

**NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER**

Review Recommendation 14-082

September 14, 2014

Review File: 14-163-5

BACKGROUND

The Applicant in this case has requested a review of the response he received to an Access to Information request he submitted to the Department of Health.

The Applicant requested

All hand written notes, handwritten and typed memoranda, handwritten and typed telephone notes and memoranda, and all email communications between [a long list of named individuals] made or communicated or recorded during the period from May 31, 2011 to and including December 31, 2011...with respect in any way, sense, directly or indirectly, to the matter of Air Ambulance service in the Kitikmeot region of Nunavut, including but not limited to, the Air Ambulance contract proposal #2011-21 Kitikmeot Air Ambulance Contract

as well as other, related records.

In requesting the review, the Applicant indicated that he was not satisfied that all the pertinent records were identified and/or disclosed.

THE PUBLIC BODY'S SUBMISSIONS

The Department of Health made the following submissions:

- a) when the Request for Information was received, they reviewed it to determine, firstly, whether they were in possession of all of the requested

records. Because many of the named individuals worked in other departments, the request was forwarded immediately to the other departments, and the Applicant was advised of this. As another preliminary matter, the public body requested clarification of parts of the request from the Applicant.

- b) each of the named individuals employed with the Department of Health were contacted and asked to identify and provide all responsive records in their possession. Most of the individuals provided the responsive records in a timely manner. Those who did not were either away or were no longer GN employees. The Department then did a thorough search of the email accounts of those who did not respond and identified the responsive records of those employees. With respect to the paper records, supervisors in the various offices in the various communities were asked to search for any such records. No responsive paper records were found.
- c) the ATIPP Co-Ordinator provided me with the list of keywords and other search parameters used. It was extensive.
- d) in all, the Department collected 1253 pages of responsive records. 516 of those were released to the Applicant in their original form, without exemptions. Many more were disclosed with some or all of the record being edited pursuant to various exemptions under the Act and some were withheld pending third party consultations pursuant to section 25 of the Act.

With respect to the exemptions claimed, the public body relied on the following sections of the Act as authority for declining to release portions of the responsive records:

- section 14(1)(a): advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Counsel

- section 14(1)(b)(i) - consultations or deliberations involving a member of the Executive Counsel
- section 14(1)(c) - positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations;
- section 14(1)(f) - contents of agendas or minutes of meetings of an agency, board, commission, corporation, office or other public body
- section 15(a) - solicitor/client privilege
- section 23(1) - unreasonable invasion of personal privacy
- section 23(2)(a) - information that relates to a medical, psychiatric or psychological matter about an individual
- section 23(2)(d) - information that relates to employment, occupational or educational history of an individual
- section 24(1)(b)(i) - business interests of a third party

DISCUSSION

1. Thoroughness of the Search/Response

I would first address the issue of the thoroughness of the search. The request was extensive and named a large number of individuals. The Department of Health's response did not garner the response that the Applicant thought that it would. He is convinced that there are many more records that have not been disclosed. He has not, however, provided me with anything to support his assumptions in this regard.

A. Transfer of portions of the Request

Only some of the individuals listed in the Applicant's Request for Information were employees of the Department of Health. Others were employees of the Government of Nunavut, but in other departments. Section 12 of the Act allows a public body to transfer a Request for Information to another public body where:

- a) the record was produced by or for the other public body;
- b) the other public body was the first to obtain the record; or
- c) the record is in the custody or under the control of the other public body.

I am satisfied that not all of the records being requested by the Applicant were under the custody or control of the Department of Health and that they took appropriate steps to transfer those parts of the request that involved the records of employees from other departments to those departments.

B. Thoroughness of the Search

I have reviewed the “keywords” used by the Department in undertaking their search for the information requested by the Applicant. That list was shared with the Applicant. He did not provide me with any additional words or phrases which he thought should have been included in the search parameters. The list of keywords was extensive, and to my eye, complete. I am satisfied that the search for electronic records was thorough and produced all of the records relevant to the request. The public body also indicated to me that supervisors had undertaken a search for paper records from the offices of the Department in several communities subject to the request. Four paper records were found and disclosed to the Applicant.

I am satisfied that the Department of Health did a thorough search of their records and, without anything to suggest the existence of other records, I am satisfied that all of the responsive records were identified by the Department.

2. Exemptions Claimed

The public body did a page by page, line by line review of the records identified by them as responsive to the Applicant’s Request for Information. There have been a number of exemptions claimed. The best way to address this is to review the exemptions page by page. In a number of cases, there are repetitive appearances of the same email in a number of records. I will comment only on the first appearance of each edited portion of

the records. My comments, however, will apply to every time the same email or chain appears.

Page 8 - The redactions on this page appear to be in a record which was part of a package provided to the Department of Health by the Applicant or at least which was clearly copied to the Applicant during the course of an appeal process. The information has been redacted pursuant to section 23(1) of the *Access to Information and Protection of Privacy Act* which prohibits the disclosure of personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy. The disclosure of the redacted portions of this letter to the Applicant would not constitute an unreasonable invasion of the privacy of the third parties involved as it is clear that the Applicant already has a copy of the document without those deletions. I **recommend** that this page be disclosed without any edits.

