NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER

Review Report 18-173

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BACKGROUND

The Applicant in this case made a request for information from the Northwest Territories Health and Social Services Authority. The specific information requested was as follows:

1. The contents of the Applicant's personnel file in the possession or under the control of Human Resources;

2. The contents of any supervisory type file(s) in the possession or under the control of the Applicant's supervisor;

3. All emails created or received by or copied to A.B., C.D. or E.F. or any of their assistants regarding the Applicant for the period December 1, 2016 to February 13, 2017 inclusive: and

4. All other records including handwritten notes of A.B., C.D. or E.F. for the period December 1, 2016 to February 13, 2017 inclusive regarding the Applicant.

In this case, A.B. was an employee of the Department of Human Resources (now Finance) and both C.D. and E.F. were the Applicant's co-workers and senior managers.

Some of the information requested was held by the Department of Human Resources (now Finance) and this portion of the request was transferred to that department

pursuant to section 12 of the Act. NTHSSA provided a response to the balance of the request. This review relates only to the response from NTHSSA.

In the package of responsive records provided to the Applicant a considerable amount of information was redacted pursuant to sections 14(1) and 23(1) of the Act. The Applicant sought a review on the basis that both sections were improperly applied. In addition, the Applicant asserted that he had been in several meetings where one or both of the two named co-workers took notes, but he had received no hand-written notes. Further, he raised concerns about the apparent practice of keeping what he called a "shadow file" containing his personal/personnel information and that this was improper.

THE ISSUES

The issues to be addressed in this review are the following:

a) Did section 23 justify NTHSSA's refusal to disclose information in the package of responsive records?
b) Did section 14 apply to those portions of the responsive records which were withheld under that section?
c) Was there an adequate search for records?
d) Is it appropriate for a separate "shadow" personnel file to be kept in the department in addition to the employee's official personnel file kept in the Department of Human Resources (now Finance)?

THE EXCEPTION PROVISIONS RELIED ON

NTHSSA has relied on two sections of the Act to justify the redaction of different parts of the responsive package, section 23 and section 14(1)(b).

> 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.

Subsection (2) of section 23 outlines circumstances in which there is a presumption that disclosure of personal information will amount to an unreasonable invasion of a third party's privacy. Subsection 23(4), on the other hand, outlines circumstances in which there will be no unreasonable invasion of privacy, including where

> (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.

Section 23 creates a mandatory rule - if the information would result in an unreasonable invasion of a third party's privacy, it cannot be disclosed.

Section 14(1)(b) of the act provides that a public body may refuse to disclose information where the disclosure could be reasonably be expected to reveal

> (b) consultations or deliberations involving
>
> (i) officers or employees of a public body,
>
> (ii) a member of the Executive Council, or
>
> (iii) the staff of a member of the Executive Council;

This section is discretionary which means that there is a two-step process which any public body relying on it must apply. First it must establish that the information in question meets the criteria for the exception. If so, the public body must then exercise its discretion and make a decision as to whether or not to disclose, based on all the relevant factors, including public interest. It is not enough that the information meets the criteria for the exemption. Because section 1 of the Act provides that access to information is a "right", the default position should always be disclosure. A refusal to disclose information pursuant to a discretionary exemption should only occur when there are good, considered reasons for the non-disclosure. In such circumstances, the

public body should provide the Applicant with a summary of the considerations which went into the making of the decision.

THE APPLICANT'S SUBMISSIONS

The Applicant provided detailed submissions on the issues.

With respect to the Application of Section 23, the Applicant noted that in every case that Section 23 was applied, it appears to have been to remove the name of an employee within the Applicant's workplace or within the Human Resources department. He argues that while the name of an individual is personal information, that alone does not prohibit the disclosure. In order for section 23 to apply, the information must be such that a disclosure of the information will amount to an unreasonable invasion of privacy for that third party. He notes that simply disclosing that a named employee did something in the context of his employment does not amount to an unreasonable invasion of privacy.

