NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER
Review Report 19-198

File: 18-167-4
August 27, 2019
Citation: 2019 NTIPC 12

BACKGROUND

The Applicant, through his lawyer, made a request to the Department of Health and Social Services for access to his "personal information" as follows:

a) information kept in any "shadow" type or working files under the custody, control or in the possession of seven (7) named employees, including handwritten notes kept in such files;
b) emails as between or copied or blind copied to, or sent on behalf of the same seven (7) named employees during a four year period.

The public body transferred the request to the Northwest Territories Health and Social Services Authority, who in turn transferred part of the request to the Department of Finance (Human Resources). This review was with respect only to that portion of the request which was handled by the Northwest Territories Health and Social Services Authority and involves records from four of the seven named employees..

THE APPLICANT'S CONCERNS

The Applicant had the following concerns:

1. With respect to records from Employee #1

The Applicant noted that only 94 pages of records from this employee were identified as being responsive. The time period identified by the Applicant in his request was just short of four years and the Applicant was not satisfied that there were only 94 emails during this time frame from this employee in which he was mentioned. The Applicant noted that he was aware of many emails that were not disclosed, in particular emails between himself and Employee #1.

2. With respect to Employee #2

Similarly, for the same four year period, the public body identified only 95 pages of responsive records from this employee. The Applicant was not satisfied that this represented all records in which he had been mentioned over those four years, particularly given the role of Employee #2 during the period in question as the Applicant's supervisor.

He noted as well, that it appeared that a number of attachments to various emails had not been disclosed, identifying a number of emails which referred to or indicated in some way the existence of an attachment which had not been disclosed.

The Applicant further argued that the public body inappropriately redacted material pursuant to section 14(1)(b) and/or did not exercise discretion with respect to disclosure as required. He argued that it appeared from the information received that much of the material redacted was "alleged statements of fact or opinion: they were not consultations or deliberations involving another officer or employee". The Applicant identified the records redacted pursuant to section 14(1)(b) that he wanted our office to review.

3. With respect to employee #3

The Applicant indicates that employee #3 was his manager from the late summer or early fall of 2015 until January of 2017. He says that during that period there were many emails sent by the Applicant regarding issues being experienced in the workplace. Those issues included, “an unsafe workplace, unfair work practices such as the rotation of the call schedule, unfair distribution regarding the schedule and conduct of others”. He notes that not all of those emails have been included in the response.

He also questions whether section 14 has been appropriately applied to some of the redacted material and whether the public body has appropriately exercised their discretion with respect to the items redacted pursuant to this section. He notes that section 14(2) of the *Access to Information and Protection of Privacy Act* provides that section 14(1) does not apply to information that:

a) is a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function; or
b) is an instruction or guideline issued to officers or employees of a public body

He questions whether the redacted material fits the criteria for an exception under section 14(1) and listed a number of records to which this argument applies.

4. With respect to Employee #4

The Applicant repeats his arguments with respect to the application of section 14(1) in relation to the records from Employee #4, again identifying the specific records which he felt were improperly redacted.

5. Other issues

On a more general basis, the Applicant argues that “it is apparent” from the disclosure received that “personnel-related documents, including those of a disciplinary nature, are being kept in paper format on local ‘shadow’ or ‘working’ files” and refers me to two file folder labels he feels are of this nature. He notes that the information on these files appear to “go beyond” records that relate to monitoring holidays, overtime and lieu time”. He argues that duplicate files for employees may result in a breach of the ATIPP Act as follows:

1. there is a risk of inadvertent disclosure of sensitive personal information including medical information: see s. 1(d), ATIPP Act;
2. the file is likely not securely stored and could be improperly accessed by others: see s. 1(d), ATIPP Act; and
3. the shadow file morphs into the employee’s personnel file with the result that the employee’s “official” personnel file is incomplete.

He argues that #3 is particularly problematic in that:

- it is highly likely that employees ... 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, it is highly likely that the disclosure will 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: see s. 1(b), ATIPP Act.

He argues that this problem is illustrated by an exchange in one of the emails as follows:

> Perhaps no one has mentioned it to you previously; it is expected that you will approach your Manager and discuss any requests for access to document(s) held on file by the employer. Following discussion your Manager should be able to act on your behalf to get the information for you or he/she is able to advise you on how to go about accessing filed information and assist you with what forms to fill out etc. As it happens, in this instance the information document you are seeking was not filed with Human Resources. Upon completion of the document (Oct. 16, 2014) [an employee] handed it over to the then Manager ... and it was kept on file here in the Department. In future, please speak with me first and we can discuss and agree on how best to go forward.

He argues that it is improper and prejudicial to an employee where information of a disciplinary nature (for example, a letter of reprimand) has been removed from an employee's personnel file but remains in the shadow or working files.

THE PUBLIC BODY'S RESPONSE

The public body in this case is the Northwest Territories Health and Social Services Authority.

I asked them to provide me with a detailed explanation for how the searches for responsive records were conducted and to provide any explanation they might have for the relatively few records identified as being responsive to the request. They noted that for employees #1, #3 and #4, each of those employees were contacted and asked to conduct a search of their own records. Each of these three employees received the

same request parameters as follows:

- Provide in their custody or in possession in any shadow type or working files including handwritten notes, emails, and written correspondence
- Emails in relation to the Applicant as between, or copied to, or blind copied to, or sent on behalf of the following individuals (listed all as per the original Request).

The ATIPP Coordinator for NTHSSA also advised that the following instructions are provided to every employee who is asked to identify records responsive to any access to information request, as follows:

> Pursuant to the Access to Information Protection of Privacy Act (ATIPP) an applicant has requested an access to information. As ATIPP Coordinator, with the authority to handle this request, you are being notified that you must complete the following. This is a mandatory requirement under the ATIPP Act.
>
> - Search:
>
> - Search all electronic and paper files (using the computer search function) for the information as requested. Information as requested is vital. For example, if a person asks for anything with their name, healthcare number, initials, date of birth, you must conduct a search **separately for ALL**. You must do so without any redactions or omissions;
>
> - Search all emails, which includes: all folders. using the search function, (inbox, sent mail, deleted mail, all mail folders, note folders, archive folders or anywhere else that you store emails);

- Search all hand written, typed notes or any other type of notes you may have.

