

**NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER**

Review Report 20-230

Citation: 2020 NTIPC 29

File: 19-196-4

May 20, 2020

BACKGROUND

The Applicant made a request to the Department of Infrastructure for:

All emails and attachments regarding [the Applicant] and/or [the Applicant's business] from and to [A.A.], [B.B.], [C.C.], [D.D.], [E.E.], [F.F.] and anybody else that these people sent or receive (sic) emails pertaining too (sic) the said parties of [the Applicant's business] and [the Applicant] in their organization between August 2018 and December 15th 2018

The named individuals all appear to be employees of the GNWT.

The Department identified a total of 902 pages of responsive records, which were provided to the Applicant in four separate packages. All four packages were disclosed with some information redacted. The Applicant sought "unredacted" copies of all of the responsive records. He also asked for a copy of "Facebook" postings referred to in one of the records but not provided.

The public body relied on section 14(1)(a) and 14(1)(b) for the majority of the material redacted from the responsive materials. Section 14 provides for a discretionary exception from disclosure for records that would be reasonably expected to reveal the deliberative process of government agencies. Some minimal information was also withheld pursuant to section 23, which prohibits the disclosure of personal information where that disclosure would result in an unreasonable invasion of a third party's privacy. Finally, some information was withheld because it was not "relevant" to the Applicant's request.

THE APPLICABLE SECTIONS OF THE ACT

The department has relied on section 14(1)(a) and (b) and section 23 as justification for most of the exceptions.

Section 14(1)(a) allows public bodies 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.

Subsection (b) allows public bodies to withhold information where the disclosure would reveal consultations or deliberations involving officers or employees of a public body.

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) outlines circumstances in which there is a presumption that the disclosure will result in an unreasonable invasion of privacy. These presumptions are rebuttable based on the specific circumstances. Furthermore, there may well be an unreasonable invasion of privacy in disclosure of personal information even where the information does not fit within one of the presumptions listed in section 23(2). Public bodies must, in all situations, consider the context of the personal information and determine whether disclosure would amount to an unreasonable invasion of privacy.

DISCUSSION

Section 14(1)(a) and (b)

Section 14(1) is one 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 an 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 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.

Section 14(1)(b) provides that a public body may refuse to disclose information that might be reasonably expected to disclose "consultations or deliberations" involving officers or employees of a public body or of the executive council. In Alberta Order 96-006, the former Alberta Information and Privacy Commissioner said the following with respect to the equivalent to our section 14(1)(b):

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.

In summary, Section 14(1) is intended to protect the decision making process within government and to allow public servants to provide candid input into that process without fear of embarrassment or negative comment. Not every question asked or answered will amount to advice, recommendations, consultations or deliberations such as to bring it under section 14(1). There must be some element of true discussion and debate involved and there must be a decision to be made. Section 14(2) makes it clear that 14(1) does not apply to a statement of the reasons a decision has been made or instructions or guidelines issued to employees of the public body, nor does it apply to a substantive rule or statement of policy adopted by a public body for the purpose of an activity of the public body. General day to day discussions about process or procedure do not attract the protection of section 14(1). Nor does it apply to decisions made. There must be some substantive issue being discussed in which it is of importance that the discussion be protected so as to protect the integrity of the discussion. Section 14(1) is not intended to avoid disclosure of uncomfortable statements made by an employee. It is intended to protect the decision making process. The mere fact that an issue will be (or was) discussed is also not protected pursuant to section 14(1).

Section 23

Section 23 prohibits public bodies from disclosing a third-party individual's personal information where that disclosure would amount to an unreasonable invasion of the third party's privacy. This is not a blanket exception to the disclosure of **any** third-party personal information. In order to meet the criteria for the exception, the disclosure must amount to an unreasonable invasion of privacy.

Section 23(2) outlines some circumstances in which there will be a presumption that disclosure will result in an unreasonable invasion of privacy. Most of these presumptions are fairly obvious as, for example, when the information relates to an individual's health or finances – the types of things that individuals tend to keep to themselves. The disclosure of a name alone without any other information in relation to the individual will not amount to an unreasonable invasion of privacy. That said, most often a name is accompanied by some other information that would serve to identify the individual or associate the individual with something else. For example, reference to an individual combined with a statement that they drove to a destination reveals that the individual likely owns a vehicle and that they were in a particular place on at least one occasion.

