



OIPC File: 21-054-4
21-222-4

GNWT: ITI-20-21-G-060
ITI-21-22-G-085

May 26, 2023

VIA Electronic mail: Kevin_OReilly@ntassembly.ca

Kevin O'Reilly
PO BOX 1320
Yellowknife, NT
X1A 2L9

Dear Sir,

Re: Request for Review – redactions made to records relating to ITI – working group minutes

Enclosed please find my review report on OIPC Files 21-054-4 and 21-222-4, setting out my findings and disposition with respect to your request for a review of Industry, Tourism & Investment (ITI) redactions made to records resulting from your ATIPP requests. The report may also be found in the national CanLII database under CanLII citation 2023 NTIPC 26.

Section 36 of the Act provides the public body with twenty (20) business days to decide whether to comply with the order or to file a Notice of Appeal with the Supreme Court of the Northwest Territories. In the event of an appeal, section 37(2) requires you to be given a written notice.

I trust you will find the foregoing in order.
Yours truly

Andrew E. Fox
Information and Privacy Commissioner
/af

Enl. 2: May 26, 2023 - Letter to ITI
Review Report - CanLII Citation 2023 NTIPC 26



OIPC FILE COPY

Attachment #1

OIPC File: 21-054-4
21-222-4

GNWT: ITI-20-21-G-060
ITI-21-22-G-085

May 26, 2023

VIA Electronic mail:

Industry, Tourism & Investment (ITI)
PO BOX 1320
Yellowknife, NT
X1A 2L9

Attention: Caroline Wawzonek, Minister of ITI

Dear Madam,

Re: Review Report – redaction to records responding to ATIPP requests by ITI

Enclosed please find my written report on OIPC files 21-054-4 and 21-222-4. This review addresses the redactions made by Industry, Tourism & Investment (ITI) to records in response to ATIPP requests. The report may also be found in the national CanLII database under CanLII citation 2023 NTIPC 26.

Pursuant to section 36 of the *Access to Information and Protection of Privacy Act*, and subject to section 37(3) in the instance of an appeal, you are required to comply with any order made in the report within **twenty (20) business days** of receiving this report.

In the instance that a public body wishes to appeal an order, section 37(2) allows that a notice of appeal may be filed with the Supreme Court of the Northwest Territories within 20 business days of the receipt of the report and requires a copy of the notice of appeal to be served on the applicant and any other person given a copy of the request for review under section 30. The Applicant's address, for the purpose of providing notice is:

Kevin O'Reilly
MLA – NWT Legislative Assembly
PO BOX 1320
Yellowknife, NT
X1A 2L9

We trust you will find the foregoing in order.

Yours truly

A handwritten signature in black ink, appearing to read 'A. Fox', written in a cursive style.

Andrew E. Fox
Information and Privacy Commissioner
/af

Enl. 1: OIPC Review Report – Citation 2023 NTIPC 26

- C. Danielle Webb – APO
- Matthew Fournier - ITI
- Kevin O'Reilly - Applicant

NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER
 Review Report on OIPC File 21-054-4 & 21-222-4
 Citation: 2023 NTIPC 26

May 26, 2023

SUMMARY

During 2020-2021, the Department of Industry, Tourism and Investment participated in a series of meetings with the Northwest Territories and Nunavut Chamber of Mines to discuss the negative effects of the COVID-19 pandemic on the mining industry. Minutes of the meetings were kept.

An individual submitted an access to information request for the meeting minutes. The Department had copies of the minutes, and provided the response, but with significant redactions. The redactions were justified on the basis of protection from unreasonable invasion of the personal privacy of third parties, and on the exemption for advice developed by or for a public body or a member of the Executive Council.

The individual submitted the same access request 6 months later and received more minutes, but again with significant redactions. The individual applied for review. I find that several of the redactions of third-party personal information are not justified, and many of the redactions of purported “advice” are also not justified.

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BACKGROUND

[1] On March 8, 2021, the Applicant submitted a request to the Department of Industry, Tourism, and Investment for access to information seeking the following:

Notes and summaries from the bi-weekly working group meetings held with the Department of Industry, Tourism, and Investment officials (including the Deputy Minister) and the NWT and Nunavut Chamber of Mines from March 1, 2020, to present.

[2] The Department provided its response on April 7, 2021. The response contained 100 pages of records with various redactions, the Applicant now asks me to review. These records are minutes of the meetings (the Minutes) of the “GNWT ITI – Chamber of Mines Working Group to Advance Minerals Industry Recovery from COVID” (the Working Group) together with two attachments: a 6-page briefing note and an 18-page Action Plan. The Applicant is of the view that these meetings between Department officials and representatives from the NWT and Nunavut Chamber of Mines were for the public interest and the Minutes should be fully public. The Applicant voiced concern about regulatory capture, noting that this Department has some regulatory oversight of the mining sector.

- [3] On September 16, 2021, the Applicant submitted another access to information request. The request used the same wording as the March 8, 2021, request; therefore, it applied to records over a longer time period. This review will address both responses.
- [4] The Department submits that some portions of the meeting Minutes should be redacted. In some cases, the redactions are said to be made to prevent an unreasonable invasion of personal privacy by protecting the personal information of third parties. This information includes the names of the individuals who attended the meetings and their associations with corporate members of the NWT and Nunavut Chamber of Mines, and also includes the names of individuals not present but who were mentioned in the meeting. Other portions of the Minutes were redacted pursuant to an exercise of discretion under subsection 14(1)(a) of the *Access to Information and Protection of Privacy Act* (ATIPPA).
- [5] On July 30, 2021, the *Access to Information and Protection of Privacy Act* amendments came into force. In the amendments, subsection 14(1)(b) was repealed. The Department relied on this subsection to justify a number of redactions in the response to the March 8, 2021, access request. The response to the September 16, 2021, request did not rely on subsection 14(1)(b), but the Department maintained many of the redactions, this time relying on subsection 14(1)(a).

What was the Working Group and how did it operate?

- [6] The Working Group was made up of senior officials of the Department (typically including the Deputy Minister, Assistant Deputy Minister, and other officials at the Director or Manager level), the President and Executive Director of the NWT and Nunavut Chamber of Mines (COM), and other individuals representing a few of the corporate members of the COM.
- [7] Minutes of the Working Group Meetings were circulated to the various members of the Working Group and reviewed at subsequent meetings. The individuals attending the meetings were frequently the same.
- [8] Department officials are bound by the *Access to Information and Protection of Privacy Act*. Individuals who are employed by, members of, or otherwise associated with the COM are members of the public and are not bound by the Act.
- [9] The COM members did not promise to keep Working Group discussions and information confidential, and the Department did not impose any such condition. There was no contractual or other legal relationship between the Department and the COM members that imposed a duty of confidentiality or otherwise.

[10] The first meeting date on the records disclosed by the Department is June 5, 2020. The Working Group developed a ‘Project Charter’ document, which bears a date of September 29, 2020.¹ The following are excerpts from the Project Charter that help describe the Working Group:

Mission/Goal:

- The Working Group will develop an action plan for the NWT to protect and ensure a stronger mineral resource development industry exists in the NWT post-COVID for the benefit of northerners, Canada, and investors.
- Further, it will advance similar actions where they make sense in Nunavut and Yukon so as to develop a coordinated Pan Territorial Approach.
- And further, it will seek support from the Federal Government for actions to strengthen resource development in the NWT, and Pan-Territorially.

.....

How the Working Group will work:

- Weekly meetings initially to prioritize shorter term goals moving to bi-weekly to monthly meetings to advance medium- and longer-term goals.
- The Working Group will report and recommend [sic] to the Business Advisory Council through its representative.
- The Working Group will report and recommend actions to the Pan Territorial (Federal/Territorial/Industry) working group.

[11] There is a sense that in the midst of the pandemic the Department was looking for ideas to help the mining industry recover from the negative impacts of the pandemic. The Chamber of Mines and its members were apparently inclined to assist. These companies not only have an economic interest in the mining industry but also potentially had expertise the Department sought to access.

[12] In its dealing with the COM members, the government has to be mindful that the COM and its members are not government – they are members of the public and entities regulated by the Department. The Department described the Chamber of Mines as an “interest group”:

the Chamber of Mines is differentiated from the general public because the Chamber is an interest group dedicated to supporting issues relevant to the mineral resources industry. Therefore, GNWT may discuss draft policies that will affect the mineral resources sector so

¹ Found at https://www.ntassembly.ca/sites/assembly/files/td_430-192.pdf . This document was tabled in the Legislative Assembly on June 4, 2021.

that industry can prepare for these changes prior to the general public becoming aware of these policies.²

- [13] In its mission statement, the Chamber of Mines describes itself as an advocacy group:

Mission

To provide leadership on, and advocate for, responsible and sustainable mineral exploration and development in the NWT and Nunavut

Key elements of the Mission:

Leadership and advocacy involves [*sic*] taking a leadership role in representing, and speaking on behalf of, the Membership of the Chamber on issues of importance.

Information Sharing

- [14] So far as I am aware, there were no specific or agreed upon rules applied to information sharing among members of the Working Group. Meeting Minutes were taken and any advice or information that was shared by or with the Department, whether orally or in writing, was also shared with the other members of the public, i.e., other individuals representing members of the Chamber of Mines.

- [15] As a rule, a public body does not share confidential information with members of the public unless and until the public body is ready to make information available to the general public. Alternatively, a public body might disclose information in a context that maintains the confidential aspect of the information. In my view, confidentiality is lost when information is released without restriction to members of the public. Once information has been made available to members of the public – such as the sharing of information with the Working Group followed by sharing meeting Minutes with members of the Working Group -- there are few cogent reasons why such information should not be made available to other members of the public.

