

**NORTHWEST TERRITORIES INFORMATION AND PRIVACY
COMMISSIONER**

Review Report 19-210

Citation: 2019 NTIPC 28

File: 18-193-4
December 31, 2019

BACKGROUND

In November, 2018 I received a request from an Applicant who had requested specific information from the Department of Finance in relation to agreements signed with suppliers of cannabis products to the NWT Liquor and Cannabis Commission.

Specifically, the Applicant had requested :

- a) the text of all such agreement signed as of the date of the request for information;
- b) all correspondence related to those agreements. The request was later amended to include:
- c) cannabis sales statistics up to and including the completion date of the request.

Access to all records responsive to parts (a) and (b) of the was refused, in full, pursuant to sections 14(1)(c) and 17(1)(c)(iii) of the *Access to Information and Protection of Privacy Act*. Access to records responsive to part (c) of the request was refused pursuant to section 25 of the Act. The Applicant sought a review of this response.

RELEVANT SECTIONS OF THE LEGISLATION

The Department of Finance, in its response to the Applicant and in its submissions to this office, relied on sections 14(1)(c) and 17(1)(c) of the *Access to Information and*

Protection of Privacy Act as justification for its refusal to disclose any of the requested records or any part of the requested records. These sections of the act are 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 ...

- (c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of the Northwest Territories or a public body, or considerations that relate to those negotiations;

The Department has also referred to and relied on section 17(1)(c) of the Act which provides:

17.(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the economic interest of the Government of the Northwest Territories or a public body or the ability of the Government to manage the economy, including the following: ...

- (c) information the disclosure of which could reasonably be expected to ...
 - (iii) interfere with contractual or other negotiations of, the Government of the Northwest Territories or a public body;

Section 25 of the Act provides:

- 25.(1) The head of a public body may refuse to disclose to an applicant information that is otherwise available to the public or that is required to be made available within six months after the applicant's request is received, whether or not for a fee.
- (2) Where the head of a public body refuses to disclose information under subsection (1), the head shall inform the applicant where the information is or will be available.

Also relevant to this review, but not cited by the Department, are the following provisions:

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; ... (emphasis added)
- 5.(1) A person who makes a request under section 6 has a **right** of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant. (emphasis added)
- (2) The right of access to a record does not extend to information excepted from disclosure under Division B of this Part, but where that information can reasonably be severed from a record, an applicant has a **right** of access to the remainder of the record. (Emphasis added)
- 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.

- 24.(1) Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant
- (a) information that would reveal trade secrets of a third party;
 - (b) financial, commercial, scientific, technical or labour relations information
 - (i) obtained in confidence, explicitly or implicitly, from a third party, ...
 - (c) information the disclosure of which could reasonably be expected to ...
 - (ii) prejudice the competitive position of a third party,
 - (iii) interfere with contractual or other negotiations of a third party

33.(1) On a review of a decision to refuse an applicant access to all or part of a record, the onus is on the head of the public body to establish that the applicant has no right of access to the record or part.

THE DEPARTMENT'S SUBMISSIONS

Unfortunately, the submissions received from the Department of Finance were very brief and not very helpful. They did not specify which of the two subsections was being relied on in relation to which record or portion of a record so we are left to assume that they are relying on both exemptions for all withheld material.

In terms of section 14, the following is the public body's submission, in full:

Section 14(1) is a discretionary exception intended to protect the deliberative process between senior officials and ministers, their staff, as well as among officials themselves. The Department believes that should the emails between officials be made publically available, it would result in advisory processes becoming less candid and comprehensive, and may make deliberations less frank, efficient and productive. The Department has decided to exercise its discretion and deny access to these records under this section.

In terms of the application of section 17(1)(b), their entire submission was the following:

The agreements themselves, drafts of which are in many cases discussed in, or attached to emails, are being denied under section 17(1)(b) of the Act which requires a three part test in order to apply. The publication of the agreements and or the discussions about the GNWT's position while negotiating these agreements would not only jeopardize the GNWT's ongoing position when negotiating supply agreements in the future, but the agreements themselves meet all three tests included in the Act:

1. Be financial, commercial, scientific, technical or other information;
2. Of which a public body of the GNWT has a proprietary interest or a right of use; and
3. Have, or be reasonably likely to have monetary value.

DISCUSSION

General

As always, it is prudent to start with the legal fact that access to information is a right, to be withheld only when the information in question falls squarely within narrow and narrowly defined exceptions to disclosure. When a public body relies on a discretionary

exception, that discretion must be exercised in a clear and transparent manner for each record or portion of each record it withholds. Disclosure is the default and there must be substantive and articulated reasons for a refusal to disclose each record or portion of a record withheld. A blanket exercise of discretion to refuse disclosure is not in accordance with the Act.

Importantly, section 5(2) clearly provides that when there is information in a record subject to an exception, the public body must, where possible, appropriately redact that information and disclose the remainder of the record.

There are over 800 pages of records identified as being responsive to parts (a) and (b) of the Applicant's request, all of which have been withheld in full on the basis of blanket exceptions applied to whole documents. This includes such things as emails between two employees attempting to set up times and dates for meetings and passing on information that has nothing to do with the giving or receiving of advice or recommendations or contract negotiations. In fact, much of the information withheld does not meet the criteria for an exception to disclosure under any provision of the Act.

Of note, as well is section 7 of the Act which imposes on the public body a positive duty to assist applicants and a duty to respond openly, accurately, completely and without delay.

The Department of Finance is a department that deals with access to information requests frequently. The Act has been in effect for more than 20 years and this department knows better. It is not clear why this particular file was dealt with in this fashion - perhaps it was an inexperienced ATIPP Coordinator with insufficient training, or the lack of time or interest, or pure laziness or even blatant disrespect for the law. Regardless of the cause, however, the Department's response to the Applicant in this case was unacceptable.

This brings us to section 33 of the legislation, which places the onus of establishing that an exemption applies squarely on the public body. This requires more than unsupported statements of opinion. There must be some reasonable evidence to support such statements.

Section 14(1)

Section 14 is one of the sections of the *Access to Information and Protection of Privacy Act* which is relied on extensively by public bodies to deny access to records, particularly where the subject matter appears to be somewhat sensitive or perhaps controversial. It is not, however, intended to protect public bodies from scrutiny. While the Department's submissions to my office on this section are extremely brief, they appear to focus on subsections (1)(a) and (1)(b). Their response letter to the Applicant, however, refers to subsection 14(1)(c).

As I have indicated in previous reviews considering section 14(1)(a) and (b), I find the following excerpt from *Review Report 051-2015* (2015 CanLII 39326 (SK IPC)) from the office of the Saskatchewan Information and Privacy Commissioner helpful. In that case, the public body relied on a section of the Saskatchewan *Freedom of Information and Protection of Privacy Act* which is similar to our section 14(1)(a). The analysis of the section starts at paragraph 19 of the report with an outline of the criteria necessary for information to fall within the exception:

[19] My office has considered this exemption many times in the past. The exemption is meant to allow for candor during the policy-making process, rather than providing for the non-disclosure of all forms of advice. The established test that my office uses to determine the applicability of this exemption is as follows:

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?
2. The advice, recommendations, proposals, analyses and/or policy options must:
 - i) be either sought, expected, or be part of the responsibility of the person who prepared the record; and
 - ii) be prepared for the purpose of doing something, for example, taking an action or making a decision; and
 - iii) involve or be intended for someone who can take or implement the action.
3. Was the advice, recommendations, analyses and/or policy options developed by or for a government institution or a member of the Executive Council?

In Ontario *Order 118* Information and Privacy Commissioner Sidney B. Linden made the following observations:

In my view, advice for the purposes of section 13(1) of the Act must contain more than mere information. Generally speaking, advice pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

The Ontario Court of Appeal accepted and adopted this approach to the term "advice" in *Ontario (Ministry Of Transportation) v. Consulting Engineers of Ontario*, 2005 CanLII 34228 (ON CA) @ [20] in accepting the decision of an adjudicator in the Office of the Ontario Information and Privacy Commissioner as follows:

advice and recommendations, for the purposes of section 13(1) must contain more than mere information. To qualify as "advice" or

"recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process (Orders P-94,P-118, P-883 and PO-1894).

In terms of subsection 14(1)(c), the information in question must relate to "positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations of the GNWT or considerations that relate to those negotiations". For section 14(1)(c) to apply, the disclosure of the information:

- a) must be reasonably expected
- b) to reveal
- c) positions, plans, procedures, criteria or instructions
- d) developed for the purpose of negotiations; or be
- e) considerations that relate to those negotiations.

In Alberta *Order F2010-037*, the Alberta Information and Privacy Commissioner discusses the equivalent section of the Alberta Freedom of Information and Protection of Privacy Act as follows:

For information to fall under section 24(1)(c), it must reveal positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the government or a public body, or considerations that relate to those negotiations (which I will refer to as "positions, etc. for the purpose of negotiations"). A "consideration" is a fact or thing taken into account in deciding or judging something (Order 99-013 at para. 44). Again, the intent of section 24(1)(c) is similar to 24(1)(a) and (b), in that it is to protect information generated

during the decision-making process, but not to protect the decision itself (Order 96-012 at para. 37; Order F2005-030 at paras. 71 and 72).

I would start with the statement made by the department that it "believes that should the emails between officials be made publically available, it would result in advisory processes becoming less candid and comprehensive, and may make deliberations less frank, efficient and productive". There is no proof offered for this bald and rather concerning argument. Surely all employees are aware that their work is subject to the *Access to Information and Protection of Privacy Act*. To suggest, without evidence to support the assertion in any way, that these employees, who are paid to advise and provide comment, might not do so if their advice and comments were made public, does not suffice to meet the intended purpose of section 14.

In order to determine whether this exception applies, each record must be considered page by page, line by line and, in some cases, word by word. It is difficult to assess the applicability of the section considering that the public body did not provide any information about the individuals involved in the correspondence. Keeping in mind that the onus is on the public body to establish that an exception applies, where questions remain they will be resolved in favour of disclosure.

I have reviewed each record and assessed it in accordance with the above discussion and, except where specifically stated, I find that section 14 does not apply for one of several reasons:

- a) many of these records are correspondence between an employee of the NWT and a representative of a third party business. Section 14 does not apply to discussions with third parties. It applies only to consultations or deliberations involving officers or employees of a public body and or positions,

plans etc. "developed for the purpose" of negotiations, which suggests internal processes.

- b) many of these records do not involve the request for or the giving of advice, recommendations, proposals, analyses, policy options or positions or plans in relation to negotiations. Many involve only factual updates and/or requests for factual information or the setting of times and dates for meetings. These kinds of records do not meet the criteria for an exception under section 14.
- c) much of the information withheld would not reveal the substance of any advice, recommendations, proposals, analysis or policy options, or positions or plans in relation to negotiations.

Section 17(1)(c)(iii)

Section 17(1) allows a public body to withhold information from an applicant where that information "could reasonably be expected to harm the economic interests of the Government of the Northwest Territories or a public body". It goes on to list a number of situations in which this might be the case, including, in subsection (c)(iii), "information the disclosure of which could reasonably be expected to ... interfere with contractual or other negotiations of, the Government of the Northwest Territories or a public body"

So, in order for subsection 17(1)(c) to apply, the information in question, must:

- a) reasonably be expected to
- b) interfere with contractual negotiations of the Government of the Northwest Territories (or a public body)

While some of the information in question fits these criteria, there is also much other information that would not be expected to affect contractual negotiations in any way. As

many of these pages involve direct negotiations with a third party contractor, section 17(1)(c) does apply to portions of some of the records, even if the negotiations have now been completed, as they reveal the back and forth between the parties which, if revealed, might affect the ability of the GNWT to negotiate with this and other parties in the future.

Section 24(1)

While the public body has not relied on section 24(1) in its refusal to disclose information, Section 24 is a mandatory exception to disclosure and, in my opinion, does apply to some of the information in question. Section 24(1) prohibits public bodies from disclosing

- a) information that would reveal trade secrets of a third party;
- b) financial, commercial, scientific, technical or labour relations information
 - i) contained in confidence, explicitly or implicitly, from a third party...
- c) information the disclosure of which could be reasonably expected to
 - i) result in undue financial loss or gain to any person;
 - ii) prejudice the competitive position of a third party;
 - iii) interfere with contractual or other negotiations of a third party...

This section, while not referred to by the public body, must be considered as public bodies are prohibited from disclosing such information. In my opinion there are significant portions of the redacted material which meets the criteria for an exception pursuant to this section.

THE RECORDS

In order to provide recommendations in the most efficient way possible, I am providing

the public body with a copy of their responsive records, which I have numbered sequentially and marked in yellow or otherwise indicated those portions of the records which I agree should be withheld. There are small portions which I suggest should be withheld pursuant to section 23 (unreasonable invasion of third party privacy), which is another mandatory exception to disclosure. I have identified those in the records accordingly but will not discuss them further. I have provided some detail on each record below with respect to my specific recommendations. There are a number of repetitive emails and email chains and I will only comment on each of these at its first appearance. All other copies should be treated accordingly.

Record 2019-020-TC014 (Pages 1-13)

With the exception of information on the bottom of page 1 and the top of page 2, and a small portion of pages 4 and 7 (as marked in the copy provided to the public body with a copy of this report), there is nothing in this record that meets the criteria for an exception under the Act. There is a very small amount of information on pages 8 and 9 which may meet the criteria for an exception pursuant to Section 17 of the Act, which has also been marked.

Some of the information in this record appears to be proprietary commercial information of a third party provided to the public body implicitly in confidence, and, therefore, subject to an exception pursuant to section 24(1)(b).

I **recommend** this record be disclosed with redactions as indicated.

Record 2019-020-TC015 (Pages 14 - 26)

This record is, for the most part, a shortened version of the chain reflected in 2019-20-TC014 and should be treated accordingly. The last two pages (25 and 26) are a chart including proprietary information provided, apparently in confidence, to the GNWT and

is, therefore, subject to an exception pursuant to section 24. I recommend that these two pages be withheld.

Record 2019-020-TC016 (Pages 27-37)

Again, this is mostly a repeat of the previous email chain and should be treated accordingly.

Record 2019-020-TC017 (Pages 38-45)

Again, this is mostly a repeat of the previous email chain and should be treated accordingly.

Record 2019-020-TC018 (Page 46)

There is nothing in this record that qualifies it for any exception under the Act. I **recommend** it be disclosed in full.

Record 2019-020-TC019 (Pages 47 -48) and **Record 2019-020-TC020** (Pages 49 - 50)

There is nothing in these records that qualifies for any exception under the Act. I **recommend** they be disclosed in full.

Record 2019-020-TC021 (Pages 51-70)

Much of this record is a repeat of previous email chains and should be treated accordingly. There are some additional emails at the beginning, a very small portion of which might meet the criteria for an exception pursuant to section 14(1)(b). Pages 62 to 70 inclusive represent what is clearly a draft copy of an agreement which is under review and contains many comments and delineations. These pages also meet the criteria for an exception under section 14(1)(b). I **recommend** the disclosure of all new information in this record with the exception of pages 62 to 70 and the marked information on page 51.

Record 2019-020-TC022 (Pages 71-81)

Much of this record is a repeat of a previous email chain and should be treated accordingly. There are some additional emails at the beginning, a very small portion of which might meet the criteria for an exception pursuant to section 14(1)(b) and possibly section 15(a) (solicitor/client privilege). As section 15 is a discretionary exception and the public body has not seen fit to apply it, however, I will not comment further on its application. I **recommend** the disclosure of all new content except as marked in the enclosed copy.

Record 2019-020-TC023 (Pages 82-92)

Much of this record is a repeat of a previous email chain and should be treated accordingly. To the extent that this record contains new content, there is nothing in this content that qualifies any of it for an exception under the Act, and I **recommend** that the new information be disclosed.

Record 2019-020-TC024 (Pages 93-103)

Most of this record is a repeat of a previous email chain and should be treated accordingly. Nothing in the new portions of the chain meets the criteria for an exception under the Act and I **recommend** it be disclosed.

Records 2019-020-TC025 (Pages 104 - 112), **Record 2019-020-TC026** (Pages 113 - 122), **Record 2019-020-TC027** (Pages 123 - 136) and **Record 2019-020-TC028** (Pages 137 - 149)

Everything in these records is included in previous email chains and should be treated accordingly.

Record 2019-020-TC029 (Pages 150 - 201)

There is nothing in pages 150 to 152 that would qualify it for any exception to disclosure under the Act and I **recommend** that these pages be disclosed. Pages 153 to 201

appear to be a slide deck provided to the GNWT on a confidential basis by a third party. It contains a considerable amount of proprietary information and is, therefore, subject to a mandatory exception to disclosure pursuant to section 24(1)(b) and/or 24(1)(c) and has been appropriately withheld.

Record 2019-020-TC034 (Pages 202-203)

There is a large portion of this email that would disclose commercial information about a third party and it is therefore protected from disclosure pursuant to section 24(1)(b) and/or section 24(1)(c). This information has been marked in the record being provided to the public body. I **recommend** the disclosure of the balance of the record.

Record 2019-020-TC035 (Pages 204 - 205)

There is a portion of this email that is clearly a consultation or deliberation between departmental officials. This portion of the email (as marked) meets the criteria for an exception pursuant to section 14(1)(b). I recommend that the balance of the record be disclosed.

Record 2019-020-TC036 (Pages 206 - 207)

This is mostly a duplicate of a previous record and should be treated accordingly. There is also a small part of the first email on the first page that contains information, the disclosure of which would constitute an unreasonable invasion of an individual's privacy which should be withheld pursuant to section 23(1) of the Act.

Record 2019-020-TC037 (Page 208)

There is nothing in this record that meets the criteria for any exception under the Act. I **recommend** it be disclosed.

Record 2019-020-TC038 (Pages 209 - 210)

All of this record is included in previous email chains and should be treated accordingly.

Records 2019-020-TC039 (Pages 211 - 212) and **Record 2019-020-TC040** (Pages 213 - 214)

Most of the information in these records is included in previous records and should be treated accordingly. There is nothing in the new information in either record that qualifies it for an exception to disclosure and I **recommend** that this new material be disclosed.

Record 2019-020-TC041 (Page 215)

All of this record is included in previous email chains and should be treated accordingly.

Records SK039 (Page 216), **SK040** (Page 221), **SK041** (Page 225), **SK042** (Page 227), **SK043** (Page 231), **SK044** (Page 234), **SK045** (Page 237), **SK046** (Page 238), **SK047** (Page 243), **SK048** (Page 244), **SK049** (Page 246), **SK050** (Page 248), **SK051A** (Page 249), **SK051** (Page 250), **SK052** (Page 258), and **SK053** (Page 264).

There is nothing in these records which would qualify for an exception to disclosure under the Act. I **recommend** that they be disclosed in full

Record SK039A (Pages 217 - 219)

There are portions of two emails on pages 218 and 219 (marked) which meet the criteria for an exception to disclosure under section 17(1)(c) and 24(1)(c). I **recommend** that the balance of the record be disclosed.

Record SK040-A (Page 220)

This record contains a password which might, if disclosed, result in financial loss to the GNWT. The password, therefore, meets the criteria under section 17(1)(c). I **recommend** that the balance of this record be disclosed.

Record SK041-A (Pages 222 - 224)

This record is mostly a copy of another record already discussed and should be treated

accordingly. To the extent that it has additional information, I **recommend** that the new information be disclosed.

Record SK042-A (Page 226)

There is nothing in this record which would qualify for an exception to disclosure under the Act. I **recommend** that it be disclosed in full

Record SK043-A (Pages 228-230)

Part of this record is a copy of information in other records already discussed and should be treated accordingly. There are portions of two emails on pages 228 and 229 (marked) which meet the criteria for an exception to disclosure under sections 24(1)(c) and 17(1)(b). I **recommend** that the balance of the new information in this record be disclosed.

Record SK044-A (Pages 232 - 233, **Record SK045-A** (Pages 235-236) and **Record SK046-A** (Pages 239 - 240)

All of the information in these records has been discussed above and should be treated accordingly.

Record SK047-A (Pages 241-242)

Except for two items which should be redacted to protect personal information from disclosure (marked), there is nothing in this record that meets the criteria for an exception to disclosure under the Act. I **recommend** the disclosure of this record with the two marked redactions.

Record SK048-A (Pages 244a and 244b), **Record SK049-A** (Page 245), and **Record SK050-A** (Page 247)

Everything in these records has already been discussed above and should be dealt with accordingly.

Record SK052-A (Pages 251-257)

Much of this record is a back and forth email exchange in relation to a negotiation between the public body and a third party. As such, a good portion of the record, as marked, meets the requirements for an exception from disclosure either pursuant to section 17(1)(c) or 24(1)(c) or both. I **recommend** the disclosure of the balance of the record.

Record SK053-A (Pages 259-263) and **Record SK054-A** (Pages 265-269)

Everything in these two records is part of Record SK052-A and should be treated accordingly.

Record SK054 (Page 270)

This record could not be opened in the electronic version provided to this office. I am assuming, however, it is similar to Record SK053, in which case I **recommend** it be disclosed.

Record TC045 (Pages 271 - 274)

On the email on page 271 there are two sentences (marked) which appear to constitute advice or recommendations and which therefore meet the criteria for an exception pursuant to section 14(1)(a) or 14(1)(c). I **recommend** that the balance of this page be disclosed.

The remaining pages of this record is a completed "Sole Source Authorization" request for the creation of an on-line system for the sale of recreational cannabis in the NWT. It is unsigned and the email that precedes it suggests that there is still some discussion between GNWT staff in finalizing the record. If this is the case, the document would meet the criteria for an exception pursuant to section 14(1)(a) or (b).

Record TC046 (Pages 275 - 297)

The initial email on page 275 contains some information (marked) that meets the criteria for an exception pursuant to section 14(1)(a) or 14(1)(b), and perhaps section 15(a), though that section has not been relied on. I **recommend** that the balance of the email be disclosed.

Pages 276 to 297 constitute a draft of a Services Agreement which is clearly in draft only, with many comments and delineations. It clearly reflects an active discussion about the terms of the contract in question, with suggestions and comments for change, and the whole document, therefore, meets the criteria for an exception pursuant to section 14(1)(a) and/or 14(1)(b).

Record TC047 (Pages 298-353)

The initial email on page 298 contains some information (marked) that meets the criteria for an exception pursuant to section 17(1)(c) as it appears to be part of a negotiation with a third party for the provision of services. I **recommend** that the balance of the email be disclosed.

Pages 299 to 353 constitute what is clearly a draft of a Services Agreement which is clearly in the negotiation stages. It reflects an active discussion about the terms of the contract in question, with suggestions and comments for change. It has been sent to the third party for further comments and therefore constitutes part of the negotiation between the parties. It meets the criteria for an exception pursuant to section 17(1)(c) and section 24(1)(c).

Record TC048 (Pages 354 - 380)

There is nothing in the email on page 354 that meets the criteria for an exception to disclosure under the Act and I **recommend** it be disclosed.

Pages 355 to 380 constitute a draft of a Services Agreement which is being reviewed and revised by a team of drafters. It contains many delineations and suggested changes, reflecting active discussion about the terms of the contract in question. The whole document, therefore, meets the criteria for an exception pursuant to section 14(1)(a) and/or 14(1)(b). I note that there are 26 blank pages between page 379 and 380. I have not included these in the numbering of the pages.

Record TC051 (Page 381) and Record TC052 (Page 382)

The content of the emails on these pages is in the nature of an update on progress made. It does not meet the criteria for any exception under the Act. I **recommend** that this page be disclosed.

Record TC054 (Page 383)

There is nothing in this email that meets the criteria for an exception under the Act. I **recommend** it be disclosed.

Record TC056 (Page 384)

Other than two small portions of this email that contain personal information (marked) there is nothing in this email that meets the criteria for an exception to disclosure under the Act. I **recommend** the disclosure of this record with the exception of the personal information.

Record TC057 (Page 385)

There is nothing in this email exchange that meets the criteria for any exception to disclosure under the Act. I **recommend** that it be disclosed.

Record TC059 (Page 386)

There are portions of this email (marked) which, if disclosed, would reveal commercial or technical information belonging to a third party. This portion of the email is subject to

a mandatory exception pursuant to section 24(1)(a), (b), or (c). I **recommend** that the balance of the page be disclosed.

Record TC062 (Pages 387 - 388)

There are portions of this email (marked) which meet the criteria for an exception to disclosure pursuant to sections 24(1)(c) and 17(1)(c). I **recommend** that the balance of this record be disclosed.

Record TC063 (Pages 389 - 423)

There are portions of the emails on page 389 and 390 (marked) which constitute consultations between two GNWT employees and which meet the criteria for an exception pursuant to section 14(1)(b) of the Act. I **recommend** that the balance of these two pages be disclosed.

Pages 391 and 392 outline government policies with respect to cloud security providers. There are some portions of this record (marked) which specify standards required by the GNWT by such providers and which, if disclosed, might prejudice the security of GNWT property. These items meet the criteria for a discretionary exception pursuant to section 20(1)(k) which allows public bodies to "refuse to disclose information to an applicant where there is a reasonable possibility that disclosure could prejudice the security of any property or system, including a building, a vehicle, a computer system or a communications system". The balance of the record is fairly basic and does not disclose anything other than good, industry standard security practices and I **recommend** the disclosure of same.

Pages 393 to 423 appear to be a precedent from another province with respect to requirements to be included in contracts between that province and cloud service providers. The circumstances surrounding the acquisition of this document by the GNWT is unclear, including whether or not it was provided in confidence. It appears to

be a standard contract, which suggests that it is in the public realm and therefore, not necessarily intended to be confidential. That said, before this record is disclosed, the Department of Finance should be consulting with the originating province. I **recommend** that this record be disclosed, subject, however, to consultation with the originating province as outlined in Section 26 of the Act.

Record TC067 (Pages 424 - 448)

The email exchange on pages 424 to 426 contain some information (marked) that meets the criteria for an exception to disclosure under section 14(1)(b) and possibly, as well pursuant to section 15(a) (solicitor/client privilege), though the department does not rely on that section. I **recommend** the balance of these pages.

Pages 427 to 448 constitute a draft of a Services Agreement which is being reviewed and revised by a team of drafters. It contains many delineations and suggested changes, reflecting active discussion about the terms of the contract in question. The whole document, therefore, meets the criteria for an exception pursuant to section 14(1)(a) and/or 14(1)(b).

Record TC068 (Pages 449 - 455)

There are some portions of the emails on these pages (marked) that meet the criteria for an exception pursuant to section 14(1)(b) and/or section 15(a). I **recommend** the disclosure of the balance of this record.

Record TC069 (Pages 456-480)

There are some portions of the emails on pages 456 to 458 (marked) that meet the criteria for an exception pursuant to section 14(1)(b) and/or section 15(a). I **recommend** the disclosure of the balance of these pages.

Pages 459 to 480 constitute a draft of a Services Agreement which is being reviewed

and revised by a team of drafters. It contains many delineations and suggested changes, reflecting active discussion about the terms of the contract in question. The whole document, therefore, meets the criteria for an exception pursuant to section 14(1)(a) and/or 14(1)(b).

Record TC070 (Pages 481 - 505)

Most of the emails on pages 481 to 483 have been commented on earlier and should be treated accordingly. There is nothing in the new information in this email chain that would qualify it for any exception to disclosure under the Act and I **recommend** that it be disclosed.

Pages 484 to 505 constitute a draft of a Services Agreement which is being reviewed and revised by a team of drafters. It contains many delineations and suggested changes, reflecting active discussion about the terms of the contract in question. The whole document, therefore, meets the criteria for an exception pursuant to section 14(1)(a) and/or 14(1)(b).

Record TC071 (Pages 506 - 530)

Most of the emails on pages 506 to 508 have been commented on earlier and should be treated accordingly. There is nothing in the new information in this email chain that would qualify it for any exception to disclosure under the Act and I **recommend** that it be disclosed.

Pages 509 - 530 constitute a draft of a Services Agreement which is being reviewed and revised by a team of drafters. It contains many delineations and suggested changes, reflecting active discussion about the terms of the contract in question. The whole document, therefore, meets the criteria for an exception pursuant to section 14(1)(a) and/or 14(1)(b).

Record TC072 (Pages 531 - 553)

There is nothing in the emails on pages 531 and 532 that would reveal the substance of any protected information. As such, these do not meet the criteria for an exception pursuant to section 14(1) of the Act and I **recommend** that these pages be disclosed.

Pages 533 - 553 constitute a draft of a Services Agreement which is being reviewed and revised by a team of drafters. It contains many delineations and suggested changes, reflecting active discussion about the terms of the contract in question. The whole document, therefore, meets the criteria for an exception pursuant to section 14(1)(a) and/or 14(1)(b).

Record TC074 (Pages 554 to 648)

There is nothing in the emails on pages 554 and 555 that would qualify for an exception to disclosure under the Act. I **recommend** these pages be disclosed.

The balance of this record is made up of a series of existing contracts between the GNWT and certain private sector businesses for the sale of liquor products. Most of the information in these documents is basic and standard contractual information. Generally, contractual arrangements between the GNWT and private sector businesses are public records subject to disclosure. Because these third parties have not have the opportunity to comment, however, I am **recommending** the disclosure of these records with certain details redacted to as to protect the commercial interests of the third parties. Should the Applicant require these documents without redactions, I suggest that he make a separate request for them so that the Department can do the appropriate consultations pursuant to section 26.

Record TC079 (Pages 649 - 678)

There is nothing on page 649 that meets the criteria for any exception to disclosure under the Act. I **recommend** that this page be disclosed.

Pages 650 to 678 appears to be an annex to an agreement for the provision of services by the GNWT on behalf of the federal government. This is information that should be publicly available and I see nothing in the agreement that might bring it under any exception of the Act. I **recommend** that this document be disclosed.

Record TC080 (Pages 679 - 681)

Most of this record has been considered as part of previous records and should be treated accordingly. To the extent that this record contains new information, there is nothing that would protect it from disclosure and I **recommend** the new information be disclosed.

Record TC081 (Pages 682 - 695)

Much of this record has been previously discussed and should be treated accordingly. New information is contained in an email on pages 682 and 683. Most of this new information (marked) meets the criteria for an exception pursuant to section 14(1)(b) as a consultation between GNWT employees. There are also portions of the emails at the bottom of page 683 and on page 685 that contains some information that is protected from disclosure pursuant to section 24(1)(c). Finally, all of the information on pages 693 to 695 is protected from disclosure pursuant to section 24(1)(c). I **recommend** the disclosure of the balance of the record.

Record TC082 (Pages 696 - 700)

Most of this record has been considered as part of previous records and should be treated accordingly. To the extent that this record contains new information, there is nothing that would protect it from disclosure and I **recommend** the new information be disclosed.

Record TC090 (Pages 701 - 702)

This email exchange involves updates and an exchange of information, but does not

amount to a consultation or deliberation pursuant to section 14(1)(b) of the Act, nor would it reveal any other protected information. I **recommend** that this record be disclosed in full.

Record TC091 (Page 703)

There is one sentence in this email (marked) that meets the criteria for an exception to disclosure under section 17(1)(c). I **recommend** that the balance of the record be disclosed.

Record TC092 (Pages 704 - 725)

Everything in this record has been previously discussed and should be treated accordingly.

Record TC093 (Page 726)

There is nothing in this page that meets the criteria for an exception to disclosure under the Act. I **recommend** that it be disclosed.

Record TC094 (Pages 727 to 731)

Most of this record has been considered as part of previous records and should be treated accordingly. To the extent that this record contains new information, there is nothing that would protect it from disclosure and I **recommend** the new information be disclosed.

Record TC095 (Page 732)

With the exception of some personal information protected pursuant to section 23 of the Act (marked), I **recommend** that this record be disclosed.

Record TC097 (Page 733)

There is nothing in this page that meets the criteria for an exception to disclosure under the Act. I **recommend** that it be disclosed.

Record TC099 (Pages 734 - 765)

There are portions of the emails on page 734 that meet the criteria for an exception pursuant to either section 17(1)(c) or 24(1)(c). I **recommend** that the balance of pages 734 and 735 be disclosed.

Pages 736 to 765 appear to be a draft of an agreement between the GNWT and a private company. This draft contains many red lines, delineations and comments and is clearly still in the negotiation stage. For this reason these pages are protection from disclosure pursuant to section 24(1)(c) and/or section 17(1)(c).

Record TC100 (Pages 766 - 783)

Portions (marked) of the email on page 766 meet the criteria for an exception to disclosure pursuant to section 14(1)(b). There are also two instances, both on page 767, of personal information which are protected from disclosure pursuant to section 23. I **recommend** that the balance of pages 766 to 768 be disclosed (noting that page 768 is blank).

Pages 769 to 783 appear to be a final or near final copy of an agreement between the GNWT and a private third party company. The agreement is, however, unsigned and it appears, from context in the preceding email, that it is still under negotiation. It would therefore meet the criteria for an exception to disclosure pursuant to sections 24(1)(c) and/or section 17(1)(c).

Record TC101 (Pages 784 - 799)

There is a portion of the email on page 784 that meets the criteria for an exception

pursuant to section 14(1)(b) of the Act. I **recommend** that the balance of this page be disclosed.

Pages 785 to 799 constitute a draft of a Services Agreement which is being reviewed and revised by a team of GNWT employees. It contains a number of suggested changes, reflecting active discussion about the terms of the contract in question. The whole document, therefore, meets the criteria for an exception pursuant to section 14(1)(a) and/or 14(1)(b).

Record TC110 (Pages 800 - 811)

There is nothing in the email on page 800 which qualifies for an exception to disclosure under the Act. I **recommend** that it be disclosed.

Pages 801 to 811 are a contract between a third party and the Northwest Territories Liquor Commission. It has been signed by one of the parties, and appears, therefore, to be a final agreement. As noted above, contracts between public bodies and third parties are generally considered to be public documents except to the extent that they contain information of the third party that might be subject to an exception pursuant to section 24 of the Act. In this case, there are two items on page 804 which may, if disclosed, affect the competitive position of the third party company. In addition, Schedule A to the Agreement (page 811) is entirely the proprietary information provided by the third party which, if disclosed, is reasonably likely to negatively affect the competitive position of the company. I therefore **recommend** the disclosure of this entire document with the exceptions marked.

Record TC113 (Pages 812 - 813)

The email in this record contains a significant amount of information (marked) which appears to be deliberative or consultative between two GNWT employees and which

therefore meets the criteria for an exception pursuant to section 14(1)(b). I **recommend** that the balance of the document be disclosed.

Record TC114 (Page 814)

There is some material in the first email on this page (marked) which meets the criteria for an exception under either section 14(1)(b) or section 15(a). I **recommend** that the balance of this page be disclosed.

Record TC115 (Page 815)

This record is the same as the previous record with one additional email. There is nothing in this new content that would meet the criteria for an exception under any section of the Act and I **recommend** the disclosure of this new content, with the balance of the record treated in accordance with the comments above.

Record TC116 (Pages 816 - 817), **Record TC117** (Pages 818 - 819), and **Record TC118** (Pages 820 - 821)

Everything in these records has been considered above and should be treated accordingly.

Record TC119 (Pages 822 - 823)

Some of the emails on this record have been previously discussed and should be treated accordingly. The content of the first email at the top of page 822 meets the criteria for an exception pursuant to section 14(1)(b) as a consultation or deliberation or, more appropriately pursuant to section 15(a) (solicitor/client privilege). The balance of the new content does not meet the criteria for an exception under the Act and I **recommend** that it be disclosed.

Record TC120 (Pages 824 - 825), and **Record TC121** (Page 826)

Everything in these records has been considered above and should be treated accordingly.

Record TC122 (Pages 827 - 828)

Most of this record has been considered as part of previous records and should be treated accordingly. To the extent that this record contains new information, there is nothing that would protect it from disclosure and I **recommend** the new information be disclosed.

Record TC123 (Pages 829-830), and **Record TC124** (Page 831)

Everything in these records has been considered above and should be treated accordingly.

Record TC125 (Page 832)

There is nothing in this record that qualifies for an exception under the Act. I **recommend** that it be disclosed.

Record TC128 (Pages 833 - 834)

With the exception of a small amount of information (marked) that constitutes the personal information of a third party, there is nothing in this record that meets the criteria for an exception under the Act. I **recommend** that this record be disclosed except for the personal information.

Record TC129 (Pages 835 -836)

Everything in this record has been considered above and should be treated accordingly.

Record TC130

This record could not be opened in the electronic version of records provided to this office. I am guessing that it is much the same as the last two records and should, therefore, be treated accordingly.

The Exercise of Discretion

With the exception of those items to which either section 23 or 24 apply, all of the exceptions noted above are discretionary exceptions. For each of the items which meets the criteria for an exception under any discretionary exception, a second step - applying discretion - must be taken. In applying discretion, the public body must consider all of the relevant considerations, both for and against disclosure, starting with the fact that disclosure is the rule and access to information is a right. Discretion must be exercised in a visible way and for each item redacted. Discretion cannot be exercised in a blanket fashion. Furthermore, public bodies should be able to explain what considerations have gone into the exercise of discretion for each redacted or withheld item. In light of the blanket refusal to disclose any of the responsive records, it is very clear that no discretion has been exercised at all in this case. I therefore **recommend** that the department exercise their discretion for each of the items noted above as meeting the criteria for an exception to disclosure pursuant to a discretionary section of the Act and that they prepare a chart and provide it to the Applicant indicating:

- a) whether or not they will disclose the record (or portion of the record identified);
- b) if the decision is to withhold access, a list of all the criteria, both for and against disclosure, that were considered in making the decision.

MISSING RECORDS

Part of the Applicant's request was for information in relation to "cannabis sales statistics". No records were specifically identified which address this part of the request. The Department advised the Applicant that they would not be providing this information because these numbers would be published within six months and it was their intention to publish quarterly reports.

In its submissions to my office, the public body pointed to section 25(2) of the *Access to Information and Protection of Privacy Act* which, on a discretionary basis, allows public bodies to refuse to disclose information that "is otherwise available to the public or that is required to be made public within six months after the applicant's request is received." They further noted that the requested information was, in fact, made available within six months of the request and pointed to the page on their web site containing that information. It does not appear that the Applicant was directed to this site until my office provided him with a copy of the Department's submissions.

The Applicant made the following observations:

- a) the information requested was not easily found on the public-facing NTLCC website;
- b) the information in the posted reports is lacking in detail and does not address his request - he notes that the two-page report provides only general dollar amounts and provides no information on quantities of product sold or inventory ordered and retained by NTLCC

DISCUSSION AND RECOMMENDATION

Section 25 of the Act does allow a public body to refuse to disclose information in certain circumstances where the information is already or will be publicly available. However, the section clearly notes that the information must already be publicly available (which it was not at the time of the request for information), or that the information is "required" to be made available within six months. The word "required" is there for a reason. There must be some actual requirement for the information to be published within six months. There does not appear to be any such requirement in this case - certainly none that the public body pointed me to. The wording of the response to both this office and to the Applicant - that it was the department's "intention" to publish statistics every six months - does not suggest that any such requirement exists. Therefore, even before we examine whether the published information was fully responsive to the request, it is clear that section 25 does not apply in this situation. There was no "requirement" that the information requested be published, only an intention to do so which may, or may not, have come to fruition.

In addition, section 25(2) requires that when a public body refuses to provide information to an applicant pursuant to section 25(1), they must "inform the applicant where the information is or will be available". This does not appear to have been done.

Also, as discussed above, this is a discretionary exception under the Act. Even if the information did fit within the criteria for an exception pursuant to section 25(1), the public body must then exercise its discretion, considering all relevant factors. There is no indication whatsoever that the Department of Finance exercised that discretion in this case.

Further, the information published does not appear to have provided a full response to the Applicant's request for information as required by section 7 of the Act. The request

was for "cannabis sales statistics". The information posted to the department's web site is entitled a "Sales Report" which provides only dollar amounts of product sold. While the reports do have some "cannabis sales statistics", they are not in any way comprehensive statistics. There may have been some room for interpretation of the Applicant's request in this regard, but the Department was required, pursuant to section 7 of the Act and its "duty to assist" to contact the Applicant and clarify what statistics he was seeking, rather than limiting the request on their own prerogative, as they did in this case.

I find that section 25 did not apply so as to give the public body the discretion to refuse to disclose "cannabis sales statistics". I **recommend** that:

- a) the public body contact the Applicant to establish what specific statistics he is seeking;
- b) that the requested information be disclosed to the Applicant within 30 days of this report, subject to any appropriate exceptions under the Act.

Once the Applicant receives a response to this part of his Request for Information, he will be entitled to seek a review of that response in accordance with the Review provisions of the Act.

CONCLUSION

I cannot leave this Report without commenting on the apparent lack of respect for the legislation demonstrated by the Department of Finance in this case. As noted above, the *Access to Information and Protection of Privacy Act* has been the law in the Northwest Territories for more than 20 years. The Department of Finance is well experienced in responding to access to information requests. There is no good excuse for their significant failures in this case to meet their legal responsibilities under the law.

I would suggest that the Minister and Deputy Minister take immediate steps and take an active leadership role to ensure full compliance with not only the letter of the law, but with the spirit and intention of the law, so as to ensure the openness and accountability that are the stated purposes of the legislation.

Elaine Keenan Bengts
Information and Privacy Commissioner