Yukon Information and Privacy Commissioner

INQUIRY REPORT
File ATP16-031AR
Pursuant to section 52 of the
Access to Information and Protection of Privacy Act

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

Public Body: **Department of Environment (Department)**

Date: **September 18, 2017**

Summary: After receiving an access to information request made to the Department by the Applicant in this case, the Department refused access to nearly 3000 pages. It cited subsection 18 (b) as grounds for refusing access to 2701 pages. It cited subsections 5 (4) (cabinet briefing), 15 (1) (executive council confidence), 18 (b) (litigation privilege), and 19.1 (2) (workplace harassment) as its authority for refusing access to the remaining pages.

The Information and Privacy Commissioner (IPC) found that subsection 5 (4) did not apply given that the time period for the exception under this subsection had expired. She found that subsection 15 (1) did apply but she did not have enough information to determine if paragraph 15 (2)(c) applied, thereby nullifying the subsection 15 (1) exception. She recommended that the Department reconsider its decision to address this issue. She determined that the Department failed to meet its burden of proof under subsection 19.1 (2) and, consequently, found that subsection 19.1 (2) did not apply to these pages.

She also found that subsection 18 (b) did not apply to any of the records over which the Department claimed this exception [18 (b) Records], but found that subsection 18 (a) applied to five pages of the 18 (b) Records. Having determined that the 18 (b) Records contained personal information that would be an unreasonable invasion of a third party's personal privacy if released to the Applicant, she recommended that these records be released after removing this information.

The Department also refused to provide the Applicant with seven pages, citing subsection 25 (1) and paragraph 25 (1)(g) as its authorities for refusal. The Department provided insufficient evidence to supports its assertion that these provisions applied to the pages. Despite this, after reviewing the information, the IPC found that subsection 25 (1) did not apply in the first instance.

The Department refused access to information contained in 32 pages and removed this information from the pages before providing them to the Applicant. It cited section 19.1 and subsection 25 (1) as its authorities. The IPC found that the Department failed to meet its burden of proof under section 19.1. She concurred with the Department that subsection 25 (1) applied to most of the information it separated or obliterated from the records and recommended that the remainder of the information be released to the Applicant.

On the final issue, the IPC determined that the Department improperly identified a page as non-responsive to the Applicant's Access Request after determining that the page contained information relevant to the Access Request. The IPC recommended that the Department disclose the information in the page to the Applicant.

Statutes Cited:

Access to Information and Protection of Privacy Act, RSY 2002, c 1: 3 "adjudicative body," "personal information," and "third party," "trade secret," 5 (1), 5 (4), 5 (4)(b), 5 (5)(b), 6 (1), 6 (2), 6 (3), 10, 15 (1), 15 (2), 15 (2)(c), 18 (a), 18 (b), 19.1, 19.1 (1), 19.1 (1)(a), 19.1 (1)(b), 19.1 (2), 24 (1), 24 (1)(a), 24 (1)(a)(ii), 24 (1)(b), 24 (1)(c), 24 (1)(c)(i), 24 (1)(c)(ii), 24 (1)(c)(iii), 24 (1)(c)(iv), 25 (1), 25 (2), 25 (2)(a), 25 (2)(d), 25 (2)(g), 25 (3), 25 (3)(e), 25 (4), 25 (4)(a), and 25 (4)(d).

Interpretation Act, RSY 2002, c 125.

Freedom of Information and Protection of Privacy Act, RSA 2000, c F-25.

Freedom of Information and Protection of Privacy Act, RSBC 1996, c 165.

Freedom of Information and Protection of Privacy Act, RSO 1990, c F.31.

Cases Cited:

A*quasourse Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner*), 1998 CanLII 6444 (BC CA).

Canada v. Solosky, 1979 CanLII 9, SCC, [1980] 1S.C.R. 821.

Ontario (Attorney General) v. Holly Big Canoe, 2006 CanLII 14965 (ON SCDC), [2006] O.J. No. 1812 (Div. Ct.).

Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23 [2010] 1S.C.R. 815.

Order F2004-026, Alberta Labour Relations Board, September 18, 2006, Alberta IPC.

Order F2009-043, Alberta Employment and Immigration, June 28, 2010, Alberta IPC.

Order F2014-38, Alberta Health Services, October 6, 2014, Alberta IPC.

Order F2015-25, City of Calgary, September 14, 2015, Alberta IPC.

Order F04-04, The Board of School Trustees of School District No. 68 (Nanaimo-Ladysmith), February 16, 2004, [2004] B.C.I.P.C.D. No. 4., BC IPC.

Order F08-10, The Board of Education of School District No. 69 (Qualicum), May 21, 2008, 2008 CanLII 30212 (BC IPC), BC IPC.

Pritchard v. Ontario, 2004 SCC 31, at para 21.

(Public Safety and Emergency Preparedness) v. Canada (Information Commissioner), 2013 FCA 104.

Review Report 023-2017 & 078-2017, Saskatchewan Power Corporation, July 13, 2017, www.oipc.sk.ca, SK IPC.

Yukon Department of Community Services and the Records Manager ATP13-037AR, August 11, 2014, www.ombudsman.yk.ca,Yukon IPC.

Yukon Department of Education ATP16-015AR, February 2, 2017, www.ombudsman.yk.ca, Yukon IPC.

Yukon Department of Energy, Mines and Resources ATP11-029AR, August 14, 2013, www.ombudsman.yk.ca, Yukon IPC.

Yukon Department of Justice ATP15-055AR, June 8, 2016, www.ombudsman.yk.ca, Yukon IPC.

Yukon Department of Tourism and Culture ATP16-004AR, October 17, 2016, www.ombudsman.yk.ca, Yukon IPC.

Explanatory Notes:

All statutory provisions referenced below are to the ATIPP Act unless otherwise stated.

I BACKGROUND

[1] In a Request for Access to Records form (Access Request) dated March 24, 2016, the Applicant requested access to the following records from the Department.

> *All records pertaining to me* [Applicant] *and the position of* [Applicant's Position] *including anything related to roles, responsibilities, program participating and competencies in a broad sense and/or for specific instances/projects from December 1, 2013 to October 1, 2015 including emails and notes to or from* [Employee 1] *from December 1, 2013 to present; to or from* [Employee 2] *and* [Employee 3] *excluding media requests that* [Applicant] *is copied on, from January 1, 2012 to present. All notes from formal or informal meetings with* [Employee 4], [Employee 5], *or* [Employee 6] *from January 1, 2012 to present and all records and information from* [Employee 7/ Employee 8/Employee 9] *(or HR) from January 1, 2012 to present.*

[2] The Records Manager received the Access Request on March 29, 2016 and identified the deadline for response as April 28, 2016. The Records Manager then extended the response deadline twice, with the last extension ending on July 15, 2016. In

a letter dated July 20, 2016,[1] the Applicant received a response from the Records Manager indicating that the records she requested in her Access Request were granted in part.

[3] In a letter from the Department that was appended to the letter the Records Manager sent to the Applicant, the Department identified that it had found 3,125 records that were responsive to the Applicant's Access Request. In the letter, the Department identified that full access was granted to 1,643 pages of the records, partial access was granted to 33 pages, and that access was refused for 1,961 pages. The explanation provided by the Department for refusing access to part or all of these records was as follows:

> *Access Granted in Part*
>
> - *Pages 1017, 1018, 1021, (3pp): information withheld as disclosure could reasonably be expected to harm the relations between employees; interfere with investigating a complaint; or, reveal information relating to workplace harassment per Section 19.1 of the ATIPP Act*
> - *Pages 91, 94 (2pp): information withheld as disclosure would be harmful to personal privacy per Section 25 (2)(a) of the ATIPP Act*
> - *Pages 515, 516, 694, 1366, 1534, 1552, 1555, 1598-1609, 1621-1625, 1631-1632, (26pp): information withheld as disclosure would be harmful to personal privacy per Section 25 (2)(d) of the ATIPP Act*
> - *Page 968: information withheld as disclosure would be harmful to personal privacy per Section 25 (2)(g) of the ATIPP Act*
> - *Page 1694: information withheld as it is not relevant to the request*
>
> *Access Refused*
>
> *Access has been denied to the following:*
>
> - *48 pages of 10 records* [sic] *not subject to disclosure as the records were prepared to brief a Minister per Section 5 (4)(b) of the ATIPP Act; and,*

[1] The Records Manager acknowledged that he was late in providing a response to the Applicant. Notwithstanding this and the fact that subsection 49 (2) would come into effect once the deadline for response was exceeded, the Records Manager did respond on July 20 with the Department's decision about the Applicant's Access Request and it is these decisions that are under review in this Inquiry.

disclosure would reveal deliberations of cabinet per Section 15 (1) of the ATIPP Act

- *1,849 pages of 529 records and 240 records (emails and attachments) which were prepared in contemplation of existing or reasonably expected adjudicative proceeding per Section 18 (b) of the ATIPP Act*
- *26 pages of 19 records as disclosure could reasonably be expected to harm the relations between employees, interfere with investigating a complaint; or, reveal information relating to workplace harassment per Section 19.1 of the ATIPP Act*
- *7 pages of 4 records as the disclosure of personal recommendations would be an unreasonable invasion of personal privacy per Section 25 (1) and 25 (2)(g) of the ATIPP Act*
- *31 pages and 462 records* [sic] *not relevant to the request*

[4] The Department went on to identify that some records were not provided. These are identified in the letter as duplicates of records provided, or records the Applicant determined were not required.

[5] On August 24, 2016, the Applicant submitted a Request for Review form wherein she requested that I review the Department's decision to refuse her access to records she had requested and its decision to separate or obliterate information from some of the records to which she was provided access.

[6] Given that this form was delivered to the office beyond the time period allowed in paragraph 49 (1)(a), I requested that she provide me with reasons for the delay. After considering these reasons, and finding that the Department would not be prejudiced by an extension of five days, I decided to extend the period for delivery of the Request for Review form by that period of time.

[7] After receiving the Applicant's request for review, I authorized a mediator to try to settle the matters at issue for the review. Settlement on the issues could not be reached.

[8] On December 9, 2016, the Applicant requested that I conduct an Inquiry in regards to the matters at issue. The Applicant and the Department were subsequently informed of my decision to proceed to Inquiry.

II INQUIRY PROCESS

[9] I sent a Notice of Written Inquiry to the parties on December 22, 2016. I received submissions from the Department on January 12, 2017. The Department included with its submissions the records at issue, except those records that it claimed a subsection 18 (b) application. On the same day, I received submissions from the Applicant. I shared the submissions with each party. On January 19, 2017, the Applicant submitted reply submissions. The Department did not submit reply submissions.

[10] Following the initial review of the submissions and records received from the parties, I issued a Notice of Production on February 3, 2017, requiring the Department to produce the subsection 18 (b) records. I provided a copy of the Notice of Production to the Applicant. On February 20, 2017, I received these records from the Department.

[11] Included in a letter received with these records were additional submissions from the Department. After reviewing these submissions, I agreed to accept them and instructed the Registrar to share them with the Applicant. The Applicant submitted additional reply submissions on March 2, 2017. I noted that when I received the subsection 18 (b) records from the Department, there were 2701 pages. The discrepancy between the Department's account of the number of pages refused and those provided to me was unclear. Despite this, I considered whether subsection 18 (b) applied to all 2701 pages.

III JURISDICTION

[12] Paragraph 48 (1)(a) authorizes me to review a refusal by a public body to grant access to a record. Paragraph 48 (1)(b) authorizes me to review a decision by a public body to separate or obliterate information from a record.

[13] In the Applicant's Request for Review, she asked that I review the Department's decision to refuse her access to certain records to which she had requested access. She also asked that I review the Department's decision to separate or obliterate information from some of the records to which she had been granted access.

[14] The Department is a public body as defined in section 3 of the ATIPP Act. Subsection 52 (1) authorizes me to conduct an Inquiry and decide all questions of fact and law arising in the course of it. Given this, I have authority under paragraphs 48 (1)(a) and (b) to conduct an Inquiry to determine whether the decisions made by the Department in regards to these records were in compliance with the ATIPP Act.

IV ISSUES

[15] The Notice of Written Inquiry sent to the parties identified the issues in this Inquiry as follows.

1. *Is the public body authorised by subsection 18 (b) to refuse to disclose the records identified by the public body as '1849* [2701] *pages of 769' records?*
2. *Is the public body required by subsection 15 (1) to refuse to disclose the records identified by the public body as '48 pages of 10 records'?*
3. *Is the public body authorised by paragraph 5 (4)(b) to refuse to disclose the records identified by the public body as '48 pages of 10 records'?*
4. *Is the public body authorised by section 19.1 to refuse to disclose the records identified by the public body as '26 pages of 19 records'?*
5. *Is the public body required by subsection 25 (1) and paragraph 25 (1)(g) to refuse to disclose the records identified by the public body as '7 pages of 4 records'?*
6. *Is the public body authorised by section 19.1 or required by paragraphs 25 (2)(a), 25 (2)(d) and 25 (2)(g) to separate and obliterate information contained within the records identified by the public body as '33 pages'?*
7. *Is the record identified by the public body as 'not relevant to the Request' responsive to Access Request #A-6242?*

The following issue was added by the IPC during the Inquiry:

8. *Is the Department authorized by subsection 18 (a) to refuse the Applicant access to the pages numbered 1468 to 1472?*

V RECORDS AT ISSUE

[16] The records at issue in this Inquiry are as follows:

1849 [2701] *pages of 769 records* (Litigation Privilege Records)

48 pages of 10 records (Cabinet Confidence Records)

48 pages of 10 records (Briefing Records)

26 pages of 19 records (Harassment Records)

7 pages of 4 records (Invasion of Privacy Records)

33 pages (Severed Records) including 1 record identified by the public body as not relevant to the Access Request (Non-relevant Record)

5 pages numbered 1468 to 1472 (Solicitor and Client Records)

(Collectively "the Records")

VI BURDEN OF PROOF

[17] Subsection 54 (1) together with paragraph (a) of that subsection states that "in a review from a request under section 48, it is up to the public body to prove that the applicant has no right of access to the record or part of it in question…" The burden, therefore, is on the Department to prove that the records it refused or the information it separated or obliterated from the Records was in compliance with the ATIPP Act.

VII DISCUSSION OF ISSUES

[18] I will first address whether paragraph 5 (4)(b) applies to the Briefing Records given that, if it does, then the Applicant has no right of access to these records.

Issue 3: Is the public body authorised by paragraph 5 (4)(b) to refuse to disclose the records identified by the public body as '48 pages of 10 records'?

[19] The portions of the ATIPP Act that are relevant to this issue are set out below:

Right to information

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

5 (4) The right of access to a record does not extend to a record created solely for the purpose of

> *(b) briefing a Minister in relation to a sitting of the Legislative Assembly, including briefings prepared to support the Minister for debate of any appropriation bill…*

(5) Subsection 4 does not apply

> *(b) to a record described in paragraph 4(b), if five or more years have passed since the beginning of the sitting in respect of which the record was created; and*

How to make a request

6 (1) To obtain access to a record, an applicant must make their request to the records manager.

6 (2) A request for access to a record may be made…in writing verified by the signature or mark of the applicant and must provide enough detail to identify the record.…

6 (3) The applicant may ask for a copy of the record…

[20] The Applicant made a request to access the Records in accordance with the requirements in section 6. As such, she has a right of access to records in the custody or control of the Department. However, according to paragraph 5 (4)(b), this right of access does not extend to records to which this paragraph applies.

[21] To prove that an Applicant has no right of access to records to which paragraph 5 (4)(b) applies, the Department will have to establish that these records were created solely for the purpose of briefing a Minister in relation to a sitting of the Legislative Assembly, including a briefing to support the Minister for the debate of any appropriation bill.

[22] The Department's submission in respect of the application of paragraph 5 (4)(b) to the Briefing Records is as follows.

> *The Public Body believes it is authorized by subsection 5 (4)(b) to refuse to disclose the records identified as "48 pages of 10 records" as they are not subject to disclosure given they were prepared as part of a ministerial briefing.*

[23] The Applicant's submissions in respect of the application of this paragraph are summarized below.

[24] In her original submissions, the Applicant identifies that she is unable to evaluate the Department's decisions in respect of "Sections 5, 19 and 25" on the basis that it did not provide her with enough detail about what the records are or to what they relate.

[25] In her reply submissions, she further alleges that the Records Manager did not meet his obligation under subparagraph 13 (1)(c)(i). It requires that he provide reasons for refusing to grant access to a record or to information in a record. She also noted that the response provided by the Department lacked sufficient reasons for her to determine if the decisions made to refuse or separate or obliterate information from the records were done in accordance with the ATIPP Act.

[26] The burden of proof with regards to the application of paragraph 5 (4)(b) is on the Department. The evidence presented by the Department is that it "believes" this paragraph applies because the Briefing Records were "prepared as part of a ministerial briefing." The Department provided no submissions to support the claim that the Briefing Records were prepared solely for the purpose of briefing a Minister in relation to a sitting of the Legislative Assembly or to support the Minister for the debate of an appropriate bill.

[27] Despite the fact that the Department provided no evidence to support its assertion that paragraph 5 (4)(b) applies the records, I must evaluate whether it does apply, given that there is no right of access under Part 2 to a record to which this paragraph applies.

[28] I am able to determine from the Briefing Records that the Minister was engaged in a conversation about the records and was provided with them. From my review of the Legislative Assembly website, I determined that that the Legislative Assembly's spring sitting in 2012 was from March 15th until May 10th. From my review of Hansard,[2] I determined that a Minister spoke during this sitting to the issues identified in the records. This evidence supports that the Briefing Records may have been created solely for the purpose of briefing a Minister for this sitting.

[29] Whether I am correct in this is irrelevant, as of the date of this Inquiry, more than five years has passed since the 2012 spring sitting began on March 15, 2012.[3] As a result, paragraph 5 (5)(b) comes into effect, thereby removing the application of paragraph 5 (4)(b). Given this, I find that the Department is not authorized to refuse the Applicant with access to the Briefing Records.

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[2] Hansard, Monday March 19, 2012, Yukon Legislative Assembly.

[3] "Year" is defined subsection 21 (1) of the *Interpretation Act* RSY 2002, c 125 to mean "calendar year".

Issue 2: Is the public body required by subsection 15 (1) to refuse to disclose the records identified by the public body as '48 pages of 10 records'?

[30] With respect to the same records, which I will now refer to as the Cabinet Confidence Records, the Department is also relying on subsection 15 (1) to refuse to grant the Applicant with access to these records.

[31] The provisions of section 15 that are relevant to this issue are as follows.

> *Cabinet Confidence*
>
> *15(1) A public body must refuse to disclose a record to an applicant if the disclosure would reveal a confidence of the Executive Council or any of its committees, including*
>
> *(a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;*
>
> *(b) a record containing advice, analyses, policy options, proposals, recommendations, or requests for directions submitted, or prepared for submission, to the Executive Council or its committees;*
>
> *(c) a record used for or reflecting consultation among Ministers on matters relating to the making of government decisions or the formulation of government policy; and*
>
> *(d) a record prepared to brief a Minister in relation to matters that*
>
> > *(i) are before or are proposed to be brought before the Executive Council or its committees, or*
> >
> > *(ii) are the subject of consultations among Ministers relating to the making of government decisions or the formulation of government policy.*
>
> *15 (2) Subsection (1) does not apply to*
>
> > *(c) a record the purpose of which is to present background information or explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if*
> >
> > > *(i) the decision has been made public,*
> > >
> > > *(ii) the decision has been implemented, or*
> > >
> > > *(iii) five or more years have passed since the decision was made or considered.*

[32] The submission provided by the Department on the application of subsection 15 (1) is as follows.

> *The Public Body believes it is required by subsection 15 (1) to refuse to disclose the records identified as "48 pages of 10 records […]" as disclosure would reveal deliberations of Cabinet.*

[33] The submissions from the Applicant are the same as those provided for Issue 3. I will not repeat them here.

[34] Subsection 15 (1) is mandatory exception to disclosure. This means that the Department must refuse access to the Cabinet Confidence Records if this subsection applies to them.

[35] The British Columbia Court of Appeal had occasion to consider the meaning of British Columbia's (BC) *Freedom of Information and Protection of Privacy Act* (BC FIPPA) subsection 12 (1). It requires a BC public body to refuse to disclose records that would "reveal the substance of deliberations of the Executive Council or any of its committees…" Justice Donald, writing for the majority, stated the following about how this provision is to be interpreted.

> *Standing alone, "substance of deliberations" is capable of a range of meanings. However, the phrase becomes clearer when read together with "including any advice, recommendations, policy considerations or draft legislation or regulations submitted ...." That list makes it plain that "substance of deliberations" refers to the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision.*[4]
>
> *…the class of things set out after "including" in s.12(1) extends the meaning of "substance of deliberations" and as a consequence the provision must be read as widely protecting the confidence of Cabinet communications.*[5]

[36] Justice Donald accepted the BC Information and Privacy Commissioner's (BC IPC) interpretation of subsection 12 (1) that information from which an accurate inference could be drawn with respect to the deliberations of Cabinet would reveal the substance of Cabinet deliberations.[6]

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[4] A*quasourse Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner*), 1998 CanLII 6444 (BC CA), at para 39.

[5] *Ibid.* 4, at para 41.

[6] *Ibid.* 4, at para 48.

