



Yukon
Information
and Privacy
Commissioner

INQUIRY REPORT

Pursuant to Section 52 of the

Access to Information and Protection of Privacy Act

Department of Finance

File ATP19-69R, ATP19-70R, ATP19-71R, and ATP19-72R

Jason Pedlar, B.A., M.A.

Information and Privacy Commissioner

April 24, 2024

Summary

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

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

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

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

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Statutes Cited

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

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

Interpretation Act, RSY 2002, c.125;

Cases and Orders Cited

Cases

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

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

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

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

Orders

Reports

Explanatory Note

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

I BACKGROUND

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

- i. *All emails sent and received by the Deputy Minister [of Finance] between October 1st, 2018 and October 3rd, 2018 (the “First Request”);*
- ii. *Any emails sent or received by the ADM, Economics, Fiscal Policy & Statistics between October 25th, 2018 and November 7th, 2018 that reference ‘carbon tax’ or ‘carbon pricing’ (the “Second Request”);*
- iii. *Any emails sent or received by anyone with the title ‘Management Board Analyst’ to different departments between August 6th, 2018 and August 13th, 2018 (the “Third Request”);*

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

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

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

[4] This report will deal with files numbered A-7458, A-7459, A-7460, and A-7461 (together the "Access Requests").

[5] The Records Manager subsequently advised the Applicant that the Department had identified records responsive to A-7458, but it was withholding them in full pursuant to the following provision(s):

- 15(1)(b).

[6] The Records Manager further advised the Applicant that the Department had identified records responsive to A-7459, but it was withholding them in full pursuant to the following provision(s):

- 15(1)(b).

[7] The Records Manager finally advised the Applicant that the Department had identified records responsive to A-7460, but it was withholding them in full pursuant to the following provision(s):

- 15(1)(a).

[8] The Records Manager finally advised the Applicant that the Department had identified records responsive to A-7461, but it was withholding them in full pursuant to the following provision(s):

- 15(1)(a); and
- 15(1)(b).

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

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

- i. IPC File No. ATP19-69R to A-7458;
- ii. IPC File No. ATP19-70R to A-7459;
- iii. IPC File No. ATP19-71R to A-7460; and
- iv. IPC File No. ATP19-72R to A-7461. (together the "IPC Files")

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

[12] As such, the IPC escalated all four files to Inquiry.

II JURISDICTION

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

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

III INQUIRY PROCESS

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

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

[17] Issues with the organization, formatting, and completeness of the Records produced by the Department persisted throughout the Inquiry process.

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

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

IV ATIPPA BROUGHT INTO FORCE

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

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

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

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

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

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

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

(3) The former Act (including the requirement for a decision by a public body under subsection 58(1) of the former Act and any appeal to the Court under subsection 59(1) of the former Act) applies as if it had not been repealed in respect of a review of a request or a complaint made under the former Act if the commissioner has not concluded the review by means of an inquiry or investigation on or before the day immediately before the coming into force of this section.

(4)...

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

III ISSUES

[22] There are two issues as follows:

- 1) Is the Department required by subparagraph 15(1)(a) to withhold the information sought by the Applicant in ATP19-71R and ATP-72R?
- 2) Is the Department required by subparagraph 15(1)(b) to withhold the information sought by the Applicant in ATP19-69R, ATP19-70R, and ATP-72R?

IV RECORDS AT ISSUE

[23] The records responsive to ATP19-69R in the custody and control of the Department consist of records exported into three electronic packages titled 'Records package L', Records package K', and 'Original records package' totaling 540 PDF formatted pages.

[24] The records responsive to ATP19-70R in the custody and control of the Department consist of records exported into one electronic package totalling 318 PDF-formatted pages.

[25] The records responsive to ATP19-71R in the custody and control of the Department consist of records exported into one electronic package totalling 2 PDF-formatted pages.

[26] The records responsive to ATP19-72R in the custody and control of the Department consist of records exported into four electronic packages titled 'Records package R', Records package J', Records package K', and 'Records package P' totalling 1,710 PDF-formatted pages. (together the "Records")

V BURDEN OF PROOF

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

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

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

VI SUBMISSIONS OF THE PARTIES

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

VII ANALYSIS

Issue 1 – Is the Department required by subsection 15(1)(a) of the Act to withhold, in full, 2 pages responsive to Access Request No. A-7460 and 43 pages responsive to Access Request No. A-7461 of the Records sought by the Applicant in the Access Requests?

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

Relevant Law

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

(a) An agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;

Analysis

Paragraph 15(1)(a)

[30] Paragraph 15(1)(a) is a mandatory exemption provision; its purpose is to prevent the release of information which may disclose information harmful to personal privacy. If it applies to the information sought by the Applicant then the Department has no discretion about whether to disclose it; it must not.

[31] Having reviewed and examined the Records, I find that Records 3 (out of office reply), 8, 9, 10, 11, and 12 (summaries of questions from public question periods) of ATP19-72R/A-7461 (Records package P) are not records which reveals a confidence of the Executive Council or any of its committees.

[32] The remainder of the 45 pages over which a paragraph 15(1)(a) exemption was claimed fulfill the criteria of the section.

[33] Any documents found to be properly withheld under paragraph 15(1)(a) are further subject to a paragraph 15(2) analysis.

[34] Paragraph 15(2) reads:

(2) Subsection 1 does not apply to:

(a) a record that has been in existence for 15 or more years;

(b) a record of a decision made by the Executive Council or any of its committees on a appeal under an Act; or

(c) a record the purpose of which is to present background information or explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if...

(i) the decision has been made public;

(ii) the decision has been implemented; or

(iii) five or more years have passed since the decision was made or considered.

[35] On the face of it, neither 15(2)(a) or 15(2)(b) apply to the Records. Application of 15(2)(c) however, requires further analysis.

[36] Having reviewed the Records, I find that the following records constitute background information, explanations, or analysis with regard to a decision that was implemented or made public on or before November 5, 2018:

- i. Record 22 of ATP19-72R/A-7461(Records package P);
- ii. Record 24 of ATP19-72R/A-7461 (Records package P);
- iii. Record 25 of ATP19-72R/A-7461 (Records package P);

Conclusion

[37] In light of the forgoing, I find that the records detailed in paragraph 36 of this report meet the criteria for release pursuant to paragraph 15(2) of the Act.

Issue 2 – Is the Department required by subsection 15(1)(b) of the Act to withhold, in full, 540 pages responsive to Access Request No. A-7458, 318 pages responsive to Access Request No. A-7459, and 1,524 pages responsive to Access Request No. A-7461 of the Records sought by the Applicant in the Access Requests?

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

Relevant Law

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

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

Analysis

Paragraph 15(1)(b)

[39] Paragraph 15(1)(b) is a discretionary exemption provision; its purpose is to prevent the release of information which may damage or interfere with the conservation of species at risk within the Yukon.

[40] Having reviewed and examined the Records, I find that the following records do not fall within the scope of paragraph 15(1)(b):

- i. Record 15 of ATP19-72R/A-7461 (Records package J);
- ii. Record 21 of ATP19-72R/A-7461 (Records package J);

- iii. Record 15 of ATP19-72R/A-7461 (Records package K);
- iv. Record 33 of ATP19-72R/A-7461 (Records package P);
- v. Record 47 of ATP19-72R/A-7461 (Records package P);

[41] The remainder of the 2,382 pages over which a paragraph 15(1)(b) exemption was claimed fulfill the criteria of the section.

[42] Any documents found to be properly withheld under paragraph 15(1)(b) are further subject to a paragraph 15(2) analysis.

[43] Paragraph 15(2) reads:

(2) Subsection 1 does not apply to:

(a) a record that has been in existence for 15 or more years;

(b) a record of a decision made by the Executive Council or any of its committees on a appeal under an Act; or

(c) a record the purpose of which is to present background information or explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if...

(i) the decision has been made public;

(ii) the decision has been implemented; or

(iii) five or more years have passed since the decision was made or considered.

[44] On the face of it, neither 15(2)(a) or 15(2)(b) apply to the Records. Application of 15(2)(c) however, requires further analysis.

[45] Having reviewed the Records, I find that none of the records constitute background information, explanations, or analysis with regard to a decision that has since been implemented or made public as of November 5, 2018.

Conclusion

[46] For these reasons, I find that the records detailed in paragraph 40 of this report do not meet the criteria for exemption pursuant to paragraph 15(1)(b) of the Act.

VIII FINDINGS

Issue 1

[47] I find that the Department Head is required to disclose the records detailed in paragraphs 31 and 36 of this report.

Issue 2

[48] I find that the Department Head is required to disclose the records detailed in paragraph 40 of this report.

IX RECOMMENDATIONS

Issue 1

[49] In light of the forgoing, I recommend that the records detailed in paragraphs 31 and 36 of this report be released to the Complainant.

Issue 2

In light of the forgoing, I recommend that the records detailed in paragraph 40 of this report be released to the Complainant.

Department Head's Response to Inquiry Report

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

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

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

Applicant's Right of Appeal

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

Original Signed

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

Distribution List:

- Department Head
- Applicant