NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER
Review Report 19-201

Citation: 2019 NTIPC 18

File: 18-190-4
September 25, 2019

BACKGROUND

The applicant made a request for records from the Government of the Northwest Territories (GNWT) Department of Industry, Tourism and Investment (ITI). The specific information requested was as follows:

> I request the report resulting from the ITI sole source contract #0002413 for the 2016-2017 fiscal year. The request is for all records related to the handling and processing of the access to information request, including all internet correspondence, notes, emails and other documents and any other communication with external parties.

In the package of responsive records provided to the Applicant some information was redacted pursuant to sections 14(1) and 23(1) of the *Access to Information and Protection of Privacy Act*. The Applicant sought a review on the basis that both sections were improperly applied.

ISSUES

1. Whether the Department of ITI properly applied section 14 of the Act.
2. Whether the Department of ITI should have password protected the responsive records.
3. Whether the public body's attempt to provide the information other than as an ATIPP request was appropriate.

4. Whether some records were missing from the response.
5. Whether use of the Applicant's name by the Department in responding to the request was a breach of the Applicant's privacy.

RELEVANT SECTIONS OF THE ACT

The exceptions on which ITI relies on most heavily are section 14(1)(a) and (b).

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

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

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

Section 23 provides that the 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.

DISCUSSION / RECOMMENDATIONS

1. Did the Department of ITI properly apply section 14 and 23 of the Act.

As set out in Review Report 18-179, in determining whether or not the deleted sections of the responsive records meet the criteria for an exception to disclosure pursuant to section 14(1), the first thing to note is that this is a discretionary exemption, 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. 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 that falls within 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 that went into the making of the decision.

Section 14(1) is intended to protect the decision making process within government and to allow public servants to provide advice, proposals, recommendations, analyses and policy options freely and without fear of being second-guessed or questioned for the advice given. In Order 96-006, the former Information and Privacy Commissioner of Alberta established a test to determine whether information is advice, recommendations, analyses or policy options within the scope of the Alberta's 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.

This finding has been accepted and used in Alberta and in other Canadian jurisdictions, including the Northwest Territories, for many years and it is the test to be applied to assess whether information falls within the criteria for an exemption pursuant to section 14(1)(a) of the NWT Act. It is also to be noted that Section 14(1)(a) does not apply so as to protect the final decision made, nor does it apply to information that is merely factual in nature or general communications undertaken in the course of a public body's day to day workflow. In the Alberta Order 96-006 noted above, then Commissioner Clark noted:

> In passing, I want to note that the equivalent section of the British Columbia Act (section 13) specifically states that factual material (among other things) cannot be withheld as advice and recommendations. As I stated, I fully appreciate that our section differs significantly from that of our neighbours. However, I cannot accept that the bare recitation of facts, without anything further, constitutes either advice etc. under [section 24(1)(a)] or consultations or deliberations under [section 24(1)(b)].

In this case, four redactions were made from email messages sent between ITI employees. The emails discussed consequences that might arise if the report the Applicant requested was released to the public. ITI's submission was that these discussions required ITI employees to speak with candour about sensitive issues in order to plan for the release of the report. ITI stated that in determining whether the discretionary power to redact the information should be exercised, particular attention

was paid to whether release of these records could lead ITI employees to speak less frankly and candidly when similar sensitive issues arise in the future.

In addition to these emails, ITI provided emails between two staff members in the response. ITI's submission was that the redactions in these notes were for information outside the scope of the request. ITI stated that each item also warranted redaction regardless of its relation to the Applicant. Redactions were made under s. 14(1)(a), s. 14(1)(b) and s. 23.

ITI submitted that the s. 23 redaction severed an individual's name because names are personal information, the name was unrelated to the ATIPP request and none of the relevant circumstances for determining if releasing personal information under s. 23(3)(a)-(d) would be met by disclosing the information in this case.

ITI submitted that the s. 14 redactions were made for the same reasoning as above - the redactions contain sensitive information that would discourage employees of ITI from writing frank and candid notes if the notes were release to the public.

With this in mind, it is necessary to do a page by page, line by line review of the redacted information.

Page 219 - The redactions on page 219 were made pursuant to s. 14(1)(a). The first bullet contains recommendations in relation to responding to the Applicant’s access to information request. This bullet meets the criteria for exception under s. 14(1)(a) and I am satisfied that ITI has exercised its discretion with respect to same.

The second bullet on this page sets out concerns about releasing some information in the report. This bullet meets the criteria for exception under s. 14(1)(a) as analyses and I am satisfied that ITI has exercised its discretion with respect to same.

The last paragraph on this page sets out a proposal with relation to students. This bullet meets the criteria for exception under s. 14(1)(a) and I am satisfied that ITI has exercised its discretion with respect to same.

Page 432 – The redactions on page 432 were made pursuant to s. 14(1)(a). The redactions set out proposals in relation to how to approach changes to a piece of legislation. This bullet meets the criteria for exception under s. 14(1)(a) and I am satisfied that ITI has exercised its discretion with respect to same.

Page 671 – The redactions on page 671 were made pursuant to s. 14(1)(b). This appears to be a record of hand written notes of an employee about various matters. There is nothing in the content of any of the items redacted from this page which would reveal the nature or substance of any consultation or deliberation between employees. The information does not meet the requirements for an exception pursuant to s 14(1)(b) and I **recommend** that the page be disclosed without redactions.

Page 673 – The redactions on page 673 were made pursuant to s. 14(1)(b). Once again, this page is hand written and appears to contain the notes of one employee. The information redacted on this page mentions a consultation but does not contain anything specific about the consultation that would reveal the substance of any discussions between government employees. The information does not meet the requirements for an exception pursuant to s 14(1)(b) and I **recommend** that the page be disclosed without redactions.

Page 674 – The redactions on page 674 were made pursuant s. 14(1)(b). The page is, again, comprised of one employee's handwritten notes. The context of the notes is not entirely clear. It appears to be notes about a particular excel spreadsheet that the employee is making for his own purposes - either as research or to remind him of items to be discussed at a later date. Without more, I cannot conclude that the redacted information meets the criteria to be a consultation or deliberation as the information is

not directed to anyone, which is one of the conditions that must be met. I **recommend** that the page be disclosed without redactions.

Page 675 – The first redaction on page 675 was made pursuant to s. 14(1)(b). The page is, once again, an excerpt from the notebook of an employee. There is no indication in this item that the information is part of a consultation or deliberation or anything more than notes made for the writer's own purposes. I am not satisfied that it meets the criteria for an exemption pursuant to section 14. I **recommend** it be disclosed.

The second redaction has been removed pursuant to s. 23. It is simply a first name. While section 23 prohibits the disclosure of personal information where that disclosure would amount to an unreasonable invasion of privacy, a fairly common first name, standing alone without context and without any other information that could identify the particular individual or anything about that individual cannot amount to an unreasonable invasion of privacy. I **recommend** that this name be disclosed.

2. Should the Department of ITI have password protected the responsive records.

In providing the responsive documents, ITI password protected the files. This proved difficult and unwieldy for the Applicant to manage. ITI's response was that it is standard practice to password protect records released under an ATIPP in order to prevent unauthorized access in the event that an attachment is inadvertently sent to the wrong email address or the attachments are otherwise intercepted by a malicious third party. In addition, ITI added that if the records are downloaded to a shared computer, the password prevents a third party from unauthorized access of the records.

There are two sections of the Act that are relevant to this issue, sections 7 and 10:

> 7. (1) The head of a public body shall make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay.
>
> 10. (1) Where an applicant is told under subsection 9(1) that access to a record will be given, the head of the public body concerned must comply with this section.

There is nothing inappropriate about password protecting the files released. In fact it is a good privacy management practice. I recognize that ITI had good intentions in doing so. However in this instance, the password proved to frustrate the Applicant's access to the records, which is not in accordance with the spirit and intention of the Act as set out in sections 7 and 10. It seems that the issue here was not that the access to the records required a password, but was more about the tools used, which allowed for only one time access to the files which meant that if the recipient failed to copy them and save them during that access, the records would be lost. There does not appear to be anything that clearly advises the recipient of this. I therefore **recommend** that the department find another vehicle for providing password protected records. That vehicle, whatever it is, should allow multiple accesses with the same password. This vehicle should be implemented by all Departments in responding to ATIPP requests electronically.

3. Was the public body's attempt to provide the information outside the ATIPP Act improper?

ITI deliberated and eventually decided to release the requested report publicly. The Applicant noted that while he believed that the ATIPP process may have been technically followed by taking this course of action, that it was not really done in pursuit of the spirit and intention of the Act.

In response, ITI stated that it is necessary to consider the earlier response provided to the Applicant. According to ITI, the same report was provided to the Applicant in confidence because there was personal information contained in the report and ITI did not at that time have consent of the third parties identified in the report to release the document publicly. ITI had committed to asking the third parties for consent to release the report publicly prior to receiving the Applicant's request for it. At the time the response was due for the Applicant's ATIPP request, the document had been posted publicly. ITI therefore decided that s. 25 of the Act applied and there was no reason to process the report under ATIPP.

In my view, while it is not inappropriate to find other ways to accommodate an Applicant, when an ATIPP request has been made, it should be responded to in accordance with the Act unless the Applicant consents to another approach.

4. Was the response complete?

The Applicant submitted that some relevant records were not provided to him. The Applicant specifically notes emails which describe ITI planning to develop pre-emptive responses in relation to release of the report and communications about the same. ITI submits that the reason for excluding this information was that it fell outside the Applicant's request. The request was for "all record related to the handling and processing of the Access to Information Request filed on August 21, 2018 by myself." ITI states that communications about how ITI would respond to the release of the report does not relate to the handling and processing of the ATIPP request. ITI further stated that the communications planning for the release of the report was done in the context that ITI was releasing the report publicly. They stated that the fact that there was an ATIPP request for the document that ITI was preparing to release regardless was secondary to ITI communications planning.

I disagree with ITI's submissions. The Applicant's request specifically asked for the records relating to the handling and processing of the ATIPP request. ITI was discussing the release of the report publically in lieu of releasing under ATIPP. This still relates to the handling of the ATIPP documents themselves.

I **recommend** that these records be released to the Applicant with appropriate redactions.

5. Did the use of the Applicant's name by the Department in responding to the request result in a breach of the Applicant's privacy?

When handling the ATIPP request, the Applicant's name was not redacted internally and, in fact, it was clear to all those dealing with the request who the Applicant was. In response to this, ITI accepted that greater precautions should have been taken to ensure that in processing the request, the Applicant's name was not needlessly shared between ITI staff members.

While there is nothing in the Act that prohibits identifying the Applicant, this is not in accordance with spirit and intention of the Act, nor is it in accordance with the way in which most government agencies address ATIPP requests. It is to be noted that Bill 29 "An Act to Amend the ATIPP Act", which has passed earlier this year and is awaiting implementation, includes a new section 6(4) which states that the identity of an applicant shall be kept confidential by the head of the public body and the coordinator designated under section 68.1, and may be disclosed only to the extent required to respond to the request.

Therefore I **recommend** that ITI take steps to comply with the spirit of the Act by keeping the names of Applicants confidential except as necessary to respond to the request, in accordance with and in anticipation of the implementation of section 6(4).

Elaine Keenan Bengts
Information and Privacy Commissioner