

**NORTHWEST TERRITORIES INFORMATION AND
PRIVACY COMMISSIONER
Review Report 20-213**

File: 19-112-4
January 22, 2020
Citation: 2020 NTIPC 2

BACKGROUND

In February 2019, the Applicant wrote to this office and asked us to review the response he received to an access request he had made to the Department of Infrastructure for:

Any and all information, documents and correspondence from June 1, 2018 to November 22, 2018 concerning the land acknowledgment sign posted for the Northwest Territories Metis Nation at the junction of Highway 2 and Highway 5.

The Department of Infrastructure provided a small package of responsive records. They redacted the second paragraph of one email on the basis that it was not relevant. They also redacted names of two identifiable third parties pursuant to section 23 of the *Access to Information and Protection of Privacy Act* (ATIPPA). The Applicant sought a review as to whether this information was appropriately redacted.

ISSUES

This review raised the following issues:

1. Did the Department properly withhold information pursuant to section 23(1) of the Act on the basis that it identified third parties?
2. Is the Department of Infrastructure authorized to withhold information it says is "not relevant" to the Applicant's request?

DISCUSSION

1. Did the Department properly withhold information pursuant to section 23(1) of the Act on the basis that it identified third parties?

The Department of Infrastructure severed the names of two identifiable third parties because they said these details were personal information.

Section 23 of ATIPPA states that:

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.

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

In this case, the information redacted was the name, business phone number and business email address and job title of an officer of the Northwest Territories Metis Nation. However it is important to note that this information was supplied in the context of a business transaction. It is in the public interest to subject the business of the government to public scrutiny. The organization was revealed to the Applicant. I fail to see how releasing the officer's name, job title, business phone number or business email address would amount to an unreasonable invasion of his privacy. I note also that the Metis Nation publishes its contact list, making it public information. I find that this information should not have been severed as releasing it would not amount to an unreasonable invasion of privacy.

2. Is the Department of Infrastructure authorized to withhold information it says is "not relevant" to the Applicant's request?

The Department of Infrastructure redacted the second paragraph of the email on the basis that it was "not relevant" to the Applicant's request. The Department outlined that the Applicant requested records from the Department "on the application and approval for the installation to erect a sign at the junction of highway 2 and 5", which is near Hay River. The redacted paragraph speaks to the status of applications from the Northwest Territories Metis Nation to erect signs near other communities and approvals that must be received before those sign applications can be considered by the Department. The Department of Infrastructure argued that because this paragraph was not relevant to the Applicant's request, it was redacted.

In response, the Applicant said that the matter is deeper than the sign's installation or the contents of the sign itself. They say that the GNWT has a duty to not display bias in any of their decision-making processes and they believe that bias may have been shown in this matter. The Applicant believed from other information not severed in other responsive emails, that the Department of Infrastructure may have been shielding bias by redacting the relevant paragraph. Because of this, the Applicant requested access to the second paragraph of the email that was severed by the Department of Infrastructure.

There are differing approaches taken by commissioners across Canada with respect to whether non-responsive information can be redacted on the basis that it is "not responsive". The two schools of thought across Canada as to whether or not a public body can withhold information that is not relevant to a request were helpfully set out by the Nova Scotia Review Officer in Review Report 16-10. I will summarize the case law set out in that decision here.

There are three jurisdictions where Information and Privacy Commissioners have determined that non-responsive information may be withheld from records as being out of scope. These jurisdictions are Ontario, Alberta and Newfoundland.

Ontario

It was determined in Ontario Order P-880, that a public body was authorized to redact portions of a record because it was deemed not relevant to the request. Importantly, the adjudicator pointed out that the Ontario Act refers to a right of access to "part" of a record in section 10(1):

Subject to subsection 69(2), every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

- (a) The record or part of the record falls within one of the exemptions under sections 12 to 22; or
- (b) The head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

The Northwest Territories does not have a provision equivalent to section 10(1) of Ontario's legislation. Rather, the Northwest Territories' legislation provides:

- 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.

Newfoundland

Although Newfoundland does not have a provision like Ontario that refers to a right to access of "part of a record", the Newfoundland Information and Privacy Commissioner issued a practice bulletin entitled "Redacting Non-Responsive Information in a Responsive Document" dated May 2016. The bulletin states that the practice of severing out-of-scope information within responsive records has been widely accepted and endorsed by Commissioners in a number of jurisdictions and has also been the long standing practice in Newfoundland.

