NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER
Review Report 20-226

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BACKGROUND

In February 2019 the Applicant made a request to the Department of Finance (Human Resources) for

> all emails and attachments regarding [the Applicant] and/or [a business] from and to [7 named employees] and anybody else that these people sent or receive (sic) emails pertaining to the said parties of [the Applicant and the business] in their organization between August 2018 and December 15th, 2018

The public body identified a number of responsive records and provided them to the Applicant. Several of these records were partially redacted pursuant to section 14(1)(b)(i) and the Applicant sought a review of those redacted sections of the records.

THE APPLICABLE SECTIONS OF THE ACT

As always, section 1 of the Act is an important starting point for considering whether exemptions have been properly applied. Section 1 sets out the purposes of the legislation. The relevant part of section 1 for the purposes of this review is the following:

> 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;....

(c) specifying limited exceptions to the rights of access;

The primary exception relied on by the public body in this review is section 14(1)(b)(i) of the *Access to Information and Protection of Privacy Act.* This section gives public bodies the discretion to withhold access to records or parts of record where the disclosure could reasonably be expected to reveal consultations or deliberations involving officers or employees of a public body.

Also relevant is section 33 which provides that when a public body denies access to a record, the onus is on them to establish that the Applicant has no right of access.

THE PUBLIC BODY'S SUBMISSIONS

The public body argued that Section 14(1)(b) is a discretionary exception intended to protect the deliberative process between senior officials and ministers and their staff as well as between officials themselves. They identified the redacted sections of the records as meeting the criteria for the exception, stating that "the analysis and the recommendations identified within the records is clearly advisory information, meant to assist departmental officials in moving forward in investigating and dealing with" a particular matter. They indicated further that it was their belief that disclosure of this information would "affect the candour with which officials would be able to discuss and consider issues of this nature" in the future. Finally, they "determined that the deliberative conversations about this matter must be protected to ensure the ability of officials to carry on this type of deliberation and consideration in the future.

I gave the public body the opportunity to expand on the basis for their "belief" that disclosure of this information would affect the candour of officials in future similar situations. No further submissions were received on this issue.

DISCUSSION

We start with section 1 of the Act which creates a *right* of access to public records. This right to access government records has been identified by the Supreme Court of Canada as a quasi-constitutional right. This means that any exceptions to disclosure must be interpreted and applied narrowly.

Section 14(1)(b)(i)

Section 14 is discretionary, which means that there is a two step process which must be applied. First, the public body must establish that the information in question meets the criteria for the exception. If it passes that hurdle, the public body must then actively exercise its discretion with respect to whether or not the information should be disclosed, considering all of the relevant circumstances. This discretion must be applied to each item redacted. It is not sufficient to apply a "blanket" discretion to every item withheld. And, as section 1 of the Act creates a right to access, the default position should always be disclosure. The discretion granted by the section to deny access to a record should only be applied when there are good, considered reasons for non-disclosure.

Section 14 reads as follows:

> 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...
>
> (b) consultations or deliberations involving
>
> (i) officers or employees of a public body

Not surprisingly, perhaps, public bodies are quick to use section 14 to justify the refusal to disclose information to applicants. There are, therefore, many reviews in which the section has been discussed, both in the Northwest Territories and other Canadian jurisdictions which have similar provisions.

For example, in Alberta Order 96-006, the Information and Privacy Commissioner of Alberta made the following comments in relation to their equivalent section of the Alberta *Freedom of Information and Protection of Privacy Act*:

> The next issue is whether section 23(1)(b)(i) ("consultations or deliberations") apply to the Records. In the broadest sense this section could be used to withhold any discussion whatsoever between any of the parties named in the section. If this were so, there would be very little access to any information under the Act. This cannot be right given the purpose of the Act which is stated in section 2 to be A... to allow any person a right of access ... subject to limited and specific exemptions as set out in this Act,". When I look at section 23 as a whole, I am convinced that the purpose of the section is to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions. The intent is, I believe to allow such persons to address an issue without fear of being wrong, "looking bad" or appearing foolish if their frank deliberations were to be made public. Again, this is consistent with Ontario and British Columbia. I therefore believe that a "consultation" occurs when the views of one or more officers or employees is sought as to the appropriateness of particular proposals or suggested actions. A "deliberation" is a discussion or consideration by the persons described in the section of the reasons for and against an action. Here again. I think that the views must either be sought or be part of responsibility of the person from whom they are sought and the views

> must be sought for the purpose of doing something, such as taking an action, making a decision or a choice.

Similarly, in Order F2012-10, the adjudicator with Alberta's Information and Privacy Commissioner's office clarified the scope of their equivalent section:

> A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision.

Each of the redacted items has to be considered individually.

Record 224

This record is a four page email chain. Most of the emails appear to be in the nature of directions given by an employee in the Department of Finance to an employee or employees in another department with respect to steps to be taken in relation to the Applicant's employment. The parties to the discussion have not been identified for me, but a search of the GNWT phone directory suggests that two of the parties involved in the discussion are employees of the Department of Finance, Human Resources in advisory positions. Another is a manager in the same division of the Department of Finance and the fourth employee involved is in a senior position in the department in

which the Applicant is/was employed. The Department has redacted much of this conversation pursuant to section 14(1)(b)(i). While there might have been a request for direction and advice, that is not clear from the email chain. Nor does there appear to be a lot of “consultation” or “deliberation” going on. Rather, the redacted information is far more in the nature of direction being given regarding steps to be taken or informational updates. Such updates or directions do not fall within section 14(1)(a) or (b). There are, however, some limited sections of the redacted materials that might, with further background or explanation, be in the nature of advice or recommendations as contemplated in section 14(1)(a). I make the following specific recommendations:

- Email dated August 29, 2018, 12:33 pm - The information redacted from paragraphs 2 and 3 of this email present two alternative approaches/options to deal with the Applicant’s situation. I am satisfied that the redactions in these two paragraphs meet the criteria for an exception pursuant to section 14(1)(a) or 14(1)(b)(i). Everything else redacted from this email is informing the recipient as to steps already taken and steps that need to be taken. There is no element of consultation or deliberation in this material. I **recommend** that, with the exception of the information redacted from paragraphs 2 and 3, this email be disclosed.

