NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER
Review Report 20-232
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BACKGROUND

On June 10th, 2019 my office received a Request for Review from counsel on behalf of an individual who had requested his own personal information from the Northwest Territories Power Corporation (NTPC). The Request for Information, made originally to NTPC on January 15, 2019, was for the Applicant's personal information as follows:

a) his last performance appraisal;
b) all records, including handwritten notes, working records and records created or kept in any shadow-type files, in the possession or under the control of the President and CEO of NTPC;
c) all records including hand written notes and emails and attachments sent, sent on behalf of, received from, copied, or blind copied to a set of 17 named individuals for the period June 27, 2017 to January 15, 2019:

On February 12th, NTPC extended the time for responding to the request pursuant to section 11 of the *Access to Information and Protection of Privacy Act* for 45 days. There was additional correspondence back and forth between the Applicant's counsel and the NTPC. NTPC then extended the response time for another 30 days to April 30, 2019. On that date NTPC disclosed 77 responsive records which were partially redacted. The public body advised the Applicant's counsel, on the same day, that they had discovered an error in the search parameters and had recently discovered an additional 987 records that might be responsive and that they were reviewing these newly identified records and that they would release any additional records by May 3rd. Of these, 54 records were disclosed to the Applicant on May 3rd.

The Applicant's specific complaints with respect to the response received fell into several categories:

1. Not all responsive records were disclosed.

    a) The Applicant pointed out that from his own records he could see that there were clearly records missing and he provided examples
    b) The Applicant's most recent performance appraisal, which had been specifically requested, was not included.
    c) The responsive records contained handwritten notes from only one of the 17 individuals named in the request.
    d) No records were provided for 9 of the 17 named individuals

2. Improper Interpretation of Exception Provisions

    a) The Applicant argued that section 14(1)(b) had been improperly applied;
    b) The Applicant argued that section 23 (unreasonable invasion of third party privacy) was not properly applied

3. Attachments not Disclosed

    a) despite an indication in the header of many emails that there were records attached to the emails, the attachments did not appear to have been included.

4. Improper charging of fees

    a) The public body failed to comply with section 50 of the *ATIPP Act* which states that where an Applicant is required to pay fees for services, the public body must give the applicant an estimate of the fees **before** providing the services.

THE PUBLIC BODY'S RESPONSE

NTPC declined my request to provide a document table which included, among other things, the number of pages in each record indicating that

> Since this information is not automatically generated, providing it for all 23,370 records would have required significant time and expense.

I also asked the public body to identify how they determined whether a record was responsive or not. NTPC responded that the records identified records as being non-responsive were either:

- not responsive to search terms and search parameters. Essentially, duplicates, records without responsive terms in the body of the record, emails sent or received by the Applicant were deemed non-responsive;
- responsive to search terms and search parameters, but reviewed and deemed not "personal information" (as defined in section 2 of the Act) of the Applicant; or
- responsive to search terms and search parameters, reviewed and deemed "personal information" (as defined in section 2 of the Act) of Ms. Berrub, but subject to Division B - Exceptions to Disclosure of the Act.

NTPC indicated that no records were withheld pursuant to section 14.

With respect to section 23, NTCP stated:

1. They did not redact the names of the 17 NTPC employees mentioned in the request for information;
2. They did redact the names of all other NTPC employees appearing in the records;
3. They did redact the names of all NTPC employees in “non-responsive parts of responsive records”;
4. They relied on subsections 23(2)(d), 23(2)(g), 23(2)(h) and 23(2)(i)
5. In determining whether the disclosure of personal information would amount to an unreasonable invasion of privacy, NTPC considered all relevant circumstances “including whether the third party would have been exposed unfairly to financial or other harm” and “whether the disclosure may have unfairly damaged the reputation of any person”

NTPC also indicated that some portions of some records were withheld pursuant to section 17(1)(b) which allows a public body to refuse to disclose information which could reasonably be expected to harm the economic interests of the public body. Information withheld pursuant to this exception, they argued, were “financial information, including budget numbers that are not publicly available”.

> Specifically, in deciding not to disclose this information, NTPC relied on subsection 17(1)(b) of the Act which states that a public body may refuse to disclose financial or commercial information in which a public body has a proprietary interest or a right of use and that has, or is reasonably likely to have, monetary value. NTPC also relied on subsection 17(1)(c) of the Act which states that a public body may refuse to disclose information which could reasonably be expected to result in financial loss to, prejudice the competitive position of, or interfere with contractual or other negotiations of the public body.

They did not provide any further explanation as to how the disclosure of the information might result in financial loss to, prejudice the competitive position of, or interfere with NTPC's contractual or other negotiations.

With respect to their failure to disclose the Applicant's most recent performance appraisal, they conceded that they had not provided that record and that it had disclosed that record during the review process. They further stated:

> NTPC notes that it provided a copy of this document to [the Applicant] at the time of [the] performance review. NTPC further notes that it provided a complete copy of [the Applicant's] personnel file to [the Applicant] prior to receiving the Request. NTPC clearly did not intentionally withhold a document that was already in [the Applicant's] possession.

They point out that "the Applicant made no attempt to rectify this situation with NTPC directly", apparently suggesting that a second request should have been made for this record before it was referred to my office for review.

NTPC also made the following observation:

> In investigating this situation, NTPC identified a few responsive records that should have been produced to the Applicant. As previously discussed, NTPC made the determination to exclude duplicates and emails that were sent or received by [the Applicant]. [The Applicant] would have been aware of the content of these emails, and some of these emails were in [the Applicant's] personnel file. NTPC removed this filter and reviewed all

documents in a subfolder containing, among others, all documents that were received by all individuals listed in the Request.

These records were provided to the Applicant during the review process.

With respect to missing attachments, the NTPC argued that some of them had, in fact been produced. They had determined that others which had not been disclosed were not responsive to the Request for Information. For example a brochure attached to one of the email chains in which the Applicant had indicated an interest in taking an Aurora College certificate program, was not disclosed because the brochure did not mention the Applicant so it was determined to be non-responsive. Others contained the personal information of third parties and were not disclosed for that reason.

With respect to the fact that there were only very few handwritten notes included in the responsive package, NTPC said that they asked all of the 17 named employees to "provide all records, including handwritten notes" and that they "did not question if handwritten notes were not provided".

There was no explanation as to why there were no records from 9 of the 17 named employees, except that "all records that did not respond to the further search criteria or that were deemed non-responsive upon review were not produced to the Applicant".

NTPC acknowledged that it did not give the Applicant a fee estimate in accordance with the requirements of the Act because "NTPC's focus was on responding to the Request properly and in a timely manner". Again they argue that this issue was not raised with NTPC except in the Request for Review but indicated they were willing to reimburse the monies paid by the Applicant.

THE APPLICANT'S RESPONSE

The Applicant was given the opportunity to respond to the submissions made by NTPC and provided a detailed response.

Firstly, with respect the public body's decision to unilaterally eliminate emails sent or received by the Applicant, he argued this was not in accordance with the ATIPP Act. They pointed out that the request for information specifically requested all

communications and records in relation to the Applicant and there was nothing in the Request for Information that suggested that these records were not included in the request.

With respect to the public body's application of section 23, the Applicant argued that the approach was not in accordance with either the spirit or intention of the legislation. Specifically, the Applicant argued that section 23(3) of the Act requires a public body to consider **all** of the relevant circumstances when making a determination as to whether a disclosure would amount to an unreasonable invasion of privacy, including whether the personal information is relevant to a fair determination of the applicant's rights. Further, the Applicant noted that there is no indication that NTPC reached out to any of the potentially affected third parties so there was no basis upon which they could possibly conclude that disclosure would expose the third party unfairly to financial or other harm or that disclosure might unfairly damage the reputation of any person referred to in the record. The Applicant further pointed out that section 23(4)(e) of the ATIPP Act expressly states that a disclosure of personal information is **not** an unreasonable invasion of privacy where the personal information relates to the employment responsibilities as an officer, employee of member of a public body.

> If the employees of the NTPC were asked about [the Applicant's] employment performance, whether [the Applicant] should or should not be considered for other employment opportunities within the NTPC, etc., which they were, the information disclosed in response to such questions must be disclosed as the disclosure of that information by a third party formed part of their employment responsibilities as employees of the NTPC and is not an unreasonable invasion of the third party's personal privacy. Such comments also fall within the definition of "personal information" in that a third party's opinion about the applicant is not the personal information of the third party; rather, it constitutes personal information of the applicant.

The Applicant acknowledged that the search terms used to locate potentially relevant records which were provided in the review process were generally appropriate. They argue, however, that NTPC did not disclose who conducted the searches or whether a software program (and the name of the program) was used to locate responsive

records. The Applicant notes the concern of a possible conflict of interest in having employees search their own records and referred to *Review Report 19-198* issued by this office in which I made the following comments:

> I think it is also important to address the process of searching for and gathering records to respond to an access request such as this one. I have commented before on having individual employees search their own records for responsive documents in situations in which there may be a conflict of interest. In almost any situation in which an employee or former employee is questioning the way in which things were done or the way in which he/she was treated in the workplace, there will be at least the appearance of a conflict of interest when involved employees search their own records. While I am not suggesting (nor is there any evidence) that any of the three individuals who searched their own records purposely failed to provide a full response, this is a situation in which there is a real or perceived conflict of interest and there should be some independent way to verify and check the response received.

Finally on this issue, the Applicant notes that the search terms used did not include the Applicant's initials ("YZ" for the purposes of this review) noting that employers often refer to employees by their initials, pointing to several instances in the documents disclosed in which that was done.

The Applicant argues that the quote above in relation to having employees search their own records is equally relevant in addressing the paucity of handwritten notes and suggests that the public body has a duty to dig a little deeper, particularly where the lack of records has been questioned.

The Applicant also suggested the fact that, according to NTPC's submissions, the "BCC" fields were not searched and this could well account for there being no records being produced from 9 of the 17 individuals named.

NTPC'S SECOND RESPONSE

The public body was asked if it had any response to the Applicant's submissions and provided the following comments:

1. With respect to those records deemed entirely or partially non-responsive:

   Since the purpose of the Request was to access personal information about [the Applicant], and in order to deal with a more manageable number of records given the short deadlines for responding to the Request under the Act, the decision was made to exclude emails sent or received by [the Applicant]. All emails that mentioned [the Applicant] and were otherwise responsive to the Request were included. NTPC views this as appropriate and reasonable.

2. With respect to NTPC's approach with respect to redactions:

   The Applicant lists many records that are "of concern (redactions improperly applied or pages not disclosed)". Since the Applicant does not have access to the withheld information (as it is subject to one or more exceptions under the Act and/or is not responsive to the Request), NTPC fails to understand the basis for the Applicant's concern. NTPC concludes that it is most likely speculation on the Applicant's behalf.

   The Applicant erroneously relies on section 23(4)(e) of the Act in support of the assertion that NTPC should produce any record containing a third party's opinion on [the Applicant's] employment performance or whether [the Applicant] should or should not have been considered for other employment opportunities within NTPC. As previously mentioned, there are clear exceptions at sections 23(2)(g) and (i) of the Act for the information that is being sought.

NTPC acknowledges that it can disclose a third party's information where the third party has, in writing, consented to or requested the disclosure as per sections 23(4)(a) and 24(2)(a) of the Act. However, NTPC also notes that it is not required to seek this consent.

3. With respect to its search methodology:

The Applicant indicated that NTPC failed to disclose who conducted the searches or whether a software program (and the name of the program) was used to locate responsive records. NTPC is under no obligation to disclose this information. However, NTPC is prepared to disclose that it used a search function to perform an electronic search to locate potentially responsive records.

The Applicant noted that NTPC did not include the search term ["YZ"]. NTPC was required to decide which terms to include and exclude in a non-exhaustive list of search terms. Its decisions in this regard were reasonable. It is inappropriate for the Applicant to attack this list which was evidently effective given that emails with the term ["YZ"] were in fact captured by the search.

4. With respect to the paucity of handwritten documents:

As previously mentioned, NTPC performed an electronic search to pull all potentially relevant emails and attachments. These make up almost all of the responsive records. NTPC also asked all individuals listed in the Request to provide any handwritten notes in their possession. The suggestion that NTPC should have had someone else search for any responsive handwritten notes in the possession of the 20 individuals named in the Request is unreasonable.

NTPC clarified, as well, that the electronic search did include searches of the “BCC” field.

NTPC felt that it had made every reasonable effort to assist the Applicant. They felt that the Applicant should have come back to NTPC after receiving the responsive package with any concerns they had rather than proceeding directly to the Office of the Information and Privacy Commissioner for a review.

In this response NTPC raised the following new issue

> The Act is not meant to act as an open invitation to a single applicant to make multiple unreasonable demands that impose a significant burden on the resources of a responsive and transparent public body. Section 31 (2) of the Act empowers the Information and Privacy Commissioner to refuse to conduct a review or discontinue a review if, in his or her opinion, the request for review is frivolous or vexatious, is not made in good faith, concerns a trivial matter, or amounts to an abuse of the right to access. NTPC submits that this Review has now reached the point where it meets all of these criteria.
>
> In any event, NTPC notes that, pursuant to section 31(3) of the Act, a review must be completed within 180 days after receipt by the Information and Privacy Commissioner of the request for review, except when a review is not conducted or is discontinued. The Applicant advised that [they] would be seeking a review on June 3, 2019 and provided reasons for the Review on June 10, 2019. On this basis, it appears that the deadline for completing the Review has now passed.
>
> As noted above, NTPC has responded fully, and in good faith, to the Applicant's initial request of January 15, 2019 and to the further review.

> For the reasons outlined above, NTPC respectfully requests that the Review be discontinued.

THE APPLICANT'S RESPONSE TO THE NEW ISSUE

In response to the new issue raised by the public body, the Applicant had a number of comments.

Firstly, the Applicant argued that the ATIPP Act expressly provides that public bodies are required, pursuant to section 7, make every reasonable effort to assist an applicant openly and accurately, completely and without delay. The time and effort necessary to comply with the Act is in no manner circumscribed under the Act and public bodies are required to spend as much time and expense as is necessary to comply with the legislation.

Secondly, the Applicant contests the suggestion that the issues raised by the Applicant were trivial given the circumstances (i.e. the termination of an employee after many years of service).

Thirdly, the Applicant disputes that they have made "multiple unreasonable demands". Rather

> The Applicant has simply exercised the rights provided to [them] in the legislation in accordance with the purposes set out in section 1. The obligations set out in the legislation are binding on the NTPC. Furthermore, if the NTPC is under resourced as it seems to claim, such a state has nothing to do with any applicant exercising their rights to access their personal information nor does it permit the NTPC to duck out from under its responsibilities mandated in the ATIPP Act. Again, the Request was not overly onerous and due to the deficiencies regarding the disclosure, a review was sought.

Fourthly, the Applicant argues that

> to claim that the Applicant's request for review was frivolous or vexatious, was not made in good faith, concerns a trivial matter, or amounts to an abuse of process, is incredible given the circumstances and the meaning that has been attributed to such conduct.

The Applicant referred to *Review Report 17-161* in which this office considered the application of section 53 of the Act and in which the following findings were made:

> Because the *Access to Information and Protection of Privacy Act* is quasi-constitutional legislation, the rights granted by the Act can and should be limited only when the circumstances are egregious. In my view, supported by decisions of other Information and Privacy Commissioners throughout the country, the circumstances in which I would favourably consider such an authorization will be rare and the onus is on the public body requesting the relief to establish that the circumstances of the case rise to the necessary level.

THE ISSUES

There are a number of issues raised by the above.

1. Are the issues raised by the Applicant in this review frivolous or vexatious such that the review should be discontinued?

2. What is the effect of the failure of the Information and Privacy Commissioner to complete this review within 180 days?

These two issues must be addressed first. If the conclusion is that this review should not proceed, there is no need to address the remaining issues. If, however, I find that

this review should continue, the following additional issues need to be addressed:

3. Were the parameters used by NTPC to identify records as responsive or non-responsive appropriate?

4. Was the search for responsive records conducted by NTPC adequate?

5. Are there additional records that could or should have been disclosed (i.e. are there missing records)?

6. Did NTPC properly apply the exception set out in section 17 of the Act?

7. Did NTPC properly apply the exception set out in section 23 of the Act?

DISCUSSION

1. Are the issues raised by the Applicant in this review frivolous or vexatious such that the review should be discontinued?

NTPC argues that, in insisting on a review of the response received to his request for information, the Applicant is abusing the system. They argue that the request for review is "frivolous or vexatious, is not made in good faith, concerns a trivial matter and amounts to an abuse of the right to access". In their words,

> The Act is not meant to act as an open invitation to a single applicant to make multiple unreasonable demands that impose a significant burden on the resources of a responsive and transparent public body.

The argument seems to be that this request for review is creating significant work for the public body and because it is their opinion that they responded fully to the request for information, the review is frivolous, vexatious and an abuse of process.

The discussion of this issue begins with section 1 of the *Access to Information and Protection of Privacy Act* which sets out the purposes of the legislation. It says:

> 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;
>
> (b) giving individuals a **right** of access to, and a right to request correction of, personal information about themselves held by public bodies;
>
> (c) specifying limited exceptions to the rights of access;
>
> (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and
>
> (e) **providing for an independent review of decisions made under this Act** (emphasis added)

So, we begin with the fact that one of the stated purposes of the Act is to give individuals the **right** to have access to all public records, subject only to limited and specific exceptions. Another of the purposes is to provide Applicants with a mechanism to review the decisions of a public body in responding to an access to information request. Section 28 of the Act sets out that right in more detail:

> 28.(1) A person who makes a request to the head of a public body for access to a record or for correction of personal information may ask the Information and Privacy Commissioner to review any decision, act or failure to act of the head that relates to that request.

Obviously, therefore, the fact that an Applicant requests a review cannot, by definition, be “unreasonable” even if a public body has been absolutely perfect in their response to an Applicant’s Request for Information. It is a right given by the Act and a means of

oversight. The public body may not appreciate the oversight, but it is clearly provided for in the legislation and is therefore not unreasonable.

There is a reason that the Act provides for independent review - a reason that the public body recognized in its own argument suggesting that this review was frivolous or vexatious:

> The Applicant lists many records that are "of concern (redactions improperly applied or pages not disclosed)". Since the Applicant does not have access to the withheld information (as it is subject to one or more exceptions under the Act and/or is not responsive to the Request), NTPC fails to understand the basis for the Applicant's concern. NTPC concludes that it is most likely speculation on the Applicant's behalf.

It is precisely because an Applicant does not have the ability to test a response that the Act provides for an independent review by an unbiased third party who does have that access.

Nor does a request for review amount to “multiple” requests. It is all part of the same process and the Applicant is merely following the process which is legislatively established.

NTPC refers to Section 31of the *Access to Information and Protection of Privacy Act* in making their request that I discontinue this review. Section 31 requires that when a request for review is received, the Information and Privacy Commissioner must conduct a review and allows that in that review the IPC may decide all questions of fact and law arising in the course of the review. The only situations in which the Information and Privacy Commissioner “may” refuse to conduct a review or discontinue a review are outlined in section 31(2):

2) The Information and Privacy Commissioner may refuse to conduct a review or may discontinue a review if, in his or her opinion, the request for a review

(a) is frivolous or vexatious;

(b) is not made in good faith;

(c) concerns a trivial matter; or

(d) amounts to an abuse of the right to access.

We begin with the clear statement that it is solely the prerogative of the Information and Privacy Commissioner to make the determination that the review request is frivolous or vexatious, not made in good faith, is with respect to a trivial matter or is an abuse of the right to access.

In analysing this provision, it is helpful to also consider section 53. Section 53 gives the Information and Privacy Commissioner the ability, at the request of a public body, to authorize the public body to disregard a Request for Information on the basis that it is:

(a) is frivolous or vexatious;

(b) is not made in good faith;

(c) concerns a trivial matter;

(d) amounts to an abuse of the right to access; or

(e) would unreasonably interfere with the operations of the public body because of its repetitious or systematic nature.

The interesting thing to observe is that there is nothing in Section 31 which allows the Information and Privacy Commissioner to refuse to conduct or to discontinue a review because the review “unreasonably interferes with the operations of the public body”. This ground arises only in relation to a public body’s request to disregard an access request. When it comes to a review, the fact that it creates extra work, even to the point

that it unreasonably interferes with the operations of the public body, is not relevant. So, to the extent that this is the grounds upon which the public body has asked me to discontinue this review, I decline to do so.

The next thing to consider, therefore, is whether the request for review is otherwise frivolous, vexatious, or made in bad faith or if continuation of the review would amount to an abuse of the right to access.

In Ontario Order M-850, there is a discussion of the meaning of the terms “frivolous”, “vexatious” and “abuse of the right to access” in the context of the Ontario Freedom of Information legislation. Assistant Commissioner Mitchinson, in discussing a decision of Commissioner Tom Wright, made the following comments and findings:

> In determining what constitutes “an abuse of the right of access”, I feel that the criteria established by Commissioner Tom Wright in Order M-618 ... are a valuable starting point. Commissioner Wright found that the appellant in that case ..... was abusing processes established under the Act .
>
> The Commissioner described in detail the factual basis for the finding that the appellant had engaged in a course of conduct which constituted an abuse of process. The Commissioner found that an excessive volume of requests and appeals, combined with four other factors, justified a conclusion that the appellant in that case had abused the access process. The four other factors were:
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> 1. the varied nature and broad scope of the requests;
> 2. the appearance that they were submitted for their “nuisance” value;
> 3. increased requests and appeals following the initiation of court proceedings by the institution;

4. the requester's working in concert with another requester whose publicly stated aim is to harass government and to break or burden the system.

Another source of assistance for interpreting the words "abuse of the right of access" is the case law dealing with the term "abuse of process".

To summarize, the abuse of process cases provide several examples of the meaning of "abuse" in the legal context, including:

- proceedings instituted without any reasonable ground;
- proceedings whose purpose is not legitimate, but is rather designed to harass, or to ulterior some other objective unrelated to the process being used;
- situations where a process is used more than once, for the purpose of revisiting an issue which has been previously addressed.

In my view, although this is not intended to be an exhaustive list, these are examples of the type of conduct which would amount to "an abuse of the right of access" for the purposes of section 5.1(a).

NTPC referred me to *Report F-2010-02* issued by the Information and Privacy Commissioner for Saskatchewan in which these concepts were discussed. That case involved an applicant who had made well over 100 separate requests for information, all with similar, though not identical, wording. The Information and Privacy Commissioner in that case made the following observations:

[44] The right to access information is considered a "quasi-constitutional" right. Indeed, Chief Justice McLachlin has commented:

> The Supreme Court of Canada has interpreted these Acts as quasi-constitutional legislation. It follows that as fundamental rights, the rights to access and to privacy are interpreted generously, while the exceptions to these rights must be understood strictly.
>
> [45] The phrase quasi-constitutional implies that certain rights, such as the right to access information held by government institutions, are fundamentally important in their nature because they reflect primary assumptions about the relationship between citizen and state....
>
> [47] I have previously stated that the right to access government records is an important matter that should only be extinguished in limited circumstances, such as when there is compelling evidence that a particular request is frivolous or vexatious.
>
> [48] From this perspective I find it difficult to reconcile the phrase "concerns a trivial matter" with the quasi-constitutional status of access to information rights. It would seem that by the nature of the status afforded these rights that few matters would qualify as trivial.

In that case, notwithstanding the fact that there had been a significant number of very similar requests for information and requests for review on the same issue from the same applicant, the Information and Privacy Commissioner did not see "compelling" evidence that the reviews concerned "trivial" matters.

In the same report, the Saskatchewan Information and Privacy Commissioner considered the terms "frivolous" and "vexatious" in relation to access to information legislation. In addition to referring to decisions of the Ontario Information and Privacy

Commissioner, he made reference to dictionary definitions of the terms as follows:

> [60] *Black's Law Dictionary* defines "frivolous" as "lacking a legal basis or legal merit; not serious; not reasonably purposeful."
>
> [61] The Merriam-Webster's Dictionary of Law defines "frivolous" as "lacking in any arguable basis or merit in either law or fact."
>
> [62] The term "vexatious" is defined in Black's Law Dictionary as "without reasonable or probable cause or excuse; harassing; annoying."
>
> [63] While the Merriam-Webster's Dictionary of Law defines "vexatious" as "lacking a sufficient ground and serving only to annoy or harass when viewed objectively."

He quoted, with approval, the criteria used by Alberta's former Information and Privacy Commissioner, Frank Work, in determining whether a request (or in this case a review) has been undertaken on vexatious grounds:

> [25] A request is not "vexatious" simply because a public body is annoyed or irked because the request is for information the release of which may be uncomfortable for the public body.
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> [26] A request is "vexatious" when the primary purpose of the request is not to gain access to information but to continually or repeatedly harass a public body in order to obstruct or grind a public body to a standstill.[1]

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[1] Office of the Information and Privacy Commissioner of Alberta, Request for Authorization to Disregard Access Requests Under section 55 of the Freedom of Information and Protection of Privacy Act, Edmonton Police Service, November 4, 2005, available at: www.oipc.ab.ca/ims/client/upload/Sect55_EPS_Nov4_05.pdf.

I agree with all of this analysis and adopt it for the purposes of this request. How does it apply to this case? I have no doubt that the Applicant's Request for Review addresses legitimate concerns in relation to the response provided and that there are no ulterior motives behind the request. Clearly, even NTPC acknowledged that at least some of the concerns raised were well founded as demonstrated by the fact that they found and disclosed a number of additional records during the review process.

I am completely satisfied that the goal of the request was to obtain the information requested and to test the response received, which is one of the purposes of the legislation and the rights granted by the legislation.

The Applicant has made only one request for information and one request for review. He was not satisfied with the response received and has, therefore, utilized the tools provided in the legislation to test the response by way of the independent oversight of the Office of the Information and Privacy Commissioner. That he has chosen to retain legal counsel who is well versed in the law surrounding access law and is therefore insisting on adherence to a high standard by the public body does not make this a frivolous or vexatious process. As will be discussed below, the issues raised are real issues and in many cases well founded, clearly revealing errors in interpretation and approach by the public body. In fact, NTPC has recognized, during the course of this review, that they made mistakes in the response provided. However, even if their response had been perfect, Applicants have a **right** to ask for an independent review of the decisions made by the public body in responding to a request for information.

I find, unequivocally, that this review is not frivolous, vexatious, or an abuse of the right of access. The issues raised are not, by any measure, trivial and the public body has provided me with nothing upon which I can conclude that the Request for Review was made in bad faith. Rather, the Request for Review is an exercise of the very rights granted by the legislation.

I therefore decline to discontinue this review.

2. What is the effect of the failure of the Information and Privacy Commissioner to complete this review within 180 days?

Section 31(3) provides as follows:

> (3) Except when a review is not conducted or is discontinued under subsection (2), a review must be completed within 180 days after the receipt by the Information and Privacy Commissioner of the request for the review

The Request for Review was received by the Office of the Information and Privacy Commissioner initially on June 4th, 2019 and perfected on June 10th. This report is, therefore, being issued more than a year beyond either of those dates. Section 31(3) says that the review of the Information is to be completed within 180 days, or six months, after receipt. Final submissions were received on April 20th, 2020. It is to be noted that the public body did not raise the section 31 issue until January 15th, which was the cause of a significant delay in "completing" the review.