With respect to the interpretation and application of section 14(1)(b), the Applicant has provided reference to a number of precedents from other Canadian jurisdictions with similar provisions in their legislation. These cases outline the situations in which the criteria for the exemption has been met. In particular, the Applicant has referred me to my *Review Report 04-041* in which I considered the application of this section. In that Report, I quoted and accepted the position set out by then Information and Privacy Commissioner Robert Clark in Alberta *Order 96-006* as follows:

> The next issue is whether section 23(1)(b)(i) ("consultations or deliberations") apply to the Records. In the broadest sense this section could be used to withhold any discussion whatsoever between any of the parties named in the section. If this were so, there would be very little access to any information under the Act. This cannot be right given the purpose of the Act which is stated in section 2 to be "... to allow any person a right of access ... subject to limited and specific exemptions as set out in this Act,". When I look at section 23 as a whole, I am convinced

> that the purpose of the section is to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions. The intent is, I believe to allow such persons to address an issue without fear of being wrong, "looking bad" or appearing foolish if their frank deliberations were to be made public. Again, this is consistent with Ontario and British Columbia. I therefore believe that a "consultation" occurs when the views of one or more officers or employees is sought as to the appropriateness of particular proposals or suggested actions. A "deliberation" is a discussion or consideration by the persons described in the section of the reasons for and against an action. Here again. I think that the views must either be sought or be part of responsibility of the person from whom they are sought and the views must be sought for the purpose of doing something, such as taking an action, making a decision or a choice.

The Applicant also referred me to three other Orders out of Alberta which outline the parameters of the equivalent section of the Alberta *Freedom of Information and Protection of Privacy Act* with respect to the proper interpretation of this section. In the first, *Order F2012-06*, he notes the comments of Adjudicator Cunningham as follows:

> It is not enough that records record discussions or communications between employees of a public body; rather, a consultation takes place only when the individuals listed in section 24(1)(b) are asked for their views regarding a potential course of action, and a deliberation occurs when those individuals discuss a decision that they are responsible for and are in the process of making.

The second Alberta Order referred to is another Order of Adjudicator Cunningham - *Order F2012-10* - in which she says:

> A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a

> particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply to protect the final decision, but rather, the process by which a decision maker makes a decision.

Finally, the Applicant has referred me to *Order F2017-28* in which Adjudicator Swanek makes the following comments:

> Further, sections 24(1)(a) and (b) apply only to the records (or parts thereof) that reveal substantive information about which advice was sought or consultations or deliberations were being held. Information such as the names of individuals involved in the advice or consultations, or dates, and information that reveals only the fact that advice is being sought or consultations held (and not the substance of the advice or consultations) cannot generally be withheld under section 24(1) (see Order F2004-026, at para. 89). As well, neither section 24(1)(a) nor (b) apply to a decision itself (Order 96-012, at paras. 31 and 37).

The Applicant argues that the meaning attributed to the words "consultations" and "deliberations" in the jurisprudence cited above is narrow in scope and that to the extent that any of the redacted content:

- was historical or factual in nature;
- revealed the fact that advice was being sought or consultations held;
- constituted directions by a superior regarding how to approach a situation
- provided informational update; or
- constituted a decision,

such content could not have been redacted pursuant to s. 14(1)(b)(i) of the ATIPP Act.

With respect to “missing records”, the Applicant simply states that he witnessed either one or both of his supervisors taking notes during meetings in which he was the topic of discussion and that there should, therefore, have been some handwritten notes included in the package of responsive records.

On the issue of the “shadow” personnel file, the Applicant argues that it is apparent from the content of the responsive records that at least some personnel type records about him were maintained with NTHSSA division office. He argued that this was improper practice, for a number of reasons, including the risk of inadvertent disclosure, the lack of appropriate security measures around the file which could result in unauthorized access to the file and, in the Applicant’s words:

> the shadow file morphs into the employee's personnel file with the result that the employee's "official” personnel file is incomplete. The latter is problematic for the following reasons:
>
> - it is highly likely that employees, including [the Applicant], are unaware of these types of shadow files;
> - if the employee is making a request for his or her personal information or a copy of their personnel file and are unaware of the shadow files, the disclosure will likely be deficient; and
> - if the employee requires correction to their personal information, corrections may not be applied to the contents of the shadow file or a copy of the corrected information may not be placed therein.

NTHSSA’S SUBMISSIONS

NTHSSA’s submissions were very short.

With respect to records edited pursuant to section 23(1), they submitted that this was “identifying information of a third party”.

With respect to records edited pursuant to section 14(1)(b), they submitted that the information in these emails was “specific to consultation with employees of a public body”.

This was the sum total of the public body’s submissions to my office. There was no comment provided with respect to the missing records and no explanation as to the existence of a “shadow” file containing information about the Applicant which would more properly be on the Applicant’s official personnel file with the Department of Human Resources (now Finance).

DISCUSSION

The Applicant has only asked me to look at a handful of the records included in the response. Because the numbering is inconsistent, I will provide the public body with a copy of the records with page numbers shown at the top right-hand side of the page. These numbers will coincide with the discussion below.

Section 14(1)(b)

The first thing to note is that section 14(1) is a discretionary exemption, which means that there is a two-step process involved. There must be an assessment and determination as to whether the information meets the criteria for an exemption and, if so, the public body must take the second step of actively exercising its discretion as to disclosure. It is not enough that the information meets the criteria for the exemption. Because section 1 of the Act provides that access to information is a "right" under the Act, the default position should always be disclosure. A refusal to disclose information that arises as a result of a discretionary exemption should only happen when there are good, considered reasons for non-disclosure. In such circumstances, the public body should provide the Applicant with a summary of the considerations which went into the making of the decision.

As outlined in the Applicant's submissions, not every discussion between employees will meet the criteria for an exemption pursuant to section 14. It is well established that the information must be:

- sought or expected, or be part of the responsibility of a person by virtue of that person's position;
- directed towards taking an action, including making a decision; and
- made to someone who can take or implement the action.

These criteria must be met whether the public body is relying on either section 14(1)(a) or 14(1)(b).

1. Pages 16 to 17

This record is a two-page email chain. For the purposes of identifying the document correctly, the email at the top of the first page is an email dated January 18, 2017 at 8:36 AM.

For the purposes of this discussion, it is easiest to comment on each email in the chain in chronological order. We therefore start with the email beginning at the bottom of page 17 (Jan 17, 2017, 4:24 PM). This is an email authored by the Applicant and addressed to one of his superiors. There is no element of consultation or deliberation in the content of this email. It is an email in which the Applicant seeks an explanation for what he considered to be a breach of his privacy. There is nothing in this email that meets the criteria for an exception to disclosure pursuant to section 14. I **recommend** that this email be disclosed.

In the next email up the chain (Jan 17, 2017, 4:26 PM), the recipient of the above email has forwarded it to someone who appears to be a Labour Relations Advisor with the Department of Human Resources, asking for assistance to respond to the email from the Applicant noted above. Section 14 does not serve to protect information that indicates only that advice has been requested. I therefore **recommend** that this email be disclosed.

The next email up the chain (Jan 17, 2017, 5:40 PM) constitutes a response to that request for advice. The header (From:, Sent:, etc) contains nothing that would allow the public body to refuse access. Nor does the salutation or the first line of the body of the email. I **recommend** that these portions of the record be disclosed, along with the signature and signature block.

The second to last paragraph of the email contains information about a third party, the disclosure of which would result in an unreasonable invasion of that individual's privacy and this paragraph has been properly redacted pursuant to section 23.

There is nothing in the balance this email which, in my opinion is addressed toward making a decision. The content of the email provides what I would consider to be an explanation for why things were done, the purpose of the steps that had been taken, and the reasons behind a particular policy. Everything in the email is retrospective, not aimed at making a decision prospectively. Section 14 does not apply to decisions already made or steps already taken. I therefore **recommend** that the email be disclosed with the exception of the second to last paragraph.

The remaining email (January 18, 2017 8:36 PM) is also in response to the request for advice. Once again, the header, the signature and the signature block contain nothing that would allow the public body to withhold the information, and I **recommend** that these portions of the email be disclosed. The first paragraph of this email does not relate in any way to a decision to be made going forward. Rather, it is an explanation about something that has already happened. It does not meet the criteria for an exemption pursuant to section 14. I **recommend** that this paragraph be disclosed.

The next paragraph is about a third party and the disclosure of the information in this paragraph would result in an unreasonable invasion of the privacy of that third party. It has been properly withheld pursuant to section 23(1) of the Act.

The last paragraph of the email does contain information focused on making a decision as to how to move forward, in particular the first two sentences. I am satisfied that this

paragraph meets the criteria for an exemption pursuant to section 14. However, there is no evidence that the public body exercised any discretion in deciding not to disclose the information in the paragraph. Keeping in mind that disclosure is the rule and that discretion to withhold information should be exercised only when there are good, considered reasons for doing so, I **recommend** that the public body actively exercise its discretion with respect to this paragraph and provide the Applicant with the reasons for their refusal to disclose should that remain their decision after the exercise of their discretion.

2. Pages 18 - 19

This is another email chain. Chronologically, the first email in the chain (January 17, 2017, 4:24 PM) is the same as the email with the same date and time on discussed above (page 17) and should be dealt with accordingly.

The second email in the chain (January 18, 2017, 10:20 AM) is addressed to the Applicant and is in response to his inquiry. There is nothing in this email that qualifies as a consultation or a deliberation, nor does it amount to advice or recommendations. I **recommend** that this email be disclosed.

There is nothing in the two emails at the top of the chain (Jan 18, 2017, 10:20 AM and Jan 18, 2017, 10:20:24 AM) which qualifies them for an exception to disclosure pursuant to section 14(1) of the Act. I **recommend** that these emails also be disclosed.

3. Pages 20 - 21

Only one email in this chain has been edited before being disclosed to the Applicant (January 17, 2017, 4:24 PM). It is an email which was authored by the Applicant and addressed to one of his superiors. It is the same email as discussed at page 17 above and it should be dealt with accordingly.

4. Pages 30 - 31

There are two emails in this chain. The first (January 19, 2017, 3:00 PM) is from the Applicant to a supervisor and an employee with the Department of Human Resources. It has been disclosed. The second email (January 20, 2017, 8:38:00 AM) is between the Applicant's supervisor and an employee of the Department of Human Resources. This email indicates a question being asked about process. As noted above, the fact that advice has been requested, and the subject of the request, are not protected from disclosure pursuant to section 14(1). I therefore **recommend** that this email be disclosed.

5. Pages 33 - 34

The first email in this chain (Jan 16, 2017, 10:17 AM) is from a member of the Department of Human Resources and is addressed to senior employees of the Applicant's work group. The header information (From:, Sent:, etc) contains no information that would be exempt from disclosure under any of the exemption provisions of the Act. The same holds true for the signature. I **recommend** that these portions of the email be disclosed.

The portion of the body of the email which has been redacted includes two questions, then a statement which is not focused on weighing whether to take one approach or another. It is, rather, as statement that suggests that a decision has been made. I am not convinced that this email meets the criteria for an exemption pursuant to section 14(1) and I **recommend** that it be disclosed.

The next email up the chain (January 16, 2017, 11:30 AM) contains nothing more than a statement of fact. Furthermore, that statement is about the Applicant. There is nothing in this statement that can be said to be "consultation" or "deliberation. I **recommend** that it be disclosed.

Finally, the last email in this chain (January 16, 2017, 12:46:45 PM) is a statement of a step that will have to be taken. There is no element of “consultation” or “deliberation” in the statement. It is clear that a decision has been made and direction is being given. Section 14(1) does not apply. Nor is there any reason to mask the name of the author of the email as it is a communication within the course of the author’s employment. I **recommend** that this email also be disclosed.

Pages 37 - 38

In this email chain, the first email in the chain (January 19, 2017, 4:50 PM) the author seeks advice as to the wording of a letter. The name of the author, the time and date the email was sent and the signature line contain nothing that would allow them to be withheld. I **recommend** that these portions of the email be disclosed. Nor is there anything in the first two lines of the body of the email (the greeting and the question that follows) that would qualify them for an exception pursuant to section 14. I **recommend** that these lines be disclosed. The balance of the body of the email however, does reveal the substance of a consultation and it meets the criteria for an exemption pursuant to section 14. I **recommend**, however, that the public body actively exercise its discretion with respect to the content of this part of the email, keeping in mind that disclosure is the rule and that discretion to withhold information should be exercised only when there are good, considered reasons for doing so. The Applicant should be advised of the reasons for the exercise, assuming that the decision is to withhold the information. Without more, I cannot see anything in this email that would suggest that it should be protected from disclosure but, of course, the discretion is not for me to exercise and there may be something more about the circumstances that I am unaware of.

Moving up the chain, (email dated January 19, 2017, 4:57 PM), the name of the author of this email, both in the header and in the signature are not protected from disclosure and I **recommend** this information be disclosed. Similarly, the greeting and the first line of the body of the email contain nothing that would reveal the substance of the

consultation taking place. I **recommend** that these two lines be disclosed. The balance of the email, however, can properly be said to be part of a consultation in which information is being provided upon which a decision is to be made. While it meets the criteria for an exception to disclosure pursuant to section 14, no discretion has been exercised. I therefore **recommend** that the public body actively exercise its discretion with respect to the content of this part of the email, keeping in mind that disclosure is the rule and that discretion to withhold information should be exercised only when there are good, considered reasons for doing so. The Applicant should be advised of the reasons for the exercise, assuming that the decision is to withhold the information. Again, without more, I fail to see anything that weigh against disclosure, but the discretion is not mine to exercise.

In the last email in the chain (January 19, 2017, 4:59:00 PM), the name of the recipient of the email has been redacted. There is nothing in the name that would serve to qualify it for an exemption under any section of the Act. I **recommend** that this name be disclosed. The email itself is a one-word email and there is nothing in that one word that can be said to be part of an ongoing consultation. I **recommend** that this word be disclosed.

Pages 39-40

There is one email in this chain that has been edited before being provided to the Applicant. That email is dated January 20, 2017, 8:38:00 AM. Once again, the name of the recipient of the email has been redacted. There is nothing in the Act that would allow for this name to be protected and I therefore **recommend** that it be disclosed. The body of the email has been withheld. I agree that the disclosure of the first paragraph of this email would reveal the substance of a consultation or request for advice. As such, the paragraph falls within the criteria for an exception pursuant to section 14. Once again, I **recommend** that the public body actively exercise its discretion with respect to the content of this part of the email, keeping in mind that disclosure is the rule and that discretion to withhold information should be exercised only when there are good,

considered reasons for doing so. The Applicant should be advised of the reasons for the exercise, assuming that the decision is to withhold the information.

The second paragraph of this email is not protected from disclosure and I **recommend** that it be disclosed.

Pages 57 - 58

Once again, dealing with the emails in this chain in chronological order, the first email is dated February 10, 2017, 3:17 PM. The entire email has been redacted, including everything in the header and the signature and signature box. There is nothing in this email that, if disclosed, would reveal the substance of any consultation or deliberation. I **recommend** that it be disclosed, in full.

The next email in the chain (February 13, 2017, 9:58 AM) once again has been redacted in its entirety. Once again, there is nothing in the header or the signature line of this email that meets the criteria for an exception pursuant to section 14. I **recommend** that this information be disclosed. The body of the email relates completely to a third party and disclosure of the information in the body of the email would result in an unreasonable invasion of that person's privacy as it contains information about the third party's employment history and medical issues. The content of the email has nothing at all to do with the Applicant. It should not be disclosed.

The next email in the chain (February 13, 2017, 11:31:00 AM) again does not seem to have anything to do with the Applicant at all except that he is the recipient of the communication in his role as an employee. The initials and gender of a third party have been redacted, and properly so. The initials of a medical practitioner have also been redacted. There is nothing in the disclosure of those initials that would constitute a breach of any person's privacy and I therefore **recommend** that the practitioner's initials be disclosed.

Section 23(1)

Pages 20 - 21

This is the same email as discussed at page 17 (January 17, 2017, 4:24 PM) above. Interestingly, although the email was completely redacted on page 17, only certain words were redacted in this version of the email. Regardless, the email originated from the Applicant himself and contains a complaint about a breach of his privacy. There is nothing in the email about any other third party, other than references to certain co-workers (not protected from disclosure). I **recommend** that this version of the email also be disclosed in full.

Pages 48 - 49

On these pages, the name of a GNWT employee (from Human Resources Department?) has been redacted. Section 23(4)(e) of the *Access to Information and Protection of Privacy Act* provides that there will be no unreasonable invasion of privacy where the information relates to the third party's "employment responsibilities as an officer, employee or member of a public body". The identity of an employee who participates in a work discussion is not protected from disclosure. I **recommend** that the name of the employee be disclosed. Similarly, the public body seems to have redacted an abbreviation for a noun. There is no apparent reason for this redaction and I **recommend** that these two pages be disclose without any redactions.

Missing Records

The Applicant advises that he witnessed one or both of his supervisors take notes during meetings at which he was the topic of the discussion but that he received no such notes in response to his request.

I **recommend** that a thorough search be done of the paper notes and records of C.D. and E.F. as defined above, and their assistants and that any notes discovered be provided to the Applicant subject only to any redactions pursuant to sections 13 to 25. If no such notes are found, an explanation for the absence of the notes should be provided to the Applicant.

The Shadow File

This issue has come up a number of times over the years with respect to employee files. As I understand it, an employee's official personnel file is kept by the Department of Finance (Human Resources). Some information, however, is required within the department or the division for day to day management purposes such as the monitoring of holidays, overtime and lieu time. This said, I believe that all of this information is digitized and available electronically to certain individuals, depending on their job description and responsibilities. This would allow someone working at a health center in, say, Norman Wells, to be able to access information necessary to authorize overtime or holidays. There is, therefore, no "shadow" file. However, as the public body did not provide any response to the concerns raised, I do not know whether this is the extent of the "shadow" file for the Applicant in his organization. I do appreciate the Applicant's concerns and I believe that he deserves an explanation as to how his personal/ personnel information is managed. I therefore **recommend** that NTHSSA provide the Applicant with a full description and explanation as to how it manages employee information and what, if any, employee information is kept in the local office, who has access to that information, what kind of security measures are in place to protect the information from unauthorized access, use or disclosure and how NTHSSA ensures that the official record is accurate and complete.

Elaine Keenan Bengts
Information and Privacy Commissioner