

**NORTHWEST TERRITORIES INFORMATION AND
PRIVACY COMMISSIONER
Review Report 20-214**

File: 18-197-4
January 23, 2020
Citation: 2020 NTIPC 3

BACKGROUND

On October 15, 2018, the Applicant made a request for records to the Government of the Northwest Territories (GNWT) Department of Environment and Natural Resources (ENR). The request was for:

All records (including e-mails, letters, memo, phone call summaries, meeting notes) related to the change of Directors for the Independent Environmental Monitoring Agency between January 1, 2014 and December 31, 2016.

The Applicant received a large volume of records relating to the request. Some information in the responsive records was redacted by ENR pursuant to sections 13, 15 and 23 of the *Access to Information and Protection of Privacy Act* (ATIPPA). The Applicant questioned the redactions and requested a review of them by this office. He also alleged that not all responsive records had been provided.

ISSUES

This review raised the following issues:

1. Was section 13 (cabinet confidences exception) properly applied?
2. Was section 15 (solicitor/client privilege exception) properly applied?
3. Was section 23 (unreasonable invasion of privacy exception) properly applied?

4. Were all the responsive records provided by ENR?

DISCUSSION

1. Preliminary Issue

Before getting to the analysis of the response provided, I must say that I found ENR's submissions on the rationale for their redactions to be wholly insufficient. Section 9(1)(c) of ATIPPA states that when refusing access to records, the public body must state the section it is relying upon as well as the reasons for the refusal. In this case, ENR's reasons for refusal consisted of simply saying they relied on the section. Furthermore, they did not indicate the subsections being relied on, which is particularly troubling with respect to section 23, which has 5 subsections and 18 subparagraphs. Section 33 of the Act puts the onus of establishing that an exception applies on the public body. In this case, the department's submissions were wholly inadequate in terms of meeting this onus. When the amendments in Bill 29 come into effect in the next few months, and this office begins to make orders instead of recommendations, public bodies will have to step up the quality of their submissions in a significant way or risk having to appeal decisions of this office to the courts.

2. The Records

During the course of this review, the department provided my office with two sets of records. The first consists of those records which were identified as being responsive to the Request for Information. The second set consists of the records disclosed to the Applicant.

Many of the records are listed as being duplicates of other responsive records or as having been released in full. I will not be commenting on those particular records.

In the index provided, it also appears that, after having reviewed records originally tagged as being possibly responsive to the request for information, ENR determined that some of the records were “out of scope” and these were not vetted further and were not included in the package sent to the Applicant. Rather than remove them from the package of “responsive records”, these were included in the index and in the records provided to my office for this review. I have reviewed all of the documents which the public body has indicated are “out of scope” and confirm that some of them are clearly outside the boundaries of the requested information. Some of them, however, are not.

The following records either predate January 1, 2014, or postdate December 31, 2016 which is the time frame indicated in the Applicant’s request for information. Because they are not within the stated time frame, they are not responsive to the Request for information. These include the following records:

17426139

17445832

17445899

38856977, 38856977a, 38856977b, 38856977c, 38856977d, and 38856977e

38871656

61506428, 61506428a, 61506428b, 61506428c, 61506428d

61507491a

68626962

Also indicated as being out of scope were the following records:

28527989, 28527989a, 28527989b - This email and attachments appear to relate to an expression of interest by a particular individual for appointment to a Board. The form completed is entitled “Expression of Interest in Natural Resource Management Boards” and is a GNWT document. In it, the individual indicates that he is interested in “any

board that focuses on natural resource management issues”, which might well include the “Independent Environmental Monitoring Agency” referred to in the Applicant’s request. I am not, therefore, convinced that it is “out of scope”. There is, however, a good amount of personal information contained in these three records, the disclosure of which would result in an unreasonable invasion of the individual’s privacy. I **recommend** that these three records be disclosed with appropriate redactions to protect the privacy of the individual as per section 23 of the Act.

28777835, 28777835a - These two records are similar to those described in the previous record, but in this instance the proponent is seeking an appointment to a specific board (not the IEMA). I agree that these records are out of scope.

36027641 - This record is a blank “Briefing Note” template and appears to have nothing at all to do with the request for information. I agree that it is out of scope.

36338148 - This appears to be a list of individuals who have expressed an interest in board work for all GNWT boards and agencies. There is no mention of the IEMA. I am not convinced, however, that it is entirely out of scope. I **recommend** that it be disclosed, but with the first and the last columns redacted to protect the personal information of those individuals on the list.

38995808 - This is an undated letter, not yet on letterhead, which is directly related to “Board Appointments” for the IEMA. There is an edit box on the page that is dated October 29, 2014, which would bring it clearly within the scope of the request. I **recommend** that this record be disclosed, subject to any appropriate exceptions which might apply pursuant to sections 13 to 25 of the Act.

43543979 - While the most recent emails in this chain post-date the time frame in the Applicant’s request for information, some of the earlier emails fall within the dates

provided. This record, therefore, as a whole, is “in scope” and I **recommend** that it be disclosed, subject to any appropriate exceptions as provided for under the Act.

45562382 - While there is a reference to IEMA in this email chain, and it is within the time frames contemplated by the Applicant, this chain does not appear to relate in any way to board appointments. I agree, therefore, that it is out of scope.

45564536, 45564536a - While there is a reference to IEMA in this email chain (and attachment), and they fall within the time frames contemplated by the Applicant, this record does not appear to relate in any way to board appointments. I agree, therefore, that it is out of scope.

45624142 - This record is mostly about other matters, but there is a reference in it to “IEMA representation”. It is, therefore, responsive. I **recommend** that it be disclosed, subject to the application of any applicable and relevant exceptions.

45634019 - While much of this record is about other matters, there is reference in one of the emails to “the change in board members at IEMA”. It is, therefore, responsive and I **recommend** that it be disclosed, subject to any applicable exceptions pursuant to sections 13 to 25 of the Act.

45634019a - There is nothing in this record that makes any reference to the IEMA. It is, therefore, out of scope.

