

**NORTHWEST TERRITORIES  
INFORMATION AND PRIVACY COMMISSIONER**

Review Report 20-233

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July 2, 2020

## **BACKGROUND**

On August 22<sup>nd</sup>, 2019 my office received a Request for Review from counsel on behalf of an individual who had requested his own personal information from the Department of Finance. The Applicant had requested all records sent to, sent on behalf of, received by or from, copied to, or blind copied to seven named employees between September 1, 2017 and May 31, 2019 in which the Applicant was named. The request specifically included a request for handwritten notes kept as part of a paper diary, journal, notebook or on loose paper. Although there were some delays, the public body responded to the request on July 25, 2019 and provided 537 pages of responsive records, some of which had been withheld in full or in part pursuant to one or more of the exceptions provided for in the Act.

The Applicant sought a review of the response received, citing several grounds, including:

- a) Incomplete disclosure
  - The Applicant complained that while the public body had disclosed 537 pages, when duplicate copies were taken into account it was “apparent that not all records were provided given the Request was for records in the possession or under the control of seven (7) individuals with whom [the Applicant] had contact
  - No records had been received from four of the seven named individuals
  - Attachments to one of the email threads had not been included
  - No handwritten notes had been provided for any of the seven individuals

- b) Improper Application of Section 14(1)(d) of the ATIPP Act, which allows a public body to withhold information that might reasonably disclose plans relating to the management of personnel which have not yet been implemented.

## **THE DEPARTMENT'S SUBMISSIONS**

The Applicant questioned the adequacy of the search for responsive records in this case. We therefore asked the Department to outline their process for identifying responsive records. The Department of Finance advised that they had sent an email request to each of the employees named in the Request for Information with a request that those employees search their records and provide copies of any records described in the Request for Information to the ATIPP Coordinator for the department for review. The request included a direction to search paper and hand-written records. Electronic and paper searches were performed by each of those individuals except for two, who were no longer employed with the Department at the time of the request. The searches for the records of these two individuals were conducted by their former supervisor. The keywords used included first and last name, along with the timeline of the request. While paper records were searched, no responsive paper records had been found.

The Applicant received no responsive records from four of the seven named individuals. The Department explained that for two of these, any records found were outside of the requested time frame for the request. A third found only two responsive email messages, both of which were included in the responsive package. The fourth was one of the employees no longer working with the Department and the records from that person were, therefore, included in the package submitted by his former supervisor.

With respect to the concern about missing handwritten and/or paper records, the Department verified that "all documentation collected and provided to our office for this request have been released to the Applicant, inclusive of all attachments".

There were some records which had areas with blacked out material but with no explanation as to the section of the Act under which the information had been withheld. With respect to these records with "black-out boxes" the Department provided the following explanation:

The box with the question mark inside each of the noted pages is what was provided to our office in the original format, it appears to be part of a third-party company signature block. Our office did not apply this mark, nor did we alter it in any way. It was fully released, as received by our office to the Applicant.

Finally, by way of explanation as to why there had been no hand written or paper records found, the public body indicated that “given the short lifecycle of transitory handwritten material, it is not uncommon for handwritten notes to be either transferred into electronic format, or discarded once the matter is actioned”.

## **THE APPLICANT’S RESPONSE**

The Applicant was invited to respond to the public body’s submissions and provided the following additional comments.

Section 14 - The Applicant pointed out that section 14 of the Act contains a discretionary exception to disclosure and that even if the information meets the criteria to be eligible for such an exception, the public body must still exercise active discretion. He noted that there was no indication at all that discretion had been exercised and argued that, in light of the fact that the information was the Applicant’s own personal information, discretion should have been exercised in favour of disclosure.

Adequate Search for Records - The Applicant pointed out a number of concerns about the searches done. In particular, he pointed out that while his request included the words “received by or from” in relation to emails requested, the search parameters described by the public body was missing these words. He argues that these instructions were deficient and likely resulted in the failure to identify all responsive records. The Applicant also pointed out that there was no indication as to where the individual employees were instructed to search for responsive records. He suggests that the instructions should have included a requirement to search active mailboxes, archived mailboxes, all relevant drives and all relevant folders”. Again, he suggests that this failure likely resulted in the failure to identify all responsive records. He was also critical of the keywords used (first and last name and the timeline identified in the request). He argues that such an approach is not likely to identify all responsive records given that employees are often referred to only by a first name. Further, while the

Applicant's first name was used, he was rarely referred to by that name in the workplace, but rather by an abbreviated name (for example, "Bob" not "Robert") and this would likely have resulted, again, in missing records, as would the failure to search the Applicant's initials and/or his email address. Finally, the Applicant took issue with the practice of the named individuals searching their own records, in particular because "[w]ith respect to certain of the individuals listed, it was a known fact that [the Applicant] had filed a harassment/abuse of authority complaint against [a named employee]. It was also known to those individuals that [the Applicant] was off work as a result of the negative impact such harassment/abuse of authority had on his health and that he was looking for a workplace accommodation". In these circumstances, the Applicant argued, having such staff conduct their own searches was "inappropriate and improper".

Finally, the Applicant felt that it was "inconceivable" that none of the named individuals had any notes relating to him.

## **DEPARTMENT'S FINAL SUBMISSIONS**

The Department provided clarifications with respect to its initial submissions as follows:

I can confirm that the request that was sent out internally within the Department of Finance did include the name "[Applicant's abbreviated name]", the phrase "received by or from" as indicated in the original request, and a broad description of handwritten documentation including all handwritten notes created by any of the individuals included in the request and kept as part of a paper diary, journal, notebook or on loose paper for the specified period.

They agreed, however, to conduct additional searches with additional search parameters. No additional records were discovered.

## **ISSUES**

I have identified the following issues in this review:

1. Were the searches conducted by the public body such that they would be reasonably likely to identify all responsive records?

2. Did the Department properly apply the exception contained in section 14(1)(d) of the Act?

## **RELEVANT SECTIONS OF THE ACT**

As always, it is important to start with the purposes of the Act as set out in Section 1. Those purposes include to make public bodies more accountable to the public by giving the public a right of access to records held by a public body and giving the public a right to access to their own personal information subject to limited exceptions.

Also important is Section 7 which requires public bodies to “make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay”.

Section 14(1)(d) of the act contains one of the “limited” exceptions to disclosure mentioned in section 1. It provides:

- 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...
  - (d) plans that relate to the management of personnel or the administration of a public body that have not yet been implemented

## **DISCUSSION**

- 1. Were the searches conducted by the public body such that they would be reasonably likely to identify all responsive records?**

I begin this discussion with the issues surrounding the adequacy of the search for responsive records. The Applicant expected more records and has questioned the scope of the searches and the method by which searches are conducted.

I have made comment in many previous reports about the way in which public bodies conduct searches for records. The Applicant referred to one recent review in which I made the following observations:

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. *Review Report 19-198, NTIPC*

In today's digital world, there will always be some variations in the way that individual employees save and organize their own electronic records. The person most likely to be able to identify and produce a record is, therefore, the person who created it. It is for this reason that asking individual employees to search their own records is, in most cases, likely to produce the best results. However, as noted, where there is discord in the workplace and those who are being asked to search for records are either directly involved in the discord or have been witness to it, questions as to bias will arise even if every such employee provides 100% of responsive records. The existence of a conflict of interest or even a perceived conflict of interest will always leave a question as to the thoroughness of the searches (or, more aptly, the completeness of the response). The ATIPP Coordinator responsible for gathering and reviewing responsive records has few tools to test the responses provided.

The other problem with asking individual employees to search for responsive records is that the searches are likely to be inconsistent. In Review Report 19-198 noted above, I made the following observations:

Quite apart from the perceived (or real) conflict of interest, employees who are not trained in responding to ATIPP requests may, as suggested by the Applicant, fail to conduct a full and adequate search for records if they are not provided specific and detailed instructions, including a list of key words to be used.

For these reasons, it is vital that the ATIPP Coordinator play an active role in the process and that they take steps to ensure accuracy of responses received. Rather than just providing employees with the wording of the access request, the ATIPP Coordinator should also be providing more specific instructions to individual employees that specify the keywords to be searched (without limiting the use of additional keywords) and include direction as to the places to be searched. Employees searching for records should also be required to certify, in writing and with a signature, the searches they have conducted, including the places searched (for example, email sent and received folders, drives and folders searched, filing cabinets searched). Requiring such certification will have two impacts. Firstly, it will send a message that the employees will be held to account for their searches. Secondly, it will give the ATIPP Coordinator the ability to assess and question the thoroughness of the search before responding to the Applicant as well as to answer specific questions about searches done in the event of a review.

I therefore **recommend** that the Department of Finance establish written protocols for ATIPP Coordinators to follow when gathering records in response to an ATIPP request. These protocols should include:

- a) providing specific instructions to individual employees that include specific the keywords to be searched (without limiting the use of additional keywords);
- b) where appropriate, requiring the ATIPP Coordinator to consult with the Applicant to identify necessary keywords to be searched;
- c) providing employees with direction as to specific places to be searched;
- d) providing employees with a form which must be completed by the person conducting the search which specifies the keywords used, the specific places and records searched (ie. incoming email, outgoing email, email archives, drives and folders searched, paper records searched etc.) and requiring the employee to certify that he/she conducted the searches, the date of the searches, and that all records responsive to the request have been provided;
- e) providing for a means to “test” the accuracy of the response provided

In this particular case, the public body agreed to address some of the failures or perceived failures raised by the Applicant, including having additional searches

conducted using keywords not originally used (the Applicant's abbreviated name, his initials and his email address). No additional records were discovered as a result of these searches.

While I acknowledge the Applicant's distrust, he has really provided no concrete reasons for his skepticism as to the completeness of the response other than, essentially, that he expected more records and that it was "inconceivable" to him that there were no handwritten or paper records. While it is not the responsibility of the Applicant to prove that there are missing records, there should be something of substance to suggest that records are missing. It doesn't have to be much, but it really needs to be more than "I know there are more records" stated boldly and baldly.

Based on the submissions of the public body, and in particular in light of their agreement to conduct additional searches during the course of this review, I am satisfied that the public body conducted adequate searches for responsive records in this case. I am, further, satisfied with the public body's explanation as to why there had been no records received from four of the seven named individuals.

The "missing" attachment to one of the email threads was identified by the Department and confirmed as having been included in the package of responsive records.

The fact that there were apparently no handwritten notes about the Applicant in the possession of any of the seven named individuals is not, in and of itself, evidence that the searches were incomplete. The Applicant has not provided any indication as to why he is so certain that there should be handwritten notes. There was no suggestion that any of the named individuals were consistent note-takers or that there were circumstances in which notes might have been taken which referred in any way to the Applicant. It is, at best, speculation on the part of the Applicant that there "must" be some hand-written notes some place. While this is not an unreasonable supposition, it is nothing more than speculation and it is equally as reasonable that there simply are no such notes. Most employees now do almost everything digitally, including note taking and the Applicant has provided no concrete reasoning for his belief that handwritten notes exist. Those notes that are handwritten are often "transitory" in nature and are quickly (and appropriately) discarded once the issue has been dealt with.



Overall, I am satisfied that the public body in this case conducted adequate searches for responsive records.

**2. Did the Department properly apply the exception contained in section 14(1)(d) of the Act?**

The Department has relied on section 14(1)(d) to withhold information in one email. Section 14 as a whole is intended to allow employees of public bodies to be candid and open during the policy-making process. This is a discretionary provision which, as I have said in numerous reports, requires a two-step analysis by the public body relying on it. First, the public body must establish that the information in question meets the criteria for the exception. If so, the public body must then exercise its discretion and make a decision as to whether to disclose based on all the relevant factors. The mere fact that the information meets the criteria for the exemption is not enough. Because Section 1 of the Act sets out that access to information is a "right" the default position is always disclosure. A refusal to disclose under a discretionary exemption should only occur when there are good, considered reasons for the redaction. In those circumstances, the public body should include a summary of the considerations which went into the exercise of applying discretion. The public body should provide the Applicant with the reasons for the refusal and the provisions of the Act on which the refusal is based pursuant to section 9(1)(c) of ATIPPA.

In the case of section 14(1)(d), the criteria that must be met for it to apply are the following:

- a) the disclosure could reasonably be expected to reveal
- b) plans
- c) that relate to the management of personnel or the administration of a public body
- d) that have not yet been implemented

The Applicant seeks a review with respect to only one email to which this section has been applied. That email appears first in Document TL-17, on the second page in an email dated May 3, 2018, 5:17 pm. Portions of the first two paragraphs of the email have been withheld. I am satisfied that the information, if disclosed, could reasonably be expected to reveal plans that relate to the management of personnel. The redacted

material outlines a step that was being contemplated by the public body but, even at the time of the writing of the email, had been rejected in favour of a different plan, which had already been implemented. The redacted material does not, therefore, meet the last criteria necessary to give the public body discretion as to whether or not it should be disclosed. The plans discussed had already been either rejected or implemented. I therefore **recommend** that this email be disclosed without redaction. This applies to each appearance of this particular email in the responsive package.

Elaine Keenan Bengts  
**Information and Privacy Commissioner**