Yukon Information and Privacy Commissioner

INQUIRY REPORT

File ATP18-25R

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

Department of Community Services

November 15, 2019

Summary

An applicant requested the Department of Community Services (Department) provide access to "[m]emoranda and emails regarding proposed amendments to the Elevator and Fixed Conveyances Act" from January 1, 2013 until present. The date of the access request was March 20, 2018. The Department provided access to some records requested and refused access to the whole of eight records on the basis they were records containing cabinet confidences. The Department cited paragraph 15 (1)(a) and subparagraph 15 (1)(d)(i) as authority for the refusal. The Department also refused access to some information in one record, citing paragraph 16 (1)(a) as its authority, on the basis that the information would reveal recommendations developed by a public body.

Subsection 15 (1) of the ATIPP Act prohibits the disclosure of records containing cabinet confidences. Paragraphs (a) through (d) of the subsection identifies records that would reveal a cabinet confidence if disclosed. The Information and Privacy Commissioner (IPC) found the Department met its burden of proving that paragraph 15 (1)(a) and subparagraph 15 (1)(d)(i) apply to the majority of the information contained in these records. She also found that subsection 15 (1) applies to some of the information. She determined that because the remaining information in the records that does not qualify as a cabinet confidence is not responsive to the access request, the Department is not required to sever the cabinet confidence information from the eight records in accordance with subsection 5 (2) and provide the remaining information to the applicant.

Paragraph 16 (1)(a) is a discretionary exception to the right of access that authorizes a public body to refuse to disclose information that would reveal advice, proposals, recommendations, analyses or policy options developed by or for a public body or Minister. The IPC found the Department failed to meet its burden of proving this provision applied to the information separated or obliterated from one record. The basis for her finding is that the content of the information would not qualify for the exception given that it is instructional information containing process about the handling of the cabinet records and contained no substantive content about a government initiative or policy. She did find that some information contained in the record qualified as a cabinet confidence under subsection 15 (1) and that the information must not be disclosed to the applicant.

The IPC confirmed that the Department must continue to refuse to disclose the eight records, in their entirety, to the applicant. She recommended the Department provide access to the one record without the information separated or obliterated with the exception of the information that she determined subsection 15 (1) applies to.

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Statutes Cited

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

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

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

Freedom of Information and Protection of Privacy Act, SS 1990-91, c F-22.01

Cases Cited

Court

Canada (Information Commissioner) v. Canada (Solicitor General), [1988] 3 F.C. 551 at 558

John Doe v. Ontario (Finance), 2014 SCC 36 (CanLII)

Information and Privacy Commissioners

ATP17-36R, Department of Community Services, November 13, 2018 (YT IPC)

Ministry of Finance, 2002 CanLII 46488 (ON IPC)

Explanatory Note

All sections, subsections, paragraphs and the like referenced in this Inquiry Report are to the ATIPP Act unless otherwise stated.

I BACKGROUND

[1] On March 20, 2018, the Applicant requested access to the following records from the Department.

> *Memoranda and emails regarding proposed amendments to the Elevator and Fixed Conveyances Act. Timeline: January 1, 2013 to present.*
>
> (Access Request)

[2] On April 17, 2018, the records manager responded to the Applicant's Access Request and therein informed the Applicant that some records were refused in whole and some in part. The sections relied on for the refusal are paragraph 15 (1)(b), subparagraph 15 (1)(d)(i) and paragraph 16 (1)(a).

[3] On April 23, 2018, the Applicant submitted a request for review to my office of the Department's decision to refuse access to the records in whole or in part. Mediation was authorized and was partially successful in settling the matter under review. Settlement was not achieved for eight records that were refused in whole and for information separated or obliterated from one record.

II JURISDICTION

[4] My authority to review the decision made by the Department to refuse access to the records or information is under paragraphs 48 (1)(a) and (b).

> *48(1) A person who makes a request under section 6 for access to a record may request the commissioner to review*
>
> *(a) a refusal by the public body to grant access to the record.*
>
> *(b) a decision by the public body to separate or obliterate information from the record;*

III INQUIRY PROCESS

[5] On July 10, 2018, a Notice of Inquiry was delivered to the Applicant and the Department, and the parties were invited to make submissions.

[6] The Department provided its submission on July 30, 2018. On July 31, 2018, the submission was provided to the Applicant for their reply. The Applicant did not make a reply submission.

IV RECORDS AT ISSUE

[7] The records at issue as identified in the Notice of Inquiry are as follows.

