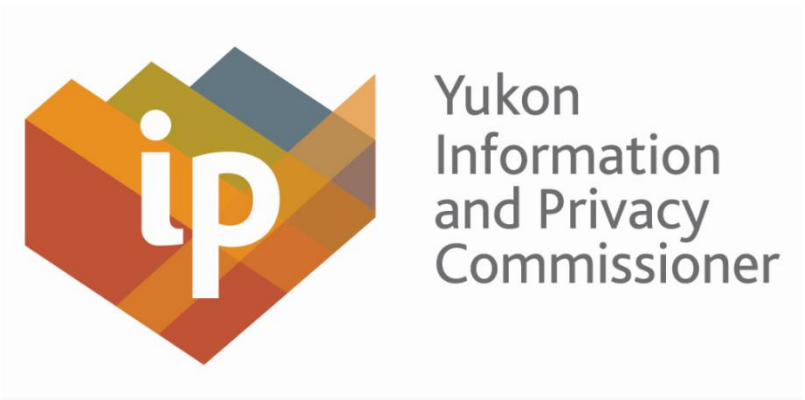

INVESTIGATION REPORT

Pursuant to section 66 of the

Access to Information and Protection of Privacy Act

Department of Justice

File ATP-ADJ-2024-09-244

Kelly Hjorth, Investigator

Office of the Information and Privacy Commissioner

December 05, 2024

Summary

On April 18, 2024, an applicant made an access request to the Yukon Department of Justice ("Public Body") for video surveillance footage captured at a facility operated and maintained by the Public Body.

The Public Body identified 53 records totalling approximately 27.5 hours; however, it refused the applicant access in full to the responsive records. As its authority, the Public Body cited s.72(1)(b)(i), (ii),(iv), and (vi). The applicant requested that the Information and Privacy Commissioner the ("IPC") review the refusal. Settlement failed to resolve the matter in its entirety and it proceeded, therefore, to investigation.

The Complainant made no submissions on their position regarding the Investigation. The Public Body made limited submissions but provided no supporting affidavit evidence or data to support the claims made. Specifically, the Public Body made no submissions on s.70 of the Act. This was a required analysis as the provision constitutes a mandatory exclusion clause. Submissions made by the Public Authority on the discretionary sections set out below were limited and unsupported by affidavit evidence or data.

The IPC found that the Public Body is not authorized to rely on s.72(1)(b)(i), (ii), (iv), or (vi) to refuse to disclose the information sought by the applicant. While not argued by the Public Body, the IPC also found that s.70 applied to certain information responsive to the access request. Accordingly, the IPC recommended that it provide the applicant with disclosure of the information to which they are entitled, with any redactions required.

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Complaint

On April 15, 2024, the Complainant made a request for access to records that they believed to be in the custody or control of the Department of Justice (the "Public Body"); namely, the Complainant requested videos of their client while the client was detained in the Arrest Processing Unit (the "APU") of the Whitehorse Correctional Centre (the "WCC").

On April 18, 2024, the ATTIP Office activated this request and assigned it file number 24-037 (the "Access Request"). By July 2, 2024, the Public Body provided its final response to the Complainant via the ATIPP Office (the "Response"). In the Response, the Public Body advised that it had identified records responsive to the Access Request (the "Records") and determined that all of the Records would be withheld in full.

On July 24, 2024, this office received a complaint from the Complainant in accordance with s.66 of the *Access to Information and Protection of Privacy Act* (the "Act") and assigned it file number ATP-COM-2024-07-184 (the "Complaint"). By July 31, 2024, we had accepted the Complaint and, as such, issued notices to the Complainant and the Public Body advising them of our decision to conduct a consultation prior to proceeding to an investigation.

By September 16, 2024, we were unable to resolve the Complaint within the statutory timelines established by the Act. We therefore escalated it to "investigation" and assigned file number ATP-ADJ-2024-09-244 (the "Investigation").

Jurisdiction

The Authority of the IPC to review the Public Body's decision(s) to refuse to provide an applicant with access to records is set out in subsections 91(1) and 91(2) of the Act.

Statutes Cited

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

Cases, Orders and Reports Cited

Cases

None Cited.

Reports

Yukon Inquiry Report ATP15-055AR.

Documents

Adult Custody Policy Manual (the "Policy Manual") – last revised September 28, 2018

Memorandum of Agreement (the "MOA") – dated January 23, 2023

Territorial Police Service Agreement (the "TPSA") – last revised May 5, 2023

Black's Law Dictionary (11th Ed., 2019)

Explanatory Note

All sections, subsections, paragraphs and the like referred to in this investigation report (the "Investigation Report") are to the Act, unless otherwise stated.

All references to a "public body" mean a public body as defined in the Act.

References to specific emails will only identify third parties outside the Public Body by a letter, such as "X", "Y" or "Z", as the case may be, for privacy protection purposes.

Burden of Proof

Paragraph 102(c) sets out the burden of proof relevant to this Investigation. It states that the burden is on the Public Body Head (the "Head") to prove that a complainant has no right to the records or to the information withheld from the records.

Submissions of the Parties

[1] The submissions of the Public Body are generally set out in the "Analysis" sections of this Investigation Report, as may be relevant to each issue. The Complainant made no submissions.

I BACKGROUND

[2] The Yukon, as a territory, has never had a municipal police force.

[3] From at least 1895, policing in the Yukon has been conducted by the Royal Canadian Mounted Police (the "RCMP").[1]

[1] The RCMP is the successor to the then North-West Mounted Police.

[4] Following passage of the *Yukon Act* in 1898, Yukon, and the RCMP have entered into operational agreements called "police contracts" to continue the long-standing tradition of providing policing to the territory.[2]

[5] Since 1974, the RCMP has maintained its Yukon headquarters in Whitehorse.[3]

[6] Prior to construction of the WCC in 2012, all persons arrested by the RCMP were held at the RCMP detachment in Whitehorse pending trial (if applicable). If found guilty and sentenced, an offender would then be remanded to a corrections facility in a southern province, generally British Colombia.

[7] In 2014, the Yukon Government ("YG") completed construction of the APU as an add-on facility to the WCC. It was designed to provide a high standard of care and protection for persons taken into custody, including for intoxication.

[8] Persons arrested or detained by police are brought to and held in the APU instead of the RCMP's Whitehorse detachment. Following processing requirements, these persons are placed into the care of correctional officers employed by YG.

[9] YG organizes the WCC, its staff, and equipment under the Public Body.

[10] The Public Body, much like the rest of YG, is subject to territorial legislation.

[11] The RCMP, despite being a territorial contract police service, is a federally created organization and subject to federal legislation.[4]

[12] This dichotomy has contributed to the formation of several agreements between the Public Body and the RCMP that govern the APU operations at the WCC. They include the MOA, the Policy Manual, and the TPSA by reference.

[13] The MOA, in particular, purports to assign the rights and responsibilities for various aspects of police prisoner care and control at the APU between the RCMP and WCC staff.

[14] Specifically, it states

> *As all APU records involve information about RCMP prisoners, the RCMP will be responsible for processing all access to information requests.*[5]

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[2] The current police contract expires in 2032.
[3] "M" Division.
[4] *Royal Canadian Mounted Police Act*, RSC 1985, c.R-10. There is no Yukon "Police Act".
[5] The MOA at para 7.6.

[15] Despite the MOA, the Complainant filed the Access Request, with regard to information that may be held by the Public Body, directly to the Public Body.

[16] In this respect, the Public Body is governed by the Act whereas the RCMP is governed by the federal *Access to Information Act* and *Privacy Act* statutes.

[17] Against this background, the following eight issues emerge.

II ISSUES

[18] There are eight issues as follows.

1) Are the Records subject to the Act?

2) Can the Public Body "contract out" of its obligation to disclose information in response to an access request regarding information that is subject to the Act?

3) Is the Head authorized to withhold the Records in full pursuant to s.72(1)(b)(i)?

4) Is the Head authorized to withhold the Records in full pursuant to s.72(1)(b)(ii)?

5) Is the Head authorized to withhold the Records in full pursuant to s.72(1)(b)(iv)?

6) Is the Head authorized to withhold the Records in full pursuant to s.72(1)(b)(vi)?

7) Is the Head required to withhold the Records, in whole or in part, pursuant to s.70?

8) Is the Head required to release the Records, in whole or in part, pursuant to s.82?

III RECORDS AT ISSUE

[19] The set of records at issue in this Investigation are fifty-three video files of security feeds which, together, total approximately 27.5 hours of footage.

IV DISCUSSION OF THE ISSUES

Issue 1 – Are the Records subject to the Act?

[20] As set out below, the Act applies to any record "held" by a public body.

[21] There is no provision of the Act that exempts a record held by a public body from the jurisdiction of the Act, based on the content of the record.

[22] The Public Body submits that "… both parties [*i.e.,* the RCMP and the WCC] retain video footage of the full APU" [Emphasis added]

[23] The Public Body also states in its submissions that

> *WCC did have video footage as the APU unit is apart of the correctional facility but could not release the footage as the request was directed for the time frame of the complaint being held as an RCMP prisoner and the request for video footage needed to be requested through the proper access to information process via the RCMP.*
>
> [Emphasis added]

[24] At paragraph 6.2 of the MOA, the agreement states that

> *6.2 At the APU…*
>
> *6.2.1 The APU will be under continuous video surveillance using CCVE.*
>
> *6.2.2 Corrections Branch will install, set up, and maintain the CCVE at the APU in accordance with the RCMP requirements for CCVE retention.*
>
> *6.2.3 RCMP will provide the Corrections Branch with required signage, and Corrections Branch will install and maintain signs in the mutually used areas of the APU to notify that the area is under continuous video surveillance.*
>
> *6.2.4 Each Participant in this Agreement will have unrestricted access to the digital data-feed from the CCVE and will have the right to maintain a record of that data on its own equipment.*
>
> *6.2.5 Each Participant of this Agreement will be responsible for the maintenance of all CCVE house in its allocated data closet within the APU, and for all recording, collection, transfer, and archiving of data from that equipment, in accordance with their own policies and applicable legislation. It will be the responsibility of each participant to download their own video footage required.*

> *6.26 The Participants of this Agreement will securely retain the APU video surveillance data gathered in carrying out this MOA for a period of not less than two years pursuant to the RCMP's Information Management Manual policy.*[6] [Emphasis Added]

Relevant Law

[25] S. 44(1) of the Act specifies that

> *A person may request access to information (including their own information) held by a* [P]*ublic* [B]*ody…*
>
> [Emphasis Added]

[26] S.1 of the Act defines "hold" as meaning

> *in respect of information, … to have custody or control of the information.*
>
> [Emphasis added]

[27] S.43 of the Act states that

> *For greater certainty, nothing in this Division is to be read as prohibiting the head of a public body from making any information or record, other than information or a record to which access is prohibited under Division 8, available to an individual or the public.'*

[28] S.64(1)(a) of the Act requires a Public Body to grant

> *… the applicant access to all the information relevant to the access request that is held by the responsive public body except the information and records withheld under paragraph (b);*
>
> [Emphasis added]

Analysis

[29] As described above, the MOA specifies that the WCC is responsible for video surveillance in the APU.

[6] The MOA, paragraph 6.2.

[30] Black's Law Dictionary ("Black's") defines "control" in the following ways:

a) *to exercise power or influence over;*

b) *to regulate or govern; or*

c) *to have a controlling interest in.*[7]

[31] Black's further defines "custody" as:

The care and control of a thing or person for inspection, preservation, or security.[8]

[32] The Public Body, in submissions, states that it "retains" video footage of the full APU, including the Records.

[33] Black's defines the word "retain" as:

To hold in possession or under control, to keep and not lose, part with or dismiss.[9] [Emphasis added]

[34] Applying these definitions to the legal obligations set out in the MOA and the Policy Manual, the Public Body has custody of the video surveillance system at the WCC generally, and control over at least one set of the recordings created by that system.

[35] Having found that the Public Body holds the Records for the purposes of the Act, the question remains whether the Act applies at all, given that the content of the Records includes RCMP prisoners.

[36] The Public Body submits no case law and makes no reference to any legislation supporting its argument that video footage of RCMP prisoners is not subject to the requirements of the Act.

[37] Accordingly, as I find that the Records are held by the Public Body, they are subject to the Act, regardless of their content.

Conclusion

[38] The Records are subject to the requirements of the Act.

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[7] *Black's Law Dictionary* 11th ed., *s.v.* "control".
[8] *Ibid., s.v.* "custody".
[9] *Ibid., s.v.* "retain".

Issue 2 – Does the Public Body have the ability to "contract out" of its obligations to respond to an access request regarding information subject to the Act?

[39] The Public Body repeatedly states in its submissions that the MOA sets out the RCMP as appropriate channel for the public to engage in regard to any request related to the disclosure of information from the APU.

[40] In support of this position, the Public Body makes a number of submissions and refers to provisions of the MOA.

[41] The Public Body submits that

> *… WCC did have video footage as the APU unit is apart of the correctional facility but could not release the footage as the request was directed for the time from of the complaint being held as an RCMP prisoner and the request for video footage needed to be requested through the proper access to information process via the RCMP.* [Emphasis added]

[42] The Public Body also submits that

> *As the APU functions as a temporary detention centre for the RCMP, all information requests for the time frame a client is held as an RCMP prisoner is redirected to the RCMP information access process.*

[43] The Public Body further submits that

> *The Department of Justice and the RCMP have a Memorandum of Agreement that outlines legal authority, obligations of both parties, process and records retention to support the partnership that is required to ensure a safe and humane service to prisoners.*

[44] The Public Body further submits

> *As the APU is a unique service the request for information process can be daunting for the public, most complainants assume because the APU is attached to the WCC and supervised by Correctional Officers the process should be the acceptable ATIPP process for gathering personal information. Very few understand the APU functions as a temporary detention centre for RCMP prisoners and all information requests must go through their process.* [Emphasis added]

[45] Additionally, the Public Body submits

> *As outlined in the Memorandum of Agreement (MOA) between the Department of Justice and the RCMP, the Whitehorse Correctional center does have unrestricted access to the digital data feed from the CCVE system and will have the right to maintain a record of that data. Additionally, if either participant of the MOA receives an access to information or privacy request that participant will advise the other of such request. As all APU records involve information about RCMP prisoners, the RCMP will be responsible for processing all access to information request.*
>
> [Emphasis added]

[46] Finally, the Public Body states that

> *It's important to highlight, the communication of the response to the ATIPP request was the Whitehorse Correctional Center cannot release the video footage, but the RCMP can if requested. WCC was upholding the requirements within the MOA agreement while adhering to the common practice within the ATIPP process.*
>
> [Emphasis added]

[47] Notably, the Public Body did respond to the Access Request, with blanket denials under provisions of ATIPPA, notwithstanding its position that the RCMP disclosure system is the more appropriate channel for disclosure of the Records.

Relevant Law

[48] S.64(1)(a) of the Act states that

> *(1) Subject to subsections (3) and 92(1), the head of the responsive public body must respond to an access request through the access and privacy officer or in the prescribed manner, if any, not later than the response date for the access request by*
>
> *(a) granting the applicant access to all the information relevant to the access request that is held by the responsive public body except the information and records withheld under paragraph (b)*[.]
>
> [Emphasis added]

[49] On thorough review of the Act and its Regulations, there is no provision that contemplates a public body to be able to contract with another entity to manage their obligation(s) under the Act.

[50] In the "Background" section of the MOA, the document states that

> *Specific operations and functions relating to RCMP prisoners that are normally assigned to RCMP members and staff, are, by this Agreement, reassigned to Corrections Branch staff at the APU in accordance with this agreement.*

[51] Sections 6.2, 6.3, and 7.0 of the MOA set out responsibilities of the Public Body and the RCMP with regard to the video surveillance of the APU.

[52] Section 6.2 of the MOA states as follows:

> *6.2. At the APU:*
>
> *6.2.1. The APU will be under continuous video surveillance using CCVE.*
>
> *6.2.2. Corrections Branch will install, set up, and maintain the CCVE at the APU in accordance with the RCMP requirements for CCVE retention.*
>
> *…*
>
> *6.2.4. Each Participant in this Agreement will have unrestricted access to the digital data-feed from the CCVE and will have the right to maintain a record of that data on its own equipment.*
>
> *6.2.5. Each Participant of this Agreement will be responsible for the maintenance of all CCVE housed in its allocated data closet within the APU, and for all recording, collection, transfer, and archiving of data from that equipment, <u>in accordance with their own policies and applicable legislation</u>. It will be the responsibility of each participant to download their own video required.*
>
> *6.2.6. The Participants of this Agreement will securely retain the APU video surveillance data gathered in carrying out this MOA for a period of not less than two years pursuant to the RCMP's Information Management Manual Policy.*
>
> [<u>Emphasis added</u>]

[53] Section 6.3 of the MOA states as follows.

> *6.3. Disclosure of CCVE Recording*
>
> *6.3.1. A video recording of an identifiable individual is personal information.*
>
> *6.3.2. Upon receipt of a written request for the disclosure of a CCVE recording, each Participant of this Agreement will provide the other a vetted copy of the relevant recorded video from the APU <u>if compliant with their respective privacy legislation</u> and other relevant legislation or policies.*
>
> *6.3.3. <u>Each Participant disclosing a video will vet it in accordance with applicable legislation.</u>*
>
> [<u>Emphasis added</u>]

[54] The relevant portions of Section 7.0 of the MOA state as follows.

> *7.0 Disclosure of Information*
>
> *7.1 <u>The Participants acknowledge that each is bound by federal and territorial statutes relating to the protection of privacy and access to information</u>.*
>
> *7.2 The Deputy Minister and Corrections Branch are bound by the provisions of the Access to Information and Protection of Privacy Act, RSY 2002 c.1, as amended.*
>
> *…*
>
> *7.6 If either of the Participants receives an access to information or privacy request regarding any matter relating to this Agreement, that participant will advise the other of such requests as soon as practicable. As all APU records involve information about RCMP prisoners, <u>the RCMP will be responsible for processing all access to information requests.</u>*
>
> [<u>Emphasis added</u>]

[55] The Policy Manual also has a section regarding personal information, from paragraphs 93 to 98, which state as follows:

> ***Retention of personal information***
>
> *93. All personal information collected about prisoners in the APU will adhere to WCC personal information retention policy and procedures.*

94. All personal information will be kept in a safe and secure manner.

95. Personal information may be subject to ATIPP requests.

96. All active APU files will be kept alphabetically and stored in a secure location in the APU.

97. All inactive APU prisoner files will be transferred to the WCC file storage holding area at the end of the Calendar year.

98. All APU files will remain separate from WCC files. [Emphasis added]

Analysis

[56] The obligation of the Public Body to grant access to information that it holds is set out above. Further, at paragraphs 20-38 above, I found that the Public Body holds the Records for the purposes of the Act.

[57] The obligations of the Public Body are recognized by the MOA and nothing in my review of either the MOA or the Policy Manual attempts to pre-empt or exclude the Act from applying to the Public Body.

[58] Despite this, the Public Body purports to designate the RCMP as the sole entity responsible for the "processing" of Access Requests received by the Public Body pursuant to the Act.

[59] This is problematic as the RCMP is not subject to the Act. It is unclear how an entity that is not subject to the act, would be the appropriate channel through which to make applications pursuant to the Act. Moreover, information held by the Public Body is not subject to federal legislation. While it may be the case that information held by the Public Body is identical to information held by the RCMP, there is not guarantee of this. This uncertainty makes it imperative that access to information held by each party is accessible pursuant to their respective legislation.

[60] The term "processing" may be interpreted in different ways. In its submissions, the Public Body states that

> *At present, WCC or the ATIPP office does not have the technology to vet video footage and to ensure that the information is release*[d] *appropriately all information request* [sic] *are directed to the RCMP.*

[61] It is possible that by employing the term "processing", the MOA simply refers to the actual technical act of redacting information contained in a video. However, if this were the case, then it is unclear why a procedure would be designed around this lack of capacity the result of which attempts to abdicate the Public Body's obligations under the Act.

[62] It is also unclear, if this was the case, why the Public Body would not have a process in place to examine a given record, determine what information, if any, needs to be redacted and then contract with the RCMP for the provision of services to do the actual redaction.

[63] As nothing in the Act allows the Public Body to "contract out" of its obligations to respond to an Access Request made pursuant to the Act, any other interpretation of the MOA would violate the provisions of the Act and therefore, be rendered ineffective.

[64] A lack of capacity to carry out redaction of information in an effective manner cannot be held out by a public body to escape its obligations under the Act. If this were the case, then any/all public bodies could simply refuse to acquire such required resources and render the Act meaningless.

[65] I find that there is no provision in the Act that allows for the obligations of a Public Body to be contracted to another party. I further find that even if that were not the case, nothing in the MOA, the Policy Manual, or the TPSA attempts to do so. On the contrary, each agreement acknowledges and affirms the obligations of each party under their respective legislation.

Conclusion

[66] The Public Body is not entitled to deny access to Records that it holds because the Records are also available from the RCMP. The nature of the data storage arrangement at the APU creates (at least) two sets of the Records – one of which is held by the Public Body the other held by the RCMP.

[67] Each set of Records is subject to the access to information legislation governing the respective organizations. Therefore, the availability of two methods to access the information by the public cannot be held up as a barricade to the Public Body's obligations under the Act.

Issue 3 – Is the Public Body authorized to rely on s.72(1)(b)(i) to withhold the Records in full?

[68] S.72(1)(b)(i) provides a discretionary exemption to the general rule of disclosure. Its purpose is to provide a public body with the means to safeguard the release of information that may interfere with ongoing law enforcement matters, as defined below.

[69] The Public Body submits that

> *The information requested involved information about an RCMP prisoner, this type of information request could be a part of an ongoing investigation or a law enforcement matter.*
>
> [Emphasis added]

[70] The Public Body also submits that

> *Individuals shown in the footage may be under investigation or involved in a trial, public release could compromise evidence or prejudice a fair trial…*
>
> [Emphasis added]

[71] The Public Body supplied no affidavit evidence or data in support of its submissions.

Relevant Law

[72] S. 72(1)(b)(i) states as follows.

> *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 could reasonably be expected to interfere with a law enforcement matter*[.]
>
> [Emphasis added]

[73] S.1 of the Act defines "law enforcement" to mean any of the following:

> *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.*

[74] In Yukon Inquiry Report ATP15-055AR, then-IPC Diane McLeod-McKay adopted the following regarding the test for the "reasonable expectation" of harm.

> *… the "reasonable expectation of probable harm" formulation… should be used wherever the "could reasonably be expected to" language is used in access to*

> *information statutes. As the Court in Merck Frosst emphasized, the statue tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: para s. 197 and 199. 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.*[10]

Analysis

[75] In order for the Public Body to rely on s. 72(1)(b)(i) the information requested by the Complainant must be found to have a reasonable expectation that it would interfere with a law enforcement matter.

[76] As set out above, s.102(c) of the Act specifies that the Public Body has a burden of proof to establish that a claimed exemption to the right of disclosure applies.

[77] In this case, the Public Body's burden is to prove "well beyond" or "considerably above" the mere possibility that disclosure of the Records would interfere with a law enforcement matter.

[78] Against this burden, the Public Body has submitted only two sentences in its submissions, with no supporting data or affidavits.

[79] It is not clear to me, and no submissions have been made to suggest, that there are any "inherent probabilities" that would render such inadequate submissions sufficient to meet this burden.

[80] As will be discussed below, the Records disclose the time, date, and location of RCMP officers, WCC staff, the Complainant, and potentially other parties. Presumably, the Complainant already knows where they were on the dates and times indicated.

[10] *Yukon Inquiry Report ATP15-055AR* at para 116.

[81] Notwithstanding the burden of the Public Body, in the absence of meaningful submissions on the point, I am unable to construct a scenario in which the information contained in the Records would be reasonably expected to interfere with a law enforcement matter.

Discretion

[82] As I have found that the Public Body is not entitled to rely on s.72(1)(b)(i), it is not necessary to analyze whether its discretion to rely on the subsection was reasonable.

Conclusion

[83] The Public Body is not authorized to rely on s.72(1)(b)(i) to withhold the Records from the Complainant in whole or in part.

Issue 4 – Is the Public Body authorized to rely on s.72(1)(b)(ii) to withhold the Records in full?

[84] S.72(1)(b)(ii) provides a discretionary exemption to the general rule of disclosure. Its purpose is to provide a public body with the means to safeguard the release of information that may reduce the effectiveness of an investigative technique or procedure by law enforcement, as defined below.

[85] The Public Body submits that

> *… as this information request was for an RCMP prisoner it was unknown if releasing the video footage would reduce the effectiveness of an investigative technique or procedure used or likely to be used in law enforcement…* [Emphasis added]

[86] The Public Body submitted no affidavit or data to support its submissions.

Relevant Law

[87] S. 72(1)(b)(ii) states as follows:

> *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*[.]
>
> [Emphasis added]

[88] I have already set out the s.1 definition in the Act of "law enforcement" above and will not repeat it here.[11] Similarly, I have already set out the previous interpretation from our office on the "reasonable expectation of probable harm" formulation in Yukon Inquiry Report ATP15-055AR.[12]

Analysis

[89] For the Public Body to rely on s. 72(1)(b)(ii), the information requested by the Complainant must be found to have a reasonable expectation that the information would reduce the effectiveness of an investigative technique or procedure used by law enforcement.

[90] As set out above, s.102(c) of the Act specifies that the Public Body has a burden of proof to establish that a claimed exemption to the right of disclosure applies.

[91] In this case, the Public Body's burden is to prove "well beyond" or "considerably above" the mere possibility that disclosure of the Records would reduce the effectiveness of an investigative technique or procedure.

[92] Against this burden, the Public Body has submitted only one sentence in its submissions, with no supporting data or affidavits.

[93] It is not clear to me, and no submissions have been made to suggest, that there are any "inherent probabilities" that would render such meager submissions sufficient to meet this burden.

[94] The Act is silent as to what would separate an "investigative" technique or procedure from any other technique or procedure employed by law enforcement. The term has not previously been interpreted by our office. As it has not been argued here that any particular technique or procedure that is visible in the Records is "investigative" in nature, it is unnecessary to interpret the term here and I decline to do so.

[11] See para. 73 of this Investigation Report.
[12] *Ibid.,* at para. 74.

[95] Simply stating that it is "unknown" as to whether the release of the Records would reduce the effectiveness of an investigative technique or procedure is insufficient to meet the burden the Act places on the Public Body.

[96] Accordingly, I find that s.72(1)(b)(ii) is not available to the Public Body.

Discretion

[97] As I have found that the Public Body is not entitled to rely on s.72(1)(b)(ii), it is not necessary to analyze whether its discretion to rely on the subsection was reasonable.

Conclusion

[98] The Public Body is not authorized to rely on s.72(1)(b)(ii) to withhold the Records from the Complainant in whole or in part.

Issue 5 – Is the Public Body authorized to rely on s.72(1)(b)(iv) to withhold the Records in full?

[99] The Public Body makes a brief reference to s.72(1)(b)(iv) in its submission. However this may have been the result of a typographical error as s.72(1)(b)(iv) was not put forward by the Public Body at either ICR or initially in rejecting the Complainants Access Request.

[100] In the even that this was not a typographical error I will evaluate s.72(1)(b)(iv) accordingly.

[101] The submission reads as follows:

> *… RCMP can carry certain risk, especially for individuals who have interactions with law enforcement, these job-related risk factors are assessed by the RCMP. This is another factor as to why information request is directed to the RCMP for assessment.*

[102] It is well established that this office will not allow a Public Body to raise an additional discretionary ground for withholding disclosure of information if that ground is not originally quoted to a complainant in response to an access request.[13]

[13] Yukon Inquiry Report ATP15-055AR at para 147

Relevant Law

[103] S. 72(1)(b)(iv) states as follows:

> *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*
>
> *(iv) harm the reputation of a person or organization referred to in a report prepared for the purpose of a law enforcement matter.* [Emphasis added]

[104] As previously stated, I have already set out the s.1 definition in the Act of "law enforcement" above and will not repeat it here.[14] Similarly, I have already set out our office's previous interpretation on the "reasonable expectation of probable harm" formulation in Yukon Inquiry Report ATP15-055AR.[15]

Analysis

[105] The Records contains only video. There are no reports as contemplated in s.72(1)(b)(iv).

[106] For this reason, and the reason discussed above, I find that no further analysis is necessary, s.72(1)(b)(iv) does not apply.

Discretion

[107] As I have found that the Public Body is not entitled to rely on s.72(1)(b)(vi), it is not necessary to analyze whether its discretion to rely on the subsection was reasonable.

Conclusion

[108] The Public Body is not authorised to rely on s.72(1)(b)(vi) to withhold the Records from the Complainant in whole or in part.

[14] See para. 73 of this Investigation Report.
[15] *Ibid.,* at para. 74.

Issue 6 – Is the Public Body authorized to rely on s.72(1)(b)(vi) to withhold the Records in full?

[109] The Public Body made no submissions on s.72(1)(b)(vi).

Relevant Law

[110] S. 72(1)(b)(vi) states as follows:

> *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*
>
> *(iv) adversely affect the security of property or a system, including a building, vehicle, computer system or communications system*[.]
>
> [Emphasis added]

[111] As previously stated, I have already set out the s.1 definition in the Act of "law enforcement" above and will not repeat it here.[16] Similarly, I have already set out our office's previous interpretation on the "reasonable expectation of probable harm" formulation in Yukon Inquiry Report ATP15-055AR.[17]

Analysis

[112] For s. 72(1)(b)(vi) to be available to the Public Body, the information requested by the Complainant must be found to have a reasonable expectation that the information would adversely affect the security of a property or a system, including a building, vehicle, computer system, or communications system.

[113] As set out above, s.102(c) of the Act specifies that the Public Body has a burden of proof to establish that a claimed exemption to the right of disclosure applies.

[16] See para. 73 of this Investigation Report.
[17] *Ibid.,* at para. 74.

[114] In this case, the Public Body's burden is to prove "well beyond" or "considerably above" the mere possibility that disclosure of the Records would adversely affect the security of a property or a system, including a building, vehicle, computer system, or communications system.

[115] Against this burden, the Public Body made no submissions.

[116] It is not clear to me that there are any "inherent probabilities" that would render the lack of submissions sufficient to meet this burden.

[117] Accordingly, I find that s.72(1)(b)(vi) is not available to the Public Body to exempt the Records from the Complainant's right of access.

Discretion

[118] As I have found that the Public Body is not entitled to rely on s.72(1)(b)(vi), it is not necessary to analyze whether its discretion to rely on the subsection was reasonable.

Conclusion

[119] The Public Body is not authorised to rely on s.72(1)(b)(vi) to withhold the Records from the Complainant in whole or in part.

Issue 7 – Is the Public Body required to withhold any Record(s), or portion(s) of the Record(s), by s.70 of the Act?

[120] S.70 is a mandatory exemption provision. Its purpose is to prevent the release of third-party information (as defined by the Act) that would constitute an unreasonable invasion of their privacy.

[121] S.70 applies to any access request where the personal information of a third-party may be released. In order to determine whether or not such a release of third-party personal information constitutes an invasion of the third-party's privacy, the Head is obliged to consider a number of factors set out in the Act. Based on this evaluation, the Head must come to a determination as to the reasonableness of the invasion and either releases or does not release the information, accordingly.

[122] The Public Body states that

> *Vetting video footage is critical to ensure that the release of information is responsible, lawful, and accurate, without proper vetting the footage can infringe on privacy rights of other inmates/prisoner, officers, and/or visitors.*

[123] However, the Public Body submitted no affidavit evidence or data to support this statement.

[124] It is unclear how the Public Body, which clearly contemplated the privacy of third-parties, failed to undertake the mandatory s.70 analysis required by that conclusion.

[125] It is also unclear what is meant by the term "vetting". The term may refer simply to the review of video footage or to the redaction of information contained in the video, or both.

[126] In any case, I agree with the Public Body's statement; however, ensuring that video footage held by a public body is properly vetted, for any definition of the term, is a responsibility of the Public Body under the Act.