As pointed out by the Nova Scotia Commissioner in Review Report 16-10, there does not appear to be any decisions or cases in Newfoundland explaining the legal basis for this practice. I agree with the Nova Scotia Commissioner who concluded that, as this is simply a practice that has been adopted, it is of interest but not of assistance in determining whether such a practice is permitted under the Northwest Territories legislation.

Alberta

Alberta does not have a provision like Ontario that refers to a "part" of a record. Nevertheless, the Alberta Information and Privacy Commissioner has found in several cases that information deemed out of scope can be withheld from the responsive records. The Commissioner noted in Order 97-020 that pursuant to section 11 of the Alberta legislation, applicants must be told whether access to the record "or part of it" is granted or refused, how access to a record "or part of it" will be given and reasons for refusal to access to a record "or part of it". Because of that wording, the Commissioner concluded that section 11 contemplates that there could be situations where a public body would provide an applicant with access to only part of a record. However, in Alberta Order 99-002 at para. 25, the Alberta Commissioner clarified that when an

applicant asks for "records" rather than "information", a public body cannot withhold portions of the records on the basis of non-responsiveness.

With respect to Alberta, I note that other jurisdictions have not followed the Alberta line of cases. Rather, some such as British Columbia and Prince Edwards Island (PEI) have actually decided to not follow the Alberta reasoning.

British Columbia

In BC Order F-15-23, the BC Information and Privacy Commissioner found at para. 42 that there was no provision of the BC legislation that would allow a public body to sever portions of records because the public body thought that those portions do not respond to the specific request. One thing the Commissioner noted is that a public body is not often in a position to know with certainty that portions of a record do not add any context or further the goal of meaningful disclosure. He concluded that portions of a record can only be redacted on the basis of an exception set out in the legislation. In this case, the BC Commissioner disagreed with the Alberta analysis by saying that the analysis "discerns conflict where none exists" (at para. 51). He distinguished the Ontario line of reasoning on the basis that the Ontario legislation includes a right of access to "part of a record".

PEI

In PEI Order No. FI-16-003, the PEI Information and Privacy Commissioner evaluated the Ontario, Alberta and British Columbia case law and concluded that public bodies are not authorized to withhold access to portions of records that the public body deems as out of scope.

Nova Scotia

In Review Report 16-10 and subsequent decisions, the Nova Scotia Information and Privacy Commissioner concluded that the Nova Scotia legislation does not permit severing information in a responsive record on the basis that the information is out of scope or not relevant. She set out five reasons for this:

- i. It is the applicant, not the public body, who defines what is and is not responsive to a request.
- ii. Nova Scotia's legislation specifically provides for the right to "all government information" and access to "any" record.
- iii. Out of scope severing is not a specific and limited exemption under the Act.
- iv. Disclosing the full record is consistent with the purposes of the Act.
- v. In order for an out of scope exemption to exist, such an exemption would have to be "read in" to the legislation.

I find that for the same reasons as set out by the Nova Scotia Information and Privacy Commissioner, that the second paragraph was incorrectly redacted on the basis of non-relevance. The Applicant asked for records related to the installed and erection of a sign near Hay River. The redacted information relates to this issue in another community. It provides context for the entire email. Secondly, ATIPPA's legislation does not refer to access to a "part" of a record as is the case in Ontario. There is no exemption in ATIPPA to redact on the basis of the information being out of scope. Disclosing the information is also consistent with the purposes of ATIPPA which allows for access to "any record" in the government's custody and control. Finally, as said by the Nova Scotia Commissioner, in order to conclude that public bodies are entitled to redact information that is out of scope, the Commissioner would have to essentially "read in" an exemption based on relevance. There is no a procedural gap here that needs

reading-in in order to review the matter. The information should not have been severed on the basis that it was not relevant.

Conclusion and Recommendations

I find that releasing the information about the Metis Nation contact would not amount to an unreasonable breach of this party privacy.

(a) I **recommend** that the third party information be released to the Applicant.

I find that public bodies are not generally permitted to redact information based on the public body's assessment that the information is not relevant. If the information does not meet the criteria for an exception as set out in sections 13 to 25 of the Act, the information contained in a responsive record must be disclosed.

(b) I **recommend** that the second paragraph that was redacted on the basis of being out of scope be released to the Applicant.

(c) I **recommend** that the public body amend its training and policy documents to detail that withholding information on the basis of non-relevance is not permitted under ATIPPA.

Elaine Keenan Bengts
Information and Privacy Commissioner