



Yukon
Information
and Privacy
Commissioner

Access to Information and Protection of Privacy Act

INVESTIGATION REPORT

File ATP15-053AI

Parties: Department of Justice (Justice)

Date: May 27, 2016

Provisions: 1 (2), 3, Part 2, 5, 6, 7, 8, 9, 10, 11, 13, 14, Part 3, 35 (1)(a), 36, 36 (a), 36 (c), 39

Complaints

On December 2, 2015, the Office of the Information and Privacy Commissioner (OIPC) received a complaint from an inmate (Complainant) alleging that the Whitehorse Correctional Centre (WCC), on receipt of the Complainant's written 'Request for Access to Records', failed to forward it directly to the Records Manager, as required by the *Access to Information and Protection of Privacy Act* (ATIPP Act).¹ The Complainant asserted that the alleged failure unduly delayed the ATIPP Act access-response process.

¹ R.S.Y. 2002, c.1, as amended.

On January 28, 2016, the OIPC received a second complaint from the Complainant alleging that WCC did not conduct an adequate search for photographic records responsive to the Access Request.

Explanatory Note

All section references in this Investigation Report (Report) are to the ATIPP Act unless otherwise stated.

Jurisdiction

I have authority under subsection 42 (b) to receive complaints or comments from the public concerning the administration of the ATIPP Act by Public Bodies, conduct investigations into those complaints and report on those investigations. WCC is within Justice and Justice is a public body under the ATIPP Act.

Investigative Process

A number of people were interviewed as part of this investigation.²

1. Two WCC Corrections Officers
2. WCC's Acting Deputy Superintendent of Operations
3. The Complainant
4. Justice's ATIPP Act Coordinator
5. WCC's Deputy Superintendent Operations
6. ATIPP Office's Administrative Assistant
7. WCC's Reception & Administrative Assistant
8. Justice's Investigations & Standards Office Investigator

² The individuals interviewed were those holding these positions at the time of the OIPC's interviews.

9. Justice's Departmental Records Officer
10. WCC's Research & Administrative Assistant
11. WCC's Correctional Services Manager
12. Justice's Public Safety & Investigations Administrative & Research Assistant/ WCC A/ Receptionist

The following people provided information to the OIPC as part of this investigation.³

1. WCC's Health Care Services Nurse
2. ATIPP Act Records Manager
3. WCC's Correctional Services Manager
4. A WCC Health Care Services Nurse
5. Justice Public Safety & Investigations Director
6. WCC's Health Care Services Manager

The OIPC received and reviewed the following documents from the parties as part of this investigation.

1. The Complainant's written Request for Access to Records
2. Email records, letters and forms provided by Justice, WCC, and the Complainant
3. WCC Policy C 1.2 'Inmate Correspondence', WCC Policy C 1.5 'Inmate Requests', WCC policy F 1.1 'Inmate Complaints', WCC Standing Order G 1.10 'Inmate Requests for Information', and WCC Standing Order G 1.15 'Video Retention'

Also reviewed was the *Corrections Act*, S.Y. 2009, c.3 and the *Corrections Regulation*, O.I.C. 2009/ 250 (collectively the *Corrections Act*) as part of this investigation.

³ *ibid.*

Background

(The following information is based on the interviews and the other information or documents referenced above.)

On [REDACTED], an inmate allegedly assaulted the Complainant, also incarcerated at WCC, [REDACTED]. Sometime in the next 10 days, WCC nurses or some unidentified individual allegedly took photographs of the Complainant's injuries in the WCC 'Admissions & Discharge' area just prior to his release.

On November 12, 2015, the Complainant, while incarcerated at WCC, completed an ATIPP Office 'Request for Access to Records' form (Access Request)⁴ asking for all hard copy written reports, digital reports and digital video recording records pertaining to the alleged assault. The Complainant had the right to ask for an envelope in which to seal his Access Request but did not exercise it.

The Complainant then gave his Access Request to a Corrections Officer (CO) on the night shift to fax to the 'ATIPP Office.' This entity houses the ATIPP Act Records Manager (Records Manager) who is responsible under the ATIPP Act to, amongst other things, receive all such requests for initial processing.⁵ The CO did not document receipt of the Complainant's Access Request and could not recall with certainty that he faxed it to the Records Manager despite being of the view that if an inmate asks a CO to fax an Access Request to the Records Manager, then this is what occurs. The CO could not, however, recall what became of this Access Request and the Complainant did not request a copy of it at any time. In any event, there is no record of WCC sending the Complainant's Access Request to the Records Manager via fax or through Yukon Government (YG) internal mail on or shortly after November 12, 2015.⁶

On November 13, 2015, the Complainant made the first of two telephone calls to the ATIPP Office to determine if it had received his Access Request. The Complainant also indicated that someone in WCC told him that WCC was gathering records responsive to his Access Request. The Administrative Assistant in the ATIPP Office informed the Complainant that they had not received his Access Request. As a consequence, the Complainant completed a WCC 'Inmate

⁴ This form was created by the ATIPP Office in the Department of Highways & Public Works where the Records Manager is housed. See the analysis section of this Report for more information about this form.

⁵ Reference to the Records Manager in this Report includes the ATIPP Office. 'He' or 'his' is also used in this capacity.

⁶ On June 8th, 2015, WCC changed its policy of conveyancing Access Requests and other sensitive ATIPP Act material by fax to conveyance by YG internal mail. This is discussed in the *Post Script* section below.

Complaint Form' stating that he completed an Access Request, gave it to a CO to forward to the ATIPP Office, and that the ATIPP Office had not received it. On the same day, WCC assigned a file number to the Inmate Complaint Form containing three successive handwritten entries. A CO responsible for the area housing the Complainant wrote that he could not locate the Complainant's Access Request.

On November 14, 2015, the Complainant made the second of two phone calls to the ATIPP Office to determine if they had received the Access Request. The answer did not change. On the same day, a Correctional Services Manager wrote that the Complainant's Access Request had only been in the WCC system for two days, that the complaint was unwarranted since WCC policy allowed for a response period of up to seven days and that the ATIPP Act process, separate from WCC policy, had its own timelines. On November 17, 2015, the Deputy Superintendent of Operations (DSO) wrote that WCC was assembling the 'package of background information' and would then forward it, along with the Complainant's Access Request, to the ATIPP Office. The DSO could not recall how he obtained the Complainant's Access Request that resulted in the gathering of records by WCC as early as November 17, 2015. He added that the point was to expedite this process over a two-day period in anticipation of the Records Manager requiring a records search following official receipt of the Complainant's Access Request. The DSO also stated that the correspondence to and from the Records Manager is not privileged so WCC could screen it for contraband purposes.

Sometime between November 19 and 20, 2015, WCC sent the Complainant's Access Request to the ATIPP Office, along with the records WCC had assembled. The ATIPP Office received the records, unsealed, on November 20, 2015, and assigned a file number to the Complainant's Access Request. Assigning a file number had the effect of activating it and generating a 'Response-to-Complainant' with a deadline of December 21, 2015. This date is the subject of the Complainant's first complaint to the OIPC, as stated above.⁷ The ATIPP Office's Administrative Assistant confirmed that it was not common practice for an Access Request to be accompanied initially by assembled records.

Later on November 20, 2015, the Records Manager advised Justice of the Access Request details and stated that he would send the records received from WCC through YG internal mail. He also stated that WCC may already have done so in view of its choosing an informal approach over the Complainant's express preference to follow the ATIPP Act procedure. He then contacted WCC, paraphrased the Access Request, sought a record-retrieval cost estimate,⁸ and

⁷ WCC's alleged failure to forward the Access Request directly to the Records Manager resulted in a response deadline of December 21st, 2015, rather than December 14th, 2015.

⁸ In aid of preparing an 'Estimate of Costs' for an Access Request applicant.

requested a description of its search methodology. That prompted an immediate 'official' WCC records search and the finding of a digital video recording (Video) from the time of the alleged assault in 2013.

The Records Manager sent a letter, dated November 20, 2015, to the Complainant confirming that he had received his Access Request and would respond to the Complainant on or before December 21, 2015, as stated above. The ATIPP Act Administrative Assistant confirmed that she phoned the Complainant with the same information. The Complainant voiced his concern that WCC should not have dealt with his Access Request internally; rather, WCC should have sent it directly to the Records Manager because the Complainant wanted to proceed independently of WCC.

On November 30, 2015, Justice advised the Records Manager that nine pages and one 'video' were found responsive to the Complainant's Access Request. Justice redacted some information on the written records for reasons of third party privacy protection. It also refused access to the Video for reasons of third party privacy protection, law enforcement, and the maintenance of WCC safety and security.⁹ Later that day, the Records Manager sent a 'Final Response' letter to the Complainant advising that Justice had completed its work on his Access Request and confirmed what would be released, inclusive of the reasons for partial access and refusal of the Video. He also advised that the Complainant could request that the Information and Privacy Commissioner (IPC) review the decision made in respect of the records so long as he made the request within 30 days of receiving the letter. Given the Records Manager's official response to the Complainant, Justice considered the file closed.

On December 1, 2015, the Complainant completed an 'ATIPP Act Complaint Form' with the OIPC alleging that WCC intercepted the Access Request contrary to ATIPP Act procedure, resulting in a week-long delay in delivering it to the Records Manager with its corresponding effect on the response deadline. WCC then faxed this document to the OIPC. The IPC decided to conduct an investigation into why WCC failed to forward the Access Request directly to the Records Manager, with its attendant delay. The IPC subsequently sent a letter to the Complainant to this end, pursuant to her authority to conduct an investigation into a complaint concerning the administration of the ATIPP Act. The IPC also sent a letter to Justice stating that the focus of the investigation would be on the ATIPP Act obligations of WCC when an inmate completes an Access Request.

⁹ The issue of not granting access to this Video is the subject of an ATIPP Act 'Request for Review' and is therefore outside the scope of this Report.

On December 9, 2015, the Complainant completed an 'ATIPP Act Request for Review' with the OIPC (Request for Review), stating that more records responsive to the Access Request should have been located, including medical records and photographs created as a result of the incident, and that, of the records received, some information had been separated from them or obliterated. The OIPC received the Request for Review five days later and contacted WCC about it. WCC then initiated another records search of electronic and paper files, inclusive of looking for medical information and related photographs.

On December 22, 2015, Justice advised the Records Manager that it had found an additional 14 pages responsive to the Access Request and would release them in full to the Complainant. It did not, however, find any photographs. Later that day, the Records Manager sent an 'Amended Final Response' letter to the Complainant and enclosed the 14 pages of records.

On December 23, 2015, WCC tried again to locate possible photographs but found none. Justice acknowledged this result the following day.

On January 28, 2016, the Complainant completed an 'ATIPP Act Complaint Form' with the OIPC. It stated that, following an assault in 2013, the Complainant had digital photographs taken of his injuries by two WCC nurses and that WCC did not perform a thorough search to locate these records.¹⁰ Later that day, the IPC sent a letter to the Complainant stating that she would investigate this new allegation as part of her on-going investigation into the complaint of December 2nd, 2015. The IPC also sent a letter to Justice to this effect. WCC subsequently searched its medical email records and found no reference to such photographs.

WCC Informal Process re Inmate Requests for Personal Information

WCC's informal process for access to an inmate's request for information is contained in WCC Standing Order 'G1.10 Inmate Requests for Information' (G1.10). WCC cites authority under its corrections legislation to set out an informal process responsive to a request for information within its custody or control. This process is articulated in G1.10 which came into effect on November 18, 2013, to facilitate, wherever possible, an informal approach that, in the view of WCC, is responsive to its ATIPP Act obligations.¹¹ In G1.10, WCC recognises that an inmate can submit a request for access to information to the Records Manager which, in turn, triggers a formal process under the ATIPP Act.

¹⁰ The issue of the alleged photographs is the subject of the Complainant's second complaint, as stated above.

¹¹ Justice, Whitehorse Correctional Centre – Standing Order G1.10, "Inmate Requests for Information" (18 November 2013) at 1 and 2.

When an inmate requests non-personal information, such as publications, brochures, redacted policies, standing orders and so forth, G1.10 allows WCC employees to provide it where operationally feasible. When an inmate requests personal information about themselves, such as the type contained in their inmate progress log, some of the WCC employees interviewed indicated that they would try to handle it verbally in an attempt, wherever possible, to lessen the administrative burden on the correctional services managers. For example, they would likely give the inmate a verbal briefing on the progress in question.

For personal information requests, some WCC employees recognised that these will likely necessitate the need for the individual to engage the formal ATIPP Act process although they recognised it might be possible to deal with the request through the informal process. While G1.10, from the outset, paraphrases the purpose of the ATIPP Act (*i.e.* to make public bodies more accountable to the public and to protect personal privacy), it then states that WCC will, to the extent possible, make a “deliberate effort to make [its] information easily accessible outside the formal ATIPP process”¹² subject to considerations of privacy protection and correctional facility security. It also states that inmates should informally request the information, subject to limitations, from WCC before submitting an Access Request.¹³ Some WCC employees acknowledged that Access Requests have, on occasion, been diverted to the informal process set out in G1.10.

G1.10 contains both definitions and provisions. The first definition of note is entitled ‘Duty to Assist’. This means “Provisions within the ATIPP Act that requires public bodies to be helpful to members of the public seeking information.”¹⁴ The next definition of note is an ‘Informal Information Request’. It means “Information that is in the custody and control of WCC.”¹⁵ It adds that this information may be released informally to applicants provided it does not disclose third party personal information or jeopardise the management, operation or security of WCC. It further adds that case managers have the authority to disclose information in the custody or control of WCC to an individual on a verbal basis. In the event of a disciplinary infraction, the inmate may also request that the person hearing the matter view a ‘Video’ of the incident and, where probative value exists, enter it into evidence.

¹² *Ibid.*, at 1.

¹³ *Ibid.*, at 2.

¹⁴ *Ibid.* This ‘duty to be helpful’ is actually to the Records Manager who, in turn, must make every reasonable effort to assist applicants and to respond to them openly, accurately and completely.

¹⁵ *Ibid.*

The other definition of note is entitled 'Formal ATIPP Request' and is set out as "A request submitted on the appropriate form to the Office of the Information and Privacy Commissioner."¹⁶ This definition also contains a salient directive that states "Before submitting a formal ATIPP request, applicants should be requesting the information informally from WCC."¹⁷ The remainder of the section contains definitions of 'ATIPP', 'Public body', 'Record' and 'WCC'.

G1.10 contains 12 provisions. The first states that, where operationally feasible, WCC shall provide inmates with information that is not personal, such as publications, brochures, the *Corrections Act*, redacted policies and standing orders. Provisions two through 11 set out the types of information WCC will not provide, a preference that inmates wishing to view their personal files or records submit written requests to WCC through an informal ATIPP process, the designation of the WCC ATIPP Coordinator as the single point-of-contact, the appropriate responses to a request, timelines, 'Video' governance, and fees in respect of the request. The final provision states that the 'Person in Charge' has the "authority to deny requests deemed frivolous or vexatious."¹⁸

Although G1.10 does not reference any specific type of request vehicle, WCC generally encourages the use of a 'Special Request' form to initiate the informal request process.¹⁹ On receiving a Special Request from an inmate marked, for example, as an 'informal ATIPP request', WCC will make a deliberate effort in keeping with G1.10 to provide the information if it can readily be accessed, does not contain third party personal information and does not require any restriction or redaction. To that end, WCC employees will log and forward the Special Request to the WCC ATIPP Coordinator. According to G1.10 provision 5, this individual has the internal authority to determine an appropriate response to an informal request for information, inclusive of attaching or disclosing the requested information, directing another person to disclose the requested information, delegating review of the request to another person (*e.g.* a case manager), refusing to disclose some of the requested information and denying the request in favour of the inmate submitting a request for access to records through the formal ATIPP Act process.

¹⁶ *Ibid.* at 2. An Access Request should be submitted to the Records Manager, not to the OIPC.

¹⁷ *Ibid.*

¹⁸ *Ibid.* at 3.

¹⁹ This triplicate form does not appear to be tied to any specific WCC policy or standing order; rather, it appears generic in nature.

If the WCC ATIPP Coordinator decides to provide the requested information, then its provision must occur as soon as practicable and, in any event, within 30 days.²⁰ The norm is seven days.²¹ A maximum of 30 days is sometimes required when a Special Request requires significant information collation or collection. Nothing is documented as to which records may have been responsive to the inmate's request beyond those attached. There is also an indication that WCC considers it possible to provide the inmate with certain information without breaching any confidentiality.

Issues

The issues in this investigation are as follows.

1. Did Justice act contrary to the ATIPP Act as a result of its handling of the Complainant's Access Request?²²
2. Did Justice conduct an adequate search for photographic records responsive to the Complainant's Access Request?

Analysis

Did Justice act contrary to the ATIPP Act as a result of its handling of the Complainant's Access Request?

In his Access Request, the Complainant made the following request for access to information in the custody or control of Justice.

...all hard copy written reports, and digital reports, as well as DVR, regarding the assault on [the Applicant] while in ██████ Unit. This assault was the ██████████ ██████████ on the above named [the Applicant].

²⁰ *Supra*, Note 12, provision 6 at 3.

²¹ The Special Request form does not reference a timeline or an anchoring policy. When queried, some WCC employees referred to the seven-day response timeframe in WCC Policy C1.5 'Inmate Requests' but the context for this policy, according to its legislative authority, is the appeal of denials respecting temporary absences. It also sets out a list of applicable forms but there is no reference to a Special Request or an Access Request.

²² For reasons stated below, this Report will use the term 'WCC' to mean 'Justice' in the context of a Public body. 'Justice' and 'WCC' are interchangeable depending on the context.

The Complainant contends that WCC, on receipt of his Access Request, chose to route it through the WCC informal process set out in G1.10 rather than sending it directly to the Records Manager as requested. In the Complainant's view, this unduly delayed the Record Manager's response. WCC contends that it acted within the parameters of G1.10, a policy anchored in corrections legislation and respective of the ATIPP Act. This did not, in its view, delay the response.

It is first necessary to examine the process for accessing information under the ATIPP Act, starting with scope of the ATIPP Act and applicable definitions. This is to ensure that the complaint fits within the ambit of the legislation.

Subsection 2(1) defines the scope of the ATIPP Act as applicable "to all records in the custody, or under the control of a public body..." There are a number of records to which the ATIPP Act does not apply. These are listed in paragraphs (a) through (g) in this subsection. As previously stated, Justice is a public body under the ATIPP Act. The records requested by the Complainant, provided they meet the definition of "record," would not fall into any of the exclusions under subsection 2(1).

'Personal information' means recorded information about an identifiable individual including, amongst other things, (a) "the individual's name, address, or telephone number" and (f) "information about the individual's health care history..." In the case at hand, the Complainant requested access to records in the custody or control of Justice that were about an alleged assault on ██████████ in which he was involved. Based on his Access Request, at least some, if not all of the records he requested, would contain his personal information and potentially that of others. His medical records and any photographs taken of him would certainly contain his personal information.

'Records' includes "books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means..." The items requested by the Complainant in his Access Request qualify as records for the purposes of the ATIPP Act.

The fact the records requested by the Complainant in his Access Request contain his personal information or personal information about others is essential in evaluating whether Justice had authority to manage his Access Request through its internal informal process in G1.10. The reason for this is discussed below.

Making an Access Request

Access to information is governed by Part 2. It sets out a clear process. According to subsection 5(1), a person who makes a request under section 6 has a right of access to such records with

some exceptions. If, however, the 'excepted' information can reasonably be separated or obliterated from the requested record, then the person also has a right of access to its remainder. In the case at hand, the Complainant has a right of access to the requested records in the custody or control of WCC, inclusive of any remaining information following potential redaction.

Section 6 sets out the process by which an 'applicant' is able to make a request to access a record. It states, amongst other things, that an applicant must make a request to the Records Manager. There is no other allowance. This is reinforced by section 8 which distinctly repeats from the outset that a request under section 6 is made to the Records Manager. It then adds that the Records Manager must communicate the response to the applicant. This language is unequivocal. It reinforces the fact that any requests for access to information under Part 2 must go exclusively through the Records Manager.

Section 6 also requires that a request for access to a record be made orally or in writing verified by the signature or mark of the applicant. If made orally, the person who receives the request must make a written record of the request and the request is not complete until verified by the signature or mark of an applicant.

In order to assist an applicant meet the requirements of section 6, the ATIPP Office created the Access Request. To complete an Access Request, an applicant must provide their contact information, name of the public body from whom the applicant believes has custody or control of the information they are seeking, details about the information they are seeking, preferred method of access to the records, signature of the applicant, and date. Below this section is an area for the Records Manager to complete once he receives the Access Request. Here the Records Manager is required to identify the 'Request no.' (the number assigned to the request by the Records Manager), the 'Date received' and 'Time limit for response to Applicant'. Following this is the address of the ATIPP Office where the form is to be sent. At the bottom of the form, it states "Personal information contained on this form is collected under the *Access to Information and Protection of Privacy Act* and will be used only for the purpose of responding to your request." There is also information about who to contact with questions about the collection of personal information.

The evidence that follows indicates that on receiving the Complainant's Access Request, WCC did not, initially, forward it to the Records Manager.

In this case, the Complainant completed an Access Request and, in good faith, asked the CO who took delivery of it to fax it to the Records Manager.²³ The CO later stated that they could

²³ See the *Post Script* section below for comments on faxing sensitive information to the Records Manager.

not confirm that they sent it as asked or, for that matter, what became of it. No documentation exists to the contrary. A subsequent search by some COs failed to find the Complainant's Access Request. Only after the Complainant called the ATIPP Office on two successive occasions to inquire about its receipt did it become apparent that his Access Request was still within the confines of WCC and had not yet been sent.

The Complainant completed his Access Request on November 12, 2015, but WCC did not forward it to the Records Manager until sometime between November 19 and 20, 2015. As a consequence, the Records Manager did not receive nor activate it until November 20, 2015. The reason for the week-long delay between inmate signature and Records Manager receipt is apparent. It is clear that WCC unilaterally decided to deal with the Complainant's Access Request by means of its informal internal process. The consequences of this will be discussed below.

Under section 7, the Records Manager has a duty to make every reasonable effort to assist an applicant. Similarly, a public body that has the record in its custody or control has a duty, under section 10, to make every effort to assist the Records Manager. In other words, the applicant looks to the Records Manager who, in turn, looks to the public body. This amounts to both entities having a common duty to ensure an applicant obtains access to information that they are seeking in accordance with process and requirements, including the timeframes, set out in the ATIPP Act. They also share a common duty to respond openly, accurately and completely to the applicant.

In this case, the evidence shows that WCC did not, at the outset, assist the Complainant in obtaining access to the information he was seeking in his Access Request in accordance with the ATIPP Act; in fact, WCC admonished him when he formally complained that the Records Manager had not yet received his Access Request a few days after the date WCC supposedly faxed it to him.

After reinforcing, in the ATIPP Act, the exclusive Records Manager conduit for access to information and responses, section 8 states that the public body having custody or control of the record has the power to decide, within the confines of the ATIPP Act, the nature of the response. It also can decide which of its officers or employees will deal with the request and determine the response. In the case at hand, this authority is not at issue. WCC did find records responsive to the Access Request and then decided what would be released to the Complainant.

Section 9 states that, on receipt of an Access Request, the Records Manager must forward it to the public body having custody or control of the record in question. The public body is then under an obligation to respond to the Records Manager in a manner quickly enough to allow

him to meet his timeframe to respond in section 11, and with sufficient information and comments to enable him to comply with the response content requirements set out in section 13. In this case, WCC sent the Complainant's Access Request to the Records Manager who, in turn, advised WCC of it. While the routing seems arguably circuitous,²⁴ the role of the Records Manager is to facilitate the processing of an Access Request for reasons of public convenience. It is designed to relieve the public, inclusive of an inmate, from having to figure out which public body holds the information they seek. It is up to the Records Manager to ensure that information sought in an Access Request is disclosed to the appropriate public body. In doing so, the Records Manager does not examine or review information to determine if access should be provided. That role, as stipulated in section 8, clearly falls to the public body.

Unless the relevance of the Records Manager is re-evaluated and amended, the public body must adhere to the process set out in the ATIPP Act when it receives an ATIPP Act request form from an applicant. In this case, WCC took a week to provide the Records Manager with the Complainant's Access Request, as well as records it believed responsive to it. While it seems reasonable to assume that all the records in question were within the custody or control of WCC, it is possible that some were embedded elsewhere. Since this determination falls solely to the Records Manager, any delay in sending an ATIPP Act request form to the Records Manager has consequences.

On receipt, the Records Manager initially has 30 days to provide a response to an applicant. During this time, he has to ascertain what public bodies may have records responsive to the Access Request. The applicant might have good reason for wanting the process to commence as soon as possible and has the right to expect that it will do so when making an access to information request under Part 2. If one public body takes it upon itself to delay the sending of an Access Request because, as in this case, it has unique control over an applicant, as well as having other means of access available, then it has added time to the ATIPP Act process without having the legislated authority to do so. WCC took a week to assemble its records package before forwarding anything to the Records Manager.

Section 11 requires the Records Manager to respond to a request for access to information received within a 30-day time limit but this obligation is only activated when he receives, by virtue of the process adopted by the ATIPP Office, a completed Access Request. The Complainant, although an inmate, is still a member of the public for purposes of the ATIPP Act. The Complainant has the right, therefore, to expect that a properly-completed Access Request would go directly to the Records Manager who, on receipt, would immediately initiate the time limit. The Complainant completed his Access Request on November 12, 2015. Had the Records

²⁴ See the *Post Script* section below for comments on re-thinking the role of the Records Manager.

Manager received it the following day, the time limit for response would have been December 14, 2015 rather than a week later.

Two Access-to-Information Schemes

WCC directs inmates to request the information contained in an Access Request informally from WCC. This is designed to expedite such requests without having to put them into the ATIPP Act process. As such, G1.10 allows the WCC ATIPP Coordinator to determine the appropriate response, inclusive of denying the request and then, if it cannot be facilitated within WCC, forward it to the Records Manager for appropriate action. The issue here is, in part, one of terminology. G1.10 does not clearly distinguish between the WCC internal process and the ATIPP Act process. Moreover, it designates the WCC ATIPP Coordinator as the single point of contact for both as opposed to using, for example, a different title for the WCC role, such as the 'Informal Request Coordinator'.

A problem arises when the WCC process interferes with the one set up under the ATIPP Act. If someone completes and submits an Access Request to the Records Manager, then this triggers sections 5 through 14 of Part 2. This is a complete legislative scheme. To avail themselves of this, a person who wants to access information from a public body must request access to the information by completing and submitting to the Records Manager an Access Request. The Records Manager in turn, forwards the information requested to the public body. At that point, the public body decides what records are responsive to the request and what of them will be released. The Records Manager provides a response setting out the result.²⁵ All of this occurs within the ambit of the ATIPP Act. Nowhere in that scheme is the provision of or the discretion for G1.10 to process an Access Request some other way.

It is not disputed that WCC has the ability under its corrections legislation to set up its own process to enable inmates to access non-personal information. The ATIPP Act, under subsection 1(2) states that "This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public independently of this Act."²⁶ It is clear, based on these words, that the ATIPP Act supports a public body in its efforts to disclose non-personal information as routinely as possible.

Since inmates are the responsibility of WCC pursuant to corrections legislation, WCC is able to make rules in aid of their well-being that manifest, for example, through policies and standing

²⁵ Complaints, reviews and appeals in respect of Access Requests are not at issue in this Report.

²⁶ *Supra*, Note 1. Emphasis is added.

orders such as G1.10. It states from the outset that WCC will, to the extent possible, make deliberate effort to ensure that its information is easily accessible 'outside' the formal ATIPP Act process, subject to certain limitations. If an inmate wants access, for example, to a food menu, then WCC may require that person to fill out a Special Request and deal with it accordingly. If an inmate wants access to records related, for example, to an internal complaint process, then a Special Request may again suffice in aid of a routine disclosure by WCC under its own process.

There is also room to disclose information through a combination of the two processes with WCC providing, for example, a copy of a study via routine disclosure and later, via formal disclosure under the ATIPP Act, certain research underlying it. In short, routine disclosure has a reasonable place from a public body's perspective. It is, however, incumbent on WCC to advise its inmates with sufficient clarity that there are two processes for access to non-personal information and how they stand-alone or interact, depending on the circumstances so that they can decide which process to utilise.²⁷

Routine disclosure of personal information is a different matter. There is nothing in the *Corrections Act* that expressly ousts the jurisdiction of the ATIPP Act. While WCC certainly collects, retains, uses and discloses personal information, it can only do so under the paramouncy and ambit of the ATIPP Act. It is unclear from an application of G1.10 to what extent WCC understands the significance of that situation.

G1.10 sets out an informal process "outside of the formal ATIPP process."²⁸ Pursuant to this informal process, it states that case managers are authorised, for example, to disclose verbally to an inmate some personal information about that individual, subject to the stated limitations and prohibitions identified in the ATIPP Act. The inference from such requests is that where an inmate is seeking access to personal information about themselves, WCC seems relatively accommodating through its own process.²⁹ The same is true, for example, where an inmate is seeking access to a Video of an incident so they can mount a possible defence to an internal breach of rule; in other words, where an inmate is seeking broader information on a subject involving themselves and likely others. WCC again uses G1.10 to make an access decision via its

²⁷ Emphasis added.

²⁸ *Supra*, Note 11 at 1. See 'Statement of Standing Order'.

²⁹ *Ibid.*, provision 3 at 2. The routine disclosure of some personal information may still be relatively straightforward, assuming the requisite authorities under the ATIPP Act are first in place.

own process.³⁰ Both examples, however, can only be addressed under the ATIPP Act. While G1.10 tries to be responsive to this requirement, it would be better served if WCC were well-versed in the distinction between Parts 2 and 3 of the ATIPP Act.

Part 2 is based on the premise that public bodies are accountable to the people. As such, a person has a *right* of access to records in the custody or control of a public body, subject to certain restrictions in the ATIPP Act.³¹ They also have a right to access personal information about themselves and the attendant right to request corrections to it. A public body can only refuse to provide access where any type of information is exempted under specific and limited provisions in Part 2. This refusal must be accompanied by clearly-stated reasons for the exemption because the burden of proof is on the public body, not the citizen, to apply the provisions of the ATIPP Act in a proper manner.

The right of access is fundamental to transparent and equitable governance. The public body, in considering its responsibilities, must be predisposed to provide as much information as possible in response to a request for access to information made under the ATIPP Act. To be clear, Part 2 can only be triggered when an applicant makes a request for access to information to the Records Manager, whether the request is for non-personal or personal information. In the latter case, it can be used to access personal information that was collected by a public body under Part 3, but the right to access this information is only within Part 2. Part 3 contains no such right. Part 3 is based on the premise of protecting personal privacy; essentially, the right of an individual to control their own personal information through the rules established in Part 3.

Just as Part 2 is a complete scheme for accessing information, inclusive of personal information, so too is Part 3 a complete scheme for governing the collection, retention, security, use and disclosure of personal information in the custody or control of a public body. Unless other legislation expressly states otherwise, the ATIPP Act applies and Part 3 is the only means of managing personal information, inclusive of addressing a Part 2 Access Request for this information.

³⁰ *Ibid.*, provisions 2 and 5 at 2. Disclosure in respect of this second example may also be possible, provided that the requisite authorities under the ATIPP Act are first in place, but it is less straight-forward. WCC should arguably look at the wording in the request, distinguish between personal information and information involving the inmate, determine which records are responsive to the request and ascertain the extent to which they concern the inmate before it makes a disclosure decision.

³¹ Emphasis added.

Part 3 stipulates the only conditions under which a Public body may disclose personal information. These are set out in sections 36 and 39, with section 36 being most applicable to WCC. There is no other way to disclose personal information unless another enactment expressly ousts the ATIPP Act and provides for its own disclosure process. In addition, disclosure under Part 3 is discretionary, meaning that a public body is not required to disclose personal information under these sections and must, before doing so, exercise its discretion about whether to disclose the personal information.

As stated, sections 36 and 39 set out the only purposes for which a public body can disclose personal information including for the purpose of responding to an access to information request. Subsection 36(a) permits a public body to disclose personal information in response to a request for access to information under Part 2. This may occur when an applicant submits an Access Request to the Records Manager under Part 2 to access their own personal information or records containing personal information about a third party.

Given that Part 3 completely governs personal information in the custody or control of Justice, WCC must look to sections in Part 3 for authority to disclose personal information, including authority for any routine disclosure. G1.10 appears to authorise disclosures of personal information contrary to Part 3.

The evidence shows, for example, that WCC routinely discloses personal information about an inmate contained in a progress log to the inmate. Section 36 does not, however, expressly provide for any routine disclosure of this kind of information to an inmate. Some jurisdictions have addressed this issue. In the *Freedom of Information and Protection of Privacy Act* (Alberta), a public body may disclose personal information for the “purpose of supervising an individual under the control or supervision of a correctional authority.”³² Manitoba has a similar provision in its legislation.³³ In these jurisdictions, this express authority likely occurs through a correctional policy that frames the disclosure of a particular category of personal information. Without a provision of this nature, WCC must find another way. It must look to section 35 or section 36 for authority to provide the inmate this information.

To illustrate, if WCC collects personal information from an inmate and uses it for managing the inmate, then providing that information to the inmate as part of this management scheme may constitute a ‘use’ under paragraph 35(1)(a).

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

³² R.S.A. 2000, c.F-5, paragraph 40(1)(aa).

³³ *Freedom of Information and Protection of Privacy Act*, C.C.S.M., c.F175, paragraph 44(1)(t).

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

If WCC, however, indirectly collects, creates or generates personal information for the purposes of managing an inmate, then providing that information to the inmate for the purpose of their management may constitute a 'disclosure' under subsection 36(c).

36 A public body may disclose personal information only

(c) for the purpose for which it was obtained or compiled or for a use consistent with that purpose.

For G1.10 to align with the rules in Part 3, WCC will need to identify its specific authority under the ATIPP Act to use or disclose the personal information of inmates. It will need to take great care in redrafting this policy to ensure that any routine uses or discloses of personal information captured within this policy comply with the use and disclosure provisions in Part 3. It will also need to ensure that its employees have a clear understanding of the limits of these uses or disclosures.

Conclusion on this Issue

In the case at hand, WCC unilaterally took it upon itself to search informally for records and assemble a package before sending the Complainant's Access Request to the Records Manager. The evidence clearly shows that this was contrary to the Complainant's intent, which was to invoke the formal access to information procedure under the ATIPP Act. His position did not change when, on the following day, he expressly stated on an internal WCC complaint form that WCC had not forwarded his Access Request to the ATIPP Office and that the Records Manager had not received it. In short, WCC made its own decision on how to handle the Complainant's Access Request outside the rules in Part 2 of the ATIPP Act. This amounted to a diversion of the Complainant's Access Request away from the formal process to the informal process under G1.10.

WCC contends that it has the ability to make this choice pursuant to G1.10 because it has a duty to inmates in terms of their well-being within the context of a safe, secure and efficient correctional centre operation. Moreover, it is willing to provide an inmate with certain information within its custody or control, inclusive of any filed report, in whole or in part, on that inmate. WCC encourages an inmate, prior to submitting an Access Request, to pursue information requests by means of G1.10 for these reasons.

This approach, on its face, seems reasonable but problems emerge on further analysis. WCC subscribes to the opening statement in G1.10 that "[YG] has committed to providing its citizens

with openness and accountability, and to protect the personal privacy of individuals whose information is in custody or control of a Public body.”³⁴ There are, however, no safeguards in G1.10 as to the availability, for example, of a ‘complaints, review and appeals’ process, especially one of sufficient rigour as to satisfy the ATIPP Act. Such a process may exist but it is not stipulated in G1.10.

There is also no clear language that WCC will not divert a request for access to information that is on an Access Request into its own process. An inmate is no different from any other citizen who wishes to access information through the ATIPP Act. If they complete an Access Request, then they have the right to have it addressed by the process set out in the ATIPP Act and not redirected to something set up ‘outside’ it, however well-intentioned. There is nothing, for example, to start the countdown in section 11 that states WCC will respond to informal ATIPP Act requests “without delay, and within 30 days.”³⁵ In fact, the diversion of the Complainant’s Access Request to G1.10 resulted in a week-long delay in starting this response countdown set out in the ATIPP Act.

G1.10 does not displace a right of access under the ATIPP Act in the absence of express language to the contrary. Since the *Corrections Act* contains no such language, a right of access pursuant to the ATIPP Act remains an independent right. It is, of course, possible to search for certain records resulting from a Special Request but this does not relieve WCC from its duties under the ATIPP Act in the face of an access to information request made on an Access Request. WCC has a responsibility to assist the Records Manager in every reasonable way meet his duty to assist the applicant including by ensuring the applicant receives the information requested in accordance with the timelines set out in Part 2.

The evidence indicates there may have been some confusion at WCC as to the differences between handling an internal Special Request as opposed to an Access Request. This may have resulted in someone thinking they were being helpful in looking proactively for records and then sending them, together with the Complainant’s Access Request, to the Records Manager a week later. Whatever the reason, this both circumvented and delayed the process specified in the ATIPP Act. It matters not that the delay may actually have had little consequence to the Complainant. It is just as inviting to speculate in the opposite direction. In short, a delay is a delay. WCC had a duty to forward the Complainant’s Access Request, on its receipt, directly to

³⁴ *Supra*, Note 11 at 1.

³⁵ Provision 6 in G1.10 states that “Responses to informal ATIPP requests will be completed as soon as practicable, and within 30 days” but there is nothing in G1.10 that expressly starts this countdown. The 30-day countdown in section 11 starts when the Records Manager, on receipt of an Access Request, assigns a file number to it.

the Records Manager. It failed to exercise this duty and, as a consequence, unduly delayed the ATIPP Act response process.

The current problem with G1.10 is that its process strays into domain held by the ATIPP Act. In fact, the WCC process in G1.10 could potentially be construed as modifying the ATIPP Act where Access Requests, such as the one in the case at hand, have been diverted in some manner to G1.10.

It is not disputed that WCC has the legislative ability to set up its own process to enable inmates to access certain information but the existence of another avenue of access does not suspend or sterilise the ATIPP Act. An inmate can complete an Access Request regardless of or in addition to any other available process. If they do complete an Access Request, then this puts them squarely in the domain of the ATIPP Act, no matter the internal process provided in G1.10. As such, WCC has only two recourses available. If an inmate submits a Special Request that subsequently produces access to records under WCC's informal process and there are no other records responsive to it, then WCC would have reasonable grounds to assert that there is no need to initiate a duplicate search under an Access Request. Alternatively, if an applicant prefers to submit an Access Request as opposed to a Special Request, then WCC must not engage its internal process.

Did Justice conduct an adequate search for photographic records responsive to the Access Request?

The Complainant contends that WCC did not conduct an adequate search for photographic records responsive to the Complainant's Access Request. WCC contends that it did conduct an adequate search and found no alleged photographs.

The ATIPP Act contains a series of provisions that, taken together, require a public body to provide information responsive to an applicant's Access Request in a timely manner. Under section 1, the purposes of the ATIPP Act, as applicable to the case at hand, are to make public bodies more accountable to the public and to protect personal privacy by providing the public with a right of access to records, inclusive of personal information about themselves, and specifying exceptions to that right. Under sections 6 and 9, the applicant submits an Access Request to the Records Manager who, in turn, activates the request and informs the public body about the information sought in the request. Under section 7, the Records Manager must assist the applicant and respond to them openly, accurately and completely. Similarly under section 10, the public body must assist the Records Manager such that he can meet his duty to the applicant. The public body has custody or control of the desired record and is required under section 9 to provide the Records Manager with sufficient information so as to inform the response to the applicant under section 13.

Section 13 does not expressly require the Records Manager to advise an applicant that a public body is unable to find a record responsive or if a record does not exist. However, the corresponding duties in sections 7 and 10 embody the requirement that the public body confirms the existence or non-existence of the record in question that is the subject of an Access Request to the Records Manager so that he can inform the applicant.³⁶ This duty implies that a public body cannot subjectively decide, for example, to perform a cursory search on the basis of conjecture that, given the applicant, no such record likely exists. It cannot decide not to perform a thorough search because it might be time-consuming, problematic and expensive. Similarly, if it has already conducted a search and there is hesitation as to its adequacy, then it must search again, inclusive of places where new records may exist since the last search. If a public body cannot find a record or where one does not exist, then it must provide reasons as part of its obligation through the Records Manager to the applicant.

A 'Schedule of Records' is an effective strategy tool to aid a public body in meeting this obligation. It serves as a record of what the public body did to search for a particular record, to determine its location or repository, to describe any record responsive to the request, or to identify a record that cannot be located or is, in fact, non-existent.

In the case at hand, the Complainant asserts that WCC nurses took photographs of an injury resulting from an assault on his person shortly after its occurrence in [REDACTED]. It is unclear from the evidence exactly where in WCC the alleged photographs were taken, or by whom, although the Complainant asserts that it occurred in the 'Admissions & Discharge' area. There is a digital camera in this area. The WCC Health Care Services unit asserts that it does not possess a camera of any sort nor does it take such photographs in the course of its duties. The veracity of these assertions is not at issue here; rather, the question to be decided is whether WCC conducted an adequate search to determine the existence or non-existence of the alleged photographs.

Under paragraphs 13(1)(a) and (b), the Records Manager must tell an applicant if they are entitled to access the record in whole or in part and, if affirmative, where, when and how access will be granted. The Access Request for this personal information about the Complainant is properly constituted under Part 2 and for the reasons stated above WCC can only disclose it in accordance with this Part. If the alleged photographs exist, then the Complainant is entitled to access them at the outset unless WCC decides to apply one of the disclosure exceptions.

³⁶ This is consistent with former Commissioner Keopke's finding in File ATP12-037AR, Department of Justice, May 15, 2013.

The Complainant first received records responsive to his Access Request on November 30, 2016. The alleged photographs were not included with these records. The Complainant then submitted a Request for Review to the OIPC on December 9, 2015. As part of this Review, an additional search for the alleged photographs occurred. From this, the Complainant received additional records on December 22, 2015, but no photographs. WCC stated that it searched certain records the next day but to no avail. It did not, however, provide a description of the search.

After submitting his complaint about adequacy of the search to the OIPC and the OIPC's request that WCC provide information about how it performed the search for the photographs, WCC provided a description of the digital locations previously searched. It acknowledged, however, that it did not search other possible repositories at that time. Finally, WCC embarked on another search between January 29, 2015 and May 06, 2016. It did not locate the alleged photographs but it did provide what reasonably amounts to a Schedule of Records.

Conclusion and Recommendations

On the first issue, WCC received a properly-completed Access Request from the Complainant but failed to forward it directly to the Records Manager, as required. This failure unduly delayed the ATIPP Act access-response process. The ATIPP Act provides a complete legislative scheme for accessing records and protecting privacy. A public body cannot divert an Access Request elsewhere, no matter the reason. In my opinion, this diversion constitutes an incorrect administration of the ATIPP Act with the result being that Justice contravened the ATIPP Act when WCC undertook this course of action to manage the Complainant's Access Request.

To remedy this contravention, I recommend the following.

1. WCC should immediately institute a practice of forwarding all inmate Access Requests directly to the Records Manager in the most expeditious time frame available, without compromising privacy.
2. WCC should suspend the application of G1.10 until it can be amended to distinguish clearly between an inmate seeking information under the parameters of the *Corrections Act* using, for example, a Special Request, and those under the parameters of the ATIPP Act using an Access Request, and ensure that any disclosures of personal information through G1.10 are in compliance with the ATIPP Act.
3. Before reinstating G1.10, WCC should provide it to the OIPC for review and comment.

4. WCC should, as soon as is reasonably practicable, institute a comprehensive ATIPP Act training program for its employees to apprise them of their obligations under this legislation, inclusive of handling an Access Request, becoming familiar with its response and review processes, and providing an informed response that follows an adequate search. This would also include distinguishing between Part 2 and 3 of the ATIPP Act.

On the second issue, WCC did not initially meet the standard required to provide the Complainant with an open, accurate and complete response, inclusive of the requirement to inform the Complainant about whether it could or could not locate records responsive to his request or a record of this search. However, when faced with additional prompting, inclusive of investigating its response, in my opinion Justice satisfactorily discharged its obligation to the Complainant. Given this, I will not make any recommendations. I will, however, make the following observation.

1. It was observed during this investigation that if WCC were to build into its 'response to access to information request' procedures a requirement to prepare a comprehensive Schedule of Records in response to each access request it receives for access to information sought by an inmate under the ATIPP Act, then it would facilitate compliance with sections 7 through 13.

A copy of the OIPC's 'Best Practice – Contents of a Response' is attached to the Annex of this Report for convenience. The template lists the type of information that WCC could include in such a schedule.

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

Distribution List:

- Public Body
- Complainant

Post Script

Personal Information in Access Requests

It became apparent during this investigation that WCC may not recognise that an Access Request contains the personal information of an inmate, their contact information and the records they are requesting. Given this, and the fact the Access Request is a record, WCC must protect the personal information in the Access Request in accordance with section 33; that is, from unauthorised access, disclosure, disposal or loss. The information gathered for this investigation indicates the Complainant's Access Request went through a number of employees in WCC without protection and its location for a period of time was unknown. Failure to adequately protect personal information could result in a security breach.

To address this issue, WCC should ensure that inmates who complete Access Requests are provided with an envelope in which to send their Access Request.³⁷ WCC employees should be educated on the need for this so that the personal information contained in the Access Request is properly secured. To reinforce the practice, WCC should explain to its employees that failure to provide an inmate with an envelope for the purposes of mailing an Access Request may cause a security breach.

Faxing Access Requests

The manner in which inmate Access Requests are being delivered to the Records Manager by WCC employees also suggests poor security practices. Prior to June, 2015, COs would send an inmate's Access Request to the Records Manager using a fax machine. While this sufficed for the most part, some would, on occasion, transpose the Records Manager number and send the Access Request to a 'non-Records Manager' destination, albeit within YG. Where this occurred, a security breach would concurrently occur.

When a fax was used, WCC had in place a tracking log to document faxes sent on behalf of inmates. This included space for the date and time sent, the 'sending' inmate and unit, the destination name and number, and the name of the employee sending fax.³⁸ While this sufficed for the most part, evidence indicates that some WCC employees did not assiduously enter the required information in the result that WCC could not conclusively verify whether some faxes had been sent, which is what occurred in this case.

To address these issues, WCC changed its fax practice in June of last year, advising WCC employees that Access Requests must now be sent to the Records Manager via YG internal mail

³⁷ This would be subject to any requirement to search the contents of an envelope for contraband if justified by law and only those responsible to conduct the search have access to the Access Request.

³⁸ I would highlight that this is a collection of personal information and requires that WCC manages the information in accordance with Part 3.

to preserve inmates' privacy. While this too has sufficed for the most part, evidence indicates that some COs are of the view that faxing Access Requests is still acceptable. This means that WCC must continue to take steps to ensure that Access Requests or other records containing personal information do not inadvertently end up in the wrong place.

Enhanced communication and the delivery of training about WCC's obligation under the ATIPP Act would go a considerable distance in resolving these issues.

It should be noted by Justice that these same issues arise for complaint and review forms filled out by inmates and sent to the OIPC.

As a result of the foregoing, I strongly suggest that Justice evaluate what occurred in relation to the Complainant's forms he completed in respect of his request for access to information, and his subsequent complaint and request for review, to determine whether a breach of security occurred. Justice should further evaluate these processes to mitigate the risk of a security breach. I would further suggest Justice evaluate whether sending the package of records to the Records Manager unsealed resulted in a security breach.

Role of the Records Manager

Yukon is the only jurisdiction in the country that has a Records Manager as part of its access to information legislative framework. As stated above, to access information in the custody or control of a Public body under Part 2 of the ATIPP Act, a person must make a request to the Records Manager.

The Records Manager and each public body have responsibilities associated with a request for access to records that are set out in sections 6 to 13 of the ATIPP Act. The role of the Records Manager is structured such that he receives Access Requests from applicants and forwards them to the public body that has custody or control of the records requested. As a matter of internal procedure, he then writes to the applicant and provides them with the date by which he must respond to the Access Request. This starts the 30-day response period, subject to possible extension. He also provides a date to the public body by which time it must provide him with its response to the Access Request. The responsibility to provide a response to the applicant's Access Request rests with the Records Manager, not with the public body.

As stated above, the original purpose underlying the coordinating role of the Records Manager³⁹ was to facilitate Access Requests and provide a 'one-window' approach to this end.

³⁹ In 2002, the ATIPP Act was amended to replace the 'Archivist' with the 'Records Manager'. Prior to that amendment, there was no 'Records Manager' in the legislation. In short, the amendment simply re-assigned the procedural duties of the Archivist to the Records Manager.

In the case at hand, WCC received an Access Request but diverted it to its internal process. This resulted in an undue delay in starting the response period under the ATIPP Act. As stated, only the Records Manager can trigger this period on receipt of an Access Request.

While it is true that an individual has the convenience of submitting an Access Request only to the Records Manager, as opposed to one or several public bodies that may or may not have custody or control of the particular records, the model is problematic. The responsibility of the Records Manager for responding to Access Requests creates issues of accountability by public bodies in managing and responding these requests and causes delays in processing them. Moreover, the current structure underlying the role of the Records Manager within government lends itself to being viewed by public bodies as merely as an administrator.⁴⁰ This has resulted in a *de facto* marginalising of the Records Manager by reducing him to that approaching perfunctory status.

In the case at hand, the applicant who submitted the Access Request was an inmate in WCC. Unlike others, the inmate's only admittance to the Records Manager is through WCC. The only way WCC can deal with an Access Request, other than to forward it immediately to the Records Manager, is to wait for the Records Manager to receive it and then issue direction to search for records responsive to it. The Report concluded that WCC unduly delayed the start of the initial response period by not sending the Access Request directly to the Records Manager. That suspended the rights of the applicant-inmate under the ATIPP Act and put into abeyance the legislated duty of the Records Manager to assist them.⁴¹

What is of particular significance is that the Records Manager, not WCC, is accountable for these failures under the ATIPP Act. Eliminating the Records Manager position places accountability for responding to Access Requests where it should be: directly on a public body. In the case at hand, had WCC been solely responsible for the Access Request on receipt, it could have, as it did, begun an immediate search for records responsive to the request. The essential difference between that scenario and the factual events of this case is that the 30-day response period, and all the attendant accountabilities, would have begun not on November 20th, 2015,

⁴⁰ An elaboration of these comments are found in the Information and Privacy Commissioner report entitled *Access to Information and Protection of Privacy Act 2015 Review, Information and Privacy Commissioner's Comments* (Whitehorse: IPC, 2015) under 'Rethinking the Role of the Records Manager' at 45-51.

⁴¹ Any undue delay has consequences. Hypothetically, this could potentially jeopardise the ability of WCC to find a record within the initial 30-day response period that could have started earlier but for its delay in sending an Access Request to the Records Manager. For example, a Video has a certain 'lifespan' before being over-written with new data. By the time the Records Manager receives an Access Request for the Video and directs a search for it, re-writing may already have occurred. To be clear, this is a hypothetical example for illustrative purposes only.

when the Records Manager received the Access Request, but on November 12th, 2015, the day the Complainant gave it to WCC.

Management of Photographic Records

If the alleged photographs existed at one time, then the unsuccessful but ultimately adequate search to locate them reveals a new issue: that of a problematic WCC record retention and retrieval system. While the issue is beyond the scope of this Report, suffice it to say that photographic records that may have been taken to substantiate the injuries to an inmate as a result of an assault on their person are likely germane in any potential legal proceeding, whether criminal or civil. While some public bodies may have less sensitivity to such an outcome, the same cannot be said for Justice or WCC, especially as set out in section 14 of the *Corrections Act*.⁴² As such, they arguably have a more acute responsibility to document such records, from their inception to their final disposition, inclusive of where they may be stored and how they may be accessed. It is strongly suggested that WCC review its current procedure for this type of record or, in the absence of one, clearly set out a comprehensive procedure in whatever format (*e.g.* policy, standing order, etc.) that best meets its responsibility.

More specifically, it would be beneficial for WCC to establish a process that ensures all digital photographs taken by WCC employees or service providers are (a) date and time-stamped and (b) kept in accordance with WCC's file management and retention requirements, including in accordance with section 34 of the ATIPP Act if applicable. If this process is developed, WCC will need to take the appropriate steps to ensure photographs are properly secured and retrievable in the event an Access Request is received for these records.

Appendix

Best practice – Contents of a Response⁴³

This eight-page document contains pertinent information on sections 7, 10, 13 and 14 of the ATIPP Act, including a sample response letter and a Schedule of Records.

⁴² S.14 states that the person in charge is responsible, under the supervision of the director of corrections, for such things as "(a) the safe, secure and efficient operation of the correctional centre; and (b) the well-being of the inmates of the centre..."

⁴³.<http://www.ombudsman.yk.ca/uploads/media/55f99bdc69b83/BP%20Contents%20of%20a%20Response.pdf?v>
1.