NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 12-058
June 11, 2012

Review File: 11-153-5

BACKGROUND

In February of 2011, the Applicant made a request for information from the Department of Community and Government Services (CGS) and/or the Department of Economic Development and Transportation (ED&T). The request was for:

> ...all information and correspondence that the Manager of Airports - Al Stewart - operating out of Cape Dorset has or may have had in his possession relating to [A.B.] and/or [the company]. And especially relating to the Hamlet of Cape Dorset regarding any work that has been done in Cape Dorset by the Hamlet or sponsored by the Hamlet whereby Mr. Stewart had involvement or discussions relating to this work, or that Mr. Stewart was copied on at his workplace.
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> ...all information and correspondence that the Manager of Airports - Al Stewart - has or may have had in his possession relating to [A.B.] and/or [the company] and specifically relating to any Government of Canada Federal Agencies and any work that they may have sponsored or been involved in.
>
> ...any and all correspondence between Mr. Stewart and [C.D.] relating to [A.B.] and/or [the company] or any work or potential work that would be performed in Cape Dorset. This included but is not limited to discussion regarding any upgrades to the Airport, Airport equipment, Hamlet buildings or infrastructure, warfs, breakwaters etc.

ED&T appears to have taken ownership of the Request for Information and provided some records to the Applicant in April of 2011. They also indicated that, among the records identified as being responsive to the Request for Information were ten emails to or from Mr. Stewart (an employee of ED&T) dated between March 2009 and 2010 which “pertain exclusively to Hamlet of Cape Dorset business and Mr. Stewart’s role as a hamlet councilor” and therefore in no way

connected to Mr. Stewart's role as an employee of ED&T. These records were not disclosed, with the public body claiming exemptions pursuant to sections 16(1)(a) and (c) of the *Access to Information and Protection of Privacy Act*. They also indicated that some of the records were exempted from disclosure pursuant to section 15(a) and 24(1)(c).

THE RELEVANT SECTIONS OF THE ACT

The *Access to Information and Protection of Privacy Act* provides that the public is entitled to access all records in the custody and control of a public body, subject to a defined number of narrow exceptions set out in the Act. In this case, the public body relied initially on three sections.

Section 16(1) of the Act provides that a public body **may** refuse to disclose information where the disclosure could be reasonably expected to:

> (a) impair relations between the Government of Nunavut and any of the following or their agencies:
>
> ....
>
> (iii) a municipal council or other local authority;
>
> ...
>
> (c) reveal information received, explicitly or implicitly, in confidence from a government, local authority or organization referred to in paragraph (a) or its agency

Section 15(a) provides public bodies with the discretion to refuse disclosure of records which are subject to privilege in law. Specifically, section 15(a) provides:

> 15. The head of a public body may refuse to disclose to an applicant
>
> (a) information that is subject to any type of privilege available at law, including solicitor-client privilege

Finally, section 24 is a mandatory exemption, which requires a public body to refuse disclose:

(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

The public body has not indicated which subsection of this clause they are relying on.

In their submission to me (though not in their initial response to the Applicant), the public body also appears to be relying on section 23(1) of the Act which provides that

> 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.

The public body does not refer to subsections 23(2), (3), or (4) which set out guidelines for determining when the disclosure meets the test of "unreasonable invasion" of personal privacy.

THE PARTIES' POSITIONS

In the Applicant's initial submissions, they take the position that email sent from or received on or through the Government of Nunavut's email system cannot be considered to be "third party" information, regardless of whether or not the communication was within the scope of duties assigned to Mr. Stewart as a Government of Nunavut employee. Furthermore, the Applicant argues that Mr. Stewart's duties as Hamlet Councilor are related to his role as an employee of ED&T and it is, therefore, impossible to discern which of the communications were personal in nature and which were related to his job within the Department of Economic Development and Transportation.

In their submissions to me, the public body first indicated that, in reviewing the records again for the purpose of this review, they discovered one email in a chain which should have been disclosed which had been missed, because "the final email in the string is *non-sequitur* - an

impromptu change of subject" in which Mr. Stewart discusses a matter that did pertain to the activities of the public body.

I had asked the public body to outline for me the process they followed in identifying the records in question. The ATIPP Co-Ordinator for the department indicated that he asked the employees in question to review their email records and provide copies of all responsive records to him for review. When the ATIPP Co-Ordinator received the records from the two employees in question, he reviewed them and filtered the records in accordance with the parameters provided by the Applicant. After completing that review, 120 pages of email records were disclosed to the Applicant and 10 email chains (20 pages) were held back.

In response to the Applicant's suggestion that not all of the responsive records were identified, the ATIPP Co-Ordinator provided the following explanation:

> I have reviewed the emails provided by the applicant in support of the allegation that not all responsive records were identified or disclosed. The records provided by the applicant are all addressed to, or carbon copied to [A.B.]. In the processing of this request I disregarded all emails in which [A.B.] was party to the email's final exchange.

He indicated that he assumed that the Applicant did not want copies of emails to which he was already privy and that he would not want additional paper copies of these records. This was done in order to control the volume of unnecessary paper for all concerned.

The public body provided me with a chart which referred to the sections of the Act relied on and how those sections applied to the records in question. Essentially those explanations are as follows:

a) Section 15(a) - the records excluded pursuant to this section are subject to solicitor-client privilege;

b) Section 16(1)(a) - a municipal corporation is an elected body which enjoys considerable autonomy. Municipalities in Nunavut are not subject to the *Access to Information and Protection of Privacy Act*. While they have autonomy, much

of the funding for Nunavut communities is derived from the Government of Nunavut. In this case, the Applicant has had several disputes with the Hamlet of Cape Dorset. The department argues that the Hamlet could, therefore, reasonably view the disclosure of the excepted records, which contain sensitive hamlet business, as an interference or betrayal, which could, in turn damage the working relationship between the GN and the hamlet.

c) Section 16(1)(c) - the emails excepted from disclosure under this section pertain to conflicts or disagreements between the Hamlet and the Applicant or situations where there was a reasonable possibility that a conflict or disagreement could arise. Given the confrontational nature of these situations, they argue, it is clear that the information was implicitly provided in confidence;

d) Section 23(1) - the emails in question pertain exclusively to Mr. Stewart's outside employment as a councilor with the Hamlet of Cape Dorset. The contents of the emails are in no way related to Mr. Stewart's position with the department. The department has referred me, in this respect, to a decision of the Ontario Superior Court which, they say, deals with the same issue - *Ottawa(City) v. Ontario (Information and Privacy Commissioner),* 2010 ONSC 6835;

e) Section 24(1)(c) - the emails in question contain information on business undertakings of organizations operating within the Hamlet, some of which are named and others which could be identified from the details in the emails. The undertakings described in the records amount to sensitive business information and disclosing them could reasonably be expected to result in undue financial loss or gain, to prejudice the competitive position of the entities or to interfere with the contractual or other negotiations to which the entities may be parties.

The public body's response was shared with the Applicant and he was invited to respond. In his response, the Applicant made the following arguments:

a) the public body did not discharge the onus imposed on it pursuant to section 33 of the Act to establish that the exemptions applied to the records in question. In order to meet that onus, the Applicant argued that they would have expected to

receive verification of the cited impairment of relations, implicit confidence, invasion of privacy or prejudice from the third parties affected by the disclosure. Because there was none of this, they conclude that any harm that might result from the disclosure of the records is speculative at best and this is not sufficient to protect the records from disclosure;

b) citing my recommendations in *Northwest Territories (Education, Culture and Employment)(Re),* 2007 CanLII73195 (NWT IPC) the Applicant argued that there was no indication whatsoever that the public body in this case actively exercised the discretion imposed on them.

c) with respect to the section 23(1) exemption claimed by the public body, the Applicant seeks to distinguish the case cited and relied on by the public body. *(Ottawa(City) v. Ontario (Information and Privacy Commissioner),* 2010 ONSC 6835). In that case, the records requested were related to an employee's role on the board of directors of a private charitable organization which were withheld from the Applicant to protect the privacy of the third party organization. The court held that the records in question were personal communications of the employee which in no way encroached on his work for the City. The Applicant seeks to distinguish this case because, while the Hamlet is not a "public body" under the *Act*, it is a democratic institution rather than a private society. The Ottawa case turned on the interpretation of the *Act* in light of the principles of democracy and accountability, and found that emails regarding the third party organization were protected from disclosure as the society was neither democratic nor accountable to the public. This is not the case in this situation where Mr. Stewart is both an employee of the GN and is a democratically elected official of the Hamlet.

d) With respect to the claim of solicitor-client privilege claimed pursuant to section 15 of the Act, the Applicant takes the position that privilege is a legal state, in which advice has been sought and given in a confidential context between a solicitor and client. It does not apply to all communications between solicitors and clients, but rather can only apply to advice given.

e) the Applicant was not satisfied that the parameters of the search were sufficient to identify all of relevant records. The Applicant sought all information and correspondence relating to [A.B.] and the company, including not only those records referencing them by name but also referencing their interests. There was further concern raised that only email correspondence was searched. There were no other types of records identified or reviewed in responding to the request.

f) the Applicant objects to the limitation of the response unilaterally imposed by the ATIPP Co-Ordinator in eliminating any record in which [A.B.] was included in the distribution list on the final link in each email chain.

In general, the Applicant argues that the public body simply has not met the burden of establishing that the claimed exemptions apply to the records in question. It is their position that mere speculation that some harm may arise is not sufficient. Rather, they argue, correspondence sent through government systems must be disclosed in the interests of protecting democratic values of accountability and openness.

The public body was invited to respond to the Applicant's argument. They maintained their position that sections 23(1) and 16(1)(c) applied to all of the records because they relate to Mr. Stewart's work on the Cape Dorset Hamlet Council and municipalities are not subject to the ATIPP Act. They maintain that employees of public bodies must be afforded some personal privacy where it is clear that there is no overlap with their duties as GN employees.

With respect to the Applicant's position that the search parameters were not wide enough, the public body takes the position that to extend the search beyond names to interests "was not specified in the request". They take the position that section 6(2) of the ATIPP Act states that the request "must provide enough detail to enable the public body to identify the record." If, therefore, the Applicant seeks to access records pertaining to the "interests" of a person or a business, they require sufficient details of said interests in order to process the request.

The public body indicated that they were amenable to providing the Applicant with copies of the records in which [A.B.] was a party to the final exchange. They "question whether the purpose of the Act 'to make public bodies more accountable to the public' is served by providing copies of records already in the Applicant's possession", but they acknowledge that they did not

address this matter in their initial response. Finally, they say that they have confirmed that the public body has no further responsive records other than the email records identified.

DISCUSSION

Before getting into the application of the particular exemptions, there are some general comments I would like to make about the way in which this Request for Information was handled by the public body.

While not raised by the Applicant in his submissions, I am concerned about the fact that the employees tasked with identifying the potentially responsive records are the very employees who created the records. Particularly in a situation such as this, where there appears to be some animosity between the Applicant and the GN employee or employees concerned, I do not believe that it is sufficient, in responding to a Request for Information, simply to ask the employee to do a search of their own records and provide the responsive records to the ATIPP Co-Ordinator, who then vets them and prepares them for disclosure under the Act. In these circumstances, whether or not the employee is completely forthright and honest in identifying the responsive records, there is a very real conflict of interest. While I do not know all of the facts, it is clear from what I have gleaned from the submissions received and the records themselves that the employee in this case and the Applicant are in direct conflict with one another. While I have been given no reason to believe that either of the GN employees involved in identifying the responsive records were anything other than honest and up front in compiling the list of responsive records, the mere appearance of a conflict of interest is enough to create doubt and raise concerns. Here, the conflict of interest is more than a mere appearance of a conflict of interest. Here, at least one of the persons doing the search is clearly in the center of a disagreement involving the Applicant and asking him to do the search is simply not within the spirit and intention of the legislation. Section 7 of the ATIPP Act puts a positive onus on public bodies to “make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay”. When read with section 1 of the Act, which outlines the purpose of the Act, which is to make public bodies more accountable to the public by giving the public the right of access to records held, I would suggest that the search done in this instance was not sufficient to meet the standards required by the Act.

A second concern is that the public body in this case does not appear to have made any effort to contact the Applicant to discuss the scope of the request or clarify the nature of the records which were being sought. Had he done so, he would have learned that the Applicant was looking for records about A.B. and the company, whether or not those records referred directly to them. In my opinion, unless there is absolutely no question whatsoever as to the records being sought, best practices require that an ATIPP Co-Ordinator touch base with the Applicant by telephone to confirm the nature and scope of the records being sought. That way, when it comes to a review, like this one, the Applicant cannot claim that they were not given the opportunity to clarify the request.

Even more concerning is the fact that the ATIPP Co-Ordinator took it upon himself to limit the response to the Applicant to exclude records where the Applicant was included in the distribution list of the final email in the chain, because he decided it wasn't something the Applicant needed. It is not for a public body to unilaterally make decisions to include or not include certain records in response to a Request for Information. If the record is responsive, it must be disclosed unless it is protected by one of the exemptions provided for in the Act or the Applicant clearly states he doesn't want it. There is nothing in the Act which allows a public body to edit the response because the person in charge of compiling the response doesn't think the Applicant really needs it. If there is any question whatsoever about what the Applicant is asking for, the appropriate response is to either provide everything or contact the Applicant, preferably by telephone, and ask the questions. Again, I refer to section 7 of the Act which requires public bodies to respond openly, accurately, completely and without delay. That did not happen in this case.

