Yukon Information and Privacy Commissioner

INQUIRY REPORT

File ATP15-055AR

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 Justice (Justice)**

Date: **June 8, 2016**

Summary

The Applicant made a request for access to a Video that was in the custody and control of Justice. He indicated in his request for access that he wished to be provided with a copy of the Video. Justice refused access on the basis that disclosure of the Video would constitute an unreasonable invasion of personal privacy of the other inmates that appeared in the Video, and that disclosure of the Video would be harmful to law enforcement and create public safety risks. Justice also refused access on the basis that the Video was privileged.

The IPC found that disclosure of a copy of the Video to the Applicant would constitute an unreasonable invasion of personal privacy to the inmates but not WCC

employees who also appeared in the Video. The IPC found that law enforcement would be harmed if a copy of the Video were disclosed to the Applicant but that Justice had not established that disclosure of a copy of the Video would interfere with public safety. The IPC also found that the Video was not privileged.

The IPC determined that if the Applicant had requested to view the Video rather than to be provided with a copy, disclosure of the Video may not be an unreasonable invasion of the other inmates' personal privacy. She also highlighted that Justice submitted that it would not have the law enforcement concerns if the Video were not disseminated, which could occur if the Applicant received a copy. The IPC reminded the Records Manager and Justice to ensure they are communicating options to an applicant to facilitate access, such as the ability to view a record if requesting a copy would result in a refusal, as occurred here.

Statutes Cited

Access to Information and Protection of Privacy Act, RSY 2002 c.1, subsection 18 (b), paragraphs 19 (1)(a), (e), (h), (j), (k), (l), subsection 22 (1)(b), and section 25.

Interpretation Act, RSY 2002, c125.

Cases Cited

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

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

Eastmond v. Canadian Pacific Railway, 2004 FC 852.

Ontario (Attorney General) v. Holly Big Canoe, 2006 CanLII 14965 (ON SCDC).

British Columbia (Ministry of Public Safety and Solicitor General) v. Stelmack, 2011 BCSC 1244.

British Columbia Ferry Services Incorporated (Re), 2014 BCIPC 22 (CanLII).

School District 57 (Prince George) (Re), 2015 BCIPC 45 (CanLII).

British Columbia (Justice) (Re), 2012 BCIPC 17 (CanLII).

British Columbia (Public Safety and Solicitor General), 2008 CanLII 41151.

British Columbia (Economic Development) (Re), 2007 CanLII 30393 (BC IPC).

Order F2016-10 (Re), 2016 CanLII 20120 (AB OIPC).

Order F2010-036, 2011 CanLII 96613 (AB OIPC).

Yukon Department of Community Services ATP11-029AR, August 2014, www.ombudsman.yk.ca, (YK IPC).

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 November 12, 2015, the Applicant requested the following from the Whitehorse Correctional Centre (WCC).

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

[2] On the bottom of the Access Request the box 'Receive copy' is checked.

[3] In a letter dated November 20, 2015 addressed to the Applicant, the Records Manager confirmed receipt of the Access Request and informed the Applicant that his Access Request had been forwarded to Justice. In that letter, the Records Manager identified the deadline for response as December 21, 2015.

[4] In a letter dated November 30, 2015, addressed to the Applicant, the Records Manager responded to the Applicant's Access Request by informing him that Justice was granting access in part. In the letter, the Records Manager stated that Justice identified nine pages of records and one digital video recording (Video) as responsive to his Access Request. The Records Manager stated further that Justice had severed personal information from the nine pages and refused access to the Video entirely. The provisions of the ATIPP Act cited by the Records Manager for the refusal were subsection 25 (1), paragraphs 25 (4)(a) and 25 (4)(d), subsection 18 (b), paragraphs 19 (1)(a), (e), (h), (j), (k), (l), and subsection 22 (1)(b).

[5] On December 14, 2015, the Office received a request for review of Justice's decision to refuse access to the Video and the information severed from the nine pages.

[6] I authorized mediation and, through this process, the parties reached an agreement that the information severed from the nine pages was done so in accordance with the ATIPP Act by Justice. Agreement could not be reached about the provisions relied on by Justice to refuse access to the Video. Consequently, mediation was unsuccessful in respect of the Video.

[7] On January 20, 2016, I received a request for Inquiry for the Video and on January 26, 2016, by letter, I decided to conduct the Inquiry under section 52 of the ATIPP Act.

II INQUIRY PROCESS

[8] A Notice of Inquiry dated January 27, 2016, was sent to the parties. Initial submissions were received from Justice on February 23, 2016, and on March 2, 2015. On March 3, 2016, the Applicant's initial submissions were received. The submissions received from Justice on February 23, 2016, were made *in camera* and later accepted as such. With the exception of the *in camera* submissions, the submissions were shared with each party and on March 21, 2016, reply submissions were received from Justice. No reply submissions were received from the Applicant.

III JURISDICTION

[9] Paragraph 48 (1)(a) of the ATIPP Act 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 Inquiry.

[10] Justice is a public body as defined in the ATIPP Act. In response to the Applicant's Access Request for the Video, Justice refused access. Given this, I have authority to conduct an Inquiry in order to determine whether Justice's decision to refuse this access was authorized by the ATIPP Act.

IV ISSUE

[11] The Notice of Inquiry sent to the parties identified one issue in this Inquiry:

> *Is the Department of Justice required by subsection 25 (1) and paragraphs 25 (4)(a) and (d), and authorized by subsection 18 (b), paragraphs 19 (1)(a), (e), (h), (j), (k), (l), and paragraphs 19 (2)(c) and 22 (1)(b) of the ATIPP Act, to refuse the applicant access to the record at issue.*

V RECORD AT ISSUE

[12] The record at issue in this Inquiry is a Video that was recorded using a digital video recording device located within the [redacted] Unit of the Whitehorse Correctional Centre (WCC).

V BURDEN OF PROOF

[13] Paragraph 54 (1)(a) establishes the burden of proof on the parties in this 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…*

VII DISCUSSION OF ISSUE

[14] In its submissions, Justice indicated it is relying on section 25, subsection 18 (b), paragraphs 19 (1)(a), (e), (h), (j), (k) and (l), 19 (2)(c), and 22 (1)(a) and (b), and subsection 22 (2) to refuse the Applicant access to the record at issue.

[15] Additional provisions relevant to the issue are as follows.

[16] The rights of an applicant to access records in the custody and control of a public body are set out in section 5.

> *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.*

[17] The process an applicant must follow to obtain access to records is set out in section 6.

> *6(1) To obtain access to a record, an applicant must make their request to the records manager.*
>
> *(2) …*
>
> *(3) The applicant may ask for a copy of the record or ask to examine the record.*

[18] The duty to assist applicants is set out in section 7.

> *7 The records manager must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

[19] The duty of the public body to assist the records manager meet his duty to assist an applicant is set out in section 10.

> *10 The public body that has the record in its custody or control must make every reasonable effort to assist the records manager and enable the records manager to respond to each applicant openly, accurately and completely.*

[20] The response an applicant is entitled to receive from the records manager to an access request is set out in section 13.

> *13(1) In a response under section 11, the records manager must tell the applicant*
>
> > *(a) whether or not the applicant is entitled to access to 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 to part of the record is refused, (i) the reasons for the refusal and the provision of this Act on which the refusal is based,*

[21] If access is granted, the public body is required follow the rules established in section 14 for providing access.

> *14(1) If an applicant is told under subsection 13(1) that access will be given, the public body concerned must comply with subsection (2) or (3) of this section.*
>
> *(2) If the applicant has asked for a copy of the record under subsection 6(3) and the record can reasonably be reproduced,*
>
> *(a) a copy of the record or part of the record must be supplied with the response; or*
>
> *(b) …*
>
> *(3) If the applicant has asked to examine the record under subsection 6(3) or if the record cannot reasonably be reproduced, the applicant must*
>
> *(a) be permitted to examine the record or part of the record;*
>
> *(b) …*
>
> *(4) The public body that has the record in its custody or control must create a record in a form usable by the applicant if*
>
> *(a) the record does not already exist in that form;*
>
> *(b) the applicant asks that the record be created in that form;*
>
> *(c) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise; and*
>
> *(d) creating the record would not unreasonably interfere with the operations of the public body.*

The provisions relied on by Justice to refuse access to the Video include both mandatory and discretionary exemptions. I will begin my analysis by examining whether Justice is required to refuse access under a mandatory exemption.

Unreasonable Invasion of Personal Privacy

Does section 25 of the ATIPP Act prohibit Justice from granting the Applicant access to the Video?