- Email dated August 30, 2018, 1:50 pm - Most of this email is a report or update on steps taken and direction decided on. It outlines strategy which appears to have been already decided upon. There are no elements of a consultation or deliberation. There is no suggestion that there are any decisions that need to be made. The decisions have been made and the strategy is being executed. With the exception of the fourth paragraph, which does appear to include advice or recommendations for moving forward, I **recommend** the disclosure of this email.

- Email dated September 4, 2018, 11:36 am - There is nothing in this email that involves a consultation or deliberation. I **recommend** that this email be disclosed in full.

- Email dated September 4, 2018, 11:44 am - There is nothing in this email that involves a consultation or deliberation. I **recommend** that this email be disclosed in full.

- Email dated September 4, 2018, 11:47 am - There is nothing in this email that involves a consultation or deliberation. I **recommend** that this email be disclosed in full.

Record 229

This record is a two page email. Again, no explanation has been provided about the role of the parties involved in the discussion though all appear to be employees of the Department of Finance, Human Resources. The email contains an update as to steps taken and plans and logistics for moving forward. There does not appear to be any suggestion of decisions to be made. There is nothing in this email that meets the criteria for an exception under section 14(1) and I **recommend** it be disclosed in full.

Record 238

This record is a three page email which begins with a request for the recipient's input with respect to a communication to be sent to a witness. Most of the information that follows this request has been redacted pursuant to section 14(1)(b)(i). I am satisfied that the redacted content is part of a consultation or deliberation and therefore meets the criteria for an exception to disclosure pursuant to either 14(1)(a) or 14(1)(b)(i).

Record 244

This record is an email on one page. The content of this email is, once again, more in the nature of an update on steps taken or to be taken. There is nothing in the content of the redacted material that suggests that a decision is expected or intended. The redacted material does not meet the criteria for an exception pursuant to section 14 and I **recommend** that this record be disclosed.

Record 249

This is a five page record which appears to be a template for an intended meeting with the Applicant, including a list of questions to be asked of the Applicant during the meeting. Most of the record has been disclosed, but there are a number of items that have been withheld. The first two are on the second page in the paragraphs numbered 1(b) and 2(b). These two redactions contain suggestions about how the interview might proceed. These suggestions probably qualify for an exception under section 14(1)(a) - advice or recommendation – but they do not meet the criteria for an exception pursuant to section 14(1)(b)(i) as a consultation or deliberation. To the extent that either of these to exceptions does apply, as the meeting in question has already taken place and all recommendations contained in this record have either been accepted or not, it seems that there is very little reason for the public body to exercise its discretion against disclosure.

The next items redacted from this record appear on page 3. They are all margin comments suggesting that certain steps be taken prior to the meeting with the Applicant. While none of these would qualify for an exception pursuant to section 14(1)(b)(i), they may, once again, meet the criteria for a discretionary exception pursuant to section 14(1)(a). Once again, to the extent that these comments relate to questions asked in a meeting that happened some time ago, I wonder about why the public body would exercise its discretion against disclosure for these items.

Section 23(2)(h)(i)

In Record 249 there are two paragraphs from which information has been redacted pursuant to section 23(2). In particular, in the paragraph numbered “6" on top of page four, information that would serve to identify a third party has been redacted from the question pursuant to section 23(2)(h)(i). Section 23 prohibits public bodies from disclosing personal information about a third party where that disclosure would amount to an unreasonable invasion of the privacy of that third party. By referencing subsection 23(2)(h)(i) it appears that the public body is suggesting that there is a presumed unreasonable invasion of privacy because the information consists of the third party’s name and it appears with “other personal information about the individual”. In this case, however, there is no other personal information about the third party in the paragraph. Section 23(2)(h)(i) is not applicable. Disclosure of a name alone, without more, does not amount to an unreasonable invasion of privacy. Furthermore, the context of the question is about an access to information request made by the Applicant. I **recommend** that the identity of the third party be disclosed.

On the same page, the identity of two other third parties has been redacted, again citing section 23(2)(h)(i). In this case, the information redacted does appear with other personal information about the third parties and I agree that the information has been properly withheld.

The Exercise of Discretion

As noted above, for those items withheld pursuant to a discretionary exception, such as section 14, discretion must be exercised. It is wholly insufficient in exercising this discretion to use a blanket explanation. Each item redacted must be assessed independently. Furthermore, in my opinion, the bald assertion that the disclosure of the information will affect candid discussions between employees in the future is not the

hook upon which a public body should be hanging its hat in terms of its exercise of discretion. Public servants hired to give advice should not be dissuaded from providing candid advice because their advice may be disclosed in accordance with law. The ATIPP Act is intended to make public bodies accountable for their actions. The very reason for ATIPP is to ensure that the public can test decisions made and advice given. Civil servants should always proceed on the basis that their advice and recommendations will be subject to public scrutiny. Except in unusual circumstances, the possibility that candid advice might be withheld in the future if information is disclosed will not suffice to overturn the public's right to access to information as provided for in section 1 of the Act.

In this case, I **recommend** that for each of the items for which I have found that the redacted material meets the criteria for an exception pursuant to section 14(1), the public body fully exercise their discretion and provide the Applicant with a full explanation for their decision with respect to disclosure/non-disclosure.

Elaine Keenan Bengts
Information and Privacy Commissioner