



Yukon
Information
and Privacy
Commissioner

INVESTIGATION REPORT

**Pursuant to sections 90 and 101 of the
*Access to Information and Protection of Privacy Act***

**Department of Justice
File ATP-ADJ-2021-07-081**

**Joni Lynn-Ellerton, Adjudicator
Office of the Information and Privacy Commissioner
December 3, 2021**

Summary

The Complainant made an access request to the Department of Justice (Department) for “all written, recorded, and video or audiotaped records, and all records produced by any other method, of information obtained and recorded by SCAN employees related to the occurrence of activities intended to investigate [the Complainant] and [certain specified venues identified by the Complainant] and any other place or vehicle during the period of Jan. 1, 2019, and June 3, 2019” (Access Request). The Head of the Department responded by providing the Complainant with access to 19 records and refused portions of 18 of the 19 records citing as its authority subsections 64(1)(b)(i), 70(3), 72(1)(b)(i), 72(1)(b)(ii) and 72(1)(b)(ix).

Subparagraph 64(1)(b)(i) is a mandatory exception to the right of access and requires the head of a responsive public body to withhold information and records upon determining that the information or records are generally excluded information. The Head did not provide any evidence to support their assertion that this subsection applies including that they did not identify why the information is generally excluded.

Section 70 is a mandatory exception to the right of access and requires the head of a responsive public body to withhold personal information they determine would be an unreasonable invasion of the third party’s privacy. The Head provided no evidence to support how this provision required them to withhold the personal information identified in the records. However, because this provision is a mandatory exception to the right of access, the Adjudicator evaluated whether any of the provisions in section 70 applied to the information in the Records and found that subsection 70 (1) applies to some of the third-party personal information in the Records.

Subparagraphs 72(1)(b)(i), 72(1)(b)(ii) and 72(1)(b)(ix) give discretionary authority to the head of a responsive public body to withhold information if the head determines that disclosure of the information could reasonably be expected to interfere with a law enforcement matter, reduce the effectiveness of an investigative technique or procedure, or endanger the life or threaten the safety of a law enforcement officer. The Head provided no evidence to support how these provisions permitted them to withhold information in the Records. The conclusion reached by the Adjudicator was that the Department did not meet its burden of proving that subparagraphs 64(1)(b)(i), 72(1)(b)(i), 72(1)(b)(ii) and 72(1)(b)(ix) applied to the information withheld from the Records.

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The Adjudicator recommended that the Head provide the Complainant with access to the information that the applicant is entitled to, except for the information required to be withheld pursuant to section 70.

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Statutes Cited

Access to Information and Protection of Privacy Act, SY 2018, c. 9

Interpretation Act, RSY 2002, c.125

Safer Communities and Neighbourhoods Act, SY 2006, c. 7

Cases Cited

Court

Aucoin v. Aldridge, 2013 YKCA 1

Macdonald Communities Limited v Alberta Utilities Commission, 2019 ABCA 353

Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3

Rizzo & Rizzo Shoes Ltd. (Re), 1998 CanLII 837 (SCC)

Information and Privacy Commissioners

Hamilton Police Services Board (Re), 2008 CanLII 46546 (ON IPC)

Explanatory Note

All sections, subsections, paragraphs and the like referenced in this Inquiry Report are to the *Access to Information and Protection of Privacy Act* (ATIPPA) unless otherwise stated.

I BACKGROUND

[1] On April 16, 2021, the Complainant requested the following information from the Department of Justice (Department).

All written, recorded, and video or audiotaped records, and all records produced by any other method, of information obtained and recorded by SCAN employees related to the occurrence of activities intended to investigate [the Complainant] and [certain specified venues identified by the Complainant] and any other place or vehicle during the period of Jan. 1, 2019, and June 3, 2019. Timeframe: 01 January 2019 - 03 June 2019.

[2] On May 26, 2021, the Records Manager informed the Complainant that the head of the Department, here the Minister of Justice (Head), had granted partial access to the records, citing the following provisions of the ATIPPA as authority for their refusal to provide full access.

- Information about third parties, the disclosure of which would be considered an unreasonable invasion of their privacy pursuant to subsection 70 (3).
- Information unrelated to the access request pursuant to subparagraph 64 (1)(b)(i).
- Information that can reasonably be expected to identify a confidential source of a law enforcement matter, interfere with a law enforcement matter, reduce the effectiveness of a law enforcement technique or procedure, or threaten the safety of a law enforcement officer pursuant to subparagraphs 72 (1)(a)(iii), 72 (1)(b)(i), 72 (1)(b)(ii), 72 (1)(b)(ix) and section 32 of the *Safer Communities and Neighbourhoods Act* (SCAN)¹.
- Information subject to legal privilege.

[3] On June 15, 2021, the Complainant made a complaint in accordance with section 66 and paragraph 90 (1)(b) about the Head's decision to refuse access to part of the records requested. The Complainant made the complaint on the following grounds.

1. Greater disclosure could have been provided while still complying with sections 70 and 72.

¹ SY 2006, c. 7

2. In the alternative, disclosure should be provided under section 82 as the disclosure of the records is in the public interest.²

[4] Settlement was attempted between June 19, 2021, and July 2, 2021, via consultation under subsection 93 (1). On July 2, 2021, legal counsel for the Department (Counsel) advised that the Department would not provide unredacted records as they were of the view that the Information and Privacy Commissioner (IPC) had not commenced an investigation. Resultantly, the IPC determined that it was necessary to conduct a formal investigation to resolve the complaint. I was assigned to conduct the investigation.

II INVESTIGATION PROCESS

[5] The IPC initiated a formal investigation and issued a written Notice of Investigation to the parties on July 9, 2021.

[6] Counsel provided a Schedule of Records that included a brief rationale for the redactions made on August 2, 2021. They did not provide further submissions.

[7] On August 18, 2021, the Registrar for the IPC contacted Counsel to clarify whether further written submissions were going to be provided. They advised that they were relying on the Schedule of Records for their submissions.

[8] The Complainant did not provide submissions in response to the Schedule of Records on August 26, 2021.

III ISSUES

[9] There is one preliminary issue and five substantive issues in this Investigation. They are as follows.

Preliminary Issue: Is a consultation in accordance with subsection 93 (1) included in an investigation commenced under section 91?

Issue One: Is the Head of the Department required by subparagraph 64 (1)(b)(i) together with section 38 of the ATIPPA to withhold information from the Records?

² ATIPP (2018) Complaint Form

Issue Two: Is the Head of the Department required by subsection 70 (3) of the ATIPPA to withhold information from the Records?

Issue Three: Is the Head of the Department authorized by subparagraph 72 (1)(b)(i) of the ATIPPA to withhold information from the Records?

Issue Four: Is the Head of the Department authorized by subparagraph 72 (1)(b)(ii) of the ATIPPA to withhold information from the Records?

Issue Five: Is the Head of the Department authorized by subparagraph 72 (1)(b)(ix) of the ATIPPA to withhold information from the Records?

[10] In its response to the Complainant, the Head of the Department also cited as their authority to refuse access to information in the records at issue subparagraph 72 (1)(a)(iii) and section 73. In the records provided by the Department, none of these provisions are cited as being applicable to the information therein. As such, I did not consider whether these provisions apply.

IV RECORDS AT ISSUE

The Records relate to an Investigation of the Complainant under the SCAN Act.

[11] There is a SCAN unit that is considered a law enforcement agency within the Department of Justice. Scan Investigators are designated as Peace Officers when they carry out their duties under that Act.³

[12] The Head of the Department withheld information from 18 of the 19 responsive records as follows.

Record #	Type of Record	Date of Record	Pages	Exceptions claimed for redactions
1	2019-779 Database Entries	March 18, 2019- April 26, 2019	3	s. 64(1)(b)(i) s. 70(3) s. 72(1)(b) (ii) s. 72(1)(b)(ix)
2	2019-779 Surveillance Log	May 2, 2019 – May 3, 2019	4	s. 70(3) s. 72(1)(b)(ix)

³ SCAN 2019 Annual Report, October 2020

3	2019-781 Case Status Report	May 9, 2019	1	s. 64(1)(b)(i) s. 72(1)(b)(ii) s. 72(1)(b)(ix)
4	2019-781 Database Entries	April 3, 2019 – May 8, 2019 and June 11, 2020	9	s. 64(1)(b)(i) s. 70 (3) s. 72(1)(b)(i) s. 72(1)(b)(ii) s. 72(1)(b)(ix)
5	2019-781 Investigator Report	June 11, 2020	1	s. 70(3) s. 72(1)(b)(i) s. 72(1)(b)(ii) s. 72(1)(b)(ix)
6	2019-781 Land Titles Search	Undated	1	s. 70(3)
7	2019-781 Motor Vehicle Registration Reports	April 16, 2019	1	s. 70(3)
8	2019-781 Surveillance Log	April 24, 2019-April 29, 2019	22	s. 64(1)(b)(i) s. 70(3) s. 72(1)(b)(i) s. 72(1)(b)(ii)
9	2019-784 Database Entries	April 16, 2019 – April 29, 2019	2	s. 72(1)(b)(i)
10	2019-782 Database Entries	May 14, 2019	2	s. 64(1)(b)(i) s. 70 (3) s. 72(1)(b)(ii) s. 72(1)(b)(ix)
11	2019-805 Case Status Report	June 17, 2019	1	s. 72(1)(b)(ix)
12	2019-805 Database Entries	April 29, 2019-May 30, 2019	4	s. 64(1)(b)(i) s. 70(3) s. 72(1)(b)(ii) s. 72(1)(b)(ix)
13	2019-805 Director's Report	June 10, 2019	3	s. 64(1)(b)(i) s. 70(3) s. 72(1)(b)(i)

				s. 72(1)(b)(ii) s. 72(1)(b)(ix)
14	2019-805 Eviction Documents	June 10, 2019	7	No Redactions
15	Investigator 1 Text Message Search Photo 1	Undated	1	s. 72(1)(b)(ix)
16	Investigator 1 Text Message Search Photo 2	Undated	1	s. 72(1)(b)(ix)
17	Notes Investigator 1	February 5, 2019 – May 27, 2019	17	s. 64(1)(b)(i) s. 70(3) s. 72(1)(b)(ii)
18	Notes Investigator 2	April 23, 2019 – May 28, 2019	13	s. 64(1)(b)(i) s. 70(3) s. 72(1)(b)(ii)
19	Notes Investigator 3	April 28, 2019 – May 30, 2019	16	s. 64(1)(b)(i) s. 70(3) s. 72(1)(b)(ii)

(Records)

V JURISDICTION

[13] My authority to conduct an Investigation into the Head's decision to refuse to provide an applicant with records or withhold information from a record is set out in subsection 91 (1) of the ATIPPA.

VI BURDEN OF PROOF

[14] Subsection 102 (c) sets out the burden of proof relevant to this Investigation and states that the burden is on the Head to prove that a complainant has no right to the records or to the information withheld from the records.

102 (c) in the case of a complaint made under section 66 that relates to a determination or decision to withhold information or a record under paragraph 64(1)(b), the head who

made the determination or decision has the burden of proving that the complainant has no right of access under this Act to the information or record.

VII SUBMISSION OF THE PARTIES

[15] The submissions of the Head are set out in the Analysis section of this Investigation Report.

VIII ANALYSIS

Preliminary Issue: Is a consultation in accordance with subsection 93 (1) included in an investigation commenced under section 91?

[16] Counsel took the position that a consultation conducted under subsection 93 (1) was not part of an investigation conducted by the IPC, and as such they refused to provide the IPC with the documents in unredacted form to address the complaint. Given this, the informal resolution team assigned to address the Head's refusal to provide access to information requested by the Complainant was unable to perform their work. As such, the IPC was left with no choice but to conduct a formal investigation to address the matter before her. She then issued a notice informing the parties that she would conduct a formal investigation and required their submissions on the issues before her.

[17] Counsel's position in this matter is significant because it may eliminate the IPC's ability to conduct consultations on any complaint. As such, the IPC asked that I address Counsel's position as a preliminary issue in this Investigation Report.

[18] The importance of the IPC in conducting consultations is significant. It allows the IPC to informally resolve complaints in a much shorter time period in an informal manner. This authority serves the public interest by ensuring complainants, who seek access to information that has been withheld by a public body, have the matter settled with the assistance of the IPC's informal resolution team in a much timelier manner, up to 60 days, and without all the formality of a formal investigation. Formal investigations are resource intensive and burdensome on the parties who are required to submit formal submissions for the investigation. Formal investigations can take up to 180 days to complete.

[19] Timeliness of access to information in access to information legislation is one of the hallmarks of these laws and forms part of an applicant's/complainant's right to access

information held by public bodies. Having access to information in a timely manner serves the purposes of the ATIPPA which include:

- a. ensuring that individuals have access to their personal information held by public bodies and have a right to request correction of it;⁴ and
- b. providing the public with a right to access information held by public bodies (subject to specific exceptions) in order to ensure government transparency and to facilitate the public's ability to meaningfully participate in the democratic process.⁵

[20] To determine whether a consultation forms part of an investigation or not, as the case may be, I will conduct a purposive interpretation of subsection 93 (1) together with any other applicable provisions.

Purposive Interpretation

[21] The modern principle of statutory interpretation requires that an initial impression left by the ordinary meaning of a provision must be assessed in the context of other provisions of the Act and the Act's overall scheme. This analysis considers how provisions or parts of an Act work together to form a functioning and coherent whole that is rational and internally consistent.⁶

[22] Further, the Yukon *Interpretation Act* states "[e]very enactment and every provision thereof shall be deemed remedial and shall be given the fair, large, and liberal interpretation that best insures the attainment of its objects".⁷

[23] The duty to investigate a complaint and the authority to conduct a consultation to resolve a complaint is enumerated in subsections 91 (1) and (2), which state:

91(1) Not later than 10 business days after the day on which a complaint is filed, the IPC must

(a) decide whether to

⁴ Subsection 6 (c).

⁵ Subsection 6 (e).

⁶ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 1998 CanLII 837 (SCC), at para. 21 and *Macdonald Communities Limited v Alberta Utilities Commission*, 2019 ABCA 353.

⁷ *Interpretation Act*, RSY 2002, c125, at section 10.

(i) *investigate the complaint in accordance with subsection (2), or*

(ii) *dismiss the complaint in accordance with subsection (3); and*

...

(2) Without delay after the IPC decides to investigate a complaint, the IPC must commence the investigation unless the IPC decides to conduct a consultation with the complainant and the respondent in accordance with section 93.

[24] Subsection 93 (1) states that:

93(1) Subject to subsection (2), the IPC may conduct a consultation with the complainant and the respondent for the purpose of resolving the complainant's complaint without an investigation by providing, not later than seven business days after the day on which the complaint was filed, a notice to each of them that explains the IPC's intention to consult.

(2) A consultation under subsection (1) may be conducted for a maximum period of 60 days, the first day of the period being the day on which the complaint to which the consultation relates is filed.

(3) Subject to subsection (4), the IPC may conduct a consultation under this section in any manner that they consider appropriate to resolve the matter that is the subject of a complaint.

(4) The IPC must

(a) without delay after a complainant consents to the dismissal of their complaint

(i) dismiss the complaint, and

(ii) provide to the complainant and the respondent a notice of the dismissal; or

(b) without delay after the IPC makes a determination that continuing the consultation is not likely to result in the resolution of the matter to which the consultation relates

(i) commence an investigation into the complaint, and

(ii) provide to the complainant and the respondent a notice of commencement of the investigation.

[25] The initial impression left by reading these sections together is that the Act carves out a resolution process that is intended to be separate from an investigation. However, when read together with sections 23, 91, 95, 97, 99 and 103 this interpretation results in absurd consequences.

[26] The ordinary meaning of paragraph 91 (1)(a) gives the IPC just two options after receiving a complaint, investigation or dismissal. There is no third option identified that allows for consultation separate and apart from the investigation stream. Further, for this paragraph to work with section 93, a consultation must be part of the investigation stream as the only other option would be dismissal.

Disclosure of Personal information

[27] Section 23 prohibits the disclosure of personal information unless there is authority in the Act to disclose this information. This section also limits the disclosure of personal information to that which is reasonably necessary for the disclosure. It states:

23 A public body must not disclose personal information

(a) except as provided under this Division; and

(b) beyond the amount that is reasonably necessary to carry out the purpose for the disclosure.

[28] Paragraph 25 (h)(xv) allows a public body to disclose personal information on a discretionary basis to the IPC.

[29] Section 7 together with its subsection (d) state “[t]his Act does not affect or limit the power of... an officer of the Legislative Assembly to, in accordance with their authority to do so, compel a witness to testify or compel the production of documents.” Under the ATIPPA Act, the IPC is an officer of the Legislative Assembly.

[30] Section 95 outlines the powers of the IPC in conducting investigations which includes the power to compel a respondent to produce relevant information or records held by a public body.⁸ Section 97 reinforces this power by requiring a respondent to produce information or

⁸ Subsection 95(1)(c) of ATIPPA

records compelled under paragraph 95 (1)(c) not later than 10 business days after a written request for production.⁹

[31] Together these provisions operate to ensure that when investigating a complaint received under section 91, the IPC is able to receive all the information required, including personal information, to investigate the complaint. The effect of section 7 is that when the IPC compels the production of information for an investigation from a public body, it must comply with the request for production despite any provision of the Act, including the section 23 limitation principle that applies to the disclosure of personal information by a public body.

[32] If sections 91 and 93 are read such that a consultation conducted under section 93 is not part of an investigation initiated under section 91, this would mean that a public body could, using its discretion, simply decide not to provide the records to the IPC that are subject to a complaint received by the IPC where she decides to conduct a consultation as occurred here. In addition, for any records containing personal information, the public body would be required to apply the limitation principles which could result in the IPC receiving redacted copies of records that are subject to the complaint and create the situation where the IPC would be unsure about whether she has the information required to properly address the complaint.

[33] There are other consequences as well.

Confidentiality

[34] If a consultation is not part of the investigation stream under the Act, there is no duty of confidentiality for the IPC or their staff to maintain the confidentiality of information received when engaged in that process.

[35] Section 103 states as follows.

Subject to paragraph 111(1)(d) and subsection 113(2), during an investigation or the preparation of a report under paragraph 101(a), the IPC, a delegate of the IPC and any other person acting under the direction of the IPC must not disclose to another person, and must take reasonable measures not to disclose to another person, information and records of the following types that they obtain, or of which they become aware, during the investigation:

(a) generally excluded information;

⁹ Section 97(1) of the ATIPP Act

- (b) information or a record to which access is prohibited under Division 8 of Part 3;*
- (c) information or a record to which the head of a responsive public body has decided to deny an applicant access under Division 9 of Part 3;*
- (d) information or a record the existence of which the head of a responsive public body has decided not to reveal in response to an access request in accordance with subsection 64(3).*

[My emphasis]

[36] Section 103 requires that the IPC and her staff maintain the confidentiality of information or records they obtain, or become aware of, during an investigation and in preparation of an investigation report only. This is because information disclosed to the IPC for the purposes of addressing a complaint can be highly sensitive and confidential. It follows from this that public bodies would be unlikely to disclose any information that is sensitive, including personal information, to the IPC during the consultation process because there is no duty of confidentiality associated with that process. The effect is that the consultation process established under the Act to informally resolve complaints in a timely manner would be sterilized.

Evidence inadmissible

[37] Section 99 prohibits the use of “[e]vidence given, disclosed or produced by a person during an investigation...inadmissible against the person in any proceeding” with certain exceptions that are set out in subsections 99 (a) through (d) [my emphasis]. Here again, a public body would be unlikely to participate in a consultation where this provision does not operate.

Avoiding Absurdity

[38] It is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. An interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is

illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment.¹⁰

[39] As such, an interpretation that leads to absurd consequences should be avoided in favour of an interpretation that avoids absurdity. As stated above, the wording of section 91 permits only two actions upon receiving a complaint, investigation or dismissal. Further, the wording *“without delay after the IPC decides to investigate a complaint, the IPC must commence the investigation unless the IPC decides to conduct a consultation”* appears to permit consultation to be undertaken only *after* the decision to investigate has been made.

[40] In assessing section 93 in the context of other provisions of the Act and the Act’s overall purposes, particularly subsections 6 (c) and (e), its scheme, and the intention of Parliament is to provide a mechanism to resolve complaints without the need for a formal investigation. As such, an interpretation that authorizes information and records to be compelled and kept confidential in the consultation process, and ensures evidence given during the process is inadmissible in other proceedings should prevail to ensure compatibility with the other provisions of the Act and the object of the enactment. This interpretation will avoid the absurdity that would arise if the consultation process were found to be outside of the investigative stream.

[41] This is possible by interpreting sections 91 and 93 to mean that a consultation may only take place after the IPC has chosen to investigate, but before commencing a formal investigation decides that the matter should be attempted to be resolved through the consultation process. This interpretation makes consultation part of the investigation stream, which triggers the powers of the IPC to compel information, the duty of confidentiality, and the inadmissibility of evidence obtained by the IPC during the process, which components must all form part of the consultation process to work as intended.

[42] An interpretation that results in the consultation process operating outside of the investigative stream would result in the IPC not having the power to compel documents, the duty of confidentiality for information received to address a complaint would not apply, and evidence submitted by a person during this process would be admissible in other proceedings. This would, in my view, result in an absurdity because it would render the consultation process unusable and force every complaint to be addressed through the formal investigation process, which would significantly lengthen an applicant’s ability to access information in a timely manner, impose an unnecessary burden on the parties to always participate in a formal process

¹⁰ *Rizzo & Rizzo Shoes Ltd. (Re)*, *supra* at para. 27

that requires written submissions, and overly tax the IPC's resources. This could not have been the intent of the legislature in enacting the consultation process provision.

Based on the foregoing, it is my view that the consultation process is within the investigative stream and all the powers of the IPC and duties associated with an investigation apply to the consultation process.

Issue One: Is the Head of the Department required by subparagraph 64 (1)(b)(i) together with subsection 38 (1) of the ATIPPA to withhold information from the Records?

[43] Subparagraph 64 (1)(b)(i) is a mandatory exception to the right of access and requires the head of a responsive public body to withhold information and records upon determining that the information or records are generally excluded information. If the head meets their burden of proving these provisions apply, then they are prohibited from providing the Complainant with access.

[44] Section 38(1) specifies the following as generally excluded information.

- (a) a court record;*
- (b) information contained in a court registry;*
- (c) judicial information;*
- (d) adjudicative information;*
- (e) a record made by or for a member of the Legislative Assembly who is not a minister;*
- (f) a record made by or for a member of the Legislative Assembly who is a minister that relates to a personal or constituency matter of the member;*
- (g) a record made by or for an officer of the Legislative Assembly that relates to their exercise of powers or their performance of duties under an Act;*
- (h) a record that relates to a prosecution, if the proceedings for the prosecution have not been completed;*
- (i) a record made by or for a coroner that relates to an investigation, inquiry or inquest conducted by the coroner under the Coroners Act that has not been completed;*

- (j) *a record of a service provider that does not relate to a service provided for or on behalf of a public body by the service provider;*
- (k) *a record acquired by the archivist under section 9 of the Archives Act from a person other than a public body;*
- (l) *personal health information held by a public body, or a program or activity of a public body, under its authority and in relation to its function as a custodian;*
- (m) *information contained in an examination or test;*
- (n) *information contained in teaching materials;*
- (o) *information gathered or created for the purpose of research conducted by*
- (i) *a researcher who is a member of the teaching faculty of Yukon University or another post-secondary institution,*
 - (ii) *a teaching or research assistant of a researcher referred to in subparagraph (i), or*
 - (iii) *any other person carrying out research in association with Yukon University or another post-secondary institution.*

[45] The Head cited subparagraph 64(1)(b)(i) and provided the following submissions to support their decision to withhold information from records 1, 3, 4, 8, 10, 12, 13, 17, 18 and 19.

Record #	Type of Record	Submissions of the Department
1	2019-779 Database Entries	Information that was unrelated to the request or the access request was redacted, per s. 64(1)(b)(i).
3	2019-781 Case Status Report	Information that was unrelated to the request or the access request was redacted, per s. 64(1)(b)(i).
4	2019-781 Database Entries	Information that was unrelated to the request or the access request was redacted, per s. 64(1)(b)(i).
8	2019-781 Surveillance Log	Information that was unrelated to the request or the access request was redacted, per s. 64(1)(b)(i).
10	2019-782 Database Entries	Information that was unrelated to the request or the access request was redacted, per s. 64(1)(b)(i).

12	2019-805 Database Entries	Information that was unrelated to the request or the access request was redacted, per s. 64(1)(b)(i).
13	2019-805 Director's Report	Information that was unrelated to the request or the access request was redacted, per s. 64(1)(b)(i).
17	Notes Investigator 1	Information that was unrelated to the request or the access request was redacted, per s. 64(1)(b)(i).
18	Notes Investigator 2	Information that was unrelated to the request or the access request was redacted, per s. 64(1)(b)(i).
19	Notes Investigator 3	Information that was unrelated to the request or the access request was redacted, per s. 64(1)(b)(i).

[46] The basis for withholding information from the above Records is that the information was “unrelated to the request or the access request was redacted per 64(1)(b)(i)”. The Head did not provide any other evidence to support their assertion that this subparagraph applies including that they did not identify why the information is generally excluded under subsection 38 (1).

[47] As such, on balance, the Head has not met their burden of proving that subparagraph 64 (1)(b)(i) authorizes them to withhold the information identified in records 1, 3, 4, 8, 10, 12, 13, 17, 18 and 19.

Issue Two: Is the Head of the Department required by subsection 70 (3) of the ATIPPA to withhold information from the Records?

[48] Subsection 70 (1) requires the head of a responsive public body to withhold information and records that the head determines would be an unreasonable invasion of the third party's privacy. In order for subsection 70 (3) to apply to the information in the records, the information has to be personal information ‘of a third party’ that if disclosed to an applicant, would be an unreasonable invasion of the third party's privacy as defined in that provision.

[49] Personal information is defined in Section 1 as follows.

“personal information” means, subject to section 3, recorded information about an identifiable individual, including

(a) their name,

(b) their home, mailing or email address or phone number,

- (c) their age, sex, gender identity or expression, or sexual orientation,*
- (d) their skin colour, fingerprints, blood type or any other genetic characteristic or biometric information,*
- (e) their race, ethnicity or nationality,*
- (f) information about their current and past physical or mental health, including their personal health information,*
- (g) information about their marital, family, education or employment status or history,*
- (h) information about their current or past
 - (i) political or religious beliefs, associations or activities,*
 - (ii) amounts or sources of income, or*
 - (iii) income tax returns,**
- (i) information about
 - (i) an asset that they wholly or partially own or owned,*
 - (ii) a liability for which they are or were wholly or partially liable,*
 - (iii) a transaction or banking activity in which they are or were involved,*
 - (iv) an assessment of credit-worthiness of which they are or were the subject,*
 - (v) a discretionary benefit in the nature of income assistance, legal aid or another similar type of benefit that they are receiving or have received, or*
 - (vi) a law enforcement matter of which they are or were the subject,**
- (j) a personal unique identifier that has been assigned to them,*
- (k) another individual's opinion or view about them, or*
- (l) their opinion or view about something other than their opinion or view about another individual.*

[50] Subsection 70 (3) lists the following types of personal information that meet the definition of unreasonable invasion of privacy.

- (a) the disclosure of information about*
 - (i) the third party's race, ethnicity, or sexual orientation,*
 - (ii) the third party's genetic characteristics or biometric information,*
 - (iii) the education or employment history of the third party,*
 - (iv) the third party's current or past*
 - (A) physical or mental health,*
 - (B) political or religious beliefs, associations or activities, or*
 - (C) amounts or sources of income,*
 - (v) assets that the third party wholly or partially owns or owned,*
 - (vi) liabilities for which the third party is or was wholly or partially liable,*
 - (vii) transactions or banking activities in which the third party is or was involved,*
or
 - (viii) assessments of credit worthiness to which the third party is or was subject;*
- (b) the disclosure of information collected from the third party's income tax returns or collected for the purpose of collecting a tax from the third party;*
- (c) the disclosure of information about a discretionary benefit in the nature of income assistance, legal aid or another similar type of benefit that the third party is receiving or has received;*
- (d) the disclosure of information about a law enforcement matter of which the third party is or was the subject, or about a legal obligation owed to a public body by the third party, if the disclosure occurs during a period in which the information is necessary for use in*
 - (i) an investigation into the matter,*
 - (ii) a prosecution of an offence as it relates to the matter, or*
 - (iii) enforcing the obligation;*

(e) the disclosure of an individual's opinion or view about the third party that has been provided for the purpose of a recommendation, evaluation or character reference in respect of the third party.

[51] Subsection 70 (4) provides what types of disclosures are not considered to be an unreasonable invasion of the third party's privacy.

Each of the following types of disclosure of a third party's personal information is not considered to be an unreasonable invasion of the third party's privacy:

- (a) a disclosure to which the third party consents in writing;*
- (b) the disclosure of information of a type of information referred to in paragraph 25(g);*
- (c) in the case of a third party who is or was an employee of a public body, the disclosure of information about
 - i. the third party's status as an employee of the public body,*
 - ii. the third party's classification or salary range, or the duties and responsibilities of the position or positions that they occupy or occupied as an employee of the public body*
 - iii. the third party's name as contained in a record prepared by them in the course of their employment with the public body, or*
 - iv. the third party's opinion or view provided in their performance of the duties and responsibilities of the position or positions that they occupy or occupied other than an opinion or view about another individual;**
- (d) in the case of information contained in a record granting, issuing or otherwise providing a licence, permit or other type of authorization of a commercial or professional nature, or a discretionary benefit other than a benefit in the nature of income assistance, legal aid or another similar type of benefit, that has been granted, issued or otherwise provided to the third party under an Act, the disclosure of the following as specified in that record:*

- i. the name of the third party to whom the licence, permit, authorization or benefit was granted, issued or otherwise provided,*
 - ii. the type of licence, permit, authorization or benefit that was granted, issued or otherwise provided,*
 - iii. the date on which the licence, permit, authorization or benefit was granted, issued or otherwise provided,*
 - iv. if applicable, the period in respect of which the licence, permit, authorization or benefit is or was valid,*
 - v. if applicable, the date on which the licence, permit, authorization or benefit expires or expired,*
 - vi. in the case of a monetary benefit, the amount of the benefit that was granted or otherwise provided;*
- (e) in the case of a third party who travelled at the expense of a public body, the disclosure of information about the expenses incurred by the third party, including all payments made to the third party by the public body in relation to the travel;*
- (f) the disclosure is authorized or required under an Act of the Legislature (including this Act) or of Parliament, or is authorized or required under a regulation made under such an Act;*
- (g) a disclosure that the head determines is necessary to protect an individual's health or safety.*

[52] Lastly, subsection 70 (5) outlines the relevant factors to be considered by the head in relation to a disclosure under subsection (1).

The following factors are relevant factors to be weighed by the head in relation to a disclosure under subsection (1) (if known to the head and applicable in the circumstances):

- (a) the type and sensitivity of the personal information that would be disclosed;*
- (b) the relationship, if any, between the third party and the applicant;*

(c) whether the personal information that would be disclosed is likely to be accurate and reliable;

(d) the following factors that are considered to suggest that the disclosure would be an unreasonable invasion of a third party's privacy:

- i. the disclosure would unfairly expose the third party to financial or other harm,*
- ii. the disclosure would unfairly damage the reputation of any person referred to in a record containing the personal information,*
- iii. the personal information to be disclosed was provided to a public body based on the public body's confirmation that it would hold the information in confidence;*

(e) the following factors that are considered to suggest that the disclosure would not be an unreasonable invasion of a third party's privacy:

- i. the disclosure would subject a program or activity, specialized service or datalinking activity of a public body to public scrutiny,*
- ii. the disclosure would be likely to promote public health and safety,*
- iii. the disclosure is authorized or required under an Act of the Legislature (including this Act) or of Parliament, or is authorized or required under a regulation made under such an Act,*
- iv. the disclosure would assist in researching or validating the claims, disputes or grievances of Aboriginal peoples,*
- v. the personal information that would be disclosed is relevant to a determination of the applicant's rights.*

[53] The Head provided the following submissions to support their decision to withhold information from records 1, 2, 4, 5, 6, 7, 8, 9, 10, 12, 13, 17, 18 and 19.

Record #	Type of Record	Submissions of the Department
1	2019-779 Database Entries	Information concerning 3rd party names, physical descriptions, assets (registration information for motor vehicles), activities, and law enforcement matters under investigation by SCAN were redacted as unreasonable invasions of personal information, per s.70 (3) ATIPP. To our knowledge, no 3rd party had provided consent to disclose their information.
2	2019-779 Surveillance Log	The requestor was not seen during surveillance. Information concerning 3rd party names, physical descriptions, assets (registration information for motor vehicles), activities, and law enforcement matters under investigation by SCAN were redacted as unreasonable invasions of personal information, per s.70 (3) ATIPP. To our knowledge, no 3rd party had provided consent to disclose their information.
4	2019-781 Database Entries	Information concerning 3rd party names, physical descriptions, assets (registration information for motor vehicles), activities, and law enforcement matters under investigation by SCAN were redacted as unreasonable invasions of personal information, per s.70 (3) ATIPP. To our knowledge, no 3rd party had provided consent to disclose their information.
5	2019-781 Investigator Report	Information concerning 3rd party names, physical descriptions, assets (registration information for motor vehicles), activities, and law enforcement matters under investigation by SCAN were redacted as unreasonable invasions of personal information, per s.70 (3) ATIPP. To our knowledge, no 3rd party had provided consent to disclose their information.
6	2019-781 Land Titles Search	Information concerning 3rd party names, assets (ownership of real property), and address were redacted as unreasonable invasions of personal information, per s.70 (3) ATIPP. To our knowledge, no 3rd party had provided consent to disclose their information.

7	2019-781 Motor Vehicle Registration Reports	Information concerning 3rd party name, assets (motor vehicle, registration info), address, phone number and driver's licence number were redacted as unreasonable invasions of personal information, per s.70 (3) ATIPP. To our knowledge, no 3rd party had provided consent to disclose their information.
8	2019-781 Surveillance Log	Information concerning 3rd party names, physical descriptions, assets (registration information for motor vehicles), activities, and law enforcement matters under investigation by SCAN were redacted as unreasonable invasions of personal information, per s.70 (3) ATIPP. To our knowledge, no 3rd party had provided consent to disclose their information.
10	2019-782 Database Entries	Information concerning 3rd party names, physical descriptions, assets (registration information for motor vehicles), activities, and law enforcement matters under investigation by SCAN were redacted as unreasonable invasions of personal information, per s.70 (3) ATIPP. To our knowledge, no 3rd party had provided consent to disclose their information.
12	2019-805 Database Entries	Information concerning 3rd party names, physical descriptions, assets (registration information for motor vehicles), activities, and law enforcement matters under investigation by SCAN were redacted as unreasonable invasions of personal information, per s.70 (3) ATIPP. To our knowledge, no 3rd party had provided consent to disclose their information.
13	2019-805 Director's Report	Information concerning 3rd party names, physical descriptions, assets (registration information for motor vehicles), activities, and law enforcement matters under investigation by SCAN were redacted as unreasonable invasions of personal information, per s.70 (3) ATIPP. To our knowledge, no 3rd party had provided consent to disclose their information.
17	Notes Investigator 1	Information concerning 3rd party names, physical descriptions, assets (registration information for

		motor vehicles), activities, and law enforcement matters under investigation by SCAN were redacted as unreasonable invasions of personal information, per s.70 (3) ATIPP. To our knowledge, no 3rd party had provided consent to disclose their information.
18	Notes Investigator 2	Information concerning 3rd party names, physical descriptions, assets (registration information for motor vehicles), activities, and law enforcement matters under investigation by SCAN were redacted as unreasonable invasions of personal information, per s.70 (3) ATIPP. To our knowledge, no 3rd party had provided consent to disclose their information
19	Notes Investigator 3	Information concerning 3rd party names, physical descriptions, assets (registration information for motor vehicles), activities, and law enforcement matters under investigation by SCAN were redacted as unreasonable invasions of personal information, per s.70 (3) ATIPP. To our knowledge, no 3rd party had provided consent to disclose their information.

[54] On the evidence provided, I am satisfied that some of the information included in the records is the personal information of third parties. However, for subsection 70 (3) to apply, the disclosure of the information must meet the definition of an unreasonable invasion of privacy.

[55] The Head provided no evidence to support how this provision requires them to withhold the personal information identified in the Records. Given that this exception to the right of access is mandatory, I must determine, as best I can, if disclosure of any of this information to the Complainant will result in an unreasonable invasion of a third party's privacy.

[56] To make this determination, I viewed each of the records. For clarity and consistency, I will address each record.

Records #1, #4, #10, and #12 – Database Entries and Records #17, #18, and #19 – Investigator Notes

[57] Records #1, #4, #10 and #12 are a collection of database entries that includes the names of SCAN investigators, the names of other third parties together with the fact that they were

observed by SCAN investigators at various locations, and the names of the registered owners and vehicle descriptions observed by SCAN investigators.

[58] Records #17, #18, and #19 are notes from SCAN investigators that include the names of other third parties together with what was observed by SCAN investigators at various locations, and the names of the registered owners and vehicle descriptions observed by SCAN investigators.

[59] It is clear that this information is personal information as defined in section 1.

[60] The process for determining whether the disclosure of personal information to an applicant will result in an unreasonable invasion of a third party's privacy is set out in subsection 70 (2).

(2) The head must make a determination under subsection (1) in accordance with the following:

(a) a disclosure of a type described in subsection (3) is presumed to be an unreasonable invasion of a third party's privacy that may be rebutted only after the head weighs all relevant factors known to the head in relation to the disclosure, including any factors referred to in subsection (5) that are applicable in the circumstances;

(b) a disclosure of a type described in subsection (4) is not to be considered an unreasonable invasion of a third party's privacy;

(c) in the case of any other type of disclosure of a third party's personal information, the head must weigh all relevant factors known to the head in relation to the disclosure, including any factors referred to in subsection (5) that are applicable in the circumstances.

[61] Having followed this process, I have identified that subsection 70 (3) may apply to the third parties observed by SCAN investigators at various locations, and the names of the registered owners of vehicles observed by SCAN investigators, in which case the information would, if disclosed to the Complainant, be presumed to be an unreasonable invasion of these third parties' privacy.

a. 70 (3)(d) – information about a law enforcement matter of which the third party is or was the subject if the disclosure occurs during a period in which the information is necessary for use in

i) an investigation into the matter,

- ii) a prosecution of an offence as it relates to the matter, or
- iii) enforcing the obligation.

Paragraph 70(3)(d)

[62] As previously stated, the SCAN unit is a law enforcement agency within the Department and SCAN investigators are designated as Peace Officers when they carry out their duties. Therefore, a SCAN investigation is a law enforcement matter. However, there is no evidence that any of the individuals named in the record were themselves subject to a SCAN investigation and that the disclosure occurs during a period in which the information is necessary for use in an investigation into the matter, or a prosecution of an offence as it relates to the matter. As such, this provision does not apply to the information.

[63] However, having considered this information, together with the factors in subsection 70 (5), in particular paragraph (a) and subparagraphs (d)(i) and (ii), it is my view that disclosure of this information would be an unreasonable invasion of these third party's privacy if this information is disclosed to the Complainant. My reason for this determination is that the information is highly sensitive and reveals that these third party's were involved in a SCAN investigation from which a negative inference can be drawn about these third parties which may cause them harm.

[64] The only personal information remaining is the names of the SCAN investigators. There is a presumption under subparagraph 70 (4)(c)(iii) that disclosure of an employee's name as contained in a record prepared by them, which I can only infer from the records, in the course of their employment with the Department is not an unreasonable invasion of their privacy. Even if I am wrong in that these employees did not prepare the records, there is a presumption in subparagraph 70 (4)(c)(iv) that an employee's opinion or views provided in their performance of their duties or responsibilities, other than an opinion or view about another third party, is not an unreasonable invasion of their privacy.

[65] Given the above, I have determined that:

- a. subsection 70 (1) together with paragraph 70 (5)(a) and subparagraphs 70 (5)(d)(i) and (ii) require the Head to withhold from the Complainant, as contained in the Records, the names of third parties together with the fact that they were observed by SCAN investigators at various locations, any observations made by the SCAN investigators about these third parties, and the names of the registered owners of vehicles and vehicle descriptions observed by SCAN; and

- b. the Head is not required under any provision in section 70 to withhold the names of the SCAN investigators as contained in the Records.

Records #2 and #8 – Surveillance Logs

[66] Records #2 and #8 are logs of the video that were recorded at two locations in Whitehorse. The logs include descriptions of vehicles, licence plate numbers, and the surnames of third parties and a brief description of their actions while on camera. The submissions of the Head state that there is registration information with respect to the vehicles observed, but upon reviewing the records, this information was not recorded.

[67] It is clear that this information is personal information as defined in section 1.

[68] For the same reasons identified above, I have determined that subsection 70 (1) together with paragraph 70 (5)(a) and subparagraphs 70 (5)(d)(i) and (ii) require the Head to withhold this information from the Complainant as contained in the Records.

Records #5 and #13 – SCAN Investigator Reports

[69] Record #5 is a report written by a SCAN Investigator. The report outlines the details of a SCAN complaint, and the early investigation and surveillance related to a residence in Whitehorse. It includes the name of the Complainant and the identity of those investigated or in relation to the complaint

[70] Record #13 is a report written by a senior SCAN Investigator. The report outlines the SCAN investigation related to a residence in Whitehorse. It includes the identity of the third parties who were investigated or surveilled in relation to the complaint.

[71] It is clear that this information is personal information as defined in section 1.

[72] For the same reasons identified above, I have determined that

- a. subsection 70 (1) together with paragraph 70 (5)(a) and subparagraphs 70 (5)(d)(i) and (ii) require the Head to withhold from the Complainant any information about the third parties, as contained in these Records, who made the complaint or who were investigated or surveilled in relation to the complaint; and
- b. the Head is not required by any provision in section 70 to withhold from the Complainant the names of the SCAN investigators as contained in these Records.

Record #6 – Land Titles Search

[73] Record #6 is a property assessment inquiry for a residence in Whitehorse and includes the names of the owner. The Head made no submissions about why this record was included as relevant to the Access Request or if it involved any SCAN investigation. As such, the only personal information at issue in this record is the names of the owners and the fact that they own the property.

[74] Having considered the personal information of these third parties in this record in context, in my view, there is no provision in section 70 that would require the Head to withhold this information from the Complainant..

Record #7- Motor Vehicle Registration Reports

[75] Record #7 is a vehicle registration inquiry with respect to a vehicle observed during a SCAN investigation and includes the name of the registered owner.

[76] The personal information at issue in this Record is the name of the registered owner of the vehicle and the fact they own the vehicle and were involved in some manner in a SCAN investigation.

[77] For the same reasons identified above, I have determined that subsection 70 (1) together with paragraph 70 (5)(a) and subparagraphs 70 (5)(d)(i) and (ii) require the Head to withhold this information from the Complainant as contained in the Record.

Issue Three: Is the Head of the Department authorized by subparagraph 72(1)(b)(i) of the ATIPPA to withhold information from the Records?

[78] Subparagraph 72(1)(b)(i) gives discretionary authority to the head of a responsive public body to withhold information if the head determines that disclosure of the information could reasonably be expected to interfere with a law enforcement matter. The section reads as follows.

72(1) Subject to subsection (2), the head of a responsive public body may deny an applicant access to information held by the responsive public body if the head determines that disclosure of the information

(b) could reasonably be expected to

(i) interfere with a law enforcement matter

[79] The Head provided the following submissions to support their decision to withhold information from Records #4, #5, #9, and #13.

Record #	Type of Record	Submissions of the Department
4	2019-781 Database Entries	Information regarding communication between SCAN officer and RCMP in response to an active investigation was redacted, per s.72(1)(b)(i) as information that could reasonably interfere with a law enforcement matter.
5	2019-781 Investigator Report	Information regarding communication between the SCAN officer and RCMP in response to an active investigation was redacted, per s.72(1)(b)(i) as information that could reasonably interfere with a law enforcement matter.
9	2019-784 Database Entries	Information regarding communication between the SCAN officers and RCMP in response to an active investigation was redacted, per s.72(1)(b)(i) as information that could reasonably interfere with a law enforcement matter. This investigation is current as of July 2021.
13	2019-805 Director's Report	Information regarding communication between the SCAN officers and RCMP in response to an active investigation was redacted, per s.72(1)(b)(i) as information that could reasonably interfere with a law enforcement matter. This investigation is current as of July 2021.

[80] Law enforcement is defined in the ATIPPA as follows.

“law enforcement” means

(a) policing, including criminal or security intelligence operations,

(b) a police, security intelligence, criminal or regulatory investigation, including the complaint that initiates the investigation, that leads or could lead to a penalty or sanction being imposed, or

(c) a proceeding that leads or could lead to a penalty or sanction being imposed.

[81] In *Hamilton Police Services Board (Re)*,¹¹ in a 2008 decision of the Information and Privacy Commissioner of Ontario by Adjudicator Diane Smith, Smith outlines how this evidentiary burden is met in the context of the law enforcement exceptions contained in Ontario's *Municipal Freedom of Information and Protection of Privacy Act*.¹²

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement exception context [Ontario (Attorney General) v. Fineberg (1994), 1994 CanLII 10563 (ON SC), 19 O.R. (3d) 197 (Div. Ct.)].

Except in the case of section 8(1)(e), where section 8 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner), [2003] O.J. No. 2182 (Div. Ct.), Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 1998 CanLII 7154 (ON CA), 41 O.R. (3d) 464 (C.A.)].

It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement exemption matter constitutes a per se fulfillment of the requirements of the exemption [Order PO-2040; Ontario (Attorney General) v. Fineberg]. [My emphasis]

[82] In 2012, the Supreme Court of Canada explained the standard of proof applicable to exceptions that use the phrase "could reasonably be expected to" in *Merck Frosst Canada Ltd. v. Canada (Health)*¹³ and again in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*.¹⁴ In *Ontario (Community Safety and Correctional Services)* the Court stated:

This Court in Merck Frosst adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in Merck Frosst

¹¹ 2008 CanLII 46546 (ON IPC).

¹² RSO 1990, c M.56, as amended to August 2008.

¹³ 2012 SCC 3.

¹⁴ *Ibid.*

emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible....

[83] The Court further explained the evidentiary burden applicable to exceptions that use the phrase “could reasonably be expected to” as follows.

...An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground... This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”...

[84] For subparagraph 72(1)(b)(i) to apply, there must be a reasonable expectation of probable harm in regard to the harm that the exception to the right of access is intended to prevent. For this provision the harm is interference with a law enforcement matter.

[85] In order to meet the burden of proof for this provision, the Head must provide evidence demonstrating that by disclosing this information to the Complainant, there is a reasonable probability that interference with a law enforcement matter will occur.

[86] I have reviewed these records. Given that the evidence provided by the Head is the same for each record, I will address these records collectively.

Records #4 and #9 – Database Entries and Records #5 and #13 – SCAN Investigator Reports

[87] Records #4 and #9 are collection of database entries that outline surveillance related to two locations in Whitehorse.

[88] Records #5 and #13 are reports written by SCAN Investigators. The reports outline surveillance related to a residence in Whitehorse.

[89] Records #4, #5, #9, and #13 include communications between SCAN Investigators and the RCMP.

[90] In regard to these Records, the Head submitted that the Records contain communications between SCAN and the RCMP in relation to an active RCMP investigation. They did not provide further evidence on this point. They then went on to merely assert, without any evidence to support the assertion, that disclosing the withheld information could reasonably interfere with any active RCMP investigation.

[91] It is clear from the cases cited above, that it is not enough for the Head to merely assert their reliance on an exception to the right of access to information without evidence that is necessary to meet their burden of proof. They must, at minimum, provide evidence well beyond or considerably above a mere possibility to reach that middle ground to establish that it is reasonably probable that the harm, which the exception to the right of access is intended to prevent against, will occur if the information sought by the Complainant is disclosed to them.

[92] As no such evidence was provided, I am unable to conclude that disclosure of this information to the Complainant would be reasonably expected to cause any interference to a law enforcement investigation.

[93] on balance, the Head has not met the burden of proving that subparagraph 72 (1)(b)(i) authorizes it to withhold information related to communications between SCAN and the RCMP from Records #4, #5, #9, and #13.

Issue Four: Is the Head of the Department authorized by subparagraph 72(1)(b)(ii) of the ATIPPA to separate or obliterate information from the Records?

[94] Paragraph 72(1)(b)(ii) gives discretionary authority to the Head of a responsive public body to withhold information and records that the Head determines could reasonably be expected to reduce the investigative technique or procedure used or likely to be used in law enforcement. It states as follows.

72(1) Subject to subsection (2), the head of a responsive public body may deny an applicant access to information held by the responsive public body if the head determines that disclosure of the information

(b) could reasonably be expected to

(ii) reduce the effectiveness of an investigative technique or procedure used or likely to be used in law enforcement

[95] The Head provided the following submissions to support their decision to withhold information from Records #1, #3, #4, #5, #8, #10, #12, #13, #17, #18, and #19.

Record #	Type of Record	Submissions of the Department
1	2019-779 Database Entries	Information concerning surveillance techniques (method, location, static or mobile, equipment) used by SCAN officers was redacted, per s. 72(1)(b)(ii) because it

		could reduce the effectiveness of this law enforcement technique.
3	2019-781 Case Status Report	Information concerning where [the Complainant] had moved gained from a different file was redacted, per s. 72(1)(b)(ii).
4	2019-781 Database Entries	Information concerning surveillance techniques (method, location, static or mobile, equipment) used by SCAN officers was redacted, per s. 72(1)(b)(ii) because it could reduce the effectiveness of this law enforcement technique.
5	2019-781 Investigator Report	Information concerning surveillance techniques (method, location, static or mobile, equipment) used by SCAN officers was redacted, per s. 72(1)(b)(ii) because it could reduce the effectiveness of this law enforcement technique.
8	2019-781 Surveillance Log	Information concerning surveillance techniques (method, location, static or mobile, equipment) used by SCAN officers was redacted, per s. 72(1)(b)(ii) because it could reduce the effectiveness of this law enforcement technique.
10	2019-782 Database Entries	Information concerning surveillance techniques (method, location, static or mobile, equipment) used by SCAN officers was redacted, per s. 72(1)(b)(ii) because it could reduce the effectiveness of this law enforcement technique.
12	2019-805 Database Entries	Information concerning surveillance techniques (method, location, static or mobile, equipment) used by SCAN officers was redacted, per s. 72(1)(b)(ii) because it could reduce the effectiveness of this law enforcement technique.
13	2019-805 Director's Report	Information concerning surveillance techniques (method, location, static or mobile, equipment) used by SCAN officers was redacted, per s. 72(1)(b)(ii) because it could reduce the effectiveness of this law enforcement technique.

17	Notes Investigator 1	Information concerning surveillance techniques (method, location, static or mobile, equipment) used by SCAN officers was redacted, per s. 72(1)(b)(ii) because it could reduce the effectiveness of this law enforcement technique
18	Notes Investigator 2	Information concerning surveillance techniques (method, location, static or mobile, equipment) used by SCAN officers was redacted, per s. 72(1)(b)(ii) because it could reduce the effectiveness of this law enforcement technique.
19	Notes Investigator 3	Information concerning surveillance techniques (method, location, static or mobile, equipment) used by SCAN officers was redacted, per s. 72(1)(b)(ii) because it could reduce the effectiveness of this law enforcement technique

[96] For subparagraph 72(1)(b)(i) to apply, there must be a reasonable expectation of probable harm in regard to the harm that the exception to the right of access is intended to prevent. For this provision the harm is the reduction of the effectiveness of an investigative technique or procedure used or likely to be used in law enforcement.

[97] In order to meet the burden of proof for this provision, the Head must provide evidence demonstrating that by disclosing this information to the Complainant, there is a reasonable probability that it will reduce the effectiveness of an investigative technique or procedure used or likely to be used in law enforcement matter.

[98] For Records #1, #4, #5, #8, #10, #12, #13, #17, #18, and #19, the evidence provided by the Head is that the surveillance techniques used by SCAN officers will be reduced if the information sought by the Complainant in these Records is disclosed to them.

[99] For Record #3, the Head submitted that information concerning where the Complainant had relocated was gained from different file. No specific investigation technique was identified, and no other evidence was provided. When reviewing the record, the only information that was redacted was the address it was believed the Complainant had relocated to, and the username of a SCAN Investigator comprised of a first initial and last name. As such, there is no information contained in Record #3 that is authorized to be withheld pursuant to subparagraph 72(1)(b)(ii).

[100] For the remainder of the Records, the Head again merely asserts that disclosing the surveillance techniques used by SCAN officers will reduce their effectiveness without providing any evidence to support the assertion. Consequently, I cannot conclude that subparagraph 72(1)(b)(i) applies to the information in these Records.

As such, on balance, the Head has not met the burden of proving that subparagraph 72 (1)(b)(ii) authorizes them to withhold information related to the method, location, or equipment used in the surveillance techniques utilized in Records #1, #3, #4, #5, #8, #10, #12, #13, #17, #18, and #19.

Issue Five: Is the Head of the Department authorized by subparagraph 72(1)(b)(ix) of the ATIPPA to withhold information from the Records?

[101] Subparagraph 72(1)(b)(ix) gives discretionary authority to the Head of a responsive public body to withhold information and records that the head determines could reasonably be expected to endanger the life of, or threaten the safety of, a law enforcement officer.

[102] Subsection 72(1)(b)(ix) reads as follows.

72(1) Subject to subsection (2), the head of a responsive public body may deny an applicant access to information held by the responsive public body if the head determines that disclosure of the information

(b) could reasonably be expected to

(ix) endanger the life of, or threaten the safety of, a law enforcement officer.

[103] The Head provided the following submissions to support their decision to withhold information from Records #1-5, #10-13, #15, and #16.

Record #	Type of Record	Submissions of the Department
1	2019-779 Database Entries	The names of SCAN investigators were redacted to protect their identity and not endanger their security or safety, per s. 72(1)(b)(ix). At the time, officers were agents of the SCAN Director involved in an investigation under the SCAN Act. Section 1(4) of the SCAN Act confirms that persons acting as agents of the Director involved in investigations under the SCAN Act are law enforcement

2	2019-779 Surveillance Log	The name of the SCAN officer that reviewed the log was redacted to protect their identity and not endanger their security or safety, per s. 72(1)(b)(ix). This officer was an agent of the SCAN Director involved in an investigation under the SCAN Act. Section 1(4) of the SCAN Act confirms that persons acting as agents of the Director involved in investigations under the SCAN Act are law enforcement.
3	2019-781 Case Status Report	The names of SCAN investigators were redacted to protect their identity and not endanger their security or safety, per s. 72(1)(b)(ix). At the time, officers were agents of the SCAN Director involved in an investigation under the SCAN Act. Section 1(4) of the SCAN Act confirms that persons acting as agents of the Director involved in investigations under the SCAN Act are law enforcement.
4	2019-781 Database Entries	The name of the SCAN officer that reviewed the log was redacted to protect their identity and not endanger their security or safety, per s. 72(1)(b)(ix). This officer was an agent of the SCAN Director involved in an investigation under the SCAN Act. Section 1(4) of the SCAN Act confirms that persons acting as agents of the Director involved in investigations under the SCAN Act are law enforcement.
5	2019-781 Investigator Report	The names of the SCAN officer was redacted to protect their identity and not endanger their security or safety, per s. 72(1)(b)(ix). At the time, the officer was an agent of the SCAN Director involved in an investigation under the SCAN Act. Section 1(4) of the SCAN Act confirms that persons acting as agents of the Director involved in investigations under the SCAN Act are law enforcement.
10	2019-782 Database Entries	The names of the SCAN officer was redacted to protect their identity and not endanger their security or safety, per s. 72(1)(b)(ix). At the time, the officer was an agent of the SCAN Director involved in an investigation under the SCAN Act. Section 1(4) of the SCAN Act confirms that persons acting as agents of the Director involved in investigations under the SCAN Act are law enforcement.

11	2019-805 Case Status Report	The names of the SCAN officer was redacted to protect their identity and not endanger their security or safety, per s. 72(1)(b)(ix). At the time, the officer was an agent of the SCAN Director involved in an investigation under the SCAN Act. Section 1(4) of the SCAN Act confirms that persons acting as agents of the Director involved in investigations under the SCAN Act are law enforcement.
12	2019-805 Database Entries	The names of SCAN investigators were redacted to protect their identity and not endanger their security or safety, per s. 72(1)(b)(ix). At the time, officers were agents of the SCAN Director involved in an investigation under the SCAN Act. Section 1(4) of the SCAN Act confirms that persons acting as agents of the Director involved in investigations under the
13	2019-805 Director's Report	The names of SCAN investigators were redacted to protect their identity and not endanger their security or safety, per s. 72(1)(b)(ix). At the time, officers were agents of the SCAN Director involved in an investigation under the SCAN Act. Section 1(4) of the SCAN Act confirms that persons acting as agents of the Director involved in investigations under the SCAN Act are law enforcement
15	Investigator 1 Text Message Search Photo 1	The name and cell phone number of SCAN investigator were redacted to protect their identity and not endanger their security or safety, per s. 72(1)(b)(ix). At the time, the officer was an agent of the SCAN Director involved in an investigation under the SCAN Act. Section 1(4) of the SCAN Act confirms that persons acting as agents of the Director involved in investigations under the SCAN Act are law enforcement.
16	Investigator 1 Text Message Search Photo 2	The name and cell phone number of SCAN investigator were redacted to protect their identity and not endanger their security or safety, per s. 72(1)(b)(ix). At the time, the officer was an agent of the SCAN Director involved in an investigation under the SCAN Act. Section 1(4) of the SCAN Act confirms that persons acting as agents of the Director involved in investigations under the SCAN Act are law enforcement.

[104] For subparagraph 72(1)(b)(ix) to apply to the information in these Records, there must be a reasonable expectation of probable harm in regard to the harm that the exception to the right of access is intended to prevent. For this provision, the harm is endangering the life of, or threatening the safety of, a law enforcement officer.

[105] In order to meet the burden of proof for this provision, the Head must provide evidence demonstrating that by disclosing this information to the Complainant, there is a reasonable probability that a law enforcement officer's life or physical safety may be endangered.

[106] As previously stated, the SCAN unit is a law enforcement agency within the Department. As such, I am satisfied that Investigators employed by the SCAN unit are law enforcement officers.

[107] The information withheld from the Records is limited to the names and cellphone numbers of SCAN investigators.

[108] Here again, the Head has provided no evidence to support their assertion that release of the SCAN investigators' names and cell phone numbers, which I assume are cell phones issued by the Department, if disclosed to the Complainant, will endanger their lives or their safety.

[109] I could speculate that because of the role of a SCAN investigator there may be some danger or safety risk if this information is released to the Complainant. However, in the absence of any evidence to support that such risk exists, which evidence must support a reasonable probability, I am unable to find that subparagraph 72 (1)(b)(ix) applies.

[110] On balance, the Head has not met their burden of proving that subparagraph 72 (1)(b)(ix) authorizes them to withhold the names and cellphone numbers of the SCAN investigators in these Records.

Third party personal information in Records #3, #9, #11, and #15 and #16

[111] Given that the Head did not meet their burden of proving that subparagraphs 64 (1)(b)(i), 72 (1)(b)(i), 72 (1)(b)(ii), or 72 (1)(b)(ix), as applicable, apply to the information in these Records and the fact that there is personal information in these Records, I must go on to determine, as best I can, if any provisions in section 70 apply to require the Department to refuse to disclose any of this information to the Complainant.

[112] As previously stated, the Head of a responsive public body must not grant an applicant access to a third party's personal information held by the responsive public body if the Head

determines that disclosure of the information would be an unreasonable invasion of the third party's privacy.

[113] The types of personal information found in Records #3, #9, #11, and #15 and #16 are as follows.

Names of Third Parties and Names of the Registered Owners of Motor Vehicles

[114] Record #9 includes the names of third parties together with the fact that they were observed by SCAN investigators at various locations, and the names of the registered owners of vehicles and vehicle descriptions observed by SCAN investigators. This information qualifies as personal information as defined in the Act.

[115] Having reviewed the provisions in section 70, specifically the factors in subsection 70 (5) paragraph (a) and subparagraphs (d)(i) and (ii), it is my view that disclosure of this information would be an unreasonable invasion of these third party's privacy if this information is disclosed to the Complainant. As previously stated, this information is highly sensitive and reveals that these third parties were involved in a SCAN investigation from which a negative inference can be drawn about these third parties which may cause them harm.

Names and Cellphone Numbers of SCAN Investigators

[116] Records #3, #11, #15 and #16 include the names of SCAN Investigators. Records #15 and #16 include both the names and cellphone numbers of SCAN Investigators. This information qualifies as personal information as defined in the Act.

[117] For the reasons stated above in relation to this personal information, the Head is not required under any provision in section 70 to withhold the names of the SCAN investigators as contained in the Record.

[118] As for the cell phone numbers, there is no evidence before me about the cell phone numbers., so I assume they are work issued cell phones. Subsection 3 (a) identifies that business contact information is not considered personal information of an individual. Business contact information is defined as "information that makes it possible to contact the individual at their place of business and includes the individual's...business phone number". There is no evidence before me that confirms or refutes that the cell phone numbers of the SCAN investigators fit within the definition of business contact information. If these phone numbers do qualify as personal information, I am unable to determine on the evidence if disclosure of this information to the application would amount to an unreasonable invasion of the SCAN investigators' privacy in accordance with any provisions in section 70. Given this, I am unable to find that the Head is required to refuse access to this information.

IX FINDINGS

[119] On the Preliminary Issue, I have determined that a consultation conducted under section 93(1) is part of an investigation commenced under section 91.

[120] On Issue One, I find that the Head has not met their burden of proving that subparagraph 64(1)(b)(i) authorizes them to withhold from the Complainant the information identified in Records #1, #3, #4, #8, #10, #12, #13, #17, #18 and #19.

[121] On issue Two, I find the following.

Records #1, #2, #4, #5, #7, #8, #10, #13, #17, #18, and #19

[122] Subsection 70(1) together with paragraph 70(5)(a) and subparagraphs 70(5)(d)(i) and (ii) requires the Head to withhold from the Complainant the following information from the above noted Records.

- a. the names of third parties together with the fact that they were observed by SCAN Investigators,
- b. any observations made by SCAN investigators about these third parties, and
- c. the names of the registered owners and the vehicle descriptions of vehicles observed by SCAN Investigators.

[123] Section 70 does not require the Head to withhold from the Complainant the names of SCAN Investigators as contained in the above noted Records.

Records #5 and #13

[124] Subsection 70 (1) together with paragraph 70(5)(a) and subparagraphs 70(5)(d)(i) and (ii) requires the Head to withhold from the Complainant any information about the third parties, as contained in these Records, who made the complaint or who were investigated or surveilled in relation to the complaint.

[125] Section 70 does not require the Head to withhold from the Complainant the names of SCAN Investigators as contained in the above noted Records.

Record #6

[126] Section 70 does not require the Head to withhold from the Complainant the personal information in the Record.

[127] On issue Three I find the Head has not met the burden of proving that subparagraph 72 (1)(b)(i) authorizes it to withhold from the Complainant information related to communications between SCAN and the RCMP from Records #4, #5, #9, and #13.

[128] On issue Four, I find the Head has not met the burden of proving that subparagraph 72 (1)(b)(ii) authorizes them to withhold from the Complainant information related to the method, location, or equipment used in the surveillance techniques utilized in Records #1, #3, #4, #5, #8, #10, #12, #13, #17, #18, and #19.

[129] On issue Five I find the Head has not met their burden of proving that subparagraph 72 (1)(b)(ix) authorizes them to withhold from the Complainant the names and cellphone numbers of the SCAN investigators in Records #3, #9, #11, and #15 and #16 .

[130] Subsection 70(1) together with paragraph 70(5)(a) and subparagraphs 70(5)(d)(i) and (ii) requires the Department to withhold from the Complainant:

- a. names of third parties together with the fact that they were observed by SCAN investigators at various locations, and
- b. names of the registered owners and vehicle descriptions observed by SCAN investigators.

X RECOMMENDATIONS

[131] On issues One through Five, I recommend that the Head disclose to the Complainant the information they requested in the Records that they are not required to withhold pursuant to Section 70.

Head's Response to Investigation Report

[132] Section 104 of the Act requires the Head to do the following after receiving the Investigation Report.

104(1) Not later than 15 business days after the day on which an investigation report is provided to a respondent under subparagraph 101(b)(ii), the respondent must, in respect of each recommendation set out in the investigation report

(a) decide whether to

(i) accept the recommendation in accordance with subsection (2), or

(ii) reject the recommendation; and

(b) provide

(i) a notice to the complainant that includes

(A) their decision, and

(B) in the case of the rejection of a recommendation, their reasons for the rejection and a statement notifying the complainant of their right to apply to the Court for a review of the decision or matter to which the recommendation relates, and

(ii) a copy of the notice to the commissioner.

(2) If a respondent accepts a recommendation set out in an investigation report, the respondent must comply with the recommendation not later than

(a)...

(b) if the respondent is the head of a public body

(i) 15 business days after the day on which the notice of acceptance under subparagraph (1)(b)(i) is provided to the complainant, or

(ii) if an extension is granted by the commissioner under subparagraph (4)(a)(i), the date specified in the notice of extension provided under paragraph (4)(b).

[133] Subsection 104 (3) authorizes the Head to seek an extension of the time to comply with a recommendation as follows.

(3) If the head of a public body reasonably believes that the public body is unable to comply with a recommendation in accordance with subparagraph (2)(b)(i), the head may, not later than 10 business days before the end of the period referred to in that

subparagraph, make a written request to the commissioner for an extension of the time within which the head must comply with the recommendation.

Subsection 104 (5) deems the Head to have rejected a recommendation if they do not provide notice as required or does not comply with it in accordance with the specified timeframes.

Complainant's Right of Appeal

[134] Subsection 105(1) gives the Complainant the right to appeal to the Yukon Supreme Court if the Head rejects a recommendation, or is considered to have done so, in accordance with the time limits set out in paragraphs (a) through (c).

ORIGINAL SIGNED

Joni Ellerton B.A., J.D.
Adjudicator
Office of the Information and Privacy Commissioner

Distribution List:

- Head of the Department
- Complainant