Record #	# of pages	Record date	Record type	Record title	Information severed (S) or record refused (R)
002	1	June 23, 2015	Excel spreadsheet attached to a June 23, 2015 email…	Copy of elevator and lifts devices Code Matrix.xlsx	R
003	1	January 4, 2018	Email	Subject: For review - Draft Safety code memo to Cabinet and Communications Strategy	S
004-005	2	January 2, 2017	Attachment appended to record #003	Gas Regulation comm strat Jan 2 2018draft2	R
006	1	January 2, 2018	Attachment to record #3 (email)	Memo Safety codes Jan 3 17 draft2	R
009-012	4	January 11, 2018	Attachment to January 11, 2018 email…	Draft of proposed changes to the Regulation of the *Elevator and Fixed Conveyances Act*	R

(Records)

V ISSUES

[8] The issues for the Inquiry are as follows.

Issue One:

Is the Department required by paragraph 15 (1)(b) or subparagraph 15 (1)(d)(i) of the ATIPP Act to refuse access to Records 002, 004-006 and 009-012?

Issue Two:

Is the Department authorized by paragraph 16 (1)(a) of the ATIPP Act to separate or obliterate information from Record 003?

VI BURDEN OF PROOF

[9] Paragraph 54 (1)(a) sets out the burden of proof relevant to this Inquiry and identifies that the burden is on the Department to prove that the Applicant has no right to access the Records or information separated or obliterated therefrom.

> *54(1) In a review resulting from a request under section 48, it is up to the public body to prove*
>
> *(a) that the applicant has no right of access to the record or the part of it in question…*

VII SUBMISSIONS

[10] The Department made a 22-page submission. I will address the submissions in the analysis section of this Inquiry Report. As indicated above, the Applicant did not make a reply submission.

VIII ANALYSIS

[11] Section 5 establishes the Applicant's right to access records in the custody or control of the Department, which is a public body under the ATIPP Act. The Records are in the Department's custody or control.

[12] The only exception to the Applicant's right of access to the Records or information therein under section 5 is if an exception applies. The exceptions to the right of access are set out in Part 2 of the ATIPP Act. Most of the exceptions in this Part are discretionary. Some are mandatory. Subsection 5 (2) states that "[t]he right of access to a record does not extend to information that is excepted from disclosure under the Part, but if that information can reasonable separated or obliterated from a record an applicant has the right of access to the remainder of the record." As indicated, eight Records were refused in full and one in part.

[13] The Department is relying on paragraph 15 (1)(b) and subparagraph 15 (1)(d)(i) to refuse access to Records 002, 004 to 006 and 009 to 012 (8 Records). Provisions falling under subsection 15 (1) are mandatory exceptions to the right of access. If either paragraph 15 (1)(b) or subparagraph 15 (1)(d)(i) apply to the 8 Records, the Department must refuse access. The Department is also relying on paragraph 16 (1)(a) to separate or obliterate information from Record 003. This provision is a discretionary exception to the right of access. This means that if the paragraph applies, the Department must still exercise its discretion about whether to provide the Applicant with access to the information.

Issue One: Is the Department required by paragraph 15 (1)(b) or subparagraph 15 (1)(d)(i) of the ATIPP Act to refuse access to Records 002, 004-006 and 009-012?

Section 15

[14] Subsection 15 (1) creates a general exception to the right of access to records that would reveal a "confidence of the Executive Council or any of its committees." The paragraphs and subparagraphs under this subsection identify a non-exhaustive list of certain kinds of records that would, if disclosed to an applicant, reveal such confidence. Paragraph 15 (1)(b) and subparagraph 15 (1)(d)(i) state as follows.

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

(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,

[15] Subsection 15 (2) creates an exception to the exception to the right of access under subsection 15 (1). It states that the exception under subsection 15 (1) will not apply where:

1. a record has been existence for 15 or more years;
2. the record is of a decision made by the Executive Council or any of its committees on an appeal under an Act; or
3. the purpose of the record 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.

Nature of Cabinet Confidentiality

[16] In Inquiry Report ATP17-36R,[1] I stated the following about the nature of cabinet confidentiality.

In Babcock v. Canada (Attorney General) (Babcock), the Supreme Court of Canada (SCC) had occasion to consider the nature of cabinet confidentiality…The SCC described the principles of cabinet confidence as follows.

Cabinet confidentiality is essential to good government. The right to pursue justice in the courts is also of primary importance in our society, as is the rule of law, accountability of the executive, and the principle that official actions must flow from statutory authority clearly granted and properly exercised...

The British democratic tradition which informs the Canadian tradition has long affirmed the confidentiality of what is said in the Cabinet room, and documents

[1] ATP17-36R, Department of Community Services, November 13, 2018 (YT IPC).

and papers prepared for Cabinet discussions. The reasons are obvious. Those charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny: see Singh v. Canada (Attorney General), [2000] 3 F.C. 185 (C.A.), at paras. 21-22. If Cabinet members' statements were subject to disclosure, Cabinet members might censor their words, consciously or unconsciously. They might shy away from stating unpopular positions, or from making comments that might be considered politically incorrect. The rationale for recognizing and protecting Cabinet confidences is well summarized by the views of Lord Salisbury in the Report of the Committee of Privy Counsellors on Ministerial Memoirs (January 1976), at p. 13.

