Yukon Information and Privacy Commissioner

INQUIRY REPORT

File ATP16-015AR

Pursuant to section 52 of the

Access to Information and Protection of Privacy Act

Diane McLeod-McKay, B.A., J.D.

Information and Privacy Commissioner

Public Body: **Department of Education (Department)**

Date: **February 2, 2017**

Summary:

An employee of the Department of Education made a complaint to the Office of the Information and Privacy Commissioner (IPC) alleging the Department used or disclosed his personal information contrary to the requirements of the *Access to Information and Protection of Privacy Act* (ATIPP Act). In his complaint he identified that several records containing his highly sensitive personal information was disclosed to his union representative who was representing him at a complaint level grievance under the Collective Agreement and that this information was also disclosed to and used by an Assistant Deputy Minister (ADM) in the Department who was chairing the meeting. The records contained information associated with the Complainant's claims to the Yukon Workers' Compensation Health and Safety Board and for disability benefits made several years prior. He alleged that the records were unrelated to his grievance and should not have been disclosed or used for the purpose of the grievance. The Department was of the view it had authority under subsections 2 (2) and 36 (d) to disclose the records to the union representative and under subsection 36 (d) and (f) to disclose them to the ADM. The IPC found the Department did not have authority to use or disclose the records. She recommended that the Department develop policy or procedure and train staff to ensure that they understand the requirements of the ATIPP Act when using or disclosing personal information for the grievance procedure under the Collective Agreement.

Statutes Cited:

Access to Information and Protection of Privacy Act, RSY 2002 c.1, subsection 2 (2), section 3 "adjudicative body" and "personal information," section 35, and subsections 36 (d) and (f).

Interpretation Act, RSY 2002, c 125.

Cases Cited:

P96-006, Workers Compensation Board, Information and Privacy Commissioner for British Columbia, March 31, 1996

F10-17, WorkSafeBC, Office of the Information and Privacy Commissioner for British Columbia, May 27, 2010

F2009-048, Calgary Board of Education, Office of the Information and Privacy Commissioner of Alberta, December 1, 2011

Explanatory Notes:

All statutory provisions referenced below are to the ATIPP Act unless otherwise stated.

I BACKGROUND

[1] In [redacted], the Complainant was employed by the Department and was governed by the terms of the Collective Agreement between the Yukon government and the Yukon Teachers' Association (Agreement).

[2] In [redacted], he made a first-level grievance in accordance with Article 10.10 (a) of the Agreement to the Department in which he alleged the Department had erroneously recorded two workplace absences in [redacted] and [redacted] as sick leave or leave without pay. This level was bypassed, however, on agreement between the Complainant and the Department.

[3] A second-level grievance was then scheduled under Article 10.10 (b) for [redacted] with the Assistant Deputy Minister for Public Schools (ADM). The ADM was an employee of the Department and, according to the decision issued by him following the grievance, the grievance occurred on [redacted] as scheduled.

[4] On [redacted], prior to the meeting, a Human Resources Consultant for the Department provided the Complainant's Yukon Teachers' Association (YTA) representative with a copy of the following records.

1. A one-page Yukon Workers' Compensation Health and Safety Board Functional Abilities Form containing information about the Complainant, signed by a "Health Care Provider" on [redacted]. This record is marked as exhibit 3.

2. A one-page Yukon Workers' Compensation Health and Safety Board Worker's Report of Injury/Illness containing information about the Complainant, signed by the Complainant on [redacted]. This record is marked as exhibit 4.

3. A three-page decision from the Yukon Workers' Compensation Health and Safety Board containing information about the Complainant, signed by the Complainant, addressed to the Complainant and dated [redacted]. This record is marked as exhibit 5.

4. A one-page letter containing a summary of the Complainant's restrictions and limitations, authored by a Disability Management Consultant with the Yukon Public Service Commission and dated [redacted]. This record is marked as exhibit 6.

5. A two-page letter containing a summary of the Complainant's independent medical examination, authored by a Disability Management Consultant with the Yukon Public Service Commission and dated [redacted]. This record is marked as exhibit 7.

(Records)

[5] The Department entered the Records as exhibits at the grievance meeting.

[6] On May 5, 2016, the Complainant requested that I review his complaint that the Records containing his personal information were disclosed to his YTA representative and the ADM contrary to the ATIPP Act.

II INQUIRY PROCESS

[7] A Notice of Written Inquiry was sent to the parties in August of 2016. Submissions were received from the Department on August 30, 2016. Documents relevant to the Inquiry were received from the Department in November and December of 2016, and in January 2017. The Department's submissions were shared with the Complainant. The Complainant did not make any submissions.

III JURISDICTION

[8] Subsection 48 (3) authorizes me to review a complaint made by a person that a public body who has the person's personal information in a record in its custody or control has not collected, used or disclosed the personal information in compliance with the ATIPP Act. Subsection 52 (1) authorizes me to conduct an Inquiry and decide all questions of fact and law arising in the course of an Inquiry.

[9] The Department is a public body as defined in section 3 of the ATIPP Act. The Complainant's complaint is that the Department was not authorized under the ATIPP Act to use and disclose his personal information that was contained in the Records that were, at the time of their use or disclosure, in the Department's custody or control. Given this, I have authority under subsection 48 (3) to conduct an Inquiry to determine whether the use or disclosure of the Records by the Department was in compliance with the ATIPP Act.

IV ISSUES

[10] The Notice of Written Inquiry sent to the parties identified the issues in this Inquiry as follows.

> *Did the Department use or disclose the Complainant's personal information in contravention of the ATIPP Act?*

V RECORDS AT ISSUE

[11] This Inquiry is not about a request for access to Records. Therefore, no records are at issue.

VI BURDEN OF PROOF

[12] The ATIPP Act is silent on which party bears the burden of proof on a review of a complaint about the collection, use or disclosure of personal information under subsection 48 (3). Because a public body is in a better position to prove such matters, I have determined that the burden of proof with respect to the use or disclosure of the Records by the Department rests with the Department.

VII DISCUSSION OF ISSUE

[13] Although the Complainant did not provide submissions, he provided the following information in a letter accompanying his request for review.

1. On [redacted], he filed a grievance with the Department in order to have his sick leave hours restored for two absences from work in [redacted] and [redacted] as a result of exercising his rights under the *Occupational Health and Safety Act*.[1]
2. He attended the grievance on [redacted] that was chaired by the ADM.
3. During the grievance, his YTA representative presented his evidence to have his sick leave restored.
4. Representatives from the Department presented submissions on behalf of the Department.
5. The evidence presented was limited to the issues and redress detailed on his grievance form.
6. A copy of the Records had been provided to his YTA representative and the ADM.
7. Two of the Records containing information about his medical condition were prepared by the Public Service Commission (PSC) from independent medical examinations he underwent in support of his claims for disability benefits in prior years.
8. He was informed by the PSC to attend these independent medical examinations to qualify for these benefits.
9. He was assured by the Public Service Commission that his medical information would be used solely for the purpose of obtaining disability benefits and would be retained in the offices of the Disability Management Branch.
10. Until the meeting on [redacted], he was unaware that the PSC had created the summaries or that they had been "distributed".
11. The Records were unrelated to his grievance and, therefore, should not have been provided to his YTA representative or the ADM.

[1] RSY 2002, c 159.

[14] In its submissions, the Department indicated that it was authorized by subsections 2 (2) and 36 (d) to disclose the Records to the YTA representative, and subsections 36 (d) and (f) to disclose them to the ADM.

[15] The provisions of the ATIPP Act that are relevant to the matter under review are as follows.

> ***Definitions***
>
> *3 In this Act,*
>
> *"adjudicative body" means any person or group of persons before whom a proceeding may be taken for a determination of rights according to established law and procedures;*
>
> *"personal information" means recorded information about an identifiable individual, including*
>
> *(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;*

Scope of this Act

2 (2) This Act does not limit the information available by law to a party to a proceeding in court or before an adjudicative body.

Use of personal information

35(1) A public body may use personal information only

(a) for the purpose for which that information was obtained or compiled, or for a use consistent with that purpose;

(b) if the individual the information is about has consented to the use; or

(c) for the purpose for which that information may be disclosed to that public body under sections 36 to 39.

(2) A public body may use personal information only to the extent necessary to enable the public body to carry out its purpose in a reasonable manner.

Disclosure of personal information

36 A public body may disclose personal information only

(d) for the purpose of complying with an enactment of, or with a treaty, arrangement or agreement made under an enactment of Canada or Yukon;

(f) to an officer or employee of the public body or to a Minister, if the information is necessary for the performance of the duties of the officer, employee or Minister;

Do the Records contain the Complainant's personal information?

[16] The parties agree that the Records contain the Complainant's personal information, including his health information.[2] I too am in agreement that this is the case.

[17] In its submissions, the Department identified the following as additional facts.

On [redacted]*, the Yukon Teachers' Association (YTA) filed a grievance on Applicant's behalf, alleging that a decision made by department (employer) in respect of the Applicant was contrary to the collective agreement between the Yukon Government and the YTA.*

On [redacted]*, an employee of the department,* [Name], *Human Resources Consultant provided an employee of the YTA*, [Name], *with a list of exhibits for the*

[2] Fact Report dated August 19, 2016, p.2.

grievance hearing scheduled for [redacted]. *This was done to ensure full disclosure in accordance with Article 10.06 of the collective agreement between Government of Yukon and the YTA…*

The exhibits included the Records identified in the Notice of Enquiry [sic], *all of which were determined to be pertinent to the grievance.*

The grievance hearing was held on [redacted]. *The grievance officer was an employee of the department (*[Name], *Assistant Deputy Minister of Public Schools). The Applicant was represented at the hearing by* [Name of YTA Representative]*, and the department was represented by* [Human Resources Consultant].

[ADM] *issued his grievance decision on* [redacted].

[18] The Department stated the following about the provisions it relied upon for the disclosures.

Access to Information and Protection of Privacy Act

Subsection 2 (2) provides that the Act does not limit the information available by law to a party to a proceeding before an adjudicative body. Under section 3, an 'adjudicative body' means any person before whom a proceeding may be taken for a determination of rights according to established law and procedures.

Subsection 36 (d) provides that a public body may disclose personal information for the purpose of complying with an enactment of the Yukon.

Subsection 36 (f) provides that a public body may disclose personal information to an employee of the public body if the information is necessary for the performance of the duties of the employee.

Education Labour Relations Act

Subsection 24 (1) provides that a collective agreement may include any terms and conditions of employment agreed to by the employer and the bargaining agent.

Subsection 27 (1) provides that a collective agreement is binding on the employer, the bargaining agent, and on the employees in the bargaining unit.

Subsection 63 (2) provides that an employee is not entitled to present a grievance relating to the application of a provision of the collective agreement in respect of the employee unless the employee has the approval of and is represented by the bargaining agent.

Collective Agreement – Government of Yukon and YTA

Article 3.01 provides that the provisions of the collective agreement apply to the YTA, the employees in the bargaining unit, and the employer.

Article 10.02 provides that an employee must be represented by the YTA in any grievance arising out of the collective agreement.

Article 10.03 (a) provides that where an employee is represented by the YTA in the presentation of a grievance, the YTA shall have the right to consult with the employer at each level of the grievance procedure.

Article 10.06 provides that there must be full disclosure by the parties of all facts and considerations pertinent to the grievance, at each and every level of the grievance process.

[19] The Department submitted that it was authorized by both subsections 2 (2) and 36 (d) to disclose the Complainant's personal information in the Records to the YTA representative.

Did the Department have authority under subsection 2 (2) to disclose the Records containing the Complainant's personal information to the YTA representative?

[20] The Department's submission in respect of its authority to rely on subsection 2 (2) is as follows.

The department submits that, for the following reasons, it was authorized under the provisions of the ATIPP Act to disclose the Records to both [the ADM] *and the YTA as part of the grievance process.*

Disclosure to YTA

First of all, it is our submission that the grievance procedure mandated by s. 63 of the Education Labour Relations Act and Article 10 of the collective agreement established an 'adjudicative body' within the meaning of ss.2 (2) of the ATIPP Act. This is because the grievance officer hearing the matter (in this case [the ADM]*) had the authority, pursuant to both the ELRA and the collective agreement, to determine the Applicant's rights under the collective agreement. Since the YTA was a party to the proceeding before* [the ADM] *and was legally entitled to full disclosure from the department of all facts and considerations pertinent to the grievance, the ATIPP Act did not limit department's obligation to provide the Records to the YTA as part of the proceeding.*

[21] Section 27 of the *Education Labour Relations Act* (ELRA), together with section 3.01 of the Agreement, make the Agreement binding on the Department, the YTA and employees of the Department who are YTA members (Employees). Section 24 of the ELRA authorizes the Department and YTA to establish terms and conditions of employment in the Agreement for Employees.

[22] Sections 63 and 64 of the ELRA, together with Article 10 of the Agreement, establish a grievance process under which Employees may grieve the interpretation by the Department of the Agreement, as occurred here. Subsection 63 (2) of the ELRA and section 10.02 of the Agreement require an Employee to be represented by the YTA for a grievance. Section 10.10 of the Agreement establishes two levels that an Employee must exhaust before going to adjudication provided for under section 64 of the ELRA. In this case, the Complainant bypassed level one based on an agreement with the Department and was in the course of having his complaint addressed at the level two complaint procedure.

[23] It is the Department's position that the ELRA and the requirements set out in Article 10 of the Agreement authorized it to disclose the Complainant's personal information in the Records to the YTA representative for the following reasons:

1. the grievance meeting held by the ADM was a proceeding before an adjudicative body;

2. the requirements in section 10.06 of the Agreement qualify as information available by law; and

3. the YTA representative who was the Complainant's representative at the grievance was a party to the proceeding.

[24] The meaning of subsection 3 (2) of British Columbia's (BC) *Freedom of Information and Protection of Privacy Act* (FIPPA) was considered by former Commissioner Flaherty in Investigation P96-006,[3] a case where he conducted a systemic investigation of BC's Workers Compensation Board (WCB) disclosure practices with respect to personal information after receiving numerous complaints in regards to those practices. Subsection 3 (2) of BC's FIPPA states that "This Act does not limit the information available by law to a party to a proceeding."

[3] P96-006, Workers Compensation Board, Information and Privacy Commissioner for British Columbia, March 31, 1996.

[25] In order to determine whether subsection 3 (2) applied to WCB's disclosure practices, the Commissioner first considered the meaning of "proceeding" and then "information available by law" found in subsection 3 (2).

Meaning of 'proceeding'

[26] The Commissioner stated the following about the meaning of the word "proceeding" in subsection 3 (2).

> *…the Act does not limit the information available by law to a party to a proceeding. At what point in the compensation process does a "proceeding" commence? The WCB states that a "proceeding" pursuant to section 3(2) takes place from the moment that the first decision is made on the claim. The WCB has thus adopted a broad interpretation of a "proceeding" under section 3(2). It states:*
>
> > *The `proceeding' which commences at that point is the ongoing adjudication and management of a claim file in regard to the appealable decision, and the legal avenue of appeal which arises at that time. Both the employer and worker have an interest in that `proceeding.' The worker's interest is obvious, because the proceeding involves his physical and financial well-being, and his legal rights under the* [*Workers Compensation Act*] *with respect to his compensation claim and his right to appeal if his claim has been denied. The employer's interest lies in the fact that ultimately it finances any compensation paid to or rehabilitation services given to the worker. There is a direct financial impact to employers in that claims costs are used to determine an employer's assessment rate under the ERA program. The employer's legal rights also arise under the WCA with respect to appeal of any decision made by an adjudicator with respect to a worker. The employer has the legal right to initiate an appeal of a decision with which it disagrees, and to participate in opposition to an appeal initiated by one of its workers*.[4]
>
> *…I find that the WCB's interpretation of "proceeding" is too broad to be consistent with the spirit of the Freedom of Information and Protection of Privacy Act. If the WCB's reasoning were followed, any administrative function whereby eligibility for a benefit was adjudicated and appealable to a quasi-judicial body could be regarded as a "proceeding" under section 3(2) and hence removed from the legislative scheme of the Act. This could, for example, include processes which determine eligibility for social assistance benefits and student loans. I find that*

[4] *Ibid.* 3, section 5.2.

> *"proceeding" with respect to section 3(2) does not take place until a formal appeal has been launched under the Workers Compensation Act.*

Meaning of 'information available by law'

[27] Commissioner Flaherty stated the following about the meaning of "information available by law" in subsection 3 (2) of BC's FIPPA.

> *Section 3(2) does not limit information available by law to a party to a proceeding. The WCB contends that full disclosure of the file is necessary to meet the standards of natural justice articulated in the Napoli decision.*[5] *Following Napoli, the WCB abandoned the practice of disclosing to employers only those documents which WCB employees decided were relevant to the appeal in favour of full disclosure. The WCB states that "the rules of natural justice require that all evidence, including an individual's personal information, which has been considered by an initial adjudicator" be disclosed. The WCB regards all information that is contained on a file as information "considered" by the adjudicator.*
>
> *I agree with the WCB's goals of administrative fairness and natural justice after an appeal has started.*
>
> *My understanding of the adjudicative process prior to an appeal is that no formal hearing takes place where the parties make submissions and present evidence. The WCB collects information, and the claims adjudicator makes a decision based on that information. The rules of administrative fairness apply, but not all of the rules that apply to "judicial" or "quasi-judicial" proceedings. Thus the adjudicative process is not a court-like hearing, and the parties do not have the right to present evidence and cross-examine witnesses. However, the adjudicator must base his or her decision on relevant information, and the parties should be advised what particular information was relied upon. The rationale for this process can be described in the claims decision. The information in the decision itself should be sufficient for either party to decide if he or she wishes to appeal. Before an appeal is filed, section 22 of the Act places significant restrictions on the disclosure of personal information about a worker to an employer.*

[28] He concludes that the practice of disclosing a worker's entire file to an employer prior to the launching of an appeal is not "information available by law" under subsection

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[5] *Napoli v. Workers Compensation Board (1981)*, 27 B.C.L.R. 306 (S.C.).

3 (2) and found the disclosure exceeds the requirements of natural justice and is a breach of the BC's FIPPA.[6]

[29] Adjudicator Fedorak, an Adjudicator with the Office of the Information and Privacy Commissioner for BC (BC OIPC), had occasion to consider the meaning of subsection 3 (2) after the BC OIPC received a complaint by an individual claiming that WCB improperly disclosed her personal information to her employer.[7] The complainant claimed that WorkSafeBC improperly disclosed three psychological reports to her employer after she appealed the claim decision made by WorkSafeBC[8] to WorkSafeBC's Review Division solely on the issue of the wage portion of her claim. She felt the reports were unrelated to the issue raised by her review associated with her wage.

[30] Adjudicator Fedorak first considered the wording of subsection 3 (2) in the context of BC's FIPPA and stated the following.

> *It is important to consider the wording of s. 3(2) of FIPPA in the context of both the entire section and FIPPA as a whole. The purpose of s. 3 is to define the scope of the legislation. It sets out that FIPPA applies to all records in the custody or under the control of a public body, with certain exceptions. Section 3(2) does not stipulate that records disclosed "to a party to a proceeding" are excluded from the scope of FIPPA or otherwise are exempt from all or part of the rules concerning the collection, use, retention, disclosure or disposal of personal information contained in Part 3 of FIPPA. Rather, the language of s. 3(2) provides reassurance that FIPPA does not restrict the availability of information to a party to a proceeding, where that information is available by law. In other words, FIPPA permits disclosures to parties to a proceeding where authorized by statute or common law.*[9]

[31] He then considered Commissioner Flaherty's decision about the meaning of the word "proceeding" in subsection 3 (2) of BC's FIPPA in P96-006 and indicated his agreement that "for s. 3(2) purposes, "proceeding" means activities governed by rules of court or rules of judicial or quasi-judicial tribunals that can result in a judgment or decision."[10] From this, he concluded that a formal review of a claim decision under the WCA, here a review by WorkSafeBC's Review Division, is a "proceeding" under subsection

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[6] *Ibid.* 3, section 5 and 5.3.

[7] F10-17, WorkSafeBC, Office of the Information and Privacy Commissioner for British Columbia, May 27, 2010.

[8] Formerly WCB.

[9] *Ibid.* 7, at para. 11.

[10] *Ibid.* 7, at para. 16.

3 (2).[11] He then went on to consider the meaning of the words "information available by law."

[32] In reaching his conclusion that the information disclosed by WorkSafeBC was information available by law under subsection 3 (2), Adjudicator Fedorak found that the language in the WCA was "broad enough" to allow WorkSafeBC's interpretation that it was necessary for them to disclose the entire claim file to the parties to the proceeding, including the employer, because this was the information that was before the decision maker who made the decision about the claim that was under review.[12]

[33] Like subsection 3 (2) of BC's FIPPA, subsection 2 (2) is found in the scope provisions of the ATIPP Act. Consequently the same can be said about the intent of subsection 2 (2) as subsection 3 (2) in BC's FIPPA. That is, taking into account the wording of the subsection in the context of the entire section and the ATIPP Act as a whole, the intent of subsection 2 (2) is to provide reassurance that the ATIPP Act does not restrict the availability of information to a party to a proceeding where that information is available by law. In my view, therefore, this subsection must be interpreted as authorizing public bodies to disclose information in their custody or control, including personal information, to parties to a proceeding where the disclosure is authorized by statute or common law.

[34] In order to determine if this subsection authorizes the disclosure by the Department to the YTA representative, the Department will need to establish that the grievance held on [redacted] by the ADM is a "proceeding" that was "before an adjudicative body." If this is established, then it will need to establish that the disclosure of the Complainant's personal information to the YTA representative was "available by law."

Meaning of "proceeding"

[35] The term "proceeding" is not defined in the ATIPP Act. It is, however, qualified by the subsequent words "in court or before an adjudicative body".

[36] "Adjudicative body" is defined in the section 3 as "any person or group of persons before whom a proceeding may be taken for a determination of rights according to established law and procedures."

[37] While the word "proceeding" is broader and takes into account administrative proceedings, I agree with the conclusions reached by Commissioner Flaherty that the kind of proceeding contemplated by this subsection is a judicial or quasi-judicial proceeding. In coming to this conclusion, I took into account that the purposes of the ATIPP Act are to

[11] *Ibid.*

[12] *Ibid.* 7, at para 29.

make public bodies more accountable and protect personal privacy and that Part 3 of the ATIPP Act establishes a complete code that a public body must follow to collect, use, and disclose personal information. Section 36 in Part 3 establishes the rules that a public body must follow to disclose personal information and restricts it from disclosing this information unless one of the subsections in section 36 apply.

[38] There are provisions in section 36 that authorize a public body to disclose personal information for administrative purposes. If subsection 2 (2) applied more broadly to encompass administrative proceedings, then the purposes of the ATIPP Act, particularly, the privacy provisions, would be thwarted if a public body were able to merely bypass these requirements be establishing administrative proceedings that authorized it to disclose personal information outside the requirements of Part 3.

[39] The definition of adjudicative body further strengthens my view that the kind of proceeding contemplated by subsection 2 (2) is judicial or quasi-judicial. This is because the definition states that the proceeding before an "adjudicative body" "must be taken for a determination of rights according to established law and procedures." In other words, the adjudicative body must be one whose proceedings are governed by "established" rules, such as rules of court or rules of judicial or quasi-judicial tribunals that can result in a judgment or decision.

[40] The Department takes the view that the grievance procedure mandated by section 63 of the ELRA and Article 10 of the Agreement establishes an adjudicative body within the meaning of ss. 2 (2) of the ATIPP Act. In its submission, the Department supports this view on the basis that the grievance officer who chairs the meeting…had authority, pursuant to both the ELRA and the Agreement, to determine the Applicant's [sic] rights under the Agreement.

[41] I disagree with the Department that the grievance that occurred in this case constitutes a proceeding before an adjudicative body. The process that the Complainant was involved in was established under section 10.10 of the Agreement. The first level under this section, subsection 10.10 (a), involves the Employee meeting with a supervisor within the Department for a "problem-solving meeting" to address the Employee's complaint. If the complaint is not resolved at this level, then the Employee may submit a written grievance to the second level of supervision within the Department, per subsection 10.10 (b), for another "problem-solving meeting to discuss the complaint or grievance." If the Employee, at the conclusion of the second level meeting, is not satisfied the grievance or complaint was addressed, then he or she can refer the matter to adjudication. An adjudicator under the ELRA has broad powers including the power to compel production of records and witnesses and the decision rendered by the adjudicator is final and binding. The procedures governing adjudication are set out in the ELRA.

[42] The process established under the Agreement is an administrative procedure agreed to by the YTA and the Department as an informal means of addressing Employee complaints made under the Agreement before they are elevated to an adjudicator under section 64 of the ELRA. It is clear to me that the procedures established under the Agreement simply codify an administrative complaints management procedure agreed to by the Department and YTA under Agreement.

[43] Despite the Department's approach in conducting a grievance under subsection 10.10 (b), it is clear that both levels of complaint management are intended to be problem-solving meetings of an administrative nature and not proceedings before an adjudicative body. A proceeding before an adjudicative body would not occur in the context of a grievance made by an Employee until the Employee refers a complaint or grievance to adjudication under section 64 of the ELRA.

[44] Based on the forgoing, the Department has failed to establish that the grievance held by the ADM on [redacted] was a proceeding before an adjudicative body. I find, therefore, that the Department did not have authority under subsection 2 (2) to disclose the Complainant's personal information in the Records to the YTA representative. Given this, I will not go on to consider if the Complainant's personal information in the Records that was disclosed to the YTA representative was "information was available by law."

Did the Department have authority under subsection 36 (d) to disclose the Records containing the Complainant's personal information to the YTA representative?

[45] The Department also submitted that subsection 36 (d) authorized it to disclose the Complainant's personal information in his Records to the YTA representative because the disclosure was required by the ELRA and Article 10 of the Agreement.

[46] In order to establish its authority for this disclosure under subsection 36 (d), the Department will need to establish that the disclosure was for the purpose of complying with an enactment of…or agreement made under an enactment of Yukon.

[47] "Enactment" is defined in the *Interpretation Act*[13] as "an Act or regulation or any portion of an Act or regulation." I previously identified that the Agreement was made under the ELRA and is binding on the Department, the YTA and Employees of the Department. It is clear from this that the Agreement was made under an enactment of Yukon.

[48] The disclosure made by the Department was, according to it, for the purpose of complying with the requirements of Article 10; more specifically, section 10.06 in Article

[13] RSY 2002, c 125.

10 which the Department claims required it to disclose to the YTA representative "all facts and considerations pertinent to the grievance, including the Records in question." Section 10.06 states the following.

> *There shall be full disclosure by the parties of all facts and considerations pertinent to the grievance at each and every level of the grievance process.* [My emphasis]

Meaning of "facts" and "considerations"

[49] The terms "facts" and "considerations" are not defined in the Agreement, the ELRA or the *Interpretation Act.*[14] The only place these words appear are in section 10.06. The meaning of these words, as contained in the Oxford Dictionary,[15] are set out below.

> The meaning of "facts" includes "a thing that is known to have occurred, to exist or to be true;" or "a piece of evidence, an item of verified information, or events and circumstances as distinct from their legal interpretation."
>
> The meaning of "considerations" includes "the act of considering; careful thought;" or "a fact or thing taken into account in deciding or judging something."

[50] Having considered the meaning of facts and considerations, and having reviewed the contents of the Records, I am satisfied that the Records would be considered as facts or considerations in subsection 10.06 of Article 10.

Meaning of "pertinent"

[51] The term "pertinent" is also not defined in the Agreement, the ELRA or the *Interpretation Act.* In the Oxford Dictionary, "pertinent" means "relevant to the matter at hand."

[52] In the Department's submission, it only states that the Records "were determined to be pertinent to the grievance" without providing any evidence to support why or how they were pertinent. I also reviewed the ADM's decision following the grievance meeting and find no reference to these Records, other than they are cited as exhibits, or any evidence that would support the Department's position that the Records were pertinent to the grievance. Given this, and based on the evidence before me, I am unable to conclude that the Records were pertinent to the grievance. Accordingly, the Department has not established that it was required to disclose the Complainant's personal information to the YTA representative under the Agreement. Consequently, I find that the Department cannot rely on subsection 36 (d) as its authority for this disclosure.

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[14] *Ibid.*

[15] Canadian Oxford Dictionary, Second Edition, edited by Katherine Barber, Don Mills Ontario, 2004.

Did the Department have authority to disclose the Records containing the Complainant's personal information to the ADM?

[53] The Department submitted that it was authorized by both subsections 36 (d) and 36 (f) to disclose the Complainant's personal information in the Records to the ADM. Unfortunately, the Department's submission regarding the application of subsection 36 (d) for disclosure of the information to the ADM suffers the same deficit as the submission regarding the application of this subsection to the disclosure to the YTA representative; in short, there is no explanation or evidence to support why the Records were pertinent to the grievance.

[54] As for subsection 36 (f), the Department must establish that disclosure of the Records containing the Complainant's personal information was "necessary" for the ADM to perform his duties under subsection 10.10 (b) of the Agreement. Here again, the Department only stated in its submission that "the disclosure was necessary" without any explanation as to why or how. As previously indicated, the decision rendered by the ADM does not shed any light on whether these Records were necessary for him to perform his duties.

[55] Given the foregoing, the Department has not established its authority to disclose the Records containing the Complainant's personal information to the ADM under subsections 36 (d) or 36 (f).

Did the Department have authority to use the Complainant's personal information in the Records?

[56] The issue in this Inquiry requires that I also consider whether the Department was authorized to use the Complainant's personal information in the Records.

[57] Section 35 is the provision that identifies when a public body can use personal information in its custody or control. It states as follows.

> *35(1) A public body may use personal information only*
>
> *(a) for the purpose for which that information was obtained or compiled, or for a use consistent with that purpose;*
>
> *(b) if the individual the information is about has consented to the use; or*
>
> *(c) for the purpose for which that information may be disclosed to that public body under sections 36 to 39.*
>
> *(2) A public body may use personal information only to the extent necessary to enable the public body to carry out its purpose in a reasonable manner.*

[58] The term "use" is not defined in the ATIPP Act or the *Interpretation Act.*[16] In Order F2009-048,[17] Adjudicator Swanek, an adjudicator with the Office of the Information and Privacy Commissioner of Alberta, had occasion to consider when a public body will have "used" personal information under Alberta's *Freedom of Information and Protection of Privacy Act* and, in doing so, stated the following.

> *In Order P2010-018 the Adjudicator considered a situation in which the complainant's personal information was disclosed by an organization in the course of litigation with an unrelated third party. Initially, the organization reviewed the document containing the complainant's personal information but determined that it was not relevant to the litigation with the third party. The organization was later ordered by the court to disclose the document to the third party. The Adjudicator found that*
>
> > *[w]hile the Organization writes that it did not "use" [the document] other than in relation to the litigation, I find that it did not actually use the Complainant's personal information. The Organization indicates that it reviewed [the document], but that it determined that the document was not relevant to the lawsuit involving Mr. X. As the Organization did not actually do anything with the information in the document, it did not use any of it in the course of the litigation.*
> >
> > *I conclude that the Organization collected and disclosed the Complainant's personal information in [the document], but that it did not use his personal information in it.*[18]

[59] She then reviewed the meaning "use" in the Canadian Oxford Dictionary. She also considered how "use" was interpreted in a prior order of her Office.[19] Given this, she determined that the definition of "use" means to "employ or apply" a record containing personal information in some way other than just to review it.

[60] I agree with the Adjudicator's findings regarding the meaning of "use." From this, I conclude that a public body will be found to have used personal information under section 35 when it applies or employs the personal information for its own particular purpose.

[61] The Department did not provide any submissions about whether the ADM used the Complainant's personal information. Although the decision of the ADM suggests that he may not have used the Records in reaching his decision, to find as such would be

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[16] *Ibid.* 13.

[17] F2009-048, Calgary Board of Education, Office of the Information and Privacy Commissioner of Alberta, December 1, 2011.

[18] *Ibid.* 17, at para. 36.

[19] Order P2010-018.

speculative on my part. Given this, and the fact the Department has the burden of proving it had authority for the ADM's use of the Complainant's personal information in the Records and has not met this burden, I am unable to find the ADM had authority to use the personal information.

VIII FINDINGS

[62] On the issue in this Inquiry, I find as follows.

1. The Department was not authorized by subsections 2 (2) or 36 (d) to disclose the Records containing the Complainant's personal information to the YTA representative.

2. The Department was not authorized by subsections 36 (d) or 36 (f) to disclose the Records containing the Complainant's personal information to the ADM.

3. The Department had no authority for the ADM's use of the Complainant's personal information.

IX RECOMMENDATION

[63] Given my findings, I recommend the following.

1. The Department should make the following changes to ensure that its employees[20] only use and disclose personal information as authorized by the ATIPP Act for the grievance procedure set out in Article 10 of the Agreement.

    i. Develop a policy or procedure to guide employees[21] who are responsible for making decisions about when personal information will be used or disclosed for the grievance procedure.

    ii. Train these employees on the policy or procedure and communicate the policy or procedure to employees so they are informed about when their personal information will be used or disclosed for the grievance procedure.

[20] Including any that are not members of the YTA.

[21] *Ibid.*

X PUBLIC BODY'S DECISION AFTER REVIEW

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

[65] If the Department does not give notice of its decision within 30 days of receiving this report, then it is deemed to have refused to follow my recommendation.

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Diane McLeod-McKay, B.A., J.D.
Yukon Information and Privacy Commissioner

Distribution List:

- Department
- Complainant

Post Script

Given the highly sensitive nature of the Complainant's personal information contained in the Records, the Department should consider taking the following steps to ensure that the information is contained.

1. Destroy the Records disclosed to the ADM for the purposes of the grievance.

2. Obtain written confirmation from the ADM that he did not copy or forward the Records to any person and that he will not use or disclose the contents of these Records for any purpose.

   If the Records were copied or forwarded or their contents divulged by the ADM, then the Department should undertake all reasonable steps to recover the Records (if applicable) or obtain confirmation that they were destroyed. It should also obtain written confirmation from the person who received the Records (if applicable) that they did not copy or forward the Records to any person, and that they will not use or disclose the contents of these Records for any purpose.

3. Contact the YTA representative and obtain written confirmation from him that he does not have any copies of the Records and that he will not use or disclose the contents of these Records for any purpose.

   If the YTA representative has copies of the Records, then the Department should take all reasonable steps to recover the Records from the YTA representative. It should also obtain written confirmation from him that he did not copy or forward the Records to any person and that he will not use or disclose the contents of these Records for any purpose.

   If the Records were copied or forwarded or their contents divulged by the YTA representative, then the Department should undertake all reasonable steps to recover the Records (if applicable) or obtain confirmation they were destroyed. It should also obtain written confirmation from the person who received the Records (if applicable) that they did not copy or forward the Records to any person and that they will not use or disclose the contents of these Records for any purpose.

4. Write to the Complainant and inform him of the steps it took recover the Records and contain their contents.