45634655 - While much of this record is about other matters, there is reference in one of the emails to “IEMA representation”. It is, therefore, responsive and I **recommend** that it be disclosed, subject to any applicable exceptions pursuant to sections 13 to 25 of the Act.

45635056, 45635056a, 45635056b, 45635056c - There does not seem to be any reference to the IEMA in any of these records and they are, therefore, out of scope.

45635407 - There is reference in this record to the IEMA bylaws with respect to board members' qualifications. Well perhaps not directly related to "the change of Directors" for the IEMA, it does refer to board members and the IEMA. I **recommend** that this record be disclosed, subject to any exceptions that apply.

45639862 - While much of this record is about other matters, there is reference in one of the emails to "IEMA representation". It is, therefore, responsive and I **recommend** that it be disclosed, subject to any applicable exceptions pursuant to sections 13 to 25 of the Act.

45644463 - There does not seem to be any reference to the IEMA in this record and it is, therefore, out of scope.

45675197 - This record relates to expressions of interest in boards and mentions IEMA specifically. I **recommend** that it be disclosed, subject to any applicable exceptions under the Act.

45677166 - This record relates to expressions of interest in boards and mentions IEMA specifically. I **recommend** that it be disclosed, subject to any applicable exceptions under the Act.

45693032 - There is nothing in this record that relates to the IEMA and it is, therefore, out of scope

45693032a - While there is mention of IEMA in this record, it has nothing to do with the appointment of Board members and it is, therefore, out of scope.

45696931 - This record clearly makes reference to the appointment of members to the IEMA Board. It is responsive and I **recommend** that it be disclosed, subject to any appropriate redactions pursuant to sections 13 - 25 of the ATIPP Act.

45696931a, 45696931b - These are resumes of individuals, protected from disclosure pursuant to section 23 of the Act.

45696931c, 45696931d - These are responsive records, directly related to the request for information. I **recommend** that they be disclosed, subject to any applicable exceptions under sections 13 to 25 of the Act.

45696931e - This record has been previously discussed and should be treated accordingly.

46760714, 46760714a - These records do not appear to relate in any way to a change in the directors of the IEMA and were properly identified as out of scope.

61503624 - While the most recent emails in this chain post-date the time frame in the Applicant's request for information, some of the earlier emails fall within the dates provided. This record, therefore, as a whole, is "in scope" and I **recommend** that it be disclosed, subject to any appropriate exceptions as provided for under the Act.

61506258 - Again, some of the emails in this record are beyond the time frame provided by the Applicant, but others are not. The record, as a whole, therefore is within scope and I **recommend** that it be disclosed, subject to any appropriate exceptions as provided for under the Act.

61507491 - Again, some of the emails in this record are beyond the time frame provided by the Applicant, but others are not. The record, as a whole, therefore is within scope

and I **recommend** that it be disclosed, subject to any appropriate exceptions as provided for under the Act.

68624912 - This appears to be a briefing note with respect to appointments to an agency other than the IEMA. It is, therefore, out of scope.

68625726a1 - This is a letter from a federal government agency to a Diavik Mines manager. It does not deal in any way with the appointment of board members to the IEMA and is, therefore, out of scope.

68625726a2 - This appears to be minutes of a meeting of the IEMA. It does not make any reference to appointment of board members and is, therefore, out of scope

68625728 - While this record mentions the IEMA, it has nothing at all to do with the appointment of directors or board members. It is, therefore, out of scope.

68626962a - This appears to be a briefing note with respect to appointments to the IEMA, dated November 4, 2014. It is within the scope of the Request for Information and I **recommend** that it be disclosed, subject to any applicable exceptions under the Act.

68627209 - This record has been partially redacted as being "out of scope". It is a two page excerpt from someone's note book. In my opinion, a record is a record and information can be withheld only if it meets the criteria for an exception under sections 13 to 25 of the Act. I **recommend** that the department review the portions of these pages redacted as being "out of scope" and that it be disclosed but for anything that meets the criteria for an exception under the Act.

3. Section 13 - Cabinet Confidences

In relation to those items withheld pursuant to section 13 of the Act, ENR's submission to this office was that records created for briefing Cabinet could not be disclosed under section 13 of ATIPPA. That was the entirety of their rationale for refusing access to records based on this section. They did not identify which subsection of section 13 they were relying upon, nor did they identify who created the record or for what specific purpose or any information about how the record qualified as a cabinet confidence. I was left only with the content of the records themselves to determine whether they met the criteria for an exception under this section of the Act.

Section 13 of ATIPPA reads as follows:

- 13(1) The head of a public body shall refuse to disclose to an applicant information that would reveal a confidence of the Executive Council, including
- (a) advice, proposals, requests for directions, recommendations, analyses or policy options prepared for presentation to the Executive Council or the Financial Management Board;
 - (b) the contents of agendas, minutes or records of decision of the Executive Council or the Financial Management Board or deliberations or decisions of the Executive Council or the Financial Management Board;
 - (c) consultations among members of the Executive Council or the Financial Management Board on matters that relate to the making of government decisions or the formulation of government policy; and
 - (d) briefings to members of the Executive Council or the Financial Management Board in relation to matters that

- (i) have been before, or are proposed to be brought before, the Executive Council or the Financial Management Board, or
- (ii) are the subject of consultations described in paragraph (c).

The purpose of the exemption for cabinet confidences is to ensure active and open debate in cabinet deliberations. As noted by Alberta's Information and Privacy Commissioner in *Alberta (Treasury) and Alberta (Community Development)*, Order 97-010;

As a result, the collective decision-making process has traditionally been protected by the rule of confidentiality. This rule protects the principle of the collective responsibility of ministers by enabling them to support government decisions, whatever their personal views. The rule also enables ministers to engage in full and frank discussions necessary for effective functioning of a Cabinet system of government.

Section 13 is a mandatory exception so if the disclosure would reveal any of the things outlined in its subsections, then it cannot be disclosed. There is no discretion with this section.

Statements of fact which are public knowledge, do not meet the criteria for an exception under section 13 because publicly available information cannot, by definition, be a "cabinet confidence". It is publicly available information.

18287127 - This record was created on November 4, 2014. It is entitled "Information Item" and is marked "Confidential". The stated purpose of the record is "to inform cabinet of the GNWT's appointments to the Independent Environmental Monitoring

Agency for the Ekati mine.” On the surface, therefore, it does appear to be intended to “brief” cabinet about intentions/steps taken. However, the first four paragraphs under the title “Summary” outline the history of the IEMA, and all of this information is publicly available. I **recommend** that these paragraphs be disclosed. I am satisfied, however, that the balance of the record outlines intended actions and possible issues that might arise as a result and this information meets the criteria for an exception pursuant to section 13(1)(d) of the Act.

28810092 - There is nothing in this email chain that would qualify it for an exception pursuant to section 13 of the Act. While the department indicates in its submissions that portions of this record were withheld pursuant to section 13, the only redactions were, in fact, apparently pursuant to section 23, which I will discuss later in this report.

28810092a - This is the same document as Record 18287127 and should be treated accordingly.

28810092b - This record, entitled “Executive Council Submissions Handbook” appears to have been disclosed without redactions and no further comment is necessary.

29659724 - This record is similar to the one discussed at 18287127. The stated purpose of the document is to “inform Cabinet” of the Minister of ENR’s intent to appoint a specific individual to the IEMA. I **recommend** that it be partially disclosed in accordance with the discussion above.

30203537 - This email exchange has been withheld pursuant to section 13. However, there is nothing in this email that would reveal any cabinet confidence. There is, however, reference to a third party, whose name should be redacted pursuant to section 23. I **recommend** that this record be disclosed with the exception of the third party’s name.

30236917 - This email exchange has been withheld pursuant to section 13. However, there is nothing in this email that would reveal any cabinet confidence. **I recommend** that this record be disclosed.

30236917a - This appears to be the same document as 18287127 and should be treated accordingly.

30237701 - There is nothing in this record that would reveal a cabinet confidence. **I recommend** that it be disclosed.

30237784 - This appears to be a duplicate of Record 30203537 and should be treated accordingly.

30509903 - This appears to be the same document as 18287127 and should be treated accordingly.

31161711 - There is nothing in the record that meets the criteria for an exception pursuant to section 13. It does, however, include the name of an individual being considered for an appointment which, if disclosed, would result in an unreasonable invasion of the individual's privacy. **I recommend** this record be disclosed with the name redacted.

31161711a - This record is almost identical to the one discussed at 29659724 and should be treated accordingly.

31699117 - This record is entitled "Minister's Speaking Notes" in relation to Appointments to the IEMA. It is completely factual. There is nothing that could be said to be advice, proposals, requests for directions, recommendations, analyses or policy options. It is not an agenda or minutes or records of a decision of the Executive Council.

It is not a consultation or a briefing. It is a one-page informational item to assist the Minister in responding to questions. It appears to be information which was intended to be used by the Minister to make a public announcement. I am not convinced that it qualifies for an exception under section 13 of the Act. It does contain personal information about the individual being appointed to the IEMA but it would appear, from the context, that consent to the disclosure of this information was given, either explicitly or by implication. I **recommend** it be disclosed.

31708937 - This is a record entitled "Cabinet Speaking Notes" and it contains much the same information as the previous record. For the same reasons, I **recommend** it be disclosed.

31764457 - There is nothing in this email that would qualify it for an exception to disclosure pursuant to section 13. It is an email from an ENR staff member to other ENR employees announcing a cabinet decision. I **recommend** it be disclosed.

31785490 - This is an email chain in which speaking notes have been requested on behalf of a Minister and the request is being addressed within the Department. This record does not meet the criteria for an exception pursuant to section 13. To the extent that the record names individuals appointed, this is information already within the public domain and disclosure would not amount to an unreasonable invasion of their privacy. I **recommend** that this record be disclosed.

32049422 - There is nothing in this email that would qualify it for an exception to disclosure pursuant to section 13. I **recommend** it be disclosed with the name of the individual to be appointed redacted.

32049422a - This appears to be the same record as 29659724 and should be treated accordingly.

32049426 - There is nothing in this email that would qualify it for an exception to disclosure pursuant to section 13. I **recommend** it be disclosed, with the exception of the name of the individual whose appointment is being discussed.

32049426a - This appears to be the same record as 29659724 and should be treated accordingly.

32050063 - There is nothing in this email that would qualify it for an exception to disclosure pursuant to section 13. I **recommend** it be disclosed with the exception of the name in the email dated March 7, 2016, 11:42 AM.

32050063a - This appears to be the same record as 29659724 and should be treated accordingly.

32277262 - There is nothing that I can discern from this email that would qualify it for an exception pursuant to section 13. I **recommend** it be disclosed with the exception of the name of the person whose appointment is pending.

35723576 - This record is another set of speaking notes for the Minister in announcing the appointment of an individual to the IEMA. The same considerations apply as for Record 31699117 and I **recommend** it be disclosed accordingly.

35725220 - This looks to be the same record as Record 31699117 and I **recommend** that it be dealt with accordingly.

38853954 - While the index provided by the public body indicates that portions of this record were withheld pursuant to section 13, it appears that all redacted material is personal information of third parties. I will, therefore, deal with it in that context.

38853954b - There is nothing in this email that would meet the requirements for an exception to disclosure pursuant to section 13. I **recommend** that it be disclosed.

38853954b1 - There is nothing in this email that would meet the requirements for an exception to disclosure pursuant to section 13. I **recommend** that it be disclosed.

38853954c - There is nothing in this email that would meet the requirements for an exception to disclosure pursuant to section 13. I **recommend** that it be disclosed, with the exception of the addressee's address on the letter, which appears to be a home address.

38853954d - This appears to be the same record as 31699117 and should be treated accordingly.

38853954e - This appears to be the same record as 31764457 and should be treated accordingly.

51561714 - there is nothing in this record that would reveal a cabinet confidence. It was not a document prepared for cabinet. I **recommend** that this page be disclosed. There does, however, appear to have been an attachment to the first email at the top of the first page and it is unclear if it is included in the responsive package. I **recommend** that the public body identify this record and disclose it, subject to any appropriate and necessary redactions.

54495559 - In this record, there are hyperlinks that appear to connect to another record. The hyperlinks do not work. However, it appears that the record would be responsive to the Applicant's request. The Department's submissions appear to suggest that the linked document would be subject to an exception pursuant to section 13. Without

seeing it, I cannot comment. I therefore **recommend** that this record be located and printed and reviewed for disclosure.

68617967 - There is nothing in this record that would reveal a cabinet confidence. I **recommend** that it be disclosed.

68617967a - This appears to be the same record as 18287127 and should be treated accordingly.

68624905 - There is nothing that provides any background with respect to who drafted this record or who it was intended for. It provides a fair amount of factual information about the history of the IEMA. There is nothing on the first page of this record that is other than factual, background information. I **recommend** that the first page be disclosed.

The second and third pages appear to contain discussion, advice, issues and analysis which, if it had been prepared for cabinet or a minister might bring it within the criteria for an exception pursuant to section 13(1)(a). If prepared for internal discussions, it might qualify for a discretionary exception pursuant to section 14 of the Act. I **recommend** that the department determine who prepared this record and for what purpose and that it be reviewed and disclosed, subject to any appropriate and applicable exceptions, properly applied (including an active exercise of discretion in the event that this record was not prepared for cabinet).

4. Section 15 - Solicitor/Client Privilege

ENR said in their response that records in relation to the request for and receipt of legal advice could not be disclosed under section 15 of ATIPPA. Again, this was their full submission on why they did not release records pursuant to this section.

First I must note that this statement is simply incorrect. Section 15 is a permissive section as opposed to a mandatory one. Thus ENR was required to exercise discretion - they are not prohibited from releasing records under section 15.

Section 15 states:

15. The head of a public body **may** refuse to disclose to an applicant
 - (a) information that is subject to any type of privilege available at law, including solicitor-client privilege;
 - (b) information prepared by or for an agent or lawyer of the Minister of Justice or a public body in relation to a matter involving the provision of legal services; or
 - (c) information in correspondence between an agent or lawyer of the Minister of Justice or a public body and any other person in relation to a matter involving the provision of advice or other services by the agent or lawyer.

As I said in Review Report 99-10, not every communication with a lawyer will attract the privilege. In the case of *British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner)* [1995] B.C.J. No. 2594, Justice Thackery set out the following test for determining whether a matter is protected by solicitor/client privilege:

To establish solicitor-client privilege three criteria must be established.

One, the communication must be between solicitor and client.....

Two, the parties intended the communication to be confidential.....

Third, the communication entails the seeking or giving of legal advice. It is the purpose of the communication that is relevant. If the purpose of the

communications was simply to obtain information as to a matter of fact, the communications would not be privileged. However, if the purpose was to obtain legal advice then the privilege attaches even if the communication entails no more than the passing of factual information.

18284006 - The signature on this email indicates that it is written by legal counsel with the Department of Justice, GNWT. On the face of it, it appears that it consists of legal advice provided in response to two specific questions asked by the department. It appears, therefore, to meet the criteria for an exception to disclosure pursuant to section 15 of the Act. There is, however, no indication at all that the department has considered the possibility of disclosure. Discretion must be exercised and the public body must be able to list the considerations, both for and against disclosure, that went into the exercise of that discretion. I **recommend** that the Department actively exercise its discretion and, should the decision be to refuse disclosure, that they outline for the Applicant all of the considerations that went into their decision.

18992035 - In this email exchange between the department and legal counsel, the department asks a number of legal questions which are answered by legal counsel. The record, as a whole, meets the criteria for an exception pursuant to section 15. I **recommend** that the Department actively exercise its discretion as noted above.

18992143 - Most of this email chain is contained in record 18992035 and should be treated accordingly. There is nothing in the first email (November 21, 2014 12:17 pm) that would attract an exception pursuant to section 15. The same holds true for the first two lines of the next email in the chain (November 21, 2014 9:51 am). I **recommend** that these portions of the new material be disclosed. I further **recommend** that the Department actively exercise its discretion with respect to the balance of this record as indicated above.

18992147 - This record is a discussion between employees about how to proceed in the face of legal advice given. It does not refer to specific advice given or received and no legal counsel is involved in the discussion. I am not convinced that this qualifies for an exception pursuant to section 15. I therefore, **recommend** that this record be disclosed without redactions.

38995932 - This appears to be the same as record 18284006 and should be treated accordingly.

54496703 - The information redacted from this document is the same as information redacted in record 18284006 and should be treated accordingly.

68617953 - This is a discussion between the department and its lawyer in which legal counsel is requesting documentation to inform an opinion that has been requested. There is no legal advice given in this exchange, but it might reveal the nature of the opinion being sought. I am satisfied that it meets the criteria for an exception pursuant to section 15(c) which allows a public body to refuse to disclose "information in correspondence between...a lawyer of ...a public body and any other person in relation to a matter involving the provision of advice or other services by the agent or lawyer". That said, once again no discretion has been exercised and the nature of this communication is such that it might well be disclosed. I **recommend** that the department actively exercise its discretion with respect to this record and provide the Applicant with an explanation as to their decision.

68617953a - This is a copy of a draft agreement between three parties, one of which is the Government of the Northwest Territories. It is unclear why this record was withheld, but it was an attachment to one of the emails in the chain that makes up record 68617953 discussed above. It is clearly a draft document, as there are a number of comments and edits on the document. Because this record was shared as part of the

legal consultation discussed above, I am satisfied that it meets the criteria for an exception pursuant to section 15(c). However, once again, no discretion appears to have been exercised and I **recommend** that discretion be actively exercised and the Applicant be provided with an explanation as to their decision.

68625722 - The information redacted from this record is the same information redacted from record 18284006 and should be treated accordingly.

5. Section 23 - Unreasonable Invasion of Privacy

ENR said in their response that records containing personal information of non-GNWT employees were redacted to protect those individuals' privacy, except in records where it was absolutely clear without a doubt that the information had been shared with the Applicant, due to the fact that they were involved in related correspondence due to a previous position that he held. This was all they submitted in terms of their reasons for applying section 23 of ATIPPA to several redactions.

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.

Subsection (2) of section 23 sets out circumstances where there is a presumption that disclosure of personal information will amount to an unreasonable invasion of a third party's privacy. In contrast, subsection 23(4) outlines circumstances where disclosure of personal information will not amount to an unreasonable invasion of privacy. In all cases, the public body must consider whether the disclosure of information would amount to an **unreasonable** invasion of privacy. The fact that a named individual has

been appointed to government board or agency, for instance, would not amount to an unreasonable invasion of that person's privacy in most cases as it is a government appointment to a public board and that information should always be publicly available. However, the resume of that individual which was used to consider his/her appointment would, if disclosed without consent, amount to an unreasonable invasion of privacy.

Section 23(1) creates a mandatory rule - if the information would result in an unreasonable invasion of a third party's privacy, it cannot be disclosed.

18286245 - This is a letter addressed to the Applicant. It includes the names of three individuals who served on the IEMA, which have been redacted. This is public information and the disclosure would not amount to an unreasonable invasion of the privacy of these individuals. Similarly, the public body has redacted the names of the individuals working for third party organizations involved in the IEMA. The people holding these positions is a matter of public record. Again, therefore, the disclosure would not amount to an unreasonable invasion of the privacy of these individuals. I **recommend** that this record be disclosed without redactions.

18286943 - Three names have been redacted from this record, all on the second page. It is unclear what role each of these individuals plays or their respective positions, but it appears that all are engaged as representatives of third parties working as partners with the GNWT. I **recommend** that these names be disclosed, as disclosure would not amount to an unreasonable invasion of their privacy.

18734113 - This is a letter addressed to a former member of the IEMA board. The department has redacted the name and address of this person. I agree that the address, which appears to be a personal address, has been properly redacted. However, the name of this person, and the fact that he/she served on the board of the IEMA is public knowledge and should be disclosed. Further the names of two people

copied on the letter, representatives of other organizations have been redacted. I **recommend** that this page be disclosed, withholding only the address of the addressee.

19017834 - This is very similar to 18734113, but for the name of the addressee. I **recommend** that it be disclosed accordingly.

19088122 - Interestingly, the public body redacted the names and email addresses of employees of a third party business in the first email on the first page of this record, but they failed to redact the same information when they appear several more times in the email chain. Because these are clearly business email addresses, I would have recommended the disclosure of the information in any event. As it is, I **recommend** the disclosure of the redacted information in this record.

19269631 - The names of individuals serving on the Board for the IEMA have been redacted pursuant to section 23. As this is all publicly available information, the disclosure of these names would not amount to an unreasonable invasion of privacy. Also redacted are the names of others whose appointment to the board are being considered. The fact that someone was recommended for a position but not appointed is information which might amount to an unreasonable invasion of privacy. I **recommend**, therefore, that this page be disclosed with the names of the departing board members intact, but the names of the proposed new board members withheld.

19482534 - This is a letter from an individual declining an appointment to the IEMA. Because he was never appointed, his identity is not in the public sphere. I agree that the information redacted from this page was appropriately redacted pursuant to section 23(1).

19913439 - The business email addresses of two GNWT partners have been withheld from this record, as well as the names of two journalists. For the reasons noted above, I

recommend the disclosure of the email addresses. Because the two journalists are not partners of the GNWT and their identity is not otherwise discernable, I am satisfied that these two names have been properly withheld pursuant to section 23.

19913439a - This appears to be almost identical to 19269631 and I **recommend** that it be treated accordingly.

21229694 - Three names have been redacted from this page. It is unclear who these individuals are, but from other responsive records, they appear to be representatives of third party companies working with the GNWT. For the reasons set out above, I **recommend** that this page be disclosed without redactions.

21229694a - The name of the addressee and the names of two individuals copied on the letter in this case have been redacted. For the reasons set out above, I am not convinced that the disclosure of these names would amount to an unreasonable invasion of their privacy. I **recommend** this record be disclosed without redactions.

29010160 - The email addresses and names of individuals acting on behalf of one of the GNWT's corporate partners have been redacted from several emails in this record. For the reasons set out above, I **recommend** that this information be disclosed. The names of a number of potential candidates for the board have also been redacted in several places. Because these are potential appointments only, and not actual appointments, I agree that these names have been properly redacted.

29212566 - The email address and name of an individual working for the IEMA has been redacted. For the reasons set out above, **recommend** the disclosure of this information. Also redacted, is the name of a sitting board member whose term is expiring (although the name was left intact in one instance). Again, because the

information about this person is/was publicly available, as is/was the information about his status as a director, I **recommend** that this information also be disclosed.

29445705 - This is a letter from an individual interested in sitting on the IEMA board. It is in the form of a letter, but contains the same kind of information you would find in a resume, including employment history, and experience. It was appropriately withheld pursuant to section 23(2)(d).

29640386 - This record is correspondence with a potential board member. The name and contact information as well as some employment history of the candidate have been redacted. Because the individual has not been appointed, I agree that this information was properly redacted.

29646167 - I **recommend** the disclosure of the name of the individual referred to as an existing member of the board as well as the identity of the individuals c.c.'d at the end of the letter be disclosed. The names of the potential board members have been properly withheld.

29658444 - I am satisfied that the information redacted from this record has been properly withheld pursuant to section 23(1) of the Act.

29796893 - Again, the names and email addresses of the GNWT's corporate partners which have been redacted from this chain should be disclosed, as should the name of the existing board member and I so **recommend**. I am satisfied that the identity of the candidates to replace the existing board member has been properly redacted pursuant to section 23.

29868891 - Once again the public body has redacted the names and email addresses of individuals employed by third party partners of the GNWT. These are public personas

and public organizations and I **recommend** that this information be disclosed for the reasons set out above. The same holds true for the names of the parties cc'd on the letter. Also redacted is the name of the sitting director of the IEMA. I **recommend** that this, too, be disclosed. I am satisfied that the identity of the candidates to replace the existing director have been properly withheld.

30289233 - This record does not appear to have been included either as a redacted record or in its original format. I **recommend** that the public body determine whether this record was, in fact, responsive, and deal with it accordingly.

31003959 - This is an email to an unsuccessful applicant for a position with the IEMA. The individual's name and email contact information have been properly redacted.

31005540 - In this email chain, the public body has redacted the name of an employee with the IEMA, as well as the position held by that individual. Also redacted is the name of the person who has been appointed to the board. I **recommend** that all of this information be disclosed. The public body has also redacted the new board member's personal email address as well as what appears to be a personal phone number. I am satisfied that this information has been properly redacted.

31053334 - Once again, this record does not appear to have been included either as a redacted record or in its original format. I **recommend** that the public body determine whether this record was, in fact, responsive, and deal with it accordingly.

31163685 - The name of the successful candidate for the board position has been redacted. For the reasons outlined above, I **recommend** that the name be disclosed.

31163685a - For the most part, the names redacted from this record should be disclosed and I so **recommend**. However, in an email dated February 10, 2016, 11:21

am, there is a discussion about two candidates, whose names have been withheld. I agree that, in this context, the disclosure of the names would amount to an unreasonable invasion of the privacy of the two candidates and the names, in this email only, have been properly withheld.

31193982 - I **recommend** that this record be disclosed without redactions.

31525189 - I **recommend** that this record be disclosed without redactions.

31792399 - This is a duplicate of record 31792798a discussed below and should be handled accordingly.

31792798 - The new board member's personal email address has been properly redacted from this record. The rest of the redacted information is all in the public realm and I **recommend** that it be disclosed.

31792798a - This is a letter to a newly appointed board member. The name of the board member, and the IEMA's Executive Director have been redacted, as well as the new board member's address. The address has been appropriately redacted, but I **recommend** the disclosure of the two names.

31946479 - The new board member's email address has been properly redacted pursuant to section 23 of the Act, as has the name of the unsuccessful applicant (email February 24, 2016 12:47 pm and email February 23, 2016 4:32 pm). I **recommend** that everything else redacted from this record be disclosed.

31948786 - I **recommend** that this record be disclosed without redactions.

32476398 - I **recommend** that this record be disclosed without redactions.

31948786a - This is the same as record 31163685a and should be dealt with accordingly.

34511796 - This is the same record as 31005540 and should be dealt with accordingly.

36468744 - The only thing that has been redacted from this document is the name of the author. However, the name of the author is included in the name given to the document in the document index, so it is obvious who the author is. I **recommend** that this letter be disclosed without redactions.

36468773 - Similarly, the only thing that has been redacted from this document is the name of the author but that name has been included in the document index, so it is obvious who the author is. I **recommend** that this letter be disclosed without redactions.

36632640 - This is a copy of 36468744 but with a date and a signature included. I **recommend** that this record be disclosed without redactions.

36874590 - This is the same letter as discussed at page 36468773 with the addition of a return address for the author (which has been redacted), the author's signature and two added c.c.'s. I **recommend** that this record be disclosed with the exception of the author's return address.

38998861 - This appears to be the same as document 29796893 and it should be dealt with accordingly.

40294318 - There is nothing in this record which, if disclosed, would amount to an unreasonable invasion of the privacy of the individuals named. I **recommend** that this record be disclosed without edits.

40294320 - With the exception of the personal email address of one of the parties to this email chain, I **recommend** that the document be disclosed without edits.

40294320a - This appears to be the same as record 36874590 and it should be dealt with accordingly.

45580290a - In this record, the name of the Chair of the IEMA has been redacted. I **recommend** that this record be disclosed without edits.

45602959a - I am satisfied that the list of potential candidates which has been redacted from this record has been properly withheld pursuant to section 23 of the Act.

45643094 - I am satisfied that the name redacted from this email was appropriately redacted pursuant to section 23 of the Act.

45675050 - With the exception of the author's phone number, I **recommend** that this record be disclosed without edits.

45675353 - In this series of emails, the names of current board members have been redacted. The context of these emails is upcoming appointments and whether or not these current board members are interested in being re-appointed for an additional term. I am not convinced that the disclosure of this information would amount to an unreasonable invasion of their privacy. I **recommend** that the names be disclosed.

45680242 - One of the emails in this record is the same as one discussed with respect to record 45675353 and it should, therefore, be treated accordingly.

45688277 - There is nothing in this email which, if disclosed, would amount to an unreasonable invasion of a third party's privacy. I **recommend** that the redacted name

be disclosed.

45688277a - This is a long email chain. It includes four large sections which have been redacted in full. These sections include a resume and other details about the individual's employment and educational history. This information has been properly redacted pursuant to section 23 of the Act. Most of the remaining redacted items are the name of an interested candidate for a board position with the IEMA - an individual who has no public facing interest in the board. I am satisfied that the name has been properly redacted throughout. In an email on the second page of the record which is dated December 07, 2015 4:33 pm, the name of a sitting board member has been redacted. This is public facing information and I **recommend** that that name be disclosed.

49669247 - The name redacted from this record is in relation to an individual appointed to the IEMA board. The fact that this person was appointed is publicly available information and I **recommend** that the record be disclosed without edits.

49669594 - The name redacted from this record is in relation to an individual appointed to the IEMA board. The fact that this person was appointed is publicly available information and I **recommend** that the record be disclosed without edits.

49851556 - Most of the redacted items in this chain refer to the successful candidate for the board position. I **recommend** that this name be disclosed. In an email which starts on the second page of the record and continues on the third page (February 10, 2016 11:21 AM) the name of an unsuccessful candidate has been redacted. I am satisfied that this was an appropriate redaction pursuant to section 23.

51372472 - There is nothing in this record which, if disclosed, would amount to an unreasonable invasion of any individual's privacy. I **recommend** it be disclosed in full.

51561070 - The name of a candidate for a board position has been redacted from this record. I am satisfied that it was properly redacted pursuant to section 23.

54494572 - The names redacted from this record are representatives of the federal government, in their capacities as federal employees. There is nothing in this record which, if disclosed, would amount to an unreasonable invasion of privacy. I **recommend** that this record be disclosed without edits.

54494780 - The author of this email has expressed opinions about individuals on the board. The disclosure of this information would amount to an unreasonable invasion of the privacy of those board members. I am satisfied that the names have been properly redacted.

54494780a - This is a record listing all of the candidates for a position on the board, and some "background" information and "other notes". The disclosure of this information would amount to an unreasonable invasion of the privacy of those individuals and I am satisfied that the information has been properly redacted.

54495061 - There is nothing in this record that would, if disclosed, result in an unreasonable invasion of any person's privacy. I **recommend** that it be disclosed in full.

54495061a - This record does not appear to have been disclosed at all. I **recommend** that this record be disclosed with the name of the "preferred choice" of candidate being redacted (third paragraph).

54495061b - There is nothing in this record that would, if disclosed, result in an unreasonable invasion of any person's privacy. I **recommend** that it be disclosed in full.

54495061c - With the exception of the names of the two candidates in the first paragraph of this letter, I **recommend** that this record be disclosed.

54495061d - With the exception of the names of the two candidates mentioned in the second paragraph of this page, I **recommend** that this record be disclosed.

54496089 - The name of an individual who has voiced an opinion about appointments to the IEMA board has been withheld. These are his personal opinions about steps taken, and therefore constitute his own personal information and I am satisfied that the disclosure would amount to an unreasonable invasion of his privacy.

54496703 - There is nothing in the redacted section of this record that would meet the criteria for an exception to disclosure pursuant to section 23. It may, however, qualify for an exception pursuant to section 15 and I will defer my recommendation with respect to this document to that discussion.

54497061 - I **recommend** that this record be disclosed without edits.

54497061a - I **recommend** that this record be disclosed without edits.

54497061b - I **recommend** that this record be disclosed without edits.

54497061c - I **recommend** that this record be disclosed except for the names of the four candidates to fill the board positions.

54497170 - Three names have been redacted from this record. All three names appear to be the names of employees with one or more of the GNWT's partners with respect to the appointment of board members to the IEMA and are referred to in their capacity as such. I **recommend** that these names be disclosed.

54497575 - Nothing has been redacted from this record.

54497575a - The only things redacted from this record are the names of the individuals to whom the letter is being copied. Each one of them is named in their capacity as representatives of certain named organizations. These names would be easily ascertainable through public sources. I am not convinced that the disclosure of the names would amount to an unreasonable invasion of the privacy of these individuals and I **recommend** that this record be disclosed without edits.

54497582 - This record is largely the same as record 54497170 and my **recommendation** with respect to that record applies here as well.

68416018 - Nothing has been redacted from this record.

68416018a - The name of a board member of the IEMA has been redacted from this record. The record refers to this individual in his capacity as a member of the board. Disclosure of the name would not amount to an unreasonable invasion of privacy and I **recommend** that it be disclosed.

68416020 - The names of individuals being considered for appointment to the board of EIMA have been redacted. Disclosure of these names would reveal additional employment/educational history and other personal information about each person and I am satisfied that these names have been properly redacted pursuant to section 23.

68617963 - Nothing has been redacted from this record.

68617963a - This appears to be a duplicate of record 54497575a and I recommend that it be treated accordingly.

68617965 - There is nothing in this record which, if disclosed, would amount to an unreasonable invasion of any person's privacy and I **recommend** that it be disclosed without edits.

68617965a - The names of three board members of the IEMA have been redacted. As their membership on the board was publicly available information, disclosure would not, in my opinion, result in an unreasonable invasion of privacy. I **recommend** that this record be disclosed in full.

68617965b - I **recommend** that this record be disclosed with the exception of the names of the candidates proposed to fill an empty board position(s).

68617965c - The name of a board member has been redacted from this letter. I **recommend** that the record be disclosed without edits.

68617971 - Nothing has been redacted from this record.

68617971a - The name of a board member has been redacted from this record. The board member is the addressee of the letter and it is written to him in his capacity as a member of the board. I **recommend** that this record be disclosed without edits.

68621075 - This email is directed to an employee of one of the GNWT's partners in relation to appointment of board members to the IEMA. It is written to that employee in the capacity as an employee. I **recommend** that this name be disclosed. The remaining items redacted from this page are the names of possible candidates for a board position and I agree that they have been properly withheld.

68624901 - This record appears to be a duplicate of 54497575a and should be dealt with accordingly.

68624909 - This record appears to be a duplicate of 54494780a and should be dealt with accordingly

68624916 - The only things redacted from this record are the names of the individuals to whom the letter is being copied. Each one of them is named in their capacity as representatives of certain named organizations. These names would be easily ascertainable through public sources. I am not convinced that the disclosure of the names would amount to an unreasonable invasion of the privacy of these individuals and I **recommend** that this record be disclosed without edits.

68624942 - I **recommend** that this record be disclosed with the exception of the names of the candidates proposed to fill an empty board position(s).

68624957 - I **recommend** that this record be disclosed with the exception of the names of the candidates proposed to fill empty board positions.

68624978 - All of the redacted material in this record is generally available as a matter of public record. I **recommend** that the record be disclosed without redactions.

68625710 - The names redacted from this record are the names of individual referred to in their capacity as representatives of one of the GNWT's partners in the appointment of board members for the IEMA. Disclosure of these names would not amount to an unreasonable invasion of their privacy and I **recommend** this record be disclosed without edits.

68625726 - This appears to be a duplicate of document 54497170 and should be treated accordingly.

68625726a - One name has been redacted from an email dated October 21, 2014, 4:37 pm. It is a first name only and it is unclear what that person's relationship is to the department or its partners. Because I am unable to ascertain this, erring on the side of caution, I agree that it should be withheld. Two other names have been redacted from an email dated October 21, 2014 4:12 PM. This email has been previously discussed and should be treated accordingly (see record 54497170)

68625789 - The name and contact information for a potential board member has been redacted. I am satisfied that the disclosure of this information would result in an unreasonable invasion of the individual's privacy and has been properly redacted.

68625956 - With the exception of the names of the potential candidates for appointment to the board, I **recommend** the disclosure of this record.

68625958 - With the exception of the new board member's address, I **recommend** that this record be disclosed.

68625963 - This record is a letter style resume, outlining an individual's educational and employment history and interests. It has been properly withheld pursuant to section 23

68625968 - The names of prospective board members redacted from this record have been appropriately redacted pursuant to section 23.

68625968a - This record is a listing of all possible candidates for positions with various boards in the NWT. Some of the personal information has been properly withheld pursuant to section 23.

68625980 - The name of a potential candidate for a position on the IEMA board has been appropriately redacted from this record.

68625980a - This record is a letter style resume, outlining an individual's educational and employment history and interests. It has been properly withheld pursuant to section 23.

68625986 - The business email addresses of employees of a number of organizations have been redacted from this email. I **recommend** that this information be disclosed.

68625986a - I **recommend** that this record be disclosed with the exception of the names of the candidates for appointment to the IEMA board.

68625990 - With the exception of the first email on the page, this records contains the same email string as discussed with respect to record 31163685a. I recommend that this record be treated accordingly, including continuing to withhold the name of the candidate discussed in the new email.

68625990a - This record is a duplicate of record 45688277as discussed above and should be treated accordingly.

68626594 - This record has been previously discussed and should be treated accordingly.

68626596 - This record has been previously discussed and should be treated accordingly.

68626758 - This record appears to have been withheld completely. While there is personal information in this email that, if disclosed, would amount to an unreasonable invasion of an individual's privacy, some of the record can be disclosed. I **recommend** that this record be disclosed with the exception of the candidate's name (it appears a number of times) and email address (which also appears several times).

68626758a - This is an individual's resume. It has been appropriately withheld pursuant to section 23.

6. Missing Records

The Applicant alleged that ENR did not provide all the relevant responsive records. His reasoning for this was that his request was for records beginning on January 1, 2014, however the earliest records dated from October 20, 2016, just over two years later. The Applicant found an email in the responsive records dated October 24, 2016 that references a letter that was sent to the Deputy Minister (DM) on September 23, 2014. This letter was not a part of the package provided by ENR. Furthermore, the Applicant noted that there was reference to a number of meetings with a corporation in 2014 and 2016. Again, he says, there were no records in the responsive package referring to these meetings. Given these missing items, the Applicant questioned whether the relevant records were searched back to the request date of 2014 and whether a proper search of the DM's office had taken place.

In response, ENR outlined the steps it took to identify the responsive records:

- Corporate Services staff identified staff within ENR that would be involved in the procedural management of appointments to the Board of Directors of the Independent Environmental Monitoring Agency.
- A discussion was held with the staff member responsible for ENR board appointments, in regards to procedural aspects of the appointment process, and which staff members would have taken part in said process.
- All staff identified were emailed, requesting that they conduct a search of all correspondence, both physical and electronic (including archival .PST Outlook files), and to identify all records that pertained to the request to Corporate Services staff.

- Identified individuals were also asked to identify any other staff members that may hold records relating to the request.
- Identified staff were provided with a personal DIMMS folder within the ATIPP request folder to put all records identified as within scope.
- Two staff members requested guidance from Corporate Services staff in regards to their searches (including how to open .PST files in Outlook), and they were aided in their searches.
- In conjunction with individual searches, the Informatics Shared Services staff completed a deep search of the DIMMS system and provided all results into a folder for Corporate Services review, a Documented Table of all results plus staff members' resulting searches was generated.

ENR's explanation for items identified by the Applicant missing from the package of responsive records was as follows:

- The earliest record is from January 2014. The earliest found records date from 2006. There is a cluster of records in the search results that begin in October/November 2014; records in the search results run throughout the scoped period to 2017.
- Corporate Services staff did not explicitly search DM records outside of the general DIMMS search, as the program staff that provides support to IEMA, and the staff member who provides board appointment support, identified that the nomination process starts as a program area-based discussion and then moves on for the Minister's final decision. DM records kept in DIMMS would have been included in the Informatics Shared Services search, however no results were identified.
- Records relating to the points raised by the Applicant were not found in the resulting searches.

- Further to the Applicant's raised issues, Corporate Services staff directed identified staff members to search all staff records of meetings; however the only resulting meeting notes had already been provided to the Applicant.

Firstly, contrary to the Applicant's statement that there were no records prior to October, 2016, there are in fact a fair number of records identified and disclosed dating from October 2014 which continue to October 2016 and beyond. I find, therefore, that the Applicant's allegations with respect to a failure to identify records prior to October, 2016 are not well founded.

With respect to the steps taken by the public body to identify the responsive records, although the above noted steps are all appropriate, I question why Informatics Shared Services staff did not complete a "deep search" of the identified individuals' email or .PST files. This was done for the DIMMS system, which is the GNWT's electronic file system, but it does not appear that they did this for emails. Granted, I have only a very rudimentary understanding of how DIMMS works and there may be a good reason for this. I do think that the failure to search the DM's files is an obvious gap in terms of being able to confirm that all responsive records have been identified. ENR said that any responsive records from the DM's records would have been captured in the Informatics Shared services search. Again, my lack of understanding with respect to how DIMMS works may impede my understanding, however it does seem strange that all other employees identified conducted their own searches except for the DM. The process should have been consistent. Furthermore, the Informatics Shared services search would not have captured the DM's paper files. I **recommend** that the Department conduct additional searches which address these apparent gaps, to determine whether there are any additional responsive records, particularly for the period from January, 2014 to October 2016, paper records (including notebooks) and the DM's records, including paper records.

CONCLUSION

As noted above, aside from the issue of the missing records, ENR's submissions were fully insufficient to comply with their section 9(1)(c) obligations to set out the reasons for the refusal or to meet the onus of establishing that the Applicant had no right to access the records/partial records withheld, as set out in section 33. In future, I expect to see ENR provide complete submissions on the rationales for their redactions, including referencing the appropriate subsection they are relying upon.

My specific recommendations are outlined above.

Elaine Keenan Bengts
Information and Privacy Commissioner