> *A Cabinet discussion was not the occasion for the deliverance of considered judgements but an opportunity for the pursuit of practical conclusions. It could only be made completely effective for this purpose if the flow of suggestions which accompanied it attained the freedom and fullness which belong to private conversations — members must feel themselves untrammelled by any consideration of consistency with the past or self-justification in the future. . . . The first rule of Cabinet conduct, he used to declare, was that no member should ever "Hansardise" another, — ever compare his present contribution to the common fund of counsel with a previously expressed opinion…*

The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly. In addition to ensuring candour in Cabinet discussions, this Court in Carey v. Ontario, [1986] 2 S.C.R. 637, at p. 659, recognized another important reason for protecting Cabinet documents, namely to avoid "creat[ing] or fan[ning] ill informed or captious public or political criticism". Thus, ministers undertake by oath as Privy Councillors to maintain the secrecy of Cabinet deliberations and the House of Commons and the courts respect the confidentiality of Cabinet decision-making.

[Citations omitted]

> *These principles denote that cabinet confidence must be preserved in order to promote good government.*[2]

[17] In its submissions, the Department cited the same provisions from Babcock as above. It added to these provisions the following paragraph from Babcock that, in my view, is relevant to determining the specific nature of the confidence that is to be preserved under access to information laws. The Supreme Court of Canada makes it clear in the paragraph that the cabinet confidence exception to the right of access under these laws is to apply narrowly, only to those records or information found to "truly" relate to cabinet deliberations.

> *At one time, the common law viewed Cabinet confidentiality as absolute. However, over time the common law has come to recognize that the public interest in Cabinet confidences must be balanced against the public interest in disclosure, to which it might sometimes be required to yield: see Carey, supra. Courts began to weigh the need to protect confidentiality in government against the public interest in disclosure, for example, preserving the integrity of the judicial system. It follows that there must be some way of determining that the information for which confidentiality is claimed truly relates to Cabinet deliberations and that it is properly withheld. At common law, the courts did this, applying a test that balanced the public interest in maintaining confidentiality [page17] against the public interest in disclosure: see Carey, supra.*[3]
> [My emphasis]

[18] Subsection 15 (1) identifies a list of records that qualify as a "cabinet confidences". The list is non-exhaustive. The records identified in the list fall into three categories:

1. records prepared for the purpose of deliberation by the Executive Council or one of its committees;

2. records placed before the Executive Council or one of its committees for deliberation; or

3. records that document deliberations by the Executive Council or one of its committees.

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[2] *Ibid.,* at para. 22.
[3] Citing *Babcock v. Canada (Attorney General)*, 2002 SCC 57 (CanLII), at para 19, Department submissions, at p. 9.

[19] It is clear that the exception under subsection 15 (1) was designed to restrict from the right of access to information in Part 2 of the ATIPP Act records that would reveal deliberations of the Executive Council or any of its committees. The reason for the exception is to protect the confidentiality of Cabinet decision-making in order to promote good government.

[20] The list of records that qualify as a cabinet confidences in subsection 15 (1) is non-exhaustive. Given this, any record that does not fall into the list under subsection 15 (1) that would reveal deliberations of the Executive Council must not be disclosed.

[21] In my view, the foregoing interpretation of subsection 15 (1) accords with the purposes of the ATIPP Act, specifically paragraphs 1 (1)(a) and (b), its scheme, and the intention of Parliament. My conclusion in this regard is supported by the decision of the Supreme Court of Canada in Babcock, which found that the protection to be afforded to the cabinet confidences of the Queen's privy council under the Federal *Access to Information Act* is limited to records or information found to truly relate to cabinet deliberations.

Department's Submissions Paragraph 15 (1)(b) and Subparagraph 15 (1)(d)(i)

[22] The Department made the following submissions on the applicability of these provisions to the 8 Records. Only those submissions relevant to the application of paragraph 15 (1)(b) and subparagraph 15 (1)(d)(i) are included here.

> *2.2 Parties*
>
> *2.2.1 The Executive Council means the Executive Council appointed under the authority of section 4 of the Yukon Act (Canada) (Interpretation Act, R.S.Y. 2002 c. 125 s.18), and its powers are then set out in s.2 of the Government Organization Act R.S.Y. 2002 c.105. This body is colloquially referred to as Cabinet.*
>
> *2.2.2 In the Yukon, the Executive Council includes amongst its committees the Cabinet Committee on Legislation, commonly abbreviated to CCL.*
>
> *2.2.3 The Commissioner in Executive Council means the Commissioner acting by and with the advice and consent of the Executive Council (Interpretation Act. R.S.Y. 2002 c.125. s.18).*
>
> > *2.2.3.1 The Commissioner in Executive Council has the power to make the regulations which are at issue here: Regulation to amend the Elevator and Fixed Conveyances Regulations (2018) OIC 2018/10.*

2.2.3.2 That regulation was made on January 18, 2018.

2.3 Process to enact an Act and/or Regulation and/or an Amendment to either:

2.3.1 The public body is directed to compile information and submit documentation to create or amend a regulation and submit for approval;

2.3.2 A submission to the Cabinet Committee on Legislation (CCL) is drafted by the policy branch of the public body, in collaboration with the program area;

2.3.3 The submission consists of the CCL proposal and a communications strategy. It is reviewed internally in the department and interdepartmentally by the Policy Review Committee (PRC) and the Communications Review Committee (CRC);

2.3.4. Once approved by the PRC and the CRC, the proposal, via a CCL submission, is submitted for approval and sign off by the ADM (Assistant Deputy Minister), DM (Deputy Minister), and Minister. It is then sent to Executive Council Office (ECO) for analysis and to be placed on a CCL agenda;

2.3.5. The submission is presented to CCL, and CCL determines and directs the next steps;

2.3.6. Based on CCL direction, the department may consult and then draft legislation;

2.3.7. The draft legislation is reviewed by CCL;

2.3.8. If CCL recommends for it to go to Cabinet, the department prepares a Cabinet submission (cab sub) with the final version of the regulation;

2.3.9. The final version of the regulation and the Cabinet submission are approved by ADM, DM and Min and then submitted to ECO;

2.3.10. ECO presents to Cabinet for approval; and

2.3.11. If approved, an Order in Council (OJC) is signed by the Commissioner, the regulation is Gazetted, and it becomes law.

2.4 The Cabinet Submission for the amendment to the Regulation to Amend the Fixed Conveyances Regulations included:

2.4.1. Yukon Elevator and Lift Devices Legislation Code Matrix (Page 002);

2.4.2. Communication Strategy (Pages 004 to 005);

2.4.3. A signed version of the Legislation Approval Memorandum, written to Cabinet, by the Minister of Community Services (Page 006); and

2.4.4. "Order-in-Council 2018/" for the Elevator and Fixed Conveyances Act and the Regulation to Amend the Fixed Conveyances Regulations (Pages 009 to 012).

2.5 Regulation to Amend the Fixed Conveyances Regulations are publically available on the Government web site:

2.5.1 Under Legislation→New Regulations→E→Elevator and Fixed Conveyances Act, Fixed Conveyances Regulations-amended OIC 2018/10; or

2.5.2. Under Legislation→Acts and Regulations→E→Elevator and Fixed Conveyances Act→Regulations→Fixed Conveyances Regulations OIC 1998/40. As they are an amendment to the regulations, the pages have been incorporated into the existing regulation.

3.1 <u>Issue #1 Regarding the public body's claim of s.15(1)(b) and s.15(1)(d)(i)</u>

3.1.1. We have set out the facts about how the Commissioner in Executive Council is informed about matters that it must decide.

3.1.2. In determining whether sections 15(1)(b) and 15(1)(d)(i) applied to these records the public body gave consideration to:

3.1.2.1. the content of the records;

3.1.2.2. the mandatory nature of s.15 - i.e. if factually the record would reveal a confidence of the Executive Council it must not be disclosed;

3.1.2.3. the type of information provided and how it was used in preparing a document for submission to the ECO; and

3.1.2.4. which records were part of the draft and which records were part of the final submission for the amended regulation.

3.1.3. Further, the public body also considered ATIPP Act s.15(2)(c)(i) and (ii) which states that Subsection (1) does not apply to <u>a record</u> the purpose of which is to present

background information or explanations or analysis to the Executive Council or any of its committee for its consideration in making a decision if

i) the decision has been made public: [or]

ii) the decision has been implemented.

3.2 <u>The Mandatory Nature of s.15(1)</u>

3.2.1 In applying the mandatory exceptions of s.15(1) the public body determined that the rule in 15(1) applies to the entire record. The implication of this is that even if a small part of the record contains information which would reveal a confidence of the Executive Council, that entire record must not be disclosed.

3.2.2 The public body considered whether these particular records would reveal a confidence of the Executive Council or one of its committees even though the records do not appear to be final versions of what was submitted.

3.2.3 In determining that these records do fall into this category, the public body was persuaded by the phrase in 15(1)(b) 'or prepared for submission'; and in 15(1)(d) 'or are proposed to be brought before the Executive Council or its committees'.

3.2.4 Record 1 and record 3, which are the email cover letters to which records 2, 4-12 were attached indicate the nature of the attachments as being matters for consideration by the Executive Council or one of its committees. At the outset, these documents were prepared to brief the Minister who, once he approved the documents, would then formally submit them to the Executive Council for their consideration in determining whether or not to bring into law the XYA regulation.

3.3. <u>Non-Application of 15(2) and 5(2)</u>

3.3.1 The public body also considered s.15(2)(c)(i) and (ii) which state that Subsection (1) does not apply to <u>a record</u> the purpose of which is to present background information or explanations or analysis to the Executive Council or any of its committee for its consideration in making a decision if

i) the decision has been made public; [or]

ii) the decision has been implemented.

3.3.2 The public body turned its mind to whether <u>parts</u> of those records which are

subject to s.15(1) could be disclosed because they fall into s.15(2) and determined that s.15(2) equally applies to an entire record. The purpose of these records is mixed, they both would reveal a confidence of the Executive Council and at the same time present background information and analysis about a decision that has been made public and implemented.

3.3.3. When resolving this conflict, the public body erred on the side of preserving the mandatory exception to the right of access.

3.4 Page 006 contains the final draft of the Legislation Approval Memorandum, written to Cabinet, by the Minister of Community Services.

3.5. In making this determination about the application of the Act to these facts, the public body has considered law and decisions on the subject of cabinet confidences from across Canada. The public body recognizes that nationally there are differences.
[Emphasis in original.]

[23] The Department then cited a number of cases in its submissions that I will refer to below in my analysis as applicable.

[24] For the 8 Records, the Department has the burden of proving on the balance of probabilities that:

1. the Records contain advice, analyses, policy options, proposals, recommendations or requests for directions submitted or prepared for submission to the Executive Council or its committees (paragraph 15 (1)(b)); or

2. they were prepared to brief a Minister in relation to matters that are before or are proposed to be brought before the Executive Council or its committees (subparagraph 15 (1)(d)(i)).

Paragraph 15 (1)(b)

Do the 8 Records contain advice, analyses, policy options, proposals, recommendations, or request for directions?

[25] The terms "advice, analyses, policy options, proposals, recommendations, or requests for directions" are not defined in the ATIPP Act and I have not considered their meaning in paragraph 15 (1)(b). As such, I will do so now.

[26] In the Oxford online Dictionary, "advice" is defined as "guidance or recommendations offered with regard to prudent future action."[4] Black's Law Dictionary defines 'advice' as "guidance offered by one person to another."[5] In ATP17-36R, I considered the meaning of "advice" in paragraph 16 (1)(a) and found it to mean that:

> *…"advice" should*
>
> *a. be sought or expected, or be part of the responsibility of a person by virtue of that person's position.*
>
> *b. be directed toward taking an action.*
>
> *c. be made to someone who can take or implement the action.*

[27] The Supreme Court of Canada (SCC) in *John Doe v. Ontario (Finance)*[6] considered the meaning of the terms 'advice' and 'policy options'. The matter before the SCC was whether the term "advice" in subsection 13 (1) of Ontario's *Freedom of Information and Protection of Privacy Act* (ON FIPPA) included or excluded a record containing policy options prepared by a public servant. The provision at issue authorizes a public body subject to ON FIPPA to refuse access to information requested by an applicant "where disclosure would reveal advice or recommendations of a public servant…" Rothstein, J., writing for the SCC, stated the following about the meaning of 'policy options.'

> *Policy options are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made. They would include matters such as the public servant's identification and consideration of alternative decisions that could be made. In other words, they constitute an evaluative analysis as opposed to objective information.*
>
> *Records containing policy options can take many forms. They might include the full range of policy options for a given decision, comprising all conceivable alternatives, or may only list a subset of alternatives that in the public servant's opinion are most worthy of consideration. They can also include the advantages and disadvantages of each option…But the list can also be less fulsome and still constitute policy options. For example, a public servant may prepare a list of all alternatives and await further instructions from the decision maker for which options should be considered in depth. Or, if the advantages and disadvantages of the policy options are either perceived as*

[4] https://www.lexico.com/en/definition/advice.
[5] Black's Law Dictionary, 10th Ed., Thomson Reuters, St. Paul, MN.
[6] 2014 SCC 36 (CanLII).

> *being obvious or have already been canvassed orally or in a prior draft, the policy options might appear without any additional explanation. As long as a list sets out alternative courses of action relating to a decision to be made, it will constitute policy options.*[7]

[28] The SCC concluded in this case that 'advice' in subsection 13 (1) of ON FIPPA includes policy options. In the ATIPP Act, the terms 'advice' and 'policy options' both appear. Given this, their meanings must be distinct such that 'advice' in paragraph 15 (1)(b) would not include 'policy options.'

[29] 'Analyses' is plural of 'analysis'. In the online Oxford Dictionary, 'analysis' means "detailed examination of the elements or structure of something."[8]

[30] The meaning of 'direction' in the online Oxford Dictionary is "instructions about how to do something."[9] Black's Law Dictionary defines 'direction' as "an act of guidance" and "an order; an instruction on how to proceed."[10]

[31] The meaning of 'proposal' in the online Oxford Dictionary is "a plan or suggestion, especially a formal written one, put forward for consideration by others."[11] In Black's Law Dictionary, 'proposal' means "something offered for consideration or acceptance; a suggestion."[12]

[32] The meaning of 'recommendation' in the online Oxford Dictionary is "a suggestion or proposal as to the best course of action, especially one put forward by an authoritative body."[13] In Black's Law Dictionary, 'recommendation' is defined as a specific piece of advice about what to do, especially when given officially" and "a suggestion that someone should choose a particular thing or person that one thinks particularly good or meritorious."[14]

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[7] *Ibid.*, at paras. 26 and 27.
[8] https://www.lexico.com/en/definition/analysis.
[9] https://www.lexico.com/en/definition/direction.
[10] Black's Law Dictionary, 10th Ed., Thomson Reuters, St. Paul, MN.
[11] https://www.lexico.com/en/definition/proposal.
[12] Black's Law Dictionary, 10th Ed., Thomson Reuters, St. Paul, MN.
[13] https://www.lexico.com/en/definition/recommendation.
[14] Black's Law Dictionary, 10th Ed., Thomson Reuters, St. Paul, MN.

[33] In deciding the meaning of these terms, which I have set out below, I took into account the following:

1. the nature of the protection afforded to records containing cabinet confidences;
2. the proper balance to be struck between this protection and the rights of individuals to access records in the custody or control of public bodies; and
3. the choice of these specific terms used in this paragraph.

[34] Based on the foregoing, I find that the terms used in paragraph 15 (1)(b) are to be interpreted as follows.

1. 'Advice' means guidance offered with regard to prudent future action by one person to another that is:
    i. sought or expected, or part of the responsibility of a person by virtue of that person's position;
    ii. directed toward taking an action; and
    iii. made to someone who can take or implement the action.
2. 'Analyses' means a detailed examination of the elements or structure of something.
3. 'Policy options' means a list or lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made.
4. 'Proposals' means a plan or suggestion offered by one person to another for their consideration or acceptance.
5. 'Recommendations' means a suggestion as to a particular course of action that is best or particularly good.
6. 'Requests for directions' mean a request made by one person who is seeking guidance or instructions from another person on how to do something or how to proceed.

[35] The 8 Records are identified in the Department's submissions as follows:

Record 002 is identified as "Copy of elevator and lifts devices Code Matrix xlsx";

Records 004 and 005 are identified as "Gas Regulation comm strat Jan 2 2018draft2";

Record 006 is identified as "Memo Safety codes Jan 3 17 draft2"

Records 009 to 012 are identified as "Draft of proposed changes to the Regulation of the *Elevator and Fixed Conveyances Act*"

[36] Based on my review of the 8 Records, I find as follows.

1. Record 002 was refused in its entirety. This document contains codes associated with elevators and lifts and some comments in respect of the codes. Having the reviewed the content of this document, I find that the majority of information contained in this record qualifies as policy options. The remaining information qualifies as advice.

2. Records 004 and 005 contain a communications strategy for communicating the amendments to the Regulation. It contains:

    i. a table with the project title, department responsible, name of the analyst associated with the communications strategy, decision body, and date (Header Table);

    ii. the issues or initiatives to be decided by Cabinet ;

    iii. the specific government priority associated with the decision;

    iv. proposed outcomes and a strategy to achieve them;

    v. key public messages;

    vi. analysis of risks and recommendations to address the risks; and

    vii. page numbers.

    These Records were refused in their entirety. Having reviewed these Records, I find that the information contained therein with the exception of the information in the Header Table, the issues or initiatives to be decided by Cabinet, the specific

government priority associated with the decision, and page numbers on Record 004 qualifies as proposals, analyses and recommendations.

3. Record 006 is a memorandum from a Minister to Cabinet that contains the following information:

    i. to/from, date and subject (Header Information);

    ii. the proposed amendments to the Regulation under the heading "Issue/Initiative";

    iii. the request of Cabinet in regards to the Regulation;

    iv. key considerations in regards to the Regulation;

    v. communication strategy objective;

    vi. identification of the attachments to the memorandum; and

    vii. the footer information (name of document, date and a page number).

    This Record was refused in its entirety. Having reviewed it, I find that the information in this Record with the exception of the Header Information, name of attachments and footer information qualifies as proposals, analyses, and a request for direction.

4. Records 009 to 012 is a copy of the draft Regulation. These Records were refused in their entirety. I find that the information in this Record qualifies as a proposal with the exception of the signature line for the Commissioner in Executive Council, the date line of the draft Regulation, and the name of the document appearing in the document footer.

Were the *8 Records submitted to the Executive Council or one of its committees?*

[37] The Department submitted that the 8 Records "were prepared to brief a Minister who, once he approved the documents, would then formally submit them to the Executive Council for their consideration…"[15] It is clear from the evidence that the 8 Records were submitted to the Executive Council sometime in January of 2018.

[15] Section 3.2.4 of the Department's submissions, at p. 6.

[38] Based on the foregoing, I find that subsection 15 (b) applies to the 8 Records in their entirety with the exception of the following information contained therein:

1. the Header Table, the issues or initiatives to be decided by Cabinet, the specific government priority associated with the decision, and the page numbers in Record 004;

2. the Header Information, identification of attachments to the memorandum, signature information, and footer information in Record 006; and

3. the signature line for the Commissioner in Executive Council, the date line of the draft Regulation, and the name of the document appearing in the document footer appearing in Records 009 to 012.

[39] Although I found paragraph 15 (1)(b) applies to most of the information contained in the 8 Records, because the Department also applied subparagraph 15 (1)(d)(i) as the basis to refuse the 8 Records, and because I found that paragraph 15 (1)(b) does not apply to some information in the 8 Records, as indicated above, I will go on to determine if subparagraph 15 (1)(d)(i) applies to the information therein.

Subparagraph 15 (1)(d)(i)

[40] This subparagraph states as follows:

> *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*
>
> *(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,…*

[41] As indicated, the Department submitted that these Records "were prepared to brief a Minister who, once he approved the documents, would then formally submit them to the Executive Council for their consideration in determining whether or not to bring into law the…regulation."[16] Having reviewed the 8 Records and the evidence, I am satisfied that the 8 Records contain briefing material that was prepared for the purpose of briefing a Minister in

[16] *Ibid*.

relation to matters that were brought before the Executive Council. However, I find that the same information as noted above in regards to the exceptions to the application of subsection 15 (1)(b) is also an exception to the application of subparagraph 15 (1)(d)(i).

[42] Although I have found that subsection 15 (1)(b) and subparagraph 15 (1)(d)(i) do not apply to certain information in the 8 Records as above noted, I am of the view that:

1. the project title in the Header information, the issues or initiatives to be decided by Cabinet, and the government priority associated with the decision in Record 004;
2. the subject line in the Header Information in Record 006; and
3. the name of the document in the document footer in Records 009 to 012

would, if disclosed, reveal the subject matter of deliberations by the Executive Council or the CCL. Given this, I find that subsection 15 (1) applies to this information.

Subsection 15 (2)

[43] Subsection 15 (2) is an exception to the exception to the right of access under subsection 15 (1). It states as follows.

15 (2) Subsection (1) does not apply to

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

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

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

(i) the decision has been made public,

(ii) the decision has been implemented, or

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

[44] If any of the circumstances under subsection 15 (2) apply to the 8 Records, then the Department cannot refuse access to them on the basis that subsection 15 (1) applies.

[45] The Department submitted the following about whether subsection 15 (2) applies to the 8 Records.

> *3.3.1 The public body also considered s. 15(2)(c)(i) and (ii) which state that Subsection (1) does not apply to 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; [or]*
>
> *ii) the decision has been implemented.*
>
> *3.3.2. The public body turned its mind to whether parts of those records which are subject to s.15(1) could be disclosed because they fall into s.15(2) and determined that s.15(2) equally applies to an entire record. The purpose of these records is mixed, they both reveal a confidence of the Executive Council and at the same time present background information and analysis about a decision that has been made public and implemented.*
>
> *3.3.3. When resolving the conflict, the public body erred on the side of preserving the mandatory exception to the right of access.*[17]

[46] The 8 Records have not been in existence for 15 or more years. They are also not a record of a decision made by the Executive Council or any of its committees on an appeal under an Act. As such, neither paragraph 15 (2)(a) or (b) apply. For the following reasons, I am of the view that paragraph 15 (2)(c) also does not apply.

[47] The words of subsection 15 (2) together with its paragraph (c) make it clear that the exemption under subsection 15 (1) will not apply to a record where the "purpose of a record" is to present background information or explanations or analysis to the Executive Council or any of its committees if the circumstances in subparagraphs (i), (ii) and (iii) exist.

[48] While I determined that Records 004 to 006 contain analysis as indicated above, I am satisfied that the *purpose* of these Records is not to present background information or explanations or analysis to the Executive Council. Their purpose, as was noted by the Department, is mixed.

[17] Department's submissions, at pp. 6 and 7.

[49] Given the foregoing, I find that paragraph 15 (2)(c) does not apply to the 8 Records.

Is the Department required to separate or obliterate cabinet confidences from the 8 Records to provide the applicant with the remainder as required by subsection 5 (2)?

[50] Subsection 5 (2) states that "[t]he right of access to…a record does not extend to information that is excepted from disclosure under this Part, but if that information can reasonably be separated or obliterated from a record an applicant has the right of access to the remainder of the record."

[51] In regards to this subsection, the Department submitted the following about the application of subsection 5 (2).

> *3.2.1 In applying the mandatory exceptions of s.15(1) the public body determined that the rule in 15(1) applies to the entire record. The implication of this is that even if a small part of the record contains information which would reveal a confidence of the Executive Council, that entire record must not be disclosed.*
>
> *3.3.4. The public body also turned its mind to the application of s.5(2) which states: "The right of access to a record does not extend to information that is excepted from disclosure under the Part, but if that information can reasonably be separated or obliterated from a record an applicant has the right of access to the remainder of the record."*
>
> *3.3.5 In determining that section 5 (2) does not apply to these records, the public body again found that the mandatory language of s.15(1) explicitly states that the public body must refuse to disclose 'a record'. The generality of the rule in s.5(2) does not modify the specific rule in s.15 (1).*[18]

[52] The Department's view is that if a record contains a cabinet confidence, then it must refuse the entire record and that subsection 5 (2) does not apply. I note here that the Department indicated in its submissions that it treated the email and attachments as separate records in order to provide more information to the applicant.[19]

[18] Department's submissions, at pp. 6 and 7.
[19] Department's submissions, at 3.3.6, at p. 7.

[53] There are 11 exceptions to the right of access under Part 2. The majority of the exceptions are for "information." Just three are for "a record." The cabinet confidence exception under section 15 is a mandatory exception to the right of access to a record containing cabinet confidences. The other two, section 18 (legal advice) and section 19.1 (harassment), are discretionary exemptions to the right of access.

[54] All public sector access to information laws in Canada have similar provisions that authorize or require a public body to refuse access to cabinet confidences. The majority of them authorize or require them to refuse access to "information" that qualifies as a cabinet confidence. In addition to Yukon's ATIPP Act, two, Saskatchewan's *Freedom of Information and Protection of Privacy Act* (SK FIPPA) and ON FIPPA contain a mandatory exception the right of access to "a record" that contains a cabinet confidence.[20] These laws, like Yukon's ATIPP Act, include a provision that requires a public body to sever information that must or may be refused, as provided for in the exceptions to disclosure, and provide the remainder of the record to the applicant.

[55] An adjudicator with the Office of Ontario's Information and Privacy Commissioner (ON IPC), Laura Cropley, had occasion to consider if Ontario's Ministry of Finance was required to sever information from records that she determined would reveal the substance of deliberations of the Executive Council in Ontario, if disclosed, and to provide the applicant with the remainder of the record. Her conclusion was that the Ministry was required to do so notwithstanding that subsection 12 (1) of ON FIPPA requires a public body to "refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or one of its committees." [My emphasis.]

[56] The requirement for a public body in Ontario to sever information from a record that may or must be excepted from disclosure and provide the remainder of the record to an applicant is in subsection 10 (1) of ON FIPPA. It states as follows.

> *Subsection to 69 (2),[21] every person has a right of access to a record or part of a record in the custody or under the control of an institution unless,*

[20] Newfoundland and Labrador's *Access to Information and Protection of Privacy Act* (NL ATIPPA) differs slightly from the rest given that it defines "cabinet record" which is distinct from the definition of "record" in access to information laws. Under NL ATIPPA, a public body must refuse to disclose to an applicant a cabinet record or information other than a cabinet record that would reveal the substance of deliberations of Cabinet (ss. 27 (1) and (2)).

[21] Subsection 69 (2) establishes when ON FIPPA applies to hospital records.

(a) the record or part of the record falls within one of the exemptions under sections 12 to 22; or

(b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[57] In reaching her conclusion, Copley referred to decisions of the ON IPC and Ontario courts that set out the principles to be applied in determining whether subsection 10 (1) applies to the cabinet confidences or solicitor-client privilege exception to the right of access in subsection 12 (1) and section 19 of ON FIPPA. Section 19 authorizes a public body to refuse to disclose "a record" to an applicant that contