Yukon Information & Privacy Commissioner

INQUIRY REPORT
FILE ATP13-037AR

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

Diane McLeod-McKay
Information and Privacy Commissioner (IPC)

Parties: **Department of Community Services, the Records Manager, the Applicant and the Third Party**

Date: **August 11, 2014**

Summary: The Applicant made a request under the *Access to Information and Protection of Privacy Act* (ATIPP Act or the Act) to Community Services for *all records and information regarding land transactions (including sales, purchases, and/or leases) between Government of Yukon and [the Third Party] from 1998 – to present*. Community Services and the Records Manager failed to provide a response by the deadline and the Applicant requested a review under paragraph 48 (1)(a). Subsequently, the Records Manager extended the time for response. Community Services and the Records Manager challenged the Information and Privacy Commissioner's (IPC) jurisdiction to review the request under paragraph 48 (1)(a) based on their view that the decision of the Records Manager to extend the time to response after the deadline was valid.

The IPC considered, as a preliminary matter, whether subsection 49 (2) of the ATIPP Act came into effect which states *the failure of the records manager or of a public body to respond in time is to be treated as a decision to refuse access to the record*. If the time were validly extended by the Records Manager under section 12, subsection 49 (2) would not have come into effect and the IPC would not have jurisdiction to review the matter under paragraph 48 (1)(a). The IPC found the Records Manager did not have authority to decide to extend the time to respond after the deadline to respond had passed and subsection 49 (2) had come into effect. Based on this finding, she found further that she had jurisdiction to conduct a review under paragraph 48 (1)(a).

In conducting the review, the IPC found that Community Services had no authority under sections 24 or 25 to refuse access to the records or part thereof requested by the Applicant and recommended the Public Body give the Applicant these records.

Statutes Cited:

Access to Information and Protection of Privacy Act, RSY 2002 c.1, section 1, subsection 5 (1), sections 6, 11, 12, 24, 25, 48 to 53,54, subsection 49 (2) and section 54.

Interpretation Act, RSY 2002, c 125, subsections 18 (j) and (k).

Cases Cited:

Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, 2011 SCC 61 (CanLII)

Dunsmuir v. New Brunswick, 2009 SCC 9 (CanLII)

Pearlman v. University of Saskatchewan (College of Medicine), 2006 SKCA 105 (CanLII)

Canada (Fisheries and Oceans) v. David Suzuki Foundation, 2012 FCA 40 (CanLII)

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 SCR 27, 1998 CanLII 837 (SCC)

Cardinal v. R. (1982), 133 D.L.R. (3d) 513 (SCC)

University of Ottawa (Re), 2008 CanLII 41553 (ON IPC)

University of Ottawa (Re), 2008 CanLII 24764 (ON IPC)

Inquiry Report, File #10-033AR (Yukon IPC)

Order F2011-002, 2011 CanLII 96606 (AB OIPC)

Order F2013-47, 2013 CanLII 80416 (AB OIPC)

Order F2012-17, 2012 CanLII 70619 (AB OIPC)

Order F2008-028, 2009 CanLII 90933 (AB OIPC)

I. BACKGROUND

[1] Community Services, a public body under the ATIPP Act (the Public Body), received a request from the Applicant under the Act for:

> *all records and information regarding land transactions (including sales, purchases, and/or leases) between Government of Yukon and [the Third Party] from 1998 – to present.*

[2] A letter dated October 11, 2013, was provided by the Records Manager to the Applicant indicating his request for access was received on that date at the ATIPP Office and that his

request was logged as ATIPP request #A-5019 (the Access Request). The "deadline for responding" to the Access Request is noted in the letter as November 12, 2013.

[3] A letter dated November 4, 2013, was provided by the Records Manager to the Applicant indicating she had made a decision to extend the time to respond to the Access Request. The *new time limit for responding* to the Access Request is noted in the letter as December 10, 2013.

[4] A letter dated December 23, 2013, was provided by the Records Manager to the Applicant indicating she had decided to extend the time to respond for an additional period. The *new time limit for responding* to the Access Request is noted in the letter as January 9, 2014.

[5] On December 23, 2013, the Applicant submitted a request for review form (the RFR Form) to my Office. On the RFR Form, there are a number of boxes an applicant may check off. In this case the Applicant checked off the following:

> *I have not yet received a reply to my access request,*
>
> *A public body or the Records Manager refused to grant access to the record I requested,*
>
> *A decision by a public body or the Records Manager to separate or obliterate information from a record I requested, and*
>
> *A decision about the extension of time for responding to a request for access to records.*

[6] On December 24, 2013, I wrote to the Records Manager and the Public Body informing them that I was conducting a review of a refusal by the Public Body to grant access to the Records requested by the Applicant under section 48 (1)(a). In that letter I stated the following:

> *The Records Manager activated access request #A-5019 on October 11, 2013 and advised the applicant by letter that a response was due on November 12, 2013. The Records Manager granted an extension by letter dated November 4, 2013, with a new time limit for response by December 10, 2013. A response was not received by* [the Applicant] *by December 10, 2013. A request for a second extension was granted by the Records Manager by letter dated December 23, 2013, with a new time limit of January 9, 2014.*
>
> *According to section 49(2) of the ATIPP Act the failure of the Records Manager or public body to respond in time to a request for access to a record is to be treated as a decision to refuse access to the record.*

[7] In that same letter I authorized a mediator to investigate and try and settle the matter under review.

[8] In a letter dated December 30, 2013 provided to my Office, the Public Body questioned my authority to proceed on the review under paragraph 48 (1)(a) and took the position that the extension of time granted in the letter of December 23, 2013 was valid.

[9] After receiving this letter, I instructed the mediator to first determine our jurisdiction to proceed under paragraph 48 (1)(a). This involved determining whether subsection 49 (2) had come into effect, thus triggering the ability of the Applicant to request a review under paragraph 48 (1)(a).

[10] In a memo dated January 7, 2014, the Public Body informed the Records Manager that some records responsive to the Access Request were ready for release but that the remaining records, identified as *approximately* 53 pages, were not ready.

[11] A letter dated January 7, 2014, was provided to the Applicant by the Records Manager. In that letter she stated the following:

> *The Department of Community Services has completed work on a portion of your ATIPP request #A-5019.*
>
> *This partial release does not include approximately 45 pages of records that are currently under review as a part of a formal third party consultation process. This release also does not include approximately 8 pages of records that are currently under review in a separate, informal, third party consultation process.*

[12] On February 28, 2014, I received a request for review form from the Third Party requesting I review the decision of the Public Body business information about the Third Party to the Applicant. The Applicant's review was still ongoing when the Third Party's request for review form was received.

[13] On March 4, 2014, I wrote to the Third Party informing it that the records subject to their request for review were already subject to a review requested by an applicant. I informed the Third Party that I would not conduct a separate review of the same records and that its interests would be addressed as part of the review underway.

[14] On March 3, 2014, I wrote to the Public Body and the Records Manager informing them that I had received the Third Party's request for review and that the Third Party's interests would be addressed as part of the Applicant's review. In that same letter, I advised the Public Body not to disclose the Records to the Applicant.

[15] On March 14, 2014, the Third Party's request for review was withdrawn.

[16] The mediator was unsuccessful in resolving the jurisdictional question in relation to the Applicant's review and the matter proceeded to Inquiry under section 52 of the ATIPP Act.

II. INQUIRY PROCESS

[17] A Notice of Inquiry dated April 25, 2014, was issued to the parties. Initial submissions were received from the Public Body and the Records Manager on May 9, 2014. No submissions were received from the Applicant or the Third Party. No reply submissions were provided.

III. JURISDICTION

[18] A preliminary issue that I must address is whether I have jurisdiction to conduct the review under paragraph 48 (1)(a) as a result of the application of subsection 49 (2). If I find that I have jurisdiction, I will go on to consider the main issue in this Inquiry.

IV. ISSUE

[19] The Notice of Inquiry identified one main issue and one preliminary issue.

The main issue in this Inquiry: ***Is the Public Body required or authorized to refuse access to the records?***

The preliminary issue in this Inquiry: ***Does subsection 49 (2) apply, in this case, such that it authorizes the IPC to conduct a review under paragraph 48 (1)(a) of the ATIPP Act?***

V. BURDEN OF PROOF

[20] Section 54 of the Act establishes the burden of proof on the parties in this Inquiry. It states:

> ***54****(1) In a review resulting from a request under section 48, it is up to the public body to prove*
>
> *(a) that the applicant has no right of access to the record or the part of it in question, or*
>
> *(b) that the extension of time is justifiable.*
>
> *(2) Despite subsection (1), in a review of a decision to give an applicant access to all or part of a record containing information that relates to a third party,*
>
> *(a) if the information is personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy; and*

(b)if the information is not personal information, it is up to the third party to prove that the applicant has no right of access to the record or part.

VI. THE RECORDS

[21] Fifty-two records are at issue in this Inquiry. The Public Body numbered them A-71 to A-73, A-76, A-80 to A-83, A-93 to A-109, A-115 to A-120, A-123 and A-124, A-130 to A-135, A-142 and A-143, A-150, B-5 to B-12, and C-1 and C-2 (the Records).

VII. DISCUSSION OF THE ISSUES

Preliminary Issue: *Does subsection 49 (2) apply in this case such that it authorizes the IPC to conduct a review under paragraph 48 (1)(a) of the ATIPP Act?*

Relevant sections of the ATIPP Act to the Preliminary Issue

[22] My authority regarding reviews is set out in sections 48 to 53 of the ATIPP Act.

[23] Subsection 48 (1) sets out the ability of an applicant to request a review.

> ***48****(1) A person who makes a request under section 6 for access to a record may request the commissioner to review*
>
> *(a) a refusal by the public body to grant access to the record;*
>
> *(b) a decision by the public body to separate or obliterate information from the record;*
>
> *(b.1) a decision by the records manager to declare the request abandoned;*
>
> *(c) a decision about an extension of time under section 12 for responding to a request for access to a record; or*
>
> *(d) a decision by the records manager to not waive a part or all of a fee imposed under this Act.*

[24] Subsection 48 (4) sets out the right of a third party to request a review.

> ***48****(4) A third party notified under section 26 of a request for access may ask for a review of a decision by the public body to disclose personal or business information about the third party.*

[25] Subsection 49 (2) sets out how an applicant can request a review.

> ***49****(1) To ask for a review under this Part, a written request must be delivered to the commissioner within*
>
> *(a) 30 days after the person asking for the review is notified of the decision that they want reviewed;*
>
> *(b) 30 days after the date of the act or failure to act that they want reviewed;*
>
> *(c) by a third party, 20 days after notice was given if the review is pursuant to subsection 48(4); or*
>
> *(d) a longer period allowed by the commissioner.*
>
> ***49*** *(2) The failure of the records manager or of a public body to respond in time to a request for access to a record is to be treated as a decision to refuse access to the record.*

[26] Section 51 provides me with authority to authorize a mediator to investigate and to try and settle a matter under review.

[27] Section 52 authorizes me to conduct an Inquiry where the matter under review is not settled.

[28] The time limit for responding to a request for access to information is set out in section 11.

> ***11****(1) The records manager must make every reasonable effort to respond without delay and must respond not later than 30 days after a request is received unless the time limit is extended under section 12.*

Section 12 *authorizes* the Records Manager to extend the time limit for responding to a request for access.

> ***12****(1) The records manager may extend by up to 30 days the time for responding to a request if*
>
> *(a) the applicant does not give enough detail to enable the public body to identify a requested record;*
>
> *(b) a large number of records is requested or must be searched and meeting the time limit would unreasonably interfere with the operations of the public body;*
>
> *(c) the public body needs more time to consult with a third party or another public body before deciding whether or not to give the applicant access to the record;*
>
> *(d) a third party asks for a review under section 48; or*

(e) multiple concurrent requests have been made by the same applicant or multiple concurrent requests have been made by two or more applicants who work for the same organization or who work in association with each other, and meeting the time limit would unreasonably interfere with the operations of one or more public bodies.

(1.1) …The records manager may extend the time for responding to a request by up to a further 30 days for the reasons set out in subsection (1) if the records manager is of the view that it is reasonable to do so in the circumstances.

(2) If the time is extended under subsection (1) or (1.1), the records manager must tell the applicant

(a) the reason for extending the time;

(b) when a response can be expected; and

(c) that under section 48 the applicant may ask for a review of the extension.

Submissions in respect of the Preliminary Issue

[29] The Records Manager submits the following in relation to the preliminary issue.

1. *Whether or not the extension was validly granted and whether or not there was a deemed refusal to disclose records to the Applicant is now moot because the records (saving those subject to a third party complaint) have been disclosed to the Applicant*.

2. *The IPC has jurisdiction to review the third party objection to the release of records under section 48 (4).*

3. *If the IPC seeks to review the decision of the Records Manager to grant an extension despite the issue being moot, then the Records Manager submits that the second extension she granted was valid.*

4. *The IPC has initiated this review incorrectly and that the Applicant was seeking a review of her decision to extend the Public Body's time for response.*

[30] The Public Body submits that it *concurs with the Records Manager regarding the IPC's jurisdiction to hear this matter pursuant to section 48 (4)*.

Analysis of the Preliminary Issue

Is the issue of whether the extension was validly granted or whether there was a deemed refusal to disclose records to the Applicant now moot because records have been disclosed to the Applicant?

[31] I have determined that the question of whether subsection 49 (2) came into effect such to trigger the Applicant's ability to request a review under paragraph 48 (1)(a) is not moot. My reasons follow.

[32] Whether the issue under review is moot depends on whether at the time of this Inquiry there remains a live controversy which affects the rights of the parties involved.[1] The issue under review in this Inquiry is whether the Public Body was required or authorized to refuse access to the Records which have not been disclosed to the Applicant in response to his Access Request. In order to make that determination, I must first determine whether I have jurisdiction. Whether I have jurisdiction depends on whether subsection 49 (2) came into effect thereby triggering the Applicants ability to request a review under paragraph 48 (1)(a). As the Records at issue in this Inquiry are records responsive to the Access Request that have not yet been released to the Applicant, there remains a live controversy which affects the right of the Applicant to access the Records.

Does the IPC have jurisdiction to review the third party objection to the release of the Records under subsection 48 (4)?

[33] Whether *I have jurisdiction* to conduct a review under subsection 48 (4) is irrelevant to the issue in this Inquiry. If I am wrong, however, I have determined that I do not have jurisdiction to conduct a review under subsection 48 (4) given that the Third Party has withdrawn its request for review.

Has the IPC initiated this review incorrectly because the Applicant was seeking a review of the Records Manager's decision to extend the Public Body's time for response?

[34] The Records Manager argues that one of the grounds identified on the Applicant's RFR Form is identified as a review of a decision about the extension of time for responding to a request. In the Records Manager's Affidavit she indicates that *the Applicant replied to my letter* that *he had contacted…the IPC office and "will be submitting a formal complaint to* [the] *office with regards to the extension"*. She goes on to highlight that the choice by my Office to proceed on a review under paragraph 48 (1)(a) has resulted in a great deal of delay and confusion in respect of a relatively uncomplicated request for records.

[35] The Records Manager and Public Body submit that if I agree with the Records Manager's position that the decision to extend was valid, *this review may proceed on the basis of [sic] section 48 (4)*. Subsection 48 (4) is the section that authorizes a third party to request that I review a public body's decision to disclose business or personal information.

[36] As previously indicated, the Applicant checked off the following boxes on the RFR Form as the bases of the request for the review:

> *I have not yet received a reply to my access request,*

[1] *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342, 1989 CanLII 123 (SCC), at pg. 35.

A public body or the Records Manager refused to grant access to the record I requested,

A decision by a public body or the Records Manager to separate or obliterate information from a record I requested, and

A decision about the extension of time for responding to a request for access to records.

[37] It is clear from the RFR Form that the Applicant was not sure the grounds on which to request a review under section 48. This is not uncommon.

[38] The RFR Form was submitted to our office on December 23, 2013. At the time of receiving the RFR form, the Applicant had not received a response to his Access Request in accordance with the requirements of the ATIPP Act. In a letter provided to him by the Records Manager, it indicated that *the new time limit for responding to you is December 10, 2013.* On December 23, 2013, the same date the Applicant submitted the RFR Form to our office, the Records Manager had send a letter to the Applicant, also dated December 23, 2013, indicating she had decided to extend the time limit for responding to the Access Request to January 9, 2014.

[39] The decision was made by our office to proceed with a review under paragraph 48 (1)(a), as it appeared *prima facie* that the extension granted after December 10, 2013 was invalid and that subsection 49 (2) enabled the Applicant to request a review under paragraph 48 (1)(a). The Applicant was aware of the basis on which we were conducting a review and made no objections.

[40] In order for the IPC to review a request by an Applicant, one of the circumstances listed under section 48 must exist. It is the contention of the Records Manager and the Public Body that subsection 49 (2) does not enable the Applicant to request a review under paragraph 48 (1)(a) because the extension granted was valid. This dispute forms the basis of the preliminary issue.

[41] In order to determine whether subsection 49 (2) enabled the Applicant to request a review under paragraph 48 (1)(a), I must first determine if the extension granted by the Records Manager on December 23, 2013 was valid.

Was the decision of the Records Manager to grant the second extension on December 23, 2013 valid?

[42] The Records Manager indicated that the calculation of time under the ATIPP Act must be done in accordance with the *Interpretation Act*. I agree.

[43] The *Interpretation* Act requires at subsections 18 (j) and (k) that:

(j) when the time limited for the doing of anything expires or falls on a holiday, the time so limited extends to and the thing may be done on the first following day that is not a holiday;

(k) when a number of days not expressed to be "clear days" is prescribed, it shall be reckoned exclusively of the first day and inclusively of the last, but when the days are expressed to be "clear days" or when the term "at least" is used, both the first day and the last shall be excluded;

[44] Section 11 requires the Records Manager to respond *not later than 30 days* after she receives a request for access under the ATIPP Act. The Records Manager indicated in her letter to the Applicant dated October 11, 2013, that the deadline for responding to his Access Request was November 12, 2013. The Records Manager submits this calculation of the time limit was in accordance with the requirements of subsection 11 (1) of the ATIPP Act. I agree.

[45] In the second letter provided to the Applicant dated November 4, 2013, which contains the decision of the Records Manager to extend the time to respond to the Access Request, the date of December 10, 2013 is identified. I find this calculation of time to also be in accordance with the requirements of the *ATIPP Act*.

[46] The calculation of time in the third letter provided to the Applicant is not at issue in this Inquiry. What is at issue is whether the decision by the Records Manager to extend the time limit to respond on December 23, 2013, 13 days after the deadline of December 10, 2013, was valid.

[47] The Records Manager takes the position that her decision to extend the time to respond under subsection 12 (1.1) after the deadline of December 10, 2013, was valid. Her reasons are that a purposive interpretation of section 12 of the ATIPP Act supports this and that I must show deference to her decision based on the principles set out in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 (ATA) and *Dunsmuir v. New Brunswick,* 2009 SCC 9 (CanLII) (Dunsmuir).

[48] In support of her position that a purposive interpretation of section 12 of the ATIPP Act provided her the authority to extend the time to respond to the Access Request after December 10, 2013, the Records Manager submits that:

…a purposive interpretation employed by the Supreme Court of Canada in the ATA Case for the interpretation of Alberta's Personal Information Protection Act applies to the Access to Information and Protection of Privacy Act provisions regarding extensions of time for response.

The requirement to respond is set out in [sic] 11(1) "must respond not later than 30 days after [sic] request is received unless the time of it is extended under section 12"."

As can be seen from [ATA] *and a reading of section 12 there is no specific statutory requirement that the extension be granted before the expiry of the term. Section 12 is silent about the time at which an extension may be granted. The only conditions placed on extensions by section 12 relate to the reasons for which an extension may be granted.*

> *…the reasons for granting the extensions were valid: to consult a third-party. The validity of the reasons for the extension is evidenced by the third party's objection/complaint to the Public Body's decision to disclose records.*

[49] In support of her position that she is owed deference in her decision, the Records Manager states:

> *The legislature has granted to the Records Manager alone the authority and discretion to decide whether to grant an extension of time to respond to a request. In that respect her authority is analogous to the authority of the Commissioner in the ATA Case because they are both empowered to make binding decisions regarding timelines.*

[50] She further argues that because her decision is reviewable but not appealable, her decision to extend under section 12 is final and binding. In this regard she states:

> *…a purposive analysis of the ATIPP Act, it is clear that while the IPC has jurisdiction to review her decision to grant an extension of time to respond to a request, there is no statutory right of appeal of the Records Manager's decision*.

[51] She then sets out the following.

1. A person is able to request the IPC to review an extension of time by the Records Manager under paragraph 48 (1)(c).

2. Subsection 57 (4) authorizes the IPC to *recommend a course of action* to the Records Manager when reviewing an extension of time.

3. Subsection 59 (2) requires a public body to inform the parties of an appeal if it decides not to follow the IPC's recommendation.

4. Section 59 does not include the right to appeal a decision by the Records Manager to extend time under section 12.

5. A purposive interpretation of these provisions together with the purpose of the ATIPP Act supports her position that her decision is final and binding.

[52] I disagree with the Records Manager's position. My reasons follow.

[53] The issue before the Supreme Court of Canada (SCC) in ATA was whether an adjudicator for the Information and Privacy Commissioner of Alberta (AB IPC) could extend a deadline to complete an Inquiry after the deadline for completion had passed. In arriving at the decision that the adjudicator could extend the Inquiry after the deadline has passed, the SCC engaged in a purposive interpretation of Alberta's *Personal Information Protection Act* (PIPA). It determined the following.

1. The standard of reasonableness should be applied to judicial review of a decision by the adjudicator regarding time extensions under PIPA.

2. A reasonableness standard of review accords deference to the decision made by the adjudicator.

3. It was reasonable for the adjudicator to rely on a prior decision of the AB IPC in which he determined, after conducting a purposive interpretation, that he had authority to extend the time to complete an Inquiry under subsection 69 (6) of Alberta's *Freedom of Information and Protection of Privacy Act (FOIPPA)* (the FOIPPA Decision).

4. It was a reasonable interpretation by the AB IPC in the FOIPPA Decision that subsection 69 (6) does not *expressly state* a requirement to notify the parties about an extension *before the 90-day period expires* and that this interpretation identifies a potential ambiguity in the provision.[2]

5. When the provision is silent as to when an extension of time can be granted, there is no presumption that silence means that the extension must be granted before expiry.[3]

6. If the ordinary meaning of legislation is ambiguous, the interpretation that best accords with the purpose of the legislation should be adopted.[4]

7. The purposive interpretation undertaken by the AB IPC in the FOIPPA Decision supports that extending the period for completion of an Inquiry after the expiry of 90 days does not result in the automatic termination of the inquiry under subsection 69 (6) of FOIPPA.

Standard of Review

[54] The Records Manager argues that I am required to show deference to her decision and review her decision to extend the time under section 12 on a standard of reasonableness. I have determined that the standard of review set out in Dunsmuir does not apply to my review of the Records Manager's decision. The Dunsmuir standard of review applies to a court's review of a statutory decision maker.

[55] The review undertaken by the IPC under the ATIPP Act is a review by a statutory decision maker, the IPC, of the decision made by another statutory decision maker, the Records Manager. As such, the Dunsmuir standard of review does not apply to my review of the Records Manager's decision. The Saskatchewan Court of Appeal considered a similar argument and concluded that, while there is some case law that supports that an administrative agency reviewing another administrative agency must employ the standard of review, the law in this area is unsettled.[5]

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[2] ATA, at paras. 62, 63 and 67.
[3] ATA, citing Justice Berger at para. 57 of *Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner)*, 2010 ABCA 26 (CanLII).
[4] ATA, at para 67 citing the IPC's decision at paras. 54-55.
[5] *Pearlman v. University of Saskatchewan (College of Medicine)*, 2006 SKCA 105 (CanLII), at para. 59.

[56] If I am wrong, however, in a recent decision by the Federal Court of Appeal, Mainville, J.A. found that the decision made by a statutory decision maker, a Minister in that case, is not owed any deference by a court reviewing the decision where:

1. the decision maker is not acting as an adjudicative tribunal,
2. is not protected by a privative clause, and
3. is not empowered by its enabling legislation to authoritatively decide questions of law.[6]

[57] In deciding that a Minister's decision in that case was not owed any deference, Mainville, J.A. stated:

> *The issues in this appeal concern the interpretation of a statute by a minister who is not acting as an adjudicator and who thus has no implicit power to decide questions of law. Of course, the Minister must take a view on what the statute means in order to act. But this is not the same as having a power delegated by Parliament to decide questions of law. The presumption of deference resulting from Dunsmuir, which was reiterated in Alberta Teachers' Association at paras. 34 and 41, does not extend to these circumstances.*[7]

[58] The Records Manager, in making her decision to extend time under section 12, was not acting as an adjudicative tribunal, the ATIPP Act does not contain a privative clause, and the Records Manager is not empowered under the ATIPP Act to decide questions of law. Consequently, I find the Records Manager is owed no deference in my review of her decision.

Purposive Interpretation

[59] The Records Manager argues that because section 12 is silent as to the timing of when the Records Manager may decide to extend the time for a response, the provision is ambiguous. She further suggests that as a result of the ambiguity in section 12, a purposive interpretation of this section is necessary to interpret its meaning and that the decision reached in ATA supports interpreting section 12 to allow the Records Manager to decide to extend the time for response after the expiry.

[60] The modern approach to statutory interpretation is that *the words of an Act are to be read in their entire* context *and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament*.[8]

[61] In Yukon's *Interpretation Act* it states that [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*.[9]

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[6] *Canada (Fisheries and Oceans) v. David Suzuki Foundation*, 2012 FCA 40 (CanLII), at para 88.

[7] *Ibid*, at para. 99.

[8] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 1998 CanLII 837 (SCC), at para. 21.

[62] The purposes of the ATIPP Act are set out in section 1 as follows:

> ***1****.(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by*
>
> *(a) giving the public the right of access to records; and*
>
> *(b) giving individuals a right of access to, and a right to request correction of, personal information about themselves; and*
>
> *(c) specifying limited exceptions to the rights of access; and*
>
> *(d) preventing the unauthorized collection, use, or disclosure of personal information by public bodies; and*
>
> *(e) providing for an independent review of decisions made under this Act.* [Underlining mine]

[63] Section 5 provides persons with a right to access records in the custody and control of a public body. Section 6 sets out the rules that a person must follow to make a request for access to records. Sections 11 and 12 set out the timeframe in which a response must be provided to an applicant's request for access, which is not later than 30 days unless extended an additional 60. Section 48 provides the ability of a person to request the IPC to review certain actions of a public body or Records Manager taken in relation to a request for access to records. It states:

> ***48****(1) A person who makes a request under section 6 for access to a record may request the commissioner to review*
>
> *(a) a refusal by the public body to grant access to the record;*
>
> *(b) a decision by the public body to separate or obliterate information from the record;*
>
> *(b.1) a decision by the records manager to declare the request abandoned;*
>
> *(c) a decision about an extension of time under section 12 for responding to a request for access to a record; or*
>
> *(d) a decision by the records manager to not waive a part or all of a fee imposed under this Act.* [Underlining mine]

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[9] *Interpretation Act*, RSY 2002, c125, at section 10.

[64] Subsection 49 (2) states that *a failure of the records manager or of a public body to respond in time to a request for access to a record is to be treated as a decision to refuse access to the record*.

[65] Reading the above provisions together, the ATIPP Act sets out a scheme that provides persons with the right to access a public body's records within a specified time period and provides for an independent review of actions taken by the public body in respect of a request for access.

[66] I agree with the Records Manager that section 12 is silent as to when the Records Manager may extend the time to respond to a request. I further agree that, in accordance with the SCC's decision in ATA, this silence constitutes an ambiguity. I disagree, however, that this ambiguity results in an interpretation of section 12 such it allows the Records Manager to decide to extend after the deadline to respond has expired. This is due to the presumption in statutory interpretation against absurd results.

[67] In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 1998 CanLII 837 (SCC), the SCC stated the following in relation to this presumption.

> *It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, supra, 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 (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, Construction of Statutes, supra, at p. 88).* [Underlining mine]

[68] Subsection 49 (2) states that *the failure of the records manager or of a public body to respond in time to a request for access to records is to be treated as a decision to refuse access to the record*. The effect of this subsection is that, if a response is not provided to an applicant within the timelines in section 11 and 12, a failure to respond in time *is to be treated as a decision to refuse access to the record*. A decision by a public body to refuse access to a record requested by an applicant is reviewable by the IPC under paragraph 48 (1)(a).

[69] By interpreting section 12 to allow the Records Manager to decide to extend the time after the time to respond has expired would have absurd results. This interpretation would result in an incompatibility with subsection 49 (2) and with one of the objects of the ATIPP Act which is to provide a review by the IPC of a refusal to provide access to records. It would have the effect of enabling the Records Manager to nullify an applicant's request for review by the IPC and the IPC's authority to conduct a review simply by deciding to extend after the 30 days expired.

[70] Where there is more than one way to interpret a provision as a result of an ambiguity, as is the case with section 12, and one interpretation produces an absurd result, that interpretation must be rejected.[10] Consequently, an interpretation of section 12 that would authorize the Records Manager to decide to extend the time to respond after expiry of the deadline established either under section 11 or 12 must be rejected. The proper interpretation of section 12 is, therefore, that the Records Manager is authorized to decide to extend the time to respond only before a deadline to respond established under section 11 or 12 has expired. Interpreting section 12 this way best accords with the purpose of the ATIPP Act.

[71] Other Information Commissioners have examined similar provisions in their respective access to information laws and found that a public body could not extend the time to respond to an access request after the expiry of a deadline to respond had passed and that doing so does not cure the triggering of a provision that deems a refusal to have occurred.[11]

[72] With respect to the Records Manager's argument that her decision to extend under section 12 is not appealable and, therefore, final and binding, I disagree for the following reasons.

[73] The Records Manager has misstated my powers in conducting a review under the ATIPP Act. If a matter under review is not settled in accordance with section 51, I have authority to conduct an Inquiry under subsection 52 (1). Subsection 52 (1) states:

> ***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.* [Underlining mine]

[74] Subsection 52 (1) clearly identifies that I have adjudicative powers to decide *all questions of fact and law* in an Inquiry. As such, when I conduct an Inquiry on a review, the findings I make in an Inquiry are final subject only to judicial review. This would include a finding that the Records Manager made a decision contrary to the ATIPP Act.

[75] I agree with the Records Manager that upon making a finding of non-compliance with the ATIPP Act, my authority is limited to making recommendations to remedy non-compliance and that only certain of my recommendations are appealable to the Yukon Supreme Court. While this is the case, it does not change the finality of my findings in an Inquiry.

[76] I find that a purposive interpretation of section 12 does not support an interpretation that authorises the Records Manager to decide to extend the time to respond to the Access Request after December 10, 2013 due to section 49 (2). I also find that the Records Manager's decision to extend after December 10, 2013 was not valid. I find further that subsection 49 (2) does apply in this case and, as a result, I have jurisdiction under

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[10] *Driedger on the Construction of Statutes, Third Edition by Ruth Sullivan*, at pp 93 and 94 citing *Cardinal v. R.* (1982), 133 D.L.R. (3d) 513 (S.C.C.), at para. 518.

[11] *University of Ottawa (Re)*, 2008 CanLII 41553 (On IPC), at p.3 and *University of Ottawa (Re)*, 2008 CanLII 24764 (ON IPC), at p.4.

paragraph 48 (1)(a) to review the Applicant's request that I review the Public Body's refusal to provide access to the Records.

[77] As I have found I have jurisdiction under paragraph 48 (1)(a), I will go on to address the main issue in this Inquiry.

Main Issue: *Is the Public Body required or authorized to refuse access to the Records?*

Background

[78] As previously stated, after receiving the Applicant's request for review, the Public Body continued to process the Access Request and in a letter dated January 7, 2014, the Records Manager indicated that some records responsive to the Access Request were released. The letter indicated that some records were not ready for release as they were going through a third party consultation process.

[79] In a letter dated February 6, 2014, the Records Manager indicated that additional records were released to the Applicant.

[80] The Records Manager provided a letter to the Third Party dated January 7, 2014, which included the following.

> *The Department of Community Services, Yukon Government, has received a request under Yukon Access to Information and Protection of Privacy (ATIPP) Act for information related to [the Third Party's business].*
>
> *On reviewing the records relating to the request it appears that some of them may contain information which, if disclosed, may affect [the Third Party's] business interests as described in section 24 (1) of the ATIPP Act.*

[81] In a memo dated February 6, 2014, to the Records Manager, the Public Body indicated that:

> *While the affected third party did not submit any written representations, Community Services has decided to grant access to the records in part. Severances have been made in accordance with section 25 (1) of the ATIPP Act.*
>
> *As per section 27, please advise the third party of our decision and their right to request a review under section 48, should they disagree with Community Services decision.*

[82] As previously stated, I received a request for review from the Third Party on February 28, 2014. This request was subsequently withdrawn by the Third Party after it was informed that a review with respect to the Records was currently underway.

Submissions from the Parties

[83] The Public Body submits that the Records contain personal information in the form of email addresses and names of individuals who are not Government employees or who were acting in their personal capacity. It contends that disclosure of the names is not an unreasonable invasion of personal privacy but disclosure of the email addresses is.

[84] In deciding disclosure of the names did not constitute an unreasonable invasion of personal privacy, the Public Body indicated:

1. these individuals names are known to the Applicant in connection with the business of the Third Party, and

2. an analysis of subsection 25 (4) supports that transparency about the business transaction *was of the utmost importance*.

[85] In deciding the disclosure of email addresses would constitute an unreasonable invasion of personal privacy, the Public Body indicated that the Applicant is unlikely to know these individuals' email addresses.

[86] The Public Body conceded that one individual's email address appears to be a work email address that is published in a public directory and thus is publicly available. Therefore, the Public Body would release this individual's email address.

[87] The Public Body further submits that some of the information in the Records may be subject to section 24 of the ATIPP Act. Specifically, the information may contain commercial and financial information of the Third Party. It contends, however, that section 24 does not apply to the Records because they were not supplied to the Public Body in confidence. On this point the Public Body indicates that:

1. the Third Party did not *supply* the information. Rather the information was proposed by Government,

2. while the information about initial negotiations were intended to be confidential, the agreement reached as a result of those negotiations is not confidential as the agreement resulted in spending public money for a public benefit, and

3. the financial information in the Records would be contained in the Third Party's audited financial statements which are available to the public under the *Societies Act*.

[88] No submissions were received from the Applicant or the Third Party.

Analysis

Do the Records contain information to which subsection 24 (1) applies?

[89] The Public Body indicated in its submissions that the Third Party has the burden of proof in respect of whether this subsection applies. This is incorrect. Subsection 49 (2) requires that I treat the failure to respond in time as a decision to refuse access to the record. Consequently, the decision I am reviewing in this Inquiry is a refusal by the Public Body to grant access to the Records. This is the case despite the Public Body's subsequent decision on February 6, 2014 to release the Records to the Applicant, which was later challenged by the Third Party. Given that my review is of a refusal by the Public Body to grant access to the Records for failure to respond to the Applicant's Access Request in time in accordance with subsection 49 (2), the burden of proof rests with the Public Body to prove the Applicant has no right of access to the Records.

[90] Section 24 (1) of the ATIPP Act states:

> ***24****(1) A public body must refuse to disclose to an applicant information*
>
> *(a) that would reveal*
>
> *(i) trade secrets of a third party, or*
>
> *(ii) commercial, financial, labour relations, scientific or technical information of a third party;*
>
> *(b) that is supplied, implicitly or explicitly, in confidence; and*
>
> *(c) the disclosure of which could reasonably be expected to*
>
> *(i) harm significantly the competitive position, or interfere significantly with the negotiating position of the third party,*
>
> *(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
>
> *(iii) result in undue financial loss or gain to any person or organization, or*
>
> *(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

[91] In order for subsection 24 (1) to apply to the information contained in the Records, the requirements in paragraphs 24 (1)(a), (b) and (c) must be met. I will first address whether the requirements of paragraph 24 (1)(a) have been met.

[92] The Public Body indicates that the Records may contain commercial or financial information about the Third Party.

[93] The meaning of commercial information was considered by my predecessor in Inquiry Report File #10-033AR. In Commissioner Koepke's Inquiry Report, at paragraph 40, he provided the following about the meaning of "commercial information" in subparagraph 24 (1)(a)(ii).

> *Access legislation in Alberta contains an exception similar to the Yukon's ATIPP Act section 24. The definition of commercial information has been considered in a number of Alberta decisions and has been defined as information that relates to the buying and selling or exchange of merchandise or services. It has been considered to include a third party's associations, history, references, bonding and insurance policies, and the names and title of key personnel and contract managers when it relates to how the third party proposes to organize its work.*

[94] The meaning of "financial information" in the same subparagraph has also been considered by the Alberta Information and Privacy Commissioner in respect of Alberta's *Freedom of Information and* Protection *of Privacy Act*. Financial information has been defined as *information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs*.[12]

[95] Upon my review of the Records, I find the following Records to contain either or both financial or commercial information about the Third Party:

1. A-71 to A-73 and A-81 to A-83 are lease agreements about a land transaction and they contain pricing information,

2. A-76 and A-80 are correspondence that sets out details associated with the lease agreement,

3. A-93 to A-108, A-115 to 124, A-131 and 132, and C-1 and C-2 contains payment or mortgage information associated with the lease agreement,

4. A-133 to A-150 discusses land subject to the lease, and

5. B-5 to B-7 contains detailed information about the Third Party's operations and financials.

[96] I find the following Records do not contain financial or commercial information:

1. A-100 is an exchange of information between Yukon Government employees about how to create a cheque requisition, how the cheque should be addressed and how to send it,

[12] *Order F2011-002*, 2011 CanLII 96606 (AB OIPC), at para. 12 also citing Alberta Information and Privacy Commissioner's *Order PO-2010*.

2. A-109 contains only the name and contact information of a lawyer,

3. A-130 is correspondence about the lease agreement, but contains no commercial or financial information, and

4. B-8 to B-12 contain information about membership that is neither commercial nor financial.

[97] Of the Records that contain no financial or commercial information, I find that these Records also do not contain trade secrets, labour relations, or scientific or technical information of the Third Party. As the requirements of subparagraph 24 (1)(a) are not met with respect to these Records, I do not need to consider if paragraphs 24 (1)(b) and (c) apply.

[98] For the Records I determined do contain either or both commercial and financial information, I will go on to determine if subparagraph 24 (1)(b) applies to these Records.

Was the information contained in the Records supplied, implicitly or explicitly, in confidence?

[99] I will first address whether the information contained in the remaining Records was "supplied" by the Third Party

[100] The Public Body submits that the Third Party did not supply the information because the description of land and the amounts to be paid were proposed by Government.

[101] A recent Order issued by Adjudicator Cunningham of the Alberta Information and Privacy Commissioner's Office identified the following in relation to the meaning of "supplied".

> *Order 2000-005 held that, generally, information in an agreement that has been negotiated between a third party and a public body is not information that has been supplied to a public body. There are exceptions, where information supplied to the public body prior to or during negotiations is contained in the agreement in a relatively unchanged state, or is immutable, or where disclosure of information in an agreement would permit an applicant to make an accurate inference about information supplied to the public body during the negotiations (See Order 2000-005 at para 85; see also an extensive discussion of this topic in British Columbia Order 03-15.)*
>
> *In this case, the information the Public Body seeks to withhold is part of a contract negotiated between itself and the Affected Party. With respect to most of the Agreement, there is no evidence before me that any of the information that the Affected Party has described as its commercial or financial information was supplied to the Public Body by the Affected Party for the purpose of or prior to the negotiations of the contracts, or that any inferences can be drawn from the requested information about information that was so supplied. Accordingly I cannot conclude that most of this part of the requested information*

was information supplied to a Public Body as contemplated by section 16(1)(b).[13]

[102] She went on to say that [n]*o matter how brief a discussion, there remains an element of exchange or bargaining when mutual agreement is required to conclude a matter. Even if a party feels compelled to accept a term, and does not believe it is in a position to argue in favor of a different term, the term is negotiated. A simple proposal and a response remains a negotiation, as mutual agreement is required for the term to become binding on the parties.*[14]

[103] She added that [t]*he ordinary meaning of "supply" is "provide" or "furnish". There is no reason to presume that the legislature intended "supply" to mean anything other than "provide" or "furnish" when it enacted section 16 (1)(b). Moreover, it has not been established for the inquiry that the term "supply" can have the meaning of "agree to terms" or "negotiate terms".*[15]

[104] Records A-71 to A-73 and A-81 to A-83 are lease agreements. I do not see anything in these Records that indicates the Third Party supplied any information. Nor do I have any evidence to support this. Consequently, I find that these Records were not supplied by the Third Party.

[105] Several other Records, A-76, A-80, A-99, A-102 and A-103, and A-105 to A-107 are correspondence between government employees or from government employees. Records C-1 and C-2 are cheque requisitions issued by the government. The information in these Records was not provided or furnished by the Third Party. Consequently, I find that the information in these Records was not supplied by the Third Party.

[106] As I have determined the foregoing Records were not supplied by the Third Party, I will not go on to consider if they were supplied "implicitly or explicitly in confidence".

[107] The remaining Records, A-93 to A-98, A-101, A-104, A-108, A-117 to A-120, A-133 to 135, A-142, A-143, and A-150 include email communications from representatives of the Third Party. Records A-123 and A-124 and Records A-131 and A-132 (which are duplicates of A-123 and A-124), and B-5 to B-7 are letters written to Yukon Government employees and the Premier by Third Party representatives. Record A-115 contains a file number identified as the Third Party's. I find that this information in these Records was provided by or furnished by the Third Party. Consequently, I will go on to consider if these Records were supplied "implicitly or explicitly in confidence".

[108] The Public Body submitted that the Records were not supplied in confidence. In support of its position, it indicated:

1. while initial negotiations were intended to be confidential, the agreement reached was not, and

[13] *Order F2013-47*, 2013 CanLII 80416 (AB OIPC) at para 34.
[14] *Ibid*, at para. 45.
[15] *Ibid*, at para. 49.

2. any financial information is publicly available given the Third Party is a Society.

Were the remaining Records supplied "explicitly" in confidence?

[109] There is nothing on the letters to indicate these Records were intended to be confidential. Similarly, in the email Records A-133 to A-135, A-142 and A-143, and A-150 there is nothing in these Records to indicate the communication was intended to be confidential. In the remainder of the email Records, which are authored by a Third Party representative, below the email is a standard email warning. It states:

> *This transmission is directed in confidence solely to the addressee and may not otherwise be distributed, copied or disclosed. The contents of this transmission may also be subject to solicitor-client privilege and all rights to that privilege are expressly claimed and not waived. If you have received this transmission in error, please notify us immediately by telephone at* [telephone number] *and delete this transmission from your system*.

[110] In Order F2012-17, Adjudicator Cunningham considered whether a standard email warning constitutes an explicit confidence in respect of the email communication preceding it. In finding it did not, she stated the following.

> *The emails…sent by the representative of the plan administrator, discussed above, contain a standard warning stating that the email may contain privileged information and should be kept confidential if received by an unintended recipient. Of these records, I have found that records 101 – 103 and records 110 – 111 contain information subject to section 16(1)(a). The confidentiality warning accompanies all email communications sent by this representative, regardless of the kind of information being sent. Moreover, I note that none of this representatives' letter correspondence in the records contains a similar caution.*
>
> *I find that this caution is evidence that this representative takes steps to ensure the confidentiality of emails that are sent in error; however, I find that the caution does not, on its own, support a finding that the records containing this caution were supplied with an explicit expectation of confidence. I make this finding because the caution states only that the emails may contain confidential information, and this caution is clearly directed at any unintended recipients of the emails, rather than the Public Body*. [16]

[111] The standard warning previously identified is similar to the one identified by Adjudicator Cunningham as its intent appears to protect the confidentiality of email sent in error and to preserve solicitor and client privilege should this occur. It is not intended to infer as

[16] *Order F2012-17*, 2012 CanLII 70619 (AB OIPC), at paras. 104 and 105.

between the parties that the contents of the email are to remain confidential. I also determined that this warning is not contained in any letters received from a Third Party representative. Consequently, I find that these Records were not supplied by the Third Party explicitly in confidence.

Were the remaining Records supplied implicitly in confidence?

[112] In Order F2012-18, Adjudicator Cunningham addressed what is required to have supplied information "implicitly in confidence". On this point she stated the following.

> *In my view, the word "implicit" denotes a particular state of understanding: a belief in a certain set of facts.*
>
> *The 1998 Freedom of Information and Protection of Privacy Policy and Practices Manual published by the Information Management and Privacy Branch at Alberta Labour (now Municipal Affairs) states, at page 64:*
>
> *Implicitly means that the confidentiality is understood even though there is no actual statement of confidentiality, agreement or other physical evidence of the understanding that the information will be kept confidential. In such cases, all relevant facts and circumstances need to be examined to determine whether or not there is an understanding of confidentiality.*[17]

[113] She further added that:

> *In Ontario Order M-169, Inquiry Officer Holly Big Canoe made the following comments with respect to the issue of confidentiality in the equivalent of section 15(1) found in the Municipal Freedom of Information and Protection of Privacy Act of Ontario:*
>
> *In regards to whether the information was supplied in confidence, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.*
>
> *In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:*

[17] *Ibid*, citing *Order 99-018* of the Alberta Information and Privacy Commissioner's Office, at para 109.

(1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.

(2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the Third Party prior to being communicated to the government organization.

(3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure.[18]

[114] The Public Body is of the view the information was not supplied explicitly or implicitly in confidence and I have no evidence from the Third Party contradicting this view. Consequently, I do not find any of the remaining Records to have been supplied implicitly in confidence.

[115] As a result of the foregoing, I find that subsection 24 (1) does not apply to any of the Records or part of them.

Does section 25 of the ATIPP Act restrict the Public Body from granting the Applicant access to the Records?

[116] The Public Body submitted that some of the Records contain names and email addresses of people who were not employees of government or were acting in their personal capacity, and that this information is "personal information" under the ATIPP Act.

[117] It submitted that the release of names of these people to the Applicant would not be an unreasonable invasion of personal privacy under section 25 (1) based on *the law and all of the relevant circumstances, including that these people's names are known to the Applicant in connection with the* [Third Party's business]. In support of this position, it added that *transparency about the transaction was of utmost importance* citing subsection 25 (4).

[118] It further submitted that the release of email addresses of these people would be an unreasonable invasion of personal privacy under subsection 25 (1). On this point it argued that *the fact that the Applicant is unlikely to know their email addresses; such disclosure would therefore be an unreasonable invasion of the people's privacy.*

[119] The Public Body conceded that it would not remove the email address of a lawyer, which it originally had removed, given that this information is publicly available.

[120] On the onus of proof in respect of the personal information removed by the Public Body, it claims the onus is on the third party to prove that the Applicant has no right of access to the Records in accordance with paragraph 54 (2)(b).

[18] *Ibid.*

[121] Paragraph 54 (2)(b) states the following:

> *54 (2) Despite subsection (1), in a review of a decision to give an applicant access to all or part of a record containing information that relates to a third party,*
>
> *…*
>
> *(b)if the information is not personal information, it is up to the third party to prove that the applicant has no right of access to the record or part.* [Underlining mine]

[122] My review, as previously stated, is of a decision by the Public Body to refuse access to a record or part of the Record. My review as it relates to personal information is of the Public Body's decision to refuse access to the information it identifies as personal information to which section 25 (1) applies. Consequently, the onus of proof under section 54 which applies to my review of this information is subsection 54 (1)(a), which states:

> ***54****(1) In a review resulting from a request under section 48, it is up to the public body to prove*
>
> *(a) that the applicant has no right of access to the record or the part of it in question*,

[123] Subsection 25 (1) of the ATIPP Act is a mandatory exception to the Applicant's right of access under subsection 5 (1). Subsection 25 (1) requires the Public Body to refuse to release personal information to the Applicant where it determines that to do so would constitute an unreasonable invasion of personal privacy. Subsection 25 (1) states:

> ***25****(1) A public body must refuse to disclose personal information about a third party to an applicant if the disclosure would be an unreasonable invasion of the third party's personal privacy.*

[124] Subsection 25 (2) creates a rebuttable presumption about when the release of personal information of a third party is presumed to be an unreasonable invasion of personal privacy. It states:

> ***25*** *(2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> *(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment, or evaluation;*
>
> *(b) the personal information was compiled and is identifiable as part of an investigation into or an assessment of what to do about, a possible violation of law or a legal obligation, except to the extent*

that disclosure is necessary to prosecute the violation or to enforce the legal obligation or to continue the investigation;

(c) the personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels;

(d) the personal information relates to the third party's employment or educational history;

(e) the personal information was obtained on a tax return or gathered for the purpose of collecting a tax;

(f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness;

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations;

(h) the personal information indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations; or

(i) the personal information consists of the third party's name together with the third party's address or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

[125] Subsection 25 (3) identifies when a release of third party personal information is not an unreasonable invasion of personal privacy. It states:

***25** (3) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*

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

(b) there are compelling circumstances affecting anyone's health or safety and notice of disclosure is mailed to the last known address of the third party;

(c) an enactment of the Yukon or Canada authorizes the disclosure;

(d) the disclosure is for a research or statistical purpose in accordance with section 38;

(e) the information is about the third party's position, functions or salary range as an officer, employee or member of a public body or as a member of a Minister's staff;

(f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body;

(g) the information is a description of property and its assessment under the Assessment and Taxation Act;

(h) the information is about expenses incurred by the third party while travelling at the expense of a public body;

(i) the disclosure reveals details of a licence, permit, or other similar discretionary benefit granted to the third party by a public body, not including personal information supplied in support of the application for the benefit; or

(j) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, not including personal information that is supplied in support of the application for the benefit or is referred to in paragraph(3)(c).

[126] Finally, subsection 25 (4) sets out what a Public Body is required to consider before deciding, based on the presumption under subsection (2) or otherwise, that the release of the personal information would constitute an unreasonable invasion of a third party's personal privacy. It states:

***25** (4) Before refusing to disclose personal information under this section, a public body must consider all the relevant circumstances, including whether*

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

(b) the personal information is unlikely to be accurate or reliable;

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

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

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

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

(g) the disclosure is likely to promote public health and safety.

[127] Most of the Records at issue in this Inquiry contain names of individuals who are not Yukon Government employees. Most of these names have not been redacted from the

Records with the exception of one, which appears on Records A-95 and A-98. Records A-93, A-95, A-98, A-101, A-104, A-108, A-117, A-119, A-133 and A-134 contain email addresses of individuals who are not Yukon Government Employees. Most of these email addresses have been redacted from the Records. However, two email addresses redacted on some Records appear on other Records unredacted. One appears on Records A-142, A-143 and A-150. The other appears on Records A-123 and A-131. Another email address of a person appearing to be a non-Government employee is unredacted and appears on Records A-142 and A-143.

Is the name and email addresses of third parties their "personal information"?

[128] "Personal information" is defined in section 3 as *recorded information about an identifiable individual*. Under the definition is the following non-exhaustive list of information considered to be personal information.

> *(a) the individual's name, address, or telephone number,*
>
> *(b) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,*
>
> *(c) the individual's age, sex, sexual orientation, marital status, or family status,*
>
> *(d) an identifying number, symbol, or other particular assigned to the individual,*
>
> *(e) the individual's fingerprints, blood type, or inheritable characteristics,*
>
> *(f) information about the individual's health care history, including a physical or mental disability,*
>
> *(g) information about the individual's educational, financial, criminal, or employment history,*
>
> *(h) anyone else's opinions about the individual; and*
>
> *(i) the individual's personal views or opinions, except if they are about someone else;*

[129] I have determined that the name and the email addresses redacted from the Records is the name and email addresses of individuals who are or appear to have been acting in a representative capacity of a private business or of the City of Whitehorse. I find that this name and these email addresses are the personal information of these individuals as identified in section 3 of the definition of personal information.

Does section 25 (1) apply to the name?

[130] Section 17 of Alberta's FOIPPA is similar to our Section 25. In Order F2008-028[19], Adjudicator Wade Riordan Raaflaub considered whether it would be an unreasonable invasion of personal privacy under section 17 of Alberta's FOIPPA to release to an applicant the names of individuals determined to be acting in a representative capacity for a government or private sector business. In finding the release of this information not to be an unreasonable invasion of these individual's personal privacy, he stated the following.

> *…many previous orders of this Office have made it clear that, as a general rule, disclosure of the names, job titles and signatures of individuals acting in what I shall variably call a "representative", "work-related" or "non-personal" capacity is not an unreasonable invasion of their personal privacy. I note the following principles in particular (with my emphases in italics):*
>
> 1. *Disclosure of the names, job titles and/or signatures of individuals is not an unreasonable invasion of personal privacy where they were acting in formal or representative capacities (Order 2000-005 at para. 116; Order F2003-004 at paras. 264 and 265; Order F2005-016 at paras. 109 and 110; Order F2006-008 at para. 42; Order F2008-009 at para. 89).*
>
> 2. *Disclosure of the names, job titles and/or signatures of individuals acting in their professional capacities is not an unreasonable invasion of personal privacy (Order 2001-013 at para. 88; Order F2003-002 at para. 62; Order F2003-004 at paras. 264 and 265).*
>
> 3. *The fact that individuals were acting in their official capacities, or signed or received documents in their capacities as public officials, weighs in favour of a finding that the disclosure of information would not be an unreasonable invasion of personal privacy (Order F2006-008 at para. 46; Order F2007-013 at para. 53; Order F2007-025 at para. 59; Order F2007-029 at paras. 25 to 27).*
>
> 4. *Where third parties were acting in their employment capacities, or their personal information exists as a consequence of their activities as staff performing their duties or as a function of their employment, this is a relevant circumstance weighing in favour of disclosure (Order F2003-005 at para. 96; Order F2004-015 at para. 96; Order F2007-021 at para. 98; Order F2008-016 at para. 93).*

[19] *Order F2008-028*, 2009 CanLII 90933 (AB OIPC)

> *I further note that the foregoing principles have been applied not only to the information of employees of the particular public body that is a party to the inquiry, but also to that of employees of other public bodies (Order F2004-026 at paras. 100 and 120), representatives of organizations and entities that are not public bodies (Order F2008-009 at para. 89; Order F2008-016 at para. 93), individuals acting on behalf of private third party businesses (Order 2000-005 at para. 115; Order F2003-004 at para. 265), individuals performing services by contract (Order F2004-026 at paras. 100 and 120), and individuals acting in a sole or independent capacity, such as lawyers and commissioners for oaths (Order 2001-013 at paras. 87 and 88; Order F2003-002 at para. 61). In my view, therefore, it does not matter who the particular individual is in order to conclude, generally, that section 17 does not apply to personal information that merely reveals that an individual did something in a formal, representative, professional, official, public or employment capacity*.[20] [Underlining mine]

[131] As is the case with Alberta's section 17, subsection 25 (2) does not create a rebuttable presumption that the release of third party's name to an applicant would constitute an unreasonable invasion of the third party's personal privacy. Among the circumstances listed in subsection 25 (3) not to constitute an unreasonable invasion of personal privacy, release of a third party's name does not appear. However, the circumstances listed in subsection 25 (2) and (3) are non-exhaustive.

[132] In considering whether the release of the third party's name in the context of this review would constitute an unreasonable invasion of the third party's personal privacy, I agree with Adjudicator Raaflaub that an important factor in determining whether the release of this information would constitute an unreasonable invasion of the third party's personal privacy is whether the name appears only in the context of acting in a purely representative capacity of a government or private sector business. As I have already determined, the individual whose name is redacted from five Records appears in the context of acting in a purely representative capacity of a private sector business. Consequently, I find that section 25 (1) does not apply to this information.

Does subsection 25 (1) apply to the email addresses?

[133] In the same Order, Adjudicator Raaflaub had occasion to consider whether section 17 of Alberta's FOIPPA prevented a public body from disclosing a third party's email address On this point, he stated the following.

> *Order F2004-026 (at para. 106) suggested that disclosure of business contact information – which is personal information under section 1(n)(i) – would not be an unreasonable invasion of personal privacy, as such information is routinely disclosed and is publicly available, both of which are relevant circumstances to consider under section 17(5) of the Act. I note other orders of this Office stating that the fact*

[20] *Ibid*, at paras. 53 and 54.

that a third party's personal information is merely business contact information, or of a type normally found on a business card, is a relevant circumstance weighing in favour of disclosure (Order 2001-002 at para. 60; Order F2003-005 at para. 96; Order F2004-015 at para. 96).

Given the foregoing, I find that disclosure of many of the telephone numbers, mailing addresses and e-mail addresses that the Public Body withheld would not be an unreasonable invasion of the personal privacy of third parties. This is where I know or it appears that the third party was acting in a representative, work-related or non-personal capacity and the telephone number, mailing address or e-mail address is one that the third party has chosen to use in the context of carrying out those activities. I point out that a home number, cell number or personal e-mail address (i.e., one not assigned by the public body or organization for which an individual works) may also constitute business contact information if an individual uses it in the course of his or her business, professional or representative activities. In this inquiry, where individuals include a cell number at the bottom of a business-related e-mail or other communication (as on pages 510 and 511), or where individuals send or receive business-related e-mails using what may be a personal e-mail address (as on pages 343 and 345, as well as throughout the records in relation to a communications consultant), I find that disclosure of the telephone number or e-mail address would not be an unreasonable invasion of personal privacy. Section 17 therefore does not apply.

There may sometimes be circumstances where disclosure of a home number or personal e-mail address that was used in a business context would be an unreasonable invasion of personal privacy and therefore should not be disclosed. For instance, on page 328, a home number is included along with a business number and cell number, leading me to presume that the home number is being included for the limited purpose of allowing a specific other person to contact the individual at a number other than the usual business or cell number. I therefore find that section 17 applies.[21]

[21] *Ibid*, at para. 59.

[134] Like the name of a third party, release of an email address of a third party does not create a rebuttable presumption under subsection 25 (2) that it would be an unreasonable invasion of personal privacy. Nor is this information enumerated in subsection 25 (3) as one of the circumstances not constituting an unreasonable invasion of the third party's personal privacy.

[135] I agree with Adjudicator Raaflaub that an important factor to consider in determining whether the release of a third party's email address would not constitute an unreasonable invasion of personal privacy is where the email address is routinely disclosed and publicly available or where it is merely business contact information, such as the kind normally found on a business card.

[136] I further concur with Adjudicator Raaflaub, that an important factor to consider in determining whether the release of a third party's personal email address would not constitute an unreasonable invasion of personal privacy is where the third party personal email address was used by a person who is or appears to be acting in a representative capacity of a government or private sector business and used this email address to send or receive business related emails in the context of carrying out those activities. I consider, as did Adjudicator Raaflaub, a personal email address to be an email address that is not assigned by a government or private sector business but acquired by the individual in his or her personal capacity.

[137] In the Records the Public Body has redacted four email addresses. My findings in relation to each of these email addresses are below.

1. One of these email addresses is the email of a lawyer who was representing the Third Party. This email address was redacted from eight Records but was unredacted in two (A-123 and A-131), which appears to be an oversight by the Public Body. This email address appears to be a business email address. The emails exchanged using this email address are in the course of representing the Third Party. The Public Body concedes that this email should not have been redacted given that, as a practicing lawyer in Yukon, this information is publicly available. I agree with the Public Body for the reasons it noted that subsection 25 (1) does not apply to the lawyer's email address.

2. Another email address belongs to a City of Whitehorse employee. This email address was redacted from two Records. Part of the email address includes "@city.whitehorse.yk.ca". This email address appears in the cc line of an email sent to the Third Party by a Yukon Government Employee. This email address appears to have been used in respect of the employee's employment responsibilities with the City and the content of the emails are related to these responsibilities. This email address is merely business card information that is publicly available and likely routinely disclosed. These factors weigh in favour of a finding that it would not be an unreasonable invasion of personal privacy to release this information to the Applicant. Consequently, I find that subsection 25 (1) does not apply to this information.

3. Another email address appears to belong to a representative of a private sector business. This email address appears in two Records. Part of the email address contains a business name. This email address appears to have been used in respect of the employee's employment responsibilities with the business and the emails exchanged are related to these responsibilities. This email address is merely business card information and likely routinely disclosed. These factors weigh in favour of a finding that it would not be an unreasonable invasion of personal privacy to release this information to the Applicant. Consequently, I find that subsection 25 (1) does not apply to this information.

4. The last email address appears to be a personal email address used by an individual who was acting in a representative capacity of the Third Party. This email address was redacted from eight Records but was unredacted in three (Records A-142, A-143 and A-150), which appears to be an oversight by the Public Body. It is evident from the email Records that this individual has chosen to use his or her personal email for the purposes of conducting business on behalf of the Third Party. The emails exchanged using this email address are all related to the business of the Third Party. These factors weigh in favour of a finding that it would not be an unreasonable invasion of personal privacy to release this information to the Applicant. Consequently, I find that subsection 25 (1) does not apply to this information.

[138] In my review of the Records, I found another email address in Records A-142 and A-143 that was not redacted by the Public Body, but which appears to be a personal email address. This appears to be an oversight by the Public Body. This email is similar to the one previously mentioned. It appears to be a personal email address used by an individual who was acting in a representative capacity of the Third Party. It is evident from the emails that this individual has chosen to use his or her personal email for the purposes of conducting business on behalf of the Third Party. The emails exchanged using this email address are all related to the business of the Third Party. These factors weigh in favour of a finding that it would not be an unreasonable invasion of personal privacy to release this information to the Applicant. Consequently, I find that subsection 25 (1) does not apply to this information.

[139] Based on the foregoing, I find that subsection 25 (1) does not apply to the Records or part of them.

VIII. FINDINGS

[140] As I have found that sections 24 and 25 do not apply to the Records or part of them, I find further that the Public Body did not meet the burden of proving the Applicant has no right to access the Records or part of them based on these sections.

IX. RECOMMENDATION

[141] Given that the Public Body did not meet the burden of proving the Applicant has no right to the Records or part of them based on section 24 or 25, I have determined that the Public Body is neither authorized nor required to refuse the access. As a result of this determination, pursuant to paragraph 57 (2)(a), I recommend the following:

> ***I recommend that the Public Body give the Applicant access to the Records.***

X. PUBLIC BODY'S DECISION AFTER REVIEW

[142] Section 58 of the Act requires the Public Body to decide, within 30 days of receiving this Inquiry Report, whether to follow my recommendation. The Public Body must give written notice of its decision to me and the parties who received a copy of this Inquiry Report, noted on the distribution list below.

[143] If the Public Body does not give notice of its decision within 30 days of receiving this Inquiry Report, it is deemed to have refused to follow my recommendation.

[144] If the Public Body does not follow my recommendation, it must inform the Applicant, in writing, of the right to appeal that decision to the Yukon Supreme Court.

XI. APPLICANT'S RIGHT OF APPEAL

[145] Subsection 59 (1) (a), gives the Applicant the right to appeal to the Yukon Supreme Court when the Public Body does not follow my recommendation to give access to a record or part of it.

ORIGINAL SIGNED

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Diane McLeod-McKay
Yukon Information and Privacy Commissioner

Distribution List: Community Services, Records Manager**,** the Applicant, and the Third Party