[37] The submission provided by the Department provided no evidence to support the assertion that if the Cabinet Confidence Records were disclosed, then they would reveal a confidence of the Executive Council. Subsection 15 (1) is a mandatory exception to the right of access. Therefore, I must determine as best I can from the evidence before me if this subsection applies to the records. Based on my review of the records, together with Hansard,[7] I was able to determine that these documents would have been considered by the Executive Council in making a decision. As such, I find that subsection 15 (1) applies to these Records.

[38] What I cannot determine from the evidence, however, is whether any of the circumstances described in paragraph 15 (2)(c) apply to these records. The Department will need to reconsider its decision about the application of subsection 15 (1) and, in so doing, must consider whether paragraph 15 (2)(c) applies.

[39] I would like to remind the Department that when making submissions for an Inquiry, it is incumbent on it to provide submissions that enable it to meet its burden of proof. It is not enough for the Department merely to state that it believes a provision in the ATIPP Act applies; rather, it must provide evidence to support this assertion. In this case, the Department failed to provide any evidence to support its stated belief that certain provisions of the ATIPP Act apply that require it to refuse the Applicant with access to information and records. I would caution the Department on failing to provide adequate evidence for an Inquiry, as the consequences for failing to meet the burden of proof will be borne by the public body with whom the burden of proof rests.

Issue 1: Is the public body authorised by subsection 18 (b) to refuse to disclose the records identified by the public body as '1849* [2701] *pages of 769' records?

[40] The majority of records (the Litigation Privilege Records) to which the Department refused to provide access were refused under subsection 18 (b). This is a discretionary exception to the right of access. In the schedule of records provided with these records, section 19.1 is also cited as an exception. The Department provided me with no submissions on the application of section 19.1 to these records, nor is the application of this section to these records identified as an issue in this Inquiry. Given this, I will not consider if section 19.1 applies to these records.

[41] Subsection 18 (b) states the following.

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[7] *Ibid 2*.

Legal advice

18 A public body may refuse to disclose to an applicant a record

(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.

[42] In its original submissions the Department submitted the following about the application of this subsection to the Litigation Privilege Records.

> *The Public Body believes it is authorized by subsection 18 (b) to refuse to disclose the records identified as "1,849* [2701] *pages of 529 records and 240 records (emails and attachments)" which were prepared in contemplation of existing or reasonably expected adjudicative proceedings.*

[43] The Applicant submitted the following in her original submissions on the application of subsection 18 (b).

[44] She reiterated her view that the Department or Records Manager did not provide her with enough information to evaluate if the Department had applied subsection 18 (b) correctly. On this point, she stated specifically in reference to subsection 18 (b) that "…the public body did not provide any details about ….the specific proceedings…before an adjudicative body under subsection 18 (b)." She then stated the following.

> *The volume of records withheld under section 18 (b) of the ATIPP Act is exceedingly high for what is normally a very specific rational for redaction. This raises concerns on my part that section 18 (b) has not been applied correctly by the public body.*
>
> *With respect to records withheld under section 18 (b) of the ATIPP Act, the public body has the ability to consider its direction given that the matters discussed and the rational for exercising litigation privilege have long concluded. Access to documents relating to those concluded processes has been refused, indicating that the public body has not considered exercising its discretion.*

[45] She then went on to identify her views on how subsection 18 (b) is to be interpreted.

> *… Litigation privilege is not a class privilege, consequently, there is no presumption that it exists. The onus of establishing litigating privilege rests with the party seeking that protection, and must be proven on a balance of probabilities.*

> [The Litigation Privilege Records] *must be made in answer to inquiries made by a party with or representing the public body for the purpose of litigation existing, or in contemplation, or anticipated. What is privileged is the communications or working papers that came into existence with a view to brief a solicitor.*
>
> *The threshold for determining whether litigation is contemplated or anticipated is objective and based on reasonableness. While certainty is not required, the party claiming the privilege must establish something more than mere speculation. There must be a defining event. Privilege cannot be attached to records that fall outside these events.*
>
> *Privilege would only attach to a record if the record met the Dominant Purpose test.*

[46] Given this, many of the documents would not, in her view, be subject to privilege for the following reasons.

> *…it is unclear how the public body has met the tests of litigation privilege. Rather, it appears that many of the documents under which the public body claims litigation privilege were:*
>
> *1) Prepared outside of the existence of an active grievance or process that could reasonably have been contemplated to continue to litigation, suggesting that litigation could not have been reasonably anticipated;*
>
> *2) Did not originate from within the public body or by those primarily involved in the public body's grievance process, suggesting that the Dominant Purpose of the record was not for seeking advice for an anticipated litigation; and*
>
> *3) Contain attachments that are independent records, redacted under litigation privilege, although they were not prepared with litigation privilege as the Dominant Purpose, or were prepared outside of an appropriate timeframe. Attaching one record to another in an email does not create litigation privilege around the attachment.*
>
> *The Applicant recognizes that litigation privilege may be applied to some documents within the time frame of her grievances, which were filed at the following dates:*
>
> - *Grievance [redacted], on the Letter of Expectation (LOE) was filed [redacted], [redacted].*

- *Grievance [redacted] was put in abeyance on or around [redacted].*
- *The grievance was formally resolved on [redacted] by removing the LOE from the applicant's file. Any potential for the grievance to go to arbitration would have ended at this point.*
- *The constructive dismissal grievance was filed [redacted]*
- *The third grievance, reflecting a continuation of the employer's behaviour as per grievance [redacted] was filed [redacted] Grievance [redacted] and 1[redacted] we considered as one grievance hence forth.*
- *Grievance [redacted] was filed on [redacted]*

In the Schedule of Records, the public body identifies these grievances as the defining event for which litigation privilege was contemplated. The applicant is unaware of any other events where the public body may have reasonably contemplated litigation to arise.

...Section 18 (b) should not have been applied to records created prior to June 19, 2013, and between March 9, 2015 and July 2, 2015. More specific to the applicant's above, listed concerns:

- *On the Schedule of Records created for grievance [redacted] and [redacted], records 1-30 were created prior to the filing of grievance [redacted].*
- *One page 16 of the Schedule of Records for grievance [redacted] and [redacted], the public body identifies that records 1-312 were withheld because they pertained to labour relations issues. Litigation privilege cannot be applied as a blanket privilege to any document that relates to a labour relations issue, but must meet the specific tests as outlined in this letter. This applies to all records withheld using Section 18(b).*
- *Page 16 of the Schedule of Records for grievance [redacted] and [redacted] notes that it was the nature of the work relationship that caused the public body to anticipate the possibility of adjudication. It is not enough for the*

[8] This grievance was filed after the date of the Access Request and is therefore not relevant to it and was not included with the records provided by the Department.

public body to speculate that there could have been adjudication. There must have been a specific, identifiable event to apply the privilege.

- *On the Schedule of Records created for grievance [redacted], records 3-11, 60-63, 68, 70 and 71 were created prior to the filing of grievance [redacted]. Records 42, 45-56, 59 and 64 were created after the conclusion of the grievance. It would have been impossible for the grievance to go to litigation once concluded.*

- *On the Schedule of Records created for grievance [redacted], all records listed were created prior to the filing of the grievance.*

[47] The letter provided in response to the Notice of Production contained the following additional submissions from the Department on the application of subsection 18 (b) to the Records.

> *Grievance [redacted] was lodged by the applicant on [redacted] regarding letter of expectation delivered to the applicant on [redacted]. In preparation for this, 11 records were generated between [redacted] and [redacted] between applicant's manager and the Department's Human Resources team. This grievance was resolved on March 9, 2015.*
>
> *Grievance [redacted] was lodged by the applicant on [redacted]; a 3rd level hearing occurred [redacted] and has been referred to adjudication, which has yet to occur.*
>
> *Grievance [redacted] was lodged by the applicant on [redacted] and the hearing occurred [redacted].*

[48] In her reply, the Applicant provided the following about the foregoing dates.

> *In the Schedule of Records provided by the Public Body, they identify **grievances** as the defining event for which litigation was contemplated. The Applicant is unaware of any other events where the Public Body may have reasonably contemplated litigation to arise. The Applicant recognizes that litigation privilege may be applied to some documents within the timeframe of her grievances. This timeframe was identified in the Applicant's reply response and the supplementary letter provided by the Public Body.* [Emphasis in original]
>
> *However, the supplementary letter provided by the Public Body separately identifies that 11 records were generated between April 29, 2013 and May 24, 2013*

> *in preparation for presenting a Letter of Expectation to the Applicant. This is outside the timeframe for the filing of grievance* [redacted]*, the event the Public Body identifies as precipitating reasonable contemplation of legal proceedings.*
>
> *Recognizing the Applicant's limitations in viewing these records, she does not believe these 11 records can meet the tests for attachment of privilege. Specifically, 1) the Dominant Purpose of these records would have been in preparing for presentation of a Letter of Expectation, a non-disciplinary human resource matter, not a legal matter (i.e. not communicated in inquiry to litigation or anticipated litigation); and 2) at the time of creating these records no specific event had occurred that would lead the Public Body to reasonably anticipate legal proceedings. That is, there were no interactions between the Applicant and the public Body at this point identifying the initiation of a process that would have potentially led to legal proceedings; hence, if the Public Body felt that the provision of a Letter of Expectation to the Applicant would have led to legal proceedings, this would have been wholly speculative. The threshold for determining whether litigation is contemplated or anticipated is objective and based upon reasonableness. While certainty is not required, the party claiming privilege must establish something more than speculation.*

[49] I recently had occasion to consider the meaning of subsection 18 (b) in Inquiry Report ATP15-055AR.[9] In this Report, I cited the following about Justice Lane's analysis (writing for the majority of the Ontario Court of Appeal) of subsection 19 (b) of Ontario's (ON) *Freedom of Information and Protection of Privacy Act* (ON FIPPA). It also contains a statutory litigation privilege like our subsection 18 (b).

> *…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.*[10]
>
> *…the second branch of s. 19* [subsection 19. (b)] *…. 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.*

[9] Yukon Department of Justice ATP15-055AR, June 8, 2016, www.ombudsman.yk.ca (YK IPC), at pp. 31 and 32.
[10] *Ontario (Attorney General) v. Holly Big Canoe*, 2006 CanLII 14965 (ON SCDC), [2006] O.J. No. 1812 (Div. Ct.), at para 26.

> *…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.*
>
> *…unlike litigation privilege, the statutory exemption [does] not terminate when the litigation terminated.*

[50] After applying a purposive approach to interpreting subsection 18 (b), I identified that the test for determining whether subsection 18 (b) authorizes a public body to refuse access to a record requested by an applicant is as follows.

> 1) *The record must have been prepared by or for a public body;*
>
> 2) *the record must have been prepared in contemplation of <u>and</u> 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.* [Emphasis in original]

[51] I also stated the following about the meaning of "in contemplation of" and "existing or reasonably expected proceedings."

> *The meaning of 'contemplate' in the Canadian Oxford Dictionary (COD) is to "regard (an event) as possible." '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."*
>
> *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 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 in original]

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. [Emphasis added]

[52] Given that subsection 18 (b) is a discretionary provision, I also indicated that in order to achieve the purposes of the ATIPP Act when interpreting subsection 18 (b), before refusing access to a record under subsection 18 (b), a public body must, as part of exercising its discretion, consider whether it is "reasonably necessary" in the circumstance to refuse access to preserve the statutory litigation privilege.

[53] The legal tests identified by the Applicant are those applied under the common law to the solicitor and client privilege that includes litigation privilege. As indicated above, subsection 18 (b) is a statutory privilege. Therefore, it must interpreted based on the

words of the provision. For clarity, the test the Department must meet to refuse the Applicant access to the Litigation Privilege Records is the need to establish that:

1) the records were prepared by or for the Department;

2) the records were prepared for the purpose of a proceeding in court or before an adjudicative body that was occurring or that was likely to or would perhaps occur; and

3) the point at which the records were prepared:

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

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

[54] If the Department is to meet the purposes of the ATIPP Act when exercising its discretion about whether to grant access to the Litigation Privilege Records after determining that subsection 18 (b) applies to them, it will also need to provide evidence to this effect: that it considered it reasonably necessary, in the circumstance, to refuse the Applicant access to the Litigation Privilege Records so as to preserve the privilege afforded under this provision.

Were the Litigation Privilege Records prepared by or for the Department?

[55] As indicated above, the Department's submissions on the application of subsection 18 (b) are that it "believes" this subsection applies. The only evidence provided by the Department about who prepared the records is that "11 records were generated between April 29, 2013 and May 24, 2013 between the applicant's manager and the Department's Human Resources team."

[56] The Applicant indicated that many of the documents did not originate from within the public body or by those primarily involved in the public body's grievance process.

[57] Despite the Department's lack of evidence about the application of subsection 18 (b) and more specifically who prepared the records, I was able, on my review of them, to ascertain that most of the records were created by or for the Department. Most of the records consist of emails authored by or received by Department employees, including the Applicant. There is no requirement, as suggested by the Applicant, that these records originate from within the Department or be authored by someone involved in the grievance process for this part of the test to be met.

[58] There were also a number of other types of records that, on my review, were clearly prepared by or for the Department, except the following.

1) There is nothing in page 065 to indicate that this record was prepared by or for the Department.

2) Pages 1626 to 1632 were prepared by a third party and posted on the third party's website. There is nothing in these records to indicate that these records were prepared for the Department.

[59] For these eight records, the Department has not established that they were created by or for the Department. Therefore, it has not met the first part of the subsection 18 (b) test and cannot rely on this subsection as authority to refuse the Applicant access to them.

[60] A number of the pages were blank; specifically, 0026, 0243, 0373, 0713, 0986, 1003, 1079, 1321, 1385, 1390, 1520, 1579, 1623, 1928, 2283 and 2507. As these records contain no information, they are not responsive to the Applicant's Access Request and I will not consider them further.

[61] For the remainder of the records, I will evaluate whether they meet the second part of the subsection 18 (b) test.

Were the remainder of Litigation Privilege Records prepared in contemplation of and for the purpose of existing or reasonably expected proceedings in court or before an adjudicative body?

[62] Other than its general belief that subsection 18 (b) applies to these records as previously indicated, the only evidence provided by the Department about whether the records were prepared in contemplation and for the purpose of existing or reasonably expected proceedings in court or before an adjudicative body is the following:

1) On [redacted], a letter of expectation was delivered to the Applicant.

2) On [redacted], the Applicant filed a grievance in response: Grievance [redacted].

3) On [redacted], Grievance [redacted] was resolved.

4) On [redacted], the Applicant filed a second and third grievance: Grievance [redacted].

5) On [redacted], a third-level hearing occurred on Grievance [redacted] and it has since been referred to adjudication.

6) On [redacted], the Applicant filed a fourth grievance: Grievance [redacted].

7) On [redacted], Grievance [redacted] was heard.

[63] The portions of the Applicant's submissions that are relevant to this part of the test are as follows:

- Other than the grievances she filed, the Applicant is unaware of any other events for which litigation was contemplated.
- The 11 records identified by the Department as "11 records [that] were generated between April 29, 2013 and May 24, 2013" were generated outside the time of filing her first grievance (Grievance [redacted]).
- She acknowledged she filed her grievances on the dates indicated by the Department.
- She added that Grievance [redacted] was put in abeyance "on or around [redacted]."
- She clarified that she filed her second grievance, Grievance [redacted], on [redacted], but that her third grievance, Grievance [redacted], was filed on [redacted]. She noted that these were combined into Grievance [redacted].
- She highlighted that, according to the schedule of records provided to her by the Department, a number of records would fall outside of these grievance periods.

[64] The evidence before me is that four grievances were filed by the Applicant at different dates under the Collective Agreement between Government of Yukon and the Public Service Alliance of Canada (Collective Agreement).[11] Two of these were combined into one. Two grievances, including the one combined, led to a third-level meeting with the Deputy Minister of the Department. The combined grievance was eventually referred

[11] The Collective Agreement referred to in this Inquiry Report is the Collective Agreement between Government of Yukon and The Public Service Alliance of Canada in effect from January 1, 2013 to December 31, 2015. The grievances referenced in this Inquiry Report occurred during the term of this Collective Agreement.

to an adjudicator under the *Public Service Labour Relations Act* (PSLRA). There is no evidence before me in regards to any court proceeding.

[65] Based on this evidence, I must first determine if the grievances filed by the Applicant constitute a proceeding before an "adjudicative body" as contemplated by subsection 18 (b).

[66] Article 28 of the Collective Agreement sets out the process that an employee who is subject to the Collective Agreement must follow when making a grievance. The relevant portions of this Article are set out below.

> *28.01 (1) An Individual employee, who has a grievance against the application or interpretation of the Collective Agreement, or any other term or condition of employment, can bring forward the grievance, as per Article 28.05 (1) and may be assisted and/or represented by the Alliance at any level.*
>
> *28.05 Except as otherwise provided in this Agreement, a grievance shall be processed by recourse to the following steps:*
>
> *(1) Individual Grievance Process for Grievances under 28.01(1):*
>
> *(a) Level 1 - First level of Supervision*
>
> *A problem-solving meeting in which the individual employee has the right of representation from the Alliance, and the supervisor has the right of consultation with the Department Human Resource Office.*
>
> *When an individual employee has requested a meeting in relation to a grievance at Level 1 such problem-solving shall be held within twenty (20) working days of the Employer's receipt of the grievance. If the matter is not resolved at Level 1 it may be referred to Level 2 within five (5) working days.*
>
> *(b) Level 2 – First level of Management*
>
> *A problem-solving meeting in which the individual employee has the right of representation from the Alliance, and the manager has the right of consultation from the Department Human Resource Office or the Staff Relations Branch of the Public Service Commission.*
>
> *The Employer shall normally reply to an individual employee's grievance at Level 2 of the grievance procedure, within ten (10) working days after the grievance is*

referred. If the matter is not resolved at Level 2 it may be referred to the Final Level within five (5) working days.

(c) Final Level – Deputy Minister

A meeting that shall be held within ten (10) working days of the grievance being referred, at which the Deputy Minister has the right of consultation with the Staff Relations Branch or the Department Human Resource Office, and in which he/she shall hear the individual employee, who has the right of representation from the Alliance.

The Deputy Minister shall provide his/her written reasoned decision, within ten (10) working days of the meeting.

[67] I recently had occasion in Inquiry Report ATP16-015AR to consider whether the grievance process under the collective agreement between the Yukon Teachers' Association and Yukon Government (YTA Collective Agreement) constituted a proceeding before an adjudicative body. In finding that this process did not constitute a proceeding before and adjudicative body, I stated the following.[12]

The Department takes the view that the grievance procedure mandated by section 63 of the ELRA and Article 10 of the Agreement establishes an adjudicative body within the meaning of ss. 2 (2) of the ATIPP Act. In its submission, the Department supports this view on the basis that the grievance officer who chairs the meeting…had authority, pursuant to both the [*Education Labour Relations Act* (ELRA)] *and the Agreement, to determine the Applicant's [sic] rights under the Agreement.*

I disagree with the Department that the grievance that occurred in this case constitutes a proceeding before an adjudicative body. The process that the Complainant was involved in was established under section 10.10 of the Agreement. The first level under this section, subsection 10.10 (a), involves the Employee meeting with a supervisor within the Department for a "problem-solving meeting" to address the Employee's complaint. If the complaint is not resolved at this level, then the Employee may submit a written grievance to the second level of supervision within the Department, per subsection 10.10 (b), for another "problem-solving meeting to discuss the complaint or grievance." If the Employee, at the

[12] Yukon Department of Education ATP16-015AR, February 2, 2017, www.ombudsman.yk.ca (YK IPC), at paras 40 to 43.

conclusion of the second level meeting, is not satisfied the grievance or complaint was addressed, then he or she can refer the matter to adjudication. An adjudicator under the ELRA has broad powers including the power to compel production of records and witnesses and the decision rendered by the adjudicator is final and binding. The procedures governing adjudication are set out in the ELRA.

The process established under the Agreement is an administrative procedure agreed to by the YTA and the Department as an informal means of addressing Employee complaints made under the Agreement before they are elevated to an adjudicator under section 64 of the ELRA. It is clear to me that the procedures established under the Agreement simply codify an administrative complaints management procedure agreed to by the Department and YTA under [sic] *Agreement. Despite the Department's approach in conducting a grievance under subsection 10.10 (b), it is clear that both levels of complaint management are intended to be problem-solving meetings of an administrative nature and not proceedings before an adjudicative body. A proceeding before an adjudicative body would not occur in the context of a grievance made by an Employee until the Employee refers a complaint or grievance to adjudication under section 64 of the ELRA.* [Emphasis added]

[68] I based the foregoing on the following analysis.