- [16] As discussed further below, the Department relies on subsection 14(1)(a) to redact portions of the minutes. Subsection 14(1)(a) states:

14. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal

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

- [17] The Department submits that the discretion under section 14(1)(a) to redact portions of the minutes was exercised “to protect the candidness of the advisory process where

² From the Department’s submissions dated April 28, 2022.

advice and recommendations may lead to an action being taken or a decision made.” The belief is that if people know they will not be publicly accountable for what they say they are more likely to state their true opinions. Without a ‘safe space’ to speak freely, the concern is that there could be a chilling effect on the sharing of information and opinion in the future which could lead to a frustration of the ability of government to function.

- [18] It is not obvious that members of the Working Group reasonably believed that the Working Group’s discussions were confidential or that this would have affected any advice or recommendations to the Working Group or the Department. In the absence of any express agreements, promises, or rules regarding confidentiality, the proposition that the COM members participated on the basis that the Working Group was a confidential forum seems to lack foundation.
- [19] In any event, members of the Working Group communicated information to each other during meetings and then later when the minutes were circulated for review. Representatives of different corporate actors in the mining industry were present during these meetings and were privy to the Minutes. There were no conditions governing information shared between members of the Working Group.³
- [20] The Department says it exercised its discretion to refuse to disclose based on a belief that disclosure would have a chilling effect on the candor of future advice the Department might seek in the future. The belief in this chilling effect continues: the Terms of Reference for the Engagement Group (a successor of the Working Group) describe the current approach to meeting notes, which are now published on the COM website:
- The meeting notes being published now are a high-level summary and do not include the detailed discussion of previous notes. The new notes largely reflect the topics and issues raised in discussion and captures only concrete actions or decisions for action by the WG as opposed to advice that may or may not ultimately be acted upon. This allows WG members to put forward policy options without worrying about the public reaction to an idea. This would ultimately be detrimental to discussions as some members may feel pressured to withhold their true feelings and thoughts about an issue. The notes now capture those policy options that ultimately turn into decisions for action, so the general public is left with the meaningful actions of the group as opposed to a word-by-word transcript of meetings, which is what the previous minutes tried to provide. *[emphasis added]*
- [21] The Department says that the possibility of public knowledge and reaction to details of policy discussions could discourage Working Group members from communicating their

³ Except in one instance, discussed below at paragraph [98]. This was an instance of the Department sharing information with COM members, not advice being offered to the Department.

true thoughts about mining policy issues. The Department provides no evidence or argument regarding the purported 'chilling effect' of full disclosure, it merely asserts this as the basis for the decision. Past decisions⁴ have noted that simply asserting the need to protect the confidentiality of advice in order to ensure the provision of frank and candid advice in the future is, without more, only speculation. Having decided to participate in the Working Group and collect the Minutes of the Working Group meetings, it seems incongruous for the Department to assert a need for confidentiality now without having provided a confidential forum in the first instance.

- [22] However, it is hard to see why any Working Group members would reasonably have thought Working Group meetings were confidential. The meetings involved discussions between members of the public (i.e., COM members representing different private entities) and government officials in the absence of any agreements or imposed conditions regarding confidentiality. The Minutes were treated in the same manner.
- [23] The Department exercised its discretion to refuse to disclose some of the records on the basis of a purported belief in the need for confidentiality. Whatever the merits of this belief, I do not have the jurisdiction to simply disagree and substitute my own view of a proper exercise of discretion. If the exercise of discretion was unlawful, the normal remedy would be to remit the matter to the head of the public body for a re-determination of the exercise of discretion. The issue here is the lack of sufficient reasons. This finds support in subsection 9(1)(c)(i) of the Act, which requires the public body to provide reasons for refusing to disclose part or all of a record.⁵
- [24] In my view, the reasons must be sufficient to understand why disclosure of these records would inhibit the future free exchange of opinion and ideas among the Working Group members, or those in similar circumstances.
- [25] In the following review of the redactions based on section 14(1)(a) I will determine first whether the express conditions of the subsection are satisfied. If the conditions are not satisfied, the redaction cannot stand. If the conditions are satisfied, then a refusal to disclose might possibly be justified on the basis of section 14(1)(a). In that case, I direct the Department to reconsider its exercise of discretion and, if it decides to refuse to disclose, to provide proper reasons for the refusal as required by section 9(1)(c)(i) of the Act. Those reasons should explain the decision to refuse to disclose and should expressly

⁴ See Applicant (Re), 2020 NTIPC 12 (CanLII), <https://canlii.ca/t/ib2mq>

⁵ 9. (1) Subject to subsection (2), the applicant must be told, in a response under subsection 8(1),

...

(c) if access to the record or to part of the record is refused

(i) the reasons for the refusal and the provision of this Act on which the refusal is based,

...

address the fact that the records have already been disclosed without redaction to other members of the public, i.e., the Working Group.

Third parties' personal information

[26] Sometime after commencing this review, I learned that the Department had not consulted third parties regarding the possible disclosure of their personal information. After consulting with the Access and Privacy Office, I delayed my review to allow the Department time to conduct the third-party consultation that should have occurred prior to issuing the Department's response. I will discuss this consultation process in more detail below as there have been different approaches taken to third-party consultation in the past and some guidance on this issue may be useful going forward.

DISCUSSION

[27] The following issues are considered herein:

- i. Do I have the jurisdiction to conduct this review?
- ii. Does the disclosure of personal information in the records constitute an unreasonable invasion of personal privacy? If so, are the redactions imposed by the Department reasonable?
- iii. Are the redactions made pursuant to section 14(1)(a) and (b) justified in each instance?

Jurisdiction:

[28] The Applicant requested the review within 30 calendar days⁶ of the date of receipt of the Department's response. The Applicant seeks a review of the redactions made to the records disclosed in the Department's response to the access to information request.

[29] Section 28(1) of the ATIPPA⁷ provides my jurisdiction to conduct this review.

[30] In exercising my jurisdiction, I am mindful of the purposes of the *Access to Information and Protection of Privacy Act* as set out in the legislation:

⁶ Prior to July 31, 2021, the time period to seek a review was 30 days. The time period now is 20 business days.

⁷ 28. (1) A person who makes a request to the head of a public body for access to a record or for correction of personal information may ask the Information and Privacy Commissioner to review any decision, act or failure to act of the head that relates to that request.

1. The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

(a) giving the public a right of access to records held by public bodies;

....

(c) specifying limited exceptions to the rights of access;

....

[31] Accountability and protection of personal privacy are the purposes of the legislation. The public's right of access created by section 5 of the Act helps create and maintain accountability of public bodies. Division B of the Act creates exceptions to the right of access, protecting of individuals' personal privacy or protecting the confidentiality of certain kinds of information that the legislature has determined to be necessary to support a well-functioning public government. Where there are discretionary exceptions to the right of access, such as in subsection 14(1)(a) of the Act, the public body must balance these competing purposes. The general rule is to disclose unless an exception applies.

[32] To assist in the conduct of this review, the Department provided me with two copies of the records: one redacted as they were provided to the applicant and one in their original unredacted form. It also provided a chart identifying the specific redactions, the sections of the ATIPPA relied on, and a short explanation for each redaction. In addition, the Department provided written responses to questions I posed during the review. I have relied on these submissions.

Does the disclosure of personal information constitute an unreasonable invasion of personal privacy?

[33] The Minutes each begin with a record of who attended the meeting. The list of attendees is not identical for each meeting, but there are two categories of attendees: officials from the Department of Industry, Tourism and Investment, and persons from the NWT and Nunavut Chamber of Mines (COM). The latter category includes both individuals directly associated with the COM and individuals associated with corporate entities that are, presumably, members of the COM. The names of Department officials are not redacted. The non-government attendees' names and their associated corporate entities are all redacted. Names of people referred to in the minutes but not in attendance are also redacted.

Do the Minutes contain personal information?

[34] The definition of 'personal information' in the ATIPPA includes information such as a person's name and the corporation the person is representing:

2. "personal information" means information about an identifiable individual, including

(a) the individual's name, home or business address or home or business telephone number,

...

(g) information about the individual's educational, financial, criminal or employment history,

...

(i) the individual's personal opinions, except where they are about someone else;

[35] The Minutes do not specify whether individuals were employed by the respective corporate entities or if they were appearing in some representative capacity. Some Minutes contain statements attributed to the person named or they contain references to people by name.

[36] An individual's name is personal information. Corporations are not individuals and they do not have personal information. Even if the names of the individuals were properly redacted – which I do not agree with, as explained below – there is no basis to redact the names of corporations as personal information.

[37] Of course, corporations can possess business interests, and business interests have some protection under section 24 of the ATIPPA. Section 24 is not cited by the Department as a basis for redaction and it is far from obvious how disclosing that a corporation's representative attended a meeting of this sort – ostensibly a working group engaged in helping the mining sector recover from the effects of the COVID-19 pandemic – could negatively affect a corporation's business interests. Since the Department did not argue that point, I will give it no further consideration.

Does the applicant have a right of access to the records containing personal information?

[38] The Minutes contain personal information of several individuals. These records are within the scope of the applicant's access to information request. The applicant's right of access to such records is set out in section 5(1) of the Act, subject to limits set out in subsections 5(2) and (3):

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.

(2) The right of access to a record does not extend to information excepted from disclosure under Division B of this Part, but where that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.

(3) The right of access to a record is subject to the payment of any applicable fee.

[39] Section 23 is one of the exceptions to disclosure set out in Division B, Part 1. It protects third parties from unreasonable invasion of personal privacy.⁸

[40] Section 23 is a lengthy provision. In summary, it provides as follows:

- i. Section 23(1) requires a public body to refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of the third party's personal privacy.

⁸ 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.

(2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where

...

(d) the personal information relates to employment, occupational or educational history;

...

(h) the personal information consists of the third party's name where

(i) it appears with other personal information about the third party, or

(ii) the disclosure of the name itself would reveal personal information about the third party;

(3) In determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of the Northwest Territories or a public body to public scrutiny;

(b) the disclosure is likely to promote public health and safety or to promote the protection of the environment;

(c) the personal information is relevant to a fair determination of the applicant's rights;

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people;

(e) the third party will be exposed unfairly to financial or other harm;

(f) the personal information has been supplied in confidence;

(g) the personal information is likely to be inaccurate or unreliable;

(g.1) the information is about an individual who has been deceased for 25 years or more and, if so, whether the length of time the individual has been deceased indicates the disclosure is not an unreasonable invasion of the deceased individual's privacy; and

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where

(a) the third party has, in the prescribed manner, consented to or requested the disclosure;

...