[22] Justice submitted that subsection 25 (1), together with paragraphs 25 (4)(a) and (d), require it to refuse access to the Video.

> *25(1) A public body must refuse to disclose personal information about a third party to an applicant if the disclosure would be an unreasonable invasion of the third party's personal privacy.*

[23] This exception would only apply if there is personal information of third parties in the Video. I viewed the Video in order to make this determination.

[24] The Video is a digital recording of a unit within WCC identified in Justice's submissions as the [redacted] Unit (Unit). The Video is date stamped [redacted]. It begins at [redacted] and ends at [redacted]. The Video appears to be taken from a camera in a fixed position located within the Unit. The Video shows multiple levels of the Unit and a common area on the main level with tables and a small kitchen area. Numerous inmates can be seen in the Video moving around the Unit along with WCC employees who appear in the Video from time to time. An incident occurs in the Video at [redacted] involving some inmates. Shortly thereafter, all inmates are shown to return to their cells and several WCC employees appear in the Unit and attend to one of the inmates who emerges from a cell. This inmate appears in the Video to be distraught and experiencing discomfort. I assume this inmate is the Applicant. No voices can be heard in the Video as there is no audio.

[25] The Applicant did not make any submissions about whether the images appearing in the Video would qualify as personal information about a third party. This fact is not significant in this case as the burden is on Justice to establish on the balance of probabilities that it is required to refuse to disclose the personal information about the third parties to the Applicant because section 25 (1) applies to the information.

[26] Justice submitted that the information in the Video is the personal information of the inmates for the following reasons:

- criminal history is included in the list of what constitutes personal information in subsection 3 (g), and
- the Video reveals images of the inmates.

[27] Justice made no submissions about whether the images of the WCC employees appearing in the Video is their personal information. Despite this, I must make a finding about whether this information is personal information in order to determine whether subsection 25 (1), a mandatory exception to the right of access, applies to this information.

[28] Section 3 of the ATIPP Act defines personal information as "recorded information about an identifiable individual." The image of an individual is not included in the list of information considered to be personal information under the definition of personal information. However, the list is non-exhaustive.

[29] For an image to be personal information, the image must be in a record and the identity of the individual must be ascertainable.

[30] The images of the inmates and WCC employees appear in the Video. A digital video recording is a 'record' as defined in the ATIPP Act.[1] The faces of the inmates and WCC employees are difficult to make out in the Video. However, a person who knows these individuals would be able to identify them when viewing the Video.

[31] From this evidence, it is clear that the images of the inmates are their personal information and I agree with Justice that the fact the Video is taken in a correctional institution also reveals that these inmates have a criminal history.

[32] It is less clear if the images of the WCC employees in the Video is their personal information given that the images are of these employees carrying out their employment duties.

[33] This issue was recently addressed by the British Columbia Supreme Court (BCSC) in *British Columbia (Ministry of Public Safety and Solicitor General) v.*

[1] Section 3 of the ATIPP Act defines 'record' to include, *inter alia*, "any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means…"

Stelmack, 2011 BCSC 1244. In that case, Russell J. concluded that the image of a corrections officer captured on video that showed her performing her duties was her personal information. In coming to this conclusion, Russell J. stated the following:

> *An employee's image, captured in the course of performing her duties, has been characterized as "personal information". In Eastmond v. Canadian Pacific Railway, 2004 FC 852 at para. 110, Lemieux J. held that "information captured by the cameras qualified as information about employees as individuals" and was therefore "information about an identifiable individual".*[2]

[34] I agree with Russell J. that the images of employees working in a correctional facility are their personal information. Given this, I find that the images of the WCC employees appearing in the Video is their personal information.

Would disclosure of the personal information in the Video constitute an unreasonable invasion of the inmates' or WCC employees' personal privacy?

Disclosure of WCC inmates' images

[35] As previously indicated, Justice is prohibited by subsection 25 (1) from disclosing the personal information to the Applicant if disclosure of the information would constitute an unreasonable invasion of the third party's personal privacy.

[36] 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;*

[2] At para. 507.

(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.

[37] 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).

[38] Subsection 25 (4) sets out what Justice must consider 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.*

[39] On the application of section 25, the Applicant submitted the following:

> *I am requiring the release of the video so that I may proceed to suit against the accused assaulter and Whitehorse Correctional Centre.*
>
> *As evidence in my case research the video will help identify witnesses as well as prove the assault.*
>
> *Third party privacy will be respected and current video and digital technology will allow blurring of third party faces and voices can be altered.*
>
> *The right to document and view all related documents and or video is guaranteed in the Canadian Bill of Rights and I wish to appeal on those grounds as well as realizing that all records will be treated with respect and privacy until entered as evidence in my lawsuit.*

[40] Justice submitted the following about why it is required under section 25 to refuse to disclose the Video to the Applicant:

In its initial submission:

> *[14] Subsection 25(2) provides a list of circumstances that would be considered an unreasonable invasion of a third party's personal privacy. This list is not an exhaustive list, and the Public Body believes that if information about a third party's employment or educational history (ss. 25 (d)) is considered an unreasonable invasion of privacy, then information about an individual's criminal history should also fall under this exemption.*
>
> *[15] Subsection 25(3), paragraphs (a) through (j) provide for circumstances when a release of third party personal information is not an unreasonable invasion of personal privacy.*
>
> *[16] The other inmates in this video have not, in writing or otherwise, consented or requested the disclosure as set out in paragraphs 25 (3)(a).*

[17] The Public Body was unable to identify any compelling circumstances in which disclosure of the number could affect anyone's health or safety as set out in paragraph 25(3)(b).

[18] The Public Body maintains that there is no enactment of Yukon or Canada which would authorize the disclosure of this information as set out in paragraph 25(3)(c).

[19] The disclosure is not for any research or statistical purpose in accordance with as set out in [sic] *paragraph 25(3)(d).*

[20] The information is not about "the individual'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 as set out in paragraph 25(3)(e).

[21] The disclosure would not reveal financial and other details of a contract to supply good or services to a public body as set out in paragraph 25 (3)(f).

[22] The information is not a description of property and its assessment under the Assessment and Taxation Act as set out in paragraph 25(3)(g).

[23] The information is not about expenses incurred by the third party while travelling at the expense of a public body, as set out in paragraph 25(3)(h).

[24] The disclosure does not reveal details of a licence, permit, or other similar discretionary benefit granted to the third party by a public body as set out in paragraph 25(3)(i).

[26] Subsection 25 (4) sets out another list of circumstances which a Public Body is required to consider before refusing to deciding [sic] *that release of the personal information would constitute an unreasonable invasion of a third party's personal privacy.*

[27] The record in question was examined when the reports of the incident were prepared in 2013. These information reports were provided to the Applicant in response to Access Request #A-6099. In addition, The Investigation and Standards Office is currently reviewing WCC's response to this incident and has reviewed the footage as part of their investigation. Finally, if the applicant [sic] *wishes to press criminal charges, the RCMP will be provided with a copy of the footage for their investigation. Therefore,*

refusing to disclose this information to the Applicant is not relevant to a fair determination of the applicant's [sic] *rights as set out in ss. 25(4)(e) of the Act.*

In its reply submission:

[1] The applicant states that he is anticipating a civil case for which the Public Body will be named as part of the suit.

[2] The Department is therefore assuming that the applicant is arguing under section 25 (4)(e), "the personal information is relevant to a fair determination of the applicant's rights."

[3] In considering all of the relevant circumstances the Public Body stands by its previous two submissions in this Inquiry as they cover most points. However, we would like to respond to the likelihood of a release through a court process as opposed to the release through an ATIPP request.

[4] The applicant could petition the court to have the video released.

[5] The Public Body, as part of the court action, would be able to petition the court not to release the record or agree to the release.

[6] If granted, the video records the applicant is seeking would become the record in a court file.

[7] As a record in a court file the record would be subject to court rules.

[8] The Public Body would be able to petition the court to put restrictions on the access and use of the record (dissemination) to outside of the court process that the Information and Privacy Commissioner cannot hear or grant.