[Commissioner Flaherty] *stated the following about the meaning of the word "proceeding" in subsection 3 (2):*

> *…the Act does not limit the information available by law to a party to a proceeding. At what point in the compensation process does a "proceeding" commence? The WCB states that a "proceeding" pursuant to section 3(2) takes place from the moment that the first decision is made on the claim. The WCB has thus adopted a broad interpretation of a "proceeding" under section 3(2). It states: The `proceeding' which commences at that point is the ongoing adjudication and management of a claim file in regard to the appealable decision, and the legal avenue of appeal which arises at that time. Both the employer and worker have an interest in that `proceeding.' The worker's interest is obvious, because the proceeding involves his physical and financial well-being, and his legal rights under the [Workers Compensation Act] with respect to his compensation claim and his right to appeal if his claim has been denied. The employer's interest lies in the fact that ultimately it finances any compensation paid to*

> *or rehabilitation services given to the worker. There is a direct financial impact to employers in that claims costs are used to determine an employer's assessment rate under the ERA program. The employer's legal rights also arise under the WCA with respect to appeal of any decision made by an adjudicator with respect to a worker. The employer has the legal right to initiate an appeal of a decision with which it disagrees, and to participate in opposition to an appeal initiated by one of its workers. 4 …I find that the WCB's interpretation of "proceeding" is too broad to be consistent with the spirit of the Freedom of Information and Protection of Privacy Act. If the WCB's reasoning were followed, any administrative function whereby eligibility for a benefit was adjudicated and appealable to a quasi-judicial body could be regarded as a "proceeding" under section 3(2) and hence removed from the legislative scheme of the Act. This could, for example, include processes which determine eligibility for social assistance benefits and student loans. I find that "proceeding" with respect to section 3(2) does not take place until a formal appeal has been launched under the Workers Compensation Act.*[13]

[Adjudicator Fedorak] *considered Commissioner Flaherty's decision about the meaning of the word "proceeding" in subsection 3 (2) of BC's FIPPA in P96-006 and indicated his agreement that "for s. 3(2) purposes, "proceeding" means activities governed by rules of court or rules of judicial or quasi-judicial tribunals that can result in a judgment or decision." From this, he concluded that a formal review of a claim decision under the WCA, here a review by WorkSafeBC's Review Division, is a "proceeding" under subsection 3(2).*[14]

[69] I added the following to this analysis.

The term "proceeding" is not defined in the ATIPP Act. It is, however, qualified by the subsequent words "in court or before an adjudicative body".

"Adjudicative body" is defined in the section 3 as "any person or group of persons before whom a proceeding may be taken for a determination of rights according to established law and procedures." [15]

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[13] *Ibid. 12*, at para 26.

[14] *Ibid. 12*, at para 31.

[15] *Ibid. 12*, at paras 36.

> *While the word "proceeding" is broader and takes into account administrative proceedings, I agree with the conclusions reached by Commissioner Flaherty that the kind of proceeding contemplated by this subsection is a judicial or quasi-judicial proceeding…*
>
> *The definition of adjudicative body further strengthens my view that the kind of proceeding contemplated by subsection 2 (2) is judicial or quasi-judicial. This is because the definition states that the proceeding before an "adjudicative body" "must be taken for a determination of rights according to established law and procedures." In other words, the adjudicative body must be one whose proceedings are governed by "established" rules, such as rules of court or rules of judicial or quasi-judicial tribunals that can result in a judgment or decision.*[16]

[70] The grievance process under the Collective Agreement is similar to that in the YTA Collective Agreement. Levels 1 and 2 of the grievance process are described as "problem-solving meetings." These are held with a supervisor or management employee. There is a third level which differs from the YTA Collective Agreement. This level is described as a "meeting." This meeting is with the Deputy Minister of the Department.

[71] An employee who is not satisfied with the grievance process set out in the Collective Agreement can refer the grievance to adjudication. Sections 78 to 83 of the PSLRA define the process to be followed for an arbitration. The rules that apply to an arbitration and the powers granted to an arbitrator to conduct an arbitration under the PSLRA are similar to those under ELRA.

[72] The process established under the Collective Agreement is an administrative procedure agreed to by Yukon Government and the Public Service Alliance of Canada as an informal means of addressing employee complaints made under the Collective Agreement before they are elevated to an adjudicator under section 78 of the PSLRA. These procedures represent the codification of an administrative complaints management procedure agreed to by these parties.

[73] Despite the manner in which these grievances are conducted, the Department meetings held under Article 28 of the Collective Agreement are not, in my view, proceedings before an adjudicative body. There is no established law or procedures that guide the decision-making process used by the Deputy Minister at the meeting. The only guidance is what is contained in paragraph 28.05 (1)(c).

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[16] *Ibid. 12*, at paras 39.

[74] I am further supported in my view that the grievance procedures established under the Collective Agreement are not the kind of proceedings meant to be protected by subsection 18 (b), given that the policy justification for this subsection is to meet the needs of the adversary system.[17] The grievance meetings held by the Department are not part of the adversary system.[18] Their sole purpose is to allow the Department, a party to the grievance, the opportunity to resolve a complaint made by one of its employees, the other grievance party, in a meeting format before it is elevated to arbitration under the PSLRA.

[75] Given the above, I have determined that the complaint management procedures in the Collective Agreement are not proceedings before an adjudicative body; rather, they are meetings that are administrative in nature. A proceeding before an adjudicative body would not occur in the context of a grievance made by an employee until the employee refers a complaint or grievance to arbitration under section 78 of the PSLRA.

[76] Based on the foregoing, the Department will need to establish that the remaining Litigation Privilege Records were prepared in contemplation of and for the purpose of a reasonably expected arbitration proceeding under the PSLRA. More specifically, it will need to establish that:

1) the purpose of preparing these records was for an arbitration proceeding under the PSLRA that was occurring or was likely to or would perhaps occur; and

2) the point at which the records were prepared:

    i. the Applicant had initiated an arbitration proceeding under the PSLRA; or

    ii. it was probable that the Applicant would initiate an arbitration proceeding under the PSLRA.

[77] The Department submitted, and the Applicant confirmed, that only one grievance, Grievance [redacted], was referred to arbitration. Other than its claim that the

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[17] *Ibid. 10*.

[18] "Adversary System" is defined in Black's Law Dictionary as "The jurisprudential network of laws, rules and procedures characterized by opposing parties who contend against each other for a result favorable to themselves. In such system, the judge acts as an independent magistrate rather than a prosecutor; distinguished from the inquisitorial system. Black's Law Dictionary, Abridged Sixth Edition, Centennial Edition (1891-1991), West Publishing Co, St. Paul, MN, 1991.

Litigation Privilege Records "were prepared in contemplation of existing or reasonably expected adjudicative proceedings," the Department did not provide any submissions to support the purpose of preparing these records was for an arbitration proceeding under the PSLRA that was occurring or was likely to or would perhaps occur. It also provided no evidence to support that, when the records were created, the Applicant had initiated an arbitration proceeding or that it was probable she would do so. Just because an arbitration proceeding under the PSLRA is possible when an employee files a grievance under the Collective Agreement does not make it probable without evidence to support the probability.

[78] Having reviewed the records, and based on the timing of the grievances, I have determined that most of these records were not created for the purpose of an arbitration that would perhaps occur or, that when they were created, it was probable arbitration would occur. A considerable number of the records are emails between the Applicant's supervisors and Department human resources staff and appear to be related to performance management issues. Eighteen records[19] are about the Applicant's Access Request. These records have no bearing on any of the Applicant's grievances. Why they are included with these records is puzzling.

[79] For the pages numbered 2385 to 2391, 2393 to 2395, 2397 to 2399, and 2401 to 2404 (Possible Litigation Privilege Records), it is clear that they were created for the purpose of the arbitration proceeding filed by the Applicant in [redacted]. At the time of their creation, the arbitration was initiated by the Applicant. These records meet the test under subsection 18 (b). Despite, this I cannot find that subsection 18 (b) applies to these records given that I have no evidence that the Department exercised its discretion properly or at all in respect of these records. As a result of this I sought additional submissions from the Department about its exercise of discretion related to these pages. Its submission on their exercise of discretion is as follows.

> *The department has refused access to the pages marked in the records as 2385 to2391, 2393 to 2395, 2397 to 2399, and 2401 to 2404 for the following reasons:*
>
> - *2386 to 2391, 2393 to 2395, 2397 to 2399 were prepared for the public body specifically for the purpose of adjudication.*

[19] Specifically, records 1444 to 1454 and 1461 to 1467.

- *Pages 2401 to 2404 relate to correspondence provided as counsel from Labour Relations to the public body specifically for the purpose of adjudication.*

[80] The Applicant's response to these submissions was to reiterate her views about her inability to determine if this subsection applied, as well as her views on the appropriate test to be applied for the Department's reliance on subsection 18 (b).

[81] In Inquiry Report ATP11-029AR, I discussed the Supreme Court of Canada's (SCC) decision in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* (Ontario PS and S)[20] wherein the Court addressed both the role of Ontario's Acting Information and Privacy Commissioner (AIPC) in reviewing the exercise of discretion by an Ontario public body under Ontario's *Freedom of Information and Protection of Privacy Act* (ON FIPPA) and how the discretion is to be exercised by a public body.[21] Specifically at paragraphs 37 to 39 of that Inquiry Report, I stated the following.

> *…The SCC identified that an exercise of discretion under FIPPA involves two steps.*
>
> > *"First the head must determine if the exception applies. If so, whether having regard to all the relevant interests, including the public interest in disclosure, disclosure could be made."*
>
> *The SCC identified that the AIPC's role in reviewing discretion also involves two steps:*
>
> > *"First the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable."*
>
> *The SCC identified that with respect to the section 14 law enforcement exception, the exercise of discretion involves balancing the interests, including the public interest against the risks of interfering with the law enforcement matter.*

[82] Although the case before the SCC involved the exercise of discretion for ON FIPPA's law enforcement exception, the decision about the exercise of discretion has clear application beyond the law enforcement context and applies to all discretionary provisions

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[20] Yukon Department of Energy, Mines and Resources ATP11-029AR, August 14, 2013, www.ombudsman.yk.ca (YK IPC) citing *Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23,* at para 38.
[21] See *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 [2010] 1SCR 815, at para 66.

in access to information legislation in general.[22] This was the conclusion reached by Adjudicator Cunningham in Order F2014-38. Her conclusion aligns with the purposes of the ATIPP Act that require public bodies to balance the right of access to information in their custody or control against the limited exceptions to this right that are set out in the ATIPP Act. I agree with her that the test set out by the SCC on the exercise of discretion has general application to all discretionary provisions in access to information legislation, with the exception of the solicitor and client privilege provision for reasons I will discuss below.

[83] In the matter before her, Adjudicator Cunningham determined that the exercise of discretion by a public body under Alberta's FIPPA involves the public body deciding whether to disclose or withhold information that is the subject of a discretionary exception by considering all the relevant factors weighing for or against disclosure. As I indicated previously, one of the factors that must be considered by a public body when exercising discretion under subsection 18 (b) is whether it is "reasonably necessary", in the circumstance, to refuse access so as to preserve the statutory litigation privilege.

Did the Department properly exercise its discretion in deciding not to release pages 2385 to 2391, 2393 to 2395, 2397 to 2399, and 2401 to 2404?

[84] Based on the foregoing, the Department must demonstrate that when it exercised its discretion in deciding not to disclose the pages to the Applicant, it considered all the relevant factors weighing for or against disclosure, including whether it is reasonably necessary, in the circumstance, to refuse access to preserve the subsection 18 (b) privilege. My role in reviewing this discretion is to determine if the Department's exercise of discretion was reasonable.

[85] Despite being given a second opportunity to make submission on the exercise of discretion under subsection 18 (b), the Department provided no evidence about its exercise of discretion in deciding not to disclose these pages to the Applicant. Given this, and because the burden of proof rests with the Department to prove it exercised this discretion reasonably, I find that it did not exercise its discretion reasonably, or at all in this case. I find, therefore, that the Department cannot rely on this subsection to refuse the Applicant with access to the Possible Litigation Privilege records.

[22] Order F2014-38, Alberta Health Services, October 6, 2014, Alberta IPC, 2014 CanLII 72623 (AB OPC), at para 92.

[86] My finding on this issue is that subsection 18 (b) does not apply to the Possible Litigation Privilege Records. As such, the Department is not authorized by this subsection to refuse the Applicant access to these records.

Subsection 25 (1) – Harm to Personal Privacy

[87] The Department did not cite subsection 25 (1) as its authority to refuse the Applicant access to the Litigation Privilege Records despite the fact that these records contain personal information and this provision is a mandatory exception.

[88] By failing to cite subsection 25 (1) in relation to the Litigation Privilege Records and address its application to them, I am left having to examine more than 2000 pages of records without the benefit of any submissions from the Department about the application of this subsection to the information at hand. In Inquiry ATP16-004 when I faced a similar situation, and citing a decision written by the BC IPC, I stated the following about a public body's duty to apply mandatory ATIPP Act provisions where applicable.

> *In Order F08-03, former Information and Privacy Commissioner for British Columbia, David Loukidelis, faced a similar situation when the public body failed to make any submissions regarding the application of section 22 to thousands of records under British Columbia's Freedom of Information and Protection of Privacy Act (BC FIPPA). Section 22 is similar to our section 25.* [In this regard, he stated that:]
>
> > *Section 22, is … a mandatory exception that cannot be ignored. The Ministry was and is obligated to apply s. 22 for that reason. The Ministry is, further, duty bound, as part of its duty under s.8(1), to tell the applicant the reasons for refusing access, including by specifying the FIPPA provisions under which access is denied. The Ministry also has a duty under s. 6 (1) to "make every reasonable effort to assist an applicant and to respond without delay to each applicant openly, accurately and completely". These provisions are not mere words, wishes or aspirations. They are legal obligations that the Legislature intended to have real meaning and that the Ministry is to take seriously. The Ministry's obligation to apply s. 22 when considering its response to an access request is also crucial to an applicant's right to request a review of a decision refusing access. How can decisions to refuse access to information be reviewed effectively if public bodies do not*

> *articulate what disclosure exceptions they have applied and to what information?*[23]
>
> *…The Department is under the same obligations and duties under the ATIPP Act as the Ministry was under BC FIPPA. The Department must ensure that it is meeting these obligations effectively to ensure the right to access information in its custody or control and the ability of my office to provide effective oversight is not hampered by the Department's improper application of the ATIPP Act….*[24]

[89] To ensure applicants are able to exercise their rights under the ATIPP Act, public bodies, including the Department, must ensure that they are applying the ATIPP Act properly. Failure to do so, as occurred here, negatively affects these rights, as well as my ability to provide effective and timely oversight.

[90] Subsection 25 (1) is a mandatory exception. Despite the fact that I have no submissions to assist me in my analysis of whether it applies to the Possible Litigation Privilege Records, I must determine, to the extent possible, as best I can if there is information in them that comes within its ambit.

[91] Section 25 states as follows.

> *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.*
>
> *(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*

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[23] Yukon Department of Tourism and Culture ATP16-004AR, October 17, 2016, www.ombudsman.yk.ca (YK IPC), at paras 43 and 44 citing Order F-08-03 Ministry of Public Safety & Solicitor General, January 31, 2008, 2008 CanLII 13321 (BC IPC), at para. 80.

[24] *Ibid. 23*, at para 45.

to prosecute the violation or to enforce the legal obligation or to continue the investigation;

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

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

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

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

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

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

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

(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).

(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.

[92] "Personal information" is defined in section 3 as "recorded information about an identifiable individual." Included in this definition is the following information:

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

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

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

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

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

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

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

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

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

[93] Most of the Litigation Privilege Records are emails between Department employees. A number of emails have attachments. The emails are primarily between the Applicant and her supervisor and between her supervisor and Department human resources employees. Other emails involve communications between these individuals and Department employees or others. In the body of some emails are the names of Department or other Yukon Government (YG) employees and those of individuals external to YG. The emails primarily contain information about the work of the Department as conducted by these employees or external third parties. There are also emails between the Department and the Public Service Alliance of Canada/Yukon Employees' Union (Union) representing the Applicant in her grievances.

[94] The attachments vary. They are comprised primarily of draft and final notes between the Applicant, her supervisors and others (human resources staff and her Union representative) and performance management documents. There are also some reports and materials created for Department level grievances.

Do the records contain personal information?

[95] As indicated, most of the records are emails. The emails marked as "None"[25] in the ATIPP column in the Records Table in Appendix A, attached to this Inquiry Report, contain

[25] "None" in this context means that no severing is required.

the names and contact information including email addresses of Department or YG employees and other individuals external to the Department and YG. These employees and other individuals are third parties for the purpose of subsection 25 (1). It is clear from the definition of personal information in section 3 that names and contact information would qualify as third party personal information. In Inquiry ATP13-037AR, I found that disclosing the names and email addresses of individuals who appeared to have been acting in a representative capacity, including as an employee, for a public body or other organization would not be an unreasonable invasion of these individuals' personal privacy.[26]

[96] Having reviewed the emails, I have determined that the names and contact information in them were provided by the Department's employees or other third parties while acting in their representative capacity for the Department, YG or an external entity. Given this, I find that disclosure of the third party names and contact information in these emails would not constitute an unreasonable invasion of their personal privacy.

[97] In these same emails, there are comments and opinions given by the Applicant, Department employees and others. It is clear that an opinion about an individual (including an employee) is his or her personal information, as are an individual's personal views or opinions unless they are about someone else. Whether the views or opinions, or other information given by an individual (or employee) who is acting in a representative capacity in carrying out employment responsibilities or functions qualifies as the individual's personal information is less clear. This question has been considered by Information and Privacy Commissioners in other jurisdictions.

[98] In Order F2004-026, former Alberta Information and Privacy Commissioner (AB IPC), Frank Work, considered whether the names of employees, together with the conveying of advice or consultations or deliberations by these employees, qualifies as their personal information. In finding that it did not, he stated the following:

> *…in my view, records of the performance of work responsibilities by an employee of a public body are not, generally speaking, personal information about that employee within*

[26] Yukon Department of Community Services ATP13-037AR, August 11, 2014, www.ombudsman.yk.ca (YK IPC), at paras 130 to 139.

the terms of section 1(n). However, they may be personal information if there is some factor which gives the information a personal dimension.[27]

The question of whether the recorded activities or work product of employees is information about them has been thoroughly canvassed in Ontario decisions that relate to the definition of "personal information" in the Ontario legislation. These decisions are summarized in Order P-1409, which states:

> *To summarize the approach taken by this office in past decisions on this subject, information which identifies an individual in his or her employment, professional or official capacity, or provides a business address or telephone number, is usually not regarded as personal information. This also applies to opinions developed or expressed by an individual in his or her employment, professional or official capacity, and information about other normal activities undertaken in that context.*

The Ontario position is that the latter such information is not personal in nature and is not about the employees, hence is not their personal information. Order R-980015 offers a policy rationale for this approach (at paragraphs 38 to 41), which includes the following comments:

> *… the rationale for the distinction between personal information and information that relates to a person's employment, professional and official government capacity also relates to the integrity of the regime establishing the public's rights of access and government's disclosure obligations. Without this distinction, the routine disclosure of information by government … could be greatly impeded as institutions sought to meet statutory notice and process obligations meant to apply only to "personal information" deserving of this kind of protection. This could, in turn, become an obstacle to access to information pertaining to the business of government which, of necessity, is conducted by individuals in the public service.*
>
> *…*
>
> *… It would also be contrary to one of the fundamental purposes of the Act, that "necessary exemptions from the right of access should be limited and specific", to interpret personal information so broadly as to encompass records subject to other exemptions which have been carefully crafted to establish appropriate boundaries for*

[27] Order F2004-026, Alberta Labour Relations Board, September 18, 2006, Alberta Information and Privacy Commissioner at para. 108. This decision was referred to in Order F2009-026. Judicial review of Order F2009-026 was denied by Alberta's Court of Queen's Bench in *Mount Royal University v. Carter*, 2011 ABQB 28.

> *protecting government's confidentiality interests and defining its disclosure obligations.*[28]

[99] He went on to address the view held by his predecessor, Bob Clark, that the Ontario position could not be followed in Alberta, given paragraph 17 (2)(e) of Alberta's *Freedom of Information and Protection of Privacy Act* (AB FOIPPA). It identifies that employment responsibilities are personal information. In this regard, AB IPC Work stated the following.

> *…in my view, these earlier decisions of this Office do not have to be seen as in conflict with the Ontario approach to information created in the discharge of employment responsibilities. Information about a person's "employment responsibilities" – a description of their position or duties – is different from information that records their performance of their responsibilities. The fact that a description of a person's employment responsibilities is personal information does not conflict with the conclusion (found in the Ontario cases) that recorded information created by people "in their professional capacity or the execution of employment responsibilities" is not personal information about them. The Ontario cases also acknowledge that even information consisting of records of employment activities can, depending on its nature, have a personal aspect. I agree with the Ontario cases referred to above insofar as they stand for the proposition that a record of what a public body employee has done in their professional or official capacities is not personal or about the person, unless that information is evaluative or is otherwise of a 'human resources' nature, or there is some other factor which gives it a personal dimension.*[29]

[100] In applying his interpretation to the records at issue in the case before him, AB IPC Work identified records containing employee comments that were of a "purely personal nature, and reveal[ed] something personal" about them. He found these comments to be the personal information of these employees that, if released, would constitute an unreasonable invasion of their personal privacy.[30]

[101] I agree with the conclusions reached by AB IPC Work and Adjudicator Higgins for the Office of Ontario's Information and Privacy Commissioner (ON IPC) in Order P-1049: information provided by an employee of a public body or other organization that is given in their representative capacity while carrying out their employment responsibilities is not their personal information because it is not "about" them in their personal capacity.

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[28] *Ibid*. *27*, at para 109

[29] *Ibid. 27*, at para 111.

[30] *Ibid. 27,* at para 113.