Page 42 - Once again, a name has been redacted from this page with section 23(1) as the justification. There is no further explanation provided. The disclosure of a name, in and of itself, does not constitute an unreasonable invasion of the privacy of a third party. In this case, the name is that of an individual who the public body was considering to assist in the review of an appeal. When combined with the other information in the email the name would reveal information about the individual. Because section 23(1) provides a mandatory exemption from disclosure, I am satisfied that it was properly withheld even though I think that the Applicant will probably be able to identify the individual from the rest of the information in the email.

Page 43 - In this record, the person's name has been left unedited but a statement about her employment background has been deleted with reliance on Section 23(2)(d). This section raises a presumption that the disclosure about an individual will be deemed to be an unreasonable invasion of that person's privacy where the personal information relation to employment, occupational or educational history. The statement deleted is not specific about any of these topics, but in a broad way suggests an area of responsibility. For the same reasons noted above, I am satisfied that the information was properly withheld.

Pages 50 and 128 - On these pages the public body has deleted the personal email addresses of individuals and I am satisfied that it was an appropriate edit pursuant to section 23(1).

Page 51 - Section 23(1) has, once again been applied to the deletion of a few words in one of the emails. There is no reference to any of the presumptions listed in section 23(2) to suggest why the public body feels that the disclosure of the information in question would be an unreasonable invasion of his privacy. That said, it is clear that the deleted portion relates to the reason for an absence from work, and I am satisfied that it was properly deleted.

Page 53 - A large portion of one of the emails on this page has been redacted pursuant to section 14(1)(a) of the Act. This section gives public bodies the discretion to refuse to disclose information “where the disclosure could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council”. By way of further explanation, the department indicates that:

the purpose of the correspondence was to supply the ...Department of Health, with analyses, recommendations and advice for extending the medevac services for the Kitikmeot region with the existing contractor.

I am satisfied that the redacted portion of the email does meet the criteria for an exemption pursuant to section 14(1)(a). This, however, does not end the matter. Section 14(1)(a) is a discretionary exemption. Disclosure is always the default and discretion must still be exercised. It appears from the submissions received from the Department that access was refused simply because the information met the criteria for the exemption. There was no discretion exercised. Even if some information meets all of the criteria to qualify it for a discretionary exemption, the step of exercising that discretion must take place. I therefore **recommend** that the public body exercise its discretion. If, in the exercise of that discretion, the public body chooses not to disclose, I

recommend that the public body indicate to the applicant the considerations that went into the exercise of the discretion.

Page 54 - Once again, the public body has relied on section 14(1)(a) for its refusal to disclose portions of the first email on this page (last in time). The public body indicates that the redacted portion of this email constitutes a statement of a decision that had been made by the Department of Health and it refers to the advice redacted from the email on page 53. I am satisfied that the first paragraph of the email would reveal the advice given in previous emails. Again, however, there is no indication that discretion has been exercised and I **recommend** that the public body exercise its discretion. If, in the exercise of that discretion, the public body chooses not to disclose, I **recommend** that the department indicate to the applicant the considerations that went into the exercise of the discretion. I am not convinced that the first sentence of the second paragraph of the email qualifies for an exemption and I **recommend** that it be disclosed.

Page 71, 85 to 88, 106, 109, 112, 115 to 117, 118 and 119 - These records involve exchanges between employees of the successful proponent of the contract in question as well as GN employees. The names and email addresses of all non-government employees have been edited pursuant to section 23(1) of the Act. Personal information has been defined in the Act to include 'the individual's name, home or business address or home or business telephone number'. By implication, it would also include a business email address. I am not satisfied, however, that the disclosure of this information would constitute an unreasonable invasion of the privacy of the third parties named. The names of the officers and directors of the company involved are public knowledge and their business email addresses are readily available in the public domain. I **recommend** that the redacted information on this page be disclosed.

Pages 113 and 114 - The names of the officers/employees of the third party contractors have been redacted from the top of page 113 citing section 23(1) of the Act. For the reasons outlined above, I **recommend** that these names be disclosed. This

record constitutes the minutes of a meeting between employees of the GN and officers/employees of the successful contractor. The substantive portion of this record have been redacted in full pursuant to section 14(1)(f) which provides public bodies with a discretion to refuse to disclose information where the disclosure could reasonably be expected to reveal the contents of agendas or minutes of meetings of an agency, board, commission, corporation, office or other body that is a public body. The department argues that these two pages constitute an agenda and minutes of a meeting of senior level employees of the Department of Health and the successful contractor. These pages, they say, discuss the medevac services to be provided by the successful contractor. They argue it is “consultative and deliberative in nature” and “may be the centre of decision-making for the Department of Health”. I am not convinced that it was intended that this section would apply to every meeting that is held by a public body. In other Canadian jurisdictions where this exemption exists, the exemption is for meetings of governing bodies and/or committees of public bodies, not for every meeting held by a public body for any purpose. Given the general purposes of the Act to encourage openness and accountability, and the general rule that exceptions should be narrowly defined, it is my opinion that section 14(1)(f) does not apply to this particular meeting. There is, however, content within the minutes which might be subject to an exemption pursuant to section 24 (business interests of a third party), which is a mandatory exemption, or pursuant to section 14(1)(b), (c) or (g) (all discretionary exemptions). I **recommend** that the public body re-evaluate these pages with these exemption sections in mind and take appropriate steps. If the Applicant is not satisfied with the response, he may ask me to review this particular item again.

Page 120 - Portions of one of the emails on this page have been redacted pursuant to section 23(1) of the Act. I am satisfied that the deleted portion would be an unreasonable invasion of the privacy of the individual involved as it relates to the dates and reasons for the employee’s time away from the office.

Page 126 - A number of names have been redacted from this page pursuant to section 23(1) of the Act. This appears to be a letter sent to the public body in support of the

Applicant's appeal. While there is no indication as to whether or not the Applicant received a copy of the record, all of the names redacted are the names of employees or former employees of the Applicant's company and obviously well known to him. While the comments relate, in a very general way, to the work history of the individuals within the Applicant's company, I cannot conclude that the disclosure of those names would be an unreasonable invasion of the privacy of the employees named. The Applicant was the employer and he therefore is clearly aware of the information being imparted. While section 23(2) provides circumstances in which unreasonable invasion of privacy will be presumed, presumptions are rebuttable and in the particular circumstances of this record, I am satisfied that the presumption does not apply. I **recommend** that this page be disclosed without edits.

Pages 131 and 132 - This record appears to be another letter of support for the Applicant's appeal. The writer's name and personal email address have been redacted pursuant to section 23 of the Act and I accept that the disclosure of that the email address would be an unreasonable invasion of the writer's privacy. Since there is no indication that the Applicant was copied on this email, it would be appropriate, as well to mask the writer's name. Two paragraphs of the letter contain a mini-resume of the writer and this section has also been properly redacted. The remaining redactions on this page are references to the names of some of the Applicant's employees and it will be fairly obvious to the Applicant by the other references in the letter which have been disclosed which of those employees are being referred to, even without the names. There can, in these circumstances, be no unreasonable invasion of the privacy of the third parties. I would, therefore, **recommend** that these pages be disclosed with this information intact.

Page 148 - This is a new branch of the email chain which first appeared at page 42. For the reasons set out above, I am satisfied that the information redacted from this page was in accordance with section 23(1).

Pages 154 to 156 - The majority of these three pages have been masked, the department citing section 14(1)(c). The public body argues that this entire record

contains a formulated and detailed evaluation exercise and scores used in awarding the medevac contract in question. Section 14(1)(c) provides a discretionary exemption for information where the disclosure could reasonably be expected to reveal “plans, positions, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the GN or considerations that relate to those negotiations”. As I understand it, however, this was an evaluation of proposals received in response to a Request for Proposals which outlined the parameters of the contract. There was little, if any, negotiation involved or anticipated. I do not believe that 14(1)(c) is applicable. That said, section 14(1)(a) would apply as the records clearly contain analyses of the proposals submitted and the committee’s recommendations to the public body were based on those analyses. There is, however, still no indication that the public body has actively exercised its discretion in refusing to disclose these pages. I **recommend** that the public body exercise its discretion. If, in the exercise of that discretion, the public body chooses not to disclose, I **recommend** that the department indicate to the applicant the considerations that went into the exercise of the discretion.

Page 160 - A portion of this page has been deleted pursuant to section 14(1)(a). It originates from a Regional Director and is addressed to a Senior Manager, two Directors, and another individual who was clearly very involved in the selection process. It contains candid statements about the submissions received. The purpose of the consultation and deliberation exemptions are to encourage open and candid discussions among GN employees. I am satisfied that the deletion on this page falls within the exemption. Once again, while the department has established that the information meets the criteria for an exemption pursuant to section 14(1)(a), there is no indication that any discretion was exercised. I therefore **recommend** that the public body exercise its discretion. If, in the exercise of that discretion, the public body chooses not to disclose, I **recommend** that the department indicate to the applicant the considerations that went into the exercise of the discretion.

Pages 162-195 - The public body has redacted virtually everything from these pages pursuant to section 14(1)(c) of the Act. They argue that these pages constitute a discussion about the evaluations done by the Government of Nunavut with respect to

the proposals received for the medevac contract in question. The evaluation notes include a list of the evaluation criteria including strengths and weaknesses that were discussed about each of the proposals, the price quoted by each of the proponents, proposal rating schedules with scores for air ambulance equipment and medical flight crew for all of the proponents, comments and observations made by the evaluators regarding the knowledge and expertise among the proponents and the scores given to each proponent by the evaluators. They say that the contents of this record includes a formulated and detailed method of evaluating scores for awarding the medevac contract and the disclosure may also reveal criteria that were developed for the purpose of contractual negotiations on behalf of the GN.