- ii. Section 23(2) sets out several different types of personal information the disclosure of which is presumed to be an unreasonable invasion of a third party's personal privacy. If a presumption arises, it may be rebutted where the relevant circumstances outweigh the presumption, or where one or more of the conditions in subsection 23(4) arise.
- iii. Section 23(3) instructs the public body to consider all relevant circumstances when determining if disclosure of third-party personal information constitutes an unreasonable invasion of personal privacy. Logically, consideration of all relevant circumstances must precede the determination of whether disclosure would constitute an unreasonable invasion of privacy. Section 23(3) provides a non-exhaustive list of types of relevant circumstances.
- iv. Section 23(4) provides a list of circumstances or conditions where the disclosure of personal information is *not* an unreasonable invasion of a third party's personal privacy. It follows that section 23(4) must be considered when determining whether an unreasonable invasion of personal privacy would occur if third party personal information is disclosed.

If the third-party personal information is disclosed, would this be an unreasonable invasion of personal privacy?

- [41] The Department submits that the relevant exceptions for the third-party personal information are found in subsections 23(2)(d) and 23(2)(h)(i) of the Act.
- [42] The information redacted pursuant to section 23(2)(d) is third party personal information. While the individuals' employment history is not always clear, it is clear that these individuals are employed or associated in some representative capacity with named corporate entities. This is sufficient to raise the presumption under section 23(2)(d).
- [43] The names redacted pursuant to section 23(2)(h)(i) appear with unredacted references to things said or done. The next question is whether a reference to something the person said or did is "other personal information."
- [44] The definition of personal information, as set out above,⁹ means information about an identifiable individual, including the individual's opinions. The list of types of information included in the definition is non-exhaustive. While information about what a person has said or done in the past is not a specifically enumerated category in the definition, it is information about an identifiable individual. For the purpose of this

⁹ See paragraph [34]

review, I accept that the information redacted under section 23(2)(h)(i) is third party personal information, which therefore raises the presumption under section 23(2). However, the analysis does not end with the presumption.

Consulting with third parties:

[45] As mentioned above, the Department did not consult with the third parties before refusing to disclose the third-party personal information pursuant to section 23(1).

[46] In my view, this was a mistake. The Department failed to follow the third-party consultation process set out in section 26. This process is mandatory and applies whenever the head of the public body is considering giving access to a record:

26. (1) Where the head of a public body is considering giving access to a record that may contain information

(a) the disclosure of which would be an unreasonable invasion of a third party's personal privacy under section 23, or

(b) that affects the interests of a third party under section 24,

the head **shall**, where reasonably possible, give written notice without delay to the third party in accordance with subsection (2). [emphasis added]

[47] A public body must take the required steps when considering whether to give access to a record. A public body will have to consider whether to give access to a record if the record is responsive to the access request. Under section 5(1), access is a right and disclosure is the rule unless an exception applies.

[48] Subsection 23(3) states that the head of the public body "must consider all the relevant circumstances" when determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy. In my view, "all relevant circumstances" requires the public body to consider:

- i. whether the circumstances give rise to a presumption of unreasonable invasion of personal privacy under subsection 23(2);
- ii. whether there are any relevant circumstances such as those listed in subsection 23(3); and
- iii. whether any of the circumstances listed in section 23(4) arise.

[49] If a presumption of unreasonable invasion of personal privacy arises under subsections 23(2)(d) or 23(2)(h)(i) the public body must still go on to consider subsections 23(3) and 23(4). Subsection 23(4)(a) addresses the effect of consent: if the third-party consents to the disclosure then there is no unreasonable invasion of personal privacy and

therefore no basis to refuse disclosure under section 23(1). Determining whether the third-party consents may in fact determine the issue of whether a disclosure would be an unreasonable invasion of personal privacy.

- [50] Section 26 applies where the public body is considering giving access to a record that may contain information the disclosure of which would be an unreasonable invasion of a third party's personal privacy. If the record does not contain information that may cause an unreasonable invasion of personal privacy if disclosed, then section 26 does not apply, and third-party consultation is not required.
- [51] If the head of the public body forms the opinion that it is not reasonably possible to consult with a third party, then the head may dispense with giving notice under section 26(3). The Department does not argue that it was not reasonably possible to give notice to third parties, so this issue does not require further discussion.
- [52] Unless the head of the public body is of the opinion that consultation is not reasonably possible, the public body should not determine whether disclosure would be an unreasonable invasion of a third party's personal privacy without consulting the third party: subsection 26(1) uses the imperative "shall" and the issue, after all, is the privacy interest of the third party and the consent of the third party, if given, is dispositive of the issue unreasonable invasion of personal privacy. If the third party does not consent, the third party has the opportunity to make submissions to the public body regarding the decision of whether to disclose the third party's personal information. Alerting the third party to this opportunity to give consent or to make submissions is the purpose served by providing notice to the third party under section 26(1).
- [53] The public body must protect the public's right of access created by section 5 and also protect third parties from *unreasonable* invasions of personal privacy as set out in section 23. Properly discharging these two responsibilities entails following the consultation procedure set out in section 26.

Consulting with members of the COM

- [54] After determining that third-party consultation had not occurred, I discussed the issue with the Access and Privacy Office. The Department agreed to conduct the third-party consultation and later reported that 5 of 11 third parties had consented to the disclosure. The other 6 had not responded. The Department attempted to consult with the members of the COM.

- [55] For the 6 non-responsive individuals, I obtained contact information in order to provide notice of this review and to determine whether the individuals had any submissions to make. Five people responded; four consented to disclosure and one objected.
- [56] The person who did not consent stated that the personal information – name, employer, and presence at some of the meetings – was valuable and sensitive information and therefore the person did not consent to disclosure. I inquired about the nature of the value or sensitivity of this personal information and the person did not provide anything further, nor did the person identify any sort of harm that might come from the disclosure of this information.
- [57] To some degree all personal information is valuable and sensitive, particularly to the individual it concerns. However, when considering the exemption in subsection 23(1) the issue is whether disclosure would be an unreasonable invasion of personal privacy. It is not enough to state a bare objection on the basis that a record contains personal information: that is not the threshold. Some further information or explanation is necessary to demonstrate the degree to which the personal information is valuable or sensitive, or what sort of harm might be anticipated to occur if the information is disclosed. In my view, this third party's submission amounts to no more than evidence of the absence of consent to disclose.
- [58] In all, two members of the COM did not consent to the disclosure of their personal information.

Consulting with other third parties

- [59] There were other third parties named in the Minutes who were not listed as members of the COM. The Department says it did not consult with these individuals as it did not have the necessary contact information.
- [60] In conducting a review, I am obliged to give notice to third parties. I was able to obtain contact information for three individuals and one of these responded, consenting to disclosure. For the remaining individuals, there is no consent to disclosure.

Determining whether disclosure of third-party information would be an unreasonable invasion of personal privacy:

Regarding those third parties who consented: Subsection 23(4)(a)

[61] Subsection 23(4)(a) states that a disclosure of a third party's personal information is not an unreasonable invasion of privacy if the third party has consented to the disclosure. All but one of the third parties who responded during consultation consented to disclosure of their personal information. There will be no redaction of personal information for the individuals who consented to disclosure.

Regarding the two members of the COM who did not consent to disclosure:

[62] Of the circumstances listed in section 23(3), subsections (a), (e) and (f) are relevant. As explained below, consideration of these subsections leads me to conclude that the presumption arising from subsection 23(2)(d) or 23(2)(h)(i) is rebutted.

Subsection 23(3)(a)

[63] Subsection 23(3)(a) directs the public body to consider whether the disclosure is desirable for the purpose of subjecting the activities of a public body to public scrutiny. The Applicant¹⁰ states the concern thus: "the fundamental issue is one of privileged and secret access to senior government officials that has led to regulatory capture of the Department. What started out as a forum for economic recovery has blossomed into a full-blown lobbying campaign with no bounds behind closed doors. I believe it is in the public interest that there be full public disclosure of what is transpiring in these meetings."

[64] The Applicant's concern is about privileged access and regulatory capture. I understand that "regulatory capture" refers to a theory regarding the phenomenon of a regulatory agency vested with the oversight of an industry being unduly influenced or directed by operators in that industry. The Department of Industry, Tourism and Investment has a broad mandate, including responsibility for the Northwest Territories Geological Survey, Mineral and Petroleum Resources, Diamonds (Royalties and Financial Analysis), the Mining Recorder's Office, as well as responsibility for other aspects of industry and investment. With senior Department officials, i.e., the Deputy Minister and the Assistant Deputy Minister for Mineral and Petroleum Resources, meeting on a regular basis with industry representatives to discuss future planning, the concern about possible regulatory capture is not entirely unfounded.

¹⁰ Pursuant to section 33(2) of the *ATIPPA*, in this situation the Applicant bears the onus to establish that the disclosure of the information would not be contrary to this Act or the regulations.