[127] It is important to note that s.70 cannot be relied upon to justify denial of the release of the Records in full because it applies only to the third-party information. Information about the Complainant and the surroundings captured in the Records cannot be withheld on this basis.

Relevant Law

[128] The relevant portion(s) of s. 70 state as follows:

> *(1) 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 <u>if the head determines</u>, in accordance with this section, that disclosure of the information would be an <u>unreasonable invasion</u> of the third party's privacy.*
>
> *(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;*

> *…*
>
> *(3) Each of the following types of disclosure of a third party's personal information is considered to be an unreasonable invasion of the third party's 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*
>
> *…*
>
> *(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;*
>
> *(4) 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:*
>
> *…*
>
> *(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*[.]
>
> [Emphasis added]

[129] Recall the definition of "law enforcement" in para. 73 above.

[130] S.1 of the Act defines "business contact information" as follows:

> *… information that makes it possible to contact the individual at their place of business and includes the individual's name, position, title, business phone number, and business email address;*

[131] S.1 of the Act defines "personal information" as meaning, *inter alia*…

> *recorded information about an identifiable individual including*
>
> *…*
>
> *(c) their age, sex, gender identity or express, or sexual orientation,*
>
> *(d) their skin colour, fingerprints, blood type or any other genetic characteristic or biometric information,*
>
> *(e) their race, ethnicity or nationality,*
>
> *…*
>
> *(i) information about*
>
> > *…*
> >
> > *(vi) a law enforcement matter of which they are or were the subject*
> >
> > *…*
>
> *(j) a personal unique identifier that has been assigned to them[.]*
>
> *…*

Analysis

[132] Neither the Complainant nor the Public Body provided submissions on s.70. It follows that the Head did not conduct the "weighing" analysis contemplated in s.70(2). I therefore have no evidence to indicate whether any particular factors in s.70(5) should be weighed more heavily than others.

[133] Despite this, s.70 is a mandatory exclusion section. As such, I must conduct an analysis based on the available information to weigh the s.70(5) factors in place of the Head.[18]

[134] To begin, I will determine what, if any, "personal information" may be captured in the Records, and then conduct the remainder of the s.70 analysis accordingly.

[135] For s.70 to apply, the information contained in the Records must be both "personal information" as defined in the Act and its disclosure an "unreasonable invasion of privacy".

[136] Video footage inherently captures significant information about an individual. This can include gender identity, skin colour, race, ethnicity and, in the present case, information about a law enforcement matter of which a person is or was the subject.

[137] In addition, video footage may be used to create, depending on the quality and resolution, biometric data from a person's face. Such data may be extracted using facial recognition software.

[138] In video records, even if an individual's face is indistinguishable or redacted, it may still be possible to identify them by observing a collection of body characteristics that in isolation may not be distinguishable. However, viewed together they could lead someone to identify an individual. These include, *inter alia,* someone's gender, height and body type, their physical mannerisms, skin colour, or identifiable markings such as tattoos, scars and other similar features.

[139] Clothing, such as uniforms, often display names and/or personally identifiable information in the form of badge numbers or inmate numbers.

[140] S.3(a) details information that is not considered "personal information" and includes business contact information which includes the names of RCMP officers and/or YG staff that may be visible in the Records.

[141] In the case of names attached to uniforms, I find that where they can be read in the Records, they do not constitute "personal information."

[142] With regard to numbers which act as unique identifiers, such as a badge number or prisoner number, I find that they constitute "personal information."

[18] *Yukon Inquiry Report ATP15-055AR* at para 27.

[143] Having determined that certain information captured in the records constitutes "personal information" I must now determine if the release of this "personal information" is an unreasonable invasion of the third-party's privacy.

[144] The analysis of whether the disclosure of such information is an unreasonable invasion of third-party privacy naturally depends on the third-party in question. Given the characteristics of the Records, there are four possible types of third-party that may be visible.

[145] The first is visitors to the APU (if any), the second is other prisoners which may have been caught by the recording devices. The third is YG staff generally including, but not limited to, WCC staff. Finally, any RCMP officers and/or personnel require their own analysis.

Third-Party Visitors

[146] For the purposes of this analysis, I will define a "visitor" as any person who attends the APU and who is not a prisoner, not an employee of YG, and not an RCMP officer, or otherwise employed by the RCMP, and acting in the course of their duties.

[147] I received no submissions from the Public Body that there are such visitors visible in the Records.

[148] Without submissions on this point, it is impossible for me to differentiate between visitors and/or any other person(s), including prisoners, who may be in "street" clothing. However, because this may be a possibility, I will continue the analysis.

[149] I make no findings on whether there are third-party visitors visible in the Records.

[150] In the event that one or more visitors are visible in the Records, I find that the Recordings would likely contain information related to the ethnicity, race, sexual orientation, and/or biometric facial information.

[151] This type of personal information clearly falls into the categories described in s.70(3)(a) and (b). As such, there is a rebuttable presumption that the disclosure of such information is prohibited.

[152] In order to complete the analysis, I must weigh all eleven factors set out in s. 70(5) and determine if the result rebuts this presumption.

[153] The factors are as follows:

> *(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 [Complainant];

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

(d) factors that are considered to suggest that the disclosure would be unreasonable:

(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) factors that are considered to suggest that the disclosure would not be unreasonable:

(i) the disclosure would subject a program or activity, specialized service or data-linking 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 in relevant to a determination of the applicant's rights.

[154] I find, however, that factors (d) and (e) do not apply.[19]

[19] More specifically, (d)(i-iii) and (e)(i-v).

[155] This leaves three factors to be weighed. I find as follows:

(a) Factor 70(5)(a) weighs strongly towards non-disclosure. Gender identity, ethnicity, facial biometric information, and any other information captured in the Records are sensitive.

(b) Factor 70(5)(b) is neutral. The relationship, if any, between the Complainant and that of any third-party visitor is unknown. Where the relationship between a Complainant and a third-party is unknown, this factor cannot weigh for or against disclosure.

(c) Factor 70(5)(c) does not weigh against release. Video records are accurate and reliable.

[156] On balance, I find that the factors set out in s.70(5) weigh against disclosure of the "personal information" of third-party visitors. Where S.70(5) factors weigh against disclosure, it cannot rebut the presumption of non-disclosure discussed above.

[157] Accordingly, I find that disclosure of the "personal information" of any third-party visitors contained in the Records would be an unreasonable invasion of their privacy.

Third-Party Prisoners

[158] I received no submissions from the Public Body that there are other prisoners visible in the Records.