While some of the information contained in these pages might meet the criteria for an exemption pursuant to section 14, there are clearly portions of this record which do not qualify for any exemption. In particular:

- all of page 162
- on pages 165, 169, 174, 180, 186, the heading NNI and the information underneath that heading and on page 191, the heading NNI and the first three bullets underneath that heading (the information in these headings is, as I understand it, really no more than a statement of fact which is publicly available information)
- on pages 166, 167, 171, 173, 176, 178, 182, 183, 187, 188, 192, and 193 columns 1 (Item), 2 (Rating Criteria), and 4 (Assigned Weight) as well as the heading above and at the top of the chart
- all of pages 168, 172, 177, 179, 189 and 194

I **recommend** that these portions of the record be disclosed. As for the remaining information in this record, while much of it is factual, it is also information which has been gleaned, for the most part, from the proposals themselves. To the extent that the proposals are from third parties, much of that information would be protected from disclosure pursuant to section 24(business interests of a third party), which is a mandatory exemption. To the extent that this information is not protected by section 24, I accept that the balance of this record consists of a true evaluation of each proposal,

weighing the strengths and weaknesses of each. The points awarded in each case appears to be a result of the weighing of this information. It therefore meets the criteria for an exemption pursuant to section 14(1)(a) -- but not section 14(1)(c) -- such that the public body has the discretion to deny access. I would, therefore, **recommend** that the public body actively exercise its discretion and, in particular, consider whether or not to disclose to the Applicant those pages which relate to his company.

Page 196 - The majority of this page has been redacted pursuant to section 14(1)(c) of the Act for the same reasons as outlined for the above record. There is, however, nothing in this page other than factual information. There is nothing on this page which would qualify for an exemption pursuant to section 14 except very possibly the last sentence of the first paragraph and first sentence of the second paragraph under the heading "Evaluation Process". Even here, the information in these sentences is clearly public knowledge by this time. **I recommend** that this page be disclosed.

Page 210 - One line in one email on this page has been redacted pursuant to section 14(1)(c) of the Act. The public body indicates that the redacted portion of this record refers to the factors that were considered in awarding the medevac contract, as well as to the negotiations involved in reaching an agreement on the terms of that contract. While I am not convinced that section 14(1)(c) would apply, I am satisfied that this line might meet the criteria for an exemption pursuant to section 14(1)(a) as a consultation and/or deliberation. No discretion has, however, been exercised and I **recommend** that the public body consider if there are any factors which dictate that this information should not be disclosed.

Page 219 - There are two small edits from this page pursuant to section 23(1), presumably because it refers to part of the job responsibilities of a particular GN employee. Section 23(4)(e), however, provides that it is not an unreasonable invasion of privacy if the information relates to a person's employment responsibilities as an officer, employee or member of a public body. **I recommend** that this page be disclosed without edits.

Pages 222, 223, 224, 225 and 226 - On these pages, the business email address and the name of an employee of the successful tenderer has been redacted. My discussion with respect to page 71 above applies to these pages as well and I **recommend** that the pages be disclosed without edits.

Page 228 - Most of this record is included in various emails already discussed, in particular with respect to page 42 through 48. It contains one additional email in which the same name has been redacted. As in the earlier emails in the chain, I am satisfied that although the Applicant will most likely be able to identify the individual whose name has been removed, it is properly redacted pursuant to section 23(1).

Pages 230 and 235 - The name of an employee of the successful tenderer has been redacted from these pages. The disclosure of the name, by itself, does not constitute an unreasonable invasion of his privacy. I **recommend** that the page be disclosed with the name intact.

Pages 237 and 238 - These two pages contain “key contact information” for the successful tenderer. The names of the senior employees, as well as their business email addresses (though not their business telephone numbers) have been masked. Again, this contact information is business information which is readily available in public forums and its disclosure would not constitute an unreasonable invasion of the privacy of the individuals concerned. I **recommend** that these pages be disclosed without edits.

Page 239 - This is the first page of an email chain in which most of the emails have been dealt with above. The only deletion from the new portion of this email is the name of a principal of the successful tenderer. The public body has refused to disclose this name pursuant to section 23(1) of the Act. I am not satisfied that the disclosure would constitute an unreasonable invasion of this person’s privacy and I **recommend** that it be disclosed.

Page 242 - See my comments with regard to page 222.

Pages 261 and 272 - See my comments with regard to page 239.

Page 293 and 296 - On these pages, the public body has deleted the name of an individual who is the owner of a named company. The name of that person and the fact that he owns the company is information that is readily available public information and is almost certainly known by the Applicant who is in the same industry in a small market. The disclosure of this name would not constitute an unreasonable invasion of the individual's privacy and I **recommend** that it be disclosed.

Page 297 - See my comments with regard to page 239

Pages 298 to 300 - These pages are a copy of a press release issued by the successful tenderer. The names of the principals of the company, certain key employees of the company and the business email addresses as well as the name of another company have been redacted from the copy of this record provided to the Applicant. This is information that the company itself released to the public. There is no breach of privacy by disclosing the names or contact information to the Applicant. I **recommend** that these pages be disclosed without edits.