Subsection 23(3)(e)

- [65] Subsection 23(3)(e) addresses the possibility that disclosure of personal information could unfairly expose a third party to financial or other harm.
- [66] I asked if the Department had promised the COM members of the Working Group to keep confidential any information those members might provide. The Department responded by saying that GNWT officials adhere to the requirements of the *Access to Information and Protection of Privacy Act* and that officials are “specifically sensitive to section 24 concerning third party business interests when dealing with industry representatives from the Chambers of Mines.”
- [67] The Department says it is mindful of third-party business interests when dealing with industry representatives, yet the Department did not consult those industry representatives when preparing the response to the access to information request despite the requirement under section 26 of the Act for the head of the public body to consult with the third party if disclosure may contain information that affects third party interests under section 24.
- [68] Under section 23(3)(e), the issue is unfair exposure to financial or other harms to a third party. Assessing the applicability of this section requires information about the type of harm the third party may be exposed to, whether it would be reasonable to expect such harm if the personal information is disclosed, and how (or why) such exposure to harm could be said to be ‘unfair’.
- [69] First, there were no promises of confidentiality by the Department. The minutes of the Working Group meetings were circulated to the various members of the Working Group after the meetings were concluded and the Department says there were no restrictions placed on the Working Group members’ regarding the content of the meetings or these Minutes. The Department also says there were no promises of confidentiality sought or obtained from the members of the Working Group when holding meetings or circulating minutes. Thus, the Department was already in the practice of distributing these records to some members of the public without any controls.
- [70] With no restrictions on the use and dissemination of these records among the Working Group members, disclosure beyond the Working Group of personal information was already possible. All but one of the members of the Working Group who responded to the consultation efforts consented to disclosure and, where the individual withheld consent, there was no indication of an expectation of harm. There does not appear to be any real concern about the possibility of unfair exposure to financial or other harm to the third-party individuals named in the Minutes.

Subsection 23(3)(f)

- [71] Subsection 23(3)(f) is concerned with a third party's personal information being supplied in confidence. There were no promises or agreements by members of the Working Group or by the Department to keep information confidential. Further, the practice of circulating the Minutes entailed circulating the Working Group members' personal information to the Department and all the non-government members without restrictions and without redactions or other protection. In my view, there is no evidence that the COM members of the Working Group supplied their personal information in confidence.
- [72] Having regard to all the circumstances, I am of the view that disclosure of the personal information of the two COM members who did not consent to the disclosure of their personal information would not be an unreasonable invasion of personal privacy and this information should therefore be disclosed.

For those third parties not listed as members of the COM:

- [73] There are several individuals who were not members of the Working Group but whose names were redacted in the Minutes. Following the names are statements attributed to the person, i.e., "John Doe said..." or "John Doe might..." Without the name, there is nothing that could reasonably be said to make the individual identifiable or would otherwise constitute 'other personal information' as contemplated by subsection 23(2)(h)(i). With the name disclosed, statements about the individual become 'identifiable personal information.' In these circumstances, the presumption created in subsection 23(2)(h)(i) applies.
- [74] The Department advised it did not consult with these individuals because it did not have contact information for them. In order to provide these individuals with notice of the review and an opportunity to provide their consent or any submissions, I attempted to obtain contact information for them. My office provided notice to three individuals. One person responded and consented to disclosure.¹¹
- [75] My office was unable to obtain contact information for the remaining several individuals, precluding any consultation. Nevertheless, I must consider whether these third parties' personal information should be disclosed to the Applicant.
- [76] Per subsection 23(3), determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy requires the

¹¹ The personal information is a name and associated regulatory agency. These redactions appear on page 73 of the September 16, 2021, response at the third paragraph and the immediately following heading "Action Plan".

public body to consider all the relevant circumstances. The 9 subparagraphs in subsection 23(3) do not enumerate any categories that apply, and no other relevant circumstances are apparent. Further, I am of the view that none of the subparagraphs in subsection 23(4) apply either. Therefore, the presumption under section 23(2) governs and the public body is correct in refusing to disclose the names of the third parties who are not part of the COM and who did not consent to disclosure of their personal information.

Redactions based on subsections 14(1)(a) and (b)

[77] In the response to the March 8, 2021, access request, the Department redacted many sections of the Minutes containing information that was not personal information. The Department relied on subsections 14(1)(a) and (b) for these redactions:

14. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal

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

(b) Repealed, SNWT 2019, c.8, s.12;

....

[78] When the response was given to the March 8, 2021, access request, subsection 14(1)(b) was in force. It was repealed on July 30, 2021, and can no longer justify a redaction. The later response to the September 16, 2021, access request relies only on subsection 14(1)(a). Therefore, the only exemptions relevant to this review are those made pursuant to subsection 14(1)(a).

Redactions based on subsection 14(1)(a)

[79] Section 14(1) allows the public body to refuse to disclose certain types of information. This is a discretionary power. If the kinds of information listed in the subparagraphs of section 14(1) exist in records responsive to the access request, then the public body must decide whether or not to sever that information and not disclose it. The head of the public body has broad discretion. All that is required is that the public body demonstrate that the decision to refuse to disclose was based on fact and was for a lawful reason. Absent evidence of bad faith or some unlawful purpose, there is little basis to review the exercise of this discretion.

[80] At the outset, I observe that section 14(1)(a) does not distinguish between advice¹² that is confidential and advice that has already been disclosed to members of the public. If the conditions in subsection 14(1)(a) exist, then the discretion to refuse to disclose is available to be exercised. Of course, once advice has been shared without restriction with a member of the public the concern about possible negative effects of further disclosure should, logically speaking, be greatly diminished or non-existent.

[81] The exercise of the discretion to refuse to disclose pursuant to subsection 14(1)(a) first requires specific conditions to be satisfied:

- i. The information must consist of “advice, proposals, recommendations, analyses or policy options”.
- ii. The information must be developed by or for a public body or a member of the Executive Council.

[82] Subsection 14(1)(a) has been considered previously by this office and in other jurisdictions applying equivalent legislation.¹³ “Advice, proposals, recommendations, analyses or policy options” (hereinafter referred to as “advice”) must be

1. Sought or expected, or be part of the responsibility of a person by virtue of that person’s position;
2. Directed toward taking an action; and
3. Made to someone who can take or implement the action.¹⁴

[83] In addition, subsection 14(1)(a) does not exempt a final decision made or exempt information that is merely factual in nature.¹⁵

[84] Fundamentally, subsection 14(1)(a) governs the disclosure of records that contain advice to a public body to inform a public body’s policy decisions or actions. It is not concerned with the policy decisions or actions of non-government actors.

¹² “Advice” refers to “advice, proposals, recommendations, analyses or policy options developed by or for a public body” as used in subsection 14(1)(a).

¹³ Applicant (Re), 2020 NTIPC 26 (CanLII), <https://canlii.ca/t/jb2n1>; Alberta Health Services (Re), 2015 CanLII 57420 (AB OIPC), <https://canlii.ca/t/gl52z>

¹⁴ Alberta Health Services (Re), 2015 CanLII 57420 (AB OIPC), <https://canlii.ca/t/gl52z>

¹⁵ See footnote 6.

[85] In my view, it would be contrary to the concept of open government if a public body were to give advice to select private-sector actors that it regulates and then refuse to disclose that advice to others in an access to information process.

Did the Working Group provide advice to the Department?

[86] The Minutes of the Working Group contain meeting records of what was said and by whom, of decisions made, actions to be taken, etc. The response to the March 8, 2021, access request includes the Minutes up to March 8, 2021, and also a 6-page draft briefing note and an 18-page Action Plan.

[87] The Working Group's Project Charter¹⁶ includes the goal of developing an action plan for the Northwest Territories to protect and ensure a stronger mineral resource development industry.

[88] The Project Charter says the Working Group will report and recommend [*sic*] to the Business Advisory Council and that it will report and recommend actions to the Pan Territorial (Federal/Territorial/Industry) working group.

[89] The Business Advisory Council is composed of representatives from various communities' Chambers of Commerce, the NWT and Nunavut Chamber of Mines, and several other business and industry organizations. These representatives are appointed by the Minister of Industry, Tourism, and Investment. Unlike the Working Group, the Business Advisory Council's mandate is to provide advice and make recommendations to the Minister and to the Executive Council. The Business Advisory Council is not a public body; therefore, advice or recommendations made to that entity is not advice made to a public body or the Executive Council.

[90] According to the Department, "the Pan Territorial (Federal/Territorial/Industry) working group is a reference to the Northern Mineral Sector Intergovernmental Working Group. This working group was formed to deal with impacts to the Northern Mineral Sector from Covid. This working group is currently doing a reset to determine the need/reach of working group in a post-Covid world."¹⁷ There is no further information available about the members of this working group or what its mandate may have been, but it is not a public body as that term is defined in the legislation.

¹⁶ Dated September 29, 2020. See paragraph 0 above.

¹⁷ This was explained in the Department's submissions dated April 28, 2022.

- [91] I asked the Department to explain how recommendations to these entities could be viewed as advice or recommendations to a public body. The response was “The engagement group is a forum for [Chamber of Mines] to provide recommendations directly to senior management of ITI and for frank discussion and analysis of proposals or policy options.” The response then quoted from the Terms of Reference of the ITI/NWT & Nunavut Chamber of Mines Engagement Group, a document that states “Effective Date: January 13, 2022.”
- [92] This response was not very helpful. My question concerned the Working Group’s one-page Project Charter of September 2020, not the Engagement Group’s four-page Terms of Reference of January 2022. I gather the Engagement Group in some sense developed from the Working Group, but its Terms of Reference sets out a broader mandate and makes no reference to the effects of COVID-19 on the mineral industry. The Terms of Reference also provides directions regarding the conduct of Engagement Group meetings and how minutes of meetings are to be created, the level of detail to be included in the minutes, and even specifying that minutes are to be published on a publicly available website operated by the Chamber of Mines.¹⁸ None of these directions existed at the relevant time or applied to the Working Group.
- [93] It is reasonably clear that the Working Group created a forum for officials from the Department to discuss issues with representatives of the mining industry, with particular regard to negative impacts from the COVID-19 pandemic. Minutes of those meetings record who attended and what was discussed. These are not transcripts, but they purport to be accurate summaries if not verbatim.
- [94] While the 2020 Project Charter’s directions are clear regarding who the Working Group will provide advice and recommendations to, I must nevertheless review the redactions based on subsection 14(1)(a) to determine if disclosure could reveal advice developed by or for the Department or some other public body. It is possible the Working Group may have developed advice, proposals, etc., for the Department or another public body regarding such a goal and such advice may appear in the Minutes. Detailed consideration of the redactions is required.