I concede, for the purpose of this review, that the review was not completed within 180 days, without deciding what, exactly, must be completed within 180 days. The question, then, is what are the consequences of that delay?

This office does not have the power to make an order against a public body. The Information and Privacy Commissioner can only make recommendations, which must then be either accepted or rejected by the public body. When the new provisions contained in Bill 29 - *An Act to Amend the Access to Information and Protection of Privacy Act* come into effect, the deadline contained in the current section 31 will

become more significant because the Information and Privacy Commissioner will then be making orders that are binding on public bodies. However, until those provisions come into effect, this office only makes recommendations and it seems of little import whether those recommendations are made on day 20 or day 181 (or even on day 400). In either case, the public body has the ability to disregard the recommendations made. The final decision as to whether or not to disclose records belongs to the head of the public body.

The Supreme Court of Newfoundland and Labrador Trial Division considered a similar situation in *Oleynik v (Newfoundland and Labrador) Information and Privacy Commissioner*, 2011 NLTD(G) 34 (CanLII). In that case the Applicant, who was not happy with the recommendations of the Information and Privacy Commissioner, asked the court to set aside his Report and recommendations on the basis that the report was issued beyond the time frame within which such reports were required to be completed under the Newfoundland legislation. Madam Justice Fry, in deciding that issue, made the following comments:

> [55] Under section 48 of the Act, the Commissioner "shall complete a review and make a report under section 49 within 90 days of receiving the request for review." The request for formal review was made on May 4, 2009 and the report was issued on April 28, 2010, nearly nine months beyond the statutory time limit. Counsel for the respondent acknowledged that the Commissioner was clearly late in issuing the report....
>
> [56] Consideration of whether or not the Commissioner's "late" report filed on April 28, 2010 is still legally valid depends on whether the statutory time limit is mandatory or directory.....

> [59] In this case, given the non-binding nature of the review and report, the lack of any prescribed consequences for failure to meet the deadline and the general purpose of the legislation, I am satisfied that the 90 day time limit in section 48 is directory rather than mandatory. Accordingly, I do not find there is a basis in the circumstances of this case to attach any legal consequences, such as invalidating the report, to the failure of the Commissioner to provide his report within 90 days...
>
> [61] Since the Commissioner did in fact file his report, any delay was cured when the statutory duty was performed by the release of the report and the failure to comply with the time limits does not, in these circumstances, carry any legal consequences.

Public bodies always have the choice to disregard recommendations made by the Information and Privacy Commissioner. To do so solely on that basis that the Review Report is issued more than 180 days after the Request for Review is received, however, would not respect the spirit and intention of the legislation, which gives the public a right to access to public records - a right which has time and again been held to be quasi-constitutional in nature. As noted in the Newfoundland case, the time frame is directory and not mandatory and missing the target date does not invalidate the recommendations made. In this case, I felt that it was important that both the Applicant and the public body were able to fully articulate their positions. Both provided detailed and extensive submissions. The public body chose to raise this new issue very late in the process. It was only fair to allow the Applicant to respond to those submissions. This exchange of arguments takes time.

I find that the failure by this office to meet its time frame for the completion of a Review Report does not affect the validity or the legality of the recommendations made. Further, as will be seen in the discussion below, this public body made significant errors in

responding to the Applicant. I have, therefore, decided to complete this review and submit it to the public body for its consideration. I expect NTPC to consider the recommendations made on the merits.

3. Were the parameters used by NTPC to identify records as responsive or non-responsive appropriate?

The Applicant questioned whether the search terms used in conducting the search for responsive records was adequate to identify all responsive records. His concerns arose partially because there were only a very few handwritten notes included in the responsive package, and partially because there was no explanation as to why there were no records from 9 of the 17 named employees. It was not an unreasonable question for the Applicant to ask in light of the fact that he anticipated receiving far more records. I therefore asked the public body to provide a list of the search terms used and a description of the process. The Applicant was largely satisfied with the search terms with the exception of the failure to include the Applicant's initials. NTPC suggested that the fact that the searches brought up some records which contained the Applicant's initials is proof that this term was not required to be included in the search parameters.

I disagree with NTPC's analysis in this regard. The fact that the searches done brought up documents that included the Applicant's initials is, rather, confirmation that this was a legitimate and necessary search term because it confirmed that the Applicant was sometimes referred to by his initials within the workplace. The Applicant is entitled to receive all records responsive to his request. I therefore **recommend** that NTPC conduct additional searches for responsive records using the Applicant's initials as indicated in his submissions in this matter. With this exception, I am satisfied that the search parameters used by NTPC were sufficient.

5. Are there additional records that could or should have been disclosed (i.e. are there missing records)?

Unilateral decisions made by NTPC

It is absolutely clear that NTPC did not initially disclose all of the records responsive to this request. The public body was very frank in saying that they, of their own volition and without any consultation with the Applicant, simply chose not to disclose records clearly responsive to the Applicant's request for a number of reasons, including

a) the record was one in which the Applicant was included either as the author of the email or as a recipient
b) the record was a "duplicate".

This kind of unilateral action is, of course, is not contemplated by the Act. There is nothing in the legislation which allows a public body to unilaterally decide that the Applicant does not want or need certain responsive records. Further, in this case, because the Applicant was no longer employed with NTPC and no longer, therefore, had access to his NTPC email account, it was not reasonable to assume that the Applicant did not require emails in which he was included as the author or as a recipient. When a public body responds to an access to information request, it must respond to the request made, not to a version of the request as amended by the public body to make its job easier. In this case, if there were uncertainty, it was completely within the public body's ability to contact the Applicant and discuss the request with him to clarify what it was he was looking for and if he needed those records on which he was the sender or a recipient. In fact, section 7 of the Act requires public bodies to make "every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay." Part of this duty to assist is to communicate with the Applicant if there are any questions or ambiguities in the Request

for Information. Public bodies are not entitled to simply impose their own version of the request on the Applicant.

During the course of this review, NTPC advised they had “removed” the filters that excluded email records in which the Applicant was the sender or a recipient of the email and that they disclosed those records to the Applicant during the course of this review. I did not receive confirmation from the Applicant that he had received these additional records.

I therefore **recommend** that, if not already done, NTPC disclose all records that were withheld because the Applicant was either the author of the email or one of the recipients.

NTPC also indicated that it chose not to provide the Applicant with duplicates. While this may seem to make a lot of sense, this is also something that cannot be done unless the public body first confirms with the Applicant that duplicate copies are not required. In the age of email communication, duplicates are often the unavoidable consequence of the “forward”, “reply” and “reply all” functions. There are almost always multiple copies of portions of the same email chain floating around on many employee’s email accounts. Each of these chains, however, provides context and, in some cases, nuances that may not appear in each version of the correspondence. I was, in fact, struck by the absence of duplicate email chains in the response provided to the Applicant as generally speaking request such as this one bring up multiple copies of the same email chain in various iterations. Unless the Applicant has specifically indicated that they do not want to receive duplicates, therefore, duplicates from all sources should always be included in an ATIPP response. I **recommend** that the public body confirm with the Applicant that he does not require duplicates in this case. If the Applicant indicates that he wants to receive duplicates, I **recommend** that NTPC disclose all versions of all records, subject to the proper application of any exceptions.

This is a good place to comment on the Applicant's responsibilities when it comes to an Access to Information Request. At least twice in the course of arguments, NTPC complained that the Applicant acted in bad faith by coming directly to my office to request a review rather than first seeking to clarify matters directly with NTPC. While I would always encourage Applicants to work with public bodies in dealing with their requests for information, there is nothing in the legislation that requires an Applicant to "attempt to rectify" apparently missing information or to make a second request for information from the public body before seeking a review through my office. As noted above, section 28 gives the Applicant the right to seek a review by the Office of the Information and Privacy Commissioner and there is no obligation for them to negotiate with the public body before they do so. There is no "duty to assist" imposed on an Applicant. That duty lies only with the public body. This is why it is important for public bodies to communicate clearly and often with the Applicant while responding to a request for information particularly when, as in this case, the number of potentially responsive records is significant. Section 7 imposes a duty on public bodies to assist Applicants, not a duty on Applicants to assist a public body.

The Applicant's Latest Performance Review Documents

NTPC also acknowledged that they had not provided the Applicant with a copy of his most recent performance evaluation, as was specifically requested in the Request for Information. This record too was said to have been provided to the Applicant during the course of this review but I did not receive confirmation from the Applicant that he had received it. I therefore **recommend** that, if not already done, NTPC disclose this record to the Applicant.

Sufficiency of the Search

The Applicant questioned why nine of the seventeen named employees produced no

responsive records. The only response that NTPC could provide was that “all records that did not respond to the further search criteria or that were deemed non-responsive upon review were not produced to the Applicant”. It is likely that the Applicant named seventeen individuals because he was certain or reasonably certain that each of them would have relevant information in their system. While it is very possible that one or two of the named individuals did not have any records mentioning the Applicant, I share the Applicant’s reservations that more than half of the named parties did not have any responsive records notwithstanding the fact that the Applicant had worked with all of them.

When asked about the process for gathering responsive records, NTPC indicated that it formally asked each of the employees named in the Applicant’s Request for Information and several others who were deemed to be “other Human Resources personnel” to “provide all records, including handwritten notes....that included any personal information in relation to” the Applicant. Those records were then provided to the ATIPP Coordinator for NTPC, who then did the document review before disclosure.

I have had the opportunity in previous reviews not involving this public body to comment on the process for gathering responsive records. In *Review Report 19-198* I considered this issue and made the following comments:

> I think it is also important to address the process of searching for and gathering records to respond to an access request such as this one. I have commented before on having individual employees search their own records for responsive documents in situations in which there may be a conflict of interest. In almost any situation in which an employee or former employee is questioning the way in which things were done or the way in which he/she was treated in the workplace, there will be at least the appearance of a conflict of interest when involved employees search their

> own records. While I am not suggesting (nor is there any evidence) that any of the three individuals who searched their own records purposely failed to provide a full response, this is a situation in which there is a real or perceived conflict of interest and there should be some independent way to verify and check the response received.

In that case, I pointed out that when individual employees are asked to search their own records, there is no mechanism in place to "test" the responses received. The process there, as in this case, did not appear to include the need for any kind of certification of the response submitted. In that case there was at least an indication that each of the named individuals had been told that the would be required to verify that they had completed the request, though there was no indication as to what that verification looked like or whether that verification was, in fact, done.

I agree with the Applicant that, given that he was a long term employee with NTPC and that he worked with all of the named individuals, it is surprising that 9 of the 17 named individuals could not identify any responsive records. In a situation such as this, and keeping in mind the purposes of the Act and the duty to assist imposed on public bodies, it seems to me incumbent on the public body to find a way to double check this lack of response. At the very least, employees should be required to certify, in writing, the searches they have done to discover responsive records. As I did in *Review Report 19-198* I **recommend** that NTPC develop a far more robust process to verify the completeness and thoroughness of the searches done, including requirement that employees searching their own records provide a written certification that all relevant records have been provided and a requirement that they provide a list of the key-words used and the specific places searched including folder names, file cabinets and other places searched. I further **recommend** that NTPC conduct additional searches of the records of those individuals who did not identify any responsive records, and that these searches be verified independently of the named individuals.

Handwritten notes

Similarly, the Applicant questions the lack of paper records, particularly handwritten records. Having worked with the named individuals for many years, the Applicant knows that several of those named habitually took handwritten notes during discussions in the workplace. That only one individual produced written notes which included a reference to the Applicant over a period of approximately 18 months seemed, to the Applicant, to be unlikely.

Again, the public body could not confirm what steps had been taken to verify that each of the named individuals had searched their paper records other than to confirm that they had been asked to do so. There does not appear to have been any follow up with the individuals in question to ensure that they had included any paper records, including notes taken during meetings or related to work matters. Because section 7 requires public bodies to make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay, more should have been done in this case to follow up with employees searching their own records. I **recommend** that NTPC require these individuals to conduct additional searches of their paper records and that these searches be certified, in writing, independently of the named individuals.

Missing Attachments

When the Applicant raised the issue of emails which were identified as containing attachments which did not appear to be included in the responsive package, NTPC went back during the course of this review and looked at the records identified by Applicant has having missing attachments. In most cases, NTPC confirmed that the attachment had, in fact, been part of the responsive record and identified each of those items for the Applicant. Two attachments were identified as having been withheld.

In the first of these, the email identified the Applicant's interest in attending a certain course at Aurora College. The College brochure about the courses was withheld because, according to NTPC, it did not meet the search parameters in that it did not contain any personal information about the Applicant. While this is true, the brochure is part of a responsive record - the email to which it is attached. If part of a record is responsive, the entire record is responsive. This is an important concept. The Act does not provide for access to "information" - it provides for access to records. Information is contained in records and context is often only ascertainable by looking at the entire record. Even if the brochure were to be considered a "record" in its own right and not part of the email record, it provides context that may be important to the understanding of the discussion. Furthermore, it appears to be a document publicly available. By choosing to interpret the request so restrictively as to avoid disclosure of a publicly available brochure, the public body is not living up to the spirit and intention of the legislation. There is no reason not to disclose it. I **recommend** the brochure be disclosed.

The second attachment is said by the public body to be notes regarding two individuals (not the Applicant) who received Long Service awards. Again, because it was attached to a responsive record, it is part of that record and needs to be assessed in accordance with the legislation and only withheld (in whole or in part) if one of the specified exceptions to disclosure apply. As I understand it, the public body they felt that the attachment contained the personal information of third parties, the disclosure of which would have resulted in an unreasonable invasion of their privacy. This may be the case, but the public body should have produced the record with appropriate redactions, and an explanation to the Applicant. I **recommend** that this record be disclosed to the Applicant with appropriate redactions.

Identification of “Responsive Records”

I have concerns about how well the public body vetted the records initially identified as potentially responsive. NTPC indicated that they had originally found 23,370 records that appeared to fit the request parameters. The actual number of records eventually disclosed, however, was less than 150. I was not given any sense of what criteria was used to eliminate so many potentially responsive records. Statements made during the review process about how NTPC eventually determined whether or not to produce a record did not give me a sense that it fully understood the Act or what constituted a responsive record. I also got the very distinct impression from the materials submitted produced during this review that the requirement to respond to ATIPP requests was burdensome and, from their perspective, a less than productive exercise. While I make no specific recommendations based on these concerns, I think my concerns are reflected in this discussion about the thoroughness of the response and I **recommend** that the public body take steps to ensure that those tasked with responding to ATIPP requests are fully trained and understand the role they play in this process.

6. Did NTPC properly apply the exception set out in section 17 of the Act?

Section 17 of the Act gives a public body the discretion to refuse to disclose information which could be reasonably be expected to harm the economic interests of the public body. Specifically NTPC relies on subsection 17(1)(b) and (c):

> 17.(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the economic interest of the Government of the Northwest Territories or a public body or the ability of the Government to manage the economy, including the following:
> ....

(b) financial, commercial, scientific, technical or other information in which the Government of the Northwest Territories or a public body has a proprietary interest or a right of use and that has, or is reasonably likely to have, monetary value;

(c) information the disclosure of which could reasonably be expected to

(i) result in financial loss to,

(ii) prejudice the competitive position of, or

(iii) interfere with contractual or other negotiations of, the Government of the Northwest Territories or a public body.

In order to qualify for an exception under section 17(1)(b) to apply, the information in question, must:

a) reasonably be expected to

b) harm the economic interests of the GNWT or one of its agencies

c) include financial, commercial, scientific, technical or other information

d) in which the public body holds a proprietary interest

OR

right of use

e) that has, or is reasonably likely to have, monetary value;

For section 17(1)(c) to apply, the information must

a) reasonably be expected to

b) harm the economic interests of the GNWT or one of its agencies;

c) by

(i) resulting in financial loss to,

(ii) prejudicing the competitive position of, or

(iii) interfering with contractual or other negotiations of, the public body.

Section 33 provides that the onus is on the public body to establish that an applicant has no right to access to a record or part of a record. Therefore, the onus to establish, on a balance of probabilities, that information meets the criteria for the exception lies with NTPC. Section 17 requires, in particular, that there be a reasonable expectation of harm that will result from disclosure.

The application of section 17 of the Act was discussed by this office in *Review Report 06-057*. In that case, the application of similar provisions to section 17 in other jurisdictions were reviewed. In that report I noted:

> In *Order 113-1996*, the British Columbia Information and Privacy Commissioner stated:
>
> > it is not enough for the severed material to fall under the language of section 17(1)(c) or (d), because in the language of 17(1) itself, disclosure must also "reasonably be expected to harm the financial or economic interests" of the School Board. (*Order 113-1996*)

I acknowledged in the same report that other Canadian jurisdictions were consistent in their approach to determining when there might be a "reasonable expectation" of harm to the public body and that there must be clear and cogent evidence which points to the harm. There must be a direct link between the disclosure and the anticipated harm.

In *Order 98-020* made by Robert Clarke, then Alberta's Information and Privacy Commissioner, he held:

> In *Order 96-016*, I said that, for section 24(1) to apply, there must be a direct link between the disclosure of the information and the expected harm. In other words, harm has to result directly from the release of the particular information. “Ripple-effect” harm is not sufficient. Also, there must be a reasonable expectation that the harm will occur.....
>
> I do not believe that speculative losses, such as the loss of manpower costs, loss of expected savings, or having to continue to spend money, is harm to economic interest in this case, as contemplated by section 24(1). I have said that, to establish “harm”, there must be “damage” or “detriment”. Such speculative losses are not “damage” or “detriment” to economic interest. Furthermore, if harm to economic interest were to include every speculative loss, then section 24(1) could be used in ways not intended, to withhold a vast array of a public body’s records.

In the case of *The Workers’ Compensation v. Tom Mitchinson, Assistant Information and Privacy Commissioner*, (1998), 41 O.R. (3d) 464 (C.A.) the Ontario Court of Appeal had the opportunity to reconsider an Order made by the Ontario Assistant Information and Privacy Commissioner who found that the equivalent section of the Ontario Act required that there be “detailed and convincing” evidence of the expected harm which the disclosure of information might result in and not merely a speculation of possible harm. Justice Labrosse, for the Court, made the following comments with respect to the nature of the evidence necessary for the equivalent section of the Ontario Act to apply.

> Lastly, as to Part 3, the use of the words "detailed and convincing" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of

> Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again, it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm.

In this case, NTPC has provided only a very basic explanation as to how section 17 applied where that is the section relied on. They stated that the information withheld was “NTPC’s financial information, including budget numbers that are not publicly available” and that they held a proprietary interest in those numbers.

I agree with NTPC that the information withheld pursuant to section 17 appears to be budget numbers prepared in the planning process for a particular year. It is proprietary information. If NTPC were a private company, this information would likely be protected under section 24 but section 24 does not require any risk of harm. Nor is it clear that a publicly owned company can claim proprietary interest in financial information. As a public body and a publicly owned company, NTPC is accountable to the residents of the Northwest Territories. They have not pointed me to any provision which would suggest that they are not required or expected to provide financial information to the public or that they can withhold dated budgetary information from the public. Most importantly, however, NTPC has not provided any evidence that the disclosure of these particular pieces of information would be reasonably likely to harm the economic interest of the public body, particularly several years after the budgets were prepared and applied. I note, as well, that this is budget information for only a relatively minuscule portion of the NTPC’s total budget and it is difficult to imagine how disclosure of these numbers could possibly harm their overall economic interests.

I **recommend** the disclosure of the information redacted on the basis of section 17(1)(a) and/or 17(1)(c) in the following records:

Document #BER000245_001 to 016
Document #BER000246_002
Document #BER000249_001 to _010
Document #BER000250_001 to _003
Document #BER000273_001

In each of these records, the names of individual employees should continue to be withheld pursuant to section 23.

Section 23

By far the majority of the information withheld from the Applicant has been withheld pursuant to section 23. Section 23 is a mandatory exception to disclosure. If the information meets the criteria, the information cannot be disclosed.

Generally speaking, section 23 prohibits public bodies from disclosing personal information, as defined in section 2, where that disclosure would result in an unreasonable invasion of a third party's privacy. Not every disclosure of personal information will result in an unreasonable invasion of privacy, though this appears to be the approach taken by NTPC as they redacted the names of all employees who were not in the list of names from whom the Applicant requested records.
Section 23 only prohibits the disclosure of personal information where that disclosure would result in an unreasonable invasion of an individual's privacy. Sections 23(2), 23(3) and 23(4) are intended to assist in the determination of when disclosure would amount to an unreasonable invasion of privacy. Important to this assessment in this case are the following:

a) Section 23(2) which provides situations in which there is a presumption that disclosure of the information will amount to an unreasonable invasion of privacy, including:
   - 23(2)(d) where the information relates to "employment, occupational or educational history"
   - Section 23(2)(g) where the information consists of personal evaluations about the third party, character references or personnel evaluations;
   - Section 23(2)(h) where the information includes the third party's name combined with other personal information about the individual;
   - Section 23(2)(i) where the information could be reasonably expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation.

b) Section 23(4) which sets out circumstances in which disclosure of personal information will **not** amount to an unreasonable invasion of privacy
   - Section 23(4)(e) where the information relates to the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body

Based on the above, I am satisfied that some of the information withheld pursuant to section 23 was properly withheld. However, as noted above, section 23(4)(e) provides that information relating to an employee's employment responsibilities are not protected. Some of the information withheld fits into this category. Other information, if disclosed would not disclose any personal information about any individual. I therefore **recommend** that the following be disclosed:

a) Document #BER000217_003 - all redacted material
b) Document #BER000222_003 - all redacted material
c) Document #BER000224_002 and _003 - all redacted material

d) Document #BER000226_001 to _003 - all redacted material but for third party information in the column “Personnel Name”

e) Document #BER000230_001 to _010 - all redacted material but for third party information in the column “Personnel”

f) Document #BER000234_001 to _006 - all redacted material
Document #BER000234_007 to _009 - all redacted material but for names of third party individuals
Document #BER000234_010 to _015 - all redacted material
Document #BER000234_016 to _020 - all redacted material but for names of third party individuals

g) Document #BER000235_01 - all redacted material but for the name of the individual at the top of the page
Document #BER000235_003 to _005 - all redacted material but for the name of students and/or attendees

h) Document #BER000237_001 - all redacted material but for the names of third parties in the column “Name”

i) Document #BER000242_001 to _006 - all redacted material but for the information about third parties in the column “Personnel”

j) Document #BER000243-001 - the numbers redacted from the first line of the email dated August 27, 2018 10:46 am

k) Document #BER000251_001 and _002 - all redacted material but for third party information in columns “Personnel Name” and “Number”

l) Document #BER000252_001 to _018 - all redacted material but for third party information in the column “Personnel”

m) Document #BER000256_002 and _003 - the information that appears in red in the chart toward the end of the page 002 and continues on page 003

n) Document #BER000162_001 - all redacted material (this is information about the organization and the responsibilities of employees and falls

under section 23(4)(e))

o) Document #BER000163_001 - all redacted material

p) Document #BER000164_001 - all redacted material

q) Document #BER000170_001 to _007 - all redacted information but for third party names and the line at the top of page 1 preceded by the asterisk

r) In all of “Batch 2" of the disclosure package, all redacted information contained in the “To:” , “From”, “CC” and “Subject” fields of emails and all signatures (including contact information) at the end of emails;

s) Document #BER00254_001 - all redacted material

t) Document #BER000255 _001 - all information in the “Attachments” field but for third party names

u) Document #BER000257_002 - all information in the last paragraph of the email dated June 30, 2017 9:01 am except for the last five words in line three and the first two of line 4

v) Document #BER000289_001 to _003 - all redacted material

w) Document #BER000280_001 - all redacted material except for the first three lines and the first partial sentence and the second full sentence of line four of the email dated November 15, 2018 10:21 am as well as the second last paragraph of the same email.

x) Document #BER000290_001 - in addition to the information in the “To:” and “From:” fields, the greeting in the email dated December 9, 2018 2:33 pm.

y) Document #BER000272_001 - in the email dated July 31, 2018, 2:12 pm, the first ten words

z) Document #BER000270_001 - all redacted material but for the second sentence of the email dated July 30, 2018 11:32 pm

aa) Document #BER000287_001 - all redacted material but for the third party name near the end of the first line of name in the second paragraph of the

email dated December 5, 2018, 9:05

bb) Document #BER000292_001 - in addition to the information in the “To:” and “From:” fields and the signature, the greeting in the email dated December 11, 2018 1:31 pm

cc) Document #BER000293_001 - all redacted material

dd) Document #BER000269_001- all redacted material but for the second, third and fifth paragraphs of the email dated July 16, 2018 5:31 pm

ee) Document #BER000303_001 - all redacted information but for third party email addresses and the phone number at the end of the email dated December 14, 2018, 5:30 pm

ff) Document #BER000273_001 and _002 - all redacted material but for the third party name in the body of the email dated August 1, 2018 5:16 pm

gg) Document #BER000295_01 - see discussion re BER000280_001

hh) Document #BER000283_001 - all redacted material but for the first line after the greeting in the email dated November 20, 2018, 9:38 am

ii) Document #BER000259 - all redacted material

Document #BER000171 appears to have a significant amount of information redacted, all of it about the Applicant. Both the redacted and the “unredacted” copies provided for my review appear to be identical (i.e. both are extensively redacted). I **recommend** that NTPC review the original version of this record and disclose such information as constitutes information about the Applicant or the Applicant’s position in the organization.

There is a similar issue with Document #BER000306_01 to _08. These pages are hand written notes of an employee and almost everything has been redacted from both the redacted and the “unredacted” versions provided for my review. I cannot assess whether the redacted material is properly redacted unless I know what it says. Further, as noted above, all information in a responsive record must be disclosed unless it meets

the criteria for one of the limited and specific exceptions under the Act. For the purposes of a notebook such as this, I would suggest that each page containing responsive material is a “record” that should be vetted in accordance with the applicable sections of the Act and that the entire record be disclosed unless there is specific information which meets the criteria for an exception pursuant to sections 13 to 25. I **recommend** that NTPC review the original version of these eight records and disclose all information but for material which is subject to one of the exceptions in the Act.

In Document #BER000288_001, two emails at the top of the page have been withheld apparently on the basis that they are “not relevant” to the request. However, once a record is determined to be responsive to a request the entire record must be disclosed, unless the record or a portion of the record falls within one of the exceptions of the Act. “Not relevant” information contained in a record often provides context and it is not for the public body to decide what part of the responsive record is needed and what part is not. I **recommend** the disclosure of these two emails. This is true, as well for Document #BER000258_001 and _002 (the body of the email dated June 30, 2017, 9:48 and the first sentence of the email dated June 30, 2017 9:43 am contain the personal information of a third party and should be withheld)

CONCLUSION

My specific recommendations are included in the discussion above. I do, however, feel that it is necessary to comment on this public body’s approach to this request. It was fairly clear in the submissions received that NTPC was not fully engaged in the process and was not terribly enamoured with having to comply with its obligations under the legislation. I understand that NTPC may not receive a lot of ATIPP requests and that this fairly significant request therefore create a significant amount of extra work that, at least from their perspective, was not terribly productive work. I also fully appreciate that it can be a time consuming and overwhelming process. However, this legislation plays

an important role in the maintenance of democratic principles and creates quasi-constitutional rights in the public to have access to public records. I would encourage NTPC to create corporate leadership that supports and encourages complete and open responses to access to information requests.

Elaine Keenan Bengts
Information and Privacy Commissioner