Page 303 - One line of this page has been redacted pursuant to section 15(a) of the Act. Section 15 provides the public body with a discretionary exemption for information which is subject to any type of privilege available at law, including solicitor-client privilege. The public body claims that the redacted portion of this email was correspondence between legal counsel and a Director within the Department of Health involving the giving of legal advice. "Since we believe the communication was intended to be confidential, we withheld that particular portion". While I am prepared to accept the redacted line amounts to legal advice, there is no indication that the public body exercised its discretion. Whether or not it was intended at the time it was written to be confidential, the public body must make an active decision about whether or not to

waive the privilege attached. I **recommend** that the public body exercise its discretion. If, in the exercise of that discretion, the public body chooses not to disclose, I **recommend** that the department indicate to the applicant the considerations that went into the exercise of the discretion.

Page 304 - The public body once again relies on section 15(1) for their refusal to disclose two lines on this page. The information excluded does not amount, in any way, to legal advice. Nor is there anything in these two lines that would reveal any legal advice or a legal direction. The mere fact that it was written by a lawyer does not automatically clothe it in solicitor/client privilege. I **recommend** that these lines be disclosed.

Page 305 - See my comments regarding page 239.

Pages 314 and 315 - The public body once again relies on Section 15(a) for the redaction of a large portion of these two pages. I am satisfied, from the content of the emails, that the information contained is legal advice being given and received and that it meets the criteria for an exemption under section 15(a). Once again, however, there is no indication that discretion was exercised. I therefore **recommend** that the public body exercise its discretion. If, in the exercise of that discretion, the public body chooses not to disclose, I **recommend** that the department indicate to the applicant the considerations that went into the exercise of the discretion.

Page 315 (bottom) - See my comments regarding page 239.

Page 316 - For those portions of this page which have been redacted pursuant to section 23(1), see my comments regarding page 239. Section 15(a) has been relied on to redact a portion of one sentence in the body of this email. There is nothing in this redacted information that constitutes solicitor/client privilege. It is not addressed to a lawyer acting for the writer. One of the email recipients is counsel for the public body, but the email is not from the client - it is from an employee of the successful tenderer. I **recommend** that it be disclosed.

Page 318 - See my comments regarding pages 314 and 315.

Page 319 - See my comments regarding page 239.

Page 320 - For most of the redacted material on this page, my comments regarding page 239 apply. There is, however one sentence (first sentence in the earliest email) which contains information, the disclosure of which would constitute an unreasonable invasion of the writer's privacy and I accept that this sentence has been properly redacted.

Pages 321 and 322 - See my comments regarding page 239

Pages 326 to 329 - For those portions of these page which have been redacted pursuant to section 23(1), see my comments regarding page 239 with the exception of the last sentence of the body of the email on page 329, which has been properly redacted as an unreasonable invasion of privacy.

For that portion of this record which has been redacted pursuant to section 15(a), the email is written by legal counsel. While I am prepared to accept the redacted portions might amount to legal advice, there is no indication that the public body exercised its discretion. Whether or not it was intended at the time it was written to be confidential, the public body must make an active decision about whether or not to waive the privilege attached. I **recommend** that the public body exercise its discretion. If, in the exercise of that discretion, the public body chooses not to disclose, I **recommend** that the department indicate to the applicant the considerations that went into the exercise of the discretion.

I note, as well, that personal information about legal counsel's travels was left in this email. That is information I would have redacted pursuant to section 23(1) as being an unreasonable invasion of her privacy.

Pages 330 to 332 - See my comments regarding page 239

Page 335 - While the redacted portion of this page meets the criteria for an exemption pursuant to section 14(1)(a), there is no indication that the public body has exercised its discretion keeping in mind that disclosure is the default position. I **recommend** that the public body exercise its discretion. If, in the exercise of that discretion, the public body chooses not to disclose, I **recommend** that the department indicate to the applicant the considerations that went into the exercise of the discretion.

Page 345 to 353 - To the extent that I have not already commented on the emails in these records, see my comments regarding page 239.

Pages 354 to 356 - To the extent that I have not already commented on the emails in these records, see my comments regarding page 314.

Pages 357 and 358 - To the extent that I have not already commented on the emails in these records, see my comments regarding page 239.

Page 370, 384, 388, 389, 394 and 406 - See my comments regarding page 239.

Pages 398 and 399 - To the extent that I have not already commented on the emails in these records, see my comments regarding page 239.

Page 436 - The public body claims that the body of this email is protected from disclosure pursuant to section 15(a) of the Act. While the email appears to be from counsel to the Deputy minister, most of the information deleted does not constitute legal advice or direction. Furthermore, once again the public body has not exercised any discretion with respect to the disclosure of the impugned selection. I therefore I **recommend** that the public body exercise its discretion. If, in the exercise of that discretion, the public body chooses not to disclose, I **recommend** that the department indicate to the applicant the considerations that went into the exercise of the discretion.

Page 437 - This is a letter from counsel for the defendants in a lawsuit commenced against the GN and is addressed to counsel for the GN. The public body claims an exemption for the body of the letter pursuant to section 15(a) of the Act. This is not, however, a communication between a lawyer and his/her client. It is a communication between two opposing counsel. As such, it is not subject to solicitor/client privilege. The public body has not provided any alternative section of the Act that might apply. I therefore **recommend** that this page be disclosed.