Specific redactions:

- [95] This review encompasses the response to the March 8, 2021, request and the response to the September 16, 2021, request. The following table indicates where the responses overlap and where they differ:

¹⁸ <https://www.miningnorth.com/resources>

Response to March 8, 2021, access request

- i. Pages 1-61 are identical to pages 1-61 of the response to the September 16, 2021, access request.
- ii. Pages 62-67 contain a 6-page memorandum entitled “Chamber of Mines Partnership”.
- iii. Page 68 contains a single page entitled “GNWT – Chamber of Mines Initiative on: *Actions Towards a North of 60 Mineral Resources Recovery Plan*. Entirely unredacted.
- iv. Pages 69-81 are identical to pages 62-74 of the response to the September 16, 2021, access request.
- v. Pages 82-100 contain what appears to be the Working Group’s Action Plan.

Response to September 16, 2021, access request

- vi. Pages 1-74 contain Minutes identical to those in the March 8, 2021, response, but with revised redactions that do not rely on subsection 14(1)(b).
- vii. Pages 74-84 contain additional Minutes not included in the response to the March 8, 2021, request.

[96] Recognizing the overlap in the responses and the change in the legislation, I will first review the Response to the September 16, 2021, access request. This will address the review of all the Minutes. I will then review pages 62-67 and 82-100 of the response to the March 8, 2021, access request, being the Chamber of Mines Partnership memorandum and the Action Plan.

[97] To further clarify, the Applicant will be aware that not all the redactions to the response to the March 8 request were applied in the response to the September 16 request. Some redactions that relied on subsection 14(1)(a) were removed, and some of the redactions that relied on subsection 14(1)(b) were removed and some were maintained, relying on subsection 14(1)(a) instead. The definitive response containing the Minutes is in the response to the September 16, 2021, access request.

Response to the September 16, 2021, access request

- [98] At page 3, under the headings “Short term actions: Mineral Tenure Relief news,” the first redacted passage refers to a decision that had been taken, then purports to impose a restriction on the use or disclosure of that information, and then refers to another possible action being considered. There is nothing indicating whether the COM members agreed to the Department’s proposed restriction.
- [99] First, this is not advice, recommendation, proposals, analyses, or policy options directed to an entity within government. This was a public body disclosing factual information to non-government actors and then attempting to control further disclosure by non-government actors regarding information the public body had just disclosed.
- [100] The Department explained this approach:
- “the Chamber of Mines is differentiated from the general public because the Chamber is an interest group dedicated to supporting issues relevant to the mineral resources industry. Therefore, GNWT may discuss draft policies that will affect the mineral resources sector so that industry can prepare for these changes prior to the general public being aware of these policies.”¹⁹
- [101] I am not sure what “dedicated to supporting issues relevant to the mineral resources industry” means exactly, but it is fair to observe that the Chamber of Mines is an interest group comprised primarily of corporate members of the mineral resources industry. These are people directly interested in the economic viability of the industry and interested in government policy decisions affecting the mining industry.
- [102] More problematic is the proposition that government can discuss policies with the Chamber of Mines “so the industry can prepare for these changes prior to the general public being aware of these policies”. The Department seems to say that it is appropriate to share policies with select members of the public before the policies are known to the general public. The rationale offered – so industry can “prepare” – does not appear to appreciate the dangers inherent in giving private individuals or organizations privileged early notice of government policy before it is made public.
- [103] It is concerning to see that the Department redacted not just the information about a policy decision but also redacted the admonition to the Working Group members not to discuss it until it was announced publicly. This is the sort of behavior that could lead to the perception of regulatory capture. While that concern is beyond my jurisdiction, I

¹⁹ *Ibid.*

find that this passage is merely factual and does not constitute advice; therefore, redaction is not justified under section 14(1)(a).

- [104] The second redaction on page 3 is explanation or commentary without any apparent recommendation for action and not directed at anyone who might take action. This does not justify redaction under section 14(1)(a).
- [105] The third redaction on page 3: three numbered paragraphs with recommendations concerning a regulatory issue. These are recommendations to mining industry actors, not government. The recommendations are purportedly those of a third party outside the Working Group; they are not recommendations from the Department. Redaction under section 14(1)(a) is not justified.
- [106] On page 4, first, third and fourth bullets: these are factual statements about possible approaches for non-government actors to engage with a federal regulatory body. This is not advice under section 14(1)(a) and redaction is not justified.
- [107] On page 4, fourth bullet under the heading “Assistance for northern service and Supply and juniors”: the redacted passages include a description of a submission given by the COM in a separate consultation process and a question about a possible federal government capability. Neither passage is advice, and redaction is not justified.
- [108] On page 5, three bullets under the heading “Royalty deferment to 2021”: first bullet is a question not advice. The second and third bullets are factual statements advising COM members how to approach the government with a request. This is not advice intended to inform or assist a government body to act. Redaction is not justified.
- [109] On page 5 under the heading “MIP funding”: this is information about an action being taken and stating that there is related activity underway. This is not advice and is not directed to anyone in government. This does not justify redaction under section 14(1)(a).
- [110] On page 5, under the heading “Any other short-term ideas?”: the redaction in the first bullet is a factual statement by a government actor about the contents of a letter. This is not advice; redaction is not justified.
- [111] At page 6, under the heading “Discussion”: the second bullet could be viewed as advice by the public body regarding possible approach to future action. This could be considered for redaction. The fourth bullet contains questions pertaining to COM members and a federal agency. This is not advice and redaction is not justified.
- [112] At page 9, under the heading “Project Flow-through Funding”: these six lines of notes appear to reflect the opinion and recommendation of COM members on changes

regarding a federal tax issue. This is not advice directed to a public body or member of the Executive Council. This does not justify redaction under section 14(1)(a).

- [113] At page 9, under the heading “Land Use Permits and License Support”: the first bullet appears to be a recommendation (i.e., “suggested paths”). It is not clear from the text who the recommendation is directed to, but the context indicates that action from Department officials is recommended. The second and fourth bullets also contain recommendations for future action by the GNWT. These could be considered for redaction under section 14(1)(a).
- [114] At page 10, under the heading “Service and Supply Companies”: these 4 lines in the third and fourth bullets suggest where a solution to an issue may lie and suggest an approach to that end. This is not directed to a public body and seems more clearly directed to either the Business Advisory Council (BAC) or the Pan Territorial (Federal/Territorial/Industry) Working Group (FPTWG). This does not justify redaction under section 14(1)(a).
- [115] At page 10, under the heading “Open Land Access to Exploration”: The first bullet contains factual information and should not be redacted. The third and fourth bullets contain advice of a very general nature that appears to be directed to the GNWT rather than to either the BAC or the FPTWG. While it is hard to understand why the Department would exercise its discretion to redact such anodyne material, redaction is an option under section 14(1)(a).
- [116] On page 11, under the heading “Incent Exploration Investment”: the first redacted bullet is a statement of a general goal; the second redacted bullet is a statement about what COM members could do. The remaining redactions are statements of fact. None of these redactions are justified under section 14(1)(a).
- [117] On page 13, under the heading “Review of June 12 Meeting Minutes and Action Items”: the redacted portions of these minutes are factual statements about what certain individuals were going to do or will be doing. This is not advice to help inform a decision or a course of action; this is factual reporting. These redactions are not justified under section 14(1)(a).
- [118] On page 14, in the 5 bullets at the top of the page: this continues the review of the June 12 Minutes. These bullets summarize a discussion regarding difficulties faced by industry and record some speculation about where ‘industry’ believes relief might be found. These notes do not appear to be directed to a public body or proposing any action by a public body. These redactions are not justified under section 14(1)(a).
- [119] On page 14, under the heading “Critical Minerals Discussion”: the first bullet contains a statement of fact. The third bullet contains a description of “Industry’s perspective”,

but does not contain advice, recommendations, or proposals, for a public body. This is factual in nature, and mostly pertaining to the federal government entities. Redaction is not justified.

- [120] On page 15, in the second bullet at the top of the page: this is a request by industry to the government to act to further a policy goal. This redaction could be justified under section 14(1)(a).
- [121] On page 15, under the headings MIP and PDAC: the redacted text is factual in nature. There is no choice to be made regarding any suggested action to be taken by a public body. These redactions are not justified under section 14(1)(a).
- [122] On page 16, at the top of the page: the redacted text is factual in nature. There is no choice to be made or any suggested action to be taken by a public body. This redaction is not justified under section 14(1)(a).
- [123] On page 18, under the heading “Protect Flow-Through Obligations”: the fifth bullet is a question and not advice. It should not be redacted. The sixth and seventh bullets contain redactions that propose a course of action and recommend a mode to effect that action. These redactions could be justified under section 14(1)(a).
- [124] On page 18, following the heading “Action”: this is a record of a decision regarding future action. This is not advice is redaction is not justified under section 14(1)(a).
- [125] On page 19, at the bottom: these three redacted lines record “action items” that, presumably, were discussed by the Working Group. These lines do not contain advice or recommendations; they are statements regarding anticipated actions to be taken. These redactions are not justified under section 14(1)(a).
- [126] On page 20, under the heading “Make Financial Opportunities Available”: the redacted passage suggests a possible course of action of a broad, general nature and could be viewed as advice under section 14(1)(a). Redaction could be considered.
- [127] On page 20, under the heading “Medium Term Actions”: this is a factual statement about action to be taken. Redaction is not justified.
- [128] On pages 20-21, under the heading “Review of Ministers’ letter to Ottawa”: the redacted text does not appear to be advice or recommendations to the BAC or the PTWG; it appears to be advice or general recommendations relating to the Working Group’s review of a letter from some GNWT Ministers’ to the Federal Government. These redactions can be considered as advice under section 14(1)(a).
- [129] On page 22, under the heading “Review of Meeting Notes from July 2, 2020”: these are excerpts of a discussion. The redacted passages do not contain advice or proposals of a particular course of action that particular public body, or bodies, might follow other

than to observe that issues can or should be discussed. These redactions are not justified under section 14(1)(a).

- [130] On page 23: the redacted passage contains statements that are factual in nature and not advice. These redactions are not justified under section 14(1)(a).
- [131] On page 24, the bullet at the top of the page: this paragraph summarizes past action and anticipates future action. It is not advice. This redaction is not justified under section 14(1)(a).
- [132] On page 25, the first paragraph containing redactions: these redacted passages are statements of fact or opinion about what is or may be possible. This is not advice. These redactions are not justified under section 14(1)(a).
- [133] On page 25, the second paragraph containing redactions: this contains advice about adding detail and scope to the 'action item critical minerals'. I take this to be a proposal to amend wording for an action item for the Working Group. The Working Group is not a public body, and suggesting an amendment to its action items does not constitute advice. These redactions are not justified under section 14(1)(a).
- [134] On page 27, under the heading "Critical Minerals Opportunities": The redacted passage records a discussion about concerns related to "Critical Minerals". There is a summary comment regarding cost and benefit, but no suggested course of action or options to consider. Discussion by the Working Group pursuant to its purpose of developing advice and recommendations for the BAC and FPTWG does not constitute advice to a public body. Redaction is not justified.
- [135] On page 28, under the heading "Land Withdrawals": The first bullet describes a recommendation made by the public body (ITI). It is not clear to whom this recommendation was made. It is a factual statement of a thing done; it is not advice. The second bullet describes "Industry" views on Land Withdrawals. There is no specified intended recipient regarding Industry views, which appears consistent with the mission of the Working Group, which is to provide advice and recommendations to the BAC and the FPTWG, neither of which are public bodies. In my view, these passages do not contain "advice" per section 14(1)(a) and should not be redacted.
- [136] On page 29, at the fourth bullet: this is a recitation of opinion statements made by a federal funding agency about the FPTWG. There is no advice for any specific action that a public body could take. This redaction is not justified under section 14(1)(a).
- [137] At the bottom of page 29: The passage contains an opinion about a federal program and a question by the COM. It does not contain advice and should not be redacted.

- [138] On page 30, at the fourth bullet: the first part of this redacted passage recommends a general course of action to a public body and redaction can be considered under section 14(1)(a). The last sentence in this bullet is not advice: it is a factual statement and redaction is not justified under section 14(1)(a).
- [139] On page 30, at the fifth bullet: the COM identifies a list of 'solutions' it "believes" should be identified to the Finance Committee. It is unclear what "Finance Committee" is being referred to or who the COM may have intended to make this identification. If this Finance Committee is within ITI and the COM was speaking directly to ITI then this might be advice to a public body and redaction can be considered under section 14(1)(a). If the information was simply a discussion in furtherance of the Working Group's purpose of advising the BAC and FPTWG, then the redaction is not justified.
- [140] On page 32, under the heading "Land Withdrawals": this passage is a suggestion to the working group for its consideration of the issue. It is not advice directed to a public body or by a public body. The redaction is not justified under section 14(1)(a).
- [141] On page 33, the fourth bullet: this is part of a discussion under the heading Federal-Territorial Coordination. The redacted passage contains a COM opinion about a role for industry and a statement of ITI's position and a suggestion for COM to follow. It does not contain advice or recommendations, etc., for a public body. Redaction is not justified.
- [142] On page 33, the seventh bullet: this is an opinion about the federal government. It is not advice and redaction is not justified.
- [143] On page 33, under the heading "Critical Minerals": the two redacted passages contain opinions voiced by the COM or a member thereof. There is no advice, recommendation, analysis, or proposal offered for ITI's consideration. The opinions expressed are part of a discussion about Critical Minerals. Again, this is presumably in furtherance of the Working Group's purpose to develop advice and recommendations to the BAC and FPTWG. Redaction is not justified.
- [144] On page 34: the first bullet contains a statement by the COM that contains no advice; the second bullet contains an opinion of ITI regarding how industry might operate. There is no advice to a public body. These redactions are not justified.
- [145] On page 36, second bullet: the redacted passage contains some 'beliefs' of a legal nature. There is no advice and redaction is not justified.
- [146] On page 37, under the heading "Meeting with Minister of ITI": the first sentence of the first bullet presents facts regarding process internal to ITI. This is not advice. The second sentence is an aspirational statement, attributed to the Deputy Minister, about

internal ITI process. Again, not advice. The third sentence is a suggestion for action to be taken by the Chamber of Mines. As this is not advice intended for a public body to act upon, the redaction is not justified.

- [147] On page 37, the second bullet describes factual information about a discussion. There is no advice and the redaction is not justified. The fourth bullet is a suggestion for action proposed by the Chamber of Mines, and according to the Action items below, the action was to be taken by the Chamber of Mines. This is not advice and redaction is not justified under section 14(1)(a).
- [148] On page 37, under the heading “Critical Minerals,” the third bullet: the redacted passage is preceded by the phrase “ITI recommends that”. The content of the redaction is a possible action for Industry to take. and does not contain advice for ITI. Redaction is not justified.
- [149] On page 38, under the heading “Review of Presentation/Slide Deck”: in reference to what is presumably a power point presentation, the Working Group has proposed wording. This is information of a factual nature and relates to parties outside government. Redaction is not justified. Under the ACTION heading, a private entity is identified as a source of more information. This is not advice, and redaction is not justified.
- [150] On page 42, in the second bullet: this passage suggests an approach to the project being discussed in the preceding unredacted bullets. This is advice to ITI and redaction could be considered under section 14(1)(a). A reason to redact is not readily apparent, but articulation of a reason is for the public body making the redaction decision.
- [151] On page 42, in the fifth bullet: this is a description of a factual nature about the content of a presentation. This is not advice and section 14(1)(a) does not justify this redaction.
- [152] On page 43, in the three “ACTION” paragraphs: these are not recommendations or proposals for possible action for a government actor. These are statements about actions to be taken by the Chamber of Mines. Section 14(1)(a) does not justify these redactions.
- [153] On page 43, under the heading “METC”: This sentence is a factual description of action being taken by a federal government department. This is not advice and section 14(1)(a) does not justify this redaction.
- [154] On page 43, under the heading “Regulatory Dialogues”: The second bullet contains a sentence that appears to quote from or summarize an excerpt of a document under discussion. It does not constitute advice and section 14(1)(a) does not justify this redaction. The sub-bullet contains a suggestion by the Department for an action by the

Department. If this is a record of advice by ITI to itself, this could be viewed as a recommendation or policy option developed by the Department and redaction could be considered under section 14(1)(a). If this is a record of an advice or recommendation to be provided to the BAC of the FPTWG, then redaction is not justified. This should be explained in reasons if the Department decides to maintain this redaction. Those reasons, of course, should also address why redaction of such advice would be appropriate given that it was already disclosed to members of the public, i.e., the COM.

- [155] On page 45, the last bullet on the page: this is a factual description of an action taken by another government and is not advice. Section 14(1)(a) does not justify this redaction.
- [156] On page 46, at the second bullet: this is a factual statement regarding a federal government minister. This is not advice. Section 14(1)(a) does not justify this redaction.
- [157] On page 46, under the heading “Review of 3 Priority Items”: the second sentence of the first bullet is a factual statement regarding a federal agency. The second bullet is a factual description and not advice. Section 14(1)(a) does not justify these redactions.
- [158] On page 47, under the heading “Critical/Strategic Minerals”: The third and fifth bullets are suggestions to the Department regarding its proposed action plan for its Critical Minerals Strategy. This is advice, albeit of a very general nature, and redaction could be considered under section 14(1)(a).
- [159] On page 50, fourth bullet: the redaction is based on section 24(1), which exists to protect business interests of third parties. The specific subsection cited is:

24. (1) Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant

(a) information

(i) that would reveal

...

(B) commercial, financial, labour relations, scientific or technical information of a third party,

(ii) that is supplied, explicitly or implicitly, in confidence, and

(iii) the disclosure of which could reasonably be expected to

...

(B) prejudice the competitive position of a third party

...

(D) result in similar information not being supplied to a public body;

[160] Subsection 24(1)(a) directs the public body to refuse to disclose information if all conditions in the subparagraphs (i), (ii), and (iii) are satisfied. Each condition must be considered separately.

- i. Subparagraph (i) is satisfied: the information is about two mining companies' holdings, which may be fairly characterized as commercial information.
- ii. Subparagraph (ii) is problematic: Some of the information is available in a public registry, but the redacted information has to be added to the information that precedes it to understand the scope of the information. There is no specific information about the terms of confidentiality that might apply to ITI generally. Again, ITI's disclosure to the Working Group was not made in a confidential context. There is nothing in the Minutes to suggest that the Department intended to keep this information confidential.
- iii. Subparagraph (iii) is also problematic: the information is disclosed by the Department to the members of the COM present at the meeting and in the absence of a representative of either company. It is hard to understand how the Department would release the information and see it disseminated in the Minutes if there was a potential for this information to prejudice the interests of either company: the COM membership is comprised of mining companies – literally, the competition. It would be rather alarming if the information was actually capable of prejudicing the companies' competitive position.
- iv. The Department does not explain how disclosure of this information could actually cause prejudice to the third parties' competitive position. Further, the Department did not consult with the third parties about the disclosure²⁰ either at the time of meeting to which the Minutes relate or when determining the response to the Applicant's access request. The proposition that disclosure could prejudice the third parties' competitive position is speculative. In my view, section 24(1) is not satisfied, and the redaction is not justified.

[161] On page 50, fifth bullet: this passage contains an opinion and then a question from the COM. This is not advice and redaction is not satisfied.

[162] On pages 50-51, under the heading "METC"²¹: the second bullet contains a general opinion about tax incentives and what may exist in other jurisdictions in the future. Continuing on page 51 at the first bullet, there is a further opinion about the METC, which is a federal tax credit. The second bullet poses a question about the activity of a federal government department. Following "ACTION" after the third bullet is a

²⁰ Third party consultation is required in such a situation: see section 26 of the ATIPPA.