A presumption can be rebutted and even where a presumption set out in section 23(2) exists, the public body must still consider whether, in the particular circumstances of the case, the disclosure would amount to an unreasonable invasion of privacy.

THE RECORDS

Package 1 - 253 pages

While the department indicated that this package was disclosed with no redactions, this is not completely accurate.

Page 42: a name has been redacted and I am satisfied that it was properly withheld pursuant to section 23 (unreasonable invasion of privacy).

Page 44: information that would identify a specific individual and the concerns expressed by that individual has been withheld in the second paragraph. I

am satisfied that disclosure of this information would result in an unreasonable invasion of that individual's privacy and has, therefore, been properly withheld.

Page 47: Again, information that would identify a third party has been withheld. It is clear from the context that the Applicant would be able to identify that individual, whether or not the information was redacted. However, it was properly withheld because, once disclosed, there are no longer any restrictions on the recipient from further using or disclosing the record and the third party's privacy is at risk.

Package 2 - 171 pages

Page 27: A name has been redacted on this page and, once again, I am satisfied that it was properly withheld pursuant to section 23.

Pages 148 to 150: These three pages are entitled "Department of Infrastructure Claims Costs, July 2018". This document is a chart which appears to identify claims made to the WSCC as well as specific information about each of the claims. The public body has withheld these charts, with the exception of one line relating to the Applicant, indicating that the remaining information is not "relevant" to the Applicant's request for personal information. "Relevance" (or lack thereof) is not an exception recognized in the *Access to Information and Protection of Privacy Act*. If a record is responsive, or contains responsive information, it must be fully disclosed except to the extent that one of the exceptions set out in sections 13 to 25 of the Act applies. While some of the information in this chart would be the personal information of injured workers, not all of it is. The organization name, accident date, WSCC registration date, claim category, late penalty and location are all data points that could be disclosed without resulting in an unreasonable invasion of privacy. I **recommend** that the Department assess this record pursuant to the exception provisions of the Act (Sections 13 to 25) and disclose those parts of the record not protected from disclosure. This applies also to pages 156 to 159, 162 to 165, 168 to 171.

Package #3 - (188 pages)

- Page 2: The name at the top of the page has been redacted from this page. It is the name of an employee of the GNWT and indicates that the email in question was probably collated by the employee or that the record came from this employee's records. Either way, section 23(4)(e) provides that the disclosure of personal information does not result in an unreasonable invasion of privacy where the personal information relates to the third party's employment responsibilities as an officer, employee or member of a public body. I **recommend** that this name be disclosed. The same applies to pages 8, 10, 12, 14, 26, 27, 29, 30, 31, 32, 33, 34, 35, 38, 43, 62, 63, 68, 70, 77, 78, 79, 80, 81, 82, 84, 85, 89, 90, 100, 102, 104, 106, 108, 115, 117, 118, 119, 120, 124, 127, 141, 146, 148, 149, 176, 179, and 184.
- Page 8: A cell phone number has been redacted from an email dated December 13, 2018 8:16 am. It is unclear whether this is a personal phone number or a business phone number. If it is a personal number, it has been properly withheld pursuant to section 23. If it is a business cell phone, it relates to the employee's responsibilities as an employee and should be disclosed. This applies as well to the phone number redacted from page 68 (the public body conceded in their submissions that this phone number should have been disclosed)
- Page 14: In an email dated September 10, 2018, 3:40, the Department has redacted most of the last three paragraphs pursuant to section 14. They argue that the redacted information represents "advice" to an employee with the department about "next steps". I am not entirely convinced that the redacted information meets the criteria for an exception to disclosure under section 14. The passage starts with the words "so just to recap" and outlines what appears to be the outcome of discussions and the decisions reached. As outlined above, section 14 is meant to protect the deliberative process, not the decision made. I **recommend** that this email be disclosed.

Page 26: The body of an email dated December 5, 2018, 4:20 has been withheld from this page. I am satisfied that the content redacted meets the criteria for an exception pursuant to section 14(1)(a) and/or 14(1)(b).

Page 27: One sentence has been redacted from an email dated August 17, 2018. I am satisfied that the redacted information meets the criteria for and exception pursuant to section 14(1)(a).

Page 30: Most of the body of an email dated December 13, 2018 8:50 has been withheld pursuant to section 14. The information in the first paragraph includes statements which seek only to inform. There is no element of a decision to be made in this portion of the email and I **recommend** it be disclosed. I am satisfied that the next two redacted paragraphs do seek input into proposed courses of action and that they meet the criteria for an exception pursuant to section 14.

A cell phone number has been redacted from the signature of this email as well. It appears to be a business cell number and its disclosure would not result in an unreasonable invasion of privacy. I **recommend** that it be disclosed. This applies, as well, to the phone numbers redacted from pages 34, 38, 43, 62, 87, 115, 146, 176 and 179.

Page 89: A phone number has been withheld in an email dated August 31, 2018 9:03. It appears to be a personal cell number and it has, therefore, been properly withheld pursuant to section 23.

Page 103: This record appears to be similar to the ones described at pages 148 to 150 above and should be treated accordingly.

Package #4 (290 pages)

Page 2: The name at the top of the page has been redacted. It is the name of an employee of the GNWT and indicates that the email in question was probably collated by the employee or that the record came from this

employee's records. Either way, section 23(4)(e) provides that the disclosure of personal information does not result in an unreasonable invasion of privacy where the personal information relates to the third party's employment responsibilities as an officer, employee or member of a public body. I **recommend** that this name be disclosed. This holds true for the name redacted from the top of pages 6, 8, 21, 30, 31, 32, 82, 83, 84, 109, 114, 116, 124, 128, 135, 143, 144, 160, 162, 164, 166, 168, 172, 182, 184, 189, 192, 194, 196, 198, 201, 205, 213, 221, 227, 235, 250, 254, 257, 270, 275, 279, 283, 285, and 289.

The body of an email dated October 23, 2018, 8:10 am was originally withheld from the Applicant pursuant to section 14. During the review process, however, the department conceded that this email should have been disclosed and I so **recommend**.

Another email on this page dated October 22, 2018 1:21 has also been withheld pursuant to section 14(1)(b)(i). The information redacted is largely factual, confirming information in relation to the Applicant and decisions already made with respect to his situation. There is no indication that any further decision is anticipated or necessary. Section 14 does not, therefore, apply. I **recommend** the disclosure of this email without edits.

Page 3: Email dated October 22, 2018, 8:35. The public body conceded during the course of the review that the redacted portion of this page should have been disclosed and I so **recommend**.

Page 6: Emails dated November 1, 2018, 10:06, 11:16 and 11:31. The public body conceded during the course of the review that the redacted portion of these emails should have been disclosed and I therefore **recommend** they be disclosed.

Email dated October 15, 2018, 10:07 (continued on page 7). Most of this email has been withheld pursuant to section 14(1)(a) as analysis developed for the public body. I am satisfied that all but the last paragraph

of this email meets the criteria for an exception pursuant to section 14(1). I **recommend** that the last paragraph be disclosed. This email is also on pages 8 and 257 and should be treated accordingly.

Page 8: The public body conceded during the course of the review that the redacted portion of an email dated November 1, 2018, 10:06 should have been disclosed and I **recommend** that this be done.

Page 17: This record is a page from an attachment to an email dated November 1, 2018, 10:06. It is obviously a draft copy as there are comments on the side. On this page, the comment has been redacted. It does not, in my opinion, amount to a request for advice or recommendation and does not meet the criteria for an exception under section 14. I **recommend** the comment be disclosed.

Page 18: Similarly, three comments have been redacted from this page. I am satisfied that the comments on this page are all elements of advice being given and therefore they meet the criteria for an exception under section 14.

Page 21: The public body conceded during the course of the review that the redacted portion of this page should have been disclosed and I **recommend** that this be done.

Page 30: The public body conceded during the course of the review that the redacted portion of this page should have been disclosed and I **recommend** that this be done.

Page 31: The entire body of an email dated November 19, 2018, 1:13 has been withheld from this page on the basis of section 14(1)(a). Most of this email is an update on steps taken or things done and directing steps that need to be taken next. Only the fourth and fifth paragraphs contain any information that suggest decisions to be made and therefore meet the criteria for an exception under section 14(1). I **recommend** that the

balance of the email be disclosed. This email is repeated at page 116 and 125/126 and should be treated accordingly.

- Page 33: Again, the department has redacted the entire body of the email on this page (November 21, 2018, 3:10). I **recommend** the disclosure of the greeting and the first two lines of this email. I am satisfied that the balance of the email meets the criteria for an exception under section 14(1)(b) as a consultation/deliberation.
- Page 82: The information deleted from the email dated November 29, 2018, 12:48 appears to meet the criteria for an exception under section 14(1).
- Page 83: The entire body of an email dated November 26, 2018 12:38 has been withheld pursuant to section 14(1)(b)(i) as a consultation or deliberation. In my opinion, the first two paragraphs of this email are statements and a request. They do not meet the criteria for an exception and I **recommend** these two paragraphs be disclosed. The last paragraph, however, does meet the criteria. This email is repeated at page 84 and should be treated accordingly.
- Page 125: The public body conceded during the course of the review that the redacted portion of an email dated December 3, 2018 9:13 should have been disclosed and I **recommend** that this be done.
- Page 127: The public body conceded during the course of the review that the redacted portion of an email dated December 4, 2018 8:36 should have been disclosed and I **recommend** that this be done.
- Page 128: The entire body of an email dated December 10, 2018 9:18 has been withheld pursuant to section 14(1)(a) as advice and recommendations. I agree that the email meets the criteria for this exception. This email is repeated at pages 135-136 and should be treated accordingly.

Page 143: The public body conceded during the course of the review that the information redacted from emails dated December 13, 2018 1:31 and 1:01 should have been disclosed and I **recommend** that this be done.

Page 148: This email is the same as that discussed at Page 14 of Package 3 (September 10, 2018, 3:40) and should be treated accordingly. This email also appears on page 163, 165 and 166-167 and should be addressed accordingly.

Page 162: The public body conceded during the course of the review that the information redacted from an email dated September 11, 2018 9:09 should have been disclosed and I **recommend** that this be done. This email is repeated at page 164.

Also on page 162 is an email dated September 10, 2018 7:25 which has been withheld as part of a deliberation between employees. While it may, strictly speaking, be part of a consultation between employees, the emails both before and after this email, also part of the consultation, have been disclosed and it is difficult to understand why this particular email would be withheld when the others were disclosed. This email is also repeated at page 164.

Page 166: The email dated September 11, 2018 3:24 which has been redacted is clearly part of a consultation and includes advice and recommendations such that it meets the criteria for an exception under section 14(1).

Page 170: In an entry dated April 18, 2018 this page contains a reference to activities on Facebook as follows:

[ZZ] did not have [his/her] FP (sic) Post response to share with [Employee A]; she said she 'deleted it right away because I didn't want further issues'. The FB posts that were provided to [Employee A] are

attached and include one from [the Applicant] and one from a third party

This paragraph suggests that there was a hard copy of certain FB posts available which were intended to be attached to the report containing the statement. The public body, however, did not produce those copies as part of the response to the Applicant's Request for Information and the Applicant has asked for a copy of those posts. The public body did not address this missing document in its submissions to my office.

It appears clear from the wording of the passage above that a copy of these FB posts were saved in some fashion and were in the possession of Employee A. I **recommend** that these records be found and disclosed to the Applicant. If for some reason they cannot be found, an explanation is required in light of the wording of the entry on this page.

Page 182: The entire body of an email dated September 14, 2018 8:17 has been withheld as part of a consultation or deliberation. In the first paragraph, only the second sentence contains anything that is focussed on a decision to be made. The other sentences are simply comments. I **recommend** that the first and last sentence of the first paragraph be disclosed. In the second paragraph, the first sentence constitutes the personal information of the author of the email and has been appropriately withheld pursuant to section 23. The second sentence is simply a statement of intention and does not meet the criteria for an exception pursuant to section 14 and I **recommend** this sentence be disclosed. Similarly, with the exception of the phone number in the last paragraph, I **recommend** that this paragraph be disclosed.

Also on this page, the public body conceded during the course of the review that the information redacted from an email dated September 14, 2018, 7:47 should have been disclosed and I **recommend** that this be done.

- Pages 184 to 188 The department has withheld the entirety of this email dated September 14, 2018, 10:16. I am satisfied that this correspondence contains advice, analysis and recommendations and is part of a consultation. It therefore meets the criteria for an exception pursuant to section 14.
- Page 189: and 190 There is nothing in the first paragraph of the email on this page dated September 14, 2018, 1:01 that meets the criteria for an exception under section 14(1). I **recommend** that this paragraph be disclosed. In the second half of the email is a draft communication, obviously provided for consultation purposes. This portion of the email meets the criteria for the exception.
- Page 192: The body of an email dated September 18, 2018, 8:12 has been redacted. With the exception of the first sentence of the third paragraph, there is nothing in the email that would reveal the substance of any consultation or deliberation. I **recommend** that this email be disclosed but for this one sentence.
- Page 194: I am satisfied that the information redacted from the email dated September 19, 2018 8:01 fits the criteria for an exception pursuant to section 14(1)(b).
- Page 196: The public body conceded during the course of the review that the information redacted from an email dated September 19, 2018, 4:40 should have been disclosed except for the phone number, which appears to be a personal phone number, and I **recommend** that this be done.
- Page 198: The public body conceded during the course of the review that the information redacted from emails dated September 18, 2018, 1:31, 12:12 and 11:34 should have been disclosed and I **recommend** that this be done.
- Page 199: The entire body of an email dated September 18, 2018, 8:02 has been redacted. With the exception of the second sentence/paragraph, there is

nothing in this email that might reveal the substance of advice or consultations and I therefore **recommend** that this email be disclosed with the exception of that sentence.

- Page 201: Again, the full email dated September 20, 2018 10:39 has been withheld. Only the first paragraph meets the criteria for the exception. I **recommend** that the second paragraph be disclosed.
- Page 205: The public body conceded during the course of the review that the information redacted from the email dated September 27, 2018, 10:20 should have been disclosed and I **recommend** that this be done.
- Page 206: The public body conceded during the course of the review that the information redacted from the email dated September 26, 2018, 7:58 should have been disclosed and I **recommend** that this be done. This email is repeated at page 213.
- Page 213: The public body conceded during the course of the review that the information redacted from the email dated September 26, 2018, 3:01 should have been disclosed and I **recommend** that this be done.
- Page 221: Information has been redacted from an email dated September 27, 10:31. I agree that the second and third paragraphs of this email are part of a consultation or deliberation and meet the criteria for an exception under section 14. I **recommend**, however that the first and last paragraphs be disclosed.
- Page 240: The body of an email dated October 4, 2018, 10:49 has been withheld. There is nothing in this email that includes advice or recommendations. There are some statements of fact that would not in any way reveal the substance of any deliberation or consultation and there is at least one conclusion voiced. I am not convinced that this email meets the criteria for an exception under section 14(1) and I **recommend** it be disclosed.

Page 250: I am satisfied that the first paragraph of the email dated October 5, 2018, 1:25 meets the criteria under section 14 as advice or recommendations. The balance of the email, however, is not information that would reveal the substance of any consultation or deliberation, nor does it contain advice or recommendations. I **recommend** that the second and third paragraphs of this email be disclosed. This email also appears at page 255.

Page 254: The public body conceded during the course of the review that the information redacted from the email dated October 10, 2018, 3:24 should have been disclosed and I **recommend** that this be done.

I am satisfied that the information withheld from the email dated October 5, 2018, 3:05 meets the criteria for an exception under section 14(1).

Page 270: The first and last paragraphs of this email, dated October 16, 2018 9:56 do not meet the criteria for an exception pursuant to section 14 and I **recommend** these paragraphs be disclosed. I am satisfied that the remaining paragraphs meet the criteria for a section 14 exception.

Page 283: I am satisfied that the information withheld from the email dated October 18, 2018, 12:55 meets the criteria for an exception under section 14(1).

The public body conceded during the course of the review that the information redacted from the email dated October 18, 2018, 12:39 should have been disclosed and I **recommend** that this be done.

Page 289: The public body conceded during the course of the review that the information redacted from the email dated October 22, 2018, 8:35 should have been disclosed and I **recommend** that this be done.

Section 14(1) is a discretionary provision which requires, in every instance in which it is used as a reason to withhold access, that the public body must actively decide, based on all the relevant facts and circumstances, whether or not the information should be disclosed, keeping in mind that disclosure is the default. While I can see, based on my

review of the records, that the department took a conservative approach to the use of section 14 in that they could well have claimed that it applied to many more records, there is nothing in their submissions that indicates that where they did identify and withhold information based on this provision, what considerations were applied in exercising that discretion. When exercising discretion against disclosure, public bodies must be able to articulate the specific considerations that went into that decision, in each case the discretion is used to refuse disclosure. I therefore **recommend** that for all information for which I have indicated that section 14(1) applies, the public body review the exercise of discretion and provide the Applicant with an explanation as to the specific considerations (both for and against) that went into each decision to withhold the information.

Elaine Keenan Bengts
Information and Privacy Commissioner