[9] The inmate will be able to respond to the Public Bodies' [sic] *petition in court.*

[10] The court process would allow for a fair hearing of the applicant's [sic] *concern for release of his personal information.*

[11] If controls on the dissemination of the record are granted by the court this will satisfy the Public Bodies' [sic] *ongoing concern over video records being disseminated outside the control of the Public Body and engendering risks to inmates and staff as described under section 19.*

> *[12] The Inquiry process does allow for the Public Body to make* [sic] *argument that information should be withheld under the ATIPP Act.*
>
> *[13] However, the Inquiry process does not afford the Public Body the necessary controls over the eventual dissemination of video records that could be released, if the Information and Privacy Commissioner decides that a fair determination of the applicant's rights under Section 25 (4)(e) outweighs the Public Bodies* [sic] *need for maintaining security and safety outlined in this case under section 19 (a), (e), (h), (j) and 19 (2)(c) of the ATIPP Act as described in our previous submissions.*
>
> *[14] The Public Body is not satisfied with the assurances of the applicant that the record will be "treated with respect and privacy" as indicated by the applicant* [sic] *in his submission.*
>
> *[15] The safety and security of the Whitehorse Correctional Centre should not turn on the good will, no matter how sincerely pledged at the time, of one individual applicant.*

[41] Turning to the application of section 25, I will begin with subsection 25 (3) because if any of these paragraphs in this subsection apply to the inmates' personal information, I need not go on to consider the other subsections of section 25.

[42] Justice submitted that the inmates' personal information does not fall into any of the circumstances listed in subsection 25 (3) where disclosure of this information would not be an unreasonable invasion of the inmates' personal privacy. I agree with Justice that subsection 25 (3) does not apply to the inmates' personal information.

[43] Justice submitted that subsection 25 (2) does apply to the inmates' personal information for two reasons: paragraphs (a) through (i) are not exhaustive and criminal history is like employment or educational history identified in paragraph 25 (2)(d). From this, Justice concluded that the disclosure of the inmates' personal information would be an unreasonable invasion of their personal privacy. I agree with Justices' conclusion but disagree that paragraph 25 (2)(d) applies. My reasoning follows.

[44] Subsection 25 (2) sets out the only circumstances where it can be *presumed* that disclosure of personal information would be an unreasonable invasion of

personal privacy. It is, therefore, an exhaustive list.[3] Paragraph 25 (2)(h) could apply to the images of some of the inmates. Although the images are unclear, if someone could identify these individuals because they know them, they could presumably also identify their racial or ethnic origin. While there is no presumption that disclosure of information about criminal history would constitute unreasonable invasion of personal privacy of the third party the information is about, given the nature of the information, in my view disclosure of this information could.

[45] Justice also made some submissions about the application of section 25 in its *in camera* submissions that I have taken into consideration.

[46] Before I decide whether Justice must refuse to disclose these images to the Applicant under subsection 25 (1), I must weigh the factors in subsection 25 (4) which are non-exhaustive.

[47] The Applicant did not make submissions on the application of each provision in subsection 25 (4). He did identify that his reason for requesting a copy of the Video is so he can initiate a 'suit' against 'the accused assaulter' and WCC. He indicated that he requires the Video to identify witnesses and prove the assault. He added that "privacy will be respected and current video and digital technology will allow blurring of the third party faces…"

[48] Despite its reliance on subsections 25 (4)(a) and (d) to refuse to disclose the personal information of the inmates to the Applicant, Justice only provided evidence in relation to paragraph 25 (4)(e).

[3] The list of personal information presumed to be an unreasonable invasion of personal privacy under subsection 25 (2) is the only kind of otherwise non-exhaustive kinds of personal information under subsection 25 (1) that would constitute an unreasonable invasion of personal privacy. In short, subsection 25(2) is an exhaustive list. For clarity, the reference to subsections 25 (2) and (3) as 'exhaustive' in Inquiry Report ATP13-037AR at paragraph 131 was intended to highlight that the kinds of information contained in subsections 25 (2) and (3) is the only kind of personal information that, if disclosed, would or would not constitute an unreasonable invasion of personal privacy. These two subsections, however, allow a public body to presume one way or the other when a disclosure of the kinds of personal information found in these subsections would or would not constitute an unreasonable invasion of personal privacy if disclosed to an applicant.

Do the factors in paragraphs 25 (4)(a) through (g) weigh for or against disclosing the inmates' images to the Applicant?

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

[49] The images of the inmates show that these inmates are incarcerated, which in and of itself reveals they have a criminal history. If a copy of the Video were made available to the Applicant such that its contents could be disseminated to the world, these inmates may be unable to secure future employment or rental housing and suffer harm as a result. They could also suffer embarrassment and humiliation. As such, I am of the view that this factor weighs against disclosure.

[50] The Applicant indicated that the images could be blurred, thereby eliminating the privacy impact. If Justice were to blur the images of the third party inmates, then I am unsure how the Video would be useful to the Applicant as he would be unable to tell from the Video whether an assault occurred or who the witnesses to the alleged assault are. Given this, I see no benefit in this case to having Justice blur the images.

[51] I will add that if the images were disclosed in a limited way, such as by allowing the Applicant or his legal counsel to view the Video, the harms that the inmates may experience if their images are disseminated widely would likely be eliminated. If the Applicant or his legal counsel only viewed the video, then in my view, and without any evidence to the contrary, the inmates whose images appear in the Video would not be exposed to unfair financial or other harm.

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

[52] The Video is an objective record of events that occurred in the Unit on [redacted], between [redacted] and [redacted], and is therefore an accurate depiction of these events. Given this, I find that this factor does not weigh for or against disclosure of the images of the inmates and is neutral.

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

[53] Adjudicator Cunningham, an adjudicator with Alberta's Office of the Information and Privacy Commissioner (AB OIPC), examined whether an image of an inmate in a holding cell was supplied by the inmate in Order F2015-02. In reaching her conclusion that the image was not supplied in confidence under Alberta's

Freedom of Information and Protection of Privacy Act (AB FOIPPA), Adjudicator Cunningham stated the following:

> *The term "supply" typically means "to provide what is necessary or required." The phrase "supplied in confidence" appears to refer to information that is actively provided by a third party, and in those circumstances where the third party is in a position to impose terms of confidentiality. With regard to the "tank 5" CCTV recording, none of the inmates had any choice but to wait in the room referred to as "tank 5" and be the subject of CCTV recordings. Moreover, it does not appear that the inmates had any ability to impose restrictions as to the extent to which the Public Body could use, or disclose the information recorded by the CCTV cameras, provided the use or disclosure conformed to the requirements of Part 2 of the FOIP Act. In any event, even if I am wrong that the personal information of inmates captured on CCTV recordings cannot be said to be supplied in confidence, the Public Body has provided no evidence regarding the expectations of the inmates regarding confidentiality or the terms and conditions under which the inmates "supplied" their personal information to the Public Body…*

[54] I agree with Adjudicator Cunningham that inmates cannot be said to have 'supplied in confidence' their images that are captured on a video while confined in a correctional institution. Having received no submission from Justice on their views about whether this information was supplied in confidence, I find that this provision also to be neutral as it does not weigh for or against disclosure of the images.

> *25 (4)(d) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant;*

[55] In my view, if the Applicant were to receive a copy of the images, then there is potential for reputational harm to occur to the inmates whose images appear in the Video. As such, I find that this factor weighs in favour of refusing disclosure of the images to the Applicant.

[56] Without any evidence to the contrary, it is unlikely that any reputational harm will occur to these inmates if only the Applicant and/ or his legal counsel were to view the Video.

> *25 (4)(e) the personal information is relevant to a fair determination of the applicant's rights;*

[57] Justice made the following submissions about why disclosing the images of the inmates to the Applicant is not relevant to a fair determination of the Applicant's rights. These submissions are summarized as follows:

- the Applicant has been given reports of the incident;
- WCC's response to the incident is under review by the Investigation and Standards Office (ISO) and the Video will be reviewed by them;
- The RCMP can view the Video if the Applicant presses criminal charges;
- The Applicant can petition the court to have the Video released and through that process Justice can apply to limit dissemination of the Video;
- Justice's primary concern is granting the Applicant unfettered access to the Video.

[58] Justice appears to suggest that paragraph 25 (4)(e) does not apply to favour disclosure in this case because the Applicant may be able to obtain access to the Video through a court process or because the ISO and RCMP can view the Video.

[59] The test in paragraph 25 (4)(e) is not whether the Applicant can access personal information through some other process or that his or her rights can be determined through some other means. The test is whether the personal information, in this case the images of the inmates, 'is relevant' to the fair determination of the Applicant's rights.

The test for determining whether this factor applies is as follows.

1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;
2. the right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;
3. the personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and

4. the personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.[4]

[60] On the first part of the test, the Applicant indicated that he wants the Video to initiate a lawsuit against WCC and the alleged assaulter. Every person, including an inmate, has a legal right to sue another person in a common law proceeding.