- Sending the Information to the ATIPP Coordinator:
  - This information must be sent to the ATIPP Coordinator(s) **before or by** the deadline given.
  - This information must be sent electronically to the ATIPP Coordinator. **DO NOT** forward emails, they must be sent to the ATIPP Coordinator(s) as an attachment in an email.
  - Handwritten notes from day timers, note pads, note books are to be scanned and sent as email attachments. Always identify who is the author of the notes.
  - Maintain an electronic folder with copies of all the information you have sent to the ATIPP Coordinator(s)
  - Please indicate in your final email that the request is completed.
  - You will be required to verify you have complied with the request as indicated above.
  - Access to information requests are confidential so please do not share information or discuss this request with anyone other than the ATIPP Coordinator - myself.

In this case, because Employee #2 was no longer an employee of NTHSSA at the time of the request, the ATIPP Coordinator sought the assistance of the Technology and Service Centre to recover and search all of this employee's emails. The Coordinator noted that this was a complex task because she had no insight into how or where the records were filed within the employee's system. She also needed to review each record to see which of the records were or were not pertinent to the request.

The ATIPP Coordinator noted that one of the reasons why there weren't a lot of records identified as responsive from employee #2 was that he was not in the position of supervisor for the entire period of time for which the Applicant sought records, but only for a total of about 7 months.

NTHSSA indicated that they had no explanation for the alleged lack of responsive records and considered the process effective and appropriate to the identification of records as required by the ATIPP Act. They were satisfied that all responsive records had been identified and provided. No effort was made to explain the records alleged as being missing from the response as outlined by the Applicant.

With respect to the application of Section 14, the public body's full submissions were as follows:

> Application of section 14 and its paragraphs was determined consistently using a three step process including - determined if the information requested qualifies for one of the paragraphs of the provision, if it does, then determined whether or not disclosure of the information can reasonably be expected to reveal the particular class of information involved, and exercised discretion whether or not to disclose the record or part of the record. Discretion in regard to this type of information was judged on the basis of the impact the disclosure can reasonably be expected to have on the public body's ability to carry on similar internal decision-making processes in the future. In particular, content of agendas, minutes, a consultation and a deliberation where the views of one or more staff is sought as to the appropriateness of particular proposals or suggested actions.

The Applicant's Response

The Applicant raised a number of concerns arising out of the public body's submissions. He noted:

a) it is unclear whether the employees asked to search their own records would understand the actual scope of records that are either in their custody or possession - for example, it is not clear whether employees are advised that records kept in off-site storage may need to be considered

b) the standard instructions are confusing and there is no mention of the need to consider name variations including possible misspelling of names or initials only.

c) he questions why TSC could not have conducted a global search across Employee #2's electronic database using proper search terms to locate potentially responsive records

d) it is unclear whether Employee #2's paper records were searched

DISCUSSION

As a preliminary issue, because the records were poorly organized, I found it necessary to provide my own numbering system. I have provided both the public body and the Applicant with a "table of concordance" which identifies the pages being referred to.

The Applicable Sections of the Act

It is always useful to begin a review with reference to the relevant provisions of the

Access to Information and Protection of Privacy Act.

For context, we begin with Section 1 which sets out the purposes of the legislation. For our purposes, the first three paragraphs of section 1 are relevant:

> 1. The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
>
> (a) giving the public a right of access to records held by public bodies;
> (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves held by public bodies;
> (c) specifying limited exceptions to the rights of access;

The section clearly sets out a "right" to access to information, particularly to information held by public bodies which relates to them as an individual.

Also relevant is section 7(1) which requires public bodies to "make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately and without delay".

The Applicant has asked us to review only a number of records which have had portions redacted pursuant to section 14(1)(b) of the Act. Section 14 is a discretionary exception which means that not only must the information withheld meet the criteria for the exception, the public body must also exercise their discretion. Just because the criteria are met does not automatically mean the information should be withheld. Public bodies must exercise their discretion and be able to articulate all of the considerations that went into the exercise of that discretion. The exercise of discretion cannot be based on

only one or two considerations. The public body must exercise discretion with ALL relevant considerations in mind, including the fact that access to information is a quasi-constitutional right to be limited only when absolutely necessary and that an individual has a **right** to have access to information about themselves except in very narrow circumstances.

Section 14(1)(b) reads as follows:

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

Issue 1. The Adequacy of the Response

The Applicant suggests that there should be more responsive records in consideration of the time period in question (4 years) and the position that he had in relation to the four named individuals during his employment with the public body. The request was for the Applicant's personal information in "emails as between or copied or blind copied to, or sent on behalf of" the named employees during a four year period. The Applicant alleges that he communicated with each of these individuals during the stated time frame on many occasions and at least some of those emails are missing, though he has provided no specifics as to dates or headings or topics. It is clear from a review of the records that at least some of the Applicant's correspondence with each individual has been included in the response.

I note that the way in which the request is written may be one of the reasons that there are fewer records than what might have been expected. The request does not request records between the Applicant and the other employees involved. Rather, the request is for emails “between” or “copied to” or “sent on behalf of” the named employees. It is possible that this was interpreted as eliminating records that were between the Applicant and any of the named individuals. This is a reasonable interpretation, but there are other interpretations possible. Because section 7 places a positive duty on public bodies to assist applicants, it would have been appropriate in this case to contact the Applicant and confirm, specifically, what was being requested.

I think it is also important to address the process of searching for and gathering records to respond to an access request such as this one. I have commented before on having individual employees search their own records for responsive documents in situations in which there may be a conflict of interest. In almost any situation in which an employee or former employee is questioning the way in which things were done or the way in which he/she was treated in the workplace, there will be at least the appearance of a conflict of interest when involved employees search their own records. While I am not suggesting (nor is there any evidence) that any of the three individuals who searched their own records purposely failed to provide a full response, this is a situation in which there is a real or perceived conflict of interest and there should be some independent way to verify and check the response received.

There does not, however, appear to be any mechanism in place to “test” the responses received. The process described by the ATIPP Coordinator does not appear to include the need for any kind of certification of the response submitted. The only mention of any kind of oversight is in the general instructions provided to each employee asked to review their own files in a statement which says that “you will be required to verify that you have complied with the request as indicated above”. There is no indication what that verification looks like - it could be a simple verbal “yes” or it could involve a much

more detailed verification which includes a list of files/folders searched and keywords used. Even with a detailed verification process, it is still only a passive one. There is no physical or active verification of the response.

Quite apart from the perceived (or real) conflict of interest, employees who are not trained in responding to ATIPP requests may, as suggested by the Applicant, fail to conduct a full and adequate search for records if they are not provided with specific and detailed instructions, including a list of key words to be used. We have no verification in this case of the details of the searches done. While I am satisfied that the ATIPP Coordinator provided adequate instructions about the types of files to be searched (electronic and paper files, all emails, all folders) I am not as confident that sufficient instruction was given as to the parameters of the searches to be done (i.e. there was no indication as to appropriate key words or any suggestion to search position name and/or the Applicant's initials or email address or any shortened name or reference to any other name that the Applicant might have been referred to in the workplace). The only instructions given to the individual employees in terms of the parameters of the search was the specific wording of the request submitted. In all probability, each of the three individuals who searched their own records used different search parameters. I think that when it comes to asking individuals who are rarely tasked with searching records for the purpose of responding to an access to information request, more detailed instructions are required.

All of this said, the Applicant has not been able to provide me with any specific records which he can point to as being "missing". The allegation of missing records appears to stem only from a conjecture that there "must" be more records because of the nature of the relationship between the parties. He says that he "knows" there are records of communications between himself and each of the parties that are missing, but has not provided any specifics to test that statement. The onus, however, is on the public body to produce all responsive records. I therefore **recommend** a second, more thorough

search be done to ensure that all responsive records have been identified and disclosed. I further **recommend** that the public body work with the Applicant (or his lawyer) to assist the public body in identifying records that appear to be missing and in identifying appropriate key words for searches.

On a more general basis, I further **recommend** that all public bodies (including the NTHSSA) develop a far more robust process to verify the completeness and thoroughness of the searches done, including a written confirmation from the employee that all relevant records have been provided and a requirement to provide a list of the key-words used and the specific places searched including folder names, file cabinets etc.

Issue 2 - Missing attachments

The Applicant points to a number of records received in response to the Request for Information which refer to attachments in the header but for which no attachments appear to have been included in the response. I have reviewed each of the records identified by the Applicant as having missing attachments. Because the packages of responsive records were not numbered and attachments were not identified as such, it is difficult to tell, in some cases, whether the attachments referred to in emails were, in fact included. It does, however, appear that there were at least some attachments not included in the response. I therefore **recommend** that the public body review the records listed below and provide the Applicant with the following:

a) for those attachments identified in this report that **were** included in the responsive package, an appropriate page or other identifying reference to the attachment referred to so that the Applicant can find it in his package;

b) for those attachments identified in this report that **were not** included in the responsive package, copies of all of the missing attachments, appropriately vetted, or an explanation for their absence. The Applicant will have the right, of course, to seek a separate review of the records received pursuant to this recommendation should that be deemed necessary.

Page # Assigned	Description	Package	Page # Given by HSSA	Number of Attachments
3	Email Jan 19, 2017 2:35:41	POB 2	11	4
4	Email Jan 27, 2017 12:01:31	POB 2	12	1
6	Email Dec 07, 2016 4:05:17	POB 2	62	1
7	Email Jan 24, 2017 9:55:00	POB 2	65	4
8	Email Feb 06, 2017 4:03:43	POB 2	68	3
9	Email Nov 28, 2016 2:24:19	POB 2	97	1
12	Email Nov 17, 2016 4:22:34	POB 2	108	1
13	Email Nov 29, 2016,11:01:51	POB 2	113	1
14	Email Jan 16, 2017 12:14:19	POB 2	114	1
15	Email Nov 17, 2016 4:45:55	POB 2	119	1
16	Email Jan 17, 2017 2:30:26	POB 2	120	1
17	Email Jan 26, 2017 4:56:02	POB 2	127	1
18	Email Nov 17, 2016 4:02:21	POB 2	128	1
19	Email Nov 17, 2016 9:12:20	POB 2	155	1
20	Email Feb 6, 2017 8:44:57	POB 2	156	1
23	Email Jan 24, 2017 11:56:37	POB 3	1	1
24	Email Nov 28, 2016 1:55:55	POB 3	31	4
34	Email Feb 15, 2017 4:05:13	POB 3	63	1
36	Email Dec 5, 2016 12:49:25	POB 3	72	1

37	Email Dec 6, 2016 9:14:54	POB 3	75	1
61	Email Feb 23, 2017, 2:55	SG 2	None	1
62	Email Feb 22, 2017, 4:49	SG 2	None	1

An email on Page 35 was identified by the Applicant as having a missing attachment, but there was no attachment indicated for that email

Issue 3 - Section 14(1)(b)

The Applicant has only asked that I review specific records from which information has been redacted pursuant to section 14 and those are the only items I will consider in this report.

As noted above, Section 14(1) gives public bodies the discretion to refuse access to records or parts of records where disclosure could 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

As discussed above, section 14(1) is a discretionary exception which means that there are two steps that the public body must take in making the decision as to whether or not to disclose the record, or portions of the record. Firstly, it must assess and determine whether or not the record meets the criteria set out in section 14(1). If the assessment is that the information does fit the criteria, the public body must then take the second step of actively exercising its discretion as to disclosure. Because section 1 of the Act provides that access to information is a “right” under the Act, the default position is always disclosure. A refusal to disclose information that falls within a discretionary

exception should only happen when there are good, considered reasons for non-disclosure. Each redaction must be separately considered and the public body must be able to articulate, for each such redaction, what considerations (both for and against disclosure) went into the decision. A blanket explanation that purports to relate to all such redactions is not sufficient.

As well, it is to be noted that section 33 of the Act places the onus of establishing that an exception applies on the public body.

Section 14(1) is intended to protect the decision making process within government and to allow public servants to provide candid input into that process without fear of embarrassment or restitution. Not every question asked or answered will amount to a consultation or deliberation such as to bring it under section 14(1). There must be some element of true discussion and debate involved and there must be a decision to be made. Section 14(2) makes it clear that 14(1)(b) does not apply to a statement of the reasons a decision has been made or instructions or guidelines issued to employees of the public body, nor does it apply to a substantive rule or statement of policy adopted by a public body for the purpose of an activity of the public body. General day to day discussions about process or procedure do not attract the protection of section 14(1)(b). Nor does it apply to decisions made.

In Order 96-006, the former Information and Privacy Commissioner of Alberta established a test to determine whether information falls under the scope of the section in the Alberta Act equivalent to our section 14(1)(a). He said:

> Accordingly, in determining whether section 23(1)(a) will be applicable to information, the advice, proposals, recommendations, analyses or policy options (“advice”) must meet the following criteria.

The [advice, proposals, recommendations, analyses and policy options] should:

1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
2. be directed toward taking an action,
3. be made to someone who can take or implement the action.

The same test applies when considering whether information is protected pursuant to section 14(1)(b). The consultation or deliberation must involve employees whose responsibility it is to deal with such matters, must be geared toward taking an action and must include someone who can take or implement the action. There must be some substantive issue being discussed in which it is of importance that the discussion be protected so as to protect the integrity of the discussion. Section 14(1) is not intended to avoid disclosure of uncomfortable statements made by an employee. It is intended to protect the decision making process. The fact that an issue will be (or was) discussed is not protected pursuant to section 14(1)(b). Nor are decisions made as a result of the consultative process protected by section 14(1)(b). It must always be kept in mind that the general purposes of the Act is to encourage openness and accountability, and the general rule is that exceptions should be narrowly defined.

Page 1 - (Email dated February 6, 2017, 4:04 pm)

The public body says that the content of this email has been withheld pursuant to section 14(1)(b) as a consultation or deliberation. I have no information about what position each of the parties to the email holds, so cannot (except through the content itself) assess whether or not the redacted information was provided as part of the responsibility of the author by virtue of that person's position or whether it was made to someone who can take or implement the action. This is true for all of the items discussed under section 14(1)(b) throughout this review.

In this case, the content of the email clearly provides direction as to steps to be taken. The direction, however, is more in the realm of an instruction or guideline issued or a statement of policy. Section 14(2) provides that section 14(1) does not apply in these cases (14(2)(f) and 14(2)(g)). The information is about the steps that are expected to be taken in a particular and common situation. I **recommend** that this email (including the information in the header) be disclosed. I further **recommend** that the attachments listed be vetted appropriately and disclosed, if not already done.

Page 2 (Email dated February 10, 2017, 4:20:43 pm)

There is nothing in this email that meets the criteria for an exception pursuant to section 14(1). It is a statement of fact. I **recommend** this email be disclosed.

Page 3 (Email dated January 19, 2017 2:35:41 pm)

Again, most of the information redacted from this email does not meet the criteria for an exception pursuant to section 14(1)(b). While it asks a question, it is about process, not about the substance of a decision to be made. I **recommend** that this email be disclosed, with the exception of the name that appears on the first line.

Page 5 (Email dated August 26, 2016, 9:21:21 am)

A name has been redacted from the first paragraph of this email and that redaction has not been question by the Applicant. The last three sentences of the paragraph have been redacted pursuant to section 14(1)(b). The material redacted is a statement of a decision made and steps to be taken. It does not contain anything that could be considered a consultation or deliberation. I **recommend** that this paragraph (with the exception of the name at the top of the paragraph) be disclosed.

Page 6 (Email dated December 5, 2016, 4:05:17 pm)

There is nothing in this email that qualifies it as a consultation or deliberation. I **recommend** it be disclosed.

Page 7 (Email dated January 24, 2017, 9:55:00 am)

There is nothing in this email that qualifies it as a consultation or deliberation. I **recommend** it be disclosed, including the information after “Attachments” in the heading.

Page 8 (Email dated February 6, 2017, 4:04:43 pm)

This is the same email as discussed at page 1 and should be treated accordingly.

Pages 9 & 10 (Email dated November 28, 2016 2:24:19 pm)

Once again, I am not convinced that any of the material redacted from these two pages amounts to a “consultation” or a “deliberation” The email provides direction as to steps to be taken. The direction, however, is more in the realm of an instruction or guideline issued to an officer of a public body or a statement of policy. The information is about the steps involved in a particular and common situation. I **recommend** that this email (including the information in the header) be disclosed.

Page 11 (Email dated November 18, 2016 9:04:23 am)

There is nothing in the redacted portion of this email that constitutes a “consultation” or “deliberation”. It is a question which, frankly, sounds rhetorical rather than being a real question seeking a real answer. There is nothing in this email that, in my opinion, attracts the protection of section 14(1)(b) and, even if I am wrong in this, there does not appear to be anything in the content that would justify the exercise of discretion against disclosure. I **recommend** this email be disclosed.

Page 12 (Email dated November 17, 2016, 4:22:34 pm)

There is nothing in this email that would reveal the substance of a consultation or deliberation between employees. I **recommend** that this email be disclosed.

Page 13 (Email dated November 29, 2016 11:01:51 am)

There is nothing in this email that would reveal the substance of a consultation or deliberation between employees. I **recommend** that this email be disclosed.

Page 15 (Email dated November 17, 2016 4:45:55 pm)

There is nothing in this email that would reveal the substance of a consultation or deliberation between employees. I **recommend** that this email be disclosed.

Page 21 (Email dated February 21, 2017 2:35:28 pm)

There is nothing in this email that would reveal the substance of a consultation or deliberation between employees. It contains merely a statement of perceived fact or conclusion reached by the author. I **recommend** that this email be disclosed.

Page 22 (Email dated November 23, 2016 2:57:14 pm)

There is nothing in this email that would reveal the substance of a consultation or deliberation between employees. It contains merely a request for an update and a question as to timing. I **recommend** that this email be disclosed.

Page 23 (Email dated January 24, 2017, 11:56:37 am)

The redacted portion of this email includes an opinion about the Applicant and a direction for action. It does not constitute a consultation or deliberation but an opinion and a decision. I **recommend** the disclosure of this email in full.

Page 24 (Email dated November 28, 2016 1:15:55 pm)

There is nothing in this email that would reveal the substance of a consultation or deliberation between employees. I **recommend** that this email be disclosed.

Page 25 (Email dated January 16, 2017, 1:28 pm)

There is nothing in this email that qualifies it for an exception pursuant to section 14(1)(b). I **recommend** that this email be disclosed.

Page 26 (Email dated November 17, 2016, 3:49:48 pm and email dated November 17, 2016, 3:43 pm)

There is a question and an answer represented in these two emails, though there is nothing that suggests that the question and answer are directed toward taking an action or to someone who can take or implement an action. They do not meet the criteria for an exception pursuant to section 14(1)(b). I **recommend** that both emails be disclosed.

Page 27 (Email dated December 8, 2016 11:58:51 am and email dated December 7, 2016 4:05 pm)

There is nothing in either of these emails that would reveal the substance of a consultation or deliberation between employees. I **recommend** they be disclosed.

Pages 28,29,30 (Email chain of 4 emails dated February 6, 2017, 4:04 pm, February 6, 2017, 4:07 pm, February 6, 2017, 4:12 pm and February 7, 2017, 8:52:14 am)

The first (in time) email in this chain is the same as one discussed at Page 1 above and should be dealt with accordingly.

The second contains a question as to process and, at a stretch, might be said to meet the criteria for an exception pursuant to section 14(1)(b), but the public body has not met the onus of establishing this in a convincing manner. Once again there is little of substance in this email and the public body has not explained its exercise of discretion to refuse access in any way that takes into account all of the relevant considerations, including the need for transparency and accountability. I **recommend** that this email be disclosed or, in the alternative, I **recommend** that the public body actively exercise its discretion with respect to disclosure and, if the decision is to withhold the email, that it provide the Applicant with a full and detailed explanation of ALL of the considerations

that went into the exercise of that discretion.

The next email up the chain is a direction as to appropriate procedure. There is nothing in this email that can be identified as a “consultation” or “deliberation”. I **recommend** that it be disclosed.

The last email in the chain (first on page 21) reflects a decision made and a direction to implement that decision. It is not a “consultation or deliberation” and I **recommend** that it be disclosed.

Pages 31and 32 (Emails dated February 6, 2017 4:07 pm, February 6, 2017, 4:12 pm, February 7, 2017, 9:02 am and February 9, 2017 2:03:40 pm)

These pages contain another email chain. The first two (in time) are the same as some of the emails in pages 21-23 and should be dealt with accordingly.

The redacted portions of the remaining two emails do not contain anything that would qualify them for an exception pursuant to section 14(1)(b) and I **recommend** they be disclosed.

Page 33 (Email dated November 17, 2016, 4:23 PM

There is nothing in this email that would reveal the substance of a consultation or deliberation between employees. I **recommend** that this email be disclosed.

Page 34 (Email dated February 15, 2017, 4:05 pm

There is nothing in this email that would reveal the substance of a consultation or deliberation between employees. I **recommend** that this email be disclosed.

Page 35 (Email dated December 5, 2016, 11:49:08 am)

There is nothing in this email that would reveal the substance of a consultation or deliberation between employees. I **recommend** that this email be disclosed.

Pages 38 - 40

These pages are all part of an email chain. The first email in question is an email dated April 6, 2016, 12:25 pm on page 40. The next email in the chain is dated April 6, 2016 12:42 pm (page 39), followed by an email dated April 6, 2016, 12:o44 (sic) pm (page 39) and finally an email dated April 6, 2016, 4:17 pm (page 38). All of the redacted portions of this exchange constitute a discussion between the CEO of the public body and a human resources specialist. These emails outline a number of concerns and and possible courses of action that might be taken. I am satisfied that the content of these emails constituted part of a consultation between the CEO and the human resources specialist and therefore meets the criteria for an exception from disclosure pursuant to s. 14(1)(b).

That said, the consultation is clearly focussed on the Applicant. The *Access to Information and Protection of Privacy Act* has, as one of its purposes, to give "individuals a right of access to, and a right to request correction of, personal information about themselves held by public bodies". This is has been found by courts throughout Canada, to and including the Supreme Court of Canada, to be a quasi-constitutional right which should be overturned only where there is a clear and well-articulated reason for doing so. In exercising its discretion under section 14(1)(b), it is important that **all** relevant considerations be taken into account. A strong argument in favour of disclosure is the Applicant's right to have access to all information held about him by public bodies. The public body suggests that if this exchange is disclosed it might possibly create a situation in which employees may hesitate to give full and frank advice in the future. This makes no sense to me as a reason for refusing to disclose to an applicant his/her own personal information. If an employee's job is to advise on

human resources issues, I have a hard time accepting that the disclosure of the advice given would be enough to prevent the employee from providing full and frank advice on the next case he/she is consulted on. Even if this case could be made out, it is difficult to understand how that consideration would outweigh the right of the Applicant to have access to his personal information, particularly where the advice being given is a fairly standard kind of advice that would apply in many situations. I **recommend** that the public body reconsider the exercise of discretion with respect to withholding the contents of these four emails, and, should they decide once again to withhold this information, that they provide the Applicant with a full explanation and a list of all the considerations, both for and against, that went into the exercise of that discretion, keeping in mind that the individual is given a right to know the information held about them by a public body.

Page 41 (Email dated April 13, 2016 1:30:49 pm)

This email has had two lines at the top of the page redacted pursuant to section 14(1)(b). These lines contain the response to a question asked in a previous email. The question answered was not a request for input on any issue. It was a question merely about who might have information being sought and an answer to that question. I'm not satisfied that these two lines meet the criteria for an exception pursuant to section 14(1)(b) and I **recommend** these two lines be disclosed.

Page 41/42 (Email dated April 13, 2016 12:33 pm)

This email contains the question answered in the previous page. Again, I am not satisfied that the redacted lines meet the criteria for an exception pursuant to section 14(1)(b) and I **recommend** they be disclosed.

Page 43 (Email dated April 12, 2016 2:45 pm)

There is nothing in this email that would qualify it for an exception pursuant to section 14(1)(b). I **recommend** it be disclosed.

Pages 44 and 45 (Emails dated July 2, 2015, 7:40 am, July 2, 9:12 am, July 2, 2015 9:13 am and July 2, 2015 10:59:56 am)

This email chain is about plans for a meeting with the Applicant and another employee. There is no "consultation" or "deliberation" as contemplated by section 14 of the Act. Rather these emails simply set out times, dates and responsibilities. There is some third party information which should be protected pursuant to section 23, but this can be accomplished by much narrow redactions, in particular by removing the name in the first line of the second paragraph of the 7:40 am email and the information after the dash in the second paragraph of the 9:13 am email. I **recommend** these emails be disclosed with the exception of these two small redactions.

Page 46 (Email dated January 27, 2016, 4:03 pm)

Two paragraphs from this email have been redacted pursuant to section 14(1)(b). Again, there are questions asked in both of these emails about how to proceed, but the questions do not appear to be truly seeking advice because what follows is about conclusions reached. For the most part, the content of both redacted paragraphs is about the Applicant and, as noted above, even if it does meet the criteria for an exception pursuant to section 14(1)(b), the right of the individual to know what the public body has said about him/her will normally outweigh the desire to keep such communications private when it comes to the exercise of discretion. There is some third party information in these paragraphs as well, but this can be redacted to protect the third parties. I **recommend** the disclosure of this paragraph except for:

a) in the first line of the first paragraph from the 7th word on the first line to the end of the sentence;
b) in the second paragraph, the first name that appears on the second line of the paragraph.

Page 47 (Email dated January 28, 2016, 1:16 pm)

There is nothing in the redacted portion of this email that, in my opinion, amounts to a consultation or deliberation within the meaning of section 14(1)(b). I **recommend** that the email be disclosed in full.

Page 48 (Email dated January 29, 2016, 3:16 pm)

There is nothing in the statement redacted from email that meets the criteria for an exception pursuant to section 14(1)(b). I **recommend** that the email be disclosed in full.

Page 49 (Email dated January 29, 2016, 2:53 pm)

The information in the statement redacted from this email does not meet the criteria for an exception pursuant to section 14(1)(b). I **recommend** that the email be disclosed in full.

Page 50 (Email dated February 22, 2016 4:03 pm)

The information redacted from this email does not meet the criteria for an exception pursuant to section 14(1)(b). I **recommend** that the email be disclosed in full.

Page 51 (Email dated February 23, 2016, 11:35 am)

Most of this email with the exception of two small items from the first line has been disclosed in full in previous records. The Applicant did not question the two small redactions, so I make no comment on them. I **recommend,** however, the disclosure of the balance of the email, which has been disclosed in a previous record.

Page 52 (Email dated March 22, 2016, 12:40 am)

There is nothing in this email that would reveal the substance of any consultation or deliberation between employees. It does not meet the criteria for an exception pursuant to section 14(1)(b) and I **recommend** it be disclosed.

Pages 52 and 53 (Emails dated March 15, 2016, 2:50 pm and March 16, 2016, 7:03 am)

These two emails outline an incident in the workplace. Two portions of the exchange have been redacted. The first in time, (in the email of March 15, 2016, 2:50 pm) contains a request for advice on how to approach an issue. It appears (though is not explicit) that the advice sought is with respect to the Applicant. While it is the start of a consultation or request for advice, and therefore meets the criteria for an exception pursuant to section 14(1)(b), I repeat my concerns above as to whether the public body considered the right of the Applicant to receive information about themselves when exercising its discretion and weighed this right against the possibility that at some point in the future an employee paid to provide advice on human resources issues might be reluctant to provide that advice or the employee asking for the advice might not ask for that advice in the future if the exchange is disclosed. I **recommend** that the public body reconsider the exercise of discretion with respect to with-holding the contents of this email, and, should they decide once again to withhold this information, that they provide the Applicant with a full explanation and a list of all the considerations, both for and against, that went into the exercise of that discretion.

With respect to the second email in the chain, it contains a list of questions. The questions are asked in the context of the advice being sought, but there is nothing in the questions themselves that would reveal the substance of the advice to be given. Rather, they point only to some of the facts that would go into the development of that advice. This email does not, in my opinion, meet the criteria for an exception pursuant to section 14(1)(b) and I **recommend** that the redacted portion of this email be disclosed. In the alternative, I **recommend** that the public body reconsider the exercise of discretion with respect to withholding the contents of this email, and, should they decide once again to withhold this information, that they provide the Applicant with a full explanation and a list of all the considerations, both for and against, that went into the exercise of that discretion.

Pages 54 and 55 (Emails dated April 13, 2016, 1:30 pm, April 13, 2016, 12:33 pm, April 13, 2016, 12:27 pm and April 12, 2016, 2:45 pm)

All of the emails in this email chain are the same as those discussed at pages 41 and 42. In this version of the emails, however, more information has been redacted. There is, therefore, no reason to withhold that information here and I **recommend** it be disclosed. As for the rest, I **recommend** that these emails be dealt with as outlined above for 41 and 42.

Page 56 (Handwritten Notes (undated))

The information redacted on this page is nothing more than a statement of a step taken by the author. It does not meet the criteria for an exception pursuant to section 14(1)(b) and I **recommend** it be disclosed.

Page 57 (Document with date Nov 16/2016)

There is nothing in the information redacted from this record pursuant to section 14(1)(b) that would qualify it for an exception under this section. I **recommend** that this portion of the document be disclosed. The Applicant has not taken issue with any of the other items redacted from this page pursuant to other sections of the Act and I therefore make no further comment.

Page 58 (Email dated November 28, 2016, 2:24 pm)

This is the same email as discussed at pages 9 and 10 and I **recommend** it be dealt with accordingly.

Page 59 (Emails dated February 6, 2017 4:12 pm and February 6, 2017, 4:07 pm

Both of these emails are copies of ones discussed at pages 28 and 29 and I **recommend** they be dealt with accordingly.

Page 60 (Email dated March 6, 2017, 4:04 pm)

I was unable to locate any email with this date and time in the responsive records from this individual.

Page 61 (Email dated February 23, 2017, 2:55 pm)

There is nothing in this email that could qualify it as a consultation or deliberation pursuant to section 14(1)(b). I **recommend** that it be disclosed.

Page 62 (Email dated February 23, 2017, 3:29 pm)

The last sentence in this email has been redacted pursuant to section 14(1)(b). While it contains a request for direction, the fact that a request for direction has been made does not reveal any substantive content of the consultation or deliberation - only that a request has been made. Even if it were subject to section 14(1)(b), I question why it would be withheld with the proper exercise of discretion, taking into account all relevant factors. I therefore **recommend** this item be disclosed.

Page 63 (Email dated February 27, 2017 4:41 pm)

There is nothing in this email that amounts to a consultation or deliberation as defined in section 14(1)(b) of the Act. I **recommend** that the information redacted pursuant to the subsection be disclosed.

Page 63 (Email dated February 27, 2017, 10:11 am)

The portion of this email redacted pursuant to section 14(1)(b) is a direction to take a particular action. It is not a consultation or a deliberation as contemplated by section 14(1)(b). I **recommend** that it be disclosed.

Page 64 (Email dated February 20, 2017, 10:18 am)

There is nothing in this email that amounts to a consultation or deliberation as defined in section 14(1)(b) of the Act. I **recommend** that the information redacted pursuant to the

subsection be disclosed.

Page 64 (Email dated February 15, 2017, 1:52 pm)

This email outlines a decision made and the author's opinion about the conclusion reached. The decision discussed is about the Applicant. To the extent that the discussion is about a decision made, it is not a consultation or a deliberation - it is a decision. The only part of this email that might possibly be considered as part of a consultation or deliberation is a question that begins the fourth paragraph. I **recommend** that the balance of this paragraph be disclosed. As for the question, I **recommend** that the public body fully exercise its discretion and, once again, should they decide to withhold this information, that they provide the Applicant with a full explanation and a list of all the considerations, both for and against, that went into the exercise of that discretion.

Page 65 (Email dated February 14, 2017, 10:19 am)

There is nothing in this email that amounts to a consultation or deliberation as defined in section 14(1)(b) of the Act. I **recommend** that the email be disclosed.

Page 66 (Email dated February 9, 2017, 11:54 am)

There is nothing in this email that amounts to a consultation or deliberation as defined in section 14(1)(b) of the Act. I **recommend** that it be disclosed.

Page 66 (Email dated February 9, 2017, 10:05 am)

There is nothing in this email that amounts to a consultation or deliberation as defined in section 14(1)(b) of the Act. I **recommend** that it be disclosed.

Page 66 (Email dated February 8, 2017, 8:43 am)

I see nothing in this email that amounts to a consultation or deliberation as defined in section 14(1)(b) of the Act. I **recommend** that the redacted portion be disclosed.

Page 67 (Email dated February 28, 2017, 3:34 pm)

I was unable to locate any email with this date and time in the responsive records.

Page 68 (Email dated December 08, 1:29 pm)

I was unable to locate any email with this date and time in the responsive records.

Pages 69 and 70 (Emails dated March 6, 2017, 4:56 pm and March 6, 2017, 3:21 pm

The first of these two emails (3:21 pm) is an email informing the recipients that a step has been taken by the Applicant pursuant to the Collective Bargaining Agreement. It is clearly about the Applicant. It appears from the context that the author of the email is tasked with responding to the union. For the most part the email is factual in nature. The rest of the email is a routine request for a response, and does not, in my opinion, amount to a consultation or deliberation as contemplated by section 14(1)(b). I **recommend** that it be disclosed. In the alternative, I **recommend** that that portion of the email that is factual only (first sentence of the first paragraph (on page 69) and the second paragraph quote (on page 70) be disclosed and that the public body actively exercise its discretion with respect to disclosure of the balance of the email, keeping in mind that the Act gives individuals the **right** to know what information public bodies hold about them and the fact that the questions asked by the author of the email are routine.

As for the second email in the chain, (4:56 pm), it reflects a decision made and a position taken. Section 14(2)(b) provides that section 14(1) does not apply to a decision made. I therefore **recommend** that this email be disclosed as well.

Page 71 (Email dated March 7, 2017, 3:49 pm)

There is nothing in this email which has been redacted pursuant to section 14(1)(b).

Page 72 (Email dated March 6, 2017, 2:31 pm)

The content of this email is a statement of fact about the leave benefits owing to the

Applicant. There is nothing in the email that meets the criteria for an exception pursuant to section 14(1)(b) and I **recommend** it be disclosed.

Pages 72 and 73 (Email dated March 6, 2017, 2:52 pm)

There is nothing in this email that would qualify it for an exception pursuant to section 14(1)(b). I **recommend** it be disclosed.

Pages 74 and 75 (Emails dated March 16, 2017, 11:58 am and March 16, 2017, 11:53 pm

I am satisfied that the content of these two emails meet the criteria for an exception pursuant to section 14(1)(b) of the Act. I **recommend** however, that the public body return to the exercise of their discretion in refusing to disclose, and should they decide to continue to withhold the information, advise the Applicant of all of the considerations, both for and against disclosure, that went into their decision to refuse to disclose.

Page 76 (Email dated March 21, 2017, 9:53 am)

This is an email asking for factual information about the Applicant and the reason it is being requested. There is nothing in this email that meets the criteria for an exception pursuant to section 14(1)(b). I **recommend** that it be disclosed.

Page 77 (Email dated March 21, 2017, 10:48 am)

The portion of this email redacted pursuant to section 14(1)(b) is again, a statement about steps that will be taken. There is no element of consultation involved in the statement and no decision that needs to be made. The information in the email does nothing more than inform the recipient of things that have happened or will be happening. The redacted information does not meet the criteria for an exception pursuant to section 14(1)(b) and I **recommend** it be disclosed.

Page 77 (Email dated March 21, 2017, 9:53 am)

This is the same email discussed at page 76 above and should be treated accordingly.

Page 78 (Email dated April13, 2017, 12:05 pm)

The portion of this email redacted pursuant to section 14(1)(b) does meet the criteria for an exception pursuant to that section. I **recommend** however, that the public body reconsider the exercise of their discretion to refuse access, considering all of the relevant circumstances. If the decision is to continue to withhold the information in question, I **recommend** that the Applicant be advised of all of the considerations, both for and against disclosure, that went into their decision.

Page 79 (Emails dated April 24, 2017, 4:32 pm and April 24, 2017, 1:00 pm

These two emails appears to be a routine discussion about staffing issues. A question is asked and answered but it does not, in my opinion, amount to a “consultation” of the kind that section 14(1)(b) was meant to protect. I **recommend** that both of these emails be disclosed.

Pages 79 and 80 (Email dated April 24, 2017, 8:42 am)

The portion of the email redacted pursuant to section 14(1)(b) is a statement. It does not meet the criteria needed to apply the exception. I **recommend** that it be disclosed.

Page 81 - (Email dated April 24, 2017, 4:50 pm)

The information in this email is a direction as to steps to be taken. There is no element of consultation or deliberation involved. Section 14(1)(b) does not apply. I **recommend** that this email be disclosed.

Page 82 - (Email dated May 11, 2017, 11:52 am)

The information in this email is a direction as to steps to be taken. There is no element of consultation or deliberation involved. Section 14(1)(b) does not apply. I **recommend**

that this email be disclosed.

Page 83 - (Email dated May 11, 2017, 4:23 pm am)
The information in this email is a direction as to steps to be taken. There is no element of consultation or deliberation involved. Section 14(1)(b) does not apply. I **recommend** that this email be disclosed.

Page 84 (Email dated May 2, 2017, 8:08 am)
The portion of the email redacted pursuant to section 14(1)(b) is a statement. It does not meet the criteria needed to apply the exception. I **recommend** that it be disclosed.

Issue 4 - The Existence of "Shadow Files"

As noted, the Applicant also raised general concerns about the apparent existence of multiple "shadow" files for personnel-related matters. He notes that it appears from the records disclosed that some records appear to have been kept in a binder (copies indicate three holed punches). He notes that the information that appears to be kept on the paper files "goes beyond records that relate to monitoring holidays, overtime and lieu time".

The public body did not offer any explanation for these "shadow" files in their submissions to my office, nor did they address the concerns raised by the Applicant.

I agree with the Applicant. To the extent that a public body is keeping records about an employee outside of their official personnel file, there are concerns about inappropriate access, use and/or disclosure and there is the risk that the formal personnel file is incomplete. Further, when it comes to the right of the employee to know what information a public body has about them, there is a risk that the unofficial or shadow file might be missed when responding to an access to information request. And, if an

employee requests a correction to his/her information, the correction may not be made in all relevant places. As pointed out by the Applicant, it is improper and prejudicial to an employee where information of a disciplinary nature has been removed from their official file but remains on the shadow file.

Government is a large machine and because not every public body has its own human resources department, I understand why some personnel information will likely need to be kept within the department by supervisors and managers. In this particular case, I am guessing that the Applicant's manager was keeping a record of errors made in his work. This does not necessarily mean that this was a "personnel" file, but was more likely a means of monitoring safety issues in which the Applicant was involved. There is, however, a very fine line and it is easy to see how a record established for one purpose (monitoring safety issues) might well be used or referred to in another context. Because I have nothing from the public body on this issue about the specifics of this file, I can only caution that there must be appropriate policies in place to deal with personnel information within each department and who can keep information about employees and for what purposes. I **recommend** that the public body review its policies with respect to the collection and maintenance of information that relates to personnel performance and ensure that sufficient security and protection is in place to prevent unauthorized access, use or disclosure and to ensure that such records will be available to the employee on request.

Elaine Keenan Bengts
Information and Privacy Commissioner