the redacted information meets the criteria for an exception.

Page 37 - This page has been redacted pursuant to section 14(1)(a) as follows:

- a) first line after the bulleted list;
- b) first line of the next paragraph;
- c) the last paragraph

All of the information redacted meets the criteria for the exception.

Page 38 - The first paragraph on this page and a portion of the commentary under "Recommendation Eighteen" have been redacted pursuant to section 14(1)(a). I am satisfied that the information withheld meets the criteria for the exception.

Page 39 - Two sections of this page have been withheld pursuant to section 14(1)(a) - the first in the paragraph immediately after the heading "Workplace Restoration" and the second in the third paragraph under the heading "Sharing the Results of the Workplace Assessment". I am satisfied that both of these redactions meet the criteria for an exception under section 14(1)(a).

Page 40 - The information redacted from this page meets the criteria for an exception pursuant to section 14(1)(a).

Pages 49 - 51 - The items redacted from these pages have all been discussed above. In all instances in which I have found that the criteria for an exception pursuant to section 14(1)(a) have been met, the public body must exercise its discretion with respect to disclosure. The default, in all cases, will be disclosure and the public body must be able to articulate clear reasons for not disclosing each item withheld. It is not sufficient to apply blanket reasoning to all items withheld. The public body must be able to articulate the reasons for its decisions in each case. All relevant circumstances must be considered, including factors that weigh in favour of disclosure and those that weigh against disclosure. I therefore **recommend** that the public body provide the Applicant with an explanation for each item redacted pursuant to section 14 indicating the specific factors that were considered in each case.

6. SECTION 23

All of the remaining redactions relate to section 23. Section 23(1) prohibits the disclosure of personal information where that disclosure would amount to an unreasonable invasion of a third party's privacy. Subsections (2), (3) and (4) provide guidance and assistance in determining when disclosure would amount to an unreasonable invasion of privacy. Subsection (2) outlines situations in which there will be a presumption that disclosure would amount to an unreasonable invasion of privacy. Subsection (3) outlines some of the factors which should be considered when the public body is determining whether disclosure would amount to an unreasonable invasion of privacy. Subsection (4) lists situations in which the disclosure of personal information will not amount to an unreasonable invasion of privacy.

The Department's Submissions with Respect to Section 23

The Department correctly stated that "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" and that this section is a mandatory exception which gives the public

body no discretion over whether or not to disclose the information if it meets the criteria for the exception.

The public body in this instance has specifically relied on subsections 23(2)(d) and 23(2)(i) which raise a presumption that an unreasonable invasion of privacy will occur if the information relates to employment, occupational or educational history (23(2)(d)) or could be reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation(23(2)(i). Access was denied to those portions of records which they determined pertained to personal employment information of individuals who participated in the review. Access was also denied to those portions of the records where the person who supplied the “recommendation evaluation or character reference” did so on the explicit understanding that they were providing their frank evaluation of other individuals in confidence. They argued that all of the participants of the management review were specifically told that their comments were being provided in confidence. They point out that this offer of confidentiality is documented in at least two places in the report itself. The Department argues that protecting this information is critical in order for the employer to receive a frank evaluation of individuals involved in the program.

The Applicant’s Submissions with Respect to Section 23

The Applicant agreed that section 23, if applicable, is a mandatory exception to disclosure. He argues, however, that the public body did not consider all of the relevant circumstances in making their determination as to whether or not disclosure would amount to an unreasonable invasion of privacy. He points to section 23(3)(c) which requires public bodies to consider “all of the relevant circumstances” when determining whether a disclosure of personal information constitutes an unreasonable invasion of a

third party's personal privacy, including

the personal information is relevant to a fair determination of the applicant's rights

He argues that the situation in the workplace has affected his ability to earn a living and access to the information in question is important to his continued employment with the department. He is also concerned about his professional reputation which he feels might be negatively impacted by this situation.

The Applicant further makes reference to subsection 23(4) which outlines circumstances where disclosure of personal information will not amount to an unreasonable invasion of privacy, including where

- (b) there are compelling circumstances affecting the health or safety of any person and notice of the disclosure is mailed to the last known address of the third party;

He argues that the situation in the workplace has significantly affected his health as a result of the way he was treated by his superior. He says that knowing what was said will assist him in his recovery and in repairing his professional reputation.

He also refers to subsection 23(4)(e) which provides that the disclosure of personal information that relates to a third party's employment responsibilities as an employee of a public body will not amount to an unreasonable invasion of privacy. He argues that:

An employee's employment responsibilities go beyond the duties and responsibilities set out in employee's job description. Employment

responsibilities also include the employee's conduct and attitude toward their direct reports and others while on the job and in some cases captures their conduct beyond the worksite.

He argues, as well, that he is aware of the identity of the individuals involved the report because he was the one who had filed a complaint that led to the assessment of the workplace being done. He quotes from Review Report 17-168 issued by this office in which I made the following comment:

As those who were involved in the investigation already know A.B.'s identity, this "disclosure" by itself does not constitute an unreasonable invasion of his privacy...

It is to be noted that this is not to be interpreted as a finding that the redactions proposed are in accordance with sections 13 to 25 of the Act.

Discussion / Recommendations with Respect to Section 23

As noted above, section 23(1) is mandatory. If the disclosure would amount to an unreasonable invasion of a third party's privacy, the public body is prohibited from disclosing the information. The whole of section 23, however, must be considered to determine when a disclosure will amount to an unreasonable invasion of privacy. For example, while section 23(2) sets out situations in which a presumption of unreasonable invasion of privacy will arise, section 23(3) provides that public bodies must consider "all the relevant circumstances". This means that even where there is a presumption of an unreasonable invasion of privacy, that presumption might be reasonably rebutted where the underpinning and facts do not support such a conclusion.

This report contains a lot of personal information in the form of opinions expressed about individuals in the workplace being assessed. It is important in this situation to remember that the definition of “personal information” as outlined in section 1 includes an opinion expressed about the specified individual. Much of the discussion in this record is about the failings, on a personal level, of several employees to meet expected levels of competence. While it relates to the employees’ “employment responsibilities” it is more about the employees’ personal competencies and abilities. I am satisfied that, to the extent that the redacted information is in relation to any employee’s competence, it is the personal information of that employee. Further, because of the context of the report, it is safe to conclude that disclosure of this kind of information would amount to an unreasonable invasion of the individual’s privacy.

I am not convinced that section 23(4)(b), which provides that there is no unreasonable invasion of privacy where “there are compelling circumstances” affecting the health or safety of any person, is helpful to the Applicant’s case. This section is meant to allow disclosure where there is an imminent and real danger to the future health or safety of individual - for example in the case of a global pandemic where it may be necessary to disclose the identity of individuals affected in order to protect those around him/her. Or where a threat has been made against an individual and there is sound and compelling reason to believe that the threat will be made good. The Applicant has not convinced me that there are “compelling” circumstances which threaten his health or safety which would bring the disclosure of a third party’s information within the meaning of this subsection.

Further, the fact that the Applicant knows the identity of those being discussed in the report does not justify disclosing information that would amount to an unreasonable invasion of privacy. Once out of the hands of the public body, there are no longer any restrictions on further disclosure and there is nothing to prevent further disclosure of the

records. If the disclosure would amount to an unreasonable invasion of privacy, therefore, the information cannot be disclosed even if the Applicant knows and can identify the parties involved.

I would also like to address the application of section 23(2)(i). This subsection provides that an unreasonable invasion of privacy will be presumed where “the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation”. In my opinion, this section is meant to allow for the public body as an employer to gather references for employment purposes, and to evaluate the work product of employees as, for example, in an annual performance review. Some of the information in this report relates directly to the competencies of employees involved. Furthermore, all participants were advised that their responses and comments would be confidential. While an assurance of confidentiality is not determinative with respect to whether or not information is subject to disclosure, it is one of the factors that can (and should) be taken into account when determining whether the disclosure would amount to an unreasonable invasion of privacy.

In this report, I will address only those items that the Applicant identified as being of concern. I will not comment on other instances of redactions pursuant to section 23.

Page 2 - The information withheld pursuant to section 23 on this page is a recommendation directed at a specified individual and has been properly withheld.

Page 3 - One sentence in the fifth paragraph under the heading “Description of Work” has been withheld pursuant to section 23(2)(d). While it contains personal information about an individual, the sentence could be more judiciously severed to protect the identity of the individual involved. I note, however, that this sentence clearly contains

“advice” and “recommendations and meets the criteria for an exception pursuant to section 14(1)(a). I do not, therefore, recommend that it be disclosed further.

The information redacted in the first paragraph under the heading “methodology” identifies interviewees. The Applicant claims that one of the individuals mentioned was himself and that this information should have been disclosed. I agree. To the extent that the redacted material refers to the Applicant, I **recommend** that the information be disclosed. I am satisfied that the remaining information, however, was properly withheld pursuant to section 23.

Page 7 - There is a sentence in the second paragraph of page 7 which begins with the words “The Fort Simpson Office”. There does not appear to be any personal information contained in this sentence and I **recommend** that it be disclosed.

Pages 9, 10, 11 and 12 - A significant amount of information has been redacted from these four pages with reliance on section 23. This section of the report is a discussion about what the consultant writing the report heard about various employees from those he interviewed. Much of it is in the nature of opinions expressed about the actions and management styles of several employees. As noted, opinions about a specified individual is that individual’s personal information. To this extent, the information is protected pursuant to section 23. Furthermore, that an identifiable individual had an opinion about another individual is also protected. Much of the redacted material has, therefore, been appropriately withheld. There are some small portions of the redacted information, however, that do not fit within the above parameters. I **recommend** the disclosure of the following:

- the first sentence of the first full paragraph on page 9
- the last two lines of the same paragraph on page 9
- the last sentence in the second paragraph on page 10

Page 13 - The Applicant has raised concerns about two redacted items. The first is in the second paragraph and the information redacted from this paragraph provides opinions about a particular employee's competence and management style. It is, therefore, that employee's personal information and was properly redacted. I question, in fact, why any portion of this paragraph was disclosed. Whether the comments and opinions are positive or negative, they are still personal information and the disclosure of unsubstantiated opinions still amounts to an unreasonable invasion of privacy.

In the first and second sentence of the last paragraph the information similarly outlines opinions expressed about a particular employee's competence and management style and has been properly redacted.

Page 14 - The Applicant has questioned the redaction of information in the paragraph at the top of the page. I am satisfied that section 23 was properly applied with respect to the information redacted from this paragraph.

This holds true, as well for the first full paragraph on this page.

Also on this page, the Applicant felt that the last paragraph should have been disclosed. Again, I am satisfied that this paragraph contains statements and opinions about a third party and disclosure would amount to an unreasonable invasion of that person's privacy.

Page 15 - I am satisfied that everything redacted from this page is the personal information about an identifiable individual or individuals, contains opinion, praise, criticism and other information about that person or persons and that the disclosure of the information would amount to an unreasonable invasion of the privacy of that person or persons.

Page 16 - I am satisfied that everything redacted from the paragraph at the top of this page is the personal information about an identifiable individual or individuals and that the disclosure of the information would amount to an unreasonable invasion of the privacy of that individual/individuals.

The Applicant feels that the second paragraph of this page should have been disclosed. It appears that this paragraph is information in relation to the Applicant. If this is the case, I **recommend** that it be disclosed, except for the final sentence which is about another individual. If this information is not about the Applicant, it has been properly withheld.

The same holds true for the last paragraph. If it is about the Applicant, I **recommend** that it be disclosed, with the exception of:

- a) the fifth and sixth words of the first line
- b) the last line of the paragraph on page sixteen after the first word of the line.

If this paragraph is not about the Applicant, I agree that it has been properly withheld.

Page 17 - The Applicant seeks to have the first partial paragraph at the top of this page disclosed. This information, however, is about third parties and I agree that it has been appropriately withheld. Also on this page, the Applicant questions the redactions from the last paragraph on the page. With the exception of the first sentence of this paragraph, which I **recommend** be disclosed, the balance of the paragraph is about the performance and competencies of third parties and has been properly withheld.

Page 18 - The Applicant has asked me to review all of the redactions pursuant to section 23(1) on this page. There is nothing in the first paragraph on this page which, if disclosed, would reveal the personal information of any particular individual. The

paragraph speaks only to areas of responsibility and uncredited opinions about those areas of responsibility and falls within section 23(4)(e) which provides that disclosure of information about an individual's responsibilities as an employee does not amount to an unreasonable invasion of privacy. I **recommend** that this paragraph be disclosed.

Similarly, the second paragraph under the heading "Reporting Relationships" speaks of reporting relationships, not personal information. I **recommend** that this paragraph also be disclosed.

The next paragraph relates to the interpersonal relationships within the organization. To the extent that one of the parties being discussed is the Applicant, I **recommend** that these sentences be disclosed.

Page 19 - Once again, the Applicant has questioned all of the redactions made to this page. All of the material withheld on this page appears, once again, to relate the Applicant and his reporting relationship with his managers, the relationship of the Applicant with his managers and the understandings of various individuals about the Applicant's situation, including opinions expressed about the Applicant. If I am correct in these assumptions, the redacted information is the Applicant's own personal information and I **recommend** that this entire page be disclosed with the exception of the following information:

- In the second last paragraph
 - the information redacted from line one
 - on line 3, words 3 through 9
 - the first word of line 4
 - the first 3 words and last two words of line 5
 - the first word and second last word of line 6
 - the sixth word of line 7

- the fifth, sixth and seventh words on line 8
- in the last paragraph
 - the second, third and fourth words of line 1
 - on line 2, the second, third and fourth words of the sentence beginning on that line
 - everything after the first two words on line 4
 - everything on line 5

Page 20 - At the top of this page are two quotes of an interviewee. The information in these quotes is not about a particular individual (though there is reference to certain employees in a tangential way). The quotes represent the opinion of a particular employee about the management of the organization. As such, they are his personal information and the disclosure of the statements would amount to an unreasonable invasion of his privacy. I am satisfied that these two paragraphs have been properly redacted pursuant to section 23.

The Applicant has also asked me to review the last paragraph before the heading “Responsibilities and Expectations” as well as the redactions from the second and third paragraphs under that title. With respect to the last paragraph before the heading, the information redacted is the personal information of third parties and has been properly redacted.

In the second paragraph under the title, the first ten lines do not contain protected personal information. It is information about the organizational structure of the organization and the responsibilities of certain positions within the organization. I **recommend** that these lines be disclosed. I am satisfied that the information redacted from the balance of this paragraph were properly withheld pursuant to section 23.

In the last paragraph on this page, I believe, once again, that this paragraph may relate to the Applicant. If so, I **recommend** that the words on the first line of this paragraph be disclosed.

Page 21 - The material redacted from the paragraph at the top of this page is about a normal management initiative. Once again, I believe that the statement withheld may be about the Applicant and, if so, I **recommend** that this information be disclosed.

In the next paragraph, the last three lines of the paragraph have been redacted. I am satisfied that the information redacted from:

- line 9 and the first word of line 10
- the last four words of line 10; and
- all of line 11

has all been appropriately withheld pursuant to section 23 as the opinion of a third party about a situation. I **recommend** the disclosure of the balance of line 10.

In the last paragraph on the page, there have been several redactions, starting on line 10. The information redacted relates to opinions about certain employees and I am satisfied that disclosure would result in an unreasonable invasion of the privacy of those employees. I make no recommendation with respect to this paragraph.

Page 22 - In the paragraphs following the heading "Staffing of Project Officer Positions" there have been a number of redactions pursuant to section 23. In the first of these paragraphs I am satisfied that the word on line 2 and the word on line 4 have both been appropriately redacted pursuant to section 23. The last sentence in this paragraph is an uncredited quote from an interviewee and is a statement of fact. There is nothing in the disclosure of this sentence that would amount to an unreasonable invasion of any person's privacy and I **recommend** that this sentence be disclosed.

In the next paragraph a statement of opinion voiced by an employee has been redacted. The opinion is his/her own personal information and I am satisfied that, in all of the circumstances, disclosure would amount to an unreasonable invasion of the employee's privacy. The last sentence of this paragraph is also a statement of opinion. The first part of the quoted section of this section is a statement of opinion about a current situation in the workplace. It is the personal information of the individual holding the opinion and I am satisfied, in the circumstances, that it has been appropriately withheld. However, the five words at the end of the quote are about an individual, and it appears that these five words might relate to the Applicant. If so, the opinion is the personal information of the Applicant and I **recommend** that these words be disclosed.

The last paragraph on this page contains opinions about the capabilities of third parties and opinions about what should happen in the workplace. I am satisfied that the redactions from this paragraph were properly redacted pursuant to section 23.

Page 23 - The Applicant questions the redaction of the first full paragraph on this page. It appears that this paragraph might be about the Applicant, though that is unclear. It may be about someone else entirely. Because this report was written by an independent contractor who did not use names, but referred only to positions, unless one has some familiarity with the organization it is not always possible to know, for certain, who is being discussed. If the public body can identify with certainty that this paragraph is about the Applicant, I **recommend** that it be disclosed. Otherwise, erring on the side of caution, I would not make that recommendation.

A bulleted paragraph at the end of the page has also been redacted. It represents an opinion about the workplace, and as such, is the personal information of the individual who made the comment. I am satisfied that disclosure of this paragraph would amount to an unreasonable invasion of the privacy of the opinion holder.

Page 24 - Three bulleted paragraphs at the top of this page are, like the bullet at the end of the previous page, opinions about the workplace and, as such, are the personal information of the individuals who made the comments. I am satisfied that disclosure of these paragraphs would amount to an unreasonable invasion of the privacy of the opinion holders.

An opinion about a third party has also been redacted from the 2nd full paragraph on this page and I am satisfied that it has been properly redacted.

The last sentence on page 24 is an opinion about a third party and has been properly withheld.

Page 25 - The first three words on this page are part of the last sentence on page 24 and have been properly redacted.

The first sentence of the first full paragraph on this page constitutes another employee's opinion about other third parties. It has been properly redacted.

The two bulleted paragraphs just above the heading "Analysis and Recommendations" contain opinions about the workplace, and as such, the information in these paragraphs is the personal information of the individual(s) who made the comment(s). I am satisfied that disclosure of these paragraphs would amount to an unreasonable invasion of the privacy of the opinion holder(s).

The first sentence of the last paragraph on the page is about lines of reporting within the public body. The words redacted from this sentence are not personal information and I **recommend** they be disclosed.

Pages 28-39 - The Applicant has questioned all of the redactions pursuant to section 23 on these pages. Much of the redacted information consists of opinions about third parties and these redactions have all been appropriately done. I do, however, **recommend** the disclosure of the following items:

- Page 28, paragraph immediately following "Recommendation One", the sentence starting on line 8 and ending on line 10
- Page 28, next paragraph - this paragraph appears to be about the Applicant and to the extent that it is, there would be no unreasonable invasion of his privacy if disclosed to him. If I am correct in this assumption, I **recommend**, that this paragraph be disclosed.
- Page 29, partial paragraph at the top of the page - again, if I am correct in my assumption that this paragraph is about the Applicant, there would be no unreasonable invasion of his privacy if it were disclosed. I **recommend** the disclosure of this paragraph if it is about the Applicant;
- Page 30, third paragraph - again, to the extent that the person being discussed in this paragraph is the Applicant, there would be no unreasonable invasion of his privacy if it were disclosed. I **recommend** the redacted portion of this paragraph be disclosed, provided that this is the case;
- Page 31, Recommendation Five - The redacted information is a recommendation that two employees take certain steps in relation to the organization of the office. This is not personal information the disclosure of which would amount to an unreasonable invasion of privacy (Section 23(4)(e)). I **recommend** that it be disclosed;
- Page 34, last sentence under heading "Communication Trust - Trust of Disclosure". There is nothing in this sentence that would reveal personal information about any individual. I **recommend** that the sentence be disclosed.

- Page 37, bullet 6 - to the extent that this bullet is about the Applicant, disclosure would not amount to an unreasonable invasion of his privacy and I **recommend** it be disclosed;
- Page 38, Recommendation Sixteen - There is nothing in the sentence redacted from this paragraph that, if disclosed, would amount to an unreasonable invasion of privacy. It is a recommendation that two employees take certain steps in relation to the work required in the office. This is not personal information. I **recommend** that it be disclosed;
- Page 38, Recommendation Eighteen, first line - There is nothing in the information redacted in this line that, if disclosed, would amount to an unreasonable invasion of privacy. It is a recommendation that an employee take certain steps in relation to the management of the office. This is not personal information. I **recommend** that it be disclosed;
- Page 38, Recommendation Nineteen, first line - This is a recommendation that certain employees take certain steps in relation to the management of the office.
- This is not personal information, the disclosure of which would result in an unreasonable invasion of privacy (Section 23(4)(e)). I **recommend** that it be disclosed;
- Page 39, Recommendation Twenty, first line - There is nothing in the information redacted in this line that, if disclosed, would amount to an unreasonable invasion of privacy. It is a recommendation that a certain employee take certain steps in relation to the management of the office. I **recommend** that it be disclosed.

Pages 49 to 51 - All of the redactions on these pages have been dealt with under my discussion of pages 28 to 39 and should be dealt with accordingly.

CONCLUSIONS

In addition to the recommendations made with respect to the responsive records, I also **recommend** that the Department of Finance take steps to ensure that its ATIPP Coordinator and other ATIPP staffing have the experience and expertise necessary to respond to access requests. While I would never suggest that it is inappropriate for a department to seek assistance from the ATIPP office, the Department of Finance is an office that receives a high volume of access requests and, as requests go, this one was not overly complex. The subject matter of the report in question was somewhat sensitive, but should not have been beyond the capacity of this department to deal with. Because of the nature of the information that the Department of Finance, Human Resources handles, it is important that there be sufficient expertise “in-house” to respond to this kind of request. This department, perhaps more than most, needs to achieve a much higher level of expertise in this area.

I further **recommend** that, if not already in existence, the Department create a handbook or other guidance document, including standard letters which can be used in dealing with applicants. For example, there should be a standard form precedent letter for when an extension of time is necessary. While such precedent letters cannot be used blindly and without thought, they will assist in ensuring that all of the necessary elements are included. In this case, that would have included information to the effect that the applicant had the right to seek a review of the extension with this office. I am fairly confident that such a handbook does exist but the ATIPP Coordinator may not have been familiar with it. Again, this points to a need for more training for ATIPP Coordinators.

Elaine Kennan Bengts
Information and Privacy Commissioner