I think it is also important to comment on the use of GN email for personal use. It is true that the contract between the union and the GN contemplates that employees can use their government email for personal use, subject to some restrictions. However, GN employees have to know that this makes every personal email they send subject to the ATIPP Act. If there is something that an employee does not want to be subject to scrutiny, or if there is a communication that is privileged, it would be far more appropriate for the employee to use his or her own personal email address. I note, as well, that the use of email sometimes makes us lazy and, as happened in this case, as admitted by the public body, sometimes an email chain on one subject spontaneously morphs into something entirely unrelated. In this case, it became clear on review that one of the records which the public body originally refused to

disclose because it contained only the “personal communications of Mr. Stewart in his role as a Hamlet councilor”, did in fact contain correspondence from Mr. Stewart in his role as an employee of the public body. Furthermore, there are times when the work an individual does for the GN may well impact upon volunteer or other work that the same person does for other organizations. Where the work of the employee blurs with his work in other areas, as in this case, the general purpose and scheme of the Act dictates that the default is disclosure of the records being sought.

Section 15

The public body claims that two of the records in question are protected by solicitor/client privilege.

The first record for which the public body claims an exemption pursuant to this section (R-9-1) is a two page record, containing three emails. The first email in the chain appears to be from a lawyer, addressed to an individual who has not been identified to me for the purpose of this review. I can take an educated guess that the individual is an employee of the Hamlet, though this is no more than a guess on my part. The Applicant’s company name is mentioned in the “subject” line. The recipient of this email has forwarded it to three people, including Mr. Stewart with a short comment, to which Mr. Stewart responds.

I am satisfied that the content of the initial email would be considered to be legal advice or representation in the hands of the Hamlet (assuming my presumption about the role of the recipient is accurate). The question for me becomes whether, by sending this legal opinion, that would otherwise be privileged, from one individual to another via a government email address, the privilege attached to the opinion/advice has been waived. If it had been sent to a private address, the answer would be far more clear. This is one of the reasons it is really important for employees to understand that, while they are allowed to use their GN email for personal use, some correspondence really should be filtered through another address. I have been given no background to assist me in determining whether the exchange has the effect of waiving the privilege. While I understand that Mr. Stewart was an elected Hamlet Councillor and, therefore, forwarding it to him may not constitute a waiver of the privilege, I have no idea who the other recipients are. Furthermore, while the first email constitutes legal advice and may be eligible for an exclusion under section 15, the other two emails do not. Another concern for me is whether section 15 applies to this record at all, as the privilege does not

belong to the GN, but to the Hamlet. As the Hamlet is not subject to the Act, they cannot claim the protection of the Act, except perhaps pursuant to section 24, which deals with the business interests of third parties.

The second record for which this exemption is claimed (R-10-1) is a two page email chain. Unfortunately, once again the public body has not identified the senders or recipients in this chain. Again, the first email in the chain appears to be from a lawyer and it appears, by its contents, to be a discussion of a legal issue that involves litigation. I am satisfied that it is an email containing legal advice and that standing alone, it would be protected by solicitor/client privilege. The initial email from the lawyer appears to be addressed to a GN employee. That employee then forwarded it to Mr. Stewart with a comment and Mr. Stewart then responded. The same analysis discussed above applies to this record.

All this is to say that the use of GN email for private correspondence which is intended to be confidential raises all kinds of issues and has many pitfalls. In my opinion, because the privilege apparently does not attach to the GN in either of these records, section 15 cannot apply to these exchanges.

Section 16

The public body has cited section 16(1)(a) and (c) as justification for their refusal to disclose each of the 10 records which have been withheld.

The analysis must begin with the acknowledgment that this section is a discretionary one. In such a situation, the public body **may** refuse to disclose the information requested. This requires that the public body actively consider the pros and the cons of disclosure and make a decision whether or not to disclose the information in question based on a balancing of those factors. In this case, I was given no information which would allow me to conclude that any discretion was exercised.

My next observation is that Section 16 is intended to protect sensitive communications between the GN and other public governments. Here, according to the public body, the correspondence in fact in no way relates to the interaction between the Hamlet and the GN. Rather, they argue that it is the private communication of an employee and is completely outside of the scope of the employee's work within the GN. I find it difficult to reconcile this argument with the general scheme of the Act.

Even if I were to accept that section 16(1)(a) was intended to apply to a situation such as this, the public body has in no way met the onus imposed in section 33 of the Act to establish that there is any reasonable possibility that the disclosure of these emails could be expected to impair relations between the GN and the Hamlet. Section 16(1) (a) provides that the public body may refuse to disclose information where the disclosure could "reasonably be expected to" impair relations between the GN and the municipal government. In Order F2006-006, the Alberta Information and Privacy Commissioner's Office considered what must be established for the exception in their section 21(1)(a), which is identical to our section 16(1)(a), to apply:

> The fact that the Public Body's relationship with the local government body is critical, and that the latter provides vital information, may establish the importance of the intergovernmental relationship, but it does not establish a reasonable expectation of harm to that relationship if information were disclosed. Under other sections of the Act, the "harm" test requires a clear cause and effect relationship between the disclosure and the alleged harm, the disclosure must cause harm and not simply interference or inconvenience, and the likelihood of harm must be genuine and conceivable

The test is an objective one and it must be applied in the real world. The harm anticipated must be real and tangible, there must be some kind of substantive proof that the harm would occur were the record to be disclosed. In this case the public body has provided me with nothing other than a bald statement that the disclosure of any of these records might possibly be considered a betrayal. There is nothing from the municipality to support this statement and I am not prepared to simply accept that statement as a fact. In my opinion, the public body has not met the onus on it to establish that section 16(1)(a) applies.

Section 16(1)(c) provides that the public body **may** refuse to disclose a record where the disclosure could reasonably be expected to reveal information received explicitly or implicitly in confidence from the local government. There are four criteria which must be met for section 16(1)(c) to apply so as to create a discretionary exemption:

a) the information must be supplied by a government, local government body or an organization listed in clause (a) or its agencies;

In this case, no evidence whatsoever has been provided to me to establish that any of the records were supplied to the GN by the municipality. I can make some assumptions with respect to some of the communications based on the email addresses and the nature of the exchanges, but some of the information clearly emanates from sources other than the Hamlet.

b) the information must be supplied explicitly or implicitly in confidence

Even if all of the communications involved here could be said to have been "supplied" by the Hamlet, there is nothing upon which I can conclude that it was supplied either explicitly or implicitly in confidence. The public body argues that the confrontational nature of the communications "makes it clear" that the information was provided in confidence. I disagree. Firstly, email communication, unless encrypted, is not necessarily a secure means of communication and this is a factor that should be considered in any analysis as to whether a communication is intended to be confidential. If there were any suggestion in any of the emails that the communication was intended to be confidential, that too would help. In the absence of something explicit, there must be something tangible for me to conclude that the information exchange was meant to be confidential and simply the fact that it touched on controversial or confrontational issues does not, in and of itself, convince me. In order to rely on this exception, the public body must be able to give me something concrete to support their bald assertion that the communications were meant to be confidential - for instance something from the authors of the emails which would outline the facts and the circumstances and their expectations when sending the emails. The public body has not provided me with anything other than a supposition in this regard.

c) the disclosure of the record must reasonably be expected to reveal the information;

I am satisfied that this part of the test has been met.

d) the information must have been in existence in a record for less than 15 years (section 16(3))

In this case, the information is clearly less than 15 years old.

The public body has not been able to meet the first two parts of this test. Section 16(1)(c) does not, therefore, apply

Section 23(1)

The public body takes the position that the email records in question are the personal information of the Applicant and that to disclose them would constitute an unreasonable invasion of his privacy. This exemption has, once again, been applied to all of the records which have not been disclosed.

The term “personal information” is defined in the *Access to Information and Protection of Privacy Act* as meaning “ 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;

So the first thing to determine is whether the emails in question, as a whole, constitute the personal information of the sender. While there are certainly parts of the correspondence that would fall within the definition above, not all of it does. The fact that the emails were written or received by Mr. Stewart in his personal capacity may make the records his personal correspondence, but does this, in and of itself, bring all of the information in the emails within the definition of his “personal information”. In my opinion, the definition of “personal information” is not that wide. Certainly, there are parts of each of the records which do fall within the definition of the “personal information” of Mr. Stewart and others named in the records. But this does not protect the correspondence as a whole.

If I am wrong in this assessment, and the emails, in their entirety, do constitute the personal information of Mr. Stewart or others , that does not automatically prevent them from being disclosed. Section 23 (1) provides that public bodies **must** refuse to disclose records **where that disclosure would constitute an unreasonable invasion of a third party's privacy**. Subsections (2), (3) and (4) of section 23 provide for some guidance to assist in analyzing whether the disclosure of a record would meet that test. Subsection (2) provides that there is a presumption that the disclosure would be an unreasonable invasion of privacy where,

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

(b) the personal information was compiled and is identifiable as part of an investigation into a possible contravention of law, except to the extent that disclosure is necessary to prosecute the contravention or continue the investigation;

(c) the personal information relates to eligibility for social assistance, student financial assistance, legal aid or other social benefits or to the determination of benefit levels;

(d) the personal information relates to employment, occupational or educational history;

(e) the personal information was obtained on a tax return or gathered for the purpose of collecting a tax;

(f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities or credit worthiness;

(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;

(i) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation; or

(j) the personal information indicates the third party's race, religious beliefs, colour, gender, age, ancestry or place of origin.

The public body has not referred me to any of these presumptions. Having reviewed them in the context of the emails in question, I am not convinced that any of these presumptions apply to the information contained in the emails in question.

Section 23(4), on the other hand, provides us with situations in which the presumption is that a disclosure will **not** result in an unreasonable invasion of a third party's privacy. These situations are:

(a) the third party has, in writing, consented to or requested the disclosure;
(b) there are compelling circumstances affecting the health or safety of any person and notice of the disclosure is mailed to the last known address of the third party;
(c) an Act of Nunavut or Canada authorizes or requires the disclosure;
(d) the disclosure is for research purposes and is in accordance with section 49;
(e) the personal 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 or as a member of the staff of a member of the Executive Council;
(f) the personal information relates to expenses incurred by the third party while traveling at the expense of a public body;
(g) the disclosure reveals details of a licence, permit or other similar discretionary benefit granted to the third party by a public body, but not personal information supplied in support of the application for the benefit;

Again, it does not appear that these records would fit into any of these categories.

Since neither of the presumptive provisions apply, there must be an analysis done to determine whether the disclosure of the records would constitute an unreasonable invasion of the privacy of the third party (in this case, Mr. Stewart, who also happens to be an employee).

Section 23(3) provides as follows:

(3) In determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Nunavut or a public body to public scrutiny;

(b) the disclosure is likely to promote public health and safety or to promote the protection of the environment;

(c) the personal information is relevant to a fair determination of the applicant's rights;

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people;

(e) the third party will be exposed unfairly to financial or other harm;

(f) the personal information has been supplied in confidence;

(g) the personal information is likely to be inaccurate or unreliable; and

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

Of these, (c), (e), (f) and (h) may be of relevance. The determination must be made by balancing the interests of the Applicant and the third parties in this case. In my opinion, there are clearly portions of each of the records in question which should be redacted in order to avoid the possibility of breaching individual privacy rights. In this regard, a line by line review must be done.

Before leaving this section, I would like to comment on the public body's reference to the case of *Ottawa (City) v. Ontario (Information and Privacy Commissioner)* 2010 ONSC 6835. This case dealt with a similar, though not identical situation. In that case, an Applicant sought disclosure of emails sent by an employee of the City of Ottawa to a private charity for whom the employee volunteered. The volunteer work done by the employee had nothing to do with his work for the City. The employee did, however, use his work email to send and receive messages pertaining to this volunteer position. He stored the emails in a folder separate from other work-related messages, but the folder remained on his work computer and on the City's email server. The Information and Privacy Commissioner held that the personal emails were subject to the freedom of information legislation because the City had "custody and control" of

the email correspondence saved on its server. The Court disagreed, holding that the Information and Privacy Commissioner had failed to consider whether or not the disclosure of the emails, private communications by a city employee unrelated to city business, would advance the purposes of the access to information legislation of the province. The court held that:

> Applying a purposive approach to the words "custody and control" and concluding they did not extend to the circumstances of the present case was appropriate. The Society was not subject to freedom of information legislation. The Solicitor, in his personal capacity, was not subject to having his personal documents seized and passed over to any citizen who requested them. The seizure by the City of such communications for the purpose of disclosing them to the public ran contrary to another goal of the same legislation, which was to protect privacy.

The Applicant in this case argues that the situation here is different because the third party organization involved is not a private organization but a public government, with a democratically elected council using public monies (provided almost exclusively by the GN) and that distinguishes this situation from the Ottawa case. I have long advocated for the inclusion of municipalities under the Act, so I definitely agree with the sentiment of this argument. Unfortunately, the GN has not yet seen fit to go in that direction. This however, is a clear example of why such amendments are necessary. I cannot, therefore, distinguish the case based only on this.

I do, however, distinguish the case on other grounds and, in particular the fact that in this case I am not satisfied that Mr. Stewart's work with the Hamlet is altogether separate from his position with the GN. It is a very small community. Mr. Stewart is in a position, in his work with the GN, to award contracts to local and other businesses. He is likely to be working with the same contractors as does the Hamlet. As is clear from this case, rivalries and disagreements will arise and it would be unreasonable to believe that Mr. Stewart (or anyone else) can completely isolate his roles. What he does in his work with the GN will spill over into his work with the municipality and vice versa. The purpose of the Act is to help to achieve openness and accountability. Using the purposive test suggested by the court, and knowing that in Nunavut's small communities, what is done in one role often blurs with and affects what happens when the same person is in another role, makes it far more likely that the purposive approach will apply to

include emails which are sent and received through the GN email system. That is, in my opinion, clearly the case here. In order to keep the public body accountable to the public, it is important that the public can test to see whether the information employees glean from one role blur into their other roles. The lines here are not nearly as clear as the lines in the Ottawa case and, for that reason, I am satisfied that the records in question do, indeed, fall under the scope of the ATIPP Act.

Section 24(1)(c)

This leaves section 24(1)(c) of the Act. Section 24 prohibits public bodies from disclosing records where the disclosure could reasonably be expected to result in undue financial loss or gain to any person, prejudice the competitive position of a third party, or interfere with the contractual or other negotiations of a third party.

In my opinion, if any exemption applies to the records in question, it is this one. Normally, however, I would have expected the public body to provide me with some evidence from the third party (in this case, the Hamlet), outlining how the disclosure of the information would negatively impact them. That was not provided and the public body has not met the onus of establishing that the exemption applies. However, this is a "prohibitive" section, and my recommendations have to consider the possibility that the third party in this case might be impacted by the disclosure of the records and make my recommendations accordingly. After all, the Act is also meant to protect the business information of third parties. I therefore have to analyze the information as best I can based on what I do have.

It is clear from the contents of the records that much of what is contained in these records is the Hamlet's business information, some of it sensitive. As noted above, some of the records contain legal advice provided to the third party with respect to active, ongoing disputes and these records are particularly sensitive and protected by the common law of privilege. Others appear to contain discussions and deliberations with respect to Hamlet issues.

CONCLUSIONS AND RECOMMENDATIONS

In the circumstances, a line by line review must be done to determine which records, or parts of the records, are protected from disclosure pursuant to section 23(1) or section 24(1)(c).

Record R-1 (one page)

This record is one page comprised of 2 email messages.

The first of these (chronologically speaking) appears to be from a Hamlet employee to Mr. Stewart. The contents deal with Hamlet business matters. In my opinion, the disclosure of the contents of this email could reasonably be expected to impact on the Hamlet's competitive position or interfere with contractual or other negotiations it may be involved in. **It has, in my opinion, been properly withheld.**

The second email, however, contains nothing that could possibly impact the Hamlet in any way. **I recommend that this email be disclosed**.

Record R-2

This is a two page record.

The first two emails in this chain (chronologically) are from a Hamlet official to A.B., the Applicant in this request. Providing the Applicant with a copy of these can, therefore, in no way prejudice the Hamlet as the Applicant will already have seen it. Nothing is being disclosed that has not already been disclosed. **I recommend that these two emails be disclosed.**

The next email in the chain contains nothing that might affect the Hamlet in any way. **I recommend that it be disclosed.**

The final email in this chain contains the opinion of the writer and, as such, it falls within the definition of "personal information". Would the disclosure of this email constitute an unreasonable invasion of the author's privacy? Based on all of the information before me, I am satisfied that it would. **This email should not, therefore, be disclosed.**

Record R-3

This is a one page record comprised of two emails.

This email chain involves the business dealings of the Hamlet and, for the most part, is not responsive to the Applicant's request for information in any event. I am prepared to accept that the disclosure of the relevant portions of this email could be reasonably expected to interfere with the contractual or other negotiations of the Hamlet. **I recommend that this record not be disclosed.**

Record R-4

This record consists of three pages.

There is nothing in the first of the emails (chronologically) which might impact on the third party's competitive position**. I recommend that it be disclosed.**

The next email is from one of the Applicants and there is, therefore, nothing in it that is not already in the possession of the Applicant. There is nothing in this email that could possibly impact on the negotiating position of the Hamlet. **I recommend that it be disclosed.**

Similarly, the next email in the chain is addressed to one of the Applicants. There is nothing new in it**. I recommend that it be disclosed.**

The third email in the chain is very short. In all of the circumstances, however, it is likely that the disclosure of the email could be reasonably expected to interfere with the Hamlet's negotiations. **This email should not be disclosed.**

There is nothing in the last email on the page that, to me, could possibly have any impact on any contractual or other negotiations of the Hamlet. **I recommend it be disclosed.**

Record R-5

This is a two page record. The first two emails in the chain (chronologically) appear to have already been provided to the Applicant directly by the Hamlet. There is nothing, therefore, in these two communications which could reasonably be expected to interfere with the Hamlet's negotiations or business dealings. **I recommend that these emails be disclosed.**

The last two emails in this chain contain nothing that could reasonably be expected to impact in any way on the Hamlet. **I recommend, therefore, that these too be disclosed.**

Record R-6

This is another two page record.

Again, the first email in the chain, chronologically, is addressed to the Applicant and presumably the Applicant will already have a copy of this. Its disclosure, therefore, could not be reasonably expected to impact on the Hamlet in any way. **I recommend it be disclosed.**

The last two emails in this record appear to involve discussions between Hamlet officials with respect to business matters. The disclosure of these two emails could be reasonably expected to affect the Hamlet's contractual or other negotiations**. I therefore recommend that these two emails not be disclosed.**

Record R-7

This email record is three pages in length.

Except for the last two emails (chronologically) all of the emails in this chain include one of the Applicants either as author or recipient. The disclosure of these records, therefore, could in not way be reasonably expected to interfere in any way with the Hamlet's business**. I recommend that these emails be disclosed.**

The last two emails contain an exchange that could be reasonably be expected to affect the contractual or other negotiations of the Hamlet if disclosed**. I therefore recommend that they not be disclosed.**

Record R-8

The first email in this chain appears to be from legal counsel to the Hamlet. The email does not, however, contain any legal advice or recommendations. I see nothing in this email that could be reasonably expected to interfere with the contractual or other negotiations of the Hamlet. **I recommend it be disclosed.**

The second email in this chain simply forwards the first one to several people, including Mr. Stewart. There is nothing in this email that could possibly affect the Hamlet**. I recommend it be disclosed.**

The final email in this chain contains the writer's opinion about certain matters. As such, it is his personal information and I am satisfied, based on the criteria listed and discussed above with respect to section 23, that the disclosure of this email would constitute an unreasonable invasion of his privacy**. I recommend that this email not be disclosed.**

Record R-9

This record consists of a legal opinion provided by counsel, which is then shared and discussed in subsequent emails. It is my opinion that the disclosure of any part of this exchange could be reasonably expected to prejudice the contractual or other negotiations of the Hamlet. **As such, disclosure of this record is prohibited**.

Record R-10

Again, this record consists of a legal opinion provided by counsel, which is then shared and discussed in the subsequent emails in the chain. It is my opinion, therefore, that the disclosure of any part of this exchange could be reasonably expected to prejudice the contractual or other negotiations of the Hamlet and **no access should be given to this record.**

Generally, as noted above, I am concerned with the way in which the public body dealt with this Request for Information. I am assuming that the public body has by now provided the Applicant with the records which were not originally provided because the ATIPP Co-Ordinator unilaterally decided not to provide them. If this hasn't been done **I recommend that it be done immediately.**

I have not touched in this report on the scope of the search terms used in identifying responsive records. If the Applicant is still wanting to expand the scope of its original request for information to include a wider scope of search terms, I would suggest that they contact the ATIPP Co-Ordinator for the department in writing to provide more detailed information about what it is, specifically, that they are looking for. I would further recommend that the public body work with the Applicant if they do take this step, to ensure that the search to be done will satisfy

the Applicant's requirements. Finally, if there is a further request such as this, **I strongly recommend that someone independent conduct the physical searches and identify the responsive records.** This is not something that should be done by someone who may have something to gain or lose by revealing or failing to reveal relevant records.

Finally, I would once again point out that employees of public bodies have to start learning to be far more careful when using their government email for personal correspondence. Nunavut's population is very small. The chances of a conflict of interest or apparent conflict of interest are therefore significantly higher than in other parts of the country. The *Access to Information and Protection of Privacy Act* was created as one means to help the public ensure that it's elected officials and employees are not swayed by outside considerations. Employees simply cannot assume that because they consider their email correspondence as "personal", the Act does not apply. It does.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner