

**NORTHWEST TERRITORIES INFORMATION AND
PRIVACY COMMISSIONER**

Review Report 19-211

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BACKGROUND

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

All reports submitted to the Department of Industry, Tourism and Investment pursuant to GNWT 2017-2018 FY Contract #2265 with the International Institute for Sustainable Development that relate to the following:

- Any cross-jurisdictional scans and policy research;
- Marketplace/operational sensitivity analysis;
- Review of existing requirements and guidance for impact benefit agreements/socio-economic agreements (IBAs/SEAs).

Following a request for clarification of his request, the request was narrowed to encompass only any final reports relating to three items mentioned in the contract change order, namely: desk-based research, marketplace/operation sensitivity analysis, and review of existing requirements and guidance for IBAs/SEAs. ITI identified that there was no final report relating to desk-based research. There were final reports relating to IBAs/SEAs. There was also a final report relating to exploration agreements. ITI provided partial access to the identified records. They severed information in the identified reports based on the application of sections 14, 23 and 24 of the *Access to Information and Protection of Privacy Act* (ATIPPA). The Applicant filed a request for review with the Information and Privacy Commissioner (IPC), arguing that the redacted information should not have been severed pursuant to sections 14 and 23 of ATIPPA.

ISSUES

The issues to be addressed in this review are as follows:

1. Did section 23 justify ITI's refusal to disclose information in the responsive records?
2. Did section 14 apply to the redacted portions of the responsive records which were withheld under that section?

DISCUSSION

1. Did section 23 justify ITI's refusal to disclose information in the responsive records?

ITI relied on section 23 of ATIPPA to justify the redaction of various parts of the responsive package. Section 23 states:

23. (1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.

Personal information is defined in section 2 of the Act to be “information about an identifiable individual”. Information about a company or an organization, therefore, does not qualify as personal information.

Subsection (2) of section 23 sets out circumstances in which there is a presumption that disclosure of personal information will be found to amount to an unreasonable invasion of a third party's privacy.

Subsection (3) of section 23 outlines that the public body must consider a non-inclusive list of relevant circumstances when deciding whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy.

Subsection (4) of section 23 outlines circumstances in which there will be no unreasonable invasion of privacy.

Subsection (5) of section 23 sets out that on refusing to disclose personal information supplied in confidence about an applicant, the public body shall give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.

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

Section 24(1) sets out when the public body must refuse to disclose information about the business interests of a third party. Section 24(1)(b) requires the public body to refuse to disclose financial, commercial, scientific, technical or labour relations information

- (i) obtained in confidence, explicitly or implicitly, from a third party, or
- (ii) that is of a confidential nature and was supplied by a third party in compliance with a lawful requirement.

While ITI suggested in its submissions to this office that section 24(1)(b) applied with respect to some of the items redacted in the document, the document itself contained no apparent redactions under this section. For this reason, I do not propose to comment further with respect to the application of section 24(1)(b) other than to say that the onus is on the public body to establish that an exception to disclosure applies. For this reason, particularly where a mandatory exception applies, it is vital for the public body to establish the facts which would bring the information within the criteria for such an exception. It is not good enough simply to state, without any evidence, that information was provided in confidence or that confidence was expected. There has to be something to support that statement, either in background and context or in a written document. No such evidence was presented to me in this case. Further, very little, if any, of the material redacted, in my opinion, relates to any identifiable or specific

third party company, and, for that reason, disclosure could not effectively reveal the trade secrets of any specific third party. Nor would the disclosure of “ranges” in reference to third party expenditures that encompass more than one company reveal any specific financial, commercial, scientific or labour relations information about any specific third party. At best, it would reveal industry standards. I am not, therefore, convinced, based on the information in the record itself and on the information provided by the public body (such as it was) that section 24 is applicable to any of the information redacted from this document.

ITI's reasons for redactions under section 23 were varied, so they set out their arguments by page number. The section 23 redactions on pages 4 and 6 of the responsive package were made to protect the identity of the two authors of the report. ITI redacted the first author's biography on page 4 in its entirety as it was identical to an online biography and therefore could be “googled” to reveal the identity of the individual. ITI stated that in accordance with section 23(5) of ATIPPA, a summary was provided that mirrored what was redacted. ITI redacted the second author's identity but the relevant information regarding their qualifications was left intact so no summary was provided. The redaction on page 6 regarding the author's workplace was redacted because, given the subject matter expertise of the authors, ITI thought this would likely indirectly identify the authors. ITI's justification for redacting information relating to the author's names is that it constituted an unreasonable invasion of their personal privacy. ITI considered the authors as third parties because they were not employees of the public body, and their names, as personal information, were related to the advice provided to ITI. ITI pointed out that section 23(2)(d) indicates that personal information relating to employment, occupational or education history is presumed to be an unreasonable invasion of a third party's personal privacy. In addition, ITI asked the authors about their views on any sensitive information in the report and they indicated a preference for their personal information to not be disclosed.

The Applicant questioned ITI's decision to withhold information about the author of the report. The Applicant pointed out that the contractors are experts in their given fields, were hired by a

public body to provide research and have presumably published materials in those areas that are publicly available. He argued that public transparency and accountability in the expenditure of public funds requires disclosure of the recipients of those funds.

Section 23(4)(e) of ATIPPA states that there is no unreasonable invasion of a third party's personal privacy where the personal information relates to the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee, or member of a public body. The definition of "employee" in section 2 of ATIPPA includes a person who performs a service for the public body under a contract.

Here the authors were contracted to conduct research and provide a report. I find that they are, therefore, "employees" for the purposes of applying ATIPPA. Writing the report was an employment responsibility of the authors of the report. Their names are not part of their employment history, as alleged by ITI. Rather, their names are part of their contracted obligations. In addition, I think that section 23(3)(a) is relevant here. This subsection outlines that the public body must consider **all** relevant circumstances, including whether the disclosure is desirable for the purpose of subjecting the activities of the GNWT to public scrutiny. I find that is the case here. The public should know who is authoring reports which have the potential to influence government decisions. I **recommend** that the names of the authors be disclosed.

I agree that the phone numbers and email addresses of these individuals were properly withheld pursuant to section 23.

The short biographies included on page 4 also include information in relation to educational and employment history and a presumption is, therefore, raised that the disclosure of this information would amount to an unreasonable invasion of privacy. Presumptions, however, are rebuttable and public bodies must consider all relevant circumstances when determining whether disclosure would amount to an unreasonable invasion of privacy, including the public interest and the factors set out in subsection 23(3). I **recommend** that ITI reconsider the

application of section 23 to these biographies, keeping in mind all relevant circumstances, including the fact that it appears that the information in question is readily available on-line. If the decision is to disclose the information, the two authors should be given notice pursuant to section 26 of the Act and provided the opportunity to object to the disclosure. This said, before further consultation is undertaken, I would **recommend** that the department consult with the Applicant to determine whether he still requires this information if the names are provided so as to avoid unnecessary work for all concerned if the Applicant is satisfied with the names alone.

The section 23 redaction on page 16 related to the identity of an individual who provided feedback about the operation of the Yukon legislative prospecting scheme. Although the prospector is not identified by name, ITI argued that there was enough identifying information about this individual to identify them indirectly. The authors of the report collected information from the prospector, including their personal information, in confidence. Therefore, ITI made its decision to exercise the discretionary power to redact this information.

The Applicant accepted ITI's position with respect to the redaction on page 16 of the responsive records. I too accept that this information was rightly withheld. Section 23(3)(f) requires the public body to consider whether the personal information was supplied in confidence, which ITI says was the case here. This third party was also not a part of creating the report on behalf of the public body.

The remainder of the section 23 redactions were for specific numbers, such as dollar amounts and percentages, which were obtained by the authors of the report from various parties. Like the redactions in the previous paragraph, these items were redacted on the basis that ITI saw the information as sensitive and that it was supplied to the authors of the report on the understanding that it would be kept confidential.

I will go through the remainder of the section 23 redactions on a page by page basis. I will note here that ITI only mentioned section 23(1) for all the redactions below. It would have been more helpful if they had set out the specific subsections that they were relying on.

Page 86 - The redacted portions on this page relate to estimates of how much to pay a particular group. This is not personal information. As noted above, personal information is about an identifiable individual and the protection afforded by section 23(1) applies only to personal information. Furthermore, I see nothing in the information provided that would specifically identify any individual third party company or organization which might bring section 24 into consideration. The department has the onus of establishing that an exception applies. They have not provided any argument that section 24 applies and there is nothing in the context of the report itself that would lead me to conclude that these numbers are sensitive proprietary information belonging to third parties. I **recommend** that the items redacted from this page be disclosed.

Page 89 - The redacted portion on this page is the percentage range of money spent in carrying out the exploration work that the authors found. Again this was redacted pursuant to section 23(1). There is nothing in this information that is relatable to an identifiable individual. It reflects a percentage range of funds reported as being paid to an unidentified number of unnamed communities. There is no personal information here and section 23 does not apply. I **recommend** that the information redacted on page 89 be disclosed.

Page 91 - The redacted information on this page sets out the costs covered for the negotiation of an exploration agreement. It was redacted pursuant to section 23(1). Section 23 does not apply as there is no personal information involved. The department has not identified any other section of the Act that might be applicable. The discussion, however, appears to be about one identifiable company or project and to that extent, the information withheld may be subject to an exception pursuant to section 24. Because section 24 is a mandatory exception, I **recommend** that the public body assess the information with that section in mind and, if it can

be verified that this information was:

- a) provided to the authors of the report;
- b) by the named company/project
- c) is financial, commercial, scientific technical or labour relations information; **and**
- d) the information was obtained explicitly or implicitly in confidence

that the Applicant be given a full explanation for withholding the information pursuant to section 24. It is to be noted that section 24 would apply if, and only if, **all** of these criteria are verified to exist.

Page 94 - The information redacted on this page outlines negotiation costs. Again section 23 does not apply to this information because it is not about an identifiable individual. The department has not referred me to any other section of the Act as being applicable and there is nothing immediately apparent to me from the general content or context of the document that would lead me to the conclusion that any other exception to disclosure would apply. I **recommend** that this information be disclosed.

Pages 95 and 96 - The information redacted on these pages sets out the amounts of money paid to mining projects. Once again, section 23 does not apply as the redacted information does not relate to any identifiable individual. The numbers redacted are provided by way of examples of amounts paid in unidentified situations to unidentified groups or organizations. No individuals are involved. Further, I can identify nothing in the context of the document as a whole that would suggest that this is proprietary information of a third party (because no third parties are identified). The numbers merely relate to facts about past payments made, without a lot of context. I **recommend** that the redacted information on the bottom of page 95 and the top of page 96 be disclosed.

There is a second paragraph with redactions on page 96 toward the end of the page. The same analysis as above applies. I **recommend** this paragraph be disclosed without redaction.

Page 97 - All the redactions on this page were made pursuant to section 23(1). The redacted information is not about any identifiable individual and section 23 does not, therefore, justify withholding the redacted information. Further, the numbers redacted do not relate to any named or identified company, but rather are ranges or “samples” applying across a number of companies or organizations which have not been identified. Section 24 would not, therefore apply. I **recommend** that this page be withheld without redaction.

Page 98 - The information redacted pursuant to section 23(1) on this page sets out the amounts that third party companies pay toward scholarships. There is no personal information in the redacted material, nor is there any proprietary information. I **recommend** that all of the redacted information on this page be disclosed.

Page 99 - The information redacted pursuant to section 23(1) on this page contains no information about an identifiable individual. I **recommend** it be disclosed.

Page 103 - The information redacted pursuant to section 23(1) on this page sets out financial activities of a third party company. It contains no personal information of any identifiable individual. I **recommend** that this redacted section be disclosed

2. Did section 14 apply to the redacted portions of the responsive records which were withheld under that section?

Section 14(1)(a) of the Act outlines that a public body may refuse to disclose information where the disclosure could be reasonably expect to reveal advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council. This is a discretionary provision which, as I have said in numerous reports, means that there is a two-step process which any public body relying on it must apply. First, the public body must establish that the information in question meets the criteria for the exception. If it does, the public body must then exercise its discretion and make a decision as to whether to disclose

based on all the relevant factors. The fact that the information meets the criteria for the exemption is not enough. Section 1 of the Act sets out that access to information is a "right". Thus, as I said in Review Report 18-173, the default position should always be disclosure. A refusal to disclose under a discretionary exemption should only occur when there are good, considered reasons for the redaction. In those circumstances, the public body should provide the Applicant with a summary of the considerations which went into the making of the decision. The public body should provide the Applicant with the reasons for the refusal and the provisions of the Act on which the refusal is based pursuant to section 9(1)(c) of ATIPPA. In future, I encourage ITI to include its reasons for refusal to the Applicant at first instance, rather than only providing these submissions upon a review by this office, as was done here.

In Review Report 18-186, I accepted the approach set out in Review Report 051-2015 (2015 CanLII 39326 (SK IPC)) from the office of the Saskatchewan Information and Privacy Commissioner as support for its application of Section 14(1)(a). 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?

The Saskatchewan report goes on to note that the following definitions have been established to assist in determining when the criteria above apply:

[20] My office has established the following definitions:

Advice includes the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts. Advice has a broader meaning than recommendations.

Recommendations relate to a suggested course of action as well as the rationale for a suggested course of action. Recommendations are generally more explicit and pointed than advice.

Proposals, analyses and policy options are closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of action.

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).

It is important, as well, to consider section 14(2) which provides that subsection (1) does not apply to information that:

- (b) is a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function;
- ...
- (e) is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal;
- (f) is an instruction or guideline issued to officers or employees of a public body;

ITI explained that all the redactions made pursuant to section 14 of ATIPPA were made on the basis that the redacted portions revealed significant policy advice provided by the authors of the reports to ITI. Their decision to exercise their discretion to redact this advice resulted from a few different factors. First, the advice provided relates to proposed new legislation and so ITI argued that the advice was inherently sensitive and subject to Legislative Assembly process conventions and rules of confidentiality related to legislative proposals and bills. ITI pointed out that the advice was provided by a third-party and therefore does not necessarily reflect the views and opinions of ITI. ITI's position was that it is important that ITI receive such frank and fulsome advice from independent parties when developing new legislation that can affect the whole Northwest Territories. ITI thought that the ability to receive such advice would be

reduced if either ITI or a third-party knew that it may be released to the public in an un-redacted form. Their view was that it is not in the public interest for third-parties to restrain themselves in this way when providing advice to ITI. Therefore, ITI decided that redaction of the information was appropriate. ITI noted that in applying these redactions, they were careful to ensure that the factual context that the advice was based on was kept un-redacted, so long as that information did not otherwise require redaction under section 23 of ATIPPA. Finally, ITI noted that no final decisions had yet been made in respect of the advice, for at the time the Request for Review was received, the bill remained in development and had not yet been introduced in the Legislative Assembly. They said that it is the prerogative of Executive Council to decide upon the content and authorize the introduction of bills. It should be noted that since I received the department's submission on this matter, the legislation in question has been passed and many of these considerations may no longer apply.

The Applicant submitted that the net that ITI was casting with the section 14 redactions appeared to be overly broad. He argued that the documents in question are not directly related to legal drafting of the legislation but rather provide background information used to better define issues and policy options. With respect to ITI's claim that "it is not in the public interest for third-parties to restrain themselves...when providing advice to ITI", the Applicant said this claim was not reasonable as ITI had not provided evidence that the third-parties were contracted to provide confidential advice. The Applicant posited that given that ITI itself stated that "no final decisions have yet been made in respect of the advice", that this supported the position that these documents are simply background material.

With all this in mind, it is necessary to do a page by page, line by line assessment of ITI's section 14(1)(a) redactions. ITI made section 14(1)(a) redactions on 17 pages of the responsive package.

Page 7 - The last line in this paragraph under the heading "Adoption of Prospector Training Courses" was redacted pursuant to section 14(1)(a). This line expresses an opinion about an existing program in another jurisdiction. It does not suggest a course of action related to a

recommendation and section 14(1)(a) does not, therefore, apply. I **recommend** this redacted material be disclosed.

Page 8 - The last line in this paragraph under the heading "Increased Notification Requirements" was redacted pursuant to this section. This line sets out analyses and the disadvantages of an existing program in another jurisdiction. It does not appear to be directed toward any particular recommended action or direction for the public body. I **recommend** this redacted material be disclosed.

Page 9 - The last line two lines in the paragraph under the heading "Exploration Plan Filing" were redacted. They set out analyses and advantages of a particular course of action. I am satisfied that these lines meet the criteria for an exemption pursuant to section 14(1)(a).

The last line under that heading "Payment Instead of Exploration and Development Work" was also redacted. This line sets out analyses of a possible course of action. I am satisfied that it, too, meets the criteria for an exemption pursuant to section 14(1)(a)

Page 14 - All of the recommendations and key considerations on this page were redacted. The headers are all set out as recommendations. I find that everything aside from the last sentence included recommendations, proposals and analyses and, therefore, met the criteria for a section 14(1)(a) exception. However the last line on the page is a statement of fact and thus should be disclosed. I **recommend** that the last line on page 14 be disclosed to the Applicant.

Page 16 - Most of the paragraph under the heading "Recommendations and Key Considerations" has been redacted pursuant to section 14(1)(a). This paragraph sets out the author's findings with respect to another jurisdiction. It is a factual statement and does not contain any advice or recommendations. I **recommend** that this paragraph be disclosed to the Applicant.

Pages 28-29 - The considerations and recommendations under the heading "Recommendations and Key Considerations" were redacted. These paragraphs set out proposals and recommendations. They discuss disadvantages of a particular course of action. I am satisfied that these paragraphs meet the criteria for a section 14(1)(a) exception.

Page 31 - The considerations listed here under the heading "Recommendations and Key Considerations" were redacted. These paragraphs set out recommendations and the advantages of a particular course of action. I am satisfied that these paragraphs meet the criteria for an exception under section 14(1)(a).

Pages 34-35 - The information under the header "Considerations and Recommendations" has been redacted. These paragraphs, for the most part, set out recommendations and the advantages and disadvantages of a particular course of action and meet the criteria for an exception to disclosure under section 14(1)(a). The exception to this is the first sentence under the first heading, which contains a factual statement. I **recommend** this sentence be disclosed.

Page 41 - The information under the heading "Recommendations and Key Considerations" was again redacted on this page. I find that the first sentence of each of the first two paragraphs are the findings of the authors and are factual in nature. I **recommend** that these sentences be released to the Applicant. The remainder of the information meets the criteria for an exception pursuant to section 14(1)(a).

Page 44 - Everything after the first line under the heading "Recommendations and Key Considerations" on this page was redacted. The information redacted here sets out analyses and the advantages and disadvantages of a particular course of action. I am satisfied that these paragraphs meet the criteria for a section 14(1)(a)

Page 51 - Again everything after the first line under the heading "Recommendations and Key Considerations" on this page was redacted. These paragraphs contain analyses and

recommendations. I am satisfied that these paragraphs meet the criteria for an exception under section 14(1)(a).

Page 54 - All the lines after the first line under the heading "Recommendations and Key Considerations" on this page were redacted. The first two sentences under the subheading are the findings of the authors. They are factual and I **recommend** that they be released to the Applicant. I find the same with respect to the first two sentences of the second paragraph and the first part of the last sentence (up to the comma). I recommend that these lines should be disclosed to the Applicant. The remainder of the information sets out analyses and meets the criteria for an exception under section 14(1)(a).

Page 58 - All of the information under the heading "Recommendations and Key Considerations" has been redacted. The line directly under the heading, however, contains no analyses or recommendation, and I **recommend** that it be disclosed. Further, the first sentence under subheading "1" is simply factual and I also **recommend** the disclosure of this sentence. The remainder of the redactions on this page set out analyses and recommendations. I am satisfied that these paragraphs meet the criteria for an exception pursuant to section 14(1)(a).

Pages 61-62 - The considerations and recommendations set out on these pages under the heading "Recommendations and Key Considerations" have been redacted. These paragraphs set out analyses and recommendations, as well as advantages and disadvantages of particular courses of action. I am satisfied that these paragraphs meet the criteria for an exception pursuant to section 14(1)(a).

While most of the redactions pursuant to section 14(1)(a) do meet the criteria for the exception, the second step is that the public body properly exercise their discretion. The department did not provide the Applicant with a fulsome explanation for the exercise of their discretion when responding to his request for information. They did, however, provide our office with an explanation during the review process. I am satisfied from these submissions that

discretion was, indeed, exercised. That said, some of the considerations that went into the exercise of that discretion no longer exist in that the legislation under consideration has now been passed by the Legislative Assembly. I therefore **recommend** that the public body reconsider the exercise of its discretion and provide the Applicant with an explanation for the decision made in terms of the factors considered in that exercise.

Conclusion

I find that ITI generally approached this request for information in a manner that resulted in the disclosure of as much information as possible and I applaud them for that effort. I was, in particular, pleased to see that ITI, with the exception of a few instances, did not redact factual information. I was, however, somewhat concerned with their interpretation of section 23, which applies only to the personal information of an identifiable individual. This is a fairly basic concept under the Act and something that an ATIPP Coordinator should know. I suspect that inexperience may have played a factor in this and encourage the department to continue to provide additional training and education for its ATIPP Coordinator so as to avoid such misinterpretations in the future.

My specific recommendations in the discussion above.

Elaine Keenan Bengts
Information and Privacy Commissioner