Page 439 - To the extent that the public body has cited section 23(1) of the Act for exemptions from this page, I would refer to my comments with respect to page 239. For those parts of the page redacted pursuant to section 15(a), I would refer to the discussion with respect to page 437. This is not correspondence between counsel and his/her client and it does not, therefore, covered by solicitor/client privilege. The public body has referred me to no other applicable exemption. I therefore **recommend** that these portions of the page be disclosed.

Pages 440 and 441 - Some of the emails in these two pages have already been discussed above. Only the information on the first page is new. Most of this page has been redacted pursuant to section 14(1)(c). While I am not convinced that section 14(1)(c) would apply, I am satisfied that this line might meet the criteria for an exemption pursuant to section 14(1)(a) as a consultation and/or deliberation. No discretion has, however, been exercised and I **recommend** that the public body consider whether or not to disclose this line notwithstanding that it fits into a discretionary exemption.

Pages 445-447 - To the extent that the public body has cited section 23(1) of the Act for exemptions from this page, I would refer to my comments with respect to page 239. On the second page of this record, the public body has claimed privilege pursuant to section 15(a) of the Act. This is not correspondence between counsel and his/her client and it does not, therefore, attract an exemption under the solicitor/client privilege exemption. The public body has referred me to no other applicable exemption. I therefore **recommend** that these portions of the page be disclosed.

Pages 453 to 456 and 458 - See my comments regarding page 239.

Pages 460 - 461 - These two pages are entitled “Briefing Note - Community and Government Services”. The public body has redacted portions of the record citing section 14(1)(c) of the Act. They argue that the information in the redacted portions of this record relate to the factors involved for awarding the medevac contract, including “comments and observations made by the evaluator regarding the strength and weakness among the proponents” and “the information also relates to the approach to the negotiations for awarding the medevac contract as referred in the evaluations notes”. I do not agree with this assessment. Most of the information redacted is factual in nature and not in any way proprietary information about the tenderers. Under the heading “Recommended Speaking Points”, the record provides the number and names of the proponents, as well as some of the factors that were deemed by the evaluation committee to be of significance. These “Speaking Points” were intended to be used for communication with the public. They do not reveal “positions, plans, procedures, criteria or instructions” developed for contractual negotiations. They reveal the decision made and those factors which went into the decision which the public body was willing to share with the public. In fact, there really were no negotiations involved here. There was an evaluation of a number of proposals with a recommendation as to which one should be accepted. I am not convinced that section 14(1)(c) is applicable. Even if the redacted information did meet the criteria for an exemption pursuant to section 14(1)(c), once again there is no indication that any such discretion was exercised. I **recommend** that this record be disclosed.

Pages 470 to 472 - To the extent that I have not already commented on the emails in these pages, see my comments regarding page 239.

Page 473 - This page is the “signature page” of the contract between the successful tenderer and the GN. The public body has redacted the names, positions and signatures of the company’s officers. While the information redacted is certainly the personal information of these individuals, I am not satisfied that, in the circumstances, the disclosure of the signatures, names and offices held by these two individuals would

constitute an unreasonable invasion of their privacy. I **recommend** that this information be disclosed.

Pages 483 to 491 - To the extent that I have not already commented on the emails in these pages, see my comments regarding page 239.

Pages 496 to 503 - To the extent that I have not already commented on the emails in these pages, see my comments regarding page 239.

Pages 513 to 515 - The public body relies on section 14(1)(b)(i) for its decision to refuse disclosure a portion of the first page of this record (the remaining deleted portions have been addressed in the comments above.) This section gives public bodies the discretion to refuse access to information that could reasonably be expected to reveal consultations or deliberations involving officers or employees of a public body. In this case, the department argues that the redacted portion of this record constitutes a statement of a decision made by the Executive Coordinator of the NNI Secretariat from the advice that was received from a manager in the Department of Health and that the exchange therefore meets the criteria for an exemption pursuant to section 14(1)(b)(i). I accept that the information redacted would meet the criteria for the application of this section, but there is no indication as to whether or not any discretion was exercised in the decision not to disclose it. I **recommend** that the public body exercise its discretion. If, in the exercise of that discretion, the public body chooses not to disclose, I **recommend** that the department indicate to the applicant the considerations that went into the exercise of the discretion.

Pages 516 and 517, 519, 520 - To the extent that I have not already commented on the emails in these pages, see my comments regarding page 239.

Pages 521 to 557, 560 to 596, 599 to 638, 640 to 675, 747 to 781, 785 to 821, 896 to 932 - These records have been withheld pursuant to section 15(a) - solicitor/client privilege. Each is a draft of the medevac contract, prepared by the department's lawyer and sent to officials of the Department of Health for consideration. In each case, the

record was clearly intended to be subject to solicitor/client privilege and I am satisfied that it meets the criteria for a discretionary exemption pursuant to section 15(a). Once again, however, there is indication as to whether or not discretion was exercised and I therefore recommend the public body exercise its discretion. If, in the exercise of that discretion, the public body chooses not to disclose, I **recommend** that the department indicate to the applicant the considerations that went into the exercise of the discretion.

Pages 558 and 559 - The portion of this record which has been redacted is from legal counsel to an employee within the Department of Health. The first two lines of the redacted portion of the email does not include any legal advice or provide any indication about policy or direction. It is not subject to solicitor/client privilege. The last line redacted, however, does meet the criteria. I **recommend** that the first two lines of the email be disclosed and that the public body exercise its discretion with respect to whether or not to disclose the last line.

Page 676 - See my comments regarding page 239.

Pages 677 to 708 - These pages have been withheld pursuant to section 14(1)(c) which provides public bodies with the discretion to refuse to disclose information where the disclosure could reasonably be expected to reveal positions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Nunavut. In this case, the record is a draft of a proposed contract between the Department and the successful tenderer, clearly provided for the purposes of putting forward a position within a negotiation of the specific terms of the Agreement. I am satisfied that the record meets the criteria for an exemption pursuant to section 14(1)(c). Once again, however, there is no indication that any discretion was exercised and I **recommend** that the public body exercise its discretion with respect to whether or not to disclose the record.

Pages 709 and 710 - To the extent that I have not already commented on the emails in these pages, see my comments regarding page 239. There is, however, one sentence at the top of page 710, which contains information which, if disclosed, would constitute

an unreasonable invasion of the writer's privacy and that sentence has been properly redacted.

Pages 711 to 744 - This record is described in the email above to be "a copy of the Agreement, signed by Deputy Minister, HSS, GN for Kitikmeot Medevac Services" and was being sent to the successful tenderer for that company's signatures. While the public body claims that section 14(1)(c) applies, I would suggest that at this point in the process, the matter is no longer a "negotiation" such that section 14(1)(c) applies. It is the final product of the negotiations. That said, portions of the record may be subject to a mandatory exemption pursuant to section 24 as "information that would reveal trade secrets of a third party". I **recommend** that the public body review this record with section 24 in mind and disclose accordingly. In the event that the Applicant does not agree with the decision of the public body in this regard, he can ask me to review the matter.

Pages 745 and 746 - To the extent that I have not already commented on the emails in these pages, see my comments regarding page 239.

Pages 782 to 784 - The only portion of this record which has been redacted is one sentence on page 783 contained in an email from legal counsel to her clients. It does not contain anything that would constitute legal advice or provide any indication about policy or direction. It is not subject to solicitor/client privilege and I **recommend** that the record be disclosed without edits.

Pages 823 to 857 - This is a copy of the draft contract which has been exchanged back and forth between the successful tenderer and the Department of Health - more particularly legal counsel for the Department. The public body has refused to disclose the draft pursuant to section 15(a) - solicitor/client privilege. This is not a communication between counsel and her client. It is a communication between the lawyer and the contractor. It is part of a negotiation. It is, therefore, subject to an exemption under section 14(1)(c). Once again, however, there is no indication that

discretion has been exercised and I **recommend** that this step be completed as outlined above.

Pages 858 to 860 - To the extent that I have not already commented on the emails in these pages, see my comments regarding page 239.

Pages 861 to 894 - See my discussion with respect to pages 711 to 744 above. This exchange deals with a final product no longer in negotiation. I **recommend** that this record be treated accordingly.

Pages 937 and 938 - Information about a patient has been removed from the emails on these pages. I am satisfied that the disclosure of the information in these two emails would have been an unreasonable invasion of the patient's privacy and these sections were properly withheld.

Page 964 - See my comments regarding page 239.

Page 997 - To the extent that I have not already commented on the redacted portion of this record, see my comments regarding page 239.

Page 1010 - I note that the public body has provided the Applicant with a page from Hansard entitled "Ministers' Statements - October 31st, 2011" with a notation that this record is a public document available at www.assembly.nu.ca and for that reason was not being disclosed. While section 25(1) of the Act gives public bodies the discretion to refuse to disclose information that is "otherwise available to the public", this does not prevent the disclosure under an Access to Information Request. In this case, the extra 16 pages would have been easily reproduced for the Applicant.

Page 1025 - This page appears to be a print out comparing the cost of medevac services under each of the six tender options which were received in response to the RFP based on 2010 statistics (though I am only guessing because it is not entirely clear

from the materials or from the record itself). The public body has claimed that section 14(1)(c) applies. They say the purpose of this record was to supply detailed information, including the final dollar values for total mileage, total base fees and the total value of each of the proposals and that this information “may be used in the course of negotiations” by the GN for awarding the medevac contract in question. The question becomes whether these numbers constitute “positions, plans, procedures, criteria or instructions” developed for the purpose of contractual negotiations. In my view, they do not. They may, however, be “analyses” developed for the public body, which would provide for a discretionary benefit pursuant to section 14(1)(a). I **recommend** that the public body reconsider this page pursuant to section 14(1)(a) and that it exercise its discretion with respect to whether or not to disclose the record.

Pages 1041 and 1042 - To the extent that I have not already commented on the redacted portion of this record, see my comments regarding page 239.

Page 1047 - Certain personal information about the writer’s plans for personal activities have been redacted from this page pursuant to section 23(1). I am satisfied that the disclosure of this information would be an unreasonable invasion of the individual’s privacy and that the information has been appropriately withheld.

Pages 1069 - 1070 - Several lines have been redacted from this record pursuant to section 15(a). The first deletion on page 1069 does not involve the giving or receiving of any legal advice and it should, therefore, be disclosed. The second deletion on the page covers two paragraphs. Once again, while some of the information deleted might constitute legal advice from the GN’s lawyer to her client, not all of the deleted information would fall into that category. Furthermore, once again there is no indication that any discretion has been applied as required by the Act. I **recommend** that the department exercise its discretion with respect to these redacted portions and, if the information is not disclosed, to provide the Applicant with a statement indicating the factors that went into its decision not to disclose.

For those parts of the record which have been redacted pursuant to section 23(1), I would refer to my comments and recommendations for page 239.

Page 1120 - The second email on this page has been redacted pursuant to section 15(1) of the Act. I am satisfied that the deleted portion constitutes information protected by solicitor/client privilege. I do not, however, have any evidence that the public body has exercised its discretion with respect to the disclosure of this information. I therefore **recommend**, as noted above, that the department actively exercise its discretion in this regard and provide the Applicant with statement indicating the factors that went into the exercise of that discretion.

Page 1123 - Large sections of this page have been deleted pursuant to section 15(a). I am satisfied that this exchange consists of a discussion about legal options between lawyer and client and, therefore meets the criteria for an exemption based on solicitor/client privilege. Once again, however, I **recommend** that the public body actively exercise its discretion.

Pages 1125 and 1148 - See my comments regarding page 239.

Page 1161 - To the extent that I have not already commented on the redacted portion of this record, see my comments regarding page 239.

Pages 1165 and 1166 - The public body relies on section 24(1)(b) of the Act to justify its refusal to disclose most of the first page of this record. Section 24(1)(b) is a mandatory exemption which means that if the information meets the criteria, the public body is prohibited from disclosing it. The section prohibits the disclosure of information which is “financial, commercial, scientific, technical or labour relations information, obtained in confidence, explicitly or implicitly, from a third party”. The public body argues that the redacted portion of this record discusses the computer database application being used by the successful proponent and a list of data sets captured in the database. They say that this is the technical information of the third party. The first

line of the second paragraph of the email is redacted. Except for the name of the program, there is nothing in this sentence that could possibly be considered technical information. I **recommend** that, except for the name of the program, this sentence be disclosed. Also redacted is the list of data collected by the program. I am not convinced that this list can be considered “technical information”. It is simply a list of the kinds of information being collected about each flight in the company’s flight log. It seems to me that there is nothing proprietary, unique or unusual about the information in the list. Nor is there any indication in the record itself or in the details included that the information was provided to the department in confidence, either explicitly or otherwise. The onus is on the public body to establish that an exemption applies and in this case, I am not satisfied that they have met that onus. I **recommend** that the public body consult with the third party pursuant to section 26 of the Act and reconsider their decision based on any objections which might be raised by the third party.

With respect to those parts of this record which have been redacted pursuant to section 23(1), I refer to my comments with respect to page 239.

Pages 1174 to 1176 and 1187 to 1188 - See my comments regarding page 239.

Page 1192 - To the extent that I have not already commented on the redacted portion of this record, see my comments regarding page 239.

Pages 1209 to 1211 - To the extent that I have not already commented on the redacted portion of this record, see my comments regarding page 239.

Page 1212 - In this record, the public body has redacted the name of an individual whose connection to the medevac contract and/or the Department of Health is uncertain and not explained. My guess is that the individual is an employee of the public body and, if so, the disclosure of his name in the context of this record would not be an unreasonable invasion of his privacy. I therefore **recommend** that the name be disclosed, unless I am wrong in my assumption with respect to the individual’s

employment. For the balance of the information redacted from this page, refer to my comments with respect to page 239.

Page 1213 - See my comments regarding page 239.

Pages 1250 to 1252 - With respect to the names deleted from pages 1250 and 1251 pursuant to section 23(1), see my comments regarding page 239.

On page 1251, a large section of the page has been redacted pursuant to section 14(1)(c). The public body indicates that this portion of the document was information that was shared by the successful proponent regarding the medevac contract. The information also related to the services that were to be provided by the successful proponent for the awarded contract. This correspondence is dated well after the contract was finalized. The correspondence has nothing to do with the negotiation of the contract or any negotiations involving the third party. It appears, instead, to be an answer to criticism which had been levelled at the successful proponent and its ability to live up to the terms of the contract. It is not protected from disclosure pursuant to section 14(1)(c). Nor is there anything in this exchange which would appear to be protected pursuant to section 24. I **recommend** that this redacted section be disclosed.

CONCLUSIONS AND RECOMMENDATIONS

My specific recommendations are set out above. It is to be noted that in reviewing these records, I attempted to comment only on the first appearance of each email or record. Many of the emails appear many times. All copies should be treated in the same way as the first.

I note, as well, that 123 pages of records were not initially disclosed to the Applicant because the public body was consulting with a third party pursuant to section 25 of the Act. In October I received a letter from the department indicating that they had disclosed further materials following that consultation. As I have heard nothing further

from the Applicant in respect of these records, I am assuming that the Applicant was satisfied with the response received after the consultation.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner