

**NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER**

Review Report 20-240

Citation: 2020 NTIPC 44

File: 19-242-4

September 17, 2020

BACKGROUND

The Applicant made a request to the Department of Municipal and Community Affairs (MACA) for the following records:

1. all information and records related to or arising from a meeting of February 2, 2018 between the Minister of Municipal and Community Affairs (the "Minister"), the Office of the Fire Marshall ("OFM"), the Town of Hay River's Senior Administrative Officer ("SAO") and the Town of Hay River's (the "Town") Council Members as that meeting related to the Minister advising the Town that the Town would not be provided with further funds for the supply and installation of a fire enclosure around Stairwell No. 1 at the Don Stewart Recreational Centre or Hay River Arena in Hay River (the "Stairwell No. 1 ");
2. all information and records related or arising from the OFM related to the Stairwell No. 1;
3. all information and records related to or arising from correspondence between the OFM and the National Research Council related to Stairwell No. 1;
4. all information and records related or arising from the Town related to the Stairwell No. 1;
5. all information and records related to or arising from correspondence between the Town and the National Research Council related to Stairwell No. 1;

6. all information and records related to or arising from the Town's Council Briefing Note dated February 1, 2018 related to Stairwell No. 1;
7. all information and records related to or arising from the Town's refusal to sign a change order for Stairwell No. 1;
8. all information and records related to or arising from correspondence between the OFM and the National Research Council related to Don Stewart Recreational Centre or Hay River Arena in Hay River;
9. all information and records related to or arising from the Town related to the Stairwell No. 1; and
10. all information and records related to or arising from correspondence between the Town and the Minister and the OFM.

The Department identified approximately 206 records consisting of 1490 pages. The Applicant sought a review of the response received pursuant to section 28 of the *Access to Information and Protection of Privacy Act* and, in particular had the following concerns:

- a) the Town of Hay River's (the "Town") Council Briefing Note dated February 1, 2018 related to Stairwell No. 1 does not appear to have been provided in the records (despite having already been previously circulated to parties including our Client), nor do any records related to or arising from that meeting appear to have been provided (points 1 and 6 of our Request);

- b) various attachments to emails throughout the records do not appear to be included. For example, the attachments to an email (the date is redacted) from Vortex Fire Consulting Inc. to the National Research Council of Canada does not appear to include attachments referenced therein (Document 565); and
- c) there do not appear to be any records related to or arising from the Town's refusal to sign a change order for Stairwell No. 1.

The Department provided a short explanation with respect to these concerns as follows:

In regards to points 1 and 3, we did not include the Town of Hay River's Council Briefing Note dated February 1, 2018, related to Stairwell No. 1 or any records related to or arising from the Town's refusal to sign a change order for Stairwell No. 1, because we do not have these records.

In regards to point 2, the numbering of the documents in retrospect, may not have made it obvious what documents went together - or were attachments. For documents with attachments, I gave the same document number and put them as part 1 of 2, part 2 of 2.

DISCUSSION

This matter was handled very poorly by the public body throughout. They did not communicate well with the Applicant, did not meet the time frames for responding to the request, and applied exceptions poorly. During the review process, there were further unexplained delays and the submissions received were not terribly helpful. I was provided with copies of the responsive records, though they were poorly organized and some were missing. I had asked the department, as part of the review and as per normal process, to provide me with a copy of each responsive record in its original form

and in the form that it had been disclosed to the Applicant, numbered for comparison purposes. I did receive both an original and a redacted copy of many records. However, in some cases I received a copy of the original record, but no redacted copy. In others, I received a copy of the redacted record, but not a copy of the original and in still other cases, I received neither an original or a redacted copy. There was no clear explanation provided for these omissions. Furthermore, there were errors in terms of the numbers assigned to the pages. All of this made it extremely difficult to thoroughly review or assess the records. For the purposes of this report, references to pages will refer first to the page number assigned by the public body, with my revised number in brackets. If the Department or the Applicant have any difficulties in identifying the correct record, they should contact our office for clarification.

The Applicant in this case did not ask me to review whether any of the material redacted from the responsive records he received was appropriately withheld. Rather, the Applicant's concerns centred around apparently missing records.

1. A Briefing Note dated February 1, 2018 was missing, as well as records related to or arising from that meeting.

Reading the Applicant's concerns, it appears that the "missing" record may be a Briefing Note prepared not by the Department but by the Town of Hay River. It would, therefore, not have been a record created by the Department. In this circumstance it is plausible that the Department is not in possession of the briefing note, which was the Department's stated reason for not including it in the response to the Applicant. When invited to do so, the Applicant did not provide any further details outlining the reasons for his belief that the Department had a copy of this record.

In the circumstances, I have been given no reason not to accept the Department's statement that they were not in possession of the record in question. I therefore make

no recommendations with respect to this specific record.

The Applicant also argued that he had not received any records relating to or arising out of the meeting for which the Briefing Note was prepared. The Department states they have no such records.

On this issue, there are many, many records that are dated in February, 2018 which have been included in the response to the Applicant. Most of them refer in one way or another to "Stairwell #1". I cannot determine whether any of these records "relate to or arise out of" the February 1st meeting, but it seems to me that at least some of them do, if only obliquely. When I asked the Applicant if they had anything further to add in relation to MACA's statement that they had no such records, no further submissions were received. I conclude, therefore, that there are records relating to or arising out of the February 1st meeting included in the responsive package. If there are specific records that the Applicant has in mind that he feels are missing, I would encourage him to make a second ATIPP request with a direct focus on those records and providing more specificity in the request.

2. Various attachments to emails throughout the records do not appear to be included.

The Applicant felt that not all relevant attachments to responsive emails were included in the responsive package. He points to one particular example in an email from Vortex Fire Consulting Inc. to the National Research Council of Canada (date redacted) which he refers to as Document 565 (569). The page numbered 565 does involve Vortex Fire Consulting and, apparently, the National Research Council of Canada but there is no email on that page on which the date has been withheld. There is such an email on page 566 (570) and the body of that email starts with the words "Attached is a personal opinion". Assuming that this is the email referred to, I do agree that there does not seem

to be a copy of the opinion referred to included in the response. On the other hand, while there is mention of an attachment in the body of the email, there is nothing in the header that indicates that anything was attached to the communication. In my experience, when there is, in fact, an attachment, it will show in the header. It could be that the mentioned attachment was included in the email as originally sent and was removed when forwarded or responded to. If this were the case, however, one would assume that it would be found in the email records of the GNWT employee included in the recipient list of the original email.

I **recommend** that the Department find the original email, dated February 5th, 2018, 8:40 pm in the records of Gupta Avinash to determine if that email included an attachment and, if so, that a copy be provided to the Applicant with any appropriate redactions. If the original email did not contain the referred to attachment, I **recommend** that the Department advise the Applicant as to the steps taken to find the attachment and the results of their searches.

- c) Records related to or arising from the Town's refusal to sign a change order for Stairwell No. 1.

To this concern, MACA has said, quite simply, that there were no records that meet the description of this part of the request. Having reviewed all of the responsive records identified, I would venture to say that there are many records, which have been included as responsive, that are “related to” or “arise from” the Town’s refusal to sign a change order, though I do not see any records that refer directly to that refusal. Again, the Applicant chose not to respond to the public body’s assertion that there were no records that were responsive to this part of the request. I have, therefore, no reason to conclude that there are any records that specifically refer to this event. I therefore make no further recommendations.

d) Application of Exceptions - Sections 23 and 24

The Applicant did not object to any of the exceptions applied by MACA in relation to the records that were disclosed. I will not, therefore, do a line by line review as I would otherwise have done. However, in my review of the records it became very clear to me that the Department did not understand and did not properly apply the exceptions to disclosure which they relied on. For the purposes of future access requests, therefore, I consider it necessary to provide some additional comment in a general way as to the proper application, particularly of sections 23 and 24.

Almost all of the information withheld appears to have been with reliance on section 24.

Section 24(1) of the *Access to Information and Protection of Privacy Act* provides as follows:

- 24.(1) Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant
- (a) information that would reveal trade secrets of a third party;
 - (b) financial, commercial, scientific, technical or labour relations information
 - (i) obtained in confidence, explicitly or implicitly, from a third party, or
 - (ii) that is of a confidential nature and was supplied by a third party in compliance with a lawful requirement;
 - (c) information the disclosure of which could reasonably be expected to
 - (i) result in undue financial loss or gain to any person,
 - (ii) prejudice the competitive position of a third party,
 - (iii) interfere with contractual or other negotiations of a

- third party, or
- (iv) result in similar information not being supplied to a public body;
 - (d) information about a third party obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax;
 - (e) a statement of a financial account relating to a third party with respect to the provision of routine services by a public body;
 - (f) a statement of financial assistance provided to a third party by a prescribed corporation or board; or
 - (g) information supplied by a third party to support an application for financial assistance mentioned in paragraph (f).

The Department did not specify which subsection of section 24 it was relying on for any of the redactions under this section. It should not be a guessing game for either the Applicant or for my office in attempting to determine which one of 13 possibilities in section 24(1) is thought to be applicable. For future reference, reliance on an exception requires specificity. Which section, which subsection, and which sub-subsection is being applied must be identified. Furthermore, there needs to be some explanation as to how that specific section of the Act applies.

In this case, most of the redacted material relates to the names, business contact information and positions of employees of third party companies or other governmental agencies. With reference to these many redactions, having reviewed all of the records responsive to this request, I can easily eliminate 24(1)(d) through (g) as applying so as to justify withholding this information. None of the information about third party

employee identity/business contact information withheld could possibly meet the criteria for an exception in accordance with any of these subsections.

The question, then, is whether the disclosure of these names, business contact information, positions held and other information that relates to these individuals in their capacity as employees would meet the criteria for an exception under any of the first three subsections of section 24(1).

Barring some very unusual circumstances that do not exist in this case, information identifying employees and their positions and business contact information does not qualify as a “trade secret”. Subsection 24(1)(a) does not, therefore, apply. Nor would this demographic information qualify as “financial, commercial, scientific, technical or labour relations information” about the third parties. Section 24(1)(b), therefore, is not applicable.

This leaves us with subsection 24(1)(c). This subsection prohibits the disclosure of information which could reasonably be expected to

- (i) result in undue financial loss or gain to any person,
- (ii) prejudice the competitive position of a third party,
- (iii) interfere with contractual or other negotiations of a third party, or
- (iv) result in similar information not being supplied to a public body.

The disclosure of the names and contact information of the employees of a third party is, without extenuating circumstances, unlikely to prejudice the competitive position of the third party, interfere with contractual or other negotiations of the third party or result in similar information not being supplied to a public body.

As the onus of establishing that an exception applies lies with the public body and no evidence has been presented to address these possibilities, these subsections can also be eliminated as being applicable.

By process of elimination, therefore, we are left with subsection 24(1)(c)(i) as the only possibly applicable subsection for justifying the withholding of the names and contact information of the employees of third party entities. Because in every case, these individuals were engaged as employees and speaking on behalf of their employer, in theory any potential financial loss or gain would fall on the employer, not on the individual. As for the third party entities (also “persons” under the law), I see nothing in the context or the content of the communications which could, by virtue of disclosure of the names and contact information of their employees, result in an “undue” financial gain or loss.

In short, in the absence of any supporting evidence, section 24(1) is not applicable so as to justify withholding the names and business contact information of employees of third party entities, at least not without much more extensive explanation than has been provided in this case.

It occurred to me that MACA simply made an error in citing section 24 and, instead, meant to refer to and rely on section 23. Section 23 prohibits the disclosure of personal information where that disclosure would amount to an unreasonable invasion of an individual’s privacy. The name of an individual, in conjunction with his/her place of employment and business contact information is all “personal information” as defined in the ATIPP Act. This, in and of itself, however, is not sufficient to withhold the information. The disclosure must amount to an unreasonable invasion of the individual’s privacy. To determine if this would be the case, public bodies must consider ALL of the relevant circumstances. In this case, by far the majority of the personal information withheld is about individuals involved in their responsibilities as employees of

businesses or agencies – businesses/agencies who they are speaking for or on behalf of. The fact that they are employees of the particular business or entity is public information and is, in most cases associated with this file, available on the employer's web sites. Disclosure of the names of employees in conjunction with their current workplace is not, in these circumstances an unreasonable invasion of privacy. The same applies for business email addresses and business telephone numbers. These are pieces of information that are most commonly not only publicly available, but advertised by both the employee and the employer. Generally speaking, it is my opinion that disclosure of the identity and contact information of employees of a business does not amount to an unreasonable invasion of privacy, particularly when the employees are senior management employees clearly speaking for or on behalf of a business or other entity, as is the case with respect to the vast majority of the communications in this case.

Because the Applicant did not object to the redactions, I do not intend, in this case, to make any recommendations in relation to these records. I do, however, strongly **recommend** that this Department invest in some educational and training opportunities for its ATIPP staff so that they can properly assess and apply the provisions of the Act.

Elaine Keenan Bengts
Information and Privacy Commissioner