INQUIRY #ATP11-003

Pursuant to section 52 of the
***Access to Information and Protection of Privacy Act* (the Act)**

INQUIRY REPORT

Public Body:	Department of Health and Social Services
Summary:	The Public Body asked the Information and Privacy Commissioner to exercise her discretion under section 52(1) of the ATIPP Act to decline to hold an inquiry respecting their decision to sever information in 28 records related to the Applicant. The Public Body argued that it had correctly applied section 25 saying the severed information was clearly third party personal information as defined in section 3 of the Act to which 25 (2) applies. Therefore a presumption exists that disclosing the information would be an unreasonable invasion of third party privacy. The IPC exercised her discretion to grant the request finding that it was plain and obvious that section 25 applied to the severed information and the applicant had not raised any arguable issue meriting an inquiry.
Recommendation:	The Commissioner decided the matter will not proceed to inquiry under section 52(1) of the Act.
Statutes Cited:	*Access to Information and Protection of Privacy Act*, R.S.Y. 2002, c. 1, sections 3, 25(1) (2) (3) (4); Act to Amend the Access to Information and Privacy Act and the Health Act, SY 2009, c. 13; *British Columbia Freedom of Information and Protection of Privacy Act*, RSBC 1996, c.165, s.56.
Authorities Cited:	Ontario IPC Order M-618; Decision F08-011, [2008] B.C.I.P.C.D. No. 36.
Other Sources Cited:	Remarks of the Right Honourable Beverly McLachlin, P.C. Chief Justice of Canada, May 5, 2009.

I. INTRODUCTION

[1] The Department of Health and Social Services (the Public Body) has requested that I exercise my discretion under section 52(1) of the Access to Information and Protection of Privacy Act (ATIPP Act) to decline to hold an inquiry on the Applicants request for review respecting a request for records.

II. BACKGROUND OF ACCESS REQUEST

[2] On January 6, 2010 the Applicant made an access request for "my entire file between 1990-2010" pursuant to the *Access to Information and Protection of Privacy Act* (ATIPP Act). The Public Body identified 1,928 records as responsive to that request. It severed some information from the records pursuant to section 25(1) of the Act and provided the remaining information to the Applicant.

[3] The Applicant requested a review of the Public Body's decision to sever information from the records.

[4] Mediation was authorized in an attempt to resolve this matter, and was partially successful. Of the 1,928 records, there were 40 records where the Applicant questioned the Public Body's decision to sever information. The Public Body agreed to review the severing in those 40 records and subsequently released more information. This left 28 records with the severed information at issue to be determined at Inquiry.

[5] On May 31, 2011 the Public Body made a request that I, as Information and Privacy Commissioner (IPC), exercise my jurisdiction under section 52(1) to decline to hold an Inquiry. The Applicant was given notice of the Public Body's request and was invited to make a submission in writing or verbally by contacting my office. The Applicant did not contact my office or make a written submission.

III. SECTION 52(1)

[6] Section 52(1) of the ATIPP Act reads as follows:

Inquiry by commissioner

52(1) If the matter is not settled under section 51, the commissioner may conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry.

[7] In December 2009 section 52(1) of the ATIPP Act was amended. The word "may" replaced the word "must" in the section.[1] The word "may" confers discretion about whether to hold an inquiry respecting a request for review of a public body's decision.

[8] It is clear that by use of the word "may" in section 52(1) the legislature contemplated that circumstances may arise when the right to an inquiry may be limited. The legislation does not prescribe the criteria or circumstances to consider in exercising my discretion under section 52(1) to decline to proceed to inquiry. Therefore it is open to me to decide the criteria to be considered in exercising this discretion.

IV. WHAT CRITERIA SHOULD BE USED TO DECIDE WHETHER OR NOT TO HOLD AN INQUIRY?

[9] A decision to deny an inquiry results in an applicant being denied the right to review a public body's decision regarding the requested records. When making a decision that impacts these rights, the importance of the rights protected by the ATIPP Act must be borne in mind.

[10] Beverly McLaughlin, Chief Justice of Canada, in a speech delivered in May 2009 noted that access and privacy legislation are special kinds of laws that define fundamental democratic rights of citizens. She commented that the Supreme Court of Canada has interpreted the *Federal Privacy Act* and *Access to Information Act* as quasi-constitutional legislation. In interpreting the rights she said: "It follows that as fundamental rights, the rights to access are interpreted generously while the exceptions to these rights must be understood strictly."[2]

[11] Another important consideration in deciding the criteria to be applied in making a decision whether or not to hold an inquiry, is my duty as IPC to ensure that the access provisions are utilized in a manner in keeping with the spirit of the ATIPP Act. I agree with Tom Wright, former Ontario Information and Privacy Commissioner, when he described that duty this way:

> *When open ended rights are granted such as the right of access to information set out in section 4(1) of the Act and the Legislature has not expressly built in reasonable limits or other controls on the unbridled use of process designed to secure those rights, in my view, it falls to those charged with administering the legislation and processes to do so in a manner that is fair reasonable and consistent with legislative purpose.* [3]

[1] Act to Amend the Access to Information and Protection of Privacy Act and the Health Act, SY 2009, c. 13, s.17
[2] Remarks of the Right Honourable Beverly McLachlin, P.C. Chief Justice of Canada, May 5, 2009, http://sr.scc-sc.gc.ca
[3] Ontario IPC Order M-618 at p. 14, available at: http://www.ipc.on.ca/images/Findings/M-618.pdf

[12] There are several other jurisdictions in Canada where the Legislature has chosen to give the IPC discretion to decline to proceed to inquiry. British Columbia's provision is similar to section 52(1) in the Yukon ATIPP Act.[4] In British Columbia, the IPC has considered a number of requests from public bodies that an inquiry not be held. These decisions provide guidance in determining a fair and reasonable process and criteria that are consistent with the purpose of the legislation.

[13] The principles that have emerged for the exercise of the discretion under BC's legislation are set out in decision F08-11.[5] For the purposes of deciding the question of whether or not to hold an inquiry pursuant to section 52 of the ATIPP Act, I adopt these principles. They can be summarized as follows:

- the public body must provide information to demonstrate why an inquiry should not be held;
- the applicant does not have a burden of demonstrating why the inquiry should be held, however where it appears obvious that the outcome of an inquiry will be to confirm that the public body properly applied the legislation, the applicant respondent must provide "some cogent basis for arguing the contrary";
- the reasons for exercising discretion and deciding not to hold an inquiry are open-ended – they include mootness, situations where it is plain and obvious that the records fall under a particular exception or outside the scope of FIPPA, and the principles of abuse of process, *res judicata* and issue estoppel;
- in each case, it must be clear that there are no arguable issues that merit the matter proceeding to inquiry.

V. ANALYSIS OF THIS REQUEST

[14] Turning now to the matter before me, in considering the Public Body's request under section 52(1), I am making no finding as to the merits of the Public Body's decision to refuse to release the severed information in the 28 records pursuant to section 25(1). Rather I am required to consider whether the public body has demonstrated that there are no arguable issues that merit the matter proceeding to inquiry.

[15] The ATIPP Act does not specifically assign the burden of proof in matters of this nature. However, the Act provides that when mediation is not successful in resolving a matter, it is referred to inquiry (section 52(1)). As a result, the public body requesting that an inquiry not be held bears the burden of demonstrating why the request should be granted. The applicant does not bear an equal burden of demonstrating why an inquiry should be held.

[4] *British Columbia Freedom of Information and Protection of Privacy Act*, RSBC 1996, c.165, s.56
[5] Decision F08-011, [2008]B.C.I.P.C.D. No. 36

VI. PUBLIC BODIES SUBMISSION

[16] The Public Body has requested that the matter not proceed to inquiry on the grounds, without using these exact words, that it is plain and obvious that section 25 applies to the severed information. The Public Body argues that section 25(1) is a mandatory provision requiring it to refuse to disclose third party personal information where a section 25(2) presumption exists because disclosing the information would be an unreasonable invasion of third party privacy. The Public Body submits that the severed information is clearly third party personal information as defined in section 3 of the Act to which 25(2) applies and therefore a presumption exists that disclosing the information would be an unreasonable invasion of third party privacy.

[17] While the Public Body is correct when it argues section 25(1) is a mandatory section, the section does not say that a third party's personal information should never be disclosed. Rather it says personal information should not be disclosed when it would result in an unreasonable invasion of personal privacy. Section 25 must be read as a whole to determine if disclosing the personal information would be an invasion of third party personal privacy. After determining the information is personal information as defined in section 3 of the Act, the next step under section 25 is to determine whether section 25(2) or (3) applies to the information. If section 25(2) applies the disclosure of the personal information is presumed to be an unreasonable invasion of personal privacy and the Public Body is required to refuse to disclose the information. However, the analysis does not end there. Before refusing to disclose the information the Public Body must go on to the final step in the section 25 analysis, which requires the Public Body to consider the application of 25(4) to the information. The Public Body must consider any relevant circumstances including those listed in section 25(4) in deciding whether disclosure of the information would be an unreasonable invasion of third party privacy.

VII. IS IT THAT PLAIN AND OBVIOUS THAT SECTION 25 APPLIES?

[18] I have examined the information severed in the records in issue. My examination reveals that the Public Body withheld the names, addresses, telephone numbers and other personal identifying information about a number of individuals that had contact, in their personal capacity, with the Public Body regarding the Applicant.

[19] In this case the severing speaks for itself. From my examination of the records it is clear that the severed information is third party personal information. It is also clear that several provisions in section 25(2) presumption of an unreasonable invasion of personal privacy apply to the information making it plain and obvious that disclosure would be an unreasonable invasion of third party privacy.

[20] The Public Body's submission does not indicate whether it actually considered the application of section 25(4) to the severed information, as it is required to do,

in coming to a decision about whether disclosure of the information would be an unreasonable invasion of third party privacy. I have considered the application of section 25(4) to determine if there are any relevant circumstances that might weigh either in favour of or against disclosure. Having done that, I agree that disclosure would be an unreasonable invasion of personal privacy.

[21] The Applicant did not make a written submission and did not contact my office to provide any information with respect to any relevant circumstances that would suggest the third party personal information should be disclosed in this case. Having considered the circumstances listed in section 25, it does not appear any circumstances exist that would favour disclosure of the information.

[22] While the Applicant does not bear the burden of demonstrating why the matter should proceed to inquiry, where as here, it is obvious that the outcome of an inquiry will be to confirm a public body correctly applied section 25 of the ATIPP Act, the Applicant must provide some basis or information that might weigh in favour of disclosure and raise an arguable issue meriting an inquiry. The Applicant was given an opportunity to do that but has not done so.

[23] I am satisfied that the Public Body has established that an inquiry would serve no useful purpose because the obvious outcome is that the Applicant would not receive any of the severed information.

VIII. CONCLUSION

[24] For the reasons given above, I have decided this matter will not proceed to inquiry under section 52(1) of the ATIPP Act.

Tracy-Anne McPhee
Yukon Information and Privacy Commissioner

July 15, 2011

Distribution List:

- Public Body - Department of Health and Social Services
- Applicant
- Records Manager
- Office of the Information and Privacy Commissioner