

**NORTHWEST TERRITORIES  
INFORMATION AND PRIVACY COMMISSIONER**

Review Report 20-228

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April 29, 2020

## **BACKGROUND**

On May 27, 2019 the Applicant made a request to the Department of Health and Social Services for records in relation to a transfer assignment for a particular position within the Department. The Department identified five records and a total of 21 pages of responsive records, but denied access to all of them pursuant to section 23(1) of the *Access to Information and Protection of Privacy Act* claiming that all of the information related to one position and that the disclosure of the information would result in an unreasonable invasion of the incumbent's privacy. In denying access, the Department identified the requested information as being information about a third party's employment, occupational and educational history and personal information relating to the hiring and management of a third party.

On July 15, 2019, the Applicant asked the Office of the Information and Privacy Commissioner to review the Department's decision pursuant to section 28 of the Act.

During the course of the review process, the Department took another look at the responsive records and decided that some of the information in the records could, in fact, be disclosed. At my suggestion, they provided the Applicant with all 21 pages of responsive records, though they were heavily redacted pursuant to sections 14(1)(a) and 23(2)(d), with two paragraphs redacted and labelled "not relevant to request".

This review will proceed on the basis of the redacted records provided to the Applicant during the course of this review process.

## **THE APPLICABLE SECTIONS OF THE ACT**

The starting point in any access to information review is to consider the stated purposes of the *Access to Information and Protection of Privacy Act* as set out in section 1. For

the purposes of this review, the relevant part of section 1 reads as follows:

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 Department has relied on section 14(1)(a) and section 23(2)(d) as exceptions applicable to various portions of these records.

Section 14(1)(a) is intended to allow employees of the GNWT to withhold access to records where the information in the records consists of advice, proposals, recommendations, analysis or policy options developed by or for a 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.

Section 23(1) prohibits the disclosure of third party personal information where the disclosure of that information will result in an unreasonable invasion of the privacy of the third party. Section 23(2), relied on by the public body, outlines circumstances in which there is a presumption that the disclosure will result in an unreasonable invasion of privacy. This includes, at section 23(2)(d) where

- d) the personal information relates to employment, occupational or educational history

## **DISCUSSION**

### Section 14(1)(a)

Section 14(1) is a section that public bodies often rely on in seeking to withhold

information. The first thing to note about this section is that it is discretionary. This effectively means that even if the information meets the criteria set out in the section for the exception, the public body still has to make a decision as to whether or not to disclose it, considering all of the relevant circumstances. This is an active step that must be taken in each instance the section is applied. It is not enough that the material meets the criteria for the exception. The second step of exercising discretion must be taken, with the starting position always being disclosure.

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.

I have adopted this interpretation of this section. 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 Ontario Order 118, Information and Privacy Commissioner Sidney B. Linden made the following observations:

In my view, advice for the purposes of section 13(1) of the Act must contain more than mere information. Generally speaking, advice pertains

to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

It is important, as well, to consider section 14(2) which provides that subsection (1) does not apply to information that:

- (b) is a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function;
- ...
- (e) is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal;
- (f) is an instruction or guideline issued to officers or employees of a public body;

With this in mind, each of the redactions must be considered individually.

Page 1 - In an email dated April 02, 2019, 1:11pm, the two last sentences of the email have been redacted. These two sentences are questions about process, asking about next steps. There is no element of advice or recommendation in these sentences. I am not convinced that section 14(1)(a) applies and I **recommend** that these two sentences be disclosed.

Page 7 - The body of an email dated April 16<sup>th</sup>, 2019, 2:10 pm has been withheld. Most of the information in the email is factual in that it appears to be either an announcement of decisions made or an update on the status of certain matters. There is nothing in the redacted material that suggests that there are decisions to be made. There is, however some third-party personal information that should remain redacted, in particular:

- a) the name at the beginning of paragraph 1
- b) the sentence that begins on the third line of paragraph 1 and ends on line four;
- c) the name at the end of paragraph 2.

I **recommend** that the balance of the email be disclosed.

Page 10 - The public body has redacted the entire body of an email dated March 27, 2019, 11:35 am. While the redacted material asks for information, it does not seek advice or recommendations with respect to a decision to be made. It reflects a decision made and steps that need to be taken to put that decision into effect. I **recommend** that this email be disclosed.