[61] On the second part of the test, based on the Applicant's submission, I conclude that he is contemplating initiating a lawsuit.

[62] On the third part of the test, following my review of the Video and based on the Applicant's submission that he wants to view the Video to identify witnesses and prove the assault, in my view, the images of the inmates appearing in the Video will have some bearing on the Applicant's ability to initiate a lawsuit.

[63] On the fourth part of the test, Justice indicated that it provided reports about the incident to the Applicant. It did not, however, provide any evidence about what these reports contain and whether the information is such that the Applicant would not require the Video to prove that the incident occurred, to identify any witnesses, and what steps may have been taken by WCC to prevent and respond to the incident. The only evidence I have before me is that the Applicant has been given some reports that may or may not contain the information he needs to initiate his lawsuit. Given this, it is necessary, in my view, that the Applicant obtain access to the inmates' images in the Video in order to prepare for a lawsuit.

[64] There is no requirement, as suggested by Justice, to consider the Public Body's need to maintain security and safety of WCC in determining whether paragraph 25 (4)(e) applies.

[65] Based on the foregoing, I find that this factor weighs in favour of disclosure of the images to the Applicant.

> *25 (4)(f) the disclosure is desirable for the purpose of subjecting the activities of the Government of Yukon or a public body to public scrutiny;*

[4] Order F12-12, *British Columbia (Justice) (Re)*, 2012 BCIPC 17 (CanLII), citing Ontario Order P-651, [1994] O.I.P.C No. 104, at para. 39.

[66] In this case, the Applicant is an inmate in WCC and is, therefore, in the physical custody of Justice. As a custodian, Justice has an obligation to prevent inmates from suffering harm while in custody. It is, therefore, desirable, in my view, to hold Justice accountable for harm suffered by an inmate while in WCC.

[67] In order to determine whether this factor weighs in favour of or against disclosure depends on whether the images of the inmates that appear on the Video may subject the activities of Justice to public scrutiny.

[68] As previously indicated, the Video shows that an incident occurred and who was present when it occurred. This information is shown through the images of those individuals appearing in the Video, some of whom are inmates. In my view, disclosing these images to the Applicant will allow for a more thorough and searching review of the activities of Justice as it relates to the incident and promote transparency.[5] Therefore, I find that this factor weighs in favour of disclosure.

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

[69] In my view, disclosing the images of the inmates to the Applicant will not promote public health and safety. As such, I find this factor neutral as it does not weigh for or against disclosure.

[70] Although I determined that the ability of the Applicant to obtain access to the images of the inmates through another process is not part of the test under paragraph 25 (4)(e), I find that this fact is a relevant circumstance that I must consider under this subsection before deciding whether Justice is required by subsection 25 (1) to refuse to disclose the inmates' images to the Applicant. In short, the fact is relevant because the 'relevant circumstances' in subsection 25 (4) are non-exhaustive in nature.

[71] Justice submitted that the Applicant may be able to access the Video by petitioning the court for access which would provide Justice the opportunity to limit the use that the Applicant can make of the Video by challenging the petition. While it may be a fact that this option is open to the Applicant, Justice submitted no

[5] Whether the release of images would allow for a more thorough and searching review of the activities of the public body itself and would promote transparency was found to have supported disclosure of images under paragraph 22 (2)(a) of British Columbia's *Freedom of Information and Protection of Privacy Act* in Order F12-12, *British Columbia (Justice) (Re)*, 2012 BCIPC 17 (CanLII).

evidence to indicate this is a viable option for the Applicant; that is, evidence that the Applicant has the means available to exercise this option. Given this, I am unable to make a finding about whether this factor weighs in favour of disclosure or not.

[72] Another circumstance that is relevant to deciding whether Justice must refuse to disclose the inmates' images to the Applicant is that the Applicant in this case requested a copy of the Video. As I indicated above, the inmates whose images appear in the Video would not likely suffer the harms identified in my analysis of the application of paragraphs 25 (4)(a) and (d) if the Video were only viewed by the Applicant or his legal counsel. Given this, if the Applicant were to make a new request for access to the Video in which he requested only to view the Video, subject to any evidence presented to the contrary through the third party consultation process, then Justice may be able to provide access to the inmate's images appearing in the Video on the basis that it would not be an unreasonable invasion of the inmates' personal privacy. As this option is open to the Applicant at no cost, I consider this to weigh in favour of non-disclosure of a copy of the Video to the Applicant.

[73] Based on the foregoing, on balance, I find that in this case Justice must refuse to disclose the images of the inmates to the Applicant in this case because to do so would constitute an unreasonable invasion of their personal privacy.

Disclosure of WCC employees' images

[74] Whether disclosure of the images of WCC employees would be an unreasonable invasion of these employees' personal privacy is a different matter. Justice did not make any submissions as to the application of section 25 to this personal information. As stated previously, because section 25 is a mandatory exception, I must determine whether it applies to this information.

[75] A recent decision by Adjudicator Alexander, from British Columbia's (BC) Office of the Information and Privacy Commissioner (OIPC), sets out the findings from a series of cases in BC[6] that examined whether the images of a corrections officer taken while performing her duties would, if released, be an unreasonable

[6] See Order F08-13, *British Columbia (Public Safety and Solicitor General)*, 2008 CanLII 41151; *British Columbia (Ministry of Public Safety and Solicitor General) v. Stelmack,* 2011 BCSC 1244; and *Ministry of Justice*, Order F12-12, *British Columbia (Justice) (Re)*, 2012 BCIPC 17 (CanLII).

invasion of her personal privacy under section 22 of BC's *Freedom of Information and Protection of Privacy Act* (BC FIPPA).[7]

The provisions at issue in those cases were paragraphs 22 (3)(d) and 22 (4)(e) of the BC FIPPA. These provisions state as follows:

> *22 (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> > *(d) the personal information relates to employment, occupational or educational history,*
>
> *22 (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
>
> > *(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,*

[76] Adjudicator Alexander identified that information that is merely descriptive about a public body employee's job functions will fall under paragraph 22 (4)(e) but where there is a personal dimension to the information such that the information 'relates to the employment' of the employee, then paragraph 22 (3)(d) will apply.

[77] In examining whether paragraph 22 (3)(d) or 22 (4)(e) applied to the image of the corrections officer, Adjudicator Alexander stated the following.[8]

> *The information was produced as a result of the routine recording of the everyday operations within VCJ. It records the Correctional Officer's "tangible activities" in the normal course of work-related activities. For that reason, the disclosure of the Correctional Officer's activities is within s. 22(4)(e). The fact of the Correctional Officer's employment is also likely within s. 22(4)(e).*
>
> *However, the Correctional Officer's facial image is not information "about" her position, functions or remuneration in the workplace. Her argument on the remittal, and Justice Russell's analysis, make it clear that her concern with*

---

[7] Order F15-42, *School District 57 (Prince George) (Re)*, 2015 BCIPC 45 (CanLII), at para 30, citing *Ministry of Justice*; Order F12-12, *British Columbia (Justice) (Re)*, 2012 BCIPC 17 (CanLII), at paras 29 and 30.

[8] Order F08-13, *British Columbia (Public Safety and Solicitor General)*, 2008 CanLII 41151, para 30.

> *respect to the disclosure of her image is not limited to being identified as an employee of VCJ. There is no fast rule concerning the application of s. 22 to information that identifies an individual as an employee of a public body: it depends on the circumstances of the case. Because the Correctional Officer's facial image does not provide information about her functions as an employee of a public body, I find that it is not "about" her position, functions or remuneration as a public body employee and thus does not fall within s. 22(4)(e).*

[78] Adjudicator Alexander disagreed with the approach taken which separated the analysis of third parties' faces and bodies. His reasoning was that the images remaining of the bodies of the correctional officer was also not information about the functions of the corrections officer.

[79] The equivalent provision in the ATIPP Act to paragraph 22 (4)(e) of the BC FIPPA is paragraph 25 (3)(e), which states:

> *25 (3) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
>
> > *(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;*

[80] I agree with Adjudicator Alexander that images, both faces and bodies, of employees of a public body that appear in a Video are not information about the functions of those employees. Based on this, I find that paragraph 25 (3)(e) does not apply to the images of the WCC employees appearing in the Video. I also find that no other provision in subsection 25 (3) would apply to these images.

[81] I will now go on to consider whether there is a presumption under subsection 25 (2) that disclosure of the images would constitute an unreasonable invasion of personal privacy of the WCC employees if their images were disclosed to the Applicant.

[82] In Order F12-12[9], the Order referred to by Adjudicator Alexander, Adjudicator Boies Parker found that paragraph 22 (3)(d) of the BC FIPPA applies to the image of the corrections officer in that case, based on evidence that the corrections officer's concern about the release of her face may cause her harm as a result of specific incidents arising from her employment history. From this, Adjudicator Boies Parker concluded that the corrections officer's image in that case 'related' to her employment history.

[83] On the evidence before me, I am unable to conclude that the images of the WCC employees appearing in the Video relate to their employment history. As such, I find that the presumption under paragraph 25 (2)(d) does not apply in this case.

[84] Given that the personal information at issue is images, racial or ethnic origin may be ascertainable from the Video. Subsection 25 (2)(h) creates a presumption whereby disclosure of personal information that indicates a third party's racial or ethnic origin would be an unreasonable invasion of the third party's personal privacy.

[85] Upon my review of the Video, I am of the view that the race or ethnic origin of the WCC employees appearing in the Video is ascertainable. Consequently, I find that subsection 25 (2)(h) does apply to the images of the WCC employees in the Video. Given this, there is a presumption that disclosure of these images will constitute an unreasonable invasion of these employees' personal privacy. This presumption is, however, rebuttable.

[86] Before deciding whether subsection 25 (1) requires Justice to refuse to disclose the images of the WCC employees, I need to weigh the factors in subsection 25 (4) in respect of these images.

[87] As I previously indicated, Justice provided no evidence about whether the images of the WCC employees are their personal information. The only evidence before me is the Video.

---

[9] *British Columbia (Justice) (Re)*, 2012 BCIPC 17 (CanLII)

Do the factors in paragraphs 25 (4)(a) through (g) weigh for or against disclosing the WCC employees' images to the Applicant?

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

[88] During the Video, approximately 10 of WCC's employees appear within its time frame. Most are wearing dark clothing. One employee is wearing a white shirt. A person is wearing what looks like nursing clothing. All employees appear to be carrying out their duties. From these images, I do not see how any of these employees may be exposed unfairly to financial or other harm and I have no evidence to suggest this is the case. Consequently, I find that this factor weighs in favour of disclosure of these images to the Applicant.

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

[89] For the same reasons I noted above in respect of my analysis of this factor concerning possible disclosure of inmates' images, I find that this factor does not weigh for or against disclosure of the images of the inmates and is neutral.

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

[90] As I have no evidence before me about whether this factor applies in this circumstance, I find that it does not and is, therefore, neutral.

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

[91] Based on the content of the Video, I do not see how disclosing the images of the WCC employees to the Applicant will unfairly damage the reputation of any of those employees. Having no evidence to the contrary, I find that this factor weighs in favour of disclosing the images to the Applicant.

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

[92] For the reasons previously stated, the first three parts of the test for determining whether this factor applies is met.

[93] On the fourth part of the test, I find that the images of the WCC employees that demonstrate what these employees did in response to the incident are necessary in order for the Applicant to prepare for the proceeding or to ensure a fair hearing. Consequently, I find that this factor weighs in favour of disclosure.

> *25 (4)(f) the disclosure is desirable for the purpose of subjecting the activities of the Government of Yukon or a public body to public scrutiny;*

[94] In my view, the images that demonstrate what WCC employees did in order to prevent or respond to the incident will allow for a more thorough and searching review of the activities of Justice as it relates to the incident and promote transparency. Consequently, I find that this factor weighs in favour of disclosure.

> *25 (4)(g) the disclosure is likely to promote public health and safety.*

[95] In my view, disclosing the images of the WCC employees to the Applicant will not promote public health and safety. As such, I find this factor neutral as it does not weigh for or against disclosure.

[96] Based on the forgoing, I find, on balance, that disclosure to the Applicant of the WCC employees' images appearing in the Video would not be an unreasonable invasion of their personal privacy and consequently the presumption under subsection 25 (2)(h) is rebutted. Therefore, I find that Justice is not required by subsection 25 (1) to refuse to disclose the images of WCC employees appearing in the Video to the Applicant.

[97] My finding in respect of WCC employees' images further supports that the Applicant may be able to obtain access to the Video by making a new request only to view the Video, as discussed under paragraph 72 above.

[98] Having taken into account that subsection 25 (1) may not prevent the Applicant from obtaining access to the Video if he makes a new request only to view the Video, I will go on to analyze Justice's ability to refuse the Applicant access to the Video on the basis of the additional provisions it cited as authority for this refusal. As part of this, I will analyse each based on the Applicant receiving a copy or only viewing the Video.

Litigation Privilege

Does subsection 18 (b) authorize Justice to refuse access to the Video?

[99] Justice indicated it is relying on subsection 18 (b) to refuse the Applicant access to the Video. Subsection 18 (b) is a discretionary exception. This means that Justice has discretion about whether to provide the Applicant with a copy of the Video after deciding this subsection applies to the Video.

[100] Justice submitted the following about its reliance on this subsection to refuse the Applicant access to the Video.

> *The primary purpose of the DVR system at WCC is to have evidence in contemplation of reasonably expected proceedings in court or before an adjudicative body. Thus the Public Body claims this record exception.*
>
> *The applicant* [sic] *has already requested a review of the incident which the document in question contemplates by the Investigation and Standards Office which would lead one to expect that he takes issue with the way that the Public Body handled the incident.*

[101] Section 18 provides a public body with the ability to refuse to provide an applicant access to records that are privileged. Specifically, section 18 states as follows.

> *18 A public body may refuse to disclose to an applicant a record*
>
> *(a) that is subject of solicitor client privilege; or*
>
> *(b) that was prepared by or for a public body in contemplation of and for the purpose of existing or reasonably expected proceedings in court or before an adjudicative body, regardless of whether it has been communicated to or from a lawyer.*

[102] There are many variations of the privilege exception in access to information legislation across Canada. Section 19 of Ontario's *Freedom of Information and Protection of Privacy Act* (ON FIPPA) has two exceptions for privileged records in their access to information legislation that are closest to our section 18.

> *19. A head may refuse to disclose a record,*
>
> *(a) that is subject to solicitor-client privilege;*

> *(b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or*
>
> *(c) …*

[103] In 2006, the Ontario Court of Appeal considered the meaning of subsections 19 (a) and (b) in the ON FIPPA. Lane, J., writing for the majority, stated the following about the meaning of these subsections.

> *This section is generally regarded as having two branches: the first is the exemption for documents covered by the well-known solicitor-client privilege; the second is the exemption created by all the words following "privilege" and is similar to the…common law "litigation privilege" protecting "solicitor's work product" or the "solicitor's brief."*[10]
>
> *…the second branch of s. 19 is not the source of litigation or "work product" privilege in the Crown brief. Litigation privilege grew out of solicitor-client privilege, but has a different policy justification. It is not related to the confidences between solicitor and client, but to the needs of the adversary system.*[11]
>
> *…the second branch of s. 19, unlike the first, does not simply import the common law into FIPPA. The second branch does not even refer to the common law litigation privilege. This point was made by Carnwath J., for the Divisional Court, in* Big Canoe *at paras. 31 and 32, where he said that while the extent of solicitor-client privilege in the first branch would vary as the common law evolved, the second branch was fixed by the words of the section. The language was clear and unambiguous: the head may refuse to disclose a record…prepared as described in the statute. It was submitted that the Court of Appeal did not adopt this reasoning, but at para. 9, Carthy J.A. points out that the Inquiry officer had accurately defined the common law [of litigation privilege] but not the statute. At para. 13, he described the error made by the Inquiry officer:*
>
> > *The error made by the Inquiry officer was in assuming that the intent was to grant litigation privilege to Crown counsel and then reading in the common law temporal limit.*[12]

---

[10] *Ontario (Attorney General) v. Holly Big Canoe*, 2006 CanLII 14965 (ON SCDC), para 4.

[11] *Ibid.,* para 26.

[12] *Ibid.* 9*,* para 27.

From this Lane, J. concluded that:

> *…the second branch was not an importation of common law litigation privilege, but an enactment in its own right…unlike litigation privilege, the statutory exemption [does] not terminate when the litigation terminated…*[13]

[104] This decision clarifies that the privilege exception in subsection 19 (b) of the ON FIPPA is not the common law litigation privilege, but a statutory privilege that must be interpreted based on the plain meaning of the words of the provision. It follows from this that there is no temporal end to the statutory privilege in subsection 19 (b) like there is for the common law litigation privilege.

Purposive interpretation of subsection 18 (b)

[105] The modern approach to statutory interpretation is that the words of an Act are to 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.[14]

[106] In Yukon's *Interpretation Act*, it states 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."[15]

The purposes of the ATIPP Act are set out in section 1 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*
>
> *(a) giving the public the right of access to records; and*
>
> *(b) giving individuals a right of access to, and a right to request correction of, personal information about themselves; and*
>
> *(c) specifying limited exceptions to the rights of access; and*
>
> *(d) preventing the unauthorized collection, use, or disclosure of personal information by public bodies; and*

---

[13] *Ibid.* 9, para 28.

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

[15] *Interpretation Act*, RSY 2002, c125, section 10.

> *(e) providing for an independent review of decisions made under this Act.*

[107] In commenting on the purposes of the ON FIPPA, Lane, J. stated the following.

> *In approaching ss. 19, 21 and 49, the first observation is that they are part of an Act with several purposes. The first is described in s. 1(a) as being to provide a right to access to information under the control of the government of Ontario, or an agency thereof, upon the principles that information should be available to the public, subject to exemptions that are necessary,…limited, specific and independently reviewed. The second purpose, set out in s. 1(b), is to protect the privacy of individuals as to their personal information held by government. The third, also in s. 1(b), is to provide individuals with a right of access to that personal information.*[16]

[108] The same can be said about the purposes of the ATIPP Act. In describing how to apply the purposes to interpreting the provisions of the ON FIPPA, Lane, J. stated further that:

> *These purposes are equal in importance and closely inter-related. Every section must be construed in the light of all three. The second observation is that, while the first purpose is expressly stated to be subject to exemptions, there is no such reservation in the statement of the second and third purposes. That does not mean that there are no limits on the implementation of the second and third purposes, but it does signal that we should not carry any such limitation beyond its narrowest scope. In order to meet the test of reasonableness, a head exercising the discretion granted by the second branch of s. 19 must do so bearing in mind the three purposes of the Act and the other sections which bear upon the decision.*[17]

[109] When interpreting subsection 19 (b), Lane, J. indicated that the exceptions to the right of access in ON FIPPA "is clearly an effort to reconcile the two aspects of FIPPA which have some potential to conflict: the right to one's own personal information and the need to limit disclosure of sensitive materials from the Crown brief."[18] On this point he stated the following.

---

[16] *Ibid.* 9, para 19.

[17] *Ibid.* 9, para 20.

[18] *Ibid.* 9, para 21.

> *Since both purposes are fundamental to FIPPA, this section must be read so as to trench as little as possible upon each purpose. This section also highlights the importance of s.19 and the protection it gives to the Crown brief. That protection can trump a person's right to his or her own personal information, one of the three purposes of the Act.*[19]

[110] Based on the conclusions reached by Lane, J. the purposes of the ATIPP Act will, in my view, only be achieved if a public body, that receives a request from an individual to access a record containing their own personal information, construes subsection 18 (b) such that the record will only be refused by the public body if it determines it is reasonably necessary in the circumstances to refuse access in order to preserve the statutory litigation privilege of the record being requested.

[111] With this in mind, I turn now to the words of subsection 18 (b). In order for a public body to refuse access to a record:

1) the record must have been prepared by or for a public body;

2) the record must have been prepared in contemplation of ***and*** for the purpose of existing or reasonably expected proceedings;

3) the proceedings must be before a court or an adjudicative body; and

4) a lawyer need not be involved in the communication of the record.

Was the record prepared by or for a public body?

[112] I already found that Justice is a public body under the ATIPP Act.

[113] Justice submitted that WCC prepared the Video using a digital video recording device that is located within the Unit. Therefore, I find that the Video was prepared by Justice.

Was the record prepared in contemplation of and for the purpose of existing or reasonably expected proceedings?

[114] The nature of the privilege in subsection 19 (b) of the ON FIPPA is slightly different than our subsection 18 (b) and this difference is important when analysing the case law interpreting subsection 19 (b) of the ON FIPPA. The purpose, as

[19] *Ibid.*

described by Ontario's Courts of the subsection 19 (b) 'statutory privilege' is to protect from disclosure the contents of a Crown counsel's brief. This is based on the wording of subsection 19 (b) that specifically references "Crown counsel." Subsection 18 (b) of the ATIPP Act does not specifically define any role within a public body for the privilege to attach. The only specification is that the record is created in the manner and for the purpose specified in the subsection.

In contemplation of:

[115] The meaning of 'contemplate' in the Canadian Oxford Dictionary (COD) is to "regard (an event) as possible.[20]" 'Possible' is defined in the COD as something "that is likely to happen," "that is perhaps true or of fact," or "that is or perhaps will be."

Existing or reasonably expected proceedings:

[116] Whether a proceeding is existing is a matter of fact. Whether a proceeding is 'reasonably expected' is something else. The Supreme Court of Canada recently identified in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31 (CanLII), that whenever the words 'reasonably expected' appear in access to information legislation 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. In this regard, Cromwell and Wagner, JJ., writing for the majority, stated the following.

> *Given that the statutory tests are expressed in identical language in provincial and federal access to information statutes, it is preferable to have only one further elaboration of that language; Merck Frosst, at para. 195:*
>
> > *I am not persuaded that we should change the way this test has been expressed by the Federal Courts for such an extended period of time. Such a change would also affect other provisions because similar language to that in s. 20(1)(c) is employed in several other exemptions under the Act, including those relating to federal-provincial affairs (s. 14), international affairs and defence (s. 15), law enforcement and investigations (s. 16), safety of individuals (s. 17), and economic interests of Canada (s. 18). In addition, as the respondent points out, the "reasonable expectation of probable*

[20] Canadian Oxford Dictionary, Second Edition, 2004, Oxford University Press, Oxford New York.

> *harm" test has been followed with respect to a number of similarly worded provincial access to information statutes. Accordingly, the legislative interpretation of this expression is of importance both to the application of many exemptions in the federal Act and to similarly worded provisions in various provincial statutes. [Emphasis added.]*
>
> *This Court in Merck Frosst adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in Merck Frosst emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This Inquiry of course 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": Merck Frosst, at para. 94, citing F.H. v. McDougall, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.*

[117] Based on the foregoing, for Justice to establish that the Video was prepared in contemplation of and for the purpose of existing or reasonably expected proceedings, it must provide evidence that:

1) a purpose of preparing the Video was for a court or adjudicative proceeding that was likely to or would perhaps occur; and

2) the point at which the Video became a record:

    a. the Applicant had initiated a court or adjudicative proceeding; or

    b. it was probable that the Applicant would initiate a court or adjudicative proceeding.

[118] As previously noted, Justice submitted that "the primary purpose of [the] DVR system is to have evidence in contemplation of reasonably expected proceedings in court or before an adjudicative body." It also submitted that the ISO review that occurred *after* the Video was created "would lead one to expect that he takes issue with the way that the Public Body handled the incident."

[119] In my view, Justice has met the first part of the test based on the evidence that at least one of the purposes of preparing the Video was in anticipation of a court or adjudicative proceeding. It has not, however, met the second part of the test. Justice provided no evidence to support that when the Video was recorded it was done so because a court or adjudicative proceeding initiated by the Applicant was existing or probable. Justice's evidence that a digital video recording is only saved and used as evidence by WCC if an incident occurs goes to the retention of the recording, not its creation. Given this, Justice cannot rely on subsection 18 (b) to refuse to disclose the Video to the Applicant.

Law Enforcement

Do paragraphs 19 (1)(a), (e), (h), (j), (k) and (l), and subsection 19 (2) authorize Justice to refuse access to the Video?

[120] Justice has indicated it is relying on paragraphs 19 (1)(a), (e), (h), (j), (k) and (l) and subsection 19 (2) to refuse the Applicant access to the Video. Like subsection 18 (b), Justice has discretion about whether to refuse access under section 19.

[121] The evidence provided by Justice about the application of the section 19 paragraphs is primarily contained in its *in camera* submissions with the exception of the following.

> *The Whitehorse Correctional Centre is a facility tasked with the legal detention of individuals. Records about powers exercised for the purpose of requiring or enforcing compliance with the law are considered law enforcement records…*
>
> *As per the arguments made* [sic] *its in camera submission, the Public Body believes that releasing this record, in whole or in part, could reasonably be expected to: interfere with law enforcement…*
>
> *If controls on the dissemination of the record are granted by the court this will satisfy the Public Bodies'* [sic] *ongoing concern over video records being disseminated outside the control of the Public Body and engendering risks to inmates and staff as described under section 19.*

[122] Justice has presented the same evidence for paragraphs 19 (1)(a), (e), (h), (j), (k) and (l). I will therefore consider the application of these paragraphs together.

[123] In order for some of these paragraphs to apply, the Video must be a law enforcement record.

Is the Video a law enforcement record?

[124] "Law enforcement" is defined in section 3 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;*

[125] Employees of WCC are vested with the powers of peace officers as they relate to the administration of the *Corrections Act, 2009*. This fact, together with the purpose WCC creates digital video records, as identified by Justice in its *in camera* submission, support that the Video was created for the purposes of policing. I also find that digital video records may be used by WCC's employees to conduct investigations that could lead to a penalty or punishment being imposed under the *Corrections Act, 2009* and the *Criminal Code of Canada*. As such, I find that the Video qualifies as a law enforcement record.

[126] I will now go on to assess whether disclosure of the Video to the Applicant 'could reasonably expected to' result in any of the harms identified in the paragraphs under subsection 19 (1) relied on by Justice.

[127] The test to apply in determining whether the law enforcement provisions in access to information legislation apply was set out recently in Order F2016-10[21] issued by AB's OIPC. In considering whether paragraph 20 (1)(m), one of the law enforcement provisions in AB's FOIPPA, applied to the information at issue in that case, Adjudicator Swanek stated the following:

[21] Order F2016-10 (Re), 2016 CanLII 20120 (AB OIPC).

> *In order for section 20(1)(m) to apply to information, the disclosure of that information must meet the harms test: there must be a clear cause and effect relationship between disclosure of the withheld information and the outcome or harm alleged; the outcome or harm that would be caused by the disclosure must constitute damage or detriment, and not simply hindrance or minimal interference; and the likelihood of the outcome or harm must be genuine and conceivable (Order 96-003 at p. 6 or para. 21).*
>
> *The third part of the test requires that the alleged harm from disclosure be reasonably expected.*[22]

[128] From here, Adjudicator Swanek went on to cite the same provisions of *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* cited above and identified that the words 'reasonably expected to' in AB's FOIPPA should be interpreted as the 'reasonable expectation of probable harm.'

[129] In order for Justice to rely on paragraphs 19 (1)(a), (e), (h), (j), (k) or (l), it must establish that there is a reasonable expectation that the harms identified in these provisions are probable if the Video is disclosed to the Applicant.

[130] The majority of the *in camera* submissions provided by Justice explain the need to refuse to provide a copy of the Video to the Applicant, citing risks to security of the building, staff and other inmates with specific examples of these risks. Based on these submissions and the fact the Applicant has requested a copy of the Video, thereby eliminating Justice's ability to control the dissemination of the Video, and taking into account the purpose of the law enforcement provisions, I am satisfied that Justice has established that it is reasonable to expect that the harms identified in paragraphs 19 (1)(a), (e), (h), (j), (k) and (l) are probable if a copy of the Video is disclosed to the Applicant.

[131] As section 19 is a discretionary exception, I must consider whether Justice properly exercised its discretion in this case.

---

[22] *Ibid.*

[132] In Inquiry Report File ATP11-029AR, I stated the following about the requirement to exercise discretion for the law enforcement exception.[23]

> *… the exercise of discretion involves balancing the interests, including the public interest, against the risks of interfering with a law enforcement matter.*

[133] For exercises of discretion, other than for solicitor and client privilege, the following additional factors are relevant to the review of discretion.[24]

- The decision was made in bad faith.
- The decision was made for an improper purpose.
- The decision took into account irrelevant considerations.
- The decision failed to take into account relevant considerations.

[134] Based on the submissions provided by Justice, inclusive of its explanations about the concerns expressed, I find that Justice properly balanced the interests at stake and that none of the factors above noted were applied to the exercise of discretion. As such, I find that Justice exercised its discretion properly in deciding to refuse the Applicant access to the Video under paragraphs 19 (1)(a), (e), (h), (j), (k) and (l).

[135] Justice made the same arguments for refusing to disclose the Video record to the Applicant for subsection 19 (1) as it made for subsection 19 (2). I disagree with Justice that subsection 19 (2) applies to the Video in this case for the following reason and find that it does not apply.

[136] Subsection 19 (2) would only apply if the Video were about the history, supervision or release of 'a person' who is under sentence and disclosure of the Video could reasonably be expected to obstruct the proper custody or supervision of 'that person.' Justice has not provided any evidence that disclosure of the Video is

---

[23] *Yukon Department of Community Services ATP11-029AR*, August 2014, www.ombudsman.yk.ca, (YK IPC), para 39.

[24] The SCC, in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII), identified that the test for determining discretion for solicitor and client privilege required different considerations other than these factors. In F2010-036, an adjudicator with Alberta's OIPC determined that these factors are relevant for other discretionary exemptions. See the discussion at paras 23 to 25 in Order F2016-10 (Re), 2016 CanLII 20120 (AB OIPC).

reasonably expected to obstruct the proper custody or supervision of a specific inmate, which is required by this subsection.

[137] Although I found that Justice can rely on paragraphs 19 (1)(a), (e), (h), (j), (k) and (l) to refuse access to the Video, Justice indicated in its submissions that if the dissemination of the record were controlled, then that it would "satisfy the Public Bodies' ongoing concern over video records being disseminated outside the control of the Public Body and engendering risks to inmates and staff as described under section 19." On this point, Justice submitted the following.

> *…the Inquiry process does not afford the Public Body the necessary controls over the eventual dissemination of video records that could be released, if the Information and Privacy Commissioner decides that a fair determination of the applicant's rights under Section 25 (4)(e) outweighs the Public Bodies* [sic] *need for maintaining security and safety outlined in this case under section 19 (1)(a), (e), (h), (j)* [sic] *and 19 (2)(c) of the ATIPP Act as described in our previous submissions.*
>
> *If controls on the dissemination of the record are granted by the court this will satisfy the Public Bodies'* [sic] *ongoing concern over video records being disseminated outside the control of the Public Body and engendering risks to inmates and staff as described under section 19.*

[138] From this submission, I conclude that if the Applicant made a new request for access to the Video and requested that only he or his legal counsel be able to view the Video, then Justice may be willing to exercise its discretion under section 19 and grant the Applicant's request to access the Video.

Interfere with Public Safety

Does paragraph 22 (1)(b) authorize Justice to refuse to disclose the Video to the Applicant?

[139] Justice made the following submissions about the application of this subsection.

> *The Public Body also asserts that if the record were released, its disclosure could reasonably expect to interfere with public safety, as set out it* [sic] *in 22 (1)(a), (b) and 22 (2) of the Act. The Public Body recognizes that these are discretionary exceptions, but insists that public safety is of the utmost concern*

> *and feels that this exemption, in the law enforcement context needs to be treated most seriously.*

[140] Justice also indicated it treats section 22 as a mandatory exception.

[141] I will first address Justice's reliance on paragraph 22 (1)(a) and subsection 22 (2). Neither of these provisions were cited by Justice in its letter to the Applicant for refusing access to the Video. The provisions were raised by Justice for the first time in its submission received on March 2, 2016. The Applicant did not make any submission about these additions.

[142] In Order F07-03, Ministry of Economic Development, June 22, 2007,[25] former Commissioner Loukidelis addressed when a public body under BC FIPPA could add discretionary provisions at the inquiry stage for authority to refuse to disclose information requested by an applicant. In this regard, he stated the following as a general proposition about this practice.

> *As a general proposition, the raising of additional discretionary exceptions at the inquiry stage is unacceptable. A public body must, at the time it considers an access request, assess which of the Act's exceptions to the right of access may, or must, be applied to information in requested records. Although I may, in appropriate circumstances, permit the raising of discretionary exceptions during the inquiry process, I am not generally inclined to do so, especially in a case such as this, where the public body raises a new discretionary exception for the first time in its initial submission and without explicitly giving any reason for doing so….*[26]

[143] He also cited the following remarks from an Order written by one of his staff.[27]

> *The Commissioner has strongly discouraged the late application of discretionary exemptions by public bodies, and I echo his concerns here. It is not conducive to an effective mediation process between public bodies and applicants, if, late in the day when the matter proceeds to inquiry, new discretionary exceptions are applied. When an applicant requests a review of*

---

[25] *British Columbia (Economic Development) (Re)*, 2007 CanLII 30393 (BC IPC).

[26] *Ibid*. 25, at para. 6.

[27] Order F01-022, [2001] B.C.I.P.C.D. No. 23, at para 8.

> *an access decision on the basis of a response under s. 8, the exceptions in issue should not be a moving target. Furthermore, since one of the aims of the mediation process is to narrow the issues that go to inquiry, to have the range of exceptions expanded once the mediation is finished and the inquiry notice is issued is counterproductive to say the least. There may be times when cogent and clear new evidence results in the public body applying a new, discretionary exemption, but these should be extremely limited….*

[144] Commissioner Loukidelis further stated that "a public body will be permitted to rely on a new discretionary exception at the inquiry stage in only certain circumstances" and that "a public body cannot rely on a new discretionary exception at the inquiry stage unless permitted to do so."[28]

[145] In that case, the public body made a number of submissions in support of its position that it could add provisions at the inquiry stage to rely on the refusal to disclose information to an applicant. They are summarized below.

a. Its failure to invoke section 17 was an oversight.[29]

b. New circumstances became known after mediation, during the inquiry stage which led [it] to believe that section 17 would apply.[30]

c. It should be allowed to correct an obvious oversight.[31]

[146] Commissioner Loukidelis refused to permit the public body to add provisions to the inquiry to rely on the refusal of access to information to an applicant on the basis that the public body had sufficient time (*i.e.* over 5 months) to consider whether section 17 would apply, that it did not identify this provision in its response to the applicant as a reason to refuse access, and that there were no new relevant facts "that [the public body] did not know when it made its decision and that it could not have known using due diligence."[32]

---

[28] *Ibid.* 25, at para 11.

[29] The only issue identified in the Notice of Inquiry in this case was the application of section 21. Section 17 was raised for the first time by the public body in its submissions for the inquiry. See para 12.

[30] *Ibid.* 25, at para 13.

[31] *Ibid*., at para 14.

[32] *Ibid*., at para 22.

[147] I agree with former Commissioner Loukidelis's conclusions about when a public body may or may not be authorized to add a new provision to rely on at the inquiry stage to refuse access to information and his reasons for these conclusions. For the reasons that follow, I will not permit Justice to add paragraph 22 (1)(a) and subsection 22 (2) to this Inquiry.

a. Justice did not identify paragraph 22 (1)(a) or subsection 22 (2) as applicable to the Video in its response to the Applicant. As I indicated previously, the first reference to these provisions were in Justice's submission for the Inquiry.

b. The time it took to provide a response to the Applicant's Access Request that included a request for the Video was only 10 days. While I acknowledge this is a short time period for Justice to decide which provisions apply, this kind of record is requested frequently by inmates and, therefore, Justice should be aware, at least in a general sense, of what provisions of the ATIPP Act may apply to requests for this kind of record. Given this, I would expect that Justice would have exercised its due diligence in determining what provisions apply to this Video, as it would any other.

c. The fact that Justice did identify paragraph 22 (1)(b) as a provision it relied on to refuse the Applicant with access to the Video, suggests it did consider, at the time of reaching its decision, whether all the provisions in section 22 applied, and found that they did not.

d. Justice did not raise any new facts during this Inquiry that it did not know when it made its decision about what provisions apply that may have then affected it decision not to rely paragraph 22 (1)(a) or subsection 22 (2).

[148] In my view, this decision will not result in an 'unfairness' to Justice.

[149] I will now go on to determine if subsection 22 (1)(b) applies to the Video. In Order F14-19,[33] Adjudicator Barret identified what a public body must establish to meet subsection 19 (1)(b) of the BC FIPPA.

---

[33] *British Columbia Ferry Services Incorporated (Re)*, 2014 BCIPC 22 (CanLII), para 38.

> *…A public body must provide sufficient evidence to support the conclusion that disclosure of the information could reasonably be expected to cause a threat to one of the interests identified in the section. There must be a rational connection between the disclosure and the threat, and evidence of speculative harm will not suffice.*

[150] Subsection 19 (1)(b) of the BC FIPPA is similar to Yukon's section 22 (1)(b)

> *19 (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to*
>
> *(b) interfere with public safety.*

In its submissions about the application of subsection 22 (b), Justice does little more than assert that this provision applies without any evidence as to why it applies. Further, I am unable to infer from the additional submission provided that disclosure of the Video to the Applicant in this case could reasonably be expected to cause a threat to public safety. Consequently, I find that subsection 22 (b) does not apply to the Video. Given this, I do not have to go on to evaluate whether Justice properly exercised its discretion in this case. That is fortunate for Justice, given that it appears it did not exercise its discretion based on its position that this provision is mandatory.

Duty to Assist

[151] This review highlights an important issue that must be addressed. Section 7 of the ATIPP Act imposes a duty on the Records Manager to assist an applicant who makes a request for access to records in the custody or control of a public body. Section 10 imposes a duty on the public body to assist the Records Manager meet his duty to assist an applicant.

[152] As noted, Justice indicated in its submissions that its main concern, and the reason it refused access under numerous paragraphs under subsection 19 (1), were because the Applicant requested a copy of the Video. Given this, it would seem that Justice should have communicated this concern to the Records Manager so that the Applicant could be informed that he may be able to view the Video rather than obtain a copy. If the Applicant agreed, then Justice could have then taken this into account when analyzing whether any of the provisions in Part 2 of the Act would result in refusing his Access Request.

[153] I did not seek any submissions from the parties or the Records Manager on this issue, and will, therefore, not make a finding. I will simply take this opportunity, however, to remind the Records Manager and Justice about their respective duties and to ensure these duties are met for each applicant.

[154] Had the Records Manager and Justice communicated with the Applicant about the possibility of viewing the Video, rather than refusing access because he requested a copy, the Applicant may have received access in a timely manner and this review may have been avoided.

Application of the Charter

The final matter I will address is the Applicant's submission regarding a potential violation of his *Charter* rights. On this point he stated the following.

> *The right to document and view all related documents and or video is guaranteed in the Canadian Bill of Rights and I wish to appeal on those grounds as well…*

It is not clear to me what provision of the *Charter* the Applicant is concerned with. I can speculate, however, that he is of the view that the *Stinchcombe* disclosure production rules[34] apply to the Video such that WCC is required under those rules to disclose it to him in accordance with his section 7 *Charter* rights.[35] The *Stinchcombe* rules only apply to records gathered by the Crown during their investigation of an offence with which an accused is charged. I have no evidence before me that the

---

[34] In *R. v. Jackson*, 2015 ONCA 832 (CanLII), LaForme, Watt and Epstien JJ.A., at para. 82, citing *R. v. Stinchcombe*, 1991 CanLII 45 (SCC) and *R. v. McNeil*, 2009 SCC 3 (CanLII) stated the following.

> "*The Stinchcombe disclosure regime extends only to material relating to the accused's case in the possession or control of the prosecuting Crown entity. This material is commonly described as the "fruits of the investigation", that is to say, material gathered during the investigation of the offence with which the accused is charged:* McNeil*, at para. 23. Relevant information includes not only information related to those matters the Crown intends to adduce in evidence against the accused, but also any information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence:* McNeil*, at para. 17; Stinchcombe, at pp. 343-44, at para 82.*"

[35] Section 7 of the *Canadian Charter of Rights and Freedoms* states that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The right to make full answer and defense is one of the principles of fundamental justice. *R. v. Stinchcombe*, 1991 CanLII 45 (SCC)

Applicant has been charged with an offence. As such, I have no reason to consider if the Applicant's *Charter* rights have been violated as a result of Justice's refusal to provide him with access to the Video.

VIII FINDINGS

[155] On the issue in this Inquiry, I find as follows.

1. Justice is not authorized by subsection 18 (b) to refuse the Applicant access to the Video.
2. Justice is authorized by paragraphs 19 (1)(a), (e), (h), (j), (k) and (l) to refuse the Applicant access to the Video.
3. Justice is not authorized by paragraph 19 (2)(c) to refuse the Applicant access to the Video.
4. Justice is not authorized by paragraph 22 (1)(b) to refuse the Applicant access to the Video.
5. Justice is required by subsection 25 (1) to refuse the Applicant access to the Video.

IX RECOMMENDATION

[156] Given my findings, I have no recommendations for Justice. In accordance with subparagraph 57 (2)(b)(i), I affirm that Justice should continue to refuse the Applicant access to the Video.

X APPLICANT'S RIGHT OF APPEAL

[157] The Applicant has the right under paragraph 59 (1)(b) to appeal to the Yukon Supreme Court when a determination is made under section 57 that the Public Body is required to refuse to give access to part of the record, as occurred in this case.

_____

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

Distribution List:

- Public Body
- Applicant
- Records Manager