[159] Accordingly, I make no findings on whether or not there are third-party prisoners in the Records.

[160] That said, in the event that one or more third-party prisoners are visible in the Records, I find that the Recordings would contain information related to, *inter alia,* their ethnicity, gender identity, sexual orientation, and/or biometric facial information.

[161] This type of personal information clearly falls into the categories described in s.70(3)(a) and (b). As such there is a rebuttable presumption that the disclosure of such information is prohibited.

[162] To complete the analysis, I must weigh the factors set out in s. 70(5) and determine if the result rebuts this presumption.

[163] As previously stated, the 11 factors are set out in para. 153 above.

[164] I find that factors (d)(i and iii) and (e) do not apply.

[165] This leaves four factors to be weighed. I find as follows:

(a) Factor 70(5)(a) weighs strongly towards non-disclosure. Gender identity, ethnicity, facial biometric information, and any other information captured in the Records are sensitive.

(b) Factor 70(5)(b). The relationship between the Complainant and third-party prisoners, if any, is unknown - with no submission made on the point. Where the relationship between the parties is unknown, this factor cannot weigh for or against disclosure.

(c) Factor 70(5)(c) does not weigh against release. Video records are accurate and reliable.

(d) Factor 70(5)(d)(ii) weighs strongly against disclosure. Reputational damage may occur to persons who are held at the APU if it becomes public knowledge that they were held there.

[166] On balance, I find that the factors set out in s.70(5) of the Act weigh against disclosure of the "personal information" of third-party prisoners. Where S.70(5) factors weigh against disclosure, it cannot rebut the presumption of non-disclosure discussed above.

[167] Accordingly, I find that disclosure of the "personal information" of any third-party prisoners contained in the Records would be an unreasonable invasion of their privacy.

[168] This aligns with the finding of our office in ATP15-55AR which also found that release of third-party prisoner's "personal information" would be an unreasonable invasion of their privacy, albeit under a different statutory scheme.

YG Personnel

[169] As set out above, s.70(4)(c)(i) provides that it will not be an unreasonable invasion of privacy to release prescribed personal information about employees of a public body.

[170] I find that YG personnel are employees of a public body.

[171] Despite this, I find that the information contained in the Records may go beyond the type of personal information contemplated by s.70(4)(c)(i) of the Act. They may include, as discussed above, information about, *inter alia,* YG employee ethnicity, gender identity, and facial biometric information.

[172] I find that the Recordings may contain information related to, inter alia, the ethnicity, gender identity, sexual orientation, and/or biometric facial information of YG personnel.

[173] This type of personal information clearly falls into the categories described in s.70(3)(a) and (b). As such, there is a rebuttable presumption that the disclosure of such information is prohibited.

[174] To complete the analysis, I must weigh the factors set out in s. 70(5) and determine if the result rebuts this presumption.

[175] As previously stated, the 11 factors are set out in para. 153 above.

[176] I find that factors (d) and (e)(iii-v) do not apply.

[177] This leaves five factors to be weighed. I find as follows:

(a) Factor 70(5)(a) weights strongly towards non-disclosure. Gender identity, ethnicity, facial biometric information, and any other information captured in the Records are sensitive.

(b) Factor 70(5)(b) weights towards disclosure. The relationship between YG personnel and the Complainant was one of the highest standards of care, as the Complainant was in the custody of the Public Body. I find this vulnerable relationship creates a preference towards disclosure.

(c) Factor 70(5)(c) does not weigh against release. Video records are accurate and reliable.

(d) Factor 70(5)(e)(i) weights moderately towards disclosure. The purpose of the Act is to provide information to the public such that it may hold public bodies accountable in a democratic system. This is in keeping with the spirit of the purpose set out in s.6(e).[20]

(e) Factor 70(5)(e)(ii) weights slightly towards disclosure. I find it likely that public scrutiny applied to the conduct of YG personnel will promote the safety and health of the public if/when a member of the public is detained as a prisoner at the APU.

[20] *(6) The purpose of the Act* [is] *(e) to provide 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*; …

[178] On balance, I find that the factors set out in s.70(5) of the Act weigh against disclosure of the "personal information" of YG personnel.

[179] Where S.70(5) factors weigh against disclosure, it cannot rebut the presumption of non-disclosure discussed above.

[180] Accordingly, I find that disclosure of the "personal information" of YG personnel contained in the Records also includes "personal information" that is not exempted by the Act and would therefore be an unreasonable invasion of their privacy.

[181] Practically speaking, the above means that portions of YG personnel, such as their likeness and any identifying number(s), visible in the Records, must be blurred or otherwise redacted. S.70 requires the Public Body to protect the privacy of third-parties while also honouring the right of the Complainant to access the Records. The blurring, or otherwise redaction, of YG personnel in this way constitutes a balancing of competing interests.

[182] By contrast, portions of YG personnel such as uniforms and names must not be redacted if visible in the Records. This is because the names of these personnel are not considered to be "personal Information" in conjunction with their employment with YG. This again is a balancing act where the need for public accountability is weighed against the reasonable expectations of privacy that a person may have when being employed by a public body.

RCMP Personnel

[183] RCMP officers are repeatedly visible in the Records. It is unknown as to whether or not non-uniformed RCMP personnel are also visible – the Public Body made no submissions on this point. As the RCMP is a federal agency and regulated by federal privacy legislation, it was unclear at the onset as to the status of its employees as a third-party for the purposes of the Act.

[184] On review of the Act, there is no provision that would separate or demarcate employees of the Government of Canada from any other third-party.

[185] As discussed above, there are certain types of "personal information" about an employee of a Public Body that is considered not to be an unreasonable invasion of privacy.

[186] The question remains as to whether RCMP officers in the Yukon are employees of the Public Body for the purposes of the Act.

[187] "Employee" is defined in the Act as follows:

> ***"employee"**, of a public body, includes*
>
> *(a) an individual who is*
>
> *(i) an employee of the public body, or of another public body that provides a service to the public body, appointed to a position in the public service pursuant to the Public Service Act,*
>
> *(ii) a principal, vice-principal or teacher, or technical support staff, of the public body appointed to their position pursuant to the Education Act, or*
>
> *(iii) an employee appointed to a position pursuant to the Cabinet and Caucus Employees Act for the purpose of assisting the minister responsible for the public body,*
>
> *(b) a service provider of the public body,*
>
> *(c) a director or officer of the public body, or*
>
> *(d) any other individual who provides a service to the public body, whether or not for compensation.*
>
> [Emphasis added]

[188] Service provider is also a defined term in the Act, which reads as follows

> **"service provider**" of a public body, means a person who, under a contract, provides a service for or on behalf of the public body and includes an employee or agent of the service provider.
>
> [Emphasis added]

[189] As discussed above, the RCMP in Yukon provide policing services under a number of contracts.

[190] I find that the RCMP meets the criteria of a service provider of the Public Body. As such, RCMP officers constitute employees of the Public Body for the purposes of the Act.

[191] As discussed above, certain “personal information” of employees, the release of which would otherwise be deemed to be an unreasonable invasion of privacy, is carved out as eligible for disclosure in the Act.

[192] I find that the names of RCMP officers displayed on their uniform constitutes “Business Contact Information” and therefore is not “personal information”.

[193] I find that any unique identifying numbers, if any, worn on an RCMP officer’s uniform is “personal information” and not carved out for disclosure by the Act.

[194] The remaining “personal information” such as an RCMP officer’s likeness, is not carved out for disclosure by the employee provision of the Act.

[195] I find that the Recordings contain information related to the ethnicity, gender identity, sexual orientation, and/or biometric facial information of RCMP officers.

[196] As such, I must perform the remainder of the s.70 analysis on the basis of my findings of “personal information” above.

[197] This type of “personal information” clearly falls into the categories described in s.70(3)(a) and (b). As such, there is a rebuttable presumption that the disclosure of such information is prohibited.

[198] To complete the analysis, I must weigh the factors set out in s. 70(5) and determine if the result rebuts this presumption.

[199] As previously stated, the 11 factors are set out in para. 153 above.

[200] I find that factors (d) and (e)(iii-v) do not apply.

[201] This leaves five factors to be weighed. I find as follows:

(a) Factor 70(5)(a) weights strongly towards non-disclosure. Gender identity, ethnicity, facial biometric information, and any other information captured in the Records are sensitive.

(b) Factor 70(5)(b) weights towards disclosure. The relationship between the RCMP and the Complainant was one of a highest standard of care, as the Complainant was in the custody of the RCMP. I find this vulnerable relationship creates a preference towards disclosure.

(c) Factor 70(5)(c) does not weigh against release. Video records are accurate and reliable.

(d) Factor 70(5)(e)(i) weights towards disclosure. The purpose of the Act is to provide information to the public such that it may hold public bodies accountable in a democratic system. This is in keeping with the spirit of the purpose previously stated in s.6(e) above. I find that this section applies to the activities of the RCMP as it is contracted by the Public Body to carry out policing in the territory.

(e) Factor 70(5)(e)(ii) weights slightly towards disclosure. I find it likely that public scrutiny applied to the conduct of the RCMP will promote the safety and health of the public if/when a member of the public is detained as a prisoner at the APU.

[202] On balance, I find that the factors set out in s.70(5) of the Act weigh slightly for non-disclosure of the "personal information" of third-party RCMP personnel.

[203] I find that s.70(5) factors weighted towards disclosure are insufficient to rebut the presumption of non-disclosure.

[204] Accordingly, I find that disclosure of certain "personal information", such as the face of an RCMP officers or staff, if any, that may be contained in the Records would be an unreasonable invasion of their privacy.

Conclusion

[205] The Public Body is required by s.70 to blur or otherwise redact certain portions of the Records, as discussed above.

Issue 8 – Is the Public Body required to release any Record(s) or portion(s) of the Record(s) by s.82 of the Act?

[206] S.82 is a mandatory disclosure provision. Its purpose is to ensure the release of information that is in the public interest.

[207] S.82(2) lists several factors for the Head to consider when if whether the release of information is in the public interest.

[208] In the absence of submissions from the Complainant or Public Body on this point, I find that none of the factors listed in s.82(2) apply.

Conclusion

[209] As such, s.82 does not require the Public Body to disclose the Records in this situation.

V FINDINGS

[210] In summary, I make the following findings.

Issue 1

[211] I find that the Records are held by the Public Body and that the presence of RCMP prisoners in the Records does not exclude the Records from being subject to the requirements of the Act.

Issue 2

[212] I find that the Public Body cannot rely on contracts with the RCMP to escape its obligations under the Act.

Issue 3

[213] I find that the Public Body is not authorized to rely on s. 72(1)(b)(i).

Issue 4

[214] I find that the Public Body is not authorized to rely on s. 72(1)(b)(ii).

Issue 5

[215] I find that the Public Body is not authorized to rely on s. 72(1)(b)(iv).

Issue 6

[216] I find that the Public Body is not authorized to rely on s. 72(1)(b)(vi).

Issue 7

[217] I find that s.70 of the Act applies, in principle, to information contained in the Records regarding the likeness of third-party visitors, prisoners, YG personnel, and RCMP personnel.

Issue 8

[218] I find that S.82 does not require the Public Body to disclose the Records that have been appropriately withheld.

VI CONCLUSIONS

[219] The Act provides that the Complainant has a right to disclosure of the Records.

[220] I have found in issues 3 through 6 that the Public Body is not entitled to rely on any of the claimed discretionary exemptions. Therefore, the Records ought to be released.

[221] As described in my analysis of issue 7, the Public Body is required to redact the specified third-party information that may be visible in the Records. Specifically, the entirety of any other prisoners and/or visitors, and, at a minimum, the likeness of any third-party YG personnel and RCMP officers.

[222] As further discussed in my issue 7 analysis, "personal information" such as identifying numbers that may be visible on the apparel of YG Personnel and/or RCMP Officers is "personal information" - but its release is not an "unreasonable invasion of personal privacy".

[223] In sum, the Records ought to be release, with appropriate likenesses of any third-party blurred or otherwise redacted.

VII RECOMMENDATIONS

[224] I recommend that the Head discloses the Records to the Complainant.

[225] I recommend that the Head redact or obscure the faces of all third-parties who may be visible in the Records.

[226] I recommend that the Head redact or obscure the bodies of all third-party inmates and visitors who may be visible in the Records.

Department Head's Response to Investigation Report

[227] Section 104 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) if the respondent is the access and privacy officer, 15 business days after the day on which the notice of acceptance under subparagraph (1)(b)(i) is provided to the complainant; or

(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).

[228] 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.

[229] 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 Court Review

[230] If the Head rejects a recommendation in an investigation report, or is considered to have done so, then s.105(1) gives a complainant a right to apply to the Yukon Supreme Court for a review of the decision or matter to which the recommendation relates.

[redacted]
Kelly Hjorth, Investigator – B.A., J.D., CIPP/C
Office of the Information and Privacy Commissioner

Distribution List:

- Public Body Department Head
- Complainant