On the same page is an email dated March 27, 2019 11:07 am, which has also been withheld pursuant to section 14(1)(a). The information in this email is factual in nature. It updates the recipient on a particular issue. It does not meet the criteria for an exception pursuant to section 14(1)(a). With the exception of the name on the second line, I **recommend** that this email be disclosed.

Page 11 - In an email dated April 2, 2019, 6:48 pm two short sentences have been withheld. The first is a statement of fact and does not meet the criteria for an exception pursuant to section 14(1)(a). I **recommend** that this sentence be disclosed. The second is a statement about the writer's recommendation. This sentence meets the criteria for the exception.

Also on this page, in an email dated April 02, 2019 1:11 pm the public body has redacted two questions. They are questions about process and what steps are required next. There is no element of advice or recommendation in the questions. I **recommend** that these two sentences be disclosed.

In an email dated April 2, 2019, 12:56 pm, the entire body of the email has been withheld pursuant to both sections 23(2)(d) and 14(1)(a). The entire first line of the redacted portion of the email, appears to relate to a third party's personal information (section 23) and meets the criteria for a mandatory exception under that section as discussed below. The balance of the email, however, is a statement of fact and a question with respect to who took a particular step. I **recommend** that the second line of this email be disclosed.

Page 17 - This record is entitled "Competition Summary Sheet" which lists interviewees for a particular position and certain information about those interviews. Two columns of this chart have been redacted pursuant to section 14(1)(a). These columns do not contain advice or recommendations but results of the interview process. They do not qualify for an exception pursuant to section 14(1). The information does, however,

constitute the personal information of the individuals being considered for the position and section 23(1), as discussed below, does apply.

Under the heading “Reference Decision”, the name of the employee assigned to check the references of the candidates has been redacted pursuant to section 14(1)(a). There is nothing in this information that qualifies for the exception and I **recommend** that this name be disclosed.

#### Section 23(2)(d)

Section 23 of the *Access to Information and Protection of Privacy Act* prohibits the disclosure of the personal information about a third party where that disclosure would result in an unreasonable invasion of privacy. This is a mandatory exception to disclosure which means that if the information meets the criteria for the exception, the public body cannot disclose it.

I am satisfied that most of the information redacted pursuant to section 23(2)(d) does, in fact, constitute the personal information of individual employees and/or applicants for positions within the organization. The redacted information is not about the individual’s job responsibilities or work-related actions. It is about their career aspirations and their employment (and in some respects, their educational) history and disclosure would constitute an unreasonable invasion of their privacy. This includes those items discussed in relation to section 14(1)(a) where I have determined that section 23 applies. There are, however, some exceptions, including the following:

- Page 1, email dated April 2, 2019, 12:56 pm - the second line
- Page 1, email dated April 2, 2019, 11:09 am - the first sentence
- Page 8, email dated April 16, 2019, 1:07 pm - the first two sentences after the heading “Manager of OR and Day Procedures (Surgical Daycare Unit, Endoscopy and Operating Room (while this is personal information, it is information about the employee’s duties as an employee and is not, therefore, considered to be an unreasonable invasion of privacy as per section 23(4)(e))
- Page 11, email dated April 2, 2019 11:09 am - the first sentence

I **recommend** the disclosure of these items.

### Not relevant to the request

On page 8 of the package of responsive records is an email dated April 16, 2019, 1:07 pm. Two paragraphs in this email have been withheld and labelled “Not relevant to ATIPP request”. As I have said on many previous occasions, a record is a record. If there is something in the record that is responsive to an access to information request, the entire record is responsive. The public body cannot carve out portions that they decide are not directly responsive to the request. The only reason that portions of a responsive record can be withheld is if they meet the criteria for an exception under sections 13 to 25. In this case, part of the two redacted paragraphs amount to personal information, the disclosure of which would result in an unreasonable invasion of a third party’s privacy.

However, under the heading “Manager - Medicine and Surgery”, the first sentence merely names a new manager. Section 23(4) provides that the disclosure of personal information where the information relates to the third party’s “classification...or employment responsibilities as an officer or employee” is not an unreasonable invasion of that person’s privacy. I **recommend** that this sentence be disclosed. The same holds true for the entire paragraph under the heading “Manager - Chemo/IV and Dialysis” and I **recommend** that this paragraph also be disclosed.

Elaine Keenan Bengts  
**Information and Privacy Commissioner**