

**NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER**

Review Recommendation 11-054

November 13, 2011

Review File: 11-177

BACKGROUND

In August, 2011, I received a request from an individual asking me to review the decision of the Department of Executive and Intergovernmental Affairs (E.I.A.) not to disclose some portions of a report which he had requested. The specific report requested had been prepared in response to a personnel issue in the Applicant's workplace as a result of a grievance filed by the Applicant under the *Public Service Act*.

Much of the report was disclosed, but the public body chose to redact certain portions of the report, relying on several sections of the Act, specifically:

- a) Section 14(1)(a) which gives public bodies the discretion to refuse access to records where the disclosure could be reasonably expected to reveal advice, proposals, recommendations, analysis or policy options developed by or for a public body or a member of the Executive Council;

- b) Section 23 which prohibits the disclosure of personal information where the disclosure would be an unreasonable invasion of a third party's personal privacy. They rely in particular on subsection 23(2)(g) and 23(2)(h), which create a presumption that the disclosure would constitute an unreasonable invasion of privacy where:
 - i) the personal information consists of personal recommendations or evaluations about the third party, character references or personnel evaluations;

- ii) the personal information consists of the third party's name where it appears with other personal information about the third party, or the disclosure of the name itself would reveal personal information about the third party;

THE APPLICABLE SECTIONS OF THE ACT

The following sections of the Act are relevant to my review:

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;
2. In this Act,

"personal information" means information about an identifiable individual, including

 - (a) the individual's name, home or business address or home or business telephone number,
 - (b) the individual's race, colour, national or ethnic origin or religious or political beliefs or associations,
 - (c) the individual's age, sex, sexual orientation, marital status or family status,
 - (d) an identifying number, symbol or other particular assigned to the individual,
 - (e) the individual's fingerprints, blood type or inheritable characteristics,
 - (f) information about the individual's health and health care

history, including information about a physical or mental disability,

- (g) information about the individual's educational, financial, criminal or employment history,
- (h) anyone else's opinions about the individual,
- (i) the individual's personal opinions, except where they are about someone else;

14.(1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal

- (a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council;

23.(1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy

(2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where ...

- g) the personal information consists of personal recommendations or evaluations about the third party, character references or personnel evaluations;
- (h) the personal information consists of the third party's name where
 - (i) it appears with other personal information about the third party, or
 - (ii) the disclosure of the name itself would reveal personal information about the third party;

33.(1) On a review of a decision to refuse an applicant access to all or part of a record, the onus is on the head of the public body to establish that the applicant has no right of access to the record or part.

(2) On a review of a decision to refuse an applicant access to all or part of a record that contains personal information about a third party, the onus is on the applicant to establish that disclosure of the information would not be contrary to this Act or the regulations.

THE PUBLIC BODY'S POSITION

The public body provided me with a copy of the subject record, both in unedited form and in the form that it was provided to the Applicant .

The record in question is an investigation report prepared for the Deputy Minister of Executive. The original record was 44 pages in length. The public body acknowledged that two pages which should have been disclosed were, in fact, withheld in error. They also provided me with a chart showing each of the parts of the report which were redacted and the specific section of the Act which they were applying to each such redaction.

Section 14 -

Generally, the public body argues that the *Access to Information and Protection of Privacy Act* was drafted so as to provide mechanisms by which Ministers and senior officials can receive open, honest and frank advice and recommendations from officials in their Department. They argue that this includes consultations or deliberations, details of contracts, management of personnel, draft legislation and the agendas or minutes of meetings. In their submissions to me, they referred me to three precedents from Alberta and Ontario. In particular, they quoted Alberta Order 97-007 where the Commissioner determined that “advice must contain more than mere factual information, and must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process”. Similarly, they pointed to Ontario Order PO-2028 which determined that only advice which could reasonably be expected to inhibit the free flow of expertise and professional assistance within the deliberative process of government satisfies the test to allow for an exemption. Finally, they suggested the three part test set out in Alberta Order 96-006 for determining whether a record constitutes advice:

- a) the information should be sought or expected, or be part of the responsibility of a person by virtue of that person's position;

- b) the information should be directed toward taking an action; and
- c) the advice should be made to someone who can take or implement the action

The public body indicates that these principles were applied when they reviewed the responsive document. They argue that the report was commissioned by the Deputy Minister of Human Resources and completed for the Deputy Minister of the Executive. The results of the investigation were used by the DM of the Executive and, ultimately, the Cabinet to evaluate the performance of a senior employee and that the outcome of the deliberations included corrective actions. They argue that both the Deputy Minister of Human Resources and the Deputy Minister of the Executive are responsible for the management of certain employees, particularly senior employees. They say that the sections of the report severed pursuant to section 14 constituted the author's analysis of the facts and evidence, his interpretation of GN policies, and his advice to the Deputy Minister of the Executive.

Section 23

The public body points out that section 23(1) of the Act prohibits the disclosure of information where that disclosure would constitute an unreasonable invasion of privacy. Section 23(2) provides guidelines for when a disclosure is presumed to be an unreasonable invasion of privacy. Section 23(4), on the other hand, provides instances in which the disclosure of personal information will not be considered to result in an unreasonable invasion of privacy. In those situations which do not fall under either of these presumptions, section 23(3) provides some guidance in determining whether or not the disclosure might result in an unreasonable invasion of an individual's privacy. The public body indicates that it redacted the names of all third parties from the report pursuant to section 23(2)(h), because the disclosure of the names would also disclose other personal information about the individuals named. Most of the information withheld under this section, they say, consists of the personal opinions and recollections of an individual, which opinions were provided in confidence and that the opinions go beyond the scope of that person's professional duties. The individual who

provided the opinions objected to the disclosure of those opinions to anyone beyond the senior management of the GN, though I have not received anything directly from her to that effect.

The public body also relies on section 23(2)(h) which provides that there is a presumption that disclosure would constitute an unreasonable invasion of privacy where it appears with other personal information about the third party, or the disclosure of the name itself would reveal personal information about the third party. Under this section, they say they redacted the names of all individuals named in the report, except the names of public servants acting in their professional capacity. There is no explanation provided as to how section 23(2)(h) applies to each of the edits individually.

The public body states that most of the information withheld pursuant to section 23(1) consists of the personal opinions and recollections of one or more employees which were provided to the investigator in confidence and which goes beyond the scope of the employee's professional duties. The opinions expressed are those of the individuals and not necessarily opinions held by the GN. They felt that the disclosure of the redacted material "may unfairly damage the reputation of any person referred to in the record requested", in particular because the investigator was engaged to investigate a serious complaint against a senior member of the public service and the results of the report, if made public, could seriously damage the reputation of individuals who provided their opinions and could jeopardize future employment and other opportunities for those individuals.

THE APPLICANT'S POSITION

The Applicant is simply not satisfied that the public body has properly vetted the report and that many of the redacted portions of the report should have been disclosed. He asks me to review the report to ensure that he has received everything he is entitled to under the Act.

DISCUSSION

I have had the benefit of being able to review both the unedited copy of the report in question as well as the edited version provided to the Applicant. Because there is some information edited from almost every page, and there are number of sections of the Act relied on for the editing, I will be dealing with each item edited individually so as to ensure certainty.

As a preliminary note, I would point out that the front cover of the report has the words "Strictly Confidential" in capital letters written across the top of it. At the bottom are the words "Strictly Confidential - Protected by Solicitor-Client Privilege", also in capital letters. Each page of the report has the words "Strictly Confidential" at the bottom of the page. This said, the public body is not relying on solicitor/client privilege to refuse disclosure of any part of the report in question. There is no explanation as to where the stated confidentiality arose from. The public body makes no claim of solicitor/client privilege. Such a privilege belongs to the client, in this case the public body. It is theirs to waive. Since they have not relied on that exemption under the Act, I can only conclude that they have waived any such privilege. If the source of the stated confidentiality is solicitor-client privilege, then the words, though prominent, do not convey confidentiality in this case as the public body is not relying on solicitor-client privilege. If the "source" of the confidentiality warnings is that the investigator gathered his information on his assurances to the participants that the report would remain confidential, then the warnings may have more impact. That said, it would appear to me that the warnings really stem from the investigator's qualification of the report as protected by solicitor client privilege. Although the warnings, therefore, may help to define the nature of the information as being sensitive, I am not satisfied that they are sufficient to convince me that disclosure of the report would constitute an unreasonable invasion of privacy.

The Edits

On page 1, paragraph 2 of this report, the name of an individual who conducted a

preliminary investigation into subject matter of this report has been edited pursuant to section 23(2)(h)(i) on the basis that the personal information consists of the third party's name along with other information about him. In this case, however, the name simply identifies the individual as being an employee of a particular company. The information does not appear with other "personal information about the individual". It appears only in relation to the person's place of employment, which is not included in the definition of personal information. **I recommend that the name of the individual should be disclosed.**

This analysis, conclusion and recommendation also applies to the following parts of the report:

Page 2, paragraph 8

Page 4, paragraph 2

Page 6, paragraph 4

It appears that page 2 may be one of the pages that the public body admits that it failed to disclose in error. In their listing of items redacted, it appears that they intended only to edit the name of an individual named on the page rather than the entire page, but it appears that the page did not make it into the version of the report that was disclosed.

I therefore recommend that this page be disclosed in full.

The third page has two sections which have been redacted. In both cases (paragraph 3, line 8 from the word "Ms" through line 10 and paragraph 5), the public body relies on section 23(1) and indicates that this sentence constitutes the personal opinion of the individual named in the sentence, and it would, therefore, be an unreasonable invasion of her privacy to disclose it. Although the definition of personal information includes "the individual's personal opinions" this alone is not sufficient to protect it from disclosure. Section 23 (1) provides that it will only be protected from disclosure if it would be an "unreasonable breach" of the individual's privacy to make the disclosure. The individual who's "opinion" has been redacted, was responsible for supervising the Applicant and in this context provided the investigator with statements about her recollection of what had transpired within the workplace. Because this statement is in

the context of the workplace, and, even more specifically within the context of the individual's responsibilities to the employer, I am having a hard time accepting that the disclosure of those statements would constitute an unreasonable invasion of the individual's privacy.

Furthermore, I am not satisfied that this sentence does, in fact, constitute an opinion. The Webster dictionary defines the word "opinion" as a belief stronger than impression and less strong than positive knowledge. The sections which have been redacted reveal only what the individual recalls about certain events in the workplace, within the context of the work day and the responsibilities of the persons involved. That does not constitute an opinion. It is positive knowledge. It cannot, therefore, qualify as an opinion.

Even if these statements could be said to be "opinion", those opinions would, for the most part, be about another person. The definition of "personal information" provides that an opinion is only the personal information of the person who holds the opinion if it is not about another person. If the opinion is about another person, the opinion is the personal information of the subject of the opinion. Most, if not all, of the "opinions" edited from the report on this basis are opinions about the Applicant and are therefore the Applicant's personal information, which he is generally entitled to receive.

I therefore recommend that these sections be disclosed.

This analysis, conclusion and recommendation also applies to the following parts of the record:

- Page 4: paragraph 1
- Page 6: paragraph 6
- Page 7: paragraph 3
- Page 8: paragraphs 2, 5, 6, and 7
- Page 9: paragraphs 4 and 5
- Page 10: paragraph 6, lines 1 through 4 to and including the word "discuss"

Page 11: paragraph 3

Page 12: paragraph 4, lines 1 through 4 to and including the word “advice.”

Page 13: paragraphs 3 and 5

Page 14: paragraphs 3 and 4

Page 15: paragraph 4, lines 11 and 12

Page 16: paragraph 7

Page 17: paragraph 1, lines 1, 2 and 3, to and including the word “issued.”
paragraph 3, lines 1, 2, 3 and 4 to and including the words “with it.”
paragraph 3, line 7 from the words “Ms Wasson, lines 8, 9, 10 and
11 to and including the word “performance”

Page 18: paragraph 4

Page 20: paragraphs 3, 4 and 6

Page 22: paragraphs 3, 5, 6 and 7

Page 23: paragraphs 1 through 6

Page 24: paragraph 1

Page 25: paragraph 6

Page 26: paragraph 4

Page 28: paragraphs 4 and 5

Page 29: paragraph 3
paragraph 5, line 6 from the words “Ms Wasson” to the end of the
paragraph

Page 30: paragraph 2

Page 37: paragraphs 1, 2 and 3

Page 39: paragraph 6

Page 40: paragraphs 1 and 2

Toward the end of page 4 (paragraph 6) another name is redacted. I am satisfied that the context of the information which has been disclosed the disclosure of the name would constitute an unreasonable invasion of the privacy of the third party named pursuant to section 23(2)(h)(i).

On page 5, there is one section redacted from the end of the third paragraph on the page. The public body relies on section 14 (1)(a) for its refusal to disclose this section of the report. In particular, they take that position that the two sentences removed constitute the investigator's analysis of the issues. I am satisfied that this section does constitute the investigator's analysis of the situation. It is to be noted, however, that section 14 provides a discretionary exemption, not a mandatory one. As such, even if the information qualifies for the exemption by definition, the public body must actively exercise its discretion in deciding whether or not to disclose it to the Applicant. The overall objective and intention of the Act is that disclosure is the rule and exemptions must be strictly applied. If, in exercising its discretion, the public body decides not to disclose parts of a record, it should be providing an explanation that confirms that it has, in fact, actively exercised that discretion. With respect to this paragraph I **recommend that the public body actively exercise its discretion under section 14(1)(a) and provide the Applicant with an explanation for their decision in the event that they choose not to disclose the contents of the paragraph.**

This analysis, conclusion and recommendation also applies to the following parts of the record:

- Page 7: paragraph 4
- Page 9: paragraphs 2 and 3
- Page 10: paragraph 2
- Page 11: paragraphs 3 and 4
- Page 12: paragraph 4, line 4 after the word "advice" and lines 5, 6, and 7
- Page 13: paragraph 6
- Page 14: paragraph 5
- Page 16: paragraph 1 through 6
- Page 17: paragraph 1, line 3 starting with the words "I will" to the end of the paragraph
paragraph 2
paragraph 3, line 4 starting with the words "If this" to the end of the paragraph

Page 24: paragraphs 2, 3 and 4
Page 30: paragraphs 3, 4 and 5
Page 31: paragraphs 1 and 2
paragraph 5, line 7 after the word “requirement” to the end of the paragraph
Page 32: paragraph 1 after the word “incidents” to the end of the paragraph
paragraphs 2, 3, 4 and 5
Page 33: paragraphs 1, 2 and 3
Page 36: paragraph 1
paragraph 5, line 6 from the words “I am unable” to the end of the paragraph
Page 37: paragraph 4
Page 38: paragraph 1
Page 40: paragraphs 3, 4, 5, and 6
Page 41: paragraphs 1 and 2

On page 10 the last paragraph has also been removed and the public body claims an exemption pursuant to section 23(1) as a stated opinion by an individual. To the extent that this paragraph was removed for this reason, my analysis outlined above also applies to this paragraph. There is, however, also reference in this paragraph and two earlier paragraphs to a true third party who was not an employee of the department being investigated but was involved with the department as a client. To the extent that this third party is referred to (admittedly by initials only) I would have suggested that the initials of the third party be removed from this whole page/section of the report to ensure that the privacy of the person referred to would be protected. However, because the person is referred to by initial in the previous two paragraphs, that information has already been disclosed and to sever it now would be unproductive. That said, the last two lines of the paragraph contain the opinions of that third party and I am satisfied that, in the context they appear, the disclosure of these lines might constitute an unreasonable invasion of the privacy of the third party. **I recommend that this paragraph be disclosed except for the last two lines, starting with the word “and”**

and ending with the word “her”.

The second paragraph on page 14 has been redacted on the basis that it constitutes the opinion of a third party. In fact, my reading of this paragraph suggests that it is a recitation of the Applicant’s point of view, not that of a third party. **I therefore recommend that this paragraph be disclosed.**

On page 17, in the last paragraph on that page, certain initials of a third party has been removed. The third party in this case has nothing to do with the workplace issue being investigated, except to the extent that the person was a client of the department and one of the matters being investigated involves transactions with the third party. The initials have, in my opinion, been properly redacted from the copy provided to the Applicant pursuant to section 23(2) (h) (i). I make no further recommendation with respect to the edits made to this paragraph.

The same considerations apply, as well, to the edits in the following paragraphs:

Page 18, paragraphs 1, 2, 3 and 6

Page 19, paragraphs 2, 3 and 5

The name edited from paragraph 4 of page 19 is, as far as I can determine, the name of a Deputy Minister of a public body. Section 23(4) specifically states that it is not an unreasonable invasion of a third party’s personal privacy where the personal information relates to the third party’s classification or employment responsibilities as an officer, employee or member of a public body. **To me, the name removed from paragraph 4 falls into this category and I recommend that it should be disclosed.**

Page 21 has not been provided to the Applicant at all. I assume this is one of the pages which the public body acknowledged that they had missed in responding to the Applicant. There does not appear to be anything in this page which would qualify for an exemption from disclosure. **I recommend that this page be disclosed to the Applicant.**

The last paragraph on page 24 and the first 5 paragraphs of page 25 have a number of words which have been redacted, theoretically to avoid the possibility of disclosing the personal information of a third party. The paragraph does relate information that is of a very sensitive nature. None of the information removed includes a name. It refers to a community, a public body and an employee in the public body by reference to a job description. Although no detailed explanation was provided, I am assuming that the argument would be that the population of Nunavut is so small that reference to any of the information which has been edited would be likely to reveal the names of the individual involved in the allegation. If this were the case, it would most definitely constitute an unreasonable invasion of that individual third party's privacy. In the circumstances, I am prepared to accept that this is the case and that the words were, therefore, properly redacted in all of these paragraphs. For future reference, however, public bodies cannot rely on me to surmise what their arguments might be and why they have made the decisions under review. The onus is on the public body to establish that the exemptions to the Act apply and simply referring me to a section of the Act will not normally be sufficient.

On page 27, the name of an employee within the public body being investigated is redacted from paragraphs 3 and 4. The discussion does not involve anything personal about the individual. Rather, it deals with her duties in the workplace and her involvement in a series of events within the workplace. I am not satisfied that the disclosure of her name would constitute an unreasonable invasion of her personal privacy. It simply refers to things she did in the course of her employment. Again, I note that the onus is on the public body to establish that an exemption applies. I am not satisfied in this case that the disclosure of the individual's name in connection with her work within the public body could be considered to be an unreasonable invasion of her privacy. **I recommend that the edits from these two paragraphs be disclosed.**

On page 35, the names of individuals have been removed. These were the names of individuals who had filed grievances in the workplace and I am satisfied that the disclosure of the names of these third parties would have been an unreasonable invasion of their privacy and that they were properly redacted.

On page 36, paragraph 5, the name of an individual who apparently provided a reference for the Applicant in connection with a Request for Proposals which he had bid on has been redacted. I am assuming that the public body feels that the disclosure would be an unreasonable invasion of the individual's privacy because it reveals that she provided a reference to the Applicant and, therefore, it falls under the mandatory exemption provided for in section 23(h)(i)...her name appears with other information about her. I understand the public body's struggle with this one. On the one hand, the Applicant is clearly going to be able to discern the name which has been removed because he knows who he received reference letters from. Furthermore, the fact that the individual provided the reference suggests that she would not be concerned about having her name associated with the Applicant or the work that he performs in a public forum. On the other hand, a literal reading of section 23(2)(h)(i) would suggest that the public body is prohibited from disclosing this information. When section 23(2)(h)(i) is read in the context of the rest of the presumptions in section 23(2), I am not convinced that this is the kind of personal information which the subsection was meant to apply to. If this is the interpretation to be placed on this subsection, it would be so broad as to cover virtually every statement about every third party and that certainly is not within the general balance created by the Act. **In the circumstances of this case, I would recommend that the name be disclosed.**

Paragraphs 5 and 6 on page 41 of the report have been completely removed from the version given to the Applicant and the public body relies on section 14(1) as advice, proposals, recommendations, analyses or policy options developed by or for a public body. These paragraphs fall under a heading "Summary and Conclusions" and I am satisfied that the contents do contain analysis, advice and recommendations. The same applies to the last three paragraphs on page 42 as well as to the remaining two pages of the report. As such, **I recommend that the public body actively exercise its discretion under section 14(1)(a) and provide the Applicant with an explanation for their decision in the event that they choose not to disclose the contents of these paragraphs.**

RECOMMENDATIONS

My recommendations are set out in the above paragraphs. I have provided the public body with a copy of the report on which I have numbered the paragraphs and the relevant lines so that my recommendations are clear. I have also highlighted the parts of the report which were originally denied to the Applicant so as to more easily identify the lines referred to above.

Elaine Keenan Bengts
Information and Privacy Commissioner