



Yukon
Information
and Privacy
Commissioner

INQUIRY REPORT

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

**Department of Finance
File ATP19-75R**

**Jason Pedlar, B.A., M.A.
Information and Privacy Commissioner
December 18, 2023**

Summary

In November of 2018, an applicant (the “Applicant”) made ten access requests to the Yukon Department of Finance (the “Department”) for the following sets of information:

- i. *All emails sent and received by the Deputy Minister [of Finance] between October 1st, 2018 and October 3rd, 2018;*
- ii. *Any emails sent or received by the ADM, Economics, Fiscal Policy & Statistics between October 25th, 2018 and November 7th, 2018 that reference ‘carbon tax’ or ‘carbon pricing’;*
- iii. *Any emails sent or received by anyone with the title ‘Management Board Analyst’ to different departments between August 6th, 2018 and August 13th, 2018;*
- iv. *Any emails sent or received by the Director, Management Board Secretariat to a different department between August 6th 2018 and August 13th, 2018;*
- v. *Any emails sent or received by the Capital Planning Analyst to a different department between October 1st and October 12th, 2018;*
- vi. *Any emails sent or received by anyone with the title ‘Management Board Analyst’ to a different department between October 1st, 2018 and October 12th, 2018;*
- vii. *Any emails sent or received by the Tax Policy Analyst in the Economics, Fiscal Policy & Statistics Branch referencing ‘carbon pricing’, ‘carbon tax’, or “fees” between October 22nd, 2018 and October 31st, 2018;*
- viii. *Any emails received by the Executive Assistant to the Deputy Minister between November 5th, 2018 and November 7th, 2018;*
- ix. *Any Documents produced by, distributed by or shared with the Director, Fiscal Relations between October 1st, 2018 and November 7th, 2018; and*
- x. *Emails to and from the ADM of Economics, Fiscal Policy and Statistics between August 10 and August 14 inclusive.*

The Department refused the Applicant access, in whole or in part, to the responsive records, citing as its authority subparagraphs 15(1)(a), 15(1)(b), 15(1)(c), 15(1)(d)(i), 15(1)(d)(ii), 16(1)(a), 16(1)(b), 16(1)(c), 16(1)(d), 17(1)(b), 17(1)(c), 17(1)(e), 20(1)(a), and 25(1).

The Applicant requested that the Information and Privacy Commissioner (the “IPC”) review the refusal. Settlement failed to resolve the matter and it proceeded to Inquiry.

Table of Contents

- Summary 2
- Statutes Cited..... 4
- Cases and Orders Cited 4
- Explanatory Note 4
- I BACKGROUND 4
- II JURISDICTION 6
- III INQUIRY PROCESS 6
- IV ATIPPA BROUGHT INTO FORCE 7
- III ISSUES 8
- IV RECORDS AT ISSUE 8
- V BURDEN OF PROOF 9
- VI SUBMISSIONS OF THE PARTIES 9
- VII ANALYSIS 9
- VIII FINDINGS..... 15
- IX RECOMMENDATIONS..... 16
- Department Head’s Response to Inquiry Report..... 17
- Applicant’s Right of Appeal..... 17

Statutes Cited

Access to Information and Protection of Privacy Act, SY 2002, c.9 (the “Act”);

Access to Information and Protection of Privacy Act, SY 2018, c.9 (the “New Act”);

Interpretation Act, RSY 2002, c.125;

Cases and Orders Cited

Cases

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R 27;

Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner), 2014 SCC 31;

Canadian Council of Christian Charities v. Canada (Minister of Finance), 1999 4 FC 245;

John Doe v. Ontario (Finance), 2014 SCC 36, [2014] 2 SCR 3.

Orders

Reports

Explanatory Note

[1] All sections, subsections, paragraphs, and the like referred to in this inquiry report are to the Act, unless otherwise stated.

I BACKGROUND

[2] In November of 2018, the Applicant made ten access requests for the following information from the Department:

- i. *All emails sent and received by the Deputy Minister [of Finance] between October 1st, 2018 and October 3rd, 2018 (the “First Request”);*
- ii. *Any emails sent or received by the ADM, Economics, Fiscal Policy & Statistics between October 25th, 2018 and November 7th, 2018 that reference ‘carbon tax’ or ‘carbon pricing’ (the “Second Request”);*

- iii. *Any emails sent or received by anyone with the title 'Management Board Analyst' to different departments between August 6th, 2018 and August 13th, 2018 (the "Third Request");*
- iv. *Any emails sent or received by the Director, Management Board Secretariat to a different department between August 6th 2018 and August 13th, 2018 (the "Fourth Request");*
- v. *Any emails sent or received by the Capital Planning Analyst to a different department between October 1st and October 12th, 2018 (the "Fifth Request");*
- vi. *Any emails sent or received by anyone with the title 'Management Board Analyst' to a different department between October 1st, 2018 and October 12th, 2018 (the "Sixth Request");*
- vii. *Any emails sent or received by the Tax Policy Analyst in the Economics, Fiscal Policy & Statistics Branch referencing 'carbon pricing', 'carbon tax', or "fees" between October 22nd, 2018 and October 31st, 2018 (the "Seventh Request");*
- viii. *Any emails received by the Executive Assistant to the Deputy Minister between November 5th, 2018 and November 7th, 2018 (the "Eighth Request");*
- ix. *Any Documents produced by, distributed by or shared with the Director, Fiscal Relations between October 1st, 2018 and November 7th, 2018 (the "Ninth Request"); and*
- x. *Emails to and from the ADM of Economics, Fiscal Policy and Statistics between August 10 and August 14 inclusive (the "Tenth Request");*

[3] Subsequently, the Records Manager assigned file numbers to the requests as follows:

- i. The First Request: Access Request No. A-7450;
- ii. The Second Request: Access Request No. A-7457;
- iii. The Third Request: Access Request No. A-7458;
- iv. The Fourth Request: Access Request No. A-7459;
- v. The Fifth Request: Access Request No. A-7460;
- vi. The Sixth Request: Access Request No. A-7461;
- vii. The Seventh Request: Access Request No. A-7462;
- viii. The Eighth Request: Access Request No. A-7464;
- ix. The Ninth Request: Access Request No. A-7469; and
- x. The Tenth Request: Access Request No. A-7476.

[4] This report will deal with file numbered A-7469 (the "Access Request").

[5] The Records Manager subsequently advised the Applicant that the Department had identified records responsive to A-7469, but it was withholding them in full pursuant to the following provision(s):

- 15(1)(b)
- 15(1)(d)(ii);
- 16(1)(b);
- 17(1)(b);
- 17(1)(c); and
- 17(1)(e).

[6] On January 3, 2019, the IPC received a request for review from the Applicant in accordance with section 52 and assigned an Informal Case Resolution investigator to attempt settlement.

[7] Subsequently, the IPC assigned file numbers as follows:

- i. IPC File No. ATP19-75R to A-7469. (the “IPC File”)

[8] From January 3, 2019 to May 2, 2019, the IPC attempted settlement of the IPC Files but we did not receive the records in an acceptable format and with sufficient detail explaining the Department’s rationale for refusing access to the records in full or in part. We also learned that the Department had not done a line-by-line review of the records at the time of responding to the access requests and was not aware it was required to release any parts of a record where there was not an exception to the right of access.

II JURISDICTION

[9] The authority of the IPC to review the Department’s decisions to refuse to provide an applicant with access to records is set out in subsection 48(1).

[10] These Inquiries are required to proceed under the jurisdiction of the Act pursuant to subsection 130(3) of the New Act.

III INQUIRY PROCESS

[11] On May 2, 2019, the IPC issued written Notices of Inquiry to the parties wherein the issues for review were set out.

[12] Also on May 2, 2019, the IPC issued Notices to Produce Records to the Department. It required the Department to produce a complete, unredacted copy of all records identified as responsive to the Access Requests, inclusive of a schedule of records.

[13] Issues with the organization, formatting, and completeness of the Records produced by the Department persisted throughout the Inquiry process leading to significant delays.

[14] On August May 24, 2019, the Department provided its submissions to the IPC in response to the Applicant's request for review.

[15] The Applicant provided the IPC with no submissions.

IV ATIPPA BROUGHT INTO FORCE

[16] On April 1, 2021, the New Act was brought into force and the Act was repealed. Section 130 of the New Act states as follows:

130(1) The commissioner must, without delay after the coming into force of this section, take one of the actions under subsection (2) if

(a) The commissioner had received a request for a review made under 48(1), (2) or (4) of the former Act, or a request for a review of a complaint made under subsection 48(3) of the former Act, before coming into force of this section; and

(b) the commissioner had not, as of the day on which this section came into force, commenced the review, by means of an inquiry or investigation.

(2) The actions for the purpose of subsection (1) are the following:

(a) to conduct a review by means of an inquiry of the request for a review or an investigation of the complaint as if the former Act had not been repealed;

(b) to treat the request made under the former act as if it had been filed under section 90 of this Act on the day on which section 90 came into force...

(3) The former Act (including the requirement for a decision by a public body under subsection 58(1) of the former Act and any appeal to the Court under subsection 59(1) of the former Act) applies as if it had not been repealed in respect of a review of a request or a complaint made under the former Act if the commissioner has not concluded the review by

means of an inquiry or investigation on or before the day immediately before the coming into force of this section.

(4)...

[17] Our office received the Applicant's Request for Review of the Department's decision on the Access Requests from the Applicant on April 11, 2019, and commenced Inquires into the matters on May 2, 2019. The Inquires had not concluded before the New Act went into effect on April 1, 2021. As such the Act applies to the matters under review.

III ISSUES

[18] There are six issues as follows:

- 1) Is the Department required by subparagraph 15(1)(b) to withhold the information sought by the Applicant in the Access Request?
- 2) Is the Department required by subparagraph 15(1)(d)(ii) to withhold the information sought by the Applicant in the Access Request?
- 3) Is the Department authorized by subparagraph 16(1)(b) to withhold the information sought by the Applicant in the Access Request?
- 4) Is the Department authorized by subparagraph 17(1)(b) to withhold the information sought by the Applicant in the Access Request?
- 5) Is the Department authorized by subparagraph 17(1)(c) to withhold the information sought by the Applicant in the Access Request?
- 6) Is the Department authorized by subparagraph 17(1)(e) to withhold the information sought by the Applicant in the Access Request?

IV RECORDS AT ISSUE

[19] The records responsive to ATP19-75R in the custody and control of the Department consist of records exported to 229 PDF-formatted pages. (the "Records")

V BURDEN OF PROOF

[20] Paragraph 54(1)(a) sets out the burden of proof relevant to this Inquiry. It states that the burden is on the public body head to prove that an applicant has no right to the records or to the information withheld from the records.

54(1) In a review resulting from a request under section 48, it is up to the public body to prove...

(a) that the applicant has no right of access to the record...

VI SUBMISSIONS OF THE PARTIES

[21] The submissions of the Department and the Applicant are set out in the Analysis sections of this Inquiry Report, as may be relevant to each issue.

VII ANALYSIS

Issue 1 – Is the Department required by subsection 15(1)(b) of the Act to withhold, in full, 148 pages of the Records sought by the Applicant in the Access Request?

[22] The Department is relying on subparagraph 15(1)(b) to refuse, in part, the Applicant access to the Records. The provision states as follows:

Relevant Law

15 (1) A public body must refuse to disclose a record to an applicant if the disclosure would reveal a confidence of the Executive Council or any of its committees, including...

(b) a record containing advice, analyses, policy options, proposals, recommendations, or requests for direction submitted, or prepared for submission, to the Executive Council or its committees;

Analysis

Paragraph 15(1)(b)

[23] Paragraph 15(1)(b) is a mandatory exemption provision. Its purpose is to prevent the release of information which may disclose a confidence of the Executive Council or its

committees. If it applies to the information sought by the Applicant then the Department has no discretion about whether to disclose it; it must not.

[24] Having reviewed Record 2, it consists of four pages of budget variance notes from various departments.

[25] Having reviewed Records 11 to 17, they consist of a letter and draft policy papers.

[26] All 148 pages of the aforementioned Records appear, on the face of it, to fall clearly within the purview of advice, analyses, policy options, proposals, recommendations, or request for direct.

Conclusion

[27] In light of the forgoing, I find that the Department has met its burden of proof to establish that a disclosure of Records 2, and 11 to 17 would be contrary to paragraph 15(1)(b).

[28] Issue 2 – Is the Department required by subsection 15(1)(d)(ii) of the Act to withhold, in full, 6 pages of the Records sought by the Applicant in the Access Request?

[29] The Department is relying on subparagraph 15(1)(d)(ii) to refuse, in part, the Applicant access to the Records. The provision states as follows:

Relevant Law

15 (1) A public body must refuse to disclose a record to an applicant if the disclosure would reveal a confidence of the Executive Council or any of its committees, including...

(d) a record prepared to brief a Minister in relation to matters that...

(ii) are the subject of consultations among Ministers relating to the making of government decisions or the formulation of government policy.

Analysis

Paragraph 15(1)(d)(ii)

[30] Paragraph 15(1)(d)(ii) is a mandatory exemption provision. Its purpose is to prevent the release of information which may disclose a confidence of the Executive Council or its

committees. If it applies to the information sought by the Applicant, then the Department has no discretion about whether to disclose it; it must not.

[31] The record in question, Record 20, is a six-page confidential briefing note produced for a Minister. As such it falls clearly within the bounds of the paragraph 15(1)(d)(ii) exemption to the general rule of disclosure.

Conclusion

[32] For these reasons, I find that the Department has met its burden of proof to establish that the paragraph 15(1)(d)(ii) exemption applies to Record 20.

Issue 3 – Is the Department authorized by subsection 16(1)(b) of the Act to withhold, in full, 21 pages of the Records sought by the Applicant in the Access Request?

The Department is relying on subparagraph 16(1)(b) to refuse, in part, the Applicant access to the Records. The provision states as follows

Relevant Law

16 (1) A public body may refuse to disclose information to an applicant if the disclosure would reveal...

(b) consultations or deliberations involving officers or employees of a public body or a Minister relating to the making of government decisions or the formulation of government policy;

Analysis

Paragraph 16(1)(b)

[33] Paragraph 16(1)(b) is a discretionary exemption provision; its purpose is to prevent the release of information which may disclose consultations or deliberations involving officer, employees, or Ministers relating to the making of government decisions and policy.

[34] Having reviewed records 5, 6, and 7 of the Records, they contain the results of employee surveys conducted by various Departments.

[35] The department has provided no submissions on how the results of such surveys constitutes a consultation or deliberation.

[36] Even in the event that the survey results did constitute such a consultation or deliberation, paragraph 16(2)(c) requires the Department to disclose the results of a statistical survey even should it satisfy the criteria of a paragraph 16(1) exception to disclosure.

[37] As I have found above that the Department is not entitled to rely on paragraph 16(1)(b), it is not necessary to analyse whether such discretion was reasonably acted upon.

Conclusion

[38] For these reasons, I find that the Department has failed its burden of proof to establish a reasonable possibility of harm pursuant to paragraph 16(1)(b).

Issue 4 – Is the Department authorized by subsection 17(1)(b) of the Act to withhold, in full, 2 pages of the Records sought by the Applicant in the Access Request?

[39] The Department is relying on subparagraph 17(1)(b) to refuse, in part, the Applicant access to the Records. The provision states as follows:

Relevant Law

17 (1) A public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the Government of the Yukon or the ability of that Government to manage the economy, including the following information...

(b) financial, commercial, scientific or technical information that belongs to a public body or to the Government of the Yukon and that has, or is reasonably likely to have, monetary value;

Analysis

Paragraph 17(1)(b)

[40] Paragraph 17(1)(b) is a discretionary exemption provision; its purpose is to prevent the release of information which may cause harm to the financial or economic interests of a Government of Yukon public body including the release of records which may have monetary value.

[41] The Department claims the provision over pages 23-25 of Record 1 of the Records. Having reviewed the pages, they appear to be a draft of roles assigned to different position in a procurement process.

[42] The Department submits that the harm is the release of a draft copy which has since been modified. The department makes no submissions on how this constitutes harm.

[43] Even in the event that the harm incurred by the release of the three pages was self evident, the Department makes no submissions on the monetary value of the records, as required by the paragraph.

[44] As I have found above that the Department is not entitled to rely on paragraph 17(1)(b), it is not necessary to analyse whether such discretion was reasonably acted upon.

Conclusion

[45] For these reasons, I find that the Department has failed its burden of proof to establish a reasonable possibility of harm pursuant to paragraph 17(1)(b).

Issue 5 – Is the Department authorized by subsection 17(1)(c) of the Act to withhold, in full, 21 pages of the Records sought by the Applicant in the Access Request?

[46] The Department is relying on subparagraph 17(1)(c) to refuse, in part, the Applicant access to the Records. The provision states as follows:

Relevant Law

17 (1) A public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the Government of the Yukon or the ability of that Government to manage the economy, including the following information...

(c) plans that relate to the management of personnel of, or the administration of, a public body and that have not yet been implemented or made public;

Analysis

Paragraph 17(1)(c)

[47] Paragraph 17(1)(c) is a discretionary exemption provision; its purpose is to prevent the release of information which may harm the financial or economic interests of the Government of Yukon by way of releasing information that relates to the management of personnel or the administration of a public body.

[48] Having reviewed records 5, 6, and 7 of the Records, they contain the results of employee surveys conducted by various Departments.

[49] The department has provided little information on the type or nature of harm that may occur as a result of the release of these records – simply stating that the release is the harm. While I can see a connection between the administration of a public body and the results of these surveys, it is unclear, absent submissions on the point, the nature or likelihood of harm occurring should the records in question be released.

[50] As I have found above that the Department is not entitled to rely on paragraph 17(1)(c), it is not necessary to analyse whether such discretion was reasonably acted upon.

Conclusion

[51] For these reasons, I find that the Department has failed its burden of proof to establish a reasonable possibility of harm pursuant to paragraph 17(1)(c).

Issue 6 – Is the Department authorized by subsection 17(1)(e) of the Act to withhold, in full, 8 pages of the Records sought by the Applicant in the Access Request?

[52] The Department is relying on subparagraph 17(1)(e) to refuse, in part, the Applicant access to the Records. The provision states as follows:

Relevant Law

17 (1) A public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the Government of the Yukon or the ability of that Government to manage the economy, including the following information...

(e) information about negotiations carried on by or for a public body or the Government of the Yukon;

Analysis

Paragraph 17(1)(e)

[53] Paragraph 17(1)(e) is a discretionary exemption provision; its purpose is to prevent the release of information which may damage or interfere with negotiations carried on by or for the Government of Yukon or any Yukon public body.

[54] Having reviewed record 18 of the Records, it consists of an option paper regarding revenue sharing agreement(s) being considered by the Government of Yukon.

[55] The Department makes no submissions on this matter. In the absence of submissions, I decline to speculate on the ways in which the release of such a document may harm ongoing negotiations. I take this opportunity to remind the Department that claiming harm is not in and of itself evidence and more substance must be provided.

[56] As I have found above that the Department is not entitled to rely on paragraph 17(1)(e), it is not necessary to analyse whether such discretion was reasonably acted upon.

Conclusion

[57] For these reasons, I find that the Department has failed its burden of proof to establish a reasonable possibility of harm pursuant to paragraph 17(1)(e).

VIII FINDINGS

Issue 1

[58] I find that the Department has met its burden of proof to establish that the paragraph 15(1)(b) exemption applies to the Records indicated.

Issue 2

[59] I find that the Department has met its burden of proof to establish that the paragraph 15(1)(d)(ii) exemption applies to Record 20.

Issue 3

[60] I find that the Department has failed its burden of proof to establish a reasonable possibility of harm pursuant to paragraph 16(1)(b).

Issue 4

[61] I find that the Department has failed its burden of proof to establish a reasonable possibility of harm pursuant to paragraph 17(1)(b).

Issue 5

[62] I find that the Department has failed its burden of proof to establish a reasonable possibility of harm pursuant to paragraph 17(1)(c).

Issue 6

[63] I find that the Department has failed its burden of proof to establish a reasonable possibility of harm pursuant to paragraph 17(1)(e).

IX RECOMMENDATIONS

Issue 1

[64] As subparagraph 15(1)(b) applies, the Department Head must not disclose the Records to the Applicant, as requested.

Issue 2

[65] As subparagraph 15(1)(d)(ii) applies, the Department Head must not disclose Record 20 to the Applicant, as requested.

Issue 3

[66] As subparagraph 16(1)(b) does not apply, I recommend that the Department Head disclose Records 5, 6, and 7 to the Applicant, as requested.

Issue 4

[67] As subparagraph 17(1)(b) does not apply, I recommend that the Department Head disclose pages 23-25 of Record 1 to the Applicant, as requested.

Issue 5

[68] As subparagraph 17(1)(c) does not apply, I recommend that the Department Head disclose Records 5, 6, and 7 of the Records to the Applicant, as requested.

Issue 6

[69] As subparagraph 17(1)(e) does not apply, I recommend that the Department Head disclose Record 18 to the Applicant, as requested.

Department Head's Response to Inquiry Report

[70] Section 58 of the Act require the Department to decide, within 30 days or receiving this Inquiry Report, whether to follow my recommendations. The Department must give written notice of its decision to me and the parties who receive a copy of this report, noted on the distribution list below.

[71] 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 recommendations.

[72] If the Department does not follow my recommendations, then it must inform the Applicant, in writing, of their right to appeal that decision to the Yukon Supreme Court.

Applicant's Right of Appeal

[73] Paragraph 59(1)(a) gives the Applicant the right to appeal to the Yukon Supreme Court if the Department Head rejects a recommendation or is considered to have done so.



Jason Pedlar, B.A., M.A.
Information and Privacy Commissioner
Office of the Information and Privacy Commissioner

Distribution List:

- Department Head
- Applicant