²¹ This is an acronym for "Minerals Exploration Tax Credit."

sentence outlining the Department's follow-up activities. None of these passages constitute advice to a public body and therefore should not be redacted.

- [163] On page 51, under the heading "Investment in Northern Infrastructure..": the redacted sentence is a factual statement, not advice. Section 14(1)(a) does not justify this redaction.
- [164] On page 52, in the second and third bullets: these are accounts of ideas the Department and the COM were sharing about the mining sector. These appear to be subjects within the purview of the BAC and FPTWG and do not advise or recommend any type of action to a public body. These passages are in the nature of high-level policy opinions. Section 14(1)(a) does not justify these redactions.
- [165] On page 55, at the top of the page: this passage suggests an approach or course of action. It is not clear if the COM was making a suggestion to the Department or to the Working Group to be carried forward to the BAC or FPTWG. The Department views this as advice to the Department, which could justify redaction under section 14(1)(a).
- [166] On page 55, under the heading "Prospectus Discussion," in the third bullet: this is a factual statement by the Department. It is not advice. Section 14(1)(a) does not justify this redaction.
- [167] On page 55, in the fourth bullet: the redacted passage is a description of the Department's possible policy or program development choices. The description is provided to the COM in response to a question about GNWT's work on a "Critical Minerals Development Strategy." The redacted passage answers a question, it is not advice developed by or for the Department. Redaction is not justified.
- [168] On page 56, in the third bullet: this is a factual statement, not advice. Section 14(1)(a) does not justify this redaction.
- [169] On page 57, under the heading "Items Added": the redacted section includes a heading and then a factual description of a planned activity by the COM. This passage does not include any advice. Section 14(1)(a) does not justify this redaction.
- [170] On page 58, in the three bullets at the top: these are three suggestions being made by the COM regarding an upcoming workshop held by a federal regulatory agency regarding its constituting legislation. This is not advice to the Department. Section 14(1)(a) does not justify these redactions.
- [171] On page 58, under the heading "Critical/Strategic Minerals": the third bullet is a factual statement and is not advice. Section 14(1)(a) does not justify this redaction. The fourth bullet is a recommendation for an action by ITI and redaction could be considered. Again, reasons for deciding to redact must be given.

- [172] On page 58, at the bottom of the page under the heading “Action Item”: this is a statement of fact about a future action the Department is going to take. This is not advice. Section 14(1)(a) does not justify this redaction.
- [173] On page 63, under the heading “Business Advisory Council”: this redacted sentence fragment appears to be a record of a proposal for action for the head of a public body. Redaction could be considered.
- [174] On page 65, under the heading “Mackenzie Valley Dialogue Workshop”: the paragraph begins with “Recommendation 1-8”, but this appears to be a reference to recommendations made in a past workshop. The redacted passage appears to summarize those recommendations opines about a need for policy development. The passage could be viewed as advice and redaction could be considered.
- [175] On page 67, under the heading “MVRMA²² Workshop,” following the letters “TWH”: this passage contains a suggestion for panel topics for said workshop. This does not appear to be advice to the Department and should not be redacted.
- [176] On page 67, at the bottom of the page: the redacted passage follows a statement of a broad topic (“How to diversify the economy.”) and suggests a possible organization for a “rep”. This does not appear to be advice to any public body and should not be redacted.
- [177] On page 68, first and second redactions at the top of the page: the first redacted passage contains an opinion and a fragment of a statement. This is not advice and should not be redacted. The second redacted passage appears to be a caution about content for a possible workshop panel. This is an opinion statement of a very general nature, and it is not clear if this was advice intended for the Department or advice intended for a possible future workshop panel. If this was advice intended for the Department, then redaction could be considered. Again, reasons for deciding to redact must be given to the Applicant.
- [178] On page 68, the three redactions in the middle of the page: These passages consist of discussion and commentary, but no advice for a public body. The passages discuss possible individuals for a possible panel for the workshop under discussion. Redaction is not justified under subsection 14(1)(a); however, the names of the third parties mentioned should be exempted under section 23(1) as discussed above.
- [179] On page 68, at the bottom: this sentence appears to be a recommendation to persons who may attend the workshop, and this may well include Department officials. While

²² I understand MVRMA to be an acronym for the *Mackenzie Valley Resource Management Act*, which is federal legislation. The Mackenzie Valley Land and Water Board, a permitting agency created under the MVRMA, holds an annual workshop.

the recommendation is rather trite, even rudimentary, it could technically be classified as advice and therefore redaction could be considered under subsection 14(1)(a).

- [180] On page 69, under the heading “Critical/Strategic Minerals”: the passage is a recommendation to the Department and redaction can be considered under subsection 14(1)(a).
- [181] On page 70, under the heading “Mineral Tenure Relief”: the redacted sentence is a factual statement describing action being taken. It is not advice and should not be redacted.
- [182] On page 72, under the second bullet (inset): this sentence appears to be either a summation of a discussion referred to in the preceding sentence, or an opinion about the solution to the matter being discussed. The sentence proposes action that may be taken by third parties – not the government. It is not advice to or for the Department and does not justify redaction.
- [183] On page 72, under the third bullet (inset): the redacted passage has three sentences. The second and third sentences are factual in nature and should not be redacted. The first sentence is a recommendation and redaction could technically be justified.
- [184] On page 72, under the fourth bullet: the redacted passage is an opinion statement regarding a non-government organization. It is not clear who uttered this statement, how it might be actioned or by whom. It does not appear to be advice directed at the Department or any other public body and redaction is therefore not justified.
- [185] On page 72, the last redaction is an opinion statement. It is not clear if this advice is directed to the Department or to mining industry operators. If it is the former, then redaction could be considered under subsection 14(1)(a). A redaction decision should provide reasons as required by section 9.
- [186] On page 73, immediately following the heading “ACTION ITEM -- Invite the Federal Government”: this redacted passage is a list of subjects the identified speakers are “to speak on.” This is a factual statement not advice. Redaction is not justified under section 14(1)(a).
- [187] On page 76, under the heading “Life after Diamond Mining”: the redactions in the third and fourth bullets contain information, a question, and a concern, all in the context of a presentation from a COM member about a website for a project. This is not advice and redaction is not justified.
- [188] On page 77, near the top: this redacted passage contains a suggestion from one COM member to another. This is not advice to government and redaction is not justified.

[189] On page 77, at the bottom: this is factual description of actions being taken or actions intended to be taken. This is not advice and redaction is not justified.

[190] On page 78, first paragraph: the Department submits that this redaction is justified pursuant to subsection 14(1)(g), which states:

14. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal

....

(g) information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.

[191] The Department submits that the redaction reveals a potential policy or budgetary decision. It is hard to see this in the actual text. There is no express reference to a pending policy or budgetary decision within the Department or the GWNT, and neither is such a decision implicit in the text. The passage appears to describe an 'approach' to an existing program.

[192] Even if this passage could be viewed as falling under subsection 14(1)(g), rationalizing the exercise of the discretion to refuse to disclose the record is hard to comprehend in the circumstances: this is a record of information being disclosed by a Department official to the COM members present at the meeting and later to those who have access to the Minutes. These are members of the public. Having disclosed the information to the members of the public already, it is difficult to understand a refusal to disclose to another member of the public 6 months later. In my view, this redaction is not justified.

[193] On page 78, the remaining redacted passages under the heading "Mineral Tenure Relief": these passages contain descriptions of the "suggested approach," delivered by Department officials to COM members. This is not advice to the government and should not be redacted.

[194] On page 79, first bullet under section 2: the redacted passages consist of a question and a suggested possible action. The text and context illustrate that this is a record of a discussion about capacity issues for "juniors" and not about advice to the Department or other public body. Questions and speculative discussions are not advice. These redactions are not justified under section 14(1)(a).

[195] On page 79, fifth and eighth bullets under section 2: section 24(1)(a)(i)(B), (ii), and (iii)(D) are the subsections relied on for this redaction.

[196] Section 24 addresses the protection of business interests of third parties. If the conditions in the section are satisfied, redaction is mandatory, not discretionary. A

redaction under subsection 24(1)(a) is required where subparagraphs (i), (ii), and (iii) are each satisfied.

- [197] The Minutes record information provided by a representative of a COM member to the Working Group. As discussed above, there are no promises or requirements of confidentiality that applied to the Working Group. Other COM members present are members of the public. Therefore, subparagraph (ii) is not satisfied. There is also no evidence to suggest disclosure of the redacted passage could result in similar information not being supplied to a public body. The Minutes do not indicate any hesitancy of the COM members to speak about the issue, and there is no apparent basis to believe that disclosure of these would have any future effect on the ability of the Department to collect relevant information. Therefore, subparagraph (iii)(D) is not satisfied, and the conditions of section 24(1)(a) are not satisfied. These passages should not be redacted.
- [198] On page 80, three bullets under section 4: these appear in a larger discussion regarding the “action plan.” The redacted passages are suggested additions to a draft action plan. It is not clear if this is a Working Group action plan or if this is a separate project of the Department. If it is the former, these redactions are not justified as advice under section 14(1)(a). If it is the latter, these passages could be viewed as advice to the Department regarding its action plan. However, in that case the decision to exercise discretion to redact demands explanation as the discussion with the Working Group entailed sharing the draft and the COM comments with members of the public, i.e., the COM members.
- [199] On page 81, under the heading “Last Comments”: the redacted passages contain suggestions from a Department official to the COM members regarding possible actions the COM might take. It is not advice offered for the benefit or consideration of the Department. Subsection 14(1)(a) does not justify these redactions.

Response to March 8, 2021, access request

Pages 62-67: This document is styled as “Confidential” and entitled “Chamber of Mines Partnership.” It appears to be a briefing note dated January 19, 2021, produced by the Department about the Working Group. The explanation for the few redactions is that the passages were “redacted to protect the advisory process to members of the Executive Council,” indicating that this is a briefing note created by the Department for a member of the Executive Council. The issue is whether the redacted passages contain ‘advice.’

- [200] On page 63, under the heading “Background”: The redaction at page 63 describes future activities expected of the Working Group. It is factual in nature, not advice. Section 14(1)(a) does not justify this redaction.
- [201] On page 64, at the bottom of the page: this paragraph contains factual description of Working Group activities and goals. It is not advice. Section 14(1)(a) does not justify this redaction.
- [202] On page 65, at the top of the page: the redacted passages contain factual information, not advice. Section 14(1)(a) does not justify these redactions.
- [203] On page 65, at the bottom of the page: the redacted passage mostly contains some advice that appears to be most appropriately directed to the Department. Section 14(1)(a) can justify the portion redacted after the word “although”. The first 8 words in the passage are purely factual. They should be severed and disclosed.
- [204] On page 67, under the heading “Mineral Exploration Tax Credit”: the redacted passage opines on the potential effect of provincial and federal mineral exploration tax credits. It is not directed toward a public body taking an action, nor is there a head of a public body who could take an action related to the content of this passage. This is not advice. Section 14(1)(a) does not justify this redaction.

Pages 82-100: This is an 18-page document, containing various parts of an Action Plan.

- [205] The Action Plan identifies or recommends actions by one or more of the federal government, the GNWT, other territorial governments, and the mining industry. The document is undated, and its provenance is somewhat unclear as it is not identified in or attached to any of the Minutes. Presumably, this is the document envisioned in the Working Group’s Project Charter. Parts of the document contain commentary, suggesting that the Working Group was still in the process of drafting. The document is presented in chart form with almost all of the chart fields redacted.
- [206] The Department explains the refusal to disclose under subsection 14(1)(a) thus:
- Detailed document revealing potential actions, approaches and policy options where disclosure would negatively affect internal planning and decision making process.
- [207] This general statement is insufficient to justify the refusal to disclose. First, many of the passages redacted do not contain “advice” as that term is used in the subsection. Second, the claim that disclosure would have a negative effect on internal planning and decision making is a bare assertion and lacks a proper foundation. In my view, nothing in the document self-evidently demonstrates a risk of a negative effect on the Department’s internal planning and decision making if the document were made public.

- [208] Some further and better explanation is necessary to justify the exercise of the discretion available under subsection 14(1)(a). The intended recipients – the BAC and the PTWG – are not public bodies and the body drafting the document – the Working Group -- is not a public body.
- [209] The Project Charter says the Working Group will develop an Action Plan for the Northwest Territories and report and recommend to the BAC and PTWG, and this appears to be what this Action Plan is intended to do. The Action Plan is not, on its face, a document containing advice to the Department or other public body. The BAC is mandated to provide advice to the Department and the BAC or the PTWG may adopt parts of this document for their own purposes, which may include providing advice to the GNWT.
- [210] According to the BAC’s Terms of Reference:²³ “The recommendations and input provided by [sic] Business Advisory Council will be in writing. This information will be publicly available by the GNWT on its website.” This seems to contemplate a very open, public advisory process, which is inconsistent with the redaction of information purportedly being supplied to the BAC.
- [211] While the Department participates in the Working Group, that does not transform the Working Group into a public body, and it does not transform the Working Group’s records into confidential documents. The Department is in possession of copies of the Working Group’s records, but that does not change their fundamental nature. In my view, absent evidence to the contrary, sharing information without restriction between a public body and members of the public denotes an inherently ‘public’ process.
- [212] The extent of redaction is surprising given the stated purpose of the Working Group was to report and recommend to the Business Advisory Council (BAC) and the Pan Territorial Working Group (PTWG), neither of which is a public body. And, as noted above, the Working Group is comprised of members of the public and there was no obligation of confidentiality binding the members of the Working Group. There is a sense of the public body trying to attach confidentiality to a process that was not.
- [213] Having regard to the above comments, I will now review the 18 pages in detail.
- [214] Page 82 begins with an “Action Plan Overview” with section headings of “Short Term Actions”, “Medium Term Actions”, and “Long Term Actions”. Each section has a column of headings that were identified in the document “*Actions Towards a North of 60 Mineral Resources Recovery Plan.*”²⁴ Each heading has an accompanying overview or definition, all of which are redacted. The entries appear to explain what is meant by

²³ https://www.iti.gov.nt.ca/sites/iti/files/tor_business_advisory_council_-_final.pdf

²⁴ Page 68 in the response to the March 8, 2021, access request.

certain phrases and many describe a recommended outcome – a specific goal or action to be taken. These recommended outcomes are directed at different governments or agencies, presumably to assist the BAC and PTWG to develop their own recommendations. In my view, none of these redactions are justified under subsection 14(1)(a).

- [215] Page 83 provides a chart with categories of types of possible actions, divided into short-, medium-, and long-term sub-categories. This chart does not identify what government or other actor is recommended to take any particular action. The redacted passages in the chart are not advice under subsection 14(1)(a) and should not be redacted.
- [216] Page 84 contains a slightly different version of the chart on page 83. The redacted passages should also not be redacted.
- [217] The redacted entries in the chart on page 86 are all colour coded to indicate that the proposed actions are completed. These are entries of a factual nature and are not ‘advice.’ These entries should not be redacted.
- [218] Pages 87-88 in the chart entitled ‘Working Group Action Item Details’: the dates cover a period from June 5, 2020, to July 15, 2020. The redacted entries for the 05-Jun-20 row appear to be a record of decisions regarding actions to be taken. These statements are factual in nature and are not ‘advice’ in the context of subsection 14(1)(a).
- [219] Pages 89-94: these 6 pages contain charts about Short-Term Action, Medium-Term Actions, and Long-Term Action. Using subject headings identified in the document *“Actions Towards a North of 60 Mineral Resources Recovery Plan,”*²⁵ the document describes problems, recommends practical approaches or solutions for each heading, identifies jurisdictional responsibility for these (Federal, Territorial,²⁶ or Indigenous), and also records the Department’s comments or responses. Much of the Department’s comments consist of information about decisions taken or actions being pursued which, again, is not advice in the context of subsection 14(1)(a). Regarding the column entries under “NWT Government”, these are arguably advice to one or more public bodies and redaction could be considered. If the Department decides to maintain a redaction of those entries, cogent reasons for the exercise of its discretion should be provided.
- [220] Pages 95-100: these pages contain the same charts as pages 89-94, but with three additional columns: “Working Group Action Items” and “Completion Date” and “Completed”. Each of these columns contain entries that are factual in nature and should not be redacted.

²⁵ Page 68 in the response to the March 8, 2021, access request.

²⁶ Territorial governments mentioned include Yukon, Northwest Territories, and Nunavut.

Conclusion:

- [221] The Working Group was comprised of senior Department officials and members of the Chamber of Mines: government and interested members of the public. The impetus for engaging in such a group was to address the negative impacts of COVID-19 on the mining industry in the Northwest Territories. Mining is important to the economy of the Northwest Territories, and it should surprise no one that the Department of Industry, Tourism and Investment was taking steps to determine what problems the industry was facing and what government might do to assist.
- [222] During my review of the response to the access to information request the absence of any formal arrangements, rules, or agreements between members of the Working Group was somewhat striking. Given the proximity between the Department and the industry actors it regulates, some formal 'rules of engagement' would have been of assistance. Members of the Working Group could have known about the 'reach' of the *Access to Information and Protection of Privacy Act* and would have governed themselves accordingly.
- [223] It is also apparent from the review that the Department significantly mis-applied subsection 14(1)(a), redacting many passages that did not contain 'advice' and seemingly exercising its discretion to redact at every opportunity without due regard for the applicant's right to access to information. Many of the redacted passages appeared, at least in my view, to be quite anodyne and uncontroversial. In the future, public bodies would be well advised to take due note of the statutory right of access guaranteed by section 5(1) of the Act and only take the deliberate step of limiting that right where it is in substance justifiable and not simply where it is arguably possible.

DISPOSITION

- [224] As set out above, I disagree with many of the redactions made by the Department of Industry Tourism and Investment in its response to the access to information request. Pursuant to section 35(2) of the *Access to Information and Protection of Privacy Act*

I order that the Department shall issue a revised response with the following amendments:

- i. The names of individuals listed in the Minutes as having attended the Working Group meetings shall be disclosed.
- ii. Names of corporations shall be disclosed.
- iii. The individual referred to in the Minutes at page 39, 60, 62, and 73 shall be identified where his name appears in the response.

- iv. All other third parties' names mentioned in the response shall remain redacted.
- v. Where redactions pursuant to subsection 14(1)(a) are found not to be justified, the Department shall remove the redactions.
- vi. Where redactions pursuant to subsection 14(1)(a) are found to be possible to justify, the Department shall, in each separate instance, consider whether to exercise its discretion to refuse to disclose the record or part thereof. Where the Department decides to exercise its discretion, it shall provide reasons for the refusal in accordance with section 9(1)(c) of the Act. Those reasons should be sufficiently detailed to allow the applicant to understand the basis for the decision to redact.
- vii. The redaction based on subsection 14(1)(g) shall be removed.
- viii. The redactions based on section 24(1) shall be removed.

Andrew E. Fox
Information and Privacy Commissioner

Notice of right of appeal under *Access to Information and Protection of Privacy Act*:

37. (1) Where the Information and Privacy Commissioner agrees under subsection 35(1) with a decision, act or failure to act of the head of a public body, an applicant or a third party given a copy of the request for review may appeal the Information and Privacy Commissioner's order by filing a notice of appeal with the Supreme Court and serving the notice on the head of the public body within 20 business days after the day the appellant receives the copy of the report and order of the Information and Privacy Commissioner.

(2) Where the Information and Privacy Commissioner does not agree under subsection 35(2) or (3) with a decision, act or failure to act of the head of a public body, the head of a public body may appeal the Information and Privacy Commissioner's order by filing a notice of appeal with the Supreme Court and serving the notice on the person who asked for the review and any other person given a copy of the request for a review under section 30, within 20 business days after the day the public body receives the copy of the report and order of the Information and Privacy Commissioner.