



Yukon
Information
and Privacy
Commissioner

INQUIRY REPORT
File ATP16-004AR
Pursuant to section 52 of the
Access to Information and Protection of Privacy Act

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

Public Body: Department of Tourism and Culture (Department)

Date: October 17, 2016

Summary:

The Applicant made a request to access records in the custody or control of the Department. These records contained the results of a survey of visitors to Yukon in the summer of 2012 and winter of 2012/13. The records contain information from over 4000 visitors, have over 700 columns, and more than two million fields of data. The Department refused access citing paragraphs 16 (4)(b) and 17 (1)(b) as their authority. The IPC found the Department had not established their authority to refuse access under these paragraphs. She then went on to evaluate if subsection 25 (1), a mandatory exception, applied to information in the records even though she had received no submissions from the Department on the application of this subsection, nor its views on what personal information should be severed to avoid disclosing personal information that would be an unreasonable invasion of the survey respondents' personal privacy. The IPC found some of the survey respondents to be identifiable and that subsection 25 (1) applied to some of the personal information in the records. She provided guidelines on severing due to the amount of information in the records and their nature. She recommended the Department disclose the records to the Applicant after severing personal information from them according to the guidelines. The IPC also reminded the

Department that properly applying exceptions, particularly those that are mandatory, is part of their duty to assist an applicant and the failure to cite an exception that may apply to information in records requested under the ATIPP Act impacts on applicants' rights including their right to effective review by the IPC.

Statutes Cited:

Access to Information and Protection of Privacy Act, RSY 2002 c.1, subsections 16 (1), (2) and (4) and paragraph 16 (4) (b), subsection 17 (1), and sections 5, 7, 10 and 25.

Cases Cited:

Inquiry Report 10-019AR, Yukon Energy Corporation, April 4, 2012, (YT IPC) at para. 30.

Order F08-07 (Additional to Order F08-03) Ministry of Public Safety & Solicitor General, March 20, 2008, 2008 CanLII 13325 (BC IPC), at para. 16.

Inquiry Report ATP15-055AR, Department of Justice, June 8, 2016 (YT IPC) at para. 116.

Order F-08-03 Ministry of Public Safety & Solicitor General, January 31, 2008, 2008 CanLII 13321 (BC IPC), at para. 80.

Order F08-07 (Additional to Order F08-03) Ministry of Public Safety & Solicitor General, March 20, 2008, 2008 CanLII 13325 (BC IPC), at para. 16.

Order 97-002, Family and Social Services, 1997 canlii 15913 (AB OIPC), at para. 24.

Explanatory Notes:

All statutory provisions referenced below are to the *Access to Information and Protection of Privacy Act* (ATIPP Act) unless otherwise stated.

I BACKGROUND

[1] In a request for access to records form (Access Request) dated December 28, 2015, the Applicant requested the following records from the Department.

1. *File name: VTP Summer Main Final Dataset to T&C Mar 11, 2014.sav...*
2. *File name: Winter Main dataset sent to T&C Jan10.sav...*
("Records" or "Datasets")

[2] In a letter dated January 8, 2016 addressed to the Applicant, the Records Manager confirmed receipt of the Access Request and informed the Applicant that their Access Request had been forwarded to the Department. In that letter, the Records Manager identified the deadline for response as February 8, 2016.

[3] In a letter dated February 12, 2016¹ addressed to the Applicant, the Records Manager responded to the Applicant's Access Request by informing them that the Department refused access to the Records.

[4] On March 8, 2016, the Applicant submitted a request for review to my Office requesting a review of the Department's decision to refuse access to the Records. Mediation was authorized but it was not successful.

[5] On May 30, 2016, a Request for Inquiry was received from the Applicant and on June 6, 2016, I decided to conduct the Inquiry under section 52 of the ATIPP Act.

II INQUIRY PROCESS

[6] A Notice of Written Inquiry dated June 7, 2016 was sent to the parties. Initial submissions were received from the Applicant on July 11, 2016, and from the Department on July 15, 2016. The submissions were shared with each party and on July 26, 2016 and July 28, 2016, respectively, the parties reply submissions were received.

¹ I note here that the Records Manager's response was beyond the deadline of February 8, 2016, and there is no evidence before me indicating that the Records Manager extended the response deadline. There is evidence in an email dated February 12, 2016 at 3:34 PM that states "The ATIPP office staff apologizes for the lateness of the response..." This evidence supports that the Records Manager delivered the response beyond the 30 day deadline allowed for a response under subsection 11 (1). This means that as of February 9, 2016, the Department was deemed to have refused the request for access to the Records under section 49. Eventually, on February 12, 2016, the Department did refuse access to the Records. The request for review in this case was of a refusal by a public body to grant access to records. Given that the Department in the end did refuse access to the Records, the operation of section 49 in this case does not alter my authority to review this matter.

III JURISDICTION

[7] Paragraph 48 (1)(a) authorizes me to review a refusal by a public body to grant access to a record requested by an applicant. Subsection 52 (1) authorizes me to conduct an Inquiry and decide all questions of fact and law arising in the course of an Inquiry.

[8] The Department is a public body as defined in section 3 of the ATIPP Act. In response to the Applicant's Access Request for the Records, the Department refused access. Given this, I have authority under paragraph 48 (1)(a) to conduct an Inquiry in order to determine whether the Department's decision to refuse this access was authorized by the ATIPP Act.

IV ISSUES

[9] The Notice of Written Inquiry sent to the parties identified two issues in this Inquiry:

1. Does paragraph 16 (4)(b) of the ATIPP Act authorize the Department of Tourism and Culture to refuse the Applicant with access to the Records?
2. Does paragraph 17(1)(b) of the ATIPP Act authorize the Department of Tourism and Culture to refuse the Applicant with access to the Records?

V RECORDS AT ISSUE

[10] The records at issue in this Inquiry, which are identified in paragraph 1 of this Inquiry Report, are two digital Datasets prepared by the Department after it gathered information by surveying visitors of Yukon in the summer of 2012 and winter of 2012/13.²

VI BURDEN OF PROOF

[11] Section 54 sets out the burden of proof on parties to an Inquiry.

² The survey was conducted by the Department through the use of a contracted service provider.

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

(a) that the applicant has no right of access to the record or the part of it in question, or

(b) that the extension of time is justifiable.

(2) Despite subsection (1), in a review of a decision to give an applicant access to all or part of a record containing information that relates to a third party,

(a) if the information is personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy; and

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

[12] Given that this review is of the Department's refusal to provide the Applicant access to the Records, as identified in paragraph 54 (1)(a) the burden is on the Department to prove that the Applicant has no right of access.

VII DISCUSSION OF ISSUE

[13] In its submissions, the Department indicated it is relying on paragraphs 16 (4)(b) and 17 (1)(b) to refuse access. The relevant portions of these provisions are set out below.

Policy advice, recommendations or draft regulations

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

(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a Minister;

(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;

(c) a pending policy or budgetary decision of a public body;

(d) the content of a draft Act, a draft regulation or a draft order of a Minister or of the Commissioner in Executive Council

(e) the content of a draft audit report prepared by the auditor general or any other prescribed person or body for audit purposes.

(2) A public body must not refuse to disclose under subsection (1)

(c) a statistical survey;

(4) Despite paragraph (2)(c), a public body

(b) shall refuse to disclose any portion of a survey that would reveal personal information and likely identify the person the personal information is about.

Disclosure harmful to the financial or economic interests of a public body

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;

Other provisions of the ATIPP Act that are relevant to the issue are as follows.

Right to information

5 (1) A person who makes a request under section 6 has a right of access to any record in the custody of or under the control of a public body, including a record containing personal information about the applicant.

(2) The right of access to a record does not extend to information that is excepted from disclosure under this Part, but if that information can reasonably be separated or obliterated from a record an applicant has the right of access to the remainder of the record.

Policy Advice, Recommendations or Draft Regulations

Does paragraph 16 (4)(b) authorize the Department to refuse to provide the Applicant with access to the Records?

[14] The Department submitted the following about its authority to refuse to disclose the Records to the Applicant in reliance on paragraph 16 (4)(b).

The information within the two requested data sets, which includes respondents' postal codes, household income, educational history, employment status and personal evaluations of amenities, activities and locations within Yukon, was collected in confidence. All survey participants were assured that their survey responses would remain anonymous and confidential, and that the detailed information from the surveys would be used for tourism development and marketing purposes by the [Department]. They completed the surveys with the understanding that their responses would not be shared with third parties and that they would not be personally identified.

While the applicant has stated that they are not requesting the 'postal codes' or 'open text fields' from the Datasets, a person (survey respondent) may be identified using a combination of responses containing personal information such as education, employment, income, age, gender, postal code, or travel information such as where and how long they stayed in a certain community. With more than 500 variables, the Datasets contain a significant amount of information that could lead to the identification of the person or people the personal information is about.

[15] Attached to the Department's submissions is a letter from the Director of Yukon Bureau of Statistics (YBS) who indicates his support for the Department's view that the information in the Datasets could be used to identify an individual the information is about.

[16] The Applicant's submission in respect of the application of paragraph 16 (4)(b) was, essentially, that are "no personal identifiers" in the Datasets. They acknowledge there may be personal information in the open-ended questions and confirm they are not requesting these questions.

[17] In reply to the Applicant's submission, the Department submitted that they disagree with the Applicant about there not being personal identifiers in the Datasets and go on to quote the comments made by the Director of YBS in support of his position that the information in the Datasets qualifies as personal information.

[18] In reply to the Department's submission, the Applicant stated the following.

Much has been said about the personal identifiers (PII). In the appendix is a list of PII's – and none of those primary variables are included in this dataset. Of the secondary list, only age and gender are in the requested data set (zip code has already been removed from the request). Age is only the year, not the date of birth. With only age and gender, even the addition of trip information would not make it possible to identify any individual. The most specific example might be a 50 year old woman from Rhode Island who visited the Yukon in June 2012. That would not lead to any individual.

The Yukon Bureau of Statistics included Education and Employment and Income on their list of demographic identifiers. We would not agree that those are personal identifiers, but would agree to removing those three variables if required to do so.

[19] In order for the Department to rely on paragraph 16 (4)(b) it would first need to establish that disclosure of the records to the Applicant would reveal one of those items listed in paragraphs 16 (1)(a) through (e). If the information would reveal one of those items, they would then need look to subsection 16 (2) to determine if the information that would reveal one of those items in subsection 16 (1) is any of the information identified in paragraphs 16 (2)(b) through (n).³ A statistical survey is identified in paragraph 16 (2)(c). If the information is listed in subsection 16 (2), the Department "must not refuse" to disclose the information even though it may reveal one of those items in subsection 16 (1). If the information is a statistical survey, the Department would need to determine if there is any personal information in the survey. If so, paragraph 16 (4)(b) would require it to remove personal information prior to disclosure if identification of a person is likely.

[20] It appears to me that the Department misunderstood the application of section 16 given that their only submissions are about the application of paragraph 16 (4)(b). They did not provide any submissions on what paragraph of subsection 16 (1) applies. Based on their submissions, they appear to be of the view that they could apply paragraph 16 (4)(b) independently of the rest of the section. This is an incorrect application of this section. Given that I have no submissions from the Department regarding subsection 16 (1), it has not established that section 16 authorizes them to refuse the Applicant access to the Records.

³ Paragraph (a) in subsection 16 (2) is repealed.

[21] I will note here that even if the Department could rely on section 16 to refuse to disclose the Records to the Applicant, which I have found they cannot, paragraph 16 (4)(b) requires a public body to “refuse to disclose any portion of a survey that would reveal personal information and likely identify the person the personal information is about” [My emphasis]. This paragraph requires a public body to identify the portions of the survey that would both reveal personal information and likely identify an individual and remove those portions from the survey.

[22] Other than making generalizations about the ability to identify individuals in reference to certain columns of information and the amount of information contained in the survey, the Department did not provide any specific submissions about what portions of the survey they could remove to avoid disclosing personal information and instead chose to refuse access to both Records entirely. This is not what is contemplated by this paragraph and is contrary to the Applicant’s right of access to information in the custody or control of the Department under subsection 5 (2). This subsection gives the Applicant the right to the remainder of a record once information that is excepted from disclosure is removed.

Disclosure Harmful to the Financial or Economic Interests of a Public Body

Does paragraph 17 (1)(b) authorize the Department to refuse the Applicant access to the Records?

[23] The Department takes the view that if it discloses the Records to the Applicant, it or Yukon government will suffer financial or economic harm or be unable manage the economy. The reason provided in support of this view is that disclosure of the Records will result in their inability to lead the enhancement, development and promotion of Yukon as a tourism destination. They emphasize that this harm will occur if the Datasets are provided to outside agencies or rival destinations.

[24] In its submissions, the Department indicated it is necessary to keep the Datasets confidential “due to the highly competitive nature of the tourism sector” which drives their need for confidentiality in order to “ensure they can best position their destination and strengthen their tourism economy.” In support of this position, the Department indicated the following.

Destinations across the world compete heavily with each other in order to maintain their attractiveness and competitiveness in the global tourism sector. In order to do so, it is necessary for destination authorities, like Tourism Yukon,

to be able to address the different needs of different market segments, as well as promote their image and manage their destination in a way that attracts visitors. To remain competitive, destinations invest significant amounts of money in market research and even more money to utilize that intelligence to design and launch relevant and targeted marketing initiatives that resonate with potential visitors.

Attracting visitors to Yukon is challenging because it is a niche destination with a narrow market segment and an extremely small budget (relative to other destinations). Other issues impacting tourism in the north include access, both in terms of availability and cost, capacity, sustainability and affordability. These constraints impact travel decision making for potential visitors, their travel habits, their travel decision making processes and considerations and their social values in order to position Yukon as a destination they want to visit.

[The information collected] from visitors to Yukon has informed the direction and decisions of Tourism Yukon...and has led to the development and implementation of countless investments in tourism development and marketing initiatives. This consumer intelligence guides the department, provides insight for Yukon's small business owners and assists organizations with initiatives to enhance and increase visitation to Yukon.

[The Department] invested...approximately six times its annual tourism research budget allocation and required a strategic partnership with and investment from the federal government. Studies like this are extremely expensive and as a result, they are only conducted every 4 – 5 years (however the last one in Yukon was conducted in 2004).

The YVTP was a comprehensive survey of Yukon visitors – essentially capturing our “market intelligence” about visitors to Yukon. The results of the survey served two purposes: the first was the development of a model used to estimate the number of visitors to the territory on a monthly basis; and the second was to provide detailed insight about Yukon's visitors. Tourism Yukon uses the survey results to assess visitor and trip characteristics, assess and estimate visitor spending, and assess travel patterns, which inform the branch's product development and marketing initiatives.

The Department listed a number of summary reports it created using the Datasets and published on-line. In reference to the summary reports, it identified that “Sharing visitor intelligence at this level is common in the tourism sector.” It also indicated that organizations such as Destination Canada, Pepsi, and Coca-Cola do not share market intelligence in order to maintain competitive advantage.

[25] The Department also submitted the following.

- The Datasets are technical and complex and, therefore, disclosing them to the Applicant “would likely lead to misinterpretation, misrepresentation, or miscommunication of the survey results” [My emphasis].
- Disclosing the Datasets to the Applicant will prevent the Department from ensuring their secure storage.
- Disclosing the Datasets to the Applicant will result in a loss of visitors’ trust in maintaining the confidentiality of the Datasets and result in diminished integrity for future similar projects.
- The contract entered into with the service provider which led to the creation of the Datasets states “The Government of Yukon is the sole owner of any material produced under this contract. Any material produced under this contract cannot be used or disclosed for any purpose other than the performance of this contract without the written approval of the Government of Yukon...”

[26] On the application of paragraph 17 (1)(b) to the Datasets, the Applicant disagreed with the Department’s view that this paragraph applies and stated the following based on this view.

...The data collection and methodology was reviewed and scrutinized by the Yukon Department of Statistics...There is no question that the data sets are accurate. Any professional market research company hired to create analysis on that data should be able to replicate the results. In fact, we feel that by releasing the data, and [creating reports from it] the government’s reputation will be enhanced. Once the industry and general public recognizes the value of the information from the data collected, it will help to justify the cost of the project.

The remainder of the Applicant's submission focus on the practice of releasing data sets in the tourism industry, which the Applicant claims is done so on request. They also identify that it is their intent to create reports from the Datasets.

[27] Much of the submission received from the Department in reply to the Applicant's submission focuses on the claims made by the Applicant regarding disclosure of the data sets in the industry. Their position is that this is not the norm. They reiterate following these submissions that they have fulfilled and will continue to fulfill requests for reports using the Datasets. They also make reference again to the wording of the contract with the service provider.

[28] On the harm alleged by the Department to financial or economic interests, the Applicant's stated the following.

Clearly the most relevant section of this letter, the Department states that "Releasing this valuable information would potentially harm the financial and commercial interests of the Government of Yukon in terms of their role of leading the enhancement, development and promotion of Yukon as [sic] tourism destination..."

The only way harm can come, as they say, is IF another destination used the data and then created an entirely NEW marketing program, and then that program convinced a person to travel to their destination and NEVER travel to the Yukon. Solely based on the use of one outdated dataset? This is not at all likely. In fact, the opposite is more likely – by having the dataset available to consultants and universities (as no one else would have the software to even access the data), the businesses of the Yukon AND the Government of the Yukon would benefit by having more intelligence to use in development and promotion. We argue that by NOT releasing the data at this time, it harms the financial and commercial interests of Yukon businesses and government.

Limiting the data summaries only to meet the needs and interests of the government undermines the needs and interests of the individual businesses (which may not always be the same as the government). The government has no right to withhold information they feel does not match with their marketing plans. Obviously, when business interests and government direction aligns, there is more power in the messaging, but it is not the right of government to dictate when they must align

[29] In reply to the Department's submissions regarding market competition, the Applicant submitted the following.

While destinations do market to attract more visitors, and a great deal of money is spent on that marketing, within the tourism industry (both the U.S. and Canada), destinations are more likely to collaborate than compete. Tourism Yukon commonly partners with the State of Alaska, Tourism BC, and Destination Canada to market regionally and share market research projects. At the TTRA (Travel and Tourism Research Association) conference recently the association executive director pointed out that the branding expert they had hired commented numerous times how the members of the TTRA (of which Tourism Yukon is one), worked together, supported each other and shared information. TTRA members are not at all competitive. The ListServe (which Tourism Yukon uses), invites all members to comment and reply to questions posed by other destinations. Information is not "leaked", it is shared in this industry. We do not believe there is any risk to the government that if this data is released a "competitive" destination will use it to steal away potential visitors. In fact, by withholding the data, if they truly believe that the data can be used to attract visitors, they are withholding it from the Yukon industry, who could also use it to attract more visitors. The government is not a private sector business – they are not "Pepsi or Coca cola [sic]". The standards within private industry are not relevant to this appeal. Likely few other case studies exist like this one because the majority of destination governments readily share the dataset when asked.

[30] In reply to the Department's submission about the risks in sharing the Datasets, the Applicant stated the following.

As stated, we agree this is a rather complex dataset – however, compared to many datasets in the industry, it would be considered as standard. Nearly all datasets include weighting variables, and the user needs to know how to use the software it is stored in...it is not likely that anyone not well versed in [the software] and without knowledge of tourism research, would even contemplate creating even summary reports. That said, if some unskilled person/consultant did get the data and tried to report on it, the end-user of that information should be wise enough to check the credentials and experience of the data analyst. It is not the role of government to filter the products of consultants – that is between the consultant and their client.

[31] In reply to the Department's submission on the issue of confidentiality associated with Datasets, the Applicant essentially takes the position there is no personal information in the Datasets.

[32] In order for the Department to rely on paragraph 17 (1)(b) to refuse the Applicant access to the Record, it will need to establish that disclosure of the information in the Records, "could reasonably be expected to cause harm" to theirs or Yukon government's financial or economic interests, or the ability of Yukon government to manage the economy. They will also need to establish that the information in the Records is "financial, commercial, scientific or technical" and that this information belongs to them and has or is "reasonably likely" to have monetary value.

Could disclosure of the information in the Records reasonably be expected to cause harm to the Department's or Yukon government's financial or economic interests, or the ability of Yukon government to manage the economy?

[33] Former Commissioner, Tracy-Anne McPhee considered the meaning of subsection 17 (1) in Inquiry Report 10-019AR.⁴ In this Inquiry Report that was authored in 2010, she identified that the public body in that case had to establish a confident and objective evidentiary basis for concluding that disclosure of information could reasonably be expected to result in harm and that there must be a clear and direct connection between the disclosure of the specific information and the harm that is alleged.⁵

[34] More recently, in 2014, the Supreme Court of Canada indicated that whenever the words "reasonably expected" appear in access to information laws in Canada, the word 'probable' should be added to ensure the middle ground between 'that which is merely possible' and 'that which is probable' is achieved.⁶ Adding in the word 'probable' to the words "could reasonably be expected to harm" in subsection 17 (1) would change these words to "reasonably be expected to cause probable harm."

[35] Adding in the word 'probable' has the effect of eliminating mere speculation about whether harm will occur and requires there be some objective evidence provided by a public body to support that the harm that is alleged will or may occur. In terms of the

⁴ Inquiry Report 10-019AR, Yukon Energy Corporation, April 4, 2012, (YT IPC) at para. 30.

⁵ At paragraph 30 citing the Information and Privacy Commissioner for British Columbia's Order 02-50.

⁶ Inquiry Report ATP15-055AR, June 8, 2016, (YT IPC) at para. 116.

evidence that is necessary to make out 'probable harm' the Supreme Court of Canada stated the following.

An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach a middle ground.

This Inquiry ... is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences."

[36] The parties each made a number of submissions about the disclosure of datasets by other jurisdictions similar to those requested by the Applicant in this case, including some United States jurisdictions. I would like to highlight for the parties that the fact that one jurisdiction, in Canada or elsewhere, discloses information similar to that found in the Datasets is irrelevant to determining whether section 17 applies. The test in section 17 is whether "the Department or Yukon government" will suffer financial harm or be unable to manage the economy as a result of disclosing "the Datasets" in response to an access to information request made under the ATIPP Act.

[37] Even if every jurisdiction had the exact same legal regime for accessing information, public bodies could choose to manage disclosure of this kind of information differently. For example, one public body may, on occasion, choose to exercise their discretion to disclose the information despite having determined the section applies, or a public body may provide routine access to this kind of information outside the access to information regime. Another factor here is that the rules for accessing information for research purposes are also different, which would affect how and under what circumstances information for research may be disclosed.

[38] I would also like to address the submissions made by the Department about the contract between it and the service provider for creation of the Datasets. It is unclear to me exactly why the Department is submitting this information as part of this Inquiry given that any contract agreement entered into with a service provider about the management of information has no bearing on the ATIPP Act and the access to information provisions therein. Any person has the right to access any information that is subject to the ATIPP Act and that is in the custody or control of a public body. A public body can only refuse to provide access to requested information if one of the exceptions in the ATIPP Act apply. A public body cannot contract out of its obligations under the ATIPP Act.

[39] In terms of the application of subsection 17 (1)(b) to the Department's refusal to provide the Applicant with the Records, I find the following.

[40] Based on the evidence provided, I find that the Department has established that it or Yukon government could suffer financial or economic harm or be unable to manage the economy as a result of disclosing the Datasets to the Applicant on the basis that:

- they may lose their competitive advantage as it relates to their ability to attract visitors to Yukon if the Datasets were obtained and used to counter this endeavour,
- the potential for misinterpretation, misrepresentation or miscommunication of the Datasets exists and could lead to inaccurate information which may negative impact on tourism, or
- visitors may refuse to participate in a future survey or provide false answers if they cannot be assured about non-disclosure and fear information about them could lead to their identification and be disclosed.

[41] The Department has not, however, made out that the harm alleged is probable. The evidence provided by the Department cannot be considered 'well beyond' or 'considerably above' a mere possibility of harm. In my view, the evidence provided only establishes that the harm alleged is a mere possibility. Given this, I find that the Department cannot rely on subsection 17 (1) to refuse to disclose the Datasets to the Applicant. As a result of this decision, I will not go on to determine if the Datasets qualify as the kind of information described in paragraph 17 (1)(b).

Disclosure Harmful to Personal Privacy

[42] The Department did not identify that it is relying on subsection 25 (1) for refusing to provide the Applicant the Records. Nor did it make any submissions regarding the application of this provision. I find this troubling given their view that the Datasets contain personal information and this provision is mandatory. This subsection requires a public body to refuse to disclose personal information to an applicant if disclosure would be an unreasonable invasion of a third party's personal privacy. However, as this provision is mandatory, I must consider whether the Records, which comprise over two million data fields, contain any personal information to which subsection 25 (1) applies without the benefit of submissions from the Department on what information needs to be severed from the Records to avoid disclosing personal information that would be an unreasonable invasion of a third party's personal privacy.

[43] In Order F08-03,⁷ former Information and Privacy Commissioner for British Columbia, David Loukidelis, faced a similar situation when the public body failed to make any submissions regarding the application of section 22 to thousands of records under British Columbia's *Freedom of Information and Protection of Privacy Act* (BC FIPPA). Section 22 is similar to our section 25. His comments about the approach he would take in applying this section in those circumstances follow.

I do not have the benefit of any specific s. 22 severing by the Minister. Therefore, at this point, I can only consider the application of s. 22 to the information in the records in a general way, as a means of providing the Ministry with guidance as to what severing should occur before the remainder of the requested information is released to the applicant.

[44] His comments regarding the Ministry's failure to provide submissions on section 22 of BC FIPPA, were as follows.

Section 22, is again, a mandatory exception that cannot be ignored. The Ministry was and is obligated to apply s. 22 for that reason. The Ministry is, further, duty-bound, as part of its duty under s.8(1)⁸, to tell the applicant the reasons for refusing access, including by specifying the FIPPA provisions under which access is denied. The Ministry also has a duty under s. 6 (1)⁹ to "make every reasonable effort to assist an applicant and to respond without delay to each applicant openly, accurately and completely". These provisions are not mere words, wishes or aspirations. They are legal obligations that the Legislature intended to have real meaning and that the Ministry is to take seriously. The Ministry's obligation to apply s. 22 when considering its response to an access request is also crucial to an applicant's right to request a review of a decision refusing access. How can decisions to refuse access to information be reviewed effectively if public bodies do not articulate what disclosure exceptions they have applied and to what information?¹⁰

⁷ Order F-08-03 *Ministry of Public Safety & Solicitor General*, January 31, 2008, 2008 CanLII 13321 (BC IPC), at para. 80.

⁸ This subsection is the same as subsection 13 (1) of the ATIPP Act.

⁹ This subsection is similar to the requirements section 7 together with section 10 of the ATIPP Act.

¹⁰ Order F08-07 (Additional to Order F08-03) *Ministry of Public Safety & Solicitor General*, March 20, 2008, 2008 CanLII 13325 (BC IPC), at para. 16.

[45] I echo these same comments in respect of the Department. The Department is under the same obligations and duties under the ATIPP Act as the Ministry was under BC FIPPA. The Department must ensure that it is meeting these obligations effectively to ensure the right to access information in its custody or control and the ability of my office to provide effective oversight is not hampered by the Department's improper application of the ATIPP Act.

[46] As the Records in this case contain a significant amount of information and I have not been provided with the Department's views on what needs to be severed from them under subsection 25 (1), I can only consider the application of this subsection in a general way and provide the Department with guidance as to what severing should occur before providing the remainder of the Records to the Applicant.

Do the Records contain personal information that if disclosed to the Applicant would constitute an unreasonable invasion of a third party's personal privacy?

[47] As indicated above, in its submissions on the application of paragraph 16 (4)(b), the Department expressed its view that there is personal information in the Datasets, namely, postal codes, household income, educational history, employment status, and personal evaluations of amenities and locations within Yukon. They also indicated that the identity of a survey respondent could be ascertained "using a combination of responses containing personal information, such as education, employment, income, age, gender, postal code or travel information such as where and how long they stayed in a certain community."

[48] Also, as indicated above, in their submissions the Applicants take the view that the Datasets "contains no personal identifiers." They also indicated they are not requesting postal codes or the fields containing open-ended questions. They also agreed to remove from their access request the personal identifiers mentioned by the YBS (education, employment and income) "if required to do so."

[49] 'Personal information' is defined section 3 of the ATIPP Act as follows.

"personal information" means recorded information about an identifiable individual, including

(a) the individual's name, address, or telephone number,

(b) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,

(c) the individual's age, sex, sexual orientation, marital status, or family status,

(d) an identifying number, symbol, or other particular assigned to the individual,

(e) the individual's fingerprints, blood type, or inheritable characteristics,

(f) information about the individual's health care history, including a physical or mental disability,

(g) information about the individual's educational, financial, criminal, or employment history,

(h) anyone else's opinions about the individual, and

(i) the individual's personal views or opinions, except if they are about someone else;

[50] As described above, the Records or Datasets are sets of data that were created from the results of a survey conducted of visitors to Yukon in the summer of 2012 and winter of 2012/13. The summer visitors Dataset contains information gathered from over 3000 visitors and for each visitor there are up to 532 columns of information that could potentially be gathered for each visitor.¹¹ The winter visitors Dataset contains information gathered from over 300 visitors and for each there are up to 292 columns of information.¹²

[51] For each visitor whose survey responses (Survey Respondent) appear in the Dataset there is a significant amount of detail about their visit including the month they arrived, how they arrived, if by air the airline they arrived on, the number of people in their party, whether their party was comprised of adults only or included kids, their length of stay and purpose of visit (business or leisure), where they live, where they visited in Yukon and Alaska, where they stayed including with friends and family, what activities they did with specific information about the activities, how much money they spent and on what they spent their money, their favorite destinations, comments about their experience, their first language, the year they were born, their age, their gender, the level of university they achieved, their employment status or if they are retired, their income

¹¹ Not all columns are filled in for each visitor interviewed.

¹² *Ibid.*

range and average, and the number of people in their household who contribute to income.

[52] In the comments columns of the Datasets, some visitors identified the names of people they stayed with. Others revealed enough information in those comments that the individual who wrote the comments could easily be identified by those who know them. There is a column that contains the responses of visitors who identified that they had stayed with family or friends. Any of these family or friends could, together with the rest of the information about the individual, identify the individual. Other information in the Datasets is unique enough that together with the rest of the information about the individual in the Dataset could be identified by combining this information with other information accessible in Yukon or elsewhere including by combining the information with other publicly available information.

[53] Based on the foregoing, I find that the Datasets contain personal information. Given this, I must determine if releasing this information to the Applicant would be an unreasonable invasion of any of the Survey Respondent's personal privacy.

[54] Subsection 25 (1) does not prohibit a public body from any disclosing any personal information about a third party in a record. The prohibition in this subsection is on disclosing personal information to an Applicant that would be an unreasonable invasion of a third party's personal privacy. Given this, if I find that disclosing any of the Survey Respondent's personal information in the Records to the Applicant would be an unreasonable invasion of their personal privacy, then the Department will be required to sever this information from the Records before disclosing them to the Applicant.

Would disclosure of third party personal information contained in the Records be an unreasonable invasion of a third party's personal privacy?

[55] Subsection 25 (2) creates a rebuttable presumption about when the disclosure of personal information would constitute an unreasonable invasion of personal privacy.

(2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment, or evaluation;

(b) the personal information was compiled and is identifiable as part of an investigation into or an assessment of what to do about, a possible violation

of law or a legal obligation, except to the extent that disclosure is necessary to prosecute the violation or to enforce the legal obligation or to continue the investigation;

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

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

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

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

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

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

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

[56] Subsection 25 (3) identifies a number of circumstances in which disclosure of a third party's personal information would not be an unreasonable invasion of the third party's personal privacy.

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

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

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

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

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

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

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

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

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

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

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

[57] Subsection 25 (4) sets out what must be considered before deciding, based on the presumption under subsection (2) or otherwise, that the disclosure of the personal information would constitute an unreasonable invasion of a third party's personal privacy.

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

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

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

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

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

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

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

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

[58] To begin with, I examined the personal information in the Records to determine if any of the circumstances identified in subsection 25 (3) apply and find they do not.

[59] I then examined the personal information to determine if any of the circumstances identified in subsection 25 (2) apply to this information and find paragraphs 25 (2)(d) and (f) apply. More specifically, I find that subsection 25 (2)(d) applies to those Survey Respondents who can be identified and who provided their level of education achieved given that this information qualifies as personal information that relates to an individual's educational history. I find that subsection 25 (2)(f) applies to those Survey Respondents who can be identified and who provided information about their income and spending while in Yukon given that this information qualifies as personal information that describes an individual's income and financial history or activities.

[60] The Department indicated that personal evaluations are personal information. I agree with the Department that a personal evaluation of an identifiable individual would be their personal information. Under paragraph 25 (2)(g), a public body can presume that disclosure of personal information that "consists of personal recommendations or evaluations, character references or personnel evaluations" would constitute an unreasonable invasion of personal privacy to a third party if this information were disclosed to an applicant.

[61] The meaning of "personal evaluation" in this provision has been considered by British Columbia's, Ontario's and Alberta's Information and Privacy Commissioners (IPCs). All took the view that this provision should be interpreted as raising a presumption concerning recommendations, evaluations or references about the identified individual in question, rather than by the individual.¹³ British Columbia's IPC added that the evaluation must be provided by someone other than that third party.¹⁴ I agree that this is the proper interpretation of paragraph 25 (2)(g). Given this, I find that the personal evaluations that

¹³ Order 97-002, *Family and Social Services*, 1997 canlii 15913 (AB OIPC), at para. 24.

¹⁴ *Ibid.*, at para. 25.

were given by the Survey Respondents were not the kind contemplated by paragraph 25 (2)(g). Therefore, I find that this paragraph does not apply to this personal information.

[62] In regards to the other third parties who were identified by the Survey Respondents in the open text comments columns, I question whether the Department had authority to collect this information.

[63] To have authority, the Department would need to identify its authority under section 29 to collect this information and it would also need to identify its authority to collect this information indirectly, which occurred in this case given that the personal information was collected from the Survey Respondents. It may be that the Department inadvertently collected this information given their inability to control what information was entered by a Survey Respondent into the open text field of the on-line survey.¹⁵ If the Department determined it did not have authority to collect this information or to indirectly collect it, it was incumbent on the Department to immediately remove this information from the survey once they realized they had inadvertently collected this information.

[64] I would be very concerned about the Department disclosing personal information as part of an access request when it should not, for lack of authority, have custody or control of the personal information. Fortunately, I do not need to make a decision about the application of subsection 25 (1) to this information given that the Applicant indicated in their submission that they have removed from their request access to the open ended questions, which includes any information contained in the comments columns.

[65] As to the employment information. The Datasets do not contain “employment history” about a third party. Rather, they contain their employment status, i.e. if employed, retired or not employed (student, unemployed, parenting, disabled). Given this, I find that paragraph 25 (2)(d) does not apply to this information. Nor do I think disclosing this personal information would constitute an unreasonable invasion of a Survey Respondent’s personal privacy and I find it would not.

[66] Having considered the columns containing age, year of birth and the self-identified type of explorer, in my view, disclosing this information would constitute an unreasonable invasion of those Survey Respondents who are identifiable and provided this information,

¹⁵ In the 2012/2013 Yukon Visitor Tracking Program: Visitor Segmentation Report located on the Department’s website at http://www.tc.gov.yk.ca/publications/2012-2013_YVTP-Visitor_Segmentation_Report.pdf it indicates on page two that the detailed surveys were completed online.

as this information may cause them embarrassment or result in discrimination based on age which could lead to other harms.

[67] Given my findings and views above about whether disclosing some of the personal information in the Datasets would constitute an unreasonable invasion of personal privacy for those Survey Respondents who are identifiable, I must go on to determine if there are any circumstances in subsection 25 (4) that weigh in favor or against disclosure of the information to the Applicant.

[68] The Department submitted that the survey respondents were informed that the survey results were confidential. They did not, however, provide me with any evidence in support of this assertion. As a result, I cannot conclude that the circumstances in paragraph 25 (4)(c) apply and find it does not.

[69] I find that paragraph 25 (4)(a) weighs in favour of non-disclosure of the identifiable Survey Respondents' ages, years of birth and kinds of explorers they are given that disclosure of this information to the Applicant may unfairly expose them to harm.

[70] Having reviewed the remaining circumstances of subsection 25 (4), and based on the evidence before me, I find that none of those circumstances apply to the remaining personal information.

[71] As a result of my findings in respect of the application of subsection 25 (1) to the personal information abovementioned, the subsection 25 (1) guidelines that are to govern the Departments severing of third party personal information from the Records are as follows.

1. the fields containing the level of education, information about income and spending, age, year of birth, and type of explorer should be severed where the Survey Respondent also provided that they stayed with family or friends;
2. the fields containing the level of education, information about income and spending, age, year of birth, and type of explorer should be severed where the Survey Respondent can be identified:
 - i. as a result of unique information provided in the survey response, or
 - ii. through combining the survey information with other accessible information in Yukon or elsewhere.

[72] Also, for clarity, the postal code column is to be severed from the Records given it did not form part of the Applicant's access request. And, based on the Applicant's submissions, any column in the Datasets containing open text should also be severed from the Records given that the Applicant indicated they were removing this information from their access request.

VIII FINDINGS

[73] On the issues in this Inquiry, I find as follows.

1. The Department is not authorized by paragraph 16 (4)(b) to refuse the Applicant access to the Records.
2. The Department is not authorized by paragraph 17 (1)(b) to refuse the Applicant access to the Records.
3. The Department is neither authorized no required to refuse access to the Records under subsection 25 (1).

IX RECOMMENDATION

[74] Given my findings in relation to subsection 25 (1), I recommend the Department give the Applicant access to the information the Records that the Applicant is entitled to after severing the personal information from the Records according to the guidelines.

X PUBLIC BODY'S DECISION AFTER REVIEW

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

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

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

XI APPLICANT'S RIGHT OF APPEAL

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

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

Distribution List:

- Department
- Applicant
- Records Manager