Further, as was highlighted by the Ontario decision, this interpretation accords with the purpose of access to information legislation, including the ATIPP Act. It is to balance the competing interests of the public's right to access information in the custody or control of public bodies and an individual's right to privacy within that regime. I further agree with Adjudicator Higgins that to expand the meaning of personal information to include information provided by employees, while carrying out their duties, would significantly hinder the ability of the public to access information. This would potentially render meaningless the other exceptions to the right of access that are carefully crafted to protect public bodies' need, in limited and specific circumstance, to refuse access to certain information so as to protect its interests.

[102] The situation does not change in the context of a manager communicating with her employees about their management, given that it is part of a manager's employment responsibilities to manage employees. This was confirmed in order F2009-043, where Adjudicator Ridley with AB IPC found that information generated by the manager in emails between her and her staff, in attempting to resolve conflict or responding to inquiries, were not her personal information unless there was a personal dimension to that information.[31]

[103] The same would be true for human resources advisors communicating with supervisors or others about the management of employees, as was found in Order F2015-25. Here Adjudicator Cunningham with AB IPC determined that unless, in that case, the human resources advisor stepped out of her official capacity when she wrote the email or had ceased to represent the public body in a portion of it, the information contained in the email would not be her personal information unless there was a personal dimension to it.[32]

[104] Based on the foregoing, I find that the comments or opinions made by the third parties in the emails marked as "Emails w/o PI" in the Appendix A "Type" column qualify as the Applicant's personal information where they are about the Applicant. Where they are not about the Applicant, I find that the comments or opinions were provided by the third parties while carrying out their respective responsibilities as representatives of the Department, YG, or, where applicable, other bodies external to the Department. There is

[31] Order F2009-043, Alberta Employment and Immigration, June 28, 2010, Alberta Information and Privacy Commissioner, at para. 35.

[32] Order F2015-25, City of Calgary, September 14, 2015, Alberta Information and Privacy Commissioner, at para. 74.

no information in these records that would qualify as having a personal dimension such that it would become personal information about a third party.

[105] If I am wrong and there are comments or opinions in these records that qualify as a third party's personal information, then having examined the information, I find that disclosure of any comments or opinions would not constitute the unreasonable invasion of a third party's personal information.

[106] There are a number of emails in Appendix A that do contain third party personal information, given that there are opinions or comments about third parties that have a personal dimension. For these emails, I must determine if disclosing the personal information in them would be an unreasonable invasion of a third party's personal privacy.

[107] Emails A and B in Appendix A contain information about an incident that resulted in injuries or other harm of a medical nature to a number of employees, including the Applicant. This information qualifies as medical information about these individuals. There is a presumption in paragraph 25 (2)(a) that disclosure of medical information would be an unreasonable invasion of personal privacy. Having considered the information, I find that disclosing this information to the Applicant would be an unreasonable invasion of the personal privacy of the third parties who are the subject of the information. Having also considered the relevant circumstances in subsection 25 (4), I find there are no circumstances that would favour disclosing this information to the Applicant. I find, therefore, that subsection 25 (1) applies to this medical information about these third parties.

[108] Emails 12, 76 and 151 also contain medical information about a Department employee and a non-employee third party. I find that subsection 25 (2)(a) applies to this information and there is nothing in subsection 25 (4) that would favour disclosure of this information to the Applicant. I find that subsection 25 (1) applies to this medical information about the third party.

[109] The Applicant is entitled to her own personal information unless it is comingled with another person's personal information such that the two cannot be separated to the degree that disclosing the Applicant's personal information to her would result in an unreasonable invasion of the third party's personal privacy. I find this to be the case for email B. I have also determined that revealing the date of the incident may allow these third parties to be identified. I find that subsection 25 (1) applies to this third party' personal information in email B.

[110] There are numerous emails in Appendix A marked in the "Type" column as "Emails with PI" that contain information reflecting an individual's personal views or comments about how they perform their supervisory role. I find that this information has a personal dimension to it and qualifies, therefore, as these individuals' personal information.

[111] There is a presumption in paragraph 25 (2)(g) that disclosure of personal information consisting of personal recommendations or evaluations, or character references or personnel evaluations would be an unreasonable invasion of a third party's personal privacy. This provision does not apply to an individual's personal or personnel evaluations or to character references about themselves. As I found in Inquiry Report ATP16-004AR,[33] this provision only applies to a personal or personnel evaluation or to a character reference given by a third party that is about another third party. As the information in these emails is given by a third party about themselves, this provision does not apply to this personal information.

[112] Having reviewed the personal information in the emails that qualify as a third party's personal information, I find that disclosure of this information to the Applicant would be an unreasonable invasion of these third party's personal privacy. In making this determination, a relevant consideration is that, in some of them, the Applicant was originally copied on the emails. This fact alone does not support disclosing the information to her, given that a disclosure to the Applicant is considered a disclosure to the public. In other words, once it is disclosed, there are no restrictions on its dissemination by the Applicant.

[113] All relevant considerations must be taken into account before deciding whether subsection 25 (1) applies to personal information, including those under subsection 4. For this information, I have determined that disclosure of this personal information to the Applicant could cause the third parties harm in the form of embarrassment and humiliation. Disclosure of this personal information could also damage the reputation of these third parties such that it may adversely affect their existing and future employment. I find that subsection 25 (1) applies to this third party' personal information in these emails.

[114] There are emails containing personal views or comments given by the Applicant or a third party about another third party. Some are also given by a third party that are not about any individual. While this information qualifies as third party personal information, the nature of the information in these emails is such that, in my view, disclosure of them

[33] *Ibid. 23,* at para 61.

to the Applicant would not be an unreasonable invasion of a third party's personal privacy. These emails are marked as "Email w/PI – no severing" in the "Type" column of Appendix A.

[115] There are emails that identify individuals as being involved in the respectful workplace process offered by YG. Being involved as a participant in this process has a personal dimension for these individuals. It suggests that such employees require personal support from the Respectful Workplace Office (RWO) to address conflict or disrespectful conduct that they have failed to address on their own or disrespectful conduct in which they were alleged to be engaged.[34] Some of these emails also specifically identify the challenges experienced by these individuals and the interventions provided by RWO to remedy the conflict or address the allegation of disrespectful conduct. In my view, this information qualifies as personal information of a third party.

[116] Having reviewed these emails, I am of the view that disclosure of this information to the Applicant would be an unreasonable invasion of these individual's personal privacy. Having also considered the relevant circumstances in subsection 25 (4), including that the Applicant was herself involved in this process, I find that disclosure of this information could cause the third parties harm in the form of embarrassment and humiliation. Moreover, the reputations of these individuals could also be damaged. I find that subsection 25 (1) applies to this third party personal information in these emails. These emails are also marked in Appendix A as "Email w/PI."

[117] There are emails that contain information about the private lives of these third party employees, including information about vacation leave or other personal matters. There is also information about other personal issues of these employees, such as the management of care for their children. This information qualifies as the personal information of these third parties. There is nothing in subsection 25 (4) that would favour disclosure of this information to the Applicant. I find that disclosing this information to the Applicant would be an unreasonable invasion of these third party employees' personal privacy and that subsection 25 (1) applies to it. These emails are marked in Appendix A as "Email w/PI."

[118] There are emails that contain personal information about third parties that qualify as their employment history, such as when an employee's term ended or information

[34] The respectful workplace obligations, process, and involvement of the RWO is set out in the Respectful Workplace Policy 3.47, YG General Administration Manual, Volume 3: Human Resource Policies. The process to engage the RWO is described in section 4 of this policy.

about a third party's performance as an employee of the Department. Under paragraph 25 (2)(d), this kind of information is presumed to be an unreasonable invasion of personal privacy if disclosed. Having reviewed the information and taken into the relevant considerations under subsection 25 (4), I find there is nothing in this subsection or otherwise that favours disclosing this information to the Applicant. As such, the presumption is not rebutted. I find that subsection 25 (1) applies to this information. These emails are marked in Appendix A as "Email w/PI."

[119] There are a number of emails that contain information about a third party's employment performance. This information qualifies as both employment history under paragraph 25 (2)(d) and a personnel evaluation under paragraph 25 (2)(g). There is a presumption under these paragraphs that disclosure of this kind of third party personal information would be an unreasonable invasion of the third party's personal privacy.

[120] Some of these emails are copied to the Applicant. As previously indicated, this fact alone does not support disclosure of the information to the Applicant. Having reviewed these emails and subsection 25 (4) I have determined that there are no circumstances favouring disclosure of this information to the Applicant. Therefore, the presumption is not rebutted and subsection 25 (1) applies. These emails are marked in Appendix A as "Email w/PI."

[121] Included in some of these emails is information about the Applicant. The Applicant's personal information in some of these emails is so intertwined with that of the third party's that in order to provide the Applicant with her own personal information, disclosure of the third party's highly sensitive personal information would also occur. Consequently, in these circumstances the information about the Applicant that is intertwined with the third party information must also be refused under subsection 25 (1). These emails are marked in Appendix A as "Email w/PI."

[122] Email 280 contains the personal email address of a Department employee, a third party. It is evident from this email that the employee was using her personal email address to conduct Department business[35]. In Inquiry Report ATP13-037AR, I stated the following about this practice:

> *…an important factor to consider in determining whether the release of a third party's personal email address would not constitute an unreasonable invasion of personal privacy is where the third party personal email address was used by a*

[35] I would caution the Department on allowing its employees to use personal email accounts to conduct Department business given that it could result in non-compliance with Part 3 of the ATIPP Act.

person who is or appears to be acting in a representative capacity of a government or private sector business and used this email address to send or receive business related emails in the context of carrying out those activities…[36]

[123] In that Inquiry, I found that disclosure of a personal email address used by third party' individuals to conduct business was not an unreasonable invasion of their personal privacy. I find the same here and conclude that subsection 25 (1) does not apply to this information.

[124] In emails 831 and 1487, there is information about non-employee individuals, including their names and information about their concerns. There is also information about an inquest into an individual's death. This information is the personal information of these third party' individuals and I find that disclosing this information to the Applicant would be an unreasonable invasion of their personal privacy. There is nothing in subsection 25 (4) that weighs in favour of disclosing this information to the Applicant. As such, I find that subsection 25 (1) applies to the information.

Attachments

[125] There are 64 attachments in the records. Some are attachments to emails. Others were included with a list of exhibits. For each, I must determine if there is personal information in them. If so, then I must determine if disclosing this personal information would be an unreasonable invasion of a third party's personal privacy. For ease of reference to the attachments, I have attached an Attachment's Table as Appendix B to this Inquiry Report.

1) Letter of expectation

[126] The first attachment[37] is a letter of expectation (LOE) that appears 15 times in the records. The LOE was written by the Applicant's supervisor. The contents, although differing slightly from version to version, is primarily about the Applicant. This information qualifies as her personal information.

[127] In some versions of the LOE, there is information about the Applicant's supervisor, a third party, that qualifies as his personal information. This same information appears in a number of emails. In those emails, I found that if this information were released to the Applicant, then it could cause her supervisor harm and could negatively affect his

[36] *Ibid.* 26, at para 136.

[37] The order of the attachments is based on their appearance in the records.

reputation. I also found that disclosure of this information to the Applicant would be an unreasonable invasion of his personal privacy. I find the same here even though the Applicant received the LOE containing this information. In my view, this fact does not outweigh the harm that could occur to the third party if this information were disclosed. I find that subsection 25 (1) applies to this third party' personal information in this attachment.

2) Draft Script for fact finding May 2014

[128] The second attachment is entitled "Draft Script for [supervisor]/[Applicant] meeting". It appears five times in the records. Most of this attachment sets out a script for the Applicant's supervisor to follow during a meeting with the Applicant. The information in this attachment primarily details with information about the actions of the Applicant during an interaction between her and her supervisor. This information qualifies as the Applicant's personal information.

[129] In this attachment, there is a comment made by the supervisor about himself. This information qualifies as the supervisor's personal information. In my view, disclosing the information would be an unreasonable invasion of the supervisor's personal privacy. Having considered this information together with subsection 25 (4), I find there is nothing in this subsection that favours disclosing it to the Applicant. As such, I find that subsection 25 (1) applies to the information in this attachment.

3) Grievance form [redacted]

[130] The third attachment is a grievance form entitled "Issue Information/Grievance Form Level 1 & 2" that was completed by the Applicant or her Union representative to initiate the Applicant's grievance against the Department. The tracking number on the form is [redacted]. This form appears four times in the records.

[131] The majority of the personal information on this form is the Applicant's. There is a signature of her Union representative that was provided by this individual in his or her representative capacity as the Applicant's Union representative for the purposes of submitting the grievance. The name and signature of a Department employee also appears on one of these attachments. This employee was involved in resolving the grievance on behalf of the Department. A name and signature are personal information. This information is personal information of two third parties.

[132] I have already determined that subsection 25 (1) will not apply to third party' personal information that was recorded in the course of the third party performing

employment responsibilities and acting as a representative of their employer. For the name and signatures appearing on this form, I find that subsection 25 (1) does not apply to this third party' personal information in this attachment.

4) Applicant's Job Description

[133] The fourth attachment is a job description for the Applicant's job that appears four times in the records and each version is slightly different.

[134] While a job description does not generally contain personal information, where the job description identified is the job of a particular individual, then the information would qualify as the individual's personal information. This job description is the Applicant's job. Therefore, it qualifies as her personal information. Given that there is no third party personal information in the attachment, I find that subsection 25 (1) does not apply to it.

[135] One version of the job description contains the name of the Applicant's supervisor. The supervisor's name appears in the context of his acting as a representative of the Department in his employment capacity. Given this, and for reasons stated above, I find that subsection 25 (1) does not apply to this information in the attachment.

5) Department employee job description

[136] The fifth attachment is a job description for a Department employee. This attachment appears once in the records and the incumbent for this job is identified. Given this, I find that this job description qualifies as his personal information. However, subsection 25 (3), together with paragraph (e) of that subsection, indicates that information about a third party's position or functions as an employee of a public body is not an unreasonable invasion of the third party's personal privacy. Having considered this, as well as the other records and information that will be released to the Applicant, I am satisfied that paragraph 25 (3)(e) applies to this information and that subsection 25 (1) does not.

6) Assessing the Probationary Period

[137] The sixth attachment is a document entitled "Assessing the Probationary Period." In the emails, there is discussion between two Department employees about using this document to assess another employee's probationary period. The assessment of this individual's probationary period qualifies as his personal information but not, in my view, the process or tools used to conduct this evaluation. Given that there is no personal information contained in this attachment, I find that subsection 25 (1) does not apply.

7) Department employee evaluation

[138] The seventh attachment contains an evaluation of a Department employee's performance. Versions of this attachment appear eight times in the records. Having reviewed its contents, I find that there is a presumption under paragraphs 25 (2)(d) and (g) that disclosure of this information would be an unreasonable invasion of the third party's personal privacy. Having considered paragraph 25 (4), I find there is nothing that favours disclosing this information to the Applicant. Consequently, the presumption is not rebutted. I find that subsection 25 (1) applies to the entire attachment.

8) Department employee work plan

[139] The eighth attachment is a work plan for a Department employee. Versions of this attachment appear nine times in the records. I am able to determine from my review of the attachment that it contains two kinds of information. The first is information about a Department employee's job functions. The second is information specific to this individual in that it describes performance measures that the individual is required to meet and on which his performance was evaluated.

[140] I find that there is information in this attachment that qualifies as third party personal information. More specifically, this information qualifies as employment and educational history of this third party. There is a presumption in paragraph 25 (2)(d) that disclosure of this kind of information would be an unreasonable invasion of his personal privacy. In some versions of this document, there is also information that would qualify as personnel evaluations. There is a presumption in paragraph 25 (2)(g) that disclosure of this kind of information would be an unreasonable invasion of personal privacy. I find that paragraphs 25 (2)(d) and (g) apply to this information and that there are no circumstances in subsection 25 (4) that favour disclosure of this information to the Applicant. Given this, I find that subsection 25 (1) applies to this information and that it must not be disclosed to the Applicant.

[141] As for the job function information in this attachment, I find that paragraph 25 (3)(e) applies and that subsection 25 (1) does not.

9) Department employee work chronology

[142] The ninth attachment contains a work chronology and notes from several meetings with a Department employee about his work plan that track his progress in meeting his specific work plan tasks. This attachment appears five times in the records.

[143] This information qualifies as this employee's personal information. I further find that this information qualifies as his employment history and constitutes a personnel evaluation of his performance. Given this, I find that the presumptions against disclosure of this information under subsections 25 (2)(d) and (g) apply and there are no circumstances in subsection 25 (4) that would apply to rebut this presumption. As such, I find subsection 25 (1) applies to the entire attachment.

10) Department employee PPP

11) Department employee PPP feedback

[144] The 10th attachment is the Personal Performance Plan for a Department employee. This attachment appears eleven times in the records. The 11th attachment contains feedback about a Department employee's performance. This attachment, appearing only once in the records, contains information about the tasks this employee was required to complete and the support provided to assist the employee in completing those tasks. The attachment also contains information evaluating this employee's performance.

[145] Both these attachments contain information that qualifies as this employee's personal information because both contain his employment history and a personnel evaluation of his performance. The presumption in paragraphs 25 (2)(d) and (g) apply to the information and I have determined that nothing in subsection 25 (4) rebuts this presumption. Given this, I find that subsection 25 (1) applies to all of both attachments.

12) Letter to Applicant *re*: hours of work

13) Memo from Applicant *re*: hours of work

[146] The 12th attachment is a draft letter prepared by the Applicant's supervisor in response to a request she made. This attachment appears five times in the records. The thirteenth attachment is a memo from the Applicant to her supervisor in which she makes a request. This attachment appears two times in the records.

[147] Having reviewed these attachments, I find that the bulk of the information in these attachments to be the Applicant's own personal information. Subsection 25 (1) does not apply to information that is the Applicant's own personal information.

[148] The only information in the response that qualifies as third party personal information is the name of the Applicant's supervisor that appears at the bottom of the response letter and the top of the memo from the Applicant. As indicted previously, disclosure of personal information provided by an employee acting in a representative

capacity will not meet the threshold in subsection 25 (1). Given the foregoing, I find that subsection 25 (1) does not apply to the information in these attachments.

14) Letter of Understanding U from Collective Agreement

15) Flex time rules

[149] The 14th attachment is the Letter of Understanding "U" from the Collective Agreement between YG and the Union. The 15th attachment contains flex time rules claimed by the Applicant to have been extracted from YG's website. These attachments appear twice in the records. There is no information in these attachments that qualify as personal information. Consequently, I find that subsection 25 (1) does not apply to these attachments.

16) Applicant's Personal Performance Plan 2013/14

[150] The 16th attachment is the Applicant's Personal Performance Plan from 2013 to 2014 (2013/14 PPP). Differing versions of this document appear twenty times in the records.

[151] Most of the information in this attachment is the Applicant's own personal information. As such, subsection 25 (1) does not apply to it.

[152] There is some third party personal information in these attachments. The names of the Applicant's supervisors appear in this attachment, as does information about one supervisor's participation in the respectful workplace process offered by the RWO. There is also information in this attachment that reveals the specific problems to be addressed through the RWO. As noted above, disclosure of this kind of personal information to the Applicant would be an unreasonable invasion of this supervisor's personal privacy. Even though the Applicant received the information when she received her copy of the PPP, this fact does not, in my view, outweigh the embarrassment and humiliation that could result to the supervisor if this information were disclosed to the Applicant. Consequently, having considered the factors in subsection 25 (4), and more specifically, paragraphs (a) and (d) of that subsection, I find that subsection 25 (1) applies to this information.

[153] As for the names of the Applicant's supervisors, their names appear in this attachment in their representative capacity as employees of the Department performing their role as the Applicant's supervisors. For the same reasons indicated above, disclosure of this personal information would not be an unreasonable invasion of these third parties' personal privacy and, therefore, subsection 25 (1) does not apply to this information.

17) Meeting transcript May 15, 2013

[154] The 17th attachment is a transcript of a meeting that occurred between the Applicant, her supervisor, a Department human resources employee and the Applicant's Union representative. This attachment appears twice in the records. This attachment contains the personal information of the Applicant, as well as that of third parties.

[155] In this attachment are opinions provided by the Applicant about her supervisor's ability to perform his role as her supervisor. This information has a personal aspect and it qualifies, therefore, as his personal information.

[156] Some of this information is the Applicant's views about interactions between her, an employee she supervises, and her supervisor. Having considered the nature of the information, together with the fact that this information was provided by the Applicant during the meeting, I find that subsection 25 (4) weighs in favour of not disclosing this information to the Applicant and that subsection 25 (1) applies to this information.

[157] Some of this information details the specific concerns the Applicant has with her supervisor. If this information were disclosed to the Applicant, then the supervisor may suffer harm to his reputation. He may also be embarrassed. Consequently, I find that subsection 25 (4) weighs in favour of non-disclosure and that subsection 25 (1) applies to this information.

[158] Some of this information is the Applicant's views about concerns she claimed were shared by her and her employee about the supervisor's actions. Having considered the nature of this information, disclosing this information could, in my view, be embarrassing for this employee. Given this, I find that subsection 25 (4) weighs in favour of non-disclosure of this information to the Applicant and that subsection 25 (1) applies.

[159] In the attachment, there is information about the respectful workplace process undertaken by the Applicant and her supervisor through the RWO and specifics about what will be addressed. For reasons previously noted, I find that subsection 25 (1) applies to this information.

[160] In the attachment, there is information provided by the Applicant about what she stated in one of her employee's personal performance plan. This information qualifies as the employee's personal information; more specifically, her employment history. In subsection 25 (2)(d) there is presumption against disclosure of this kind of personal information. Having considered subsection 25 (4), I find there is nothing in this subsection to rebut the presumption and that subsection 25 (1) applies.

[161] Lastly, in the attachment, there is personal information about the Applicant's supervisor's leave. Having considered the nature of this information, I find that disclosure of this information would not be an unreasonable invasion of the supervisor's personal privacy given that the information indicated only when he will return from vacation.

18) Applicant's Personal Performance Plan 2014/15

[162] The 18th attachment is the Applicant's Personal Performance Plan from 2014 to 2015 (2014/15 PPP). Differing versions of this attachment appears eleven times in the records, with three attachments being just an excerpt of this PPP.

[163] As with the 2013/14 PPP, this one contains primarily the Applicant's own personal information to which subsection 25 (1) does not apply. There is however, third party personal information included within.

[164] There is information about the Applicant's supervisor that would qualify as the supervisor's personal information in that it describes information associated with her prior employment. This information qualifies as her employment history. Paragraph 25 (2)(d) creates a presumption that disclosure of this kind of personal information would be an unreasonable invasion of third party personal privacy. Having reviewed this information and taking into consideration the factors in subsection 25 (4), including that the Applicant supplied this information, I find that paragraph 25 (4)(a) weighs in favour of nondisclosure of this information and that the presumption is not rebutted. As such, I find that subsection 25 (1) applies.

[165] In the excerpts from the 2014/15 PPP, there is information about this same supervisor that is about her performance as a supervisor. I find this to be her personal information. Having considered the nature of the information, together with subsection 25 (4), I find there is nothing in this subsection that weighs in favour of disclosing the information and that subsection 25 (1) applies.

[166] Also in the excerpts is information about a statement made in another employee's personal performance plan. This information is this employee's personal information; more specifically, his employment history. As such, subsection 25 (2)(d) applies and there is nothing in subsection 25 (4) to rebut the presumption against disclosure in paragraph 25 (2)(d). Given this, I find that subsection 25 (1) applies to this information.

[167] In some versions of this attachment, there are names of Department employees who are acting in their representative capacity carrying out their employment responsibilities. I find subsection 25 (1) does not apply to this information.

19) Comments re: Applicant's 2013/14 PPP

[168] The 19th attachment contains comments prepared by the Union and the Applicant in regards to the Applicant's 2013/14 PPP. This attachment appears three times in the records.

[169] There is information in this attachment about the RWO process, including details about it. This information is about the Applicant and her supervisor. The information about the supervisor qualifies as his third party personal information.

[170] Paragraphs 25 (4)(a) and (d) weigh in favour of not disclosing the supervisor's third party personal information to the Applicant for reasons previously noted. The Applicant's information is so intertwined with that of the supervisor's that it cannot be separated. Given this, I find that subsection 25 (1) applies to this information.

20) Conflict of Interest Policy

[171] The 20th attachment is the Department conflict of interest policy. It contains no personal information. I find, therefore, that subsection 25 (1) does not apply to it.

21) Interim Direction on Working Relationship between Department employees for 2015

[172] The 21st attachment is a memorandum to a number of Department employees from an Assistant Deputy Minister of the Department. This attachment contains only the names of Department employees in relation to their employment responsibilities. For reasons already stated, I find that subsection 25 (1) does not apply to this information.

22) Grievance form [redacted]

[173] The 22nd attachment is a grievance form, Grievance [redacted]. It appears eight times in the records. The only personal information in this form is: the Applicant's name, contact information and signature; the name, contact information and signature of her Union representative; and in some of these forms, the name and signature of her supervisor. This information was provided by them in their capacity as a Union representative and supervisor respectively, and, for reasons noted above, subsection 25 (1) does not apply to this information.

23) Department grievances filed from 2010 to 2015

[174] The 23rd attachment is a document containing grievances filed by Department employees, including those filed by the Applicant. The information included in this

document is the employee name, the decision, and dates filed and resolved. The information about employees other than the Applicant is their personal information; more specifically, relating to their employment history. As such, paragraph 25 (2)(d) applies. Moreover, there is nothing in subsection 25 (4) that would rebut the presumption that disclosing this information would be an unreasonable invasion of these third parties' personal privacy. As such, I find that subsection 25 (1) applies to this third party' personal information in this attachment.

24) Applicant's offer letter

[175] The 24th attachment is the offer letter provided to the Applicant at the start of her employment with the Department. Other than the name of human resources officer appearing at the bottom of the form, along with her signature, the personal information in this letter is the Applicant's. The name and signature of the human resources officer qualifies as her personal information. I find, however, that subsection 25 (1) does not apply to this information since this personal information appears in the context of these individuals acting in their representative capacities.

25) Level 1 Grievance notes (meeting 1) and summary *re*: Grievance [redacted]

[176] The 25th attachment is a recap of the first meeting for the first level grievance that occurred on [redacted].[38] This attachment, appearing six times in the records, contains the Applicant's own personal information and that of third parties. There are two versions of this attachment.

[177] In the first version, the third party personal information consists of a positive comment made by the Applicant about one of her employees, a reference to a Department employee "resigning" and the fact another Department employee took another job. Having considered the nature of this information and the context in which it is used in the document, together with subsection 25 (4), I find that this information would not be an unreasonable invasion of these employees' personal privacy if disclosed to the Applicant. I find that subsection 25 (1) does not apply to this information.

[178] In the second version, there are only the names of the attendees: the Applicant, her supervisor and her Union representative. The first version contains the initials of these attendees. The names or initials of the supervisor and Union representative appear in their representative capacities of their respective organizations. They also appear while

[38] The time of the meeting is indicated on record 1049.

acting in these capacities. I find that subsection 25 (1) does not apply to this third party personal information.

26) Level 1 Grievance notes (meeting 2) and summary *re*: Grievance [redacted]

[179] The 26th attachment is a recap of the second first-level grievance meeting that occurred on [redacted]. This attachment appears five times in the records and contains personal information about the Applicant, as well as third parties. There are two versions of this attachment.

[180] In the first version, there is information provided by the Applicant that describes the feelings about a Department employee. This information qualifies as this third party's personal information. Having considered the information, together with subsection 25 (4), I find that paragraphs 25 (4)(a) and (d) weigh against disclosing this information to the Applicant and that subsection 25 (1) applies to this information.

[181] In this same version, there is personal information in the form of medical information provided about a Department employee. Paragraph 25 (2)(a) applies to this information and I find that nothing in subsection 25 (4) rebuts the presumption that disclosure of information to which this paragraph applies would be an unreasonable invasion of personal privacy. As such, I find that subsection 25 (1) applies to this information.

[182] Also in this same version is a comment provided by the supervisor about the "recollection or memory" of a Department employee. Having considered the nature of this information and the context in which this information appears, I have determined that disclosure of this information to the Applicant would not be an unreasonable invasion of this employee's personal privacy. I find, therefore, that subsection 25 (1) does not apply to the information.

[183] In the second version, there is no personal information other than the names of the attendees: the Applicant, her supervisor and her Union representative. Initials of these same attendees also appear in the first version. This information appears in the context of these third parties' employment. I find that subsection 25 (1) does not apply to this information.

27) Department employee job description

[184] The 27th attachment is a job description. It appears only once in the records. There is no personal information in this attachment. As such, subsection 25 (1) does not apply.

28) Grievance form [redacted]

[185] The 28th attachment is a grievance form: Grievance [redacted]. It appears five times in the records. The only personal information in this form is: the Applicant's name, contact information and signature; the name, contact information and signature of her Union representative; and, in some of these forms, the name and signature of her supervisor. This information appears in the context of these third parties' employment. I find that subsection 25 (1) does not apply to this information.

29) Follow-up meeting notes *re*: conduct May 16, 2013

[186] The 29th attachment contains notes about a follow-up meeting dated May 16, 2013. This attachment appears twice in the records, although one is missing two pages. Most of the information in this attachment is that of the Applicant's. There is, however, personal information about the supervisor's conduct and his feelings that are of a personal nature. Having reviewed this information and subsection 25 (4), I find that subsection 25 (4)(a) weighs in favour of not disclosing this information to the Applicant. I find that subsection 25 (1) applies to this information.

30) Applicant's comments to 2013/14 PPP

[187] The 30th attachment contains the Applicant's comments to her 2013/14 PPP. There are two versions of this attachment that appear five times in the records. Both versions of this attachment contain the Applicant's views or opinions about her supervisor. One version of the attachment contains her additional views or opinion about her supervisor's behaviour. This information qualifies as the personal information of the supervisor, a third party.

[188] Having reviewed this information, together with subsection 25 (4), and taking into consideration that the information was provided by the Applicant, I find that this information would be an unreasonable invasion of the supervisor's personal privacy, given that disclosure of it may cause him harm in the form of embarrassment or humiliation. For the additional information, I also find that subsection 25 (4)(d) applies in that disclosure of this information would likely cause harm to the supervisor's reputation. I find that subsection 25 (1) applies to this information.

31) Level 1 Grievance summary (meeting 3) *re*: Grievance [redacted]

[189] The 31st attachment is a summary of the first level grievance third meeting. It appears twice in the records. The only third party personal information in this attachment

are the names of the attendees. As these individuals appear to be acting in their official capacity, I find that subsection 25 (1) does not apply to this information.

32) Handwritten notes *re*: meeting with Applicant

33) Questions *re*: Applicant's job description

34) Handwritten notes re: meeting with Applicant's supervisor

35) Study

36) Information from website

[190] The 32nd, 33rd, 34th, 35th and 36th attachments contain no third party personal information. As such, I find that subsection 25 (1) does not apply to them. The 34th attachment contains only the name of the supervisor. As this third party appears to be acting in an official capacity, I find that subsection 25 (1) does not apply to this information.

37) Level 3 Grievance drafts and final

[191] The 37th attachment is comprised of the various drafts and final versions of the third-level grievance prepared by the Department. This attachment appears 17 times in the records.

[192] All of the drafts and final version contain third party personal information. Some information, while qualifying as third party personal information, does not meet the threshold in subsection 25 (1). This information includes such references as an employee "resigned" or that an employee asked for training. Taken in context, this information, if disclosed to the Applicant, would not be an unreasonable invasion of these employees' personal privacy. I find that subsection 25 (1) does not apply to this information.

[193] Some third party personal information in these attachments does meet this threshold. There is third party personal information that describes employees personal attributes in completing their tasks or their specific experience. Subsection 25 (2)(g) creates a presumption that personal information that is evaluative or that constitutes a personnel evaluation is presumed to be an unreasonable invasion of personal privacy if disclosed. Having considered the factors in subsection 25 (4), there is nothing in that subsection that favours disclosing this information the Applicant. As such, the presumption is not rebutted and I find that subsection 25 (1) applies to this information.

[194] There is an opinion that was provided by the Applicant in her grievance about another Department employee. If this information were disclosed, then the employee may be embarrassed or humiliated. As such, subsection 25 (4)(a) weighs in favour of not disclosing this information the Applicant. I find subsection 25 (1) applies to this information.

[195] There is detailed information about an employee's overtime. This information qualifies as this employees' personal information as it speaks to her specific income. Having considered this information, together with subsection 25 (4), I find that nothing in subsection 25 (4) weighs in favour of disclosing this information to the Applicant.

[196] In some of the versions, there is information that may relate to another grievance. Such information is likely in this document as a result of the Department using precedence to guide its writing. It is, however, unclear from this information if it contains third party personal information. I need not decide this given that I have determined that this information is not related to the Applicant's Access Request and is, therefore, not-responsive to the request.[39] Given that this information may contain the personal information of a third party, I recommend that the Department separate or obliterate this information from the attachments wherever it appears prior to disclosing the remainder of the attachment to the Applicant. To assist the Department with this task, I have identified the records in the Appendix A Records Tables that contain this information.

38) Applicant's Personal Performance Plan 2011/12

[197] The 38th attachment is the Applicant's 2011 to 2012 Personal Performance Plan (PPP). There are two versions of this attachment that appear twice in the records. The only third party personal information is the name of the Applicant's supervisor who authored the PPP. As this individual is acting in an official capacity, I find that subsection 25 (1) does not apply to this information.

39) Level 2 grievance summary re: Grievance [redacted]

[198] The 39th attachment is a summary of the second-level grievance meeting. It appears three times in the records. There are names of third parties in the attachment

[39] The test for determining whether a record is responsive to an access to information request was recently considered by Saskatchewan's Information and Privacy Commissioner, Ronald Kruzeniski, Q.C., in Review Report 023-2017 & 078-2017, Saskatchewan Power Corporation, July 13, 2017. He identified at paragraph 28 that "Responsive means relevant. The term describes any information or records that do not reasonably related to an Applicant's request will be considered "not-responsive." "

who attended the meeting in their representative capacities as either Department employees or on behalf of the Union. As these individuals appear to be acting in their official capacity, I find that subsection 25 (1) does not apply to this information.

[199] Also in this attachment is information about an employee's change in jobs. While this information qualifies as this third party's personal information, having considered the information in the context that it appears, I find that subsection 25 (1) does not apply.

40) Request for Recruitment form

41) 2009 – 2015 work plans

42) Sections of the *Public Service Act*

[200] The 40th, 41st and 42nd attachments have no third party personal information in them and I find, therefore, that subsection 25 (1) does not apply.

43) Memo to Applicant about staffing

[201] The 43rd attachment is a memo to the Applicant from her supervisor about staffing. The only third party personal information in this attachment is the supervisor's name. I find that subsection 25 (1) does not apply to this information, given that this personal information appears in the context of this individual acting in a representative capacity.

44) Union submissions re: Grievances [redacted] and [redacted]

[202] The 44th attachment is the Union's submission for the third-level grievance. It appears only once in the records. This attachment contains third party personal information in the form of descriptions of a number of employees' job tasks or functions. Subsection 25 (3)(e) identifies that this type of information, if disclosed to an applicant, would not be an unreasonable invasion of a third party's personal privacy. Given this, I find that subsection 25 (1) does not apply to this information.

[203] There is third party personal information in this attachment to which subsection 25 (1) applies. There is a comment made about the Applicant's supervisor's conduct. There are two comments made about the specific interests of a Department employee and also information about this individual's income. There is also information about a Department employee's health status and workplace accommodation. Having considered this information, together with the factors in subsection 25 (4), including that the information was provided by the Union, paragraphs (a) and (d) of subsection 25 (4) weigh in favour of not disclosing this information to the Applicant. I find that subsection 25 (1) applies to this information.

[204] There is additional third party personal information that relates to a Department employee's PPP, to a specific employee's term not being extended, and how an employee manages her work. Having considered the nature of this information in the context that it appears, I have determined that subsection 25 (1) does not apply to this information.

44 (a) Supervisor's notes about one-on-one with Applicant

[205] The 44th attachment (a) contains notes from a meeting between the Applicant and her Supervisor. Other than the names of the supervisor and other Department employees, whose names appear in the context of performing their employment obligations, there is no personal information in this attachment. I find that subsection 25 (1) does not apply to the employees' names.

44 (b) Union rebuttal

[206] The 44th attachment (b) is the Union's rebuttal to the Department's argument in respect of the Applicant's grievance. This document contains the personal information of Department employees. Some of this personal information includes the names of employees who appear in the context of performing their employment obligations. For reasons already stated, I find that subsection 25 (1) does not apply to this personal information.

[207] In this attachment, there is personal information about an employee's health and other employees' overtime and leave. For the health information, subsections 25 (4)(a) and (d) weigh in favour of not disclosing this information to the Applicant, as the employee may suffer embarrassment and damage to their reputation if this information were disclosed to the Applicant. I find that subsection 25 (1) applies to this information. As for the other information, I see nothing in subsection 25 (4) that weighs in favour of disclosing this information to the Applicant. I also find that the nature and context of this information is such that subsection 25 (1) applies.

[208] Also in this attachment is personal information about a Department employee that qualifies as his personal information. Given that this information only states that an employee "retired" without revealing anything further, I find that subsection 25 (1) does not apply to this information.

45) Jurisdictional review

46) Demographic analysis

[209] The 45th and 46th attachments are documents authored by the Applicant. The only third party personal information in these documents is the initials of the Applicant's supervisor who reviewed and commented on the document in her capacity as the Applicant's supervisor. I find that subsection 25 (1) does not apply to this information.

47) Meeting notes from January 4, 2016 meeting

[210] The 47th attachment is notes from a meeting between the Applicant and her supervisor. This attachment appears twice in the records. The only third party personal information in this attachment is the supervisor's name and the names of other Department employees who appear in their representative capacity. I find that subsection 25 (1) does not apply to this personal information.

48) Map

[211] The 48th attachment is a map. This attachment does not contain any personal information. As such, I find that subsection 25 (1) does not apply.

49) Script for January 26, 2016 meeting

51) Script draft for March 14 meeting

[212] The a9th and 51st attachments are scripts for a meeting with the Applicant prepared by her supervisor and a Department human resources representative. The attachments contain the names of these employees acting in their representative capacity. There is also information about the supervisor's feelings. While this information qualifies as third party' personal information, I find that subsection 25 (1) does not apply to the names or to the information about the supervisor's feelings. I have determined the latter after considering the nature of the information in the context that it appears.

50) [redacted]

[213] The 50th attachment is a rebuttal prepared by the Department in response to the Union's grievance submission. The attachment contains third party personal information in the form of names of Department employees, including the supervisor acting in their representative capacities and factual information indicating that a specific Department employee did not have a grievance underway. I find that subsection 25 (1) does not apply to the names. Having considered the information about the grievance, I have also determined that the nature of the information, in the context that it appears, would not

be an unreasonable invasion of this employee's privacy to disclose this information to the Applicant. As such, subsection 25 (1) does not apply.

52) Report – comments from reviewers

53) Report

[214] The 52nd and 53rd attachments are technical papers. The only third party personal information in these papers are the names of authors whose work was cited. I find that subsection 25 (1) does not apply to these names.

54) Department positions start and end dates chart

[215] The 54th attachment is a chart containing the start and end dates of a number of temporary and casual positions. The chart also identifies that one position ended due to resignation. No individuals are associated with the information in this chart. I find, therefore, that it does not contain personal information and that subsection 25 (1) does not apply.

55) Exhibit list

[216] The 55th attachment is the exhibit list. This attachment appears seven times in the records in various iterations. There are names of Department employees in this attachment who, while carrying out their employment obligations, received or sent emails associated with the work of the Department or who otherwise worked with the Applicant in some way. While these names are third party personal information, I find that subsection 25 (1) does not apply to them as they appear in their representative capacities.

[217] There is also information about what some third parties did or did not do. Having considered the nature of this information, together with the context in which it appears, I have determined that subsection 25 (1) does not apply to this information.

[218] This attachment does contain some third party personal information that, if disclosed, would be an unreasonable invasion of these third parties' personal privacy.

[219] There are references in this attachment to Department employees' employment history. There is a presumption in paragraph 25 (2)(d) that disclosure of this kind of information would be an unreasonable invasion of personal privacy. Having considered the factors in subsection 25 (4), along with the likelihood that the Applicant would have received this exhibit list, I find that the presumption is not rebutted and that subsection 25 (1) applies.

[220] Also in this attachment are comments about the supervisor's conduct that, if disclosed, may cause her to be embarrassed or humiliated and may also damage her reputation. Given this, paragraphs 25 (4)(a) and (d) weigh against disclosing this information to the Applicant and I find that subsection 25 (1) applies.

56) Level 1 Grievance script [redacted]

57) June 4, 2015 meeting recap

58) Draft meeting agenda for August 21, 2015

[221] The 56th, 57th and 58th attachments are notes from meetings with the Applicant. The only third party personal information in these attachments are the names of the meeting attendees who attended in their representative capacity and names of other Department employees. The other Department employees' names are provided in the context of their employment responsibilities. I find that subsection 25 (1) does not apply to the third party names in these attachments.

59) Department's response to the Union's exhibits *re*: Grievances [redacted] and [redacted]

[222] The 59th attachment contains information about one Department employee's income and information about the specific work experience of a number of Department employees. This information qualifies as third party personal information. Having considered the nature of the information, together with subsection 25 (4), I find that disclosure of this information to the Applicant would be an unreasonable invasion of these third parties' personal privacy and that subsection 25 (1) applies to it.

[223] There is other information in this attachment that qualifies as the personal information of third parties. Having taken this information into consideration and the context in which it appears, I find that subsection 25 (1) does not apply to it.

60) Department's draft rebuttal *re*: Grievances [redacted] and [redacted]

[224] The 60th attachment is a draft rebuttal prepared by the Department to address the Applicant's grievance submission. This attachment contains information about the supervisor's conduct. It also references that a specific Department employee received overtime.

[225] The information about the supervisor is her personal information. If disclosed, this information could cause her harm and damage her reputation. As such, paragraphs 25

(4)(a) and (d) weigh in favour of not disclosing this information to the Applicant. Given this, I find that subsection 25 (1) applies to this information.

[226] As for the overtime reference, the information provided only indicates that the employee received overtime without any further detail. Taken in context, I find that disclosing this information to the Applicant would not be an unreasonable invasion of this employee's personal privacy and that subsection 25 (1) does not apply.

61) Meeting notes January 26, 2016

[227] The 61st attachment is notes from a meeting with the Applicant. The names of the attendees appear in the attachment. I find that subsection 25 (1) does not apply to these names, given that this personal information appears in the context of these individuals acting in their representative capacities.

[228] There is a comment about a Department employee provided by the supervisor. This information constitutes a character reference for this employee. It qualifies, therefore, as her personal information and paragraph 25 (2)(g) creates a rebuttable presumption: if this kind of information is disclosed, then it will constitute an unreasonable invasion of personal privacy. Having considered this information, together with subsection 25 (4), I find that the presumption is not rebutted and that subsection 25 (1) applies.

62) Hand over report September 3, 2013

[229] The 62nd attachment is a hand-over report. This attachment contains employment and salary information about several Department employees. This information qualifies as these third parties' personal information.

[230] Paragraph 25 (2)(d) creates a rebuttable presumption that disclosure of employment related information is an unreasonable invasion of personal privacy. Having considered subsection 25 (4), I find there is nothing in that subsection that rebuts the presumption in this case. As such, I find that subsection 25 (1) applies to this information.

[231] As for the salary information, having considered the information, together with subsection 25 (4), I find that subsection 25 (1) applies to this information.

63) General discussion between Department employees June 2015

[232] The 63rd attachment is a transcript of a discussion between the Applicant and Department employees. This attachment contains cell phone numbers of Department

employees and other personal information about citizens. This information qualifies as third party personal information.

[233] Having considered this information, together with subsection 25 (4) and the fact that the Applicant was part of the conversation, I find there is nothing in subsection 25 (4) that favours disclosing this information to her and that doing so would be an unreasonable invasion of these third parties' personal privacy. I find, therefore, that subsection 25 (1) applies to this information.

64) Third-Level Grievance decision

[234] The 64th attachment is the decision made by the Deputy Minister of the Department who was responsible for deciding the third-level of a grievance under the Collective Agreement. There is no personal information in this attachment except for the names of Department employees whose names appear in a representative capacity of the Department and Union. I find that subsection 25 (1) does not apply to this personal information.

Subsection 24 (1) – Harm to Business Interests

[235] Before moving on to consider the other records, I must first determine if subsection 24 (1) applies to the Litigation Privilege Records. Like subsection 25 (1), subsection 24 (1) is a mandatory exception.

[236] In the records, there is information about the Union's involvement in the grievance process that may qualify as the Union's labour relations information to which subsection 24 (1) may apply. The relevant portions of this subsection are below:

24(1) A public body must refuse to disclose to an applicant information

(a) that would reveal

(ii) … labour relations… information of a third party;

(b) that is supplied, implicitly or explicitly, in confidence; and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position, or interfere significantly with the negotiating position of the third party,

> *(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
>
> *(iii) result in undue financial loss or gain to any person or organization, or*
>
> *(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

[237] Adjudicators with the BC IPC's Office have considered subsection 21 (1) of BC FIPPA. It has the same wording as subsection 24 (1) of the ATIPP Act.

The term "labour relations" is not defined in BC FIPPA. Several Orders from the BC IPC Office have interpreted the term as "information respecting the collective bargaining relationship between an employer and its employees and their union." It is noted that this definition includes "information related to an issue or dispute, such as a grievance, arising within the context of the collective bargaining relationship and collective agreement."

[238] The meaning of "third party" in the context of subsection 21 (1) of BC FIPPA is described in these Orders as follows.

- A third party to which subsection 21 (1) applies must be one whose business interests are at stake.
- A third party cannot be an Applicant or a public body. Nor can it be an employee of a public body whose involvement is purely of a personal nature.
- A Union representing public body' employees under a collective agreement can be a third party for the purposes of this subsection.[40]

[239] Having considered the foregoing, together with the purposes of the ATIPP Act and the wording of subsection 24 (1), I agree that the meaning of "labour relations" in subsection 24 (1) of the ATIPP Act is intended to protect business interests of third parties rather than interests of a personal nature.

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[40] Order 04-04, The Board of School Trustees of School District No. 68 (Nanaimo-Ladysmith), February 16, 2004, British Columbia Information and Privacy Commissioner, [2004] B.C.I.P.C.D. No. 4, in which the Adjudicator's interpretation of subsection 21 (1) was upheld on judicial review.

[240] The meaning of "third party" in subsection 24 (1) accords with the meaning from the BC IPC Orders given that "third party" is defined in the ATIPP Act to expressly exclude the person who made the request (an applicant) and a pubic body.

Do the Litigation Privilege Records contain the Union's labour relations information?

[241] In the records, there are a number of emails containing discussions between the Union and Department employees in respect of the grievances in which the Union is representing the Applicant. Some of these emails do not contain information that would qualify as the Union's labour relations information, given that the information is only about arranging meetings or other similar administrative tasks.

[242] There are some emails and attachments that contain information about the Union's specific representation of the Applicant in respect of her grievances against the Department, such as the position it is advancing on specific issues and its discussions and comments in relation to these issues. This information would qualify as the Union's labour relations information.

[243] There is also information in the emails and attachments that reflect the Departments position in responding to the grievances, including its discussion and comments in relation to those issues. This information would qualify as the Department's labour relations information. Subsection 24 (1) does not apply to this information, nor does it apply to any labour relations information of or about the Applicant that is distinct from that of the Union's.

[244] Having reviewed the various documents referenced above, I find that there are several that contain information that would qualify as the Union's labour relations information; specifically, I found this information to be in grievance forms, emails, meeting notes and documents generated by the Union in respect of a grievance or, alternatively, by the Department referring to this information in addressing the grievance.

[245] It is not enough that the Litigation Records contain the Union's labour relations information. For subsection 24 (1) to apply, the information must have been supplied to the Department in confidence and there must be harm that the Union will suffer if the labour relations information is disclosed to the Applicant.

[246] Paragraph 24 (1)(b) requires that the information be supplied and done so in confidence. As such, this is a two part inquiry.

Was the labour relations information supplied?

[247] In Order F-0810, Adjudicator Francis with the BC IPC Office determined that labour relations information can be supplied in a number of ways, including "where a third party provided the recorded information in question to the public body directly, in the form of something such as a financial statement or a proposal, or where it was indirectly supplied to the public body through a different third party. A public body's own documents may also reveal information that a third party supplied it in confidence.[41] I agree that information to which paragraph 24 (1)(a) applies may be supplied to a public body under paragraph 24 1 (b) from a number of sources, including those identified by Adjudicator Francis.

[248] I have determined from my review of the records that the Union signed the grievance forms as the representative of the Applicant for the purposes of the grievance, and that they contained specific information about the nature of the grievance being advanced by the Union. There are emails that indicate, for some of these grievances, that they were provided by the Union to the Department. Two grievance forms do not have an email indicating this but it is clear from the records that these forms were supplied to the Department from either the Applicant or the Union. Based on this evidence, I find that paragraph 24 (1)(b) is met with respect to these records.

[249] To address the grievance, the Department then generated a number of records, including emails, meeting notes and submissions that reveal the information supplied by the Union. For these records, I find that paragraph 24 (1)(b) is met.

Was the labour relations information supplied in confidence?

[250] Paragraph 24 (1)(b) requires the supplied information to have been provided "explicitly" or "implicitly" in confidence.

[251] In Inquiry Report ATP13-037AR, I determined that "implicitly" will be made out when:

- The parties involved in the supply and receipt of the information can demonstrate that they had an understanding that, when the information was supplied to the public body, it was to be kept confidential.

[41] Order F08-10, The Board of Education of School District No. 69 (Qualicum), May 21, 2008, 2008 CanLII 30212 (BC IPC), British Columbia Information and Privacy Commissioner, at paras 52 to 57.

- There must be a reasonable and objective basis on which to determine whether the parties had this understanding.
- A reasonable and objective basis for this understanding will only be made out after examining all the relevant facts and circumstances including whether the information was:
    - communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
    - treated consistently in a manner that indicates a concern for its protection from disclosure by the third party prior to being communicated to the government organization;
    - not otherwise disclosed or available from sources to which the public has access; and
    - prepared for a purpose which would not entail disclosure.

[252] There is one email that contains the word "Confidential" in the subject line. For this record only, I am satisfied that the sender of this email intended that the contents be kept confidential. I find that the Union's labour relations information in this email was explicitly provided in confidence. For the remaining records, there is nothing in them that indicates that the Union's labour relations information was supplied in confidence. There is no physical evidence in the records, other than a standard confidentiality message that appears on a few emails, to indicate that the labour relations information in them was to be kept confidential. In Inquiry Report ATP13-037 AR, I said that a standard email confidentiality statement does not meet the threshold required to establish that a record or its contents were intended by the parties to the email to be kept in confidence. For these, I find they were not supplied explicitly or implicitly in confidence.

[253] Whether I am right about this is irrelevant given that, for the following reasons, I have determined that none of the harms identified in paragraph 24 (1)(c) will result from releasing these records to the Applicant. As such, subsection 24 (1) does not apply to them.

Will disclosing the Union's labour relations information in records to the Applicant cause the Union harm?

[254] For paragraph 24 (1)(c) to apply, there must be evidence that disclosure of the Union's labour relations information to the Applicant could reasonably be expected to result in the harm identified in this paragraph.

[255] I am of the view that disclosing the labour relations information to the Applicant would not significantly harm the competitive position, or significantly interfere with the negotiating position of the Union. Disseminating this information beyond the parties to the grievance could result in this type of harm; however, the Applicant, in this case, is a party to the grievance. The labour relations information in question is about the Applicant's grievances against the Department. As a party, she was privy to the communications surrounding her grievances and, therefore, already has knowledge of the information. Further, any harm that the Union could suffer through dissemination of the information beyond the parties may also harm the Applicant. Therefore, it is highly unlikely that she would disseminate this information. Given this, I find that the harm in subparagraph 24 (1)(c)(ii) would not occur.

[256] The Collective Agreement between YG and the Union identifies as its purpose "to maintain harmonious and mutually beneficial relationships between the Employer, the employees, and the Alliance" and "to establish within the framework provided by law, an effective working relationship at all levels in which the member of the Bargaining Unit are employed." Within this framework is the grievance process. This process requires involvement of employees, the Union and YG departments in working to resolve grievances brought forth by an employee. The purpose of the Collective Agreement supports that the Union and the Department will endeavour to work harmoniously in an effort to resolve grievances in such as manner as to maintain an effecting working relationship. It would be contrary to this objective, and cause harm to employees involved in the grievance process, for the Union to refuse to supply YG with labour relations information when involved in a grievance as a result of a YG department disclosing this information to an applicant. Further, refusing to supply this information for a grievance could result in more failed grievances and increase the number of arbitrations, which are lengthy and costly.

[257] As a result of the foregoing, it is unlikely that the Union would refuse to supply labour relations information to the Department. Consequently, I find that the harm in subparagraph 24 (1)(c)(ii) would not occur.

[258] There is nothing in the records to indicate the possibility of the Union suffering financial harm if the labour relations information is disclosed to the Applicant, nor do I see on the facts before me that any such harm could occur. As such, I find that subparagraph 24 (1)(c)(iii) does not apply.

[259] In terms of the harm described in subparagraph 24 (1)(c)(iv), in Order F08-10, Adjudicator Francis found that a grievance under a collective agreement to be a "labour relations dispute."[42] I agree with Adjudicator Francis that this is the correct interpretation of this term.

[260] In the same Order, Adjudicator Francis had this to say about the meaning of the terms "labour relations officer or other person appointed to resolve or inquire into a labour relations dispute" in addressing the unions' argument that a labour relations officer or other person can be an employee or officer of a public body who is responsible to address a grievance:

> *I do not, however, agree with the unions that the superintendent, assistant superintendent or human resources officer was a "labour relations officer" or an "other person" appointed to inquire into and resolve this "labour relations dispute". I considered the interpretation of these terms in Order 04-04 and found that they referred to a neutral third party. I remain of that view in this case. I agree with the School District that it and the unions represented their own interests in the grievance discussions and that, where the parties to a grievance cannot resolve a grievance, a neutral third party with authority to resolve the matter would be an arbitrator appointed under Article A.6 and A.7. I find that s. 21(1)(c)(iv) does not apply in this case.*[43]

[261] Paragraph 17 (1)(d) of ON FIPPA which is similar to paragraph 24 (1)(c)(iv) of the ATIPP Act, states as follows:

> *17(1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,*
>
> *(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.*

---

[42] *Ibid. 41,* at para 74.

[43] *Ibid. 41,* at para 75.

[262] A decision of the ON IPC's Office had this to say about the meaning of the terms "conciliation officer, mediator, labour relations officer or other person" in that subparagraph:

> *It is my opinion that section 17(1)(d) was intended to cover the information furnished to, and the reports prepared by conciliation officers, mediators and others who are appointed as **neutral third parties** to resolve labour relations disputes, and **only** those who are appointed under statutory schemes. [Emphasis in original]*[44]

[263] While the terms differ slightly between the BC FIPPA and ON FIPPA, both decisions conclude in respect of these provisions that the person or body appointed by the parties involved in a labour relations dispute to resolve or inquire into a labour relations dispute must be a neutral third party. I concur that the person or body referred to in subparagraph 24 (1)(c)(iv) must be a neutral third party.

[264] In the case before me, there was no neutral third party appointed to inquire into or resolve a labour relations dispute. The only persons involved in this dispute were the parties themselves: the Union, the grievor (Applicant), and the employer (Department). As such, subparagraph 24 (1)(c)(iv) does not apply.

[265] Based on the foregoing, I find that subsection 24 (1) does not apply to the Union's labour relations information.

[266] In the Litigation Privilege Records are some quotes provided by contractors for work with the Department. These quotes appear in pages 1573, 1574, 1887, 2138 and 2139. Subsection 24 (1) may apply to this information and I must therefore decide if it does.

[267] The amount a contractor quotes for contract work would qualify as commercial information. There is not enough information in the records to determine if the information was supplied explicitly or implicitly in confidence, nor is there enough information to determine if the contractors will suffer harm if this information is released to the Applicant. Consequently, to decide whether subsection 24 (1) applies to the information in these records, I had to request submissions from the third parties to determine if this subsection applied to the quotes. I requested submissions on August 10, 2017, and received them from the third parties on August 22 and 29, 2017, respectively.

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[44] *Ibid. 40,* at para 119 citing Order P-653, [1994], O.I.P.C. 108 Ontario Information and Privacy Commissioner, at para 6.

The Applicant provided a response to my request for submissions about the application of subsection 24 (1) on August 11, 2017.

[268] For subsection 24 (1) to apply to the information, the third parties need to establish that disclosing the information to the Applicant will reveal trade secrets or commercial, financial, labour relation, scientific or technical information that was supplied implicitly or explicitly, in confidence, and the disclosure could reasonably be expected to

> *(i) harm significantly the competitive position, or interfere significantly with the negotiating position of the third party,*
>
> *(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
>
> *(iii) result in undue financial loss or gain to any person or organization, or*
>
> *(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

[269] All parts of the test must be met for subsection 24 (1) to apply to the information.

[270] There were three submissions of the parties.

[271] One third party (Third Party A) stated the following about the application of subsection 24 (1) to the information.

> *I think* [the information] *does qualify in terms of the 24 (1) A* [sic] a*s follows*
>
> *a) It would reveal financial and labor relations of a third party (my company* [business name] *and the government of the Yukon)*
>
> *b) It was supplied as a confidential e-mail between myself and* [Supervisor] *(an employee with the Government of the Yukon)*
>
> *c) The information might harm (i) the competitive position of the third party* [Third Party A].

[272] The other third party (Third Party B) stated the following about the application of subsection 24 (1) to the information.

> *On July 8, 2015, the Yukon Government released a request for proposal (RFP) for a standing offer agreement to conduct statistical analysis* [for certain work of the

Department]…*The RFP was generally accessible for consulting companies to bid upon and was value driven, meaning the company rates would be deciding factor in awarding the standing offer.*

On August 5, 2015 [Third Party A] *submitted a proposal titled* [RFP submitted by Third Party A] *for a standing offer agreement to conduct statistical analysis of* [specific things identified in the RFP]. *In this proposal,* [Third Party A] *demonstrated its statistical experience, provided project overviews and provided hourly billing rates, project duration, and costs to conduct to example analysis…*

On September 21, 2015 the Yukon Government awarded the "Standing Offer Agreement…to [Third Party A]…

[The] *text from Yukon DOE* [Department of Environment] *emails that were subject to the ATIPP request* [were] *the quotes provided by ERM in its competitive proposal described above…*

[Third Party B] *objects to the release of the cost quote information included in the Yukon DOE emails listed by IPC.*

The rates and costing information discussed in the Yukon DOE emails is confidential information that is only shared between [Third Party B] *and its clients.* [Third Party B] *feels that this information meets each of the three subsections of Subsection 24(1) of of* [sic] the ATIPP Act as described below:

> *Subsection 24 (1) of of* [sic] *the ATIPP Act states as follows:*
> *24 (1) A public body must refuse to disclose to an applicant information that would reveal*
>
> > *(i) trade secrets of a third party, or*

The rates and costing provided by [business name] *satisfies sub-section (a) of 24(1), as trade secrets of* [Third Party B]. *The consulting business is fiercly* [sic] competitive and rates and costing estimates are closely guarded corporate information.

> > *(ii) commercial, financial, labour relations, scientific or technical information of a third party;*
>
> *(b) that is supplied, implicitly or explicitly, in confidence; and*

> *The rates and costing schedule provided in the* [Third Party B] *proposal to the Yukon Government were made in confidence with the expectation that these information would not be released to the public except through a Freedom of Information Request, to which the* [Third Party B] *would have an opportunity to comment.*
>
> > *(c) the disclosure of which could reasonably be expected to*
> >
> > > *(i) harm significantly the competitive position, or interfere significantly with the negotiating position of the third party,*
>
> *The disclosure of the quoted rates in the Yukon DOE emails would significantly harm the competitive position of* [Third Party B]. *Environmental consulting proposals are often chosen based on costs. Having our competitors aware of our rates and costs would significantly harm* [Third Party B] *competitive position in the marketplace.*

[273] The Applicant stated the following about the application of subsection 24 (1) to the information: [she] "believes there is merit in identifying if this information does meet the requirements of section 24."

[274] Given that I am not reviewing the Department's decision to provide the Applicant with access to the information to which subsection 24 (1) may apply, the ATIPP Act is silent on the burden of proof. In the circumstances, however, the third parties are in the best position to establish that they will suffer harm if the quotes in the emails are released to the Applicant. Given this, they have the burden of proving that this is the case.

[275] I will first address whether subsection 24 (1) applies to the information in the records associated with Third Party B. As previously noted, this information consists of dollar value quotes provided by Third Party B to perform certain services for the Department. These quotes appear on pages 1573, 1574,[45] and 1887.

If the information were disclosed, would it reveal trade secrets or commercial, financial, labour relations, scientific or technical information of Third Party B?

[276] It is the position of Third Party B that the information is "rates and costing information" that, if disclosed, would reveal its trade secrets. The meaning of trade secrets is defined in section 3 of the ATIPP Act as "…information, including a formula, pattern, compilation, program, device, product, method, technique or process…" The

[45] These same quotes appear on other pages that are duplicates of the emails appearing on pages 1573 and 1574.

quotes are not trade secrets but they do, in my view, qualify as commercial information of Third Party B. In Inquiry Report ATP13-037AR, I defined commercial information as follows.

> *"commercial information"* means information that relates to the buying and selling or exchange of merchandise or services. It can also include a third party's associations, history, references, bonding and insurance policies, and the names and title of key personnel and contract managers when it relates to how the third party proposes to organize its work.[46]

Was the information supplied implicitly or explicitly in confidence?

[277] There are two parts to this inquiry. First, the information must have been "supplied" by the Third Party. Second, Third Party B must have done so implicitly or explicitly in confidence.

[278] Third Party B indicated in its submission that the quotes appearing in the emails were provided by it in its response to the 'request for proposal' put out by YG for a standing offer agreement for provision of certain services. It also indicated that the Third Party B and YG subsequently entered into a 'standing offer agreement' (SOA).

[279] From what I am able to determine from Third Party A's submission and the content of the emails, Third Party A provided hourly rates for certain types of work that it may perform under the SOA. The quotes that appear in the emails are the dollar value that Third Party A gave in response to a request by the Department to perform specific work under the SOA. The quotes provided would be based on the hourly rates contained in the SOA. These quotes were provided by Third Party B in response to a request for a quote on two specific projects. The discussion in the email is about the quotes and not about any negotiation with the Third Party B with respect to them. If negotiation had occurred regarding these quotes, then the Third Party could not make out that the information was supplied by them. However, given that there appears to have been no negotiation in respect of the quotes given, I find that these quotes were supplied by Third Party B.

[280] Third Party B also indicated that it was its understanding that the "rates and quotes" it submitted in response to the RFP were confidential. The issue here is not whether the information contained in the SOA is confidential, but whether the quotes provided to the Department for specific project work based on pricing in the SOA is confidential. Given that I have no submissions on whether these quotes were supplied in

[46] *Ibid.* 26, at para 93.

confidence, and there is nothing in the emails to support this conclusion, I am unable to find that the quotes were provided in confidence. Whether I am correct in this does not matter given that, for the following reasons, I also find that the harm identified by the Third Party is not probable in the circumstances.

Will Third Party B suffer the harm identified in paragraph 24 (1)(c)(i)?

[281] Paragraph 24 (1)(c) uses the words "reasonably expected to" before subparagraph (i) where the harm that could occur to a third party is identified if certain business information were released to an applicant. As previously indicated, wherever these words appear in access to information legislation, the word "probable" should be incorporated, such that the phrase becomes "reasonable expectation of ***probable*** harm."

[282] In this case, Third Party A is of the view that its competitive position will be harmed or its negotiation position interfered with if the quotes are released to the Applicant. Its evidence is that disclosure of this information would result in its competitors becoming aware of its rates and costs, therefore harming its competitive position.

[283] The information contained in the emails is a quote, along with a general description of the project associated with the quote. There is no breakdown of costs to indicate what was used to arrive at the quote, and nothing that would reveal the rates and costs of the Third Party. Additionally, there is no evidence to support that the harm identified is probable. To meet this standard, a third party must provide more evidence than a mere assertion that the harm will occur. It must provide some evidence to support that the harm is probable were the business information released to the Applicant. There is no evidence to this end.

[284] Based on the foregoing, I find that the Department is not required to refuse to disclose Third Party B's quotes that appear in pages 1573, 1574 and 1887.

If the information were disclosed, would it reveal trade secrets or commercial, financial, labour relations, scientific or technical information of Third Party A?

[285] As for Third Party A, for the same reasons as noted above in respect of the quotes of Third Party B, I find that the quotes for Third Party A that appear on pages 2138 and 2139 are commercial information.

[286] Third Party A mentioned that if the information were disclosed, it would reveal labour relations information pertinent to it or YG. It provided no evidence as to how the information constitutes labour relations information. I find it does not constitute such information.

Was the information supplied by Third Party A in confidence?

[287] There is not enough evidence in the submission from Third Party A or the emails to support that the information was supplied by Third Party A, or that it was done so in confidence.

Will Third Party A suffer any harm identified in paragraph 24 (1)(c) if the information is released to the Applicant?

[288] There is no evidence to support that any harms identified in paragraph 24 (1)(c) will be experienced by Third Party A if this information is released to the Applicant.

[289] Based on the foregoing, I find that the Department is not required to refuse to disclose the quotes associated with Third Party A appearing on pages 2139 and 2140.

[290] Amongst the Litigation Privilege Records were five pages numbered 1468 to 1472, to which I determined subsection 18 (a), solicitor and client privilege, may apply. Given the important policy considerations underlying solicitor and client privilege, I asked the Department to provide me with submissions on the application of this subsection to these pages. Having received submissions from the Department that indicate it denied access, I must add an eighth issue to this Inquiry to address whether the Department is authorized by subsection 18 (a) to refuse the Applicant access to these pages.

Issue 8: Is the Department authorized by subsection 18 (a) to refuse the Applicant access to the pages numbered 1468 to 1472?

[291] The Department provided the following submissions about the application of subsection 18 (a) to the five pages:

> *For the records contained within the pages 1468 to 1472, 18(a) does apply as the information was created by legal counsel for the public body, and is subject to solicitor client privilege.*

[292] In Inquiry Report ATP11-029AR,[47] I set out the Solosky test identified by the Supreme Court of Canada in *Canada v. Solosky* for determining if subsection 18 (a) applies to records. In that Inquiry, I determined that the public body was required to meet all three parts (below) of the Solosky test for subsection 18 (a) to apply to the records.

[47] *Ibid.* 20, citing *Canada v. Solosky,* 1979 CanLII 9, SCC, [1980] 1S.C.R. 821, at para 19.

a. The information severed from the records must involve a communication between a solicitor and a client.

b. The nature of the communication between the solicitor and client was the seeking or giving of legal advice.

c. The communication was intended to be confidential.

[293] I also stated that subsection 18 (a) applies to legal advice given by an in-house lawyer but that the subsection cannot be applied to communications between an in-house lawyer and a client that are not considered to be legal advice, such as business advice or communications that are purely social in nature.[48]

[294] The Solicitor and Client Records consist of five pages of email communications. There is an email on pages 1468 and 1469 from a lawyer with the Solicitors Unit in the Department of Justice (Justice Lawyer) addressed to a Staff Relations Employee from the Public Service Commission (SR Employee). This email, received by the SR Employee, was then forwarded by her to a human resources employee (HR Employee) in the Department. The SR Employee includes in her email analysis of the information contained in the Justice Lawyer's email. This email is on page 1468. The email received by the HR Employee containing the email string between the Justice Lawyer and the SR Employee was then forwarded to the Deputy Minister of the Department and two other Department employees. The HR Employee's email contains only her contact information and a confidentiality notice in the body. This email is on page 1470.

[295] The submissions provided by the Department only indicate that the "information was created by legal counsel for the public body" and that it is "subject to solicitor client privilege." The Department provided no evidence to support that the emails contain a communication between a solicitor and client that involves the giving and receiving of legal advice or that the communication was intended to be confidential.

[296] Despite not being provided with adequate submissions on the application of subsection 18 (a) to the records, I am able to determine that the entire email, with the exception of the names and date, authored by the Justice Lawyer to the SR Employee contains legal advice given by a lawyer to a client and that the communications are intended to be confidential. I am also able to determine that some of the information in the email authored by the SR Employee would fall within the solicitor and client privilege protection afforded by subsection 18 (a), since this information reveals the advice given by

[48] *Ibid. 47,* at para 20.

the Justice Lawyer and is, therefore, within the continuum of communications in which the Justice Lawyer provided the advice.

[297] The Supreme Court of Canada in *Pritchard v. Ontario*[49] stated the following about the continuum of communications principle as it pertains to solicitor and client privilege:

> *Where solicitor-client privilege is found, it applies to a broad range of communications between lawyer and client as outlined above. It will apply with equal force in the context of advice given to an administrative board by in-house counsel as it does to advice given in the realm of private law. If an in-house lawyer is conveying advice that would be characterized as privileged, the fact that he or she is "in-house" does not remove the privilege, or change its nature.*

[298] Canada's Federal Court of Appeal in *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*,[50] found the principle extends to circumstances "where a Director of a government department receives legal advice on how certain proceedings should be conducted and the director so instructs those conducting proceedings, the instruction, essentially cribbed from the legal advice, to form part of the continuum and are protected."

[299] Other than the subject line that would reveal the advice sought and received from the Justice Lawyer, the email authored by the HR Employee contains no legal advice.

[300] Given that subsection 18 (a) is a discretionary exception, and having found that the records contain solicitor and client privilege information, I must go on to assess whether the Department exercised its discretion reasonably in deciding to refuse the Applicant access to these records.

[301] The test for the exercise of discretion in relation to solicitor and client privilege records differs from the test identified above for all the other discretionary provisions in the ATIPP Act. It is also distinct from the discretion exercised in relation to litigation privilege due to the different policy justifications underlying each privilege.[51] In Inquiry Report ATP11-029AR, citing the SCC decision in Ontario PS and S, I stated the following

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[49] *Pritchard v. Ontario*, 2004 SCC 31, at para 21.

[50] *(Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.

[51] See paragraph 49 above where I discuss the different policy justifications for litigation and solicitor and client privilege.

about how discretion should be exercised by a public body for records subject to solicitor and client privilege:[52]

> *On the nature of the exercise of discretion as it relates to solicitor client privilege, the SCC indicated that in deciding whether to disclose information subject to solicitor client privilege, the considerations are different. In this regards, the SCC states the following:*
>
> > *"The purpose of the exemption is clearly to protect solicitor-client privilege, which has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship…*
> >
> > *The only exceptions recognized to the privilege are the narrowly guarded public safety and right to make full answer and defence exception."*
>
> *The SCC also stated that the solicitor client privilege does not involve a balancing of interests on a case by cases basis…Rather, the protection afforded to solicitor client privilege "will only yield in clearly defined circumstances."*

[302] Although the Department provided me no evidence about its exercise of discretion in relation to the 5 pages, I see no reason to exercise my authority under subparagraph 57 (1)(b)(i) of the ATIPP Act to recommend that the Department reconsider its decision to refuse to disclose the information in these email records. This is because I am able to determine on the facts and evidence presented, that the nature of the protection afforded to the solicitor and client privilege information in the emails outweighs the Applicant's interest in accessing these records.

[303] My findings in respect of this issue are as follows:

1) subsection 18 (a) applies to the email authored by the Justice Lawyer on pages 1468 to 1469 and 1470 to 1472, with the exception of the names in the "to" and "from" lines and the date and time in the "sent" line;

2) subsection 18 (a) applies to the information in the email authored by the SR Employee on page 1468 and 1470, with the exception of the names in the "to" and "from" lines and the date and time in the "sent" line, and the last paragraph; and

[52] *Ibid. 20,* at paras 40 to 41.

3) subsection 18 (a) does not apply to the information in the email authored by the HR Employee on page 1470, with the exception of the subject line.

Issue 5: Is the public body required by subsection 25 (1) and paragraph 25 (2)(g) to refuse to disclose the records identified by the public body as '7 pages of 4 records'?

[304] There are seven pages of four records, the Invasion of Privacy Records, that the public body claims it is required not to disclose because they contain information to which subsection 25 (1) applies. Specifically, it claims that paragraph 25 (2)(g) applies to the information in these records. Its evidence in respect of the application of this paragraph is that "the disclosure of personal recommendations would be an unreasonable invasion of personal privacy as the information consists of personal recommendations of a third party."

[305] The records are emails between Department employees. Some are to or from the Applicant. For subsection 25 (1) to apply, these records they must contain personal information of a third party that, if disclosed, would be an unreasonable invasion of the third party's personal privacy.

[306] Most of the emails contain information about the Applicant that qualifies as her own personal information. This is not third party personal information. The only other personal information in the emails is the names of Department employees who appear to be acting in their representative capacities in carrying out their employment responsibilities. While this information qualifies as third party' personal information, I find that subsection 25 (1) does not apply to this information.

[307] I note in the schedule provided by the Department is the statement "remainder not required by Applicant." It is unclear to me what this means. The information that this statement is referring to is information provided by the Applicant to a Department employee about her overtime and performance. This information is her personal information. The statement may mean the Department has already provided this information to the Applicant. If it has not, then I find this information to be related to the Applicant's Access Request and, therefore, responsive to it.[53] Consequently, if the Department has not provided the Applicant with access to this information, then it should do so.

[53] See footnote 39 for the test to determine whether a record or information is responsive to an access request.

Issue 4: Is the public body authorised by section 19.1 to refuse to disclose the records identified by the public body as '26 pages of 19 records'?

[308] Section 19.1 is a discretionary provision that authorizes a public body under subsection (2) of that section to refuse to disclose a workplace harassment record or any information in it if its disclosure could reasonably be expected to

> *(a) deter an employee from making a complaint under a policy or provision referred to in subsection (1) or impede resolution of the complaint;*
>
> *(b) be harmful to relations between employees in the workplace of a public body;*
>
> *(c) be harmful to the implementation of a policy or provision referred to in subsection (1);*
>
> *(d) interfere with the investigation of a complaint under a policy or provision referred to in subsection (1);*
>
> *(e) reveal information relating to proceedings taken or to be taken for resolution or adjudication of a complaint under a policy or provision referred to in subsection (1) or impede resolution of the complaint;*
>
> *(f) reveal a record that has been supplied in confidence in the investigation of a complaint under a policy or provision referred to in subsection (1);*
>
> *(g) unfairly damage the reputation of a person referred to in the record; or*
>
> *(h) prejudice the legal rights of a person involved in the conduct of existing or reasonably expected proceedings in court or before an adjudicative body arising out of the investigation of a complaint under a policy or provision referred to in subsection (1)*

[309] The evidence provided by the Department about the application of this section is that it "believes it is authorized by subsection 19.1 [sic] to refuse to disclose the Harassment Records (and any information in them or about them)…as they could reasonably be expected to harm the relations between employees; interfere with investigating a complaint; or, reveal information relating to workplace harassment." It further identifies in the schedule of records accompanying the records that these records

- involve or mention the Respectful Workplace Office (RWO) of the Public Service Commission; or

- relate to proceedings taken including proceedings taken of a complaint prepared by the Department when contemplating expected proceedings.

[310] The Applicant did not provide any submissions specifically about the application of section 19.1.

[311] Section 19.1 went into effect after amendments to the ATIPP Act were made in 2003.[54] There is no other provision similar to this section in other access to information legislation in Canada of which I am aware. The rationale for adding this section to the ATIPP Act was discussed in Yukon's Legislative Assembly. The remarks made about the need for this section appear below:

> ***Hon. Mr. Hart:*** *I am pleased to be able to speak today to the amendment we have introduced to the Access to Information and Protection of Privacy Act. This government values a healthy workplace for employees and one that is free from harassment. We are committed to ensuring that the harassment complaint process available to employees of the government is fair and objective and that it is focused on restoring a positive and productive workplace.*
>
> *This amendment follows through on the government's commitment to maintain a safe, healthy and harassment-free workplace and to ensure that all parties involved in harassment complaints and investigations will be assured that the process is confidential.*
>
> *Workplace harassment complaints deal with highly sensitive and personal information about employees and their relationships with each other.*
>
> *Mr. Speaker, these sensitive and difficult issues must be resolved in an environment that respects the privacy and dignity of individuals.*
>
> *It is important that the workplace harassment prevention office that receives these complaints and conducts the investigations can assure all parties that this is a confidential process the employees can trust. We are committed to providing that protection, Mr. Speaker.*
>
> *The amendment that we are proposing to this Legislature will extend protection from disclosure of records and information related to workplace harassment complaints*

[54] Bill No. 40, *Act to Amend the Access to Information and Protection of Privacy Act*, proclaimed in force on November 17, 2003 during the 31st Legislature of the Yukon Legislative Assembly.

under our harassment policy and under the harassment articles of both collective agreements.

Mr. Speaker, a recent Supreme Court decision and a decision of the Information and Privacy Commission on this issue have confirmed the need for this amendment and to ensure the confidentiality of the information that is so necessary to an effective complaint and investigation process.

Both decisions acknowledge that these records are sensitive and that confidentiality is critical to a fair process. Both decisions also stated that the current act cannot provide protection to records of some form of workplace harassment, interpersonal harassment and abuse of authority, and that, if such protection is to be extended to complaints of these kinds, then the act must be amended to provide that protection.

Public access to workplace harassment records through the Access to Information and [sic] *Privacy Act permits these records to be used without any constraint on the parties involved. Public access to these records is in direct conflict with the stated purpose of the policy in collective agreements: to stop harassment and restore the workplace.*

Mr. Speaker, both the workplace harassment policy and the letters of understanding with the Yukon Government Employees Union and the Yukon Teachers Association commit to confidentiality of the harassment complaint process. Participants in the process have access to records within the complaint and investigation process, but the confidentiality constraints are placed on their disclosure.

The Access to Information and Protection of Privacy Act is designed to strike a balance between the public's right to information and the individual's right to privacy. It is our government's role to ensure this balance. The balancing of these two interests means we must release public information when it is appropriate and to do so, and we must protect people's privacy when it is necessary.

If harassment information is released under the Access to Information and Protection of Privacy Act, individuals may share this information and this may harm the complaint process and the individuals involved in complaints and investigations.

The proposed amendment clearly lays out the potential harm that could occur from the disclosure of complaint and investigation records.

Mr. Speaker, consider the harm that could be done if people hesitate to file complaints. Consider the harm that could be done if witnesses hesitate to fully disclose all the pertinent information to an investigator. Consider the harm that could be done if

disclosing personal information unfairly put individual reputations at risk. Consider, Mr. Speaker, the effect that the release of these records could have on an already fractured workplace.

If our goal is to restore a productive workplace, then releasing these records will undermine our efforts. This government is committed to the actions that will help to achieve a respectful workplace where employees can have positive interactions with their colleagues, working together to deliver public service to the Yukoners they serve.

It is important that we have a way to address and resolve those instances where, regrettably, an employee feels he or she is not being treated with dignity and is being subjected to unacceptable behaviour. The process for resolution must be effective, and to be effective it must be confidential.[55]

Are the records "workplace harassment records?"

[312] Subsection 19.1 (1) identifies that a "workplace harassment record" is:

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

[313] The Department did not provide me with a workplace harassment policy, nor is there a policy identified in YG's 'General Administration Manual' called a "workplace harassment policy." There is a policy titled "Respectful Workplace." This policy went into effect April 16, 2013 and was in effect until October 25, 2015.[56] I am satisfied that this policy is a workplace harassment policy for the purposes of subsection 19.1 (a). There is

[55] Honourable Mr. Hart, then Minister of Highways and Public Works, 31st Legislature, Session 1, November 3, 2003, at p. 14.

[56] There are similar policies in place before and after this policy. However, this policy is the one that was in effect when the Applicant made her complaint in May of 2013. The process involving the RWO was complete by September 2014.

also a provision in Article 6 of the Collective Agreement that refers to the Respectful Workplace Policy (Policy) and establishes rights for employees to seek redress for harassment, as defined in section 6.02 of the Collective Agreement, under the Policy through the YG Respectful Workplace Office (RWO).

Were the records created in the course of, or in contemplation of, an investigation about whether there has been, or what to do about, a violation of a workplace harassment policy or provision in the Collective Agreement?

[314] What I am able to ascertain from the records is that the Applicant engaged the RWO to investigate her allegation that her supervisor was engaging in disrespectful conduct. The disrespectful conduct alleged to have occurred was within the definition of "Disrespectful conduct" in the Policy.

[315] After engaging the RWO, the decision made by the parties and the RWO was to use the conflicts resolution process to address workplace conflict between her and her supervisor. Based on the evidence before me, I find that this process does not constitute an investigation about whether a violation of the Policy or the Article 6 Collective Agreement provision may or would occur. Given this, I also find that these records are not workplace harassment records and that the Department cannot rely on section 19.1 to refuse the Applicant access to the records.

[316] While the conflicts resolution process was unfolding, the RWO also undertook an investigation into the allegation of disrespectful conduct made by the Applicant. According to the records, its investigation consisted of a review of its file associated with the allegation to determine if there was evidence of disrespectful conduct, as defined in the Policy. Contained in the files was the Applicant's allegation and statements from others. Based on the evidence in the file, the RWO found that the supervisor did not violate the Policy. Its conclusion was shared with the Supervisor. The conclusion was also shared with the Applicant. I find that records pertaining to this investigation by the RWO to be workplace harassment records created in the course of an investigation about whether there has been, or what to do about, a violation of the Policy. I will refer to these records below as the "Workplace Harassment Records."

[317] For the Workplace Harassment Records, I must determine if any of paragraphs under subsection 19.1 (2) apply to these records. One of these records is an email that was included in the Litigation Privilege Records. For this email, dated [redacted], at [redacted] between a Department human resources employees and employees of the RWO, and marked as records 053 and 054 in this package of the Department's records, I have already determined that a portion of it would be an unreasonable invasion of

personal privacy to the Applicant's supervisor. As such, I will not consider this information in my analysis below.

Will disclosure of the Workplace Harassment Records reasonably be expected to result in any of paragraphs (a) through (h)?

[318] Subsection 19.1 (2) identifies that the Department may refuse to disclose the Workplace Harassment Records and information in them to the Applicant if disclosure "could reasonably be expected to" result in any of the things identified in paragraphs (a) through (h). As noted above, whenever the words "reasonably expected to" appears in access to information legislation a public body must provide evidence well beyond or "considerably above" a mere possibility of harm to reach that middle ground, such that the harm to be suffered is probable. Also as noted, the inquiry into this determination 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, as well as inherent probabilities or improbabilities or the seriousness of the allegations or consequences.[57]

[319] During debate in the Legislative Assembly about the need for section 19.1, the ability to protect the confidentiality of workplace harassment records was addressed. It was emphasized that employees may be less willing to participate in a process designed to resolve workplace harassment complaints if the information about their involvement is accessible to the public through the access to information process under the ATIPP Act.

[320] In interpreting these subsections, the purpose of the ATIPP Act must be considered, along with words of the section within the Act as a whole. The purposes of the ATIPP Act relevant to this interpretation are as follows:

> *Purposes of this Act*
>
> *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 a right of access to records;*
> >
> > *(b) giving individuals a right of access to, and a right to request correction of, personal information about themselves;*
> >
> > *(c) specifying limited exceptions to the rights of access;*

[57] See paragraph 51 in this Inquiry Report.

(d) ….

(e)….

[321] The need to balance the right of access to information by the public and individuals against the limited and specific exceptions to this right is key in determining the proper interpretation of section 19.1. There are other relevant factors.

[322] Subsection 25 (1) is a mandatory exception that requires a public body to refuse to disclose personal information if disclosure would be an unreasonable invasion of personal privacy. Therefore, if there is any personal information in workplace harassment records that, if disclosed, would be an unreasonable invasion of personal privacy, then the public body must refuse to disclose this information. A factor in determining whether disclosure of personal information would be an unreasonable invasion of personal privacy is where harm will occur to an individual as a result of the disclosure. The existence of subsection 25 (1) suggests that the harm section 19.1 is designed to protect is not personal in nature. Rather, subsection 19.1 appears to be directed at protecting the public body's ability to facilitate resolution of workplace harassment issues. This conclusion is consistent with the comments made in the Legislative Assembly about this section.

[323] Section 19.1 is a discretionary rather than mandatory exception to the right of access under the ATIPP Act. This fact supports that the harm protected by section 19.1 is harm to the public body, rather than to an individual or third party, that could occur by disclosing workplace harassment records to which subsection 19.1 applies. This fact also supports that protection against this harm is not absolute. Whether to disclose information to an applicant to which paragraphs 19.1 (2) (a) through (h) apply is up to the public body to determine after weighing the risks of harm that it may suffer from disclosure against the right of an individual or the public to have access.

[324] To claim an exception in response to the Applicant's Access Request, the Department has the burden of proving it is probable that it would suffer one or more of the harms described in paragraphs (a) through (h) if it discloses the records or information in them to the Applicant. It must also demonstrate that it exercised discretion in deciding to refuse the Applicant access.

[325] The Department claimed in its submission that "the relations between employees; interfere with investigating a complaint; or, reveal information relating to workplace harassment" will be harmed if the records are disclosed to the Applicant. It provided no evidence to support why disclosing <u>these Workplace Harassment Records</u> to the Applicant

would result in any of these harms, nor did it provide any evidence to support that it exercised its discretion in deciding not to disclose the records to the Applicant.

[326] From my review of the Policy, it is clear that there is a policy expectation that the information involved in the services offered by the RWO will be kept confidential. Both the Department and its employees are bound by this Policy. Confidentiality of information generated as part of the RWO's processes is addressed in section 5, which states:

> *5 CONFIDENTIALITY*
>
> *5.1 Unless otherwise agreed by the individual bringing forward a request for assistance, or as required by law, a request for assistance under this Policy will be treated as confidential information.*
>
> *5.2 Unless otherwise agreed by process participants, or determined in the communication plan referred to in section 4.10, all employees involved in a process arising from a request for assistance will keep the process and anything said in the course of the process confidential.*
>
> *5.3 If it comes to the attention of the RWO that the confidentiality provisions of this Policy may have been breached, the RWO will investigate and make recommendations for remedial action.*

[327] Section 5 of the Policy cannot be read by the Department to remove its obligations under section 19.1 to determine if the specific information in records, created as part of an RWO process subject to an access request, would cause harm if disclosed. It also cannot be read to alleviate its duty to exercise discretion about whether to disclose the records after determining it is probable that harm will occur. In my view, the confidentiality requirements in the policy speak only to an inherent probability that harm could occur to the public body if this type of information were disclosed due to the expectation of confidentiality set out in the Policy. As previously mentioned, the Court in Merck Frosst indicated that where an inherent probability exists that harm will occur, the amount and quality of evidence on which to meet a burden of proving that the harm is probable is lessened.

[328] Based on my review of the records, I am unable to determine if it is probable that the public body would suffer any of the harms in paragraphs 19.1 (2)(a) through (h) if these specific Workplace Harassment Records or the information in them were disclosed to the Applicant. As a result of the Department's failure to provide me with sufficient evidence to meet its burden of proof, I find that it has not done so and, therefore, it is not

authorized by section 19.1 to refuse the Applicant with access to the Workplace Harassment Records.

[329] In making this finding, I wish to acknowledge the rationale underlying the need for inclusion of the section 19.1 exception and remind public bodies that to apply this exception, they must undertake a process wherein they evaluate if it is probable that any of the harms will occur in paragraphs 19.1 (2)(a) through (h). On determining that harm is probable as a result of disclosing the specific record or information to the specific applicant, they must also make a decision about whether the risks in disclosing the information outweigh an applicant's or the public's right of access to information. I would further remind public bodies that, during an Inquiry on a review of an access request wherein subsection 19.1 is claimed, it is incumbent on public bodies to provide sufficient evidence in support of their evaluation and discretion in applying this section. Failure to do so will not only be fatal to their case, but, in my view, will undermine the entire rationale for including section 19.1 in the ATIPP Act.

Subsection 25 (1) – Harm to Personal Privacy

[330] Before moving on to the next issue, I must evaluate if there is information in the Workplace Harassment Records, as well as those records I determined are not Workplace Harassment Records that qualify as personal information of third parties. As such, I must determine if subsection 25 (1) applies to this information.

[331] The non-Workplace Harassment Records and most of the Workplace Harassment Records were all included in the Litigation Privilege Records. As I have already made findings about the application of subsection 25 (1) to these records, I will not reconsider them here. The following three records were not included with the Litigation Privilege Records. My finding in respect of the application of subsection 25 (1) to these records follows:

1) Record 063 is an email from an employee of the RWO to a Department human resources employee. It is dated [redacted] The record indicates it was sent at [redacted] There is information in this email about the Applicant's supervisor that qualifies as his third party personal information. Having reviewed this information, I find that if this information were disclosed to the Applicant, then it could cause embarrassment and humiliation to the supervisor and could also damage his reputation. Given this, I find that paragraphs 25 (4)(a) and (d) weigh in favour of not disclosing this information to the Applicant and that subsection 25 (1) applies.

2) Record 051 contains an email from an employee of the RWO to the Applicant's supervisor. It is dated September [redacted] The record indicates that it was sent at [redacted] There is information in this email about the Applicant's supervisor that qualifies as his third party personal information. Having reviewed this information, I find that if this information were disclosed to the Applicant, then it too could cause embarrassment and humiliation to the supervisor and could also damage his reputation. Given this, I find this information weighs in favour of not disclosing this information to the Applicant and that subsection 25 (1) applies. There is also information in this email that constitutes personal evaluations and character references of the supervisor. There is a presumption in paragraph 25 (2)(g) that disclosure of this kind of information would be an unreasonable invasion of personal privacy. Having considered this, together with subsection 25 (4), I find that nothing in subsection 25 (4) rebuts the presumption and find that subsection 25 (1) applies to this information.

3) Record 052 from the Applicant's supervisor to a Department employee dated [redacted] and sent at [redacted] contains only names of Department employees who appear to be acting in their representative capacities in carrying out their employment obligations. For reasons already stated, I find that subsection 25 (1) does not apply to these names.

[332] To assist the Department in identifying the information to be separated or obliterated from these records, I have provided it with copies identifying the information to which subsection 25 (1) applies.

Issue 6: Is the public body authorised by section 19.1 or required by paragraphs 25 (2)(a), 25 (2)(d) and 25 (2)(g) to separate and obliterate information contained within the records identified by the public body as '33 pages'?

[333] The issue identified here suggests there are 33 pages that are pertinent. The Department makes the same reference to 33 pages in its submissions. In those submissions, it indicates that one of these records is not responsive to the Applicant's Access Request. This is addressed in Issue 7. As such, for Issue 6, I will only address the remaining 32 pages of the Severed Records.

[334] The Department separated or obliterated information from pages 01017, 01018 and 01021 that the Applicant received, citing section 19.1 as its authority. On the

application of this section to the separations or obliterations, the Department submitted the following.

> *The Public Body believes it is authorized by subsection 19.1 (a) and 19.1 (2)(e) to separate and obliterate information contained in 3 pages of records, which are within the records identified as "33 pages of records.",* [sic] *as disclosure could reasonably be expected to harm the relations between employees; interfere with investigating a complaint, or, reveal information relating to workplace harassment.*
>
> *The information severed from the 3 pages…was created over the course of an investigation of the Respectful Workplace Office. The information was severed from the 3 pages of records as the Public Body may refuse to disclose a record and any information in it or about it* [sic] *could reasonably be expected to reveal information relating to proceedings taken or to be taken for resolution or adjudication of a complaint under a policy or provision referred to in subsection 19.1 (1) or impede resolution of a complaint.*

[335] There is nothing in the submission provided by the Department that indicate that the records were created in the course of, or in contemplation of, an investigation about whether there has been, or what to do about, a violation of a workplace harassment policy or Article 6 of the Collective Agreement. The contents of the record appear to relate to the conflict resolution process engaged by the Applicant and her supervisor, although I cannot definitively determine this. There is a reference in one of the records to another of the Applicant's supervisors. This suggests the notes in the records, which are notes of a meeting involving the Applicant, are about a meeting in which the RWO was not involved.

[336] Based on the evidence before me, the Department has not met its burden of proof regarding the application of section 19.1 to the information in these 3 pages of records. Therefore, it is not authorized by section 19.1 to refuse to disclose this information to the Applicant.

[337] Next I will determine if subsection 25 (1) applies to the records. As part of my analysis, I will also determine if there is third party personal information in the three pages of records to which the Department claimed a section 19.1 exception.

[338] The submissions from the Department regarding the application of subsection 25 (1) to information in 29 pages of records are as follows.

The Public Body believes it is required by subsection 25 (1) and paragraph 25 (2)(a) to separate or obliterate information contained within 2 pages of records, within the records identified as "33 pages of records" as disclosure would be an unreasonable invasion of personal privacy as the information relates to a medical condition of a third party.

The Public Body believes it is required by subsection 25 (1) and paragraph 25 (2)(d) to separate or obliterate information contained within 26 pages of records, within the records identified as "33 pages of records", as disclosure would be an unreasonable invasion of personal privacy as the information relates to a third party's employment history.

The Public Body believes it is required by subsection 25 (1) and paragraph 25 (2)(g) to separate and obliterate information contained within 1 page of records, within the records identified as "33 pages of records", as disclosure would be an unreasonable invasion of personal privacy as the information consists of personal recommendations of a third party and was supplied explicitly in confidence.

[339] There are two pages numbered 00091 and 00094 to which the Department claims that subsection 25 (1) together with paragraph 25 (2)(a) apply.

[340] Paragraph 25 (2)(a), as previously stated, creates a rebuttable presumption that disclosure of third party information that is medical, psychiatric, or psychological history, diagnosis, condition, treatment, or evaluation information would be an unreasonable invasion of the third party's personal privacy if this paragraph applies. Subsection 25 (4) identifies a list of factors that a public body must consider before refusing access to the personal information. The Department has provided no evidence that it considered this subsection at all in arriving at its decision that subsection 25 (1) applies to this information. As such, it has misapplied the subsection. The same can be said for its reliance on subsection 25 (1), together with paragraphs 25 (2) (d) and (g), to refuse to disclose the information to the Applicant in the remaining records. Despite this, because subsection 25 (1) is a mandatory exception, I must conduct my own evaluation of the information to determine if this subsection applies to the information separated or obliterated by the Department from the Severed Records.

[341] I first reviewed the separations or obliterations from the Severed Records to determine if they were addressed as part of my review of the application of subsection 25 (1) to the Litigation Privilege Records and have determined that the Severed Records were not included with the Litigation Privilege Records. I then reviewed the contents of the Severed Records and have determined that subsection 25 (1) does apply to most of the

separations or obliterations made in the records by the Department based on the following.

1) There is information in record number 00091 that qualifies as third party information to which paragraph 25 (2)(a) applies; more specifically, this information contains the diagnosis of a third party. As such, there is a presumption that disclosure of this personal information would be an unreasonable invasion of the third party's personal privacy. Disclosure of this information may cause the third party harm in terms of embarrassment and humiliation. It may also cause damage to the third party's reputation. Given this, I find that subsection 25 (4) weighs in favour of non-disclosure of this personal information to the Applicant and that subsection 25 (1) applies.

2) There is information in pages 00094, 00515, 00694, 01366, 01534, 01552 and 01555 that contains third party personal information about Department employees. Disclosure of this information could cause embarrassment or humiliation to these employees and for some it could damage their reputations. Given this, I find subsection 25 (4) weighs in favour of not disclosing this information to the Applicant and that subsection 25 (1) applies.

3) There is information in records 01598 to 01600, 01604 to 01609, 01621 to 01623, and 01631 to 01632 that contain the employee numbers of the Department's employees. Disclosure of a copy of this information to the Applicant without proper protections in place to prevent dissemination puts these employees at risk of identity theft or phishing. As such, I find subsection 25 (4)(a) weighs in favour of not disclosing this information to the Applicant and that subsection 25 (1) applies.

4) For these same records, there is information about whether an employee is active, the record number assigned to them, their start date and their service date. This information qualifies as employment history under paragraph 25 (2)(d). There nothing in subsection 25 (4) to rebut the presumption under this paragraph that disclosure of this information will be an unreasonable invasion of these employees' personal privacy. Consequently, I find that subsection 25 (1) applies to this information.

5) There is information in pages 00515 and 00516 the contain information that qualifies as a third party's employment history. There is a presumption that disclosure of this information would be an unreasonable invasion of the third party's personal privacy. Disclosure of this information may cause the third

party harm embarrassment and humiliation. It may also cause damage to the third party's reputation. Given this, I find that the presumption is not rebutted by subsection 25 (4) and that subsection 25 (1) applies.

6) There is information in records 01624 to 01625 that contain personnel evaluations of a Department employee completed by another Department employee. There is also information in these records along with records 1601 to 1603 that qualify as this third party's employment history. There is a presumption in subsections 2 (d) or (g) that disclosure of this information would be an unreasonable invasion of the third party's personal privacy. Having reviewed this information, together with subsection 25 (4), I find there is nothing in this subsection that rebuts this presumption and that subsection 25 (1) applies.

[342] The following are records to which subsection 25 (1) does not, in my determination, apply.

1) In records 00094, 00516, 01017, and 01534, there are names of employees that qualifies as their third party personal information. These names appear in the context of these employees performing their employment responsibilities on behalf of the Department. I find that subsection 25 (1) does not apply to this information.

2) In pages 00094, 00515, 00516, and 01366, there are names and other personal information about Department employees. Having considered the nature of the information in the context that it appears, together with subsection 25 (4), I find that subsection 25 (1) does not apply to the information in these records.

[343] In records 00516, 00968, 01018 and 01021, there is information identified by the Department that it claims is subject to subsection 25 (1). Having reviewed this information, I find this information is not personal information. As such, I find that subsection 25 (1) does not apply to this information.

[344] To assist the Department in identifying the information that subsection 25 (1) does and does not apply to in these records, I have provided copies that are marked to identify this.

7. Is the record identified by the public body 'not relevant to the Request' responsive to Access Request #A-6242?

[345] The Department is of the view that one of the 33 records identified in issue 6, the Non-relevant Record, is not relevant to the Applicant's Access Request. The Applicant's Access request was for the following:

> *All records pertaining to me* [Applicant] *and the position of* [Applicant's Position] *including anything related to roles, responsibilities, program participating and competencies in a broad sense and/or for specific instances/projects from December 1, 2013 to October 1, 2015 including emails and notes to or from* [Employee 1] *from December 1, 2013 to present; to or from* [Employee 2] *and* [Employee 3] *excluding media requests that* [Applicant] *is copied on, from January 1, 2012 to present. All notes from formal or informal meetings with* [Employee 4], [Employee 5], *or* [Employee 6] *from January 1, 2012 to present and all records and information from* [Employee 7/ Employee 8/Employee 9] *(or HR) from January 1, 2012 to present.*

[346] As previously identified, the test for determining whether a record is responsive to an access to information request is relevancy. Included in Commissioner Kruzeniski's comments in Review Report 023-2017 & 078-2017 about whether a record is relevant and therefore responsive to an access request, was the following:[58]

> *The purpose of FOIP is best served when a government institution adopts a liberal interpretation of the request. If a government institution has any doubts about its interpretation, it has a duty to assist the Applicant by clarifying it or reformulating it.*

[347] The approach taken by Commissioner Kruzeniski in determining whether a record of information is responsive to an access request is consistent with the purposes of the ATIPP Act. I agree, therefore, with Commissioner Kruzeniski that a public body must consider any access request received liberally and, in meeting its duty to assist under section 10, it must, in conjunction with the Records Manager, clarify any confusion about whether a record or information is responsive with an Applicant. This is ensure that he or she receives all information responsive to the request. I would add here that it is the public body who has the information. Therefore, it must, when processing an access to information request, take the time to ensure that the Applicant has a clear picture of the records or information in its custody or control that *may* be relevant to the request. This

[58] *Ibid. 39,* at para 30.

enable the Applicant to determine exactly the records or information to which they want access.

[348] The Applicant requested "All records pertaining to me [Applicant] and the position of [Applicant's Position] including…" In the Oxford Dictionary, the term "pertain" means "relate or have reference to." Taking a liberal interpretation of the information requested by the Applicant, a record or information in a record will be responsive to the Applicant's request if the record of information relates to or refers to her or her position.

[349] The record in question is an email between Department human resources employees. In the Applicant's Access Request, she expressly identified that she wants access to "…all records and information from [three named Department human resources employees] from January 1, 2012 to present." The email is from one of these individuals to another of these individuals. The subject line of the email is "agenda items – Bilateral today – [employee names]. The contents of the email is the detail about what these two employees planned to discuss during their meeting. Most of the information in the email does not relate to or have any relevance to the Applicant or her position, with the exception of one line that expressly identifies the Applicant and is about her conversation with her Union representative. I find that this information is relevant to the Applicant's Access Request and is, therefore, responsive to it. Given this, I find that the Department has improperly identified this record as non-responsive to the Applicant's access request. It must, therefore, provide the relevant portion of this email to the Applicant. I have identified the relevant portion of this email in this record to assist the Department.

VIII FINDINGS AND RECOMMENDATIONS

In accordance with my authority under section 57 of the ATIPP Act, below are my findings and recommendations with respect to the issues in this Inquiry.

Issue 1: Is the public body authorised by subsection 18 (b) to refuse to disclose the records identified by the Public Body as '1849* [2701] *pages of 769' records?

FINDINGS

I find that the Department is not authorized by subsection 18 (b) to refuse the Applicant access to these records.

I find that the Department is required to refuse access to information identified in these records as being subject to subsection 25 (1).

I find that there is information in some versions of attachment 37, Level 3 Grievance drafts that is non-responsive to the Applicant's Access Request.

RECOMMENDATION

1.1 I recommend that the Department gives the Applicant access to these records or the information in them to which subsection 25 (1) does not apply.

1.2 For the records containing information that is non-responsive to the Applicant's Access Request, I recommend the Department sever or obliterate this information from these records prior to disclosing them to the Applicant.

Issue 2: Is the public body required by subsection 15 (1) to refuse to disclose the records identified by the public body as '48 pages of 10 records'?

FINDING

I find that that the Department is authorized by subsection 15 (1) to refuse to disclose these records to the Applicant. However, I was unable to make a finding about the application of paragraph 15 (2)(c) to these records.

RECOMMENDATION

2.1 I recommend that the Department reconsiders its decision about the application of section 15 and, in particular, whether paragraph 15 (2)(c) applies to these records.

Issue 3: Is the public body authorised by paragraph 5 (4)(b) to refuse to disclose the records identified by the public body as '48 pages of 10 records'?

FINDING

I find that the Department is not authorized by paragraph 5 (4)(b) to refuse to disclose these records to the Applicant.

RECOMMENDATION

3.1 I recommend that the Department gives the Applicant access to these records.

Issue 4: Is the public body authorised by section 19.1 to refuse to disclose the records identified by the public body as '26 pages of 19 records'?

FINDINGS

I find that the Department is not authorized to refuse access to these records under subsection 19.1.

I find that the Department is required to refuse access to information identified in these records as being subject to subsection 25 (1).

RECOMMENDATION

4.1 I recommend the Department gives the Applicant access to these records or information in these records to which subsection 25 (1) does not apply.

Issue 5: Is the public body required by subsection 25 (1) and paragraph 25 (1)(g) to refuse to disclose the records identified by the public body as '7 pages of 4 records'?

FINDINGS

I find that the Department is not required to refuse access to these records under subsection 25 (1).

I find that the information identified in the Department's schedule of records associated with this issue described as "remainder not required by Applicant" to be responsive to the Applicant's Access Request.

RECOMMENDATION

5.1 I recommend that the Department gives the Applicant access to these records, including access to the information identified in the schedule of records as "remainder not required by Applicant."

Issue 6: Is the public body authorised by section 19.1 or required by paragraphs 25 (2)(a), 25 (2)(d) and 25 (2)(g) to separate and obliterate information contained within the records identified by the public body as '33 pages'?

FINDINGS

I find that the Department is not authorized to refuse access to these records under section 19.1

I find that the Department is required to refuse access to information identified in the records as being subject to subsection 25 (1).

RECOMMENDATION

6.1 I recommend that the Department gives the Applicant access to the information in the records to which subsection 25 (1) does not apply.

Issue 7: Is the record identified by the public body 'not relevant to the Request' responsive to Access Request #A-6242?

FINDING

I find that page 1694 is relevant to the Applicant's access request.

RECOMMENDATION

7.1 I recommend that the Department gives the Applicant the information in this record that is relevant to her Access Request.

Issue 8: Is the Department authorized by subsection 18 (a) to refuse the Applicant access to the pages numbered 1468 to 1472?

FINDING

I find that the Department is authorized by subsection 18 (a) to refuse the Applicant with the information in these pages to which this subsection applies.

RECOMMENDATION

8.1 I recommend that the Department separate or obliterate the subsection 18 (a) information from these pages and provide the remainder of the information in the records to the Applicant.

IX PUBLIC BODY'S DECISION AFTER REVIEW

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

[351] If the Department does not follow the recommendations of the IPC, then it must inform the Applicant in writing about her right to Appeal its decision to the Yukon Supreme Court under section 59.[59]

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

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

Distribution List:

- Department with Appendix A and B (no redaction)
- Applicant without Appendix A and B
- Third Parties without Appendix A and B

[59] Subsection 59 (1) states that an applicant may appeal to the Yukon Supreme Court: (a) a decision by a public body under section 58 to not follow the IPCs recommendation that the public body give the applicant access to a record or part of it; or (b) a determination by the commissioner under section 57 that the public body is authorized or required to refuse access to all or part of the record. Subsection 59 (3) states that an appeal must be made by giving written notice of the appeal to the public body within 30 days of the appellant receiving the public body's decision.