



Yukon
Information
and Privacy
Commissioner

INQUIRY REPORT

File ATP18-03R

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

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

Information and Privacy Commissioner

Public Service Commission

July 3, 2019

Summary

After receiving an access to information request from an applicant (Applicant), the Public Service Commission (Commission) responded to the Applicant by refusing to grant their access request. The Commission denied access on the basis that it was refusing to confirm or deny the existence of the records requested by the Applicant. The authority to refuse to confirm or deny the existence of records is set out in paragraph 13 (2)(c) of the *Access to Information and Protection of Privacy Act* (ATIPP Act). The Applicant requested the Information and Privacy Commissioner (IPC) review the refusal. Following her review, the IPC found the Commission met its burden of proving that paragraph 13 (2)(c) authorizes it to confirm or deny the existence of records requested by the Applicant because revealing whether or not these records exist would cause harm to a third party that amounts to an unreasonable invasion of their personal privacy. She also found the Commission could not rely on this authority where, for any of the records requested by the Applicant, these factors are not present. The IPC reviewed the Commission's exercise of discretion in applying paragraph 13 (2)(c) and concluded it exercised its discretion as required.



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(Note there are 25 pages in this Inquiry Report inclusive of the Appendix)

Statutes Cited

Yukon

Access to Information and Protection of Privacy Act, RSY 2002, c.1

Interpretation Act, RSY 2002, c.125

Cases and Decisions Cited

Alberta

Order F2006-12 (Re), 2006 CanLII 80870 (AB OIPC)

British Columbia

British Columbia Coroners Service, (Re) 2015 BCIPC 1 (CanLII)

Court

Attaran v. Canada (Foreign Affairs), 2011 FCA 182

Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23

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



Access Request and Review

[1] On September 21, 2018, the Applicant made the following request for access to records to the Commission.

Any communication between [Commission Employee] (Director of Labour Relations...) and [third party] including, but not limited to emails, phone calls, written messages, memos, notes, text messages, letters, etc...or any communications where [third party] is the subject or topic. Date range from November 20th, 2017 to June 30th, 2018 (Access Request).

[2] On October 18, 2018, the records manager informed the Applicant that the Commission reviewed the Applicant's Access Request and refused to confirm or deny the existence of any records under paragraph 13 (2)(c).¹

[3] On October 22, 2018, the Applicant requested the IPC review the Commission's decision.

Jurisdiction

[4] Subsection 5 (1) provides individuals, or 'applicants', with a right of access to any record in the custody or under the control of a public body. An access request must be made to the records manager.² Once received, the records manager is required to pass on the access request to the public body identified therein.³ The public body must then decide what its response will be to the access request and pass this information on to the records manager. The records manager is obligated under subsection 13 (1) to tell the applicant:⁴

(a) whether or not the applicant is entitled to access the record or to part of the record;

(b) if the applicant is entitled to access, where, when and how access will be given; and

(c) if access to the record or part of the record is refused,

(i) the reasons for the refusal and the provision of this Act on which the refusal is based,

(ii) the title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and

¹ Response from the records manager dated October 18, 2018.

² Subsection 6 (1).

³ Section 9.

⁴ Subsection 8 (a) and subsections 9 (a) and (b).

(iii) that the applicant may ask for a review under section 48.

[5] Where the response by the public body is to refuse to confirm or deny the existence of a record in the access request, subsection 13 (2) authorizes the records manager to cite this as the reason for refusal. The Commission is a public body under the ATIPP Act (Public Body).

[6] In this case, the records manager informed the Applicant that the Public Body refused to confirm or deny the existence of the records requested by the Applicant in their Access Request. It is on this basis that the Public Body refused access to the records requested by the Applicant. The Applicant then requested that the IPC review the refusal to grant access to the records. My authority to review a refusal to grant access to a record is under paragraph 48 (1)(a) of the ATIPP Act.

Burden of Proof

[7] Section 54 sets out the burden of proof for an Inquiry.

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[.]

[8] Given that the Public Body refused to confirm or deny the existence of the records, it has the burden of proving its reliance on subsection 13 (2).

Explanatory Note

[9] All provisions cited herein are to the ATIPP Act unless otherwise stated.

Inquiry Process

[10] In an effort to try and settle the matter under review, the IPC requested that the parties provide submissions setting out their respective positions on the application of paragraph 13 (2)(c). After reviewing the submissions, the IPC decided to conduct an Inquiry.

[11] The Notice of Inquiry was sent to the parties informing them about the Inquiry. Given the Public Body's reliance on paragraph 13 (2)(c), I accepted its submissions *in camera*.

I. ISSUE

[12] The matter at issue in this Inquiry is as follows.

Does the [Public Body] have authority, under paragraph 13 (2)(c), to refuse to confirm or deny the existence of the records requested by the Applicant in their Access Request?

II. SUBMISSIONS OF THE PARTIES

[13] As indicated, the submissions from the Public Body were accepted *in camera*. In the Applicant's submissions, their position, essentially, is that they disagree with the Public Body's reliance on paragraph 13 (2)(c) to refuse access to the records requested.

III. ANALYSIS

Subsection 13 (2)

[14] Subsection 13 (2) authorizes a public body to refuse to confirm or deny the existence of records requested by an applicant. They are:

- (a) a record referred to in section 19.1;*
- (b) a record containing information described in section 19 or section 19.1; or*
- (c) a record containing personal information about the applicant or a third party.*

[15] As indicated, the Public Body cited paragraph 13 (2)(c) as its authority to refuse to confirm or deny the existence of the records requested by the Applicant in their Access Request.

[16] The majority of access to information laws in Canada have a provision similar to Yukon's subsection 13 (2) wherein a public body is authorized to confirm or deny the existence of records.

[17] Section 12 of Alberta's *Freedom of Information and Protection of Privacy Act* (AB FOIPPA) is similar to our section 13. It states as follows.

12(1) In a response under section 11, the applicant must be told

- (a) whether access to the record or part of it is granted or refused, ...*
- (c) if access to the record or to part of it is refused,*

(i)..the reasons for the refusal and the provision of this Act on which the refusal is based,

(2) Despite subsection (1)(c)(i), the head of a public body may, in a response, refuse to confirm or deny the existence of

(a) a record containing information described in section 18 or 20, or

(b) a record containing personal information about a third party if disclosing the existence of the information would be an unreasonable invasion of the third party's personal privacy.

[18] In Order F2006, Alberta's Information and Privacy Commissioner (AB IPC) stated the following about when a public body in Alberta can rely on subsection 12 (2) of FOIPPA.

Conditions for relying on section 12 (2)

Except for the requirement that the records requested contain information described in section 18 and 20, section 12 (2) does not provide guidance as to when it should be used. Sections 18 and 20 address situations in which records may be withheld, but when these sections (only) are applied, the applicant is told that records exist. Section 12 (2)(a) provides the Public Body with an additional tool that it may not only withhold these particular classes of records, but also whether they exist. This absence of guidance as to when the provision should be used is in contrast to section 12 (2)(b). The latter permits withholding whether records about a third party exist, but only if disclosure of the existence of this information would itself be an unreasonable invasion of the privacy of the third party. There is, therefore, a question of whether a similar restriction should be imposed for the use of section 12 (2)(a), such that it is to be relied on only when its use would protect the same interest as non-disclosure of the records would protect.

Earlier orders of this Office have said that section 12 (2) is to be used having regard to the objects of the Act, including access principles. In my view, in order to rely on section 12 (2)(a) to refuse to say whether information exists that falls into a particular subsection of section 18 or 20, the Public Body should first consider what interest would be protected by withholding such information under the particular subsection of section 18 or 20, and then ask whether refusing to say if such information exists would, in the particular case, promote or protect the same interest. A line of Ontario decisions, which includes a decision of the Ontario Court of Appeal, support this interpretation. These cases interpret similar Ontario legislation that restricts the use of the "refuse to confirm or deny" provision to situations where the refusal to say if the information exists protects the same interest as refusal to disclose the information. The Ontario legislation does not impose such a restriction expressly. However, the Office of the Information and Privacy Commissioner has, on many

occasions, read in such a restriction, relative to both a provision that permits refusal to confirm or deny whether records exist that would, if disclosed, be an unjustified invasion of personal privacy, as well as in relation to provisions that permit refusal to confirm or deny records the disclosure of which would harm law enforcement matters. For example, in Order P-344, the Assistant Commissioner, in interpreting section 14 (3) of the Ontario Freedom of Information and Protection of Privacy Act (which permits refusal to confirm or deny a record where disclosure of the record could cause specified consequences very similar to those listed in section 20 of the Alberta Act), said:

A requester in a section 14 (3) situation is in a very different position than other requesters who have been denied access under the Act. By invoking section 14 (3), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power which I feel should be exercised only in rare cases.

In my view, an institution relying on section 14 (3) must do more than merely indicate that records of the nature requested, if they exist, would qualify for exemption under sections 14 (1) or (2). An institution must provide detailed and convincing evidence that disclosure of the mere existence of the requested records would convey information to the requester which could compromise the effectiveness of a law enforcement activity.

The Ontario Court of Appeal recently approved this interpretation (dealing with a refusal to confirm or deny the existence of a report pursuant to the provision relating to unjustified invasion of privacy), and leave to appeal to the Supreme Court of Canada has been denied. The majority said:

The Commissioner's reading ... requires that in order to exercise his discretion to refuse to confirm or deny the report's existence, the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy. The scheme of the Act is designed both to advance public access to information and protection of individual privacy and also to provide the necessary balancing of these purposes. ... [T]he Act itself uses the concept of an unjustified invasion of privacy to strike the balance between access and privacy with respect to personal information contained in a report. The Commissioner's reading ... uses the same concept for the same purpose where the information is the fact of the existence of a report rather than its contents. ... The Commissioner reads the discretion given by the subsection to be constrained in this way in reflection of the

Act's fundamental purposes and the balance required to be struck between them. In my view this is a reasonable interpretation ...

This analysis applies equally to section 12 (2)(a): whether a specified harm to law enforcement will be caused is the "concept" used to strike the balance between access rights and the goals of law enforcement. This is the approach that has been taken by the Ontario Privacy Commissioner's Office, and I agree with it.

As noted earlier, the Alberta legislation differs somewhat from that in Ontario, in that our section 12 (2)(b) (unreasonable invasion of privacy) expressly contains the restriction just discussed, but 12 (2)(a) (which refers to information described in sections 18 and 20) does not. Arguably, this could be taken to mean that such a restriction should be applied only to the former and not the latter. However, the result would be that section 12 (2)(a) may be relied on only in situations where information is described by the subsections, yet a decision to use it may be made for some completely unknown, unrelated purpose. This is not a sensible result. The sensible purpose for both provisions is that it is to prevent requestors from obtaining information from a request indirectly that they cannot obtain directly.

Requestors are denied access to information if access would cause harm to law enforcement, or unreasonable invasion of privacy. They should be denied information as to whether a record exists for the same reason, but not otherwise. Despite the difference in wording between sections 12 (2)(a) and 12 (2)(b), this restriction makes the same sense for both sections; therefore, in my view, it was intended for both, and I interpret section 20 (2)(a) as implicitly containing it. The discretion to refuse to confirm or deny is available only if the condition is met that it is being used to protect the same interest as non-disclosure of information.^[6] This interpretation is also in accordance with the general principle in the Act of permitting access subject only to limited and specific exceptions.⁵

[19] For reference, I note that Ontario's *Freedom of Information and Protection of Privacy Act* (ON FIPPA), authorizes a public body to confirm or deny the existence in the following circumstances.

- 1) Under subsection 14 (3), a head may refuse to confirm or deny the existence of records to which subsections 14 (1) and (2) apply. These subsections authorize a public body to refuse to disclose a record where the disclosure could reasonably be expected to harm law enforcement, the nature of which is described in the paragraphs of subsections 14 (1) and (2).

⁵ Order F2006-12 (Re), 2006 CanLII 80870 (AB OIPC), at paras 17 to 22.

- 2) Under subsection 21 (5), a head may refuse to confirm or deny the existence of a record if disclosure of the records would constitute an unjustified invasion of personal privacy.

[20] In *British Columbia Coroners Service (Re)*,⁶ Adjudicator Ross came to a similar conclusion in interpreting British Columbia's *Freedom of Information and Protection of Privacy Act* (BC FIPPA). It states as follow.

8 (2) the head of a public body may refuse in a response to confirm or deny the existence of

(a) a record containing information described in section 15 (information harmful to law enforcement), or

(b) a record containing personal information of a third party if disclosure of the existence of the information would be an unreasonable invasion of that party's personal privacy.

[21] The conclusion reached by Adjudicator Ross was that it is implied in BC FIPPA's paragraph 8 (2)(a) that the harms in section 15 must occur in order to confirm or deny the existence of a record. The reasons for his conclusion follow.

*...in my view it is consistent with the purposes, provisions and administration of FIPPA to interpret and apply s. 8 (2)(a) so that public bodies may only exercise their discretion and rely on s. 8 (2)(a) if the information conveyed by confirming or denying the record's existence would itself be exempt under s. 15. The purposes of FIPPA, as stated in s. 2, are to make public bodies more accountable to the public and to protect personal privacy by giving the public a right of access to records and specifying limited exceptions to the rights of access, among other things. As the Supreme Court of Canada recently stated in *John Doe v. Ontario (Finance)*:*

Access to information legislation serves an important public interest: accountability of government to the citizenry. An open and democratic society requires public access to government information to enable public debate on the conduct of government institutions.

However, as with all rights recognized in law, the right of access to information is not unbounded. All Canadian access to information statutes balance access to government information with the protection of other interests that would be adversely affected by otherwise unbridled disclosure of such information.

⁶ 2015 BCIPC 1 (CanLII)

In my view, it may undermine the purposes and statutory scheme of FIPPA to interpret s. 8 (2)(a) in a way that enables public bodies to confirm or deny the existence of any record that contains information described in s. 15 of FIPPA (information harmful to law enforcement) without regard to whether there is any harm under s. 15 arising from confirming or denying the existence of the record.

If public bodies were authorized to rely on s. 8 (2)(a) without regard to related harm under s. 15, it may be problematic from an administrative law and natural justice perspective because it may result in multiple inquiries for the same request for records (in circumstances where records exist). This could occur because a public body could rely on s. 8 (2)(a) at a first inquiry on the basis that it contains information described in s. 15. Then, if the public body did not succeed at this first inquiry, it could withhold the information under s. 15 and attempt to bolster its evidence at a second inquiry. This would result in additional time, costs and delays, in addition to prejudicing the applicant by giving the public body two opportunities to withhold the same information for the same reason (i.e. that s. 15 applies).

Further, this interpretation of s. 8 (2)(a) may hamper the obligation to sever records under s. 4 (2) of FIPPA and result in information being withheld from applicants that public bodies would otherwise be required disclosed to them. Section 4 (2) provides that if information excepted from disclosure can reasonably be severed from a record, an applicant has the right of access to the remainder of the record. For example, there could be one sentence in a record that is exempt from disclosure under s. 15 that could reasonably be severed from the remainder of the record. In that instance, the public body would ordinarily be authorized to withhold the one sentence under s. 15 and required to disclose the remainder of the record to the applicant. However, applying s. 8 (2) prevents the operation of this obligation to sever records under s. 4 (2). This is because s. 8 (2) relates to denying applicants knowledge of whether a record exists, but severing information under s. 4 (2) confirms that the record exists. Since severing under s. 4 (2) cannot operate in conjunction with s. 8 (2)(a) because it would confirm the existence of a record, applying s. 8 (2)(a) would result in the entire record being withheld from the applicant rather than just the information that is exempt from disclosure under s. 15.⁷

[22] The ATIPP Act's subsection 13 (2) differs slightly from the authority granted to public bodies subject to the ON FIPPA, AB FOIPPA, or BC FIPPA. Specifically, subsection 13 (2) authorizes a public body subject to the ATIPP Act to refuse or deny the existence of:

⁷ *Ibid.*, at paras 68 to 71.

- 1) a workplace harassment record⁸ (subsection 19.1 (1));
- 2) a record containing information in or about a workplace harassment record and information about law enforcement⁹ (section 19); or
- 3) a record containing personal information.¹⁰

[23] Subsection 13 (2) does not expressly require a public body to consider the interests that may be negatively impacted as a result of refusing to confirm or deny the existence of a record or information identified in paragraphs 13 (2)(a) through (c). However, in my view, it is implied for the following reasons.

[24] The words of subsection 13 (2) must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.¹¹ In addition, Yukon's *Interpretation Act* requires that "every enactment and every provision thereof shall be deemed remedial and shall be given the fair, large, and liberal interpretation that best insures the attainment of its objects."¹²

[25] The words in subsection 13 (2) on their own appear to authorize a public body to refuse to confirm or deny the existence of a workplace harassment record, information in a workplace harassment record or law enforcement record, or a record containing personal information without having to consider the exceptions to the right of access set out in Part 2.¹³ However, the purposes of the ATIPP Act, together with the scheme of the ATIPP Act, suggest otherwise.

[26] Purposes 1 (a) to (d) are relevant. They are as follows.

1 (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

⁸ Defined in subsection 19.1 (1) as "a record created in the course of, or in contemplation of, an investigation about whether there has been, or what to do about, a violation of (a) a workplace harassment policy approved by the Executive Council or the Commissioner in Executive Council to govern the conduct of a public body's employees in the course of their employment for a public body; or (b) a provision of a collective agreement under which the Government of Yukon is the employer defining, and providing a process for dealing with, workplace harassment of a public body's employees by a public body's employees."

⁹ "Law enforcement" is defined as "(a) policing, including criminal intelligence operations, (b) investigations that lead or could lead to a penalty or punishment being imposed or an order being made under an Act of Parliament or of the Legislature, (c) proceedings that lead or could lead to a penalty or punishment being imposed or an order being made under an Act of Parliament or of the Legislature, and (d) investigations and proceedings taken or powers exercised for the purpose of requiring or enforcing compliance with the law[.]"

¹⁰ "Personal information" is defined as "recorded information about an identifiable individual."

¹¹ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 1998 CanLII 837 (SCC), at para. 21.

¹² *Interpretation Act*, RSY 2002, c125, at section 10.

¹³ These exceptions are set out in sections 15 to 25.

(a) giving the public a right of access to records;

(b) giving individuals a right of access to, and a right to request correction of, personal information about themselves;

(c) specifying limited exceptions to the rights of access;

(d) preventing the unauthorized collection, use, or disclosure of personal information by public bodies[.]

[27] It is clear from these purposes, and the exceptions, that when applied to the right of access to information set out in Part 2 of the ATIPP Act, the exceptions are carefully crafted to limit access to information in the custody or control of a public body only as much as is necessary to protect certain interests. These carefully crafted exceptions were designed to strike the right balance between the rights of applicants to access information in the custody or control of public bodies and their need to limit access in certain specified circumstances. The concept used in AB FOIPPA subsection 12 (2) to strike this balance is that the right of an applicant to even know whether a record or information exists is circumscribed where, in subsection 13 (2), the goals of protecting workplace harassment records and information therein in section 19.1, the goals of law enforcement in section 19, and the goals of protecting personal information under the Part 2 exceptions outweigh this right.

[28] Based on the foregoing, my views on the interpretation and application of subsection 13 (2) are as follows.

- 1) In order to rely on paragraphs 13 (2) (a) or (b) and refuse to say whether information exists as described in these paragraphs, the public body should first, consider what interest would be protected by refusing information subject to an access request under the particular subsection of sections 19 or 19.1. Next, the public body should ask whether refusing to say if such a record or information exists would, in the particular case, promote or protect the same interest.
- 2) In order to rely on paragraph 13 (2)(c) and refuse to say whether a record containing personal information exists, the public body should first, consider what interest would be protected by refusing access to personal information subject to an access request under any applicable exception to the right of access to personal information under Part 2. The public body should then ask whether refusing to say if such a record or information therein exists would, in the particular case, promote or protect the same interest.

- 3) The authority under subsection 13 (2) should be exercised by public bodies only in rare cases.
- 4) Upon the IPC receiving a request for review of a public body's decision to refuse to provide an applicant with access to a record on the basis it is relying one of the paragraphs under subsection 13 (2), the public body must provide detailed and convincing evidence in support of its decision.

Does the [Public Body] have authority under paragraph 13 (2)(c) to refuse to confirm or deny the existence of the records requested by the Applicant in their Access Request?

[29] The information requested by the Applicant is communications amongst two individuals, a Public Body Employee and a third party, and communications where the subject matter or topic is about the third party.

[30] The position of the Public Body is that it is refusing to confirm or deny the existence of the records requested by the Applicant on the basis that the third party will suffer harm. It submits that this party will suffer harm because revealing whether any of these records exist will reveal certain highly sensitive personal information about the third party. The Applicant's position is that they disagree with the authority cited by the Public Body to refuse access to the records requested.

[31] A public body is authorized under paragraph 13 (2)(c) to refuse to confirm or deny the existence of a record where revealing its existence would cause harm to an individual such that it amounts to an unreasonable invasion of their personal privacy. Having reviewed the evidence, the Public Body may confirm or deny the existence of records requested by the Applicant where harm will occur to the third party that amounts to an unreasonable invasion of their personal privacy. However, where no such harm will occur and there otherwise is no unreasonable invasion of the third party's personal privacy that will occur from confirming or denying the existence of the Records, it cannot rely on paragraph 13 (2)(c).

Finding – Paragraph 13 (2)(c)

[32] Having reviewed the evidence provided by the parties, I find that:

- 1) the Public Body has met its burden of proving that paragraph 13 (2)(c) applies in this case and is authorized to refuse to confirm or deny the existence of records requested by the Applicant, subject to the following:
- 2) the Public Body is not authorized to refuse to confirm or deny the existence of any records where confirmation of the existence, or non-existence, of a record would not cause harm to the third party or otherwise amount to an unreasonable invasion of their personal privacy.

Did the Public Body exercise its discretion?

[33] The authority granted to the Public Body under paragraph 13 (2)(c) is discretionary. This means that once the Public Body determines that it has authority to confirm or deny the existence of a record requested by an applicant under this paragraph, it must still exercise its discretion about whether to exercise the authority.

[34] The Public Body did not provide any submission in regards to the exercise of discretion. This is not determinative of the issue if I am able to draw an inference, based on the totality of the evidence, that the Public Body exercised its discretion prior to deciding whether to exercise its authority to confirm or deny the existence of the records sought by the Applicant in their Access Request.¹⁴

Subsection 13 (2) Exercise of Discretion

[35] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*,¹⁵ Chief Justice McLachlin and Justice J. Abella, writing for the Supreme Court of Canada (SCC), provided the following about how discretion is to be exercised by a public body under Ontario's *Freedom of Information and Protection of Privacy Act* (ON FIPPA) when the head of a public body applies a discretionary exception to the right of access under that Act.

- 1) For any discretionary exemption, the “discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case.”¹⁶
- 2) There are two steps.
 - i. The head must first determine whether the exemption applies.
 - ii. If it does, the head must then “go on to ask whether, having regards to all the relevant interests, including the public interest in disclosure, disclosure should be made.”¹⁷

[36] They then set out the responsibility of the reviewing commissioner as follows.

- 1) There are two steps.

¹⁴ As determined by the Federal Court of Appeal in *Attaran v. Canada (Foreign Affairs)*, 2011 FCA 182, at paras 35 and 36.

¹⁵ 2010 SCC 23.

¹⁶ *Ibid.*, at para 66.

¹⁷ *Ibid.*

- i. The commissioner must first determine whether the exception was properly claimed.
- ii. If so, the commissioner must then determine whether the head's exercise of discretion was reasonable.¹⁸

[37] They also cited a prior decision of the Ontario Information and Privacy Commissioner (ON IPC) who indicated the following about the commissioner's duty.

*In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the Act. While it may be that I do not have the authority to substitute my discretion for that of the head I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly.*¹⁹ [Emphasis in original]

[38] In the case before the SCC, it determined that the ON IPC failed to review the exercise of the head's discretion in respect of the law enforcement provisions of ON FIPPA and remitted the matter back to the ON IPC for reconsideration.²⁰

[39] The exercise of discretion in subsection 13 (2) is not in relation to the authority of a public body to refuse access to a record as provided for in the discretionary exceptions to the right of access set out in Part 2. Rather, the exercise of discretion in subsection 13 (2) pertains to the authority of a public body to refuse to confirm or deny the existence of those records specified in its paragraphs (a) through (c). Although the context in which the exercise of discretion occurs differs somewhat, the basis on which the exercise of discretion occurs is the same; that is, to ensure that the purposes of the ATIPPA Act in relation to the right of access to records in Part 2 are achieved. For this reason, my view is that the manner in which the exercise of discretion occurs in subsection 13 (2) will be the same as for the discretionary exceptions to the right of access in this Part.

¹⁸ *Ibid.*, at para 68.

¹⁹ *Ibid.*, at para 69.

²⁰ *Ibid.*, at para 74.

Finding - Exercise of Discretion

[40] Although the Public Body did not provide direct evidence on its exercise of discretion in deciding whether to exercise its authority under paragraph 13 (2)(c) to refuse to confirm or deny the existence of the records requested by the Applicant, I was able to infer from the evidence that it did so.

IV. FINDINGS AND RECOMMENDATIONS

[41] In regards to the issue under review, I find as follows:

- 1) the Public Body has met its burden of proving that paragraph 13 (2)(c) applies in this case and is authorized to refuse to confirm or deny the existence of records requested by the Applicant, subject to the following:
- 2) the Public Body is not authorized to refuse to confirm or deny the existence of any records where confirmation of the existence or non-existence of a record would not cause harm to the third party or otherwise amount to an unreasonable invasion of their personal privacy; and
- 3) the Public Body exercised its discretion as required.

[42] I made one recommendation to the Public Body.

[43] Detailed reasons for my findings and recommendation will be provided to the Public Body in a separate Appendix to this Inquiry Report given my obligation under paragraph 44 (3)(b) which states as follows.

(3) In conducting an investigation under paragraph 42(b) or a review resulting from a request under section 48, and in a report prepared under this Act, the commissioner and anyone acting for or under the direction of the commissioner must take every reasonable precaution to avoid disclosing and must not disclose

(b) whether information exists, if the public body in refusing to provide access does not indicate whether the information exists.

Public Body's Review after Decision

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

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

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

Applicant's Right of Appeal

[47] Paragraph 59 (1)(a), gives the Applicant the right to appeal to the Yukon Supreme Court when the Public Body does not follow any recommendation.

ORIGINAL SIGNED

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

Distribution List:

- Public Body (with Appendix)
- Applicant (without Appendix)
- Records Manager (without Appendix)

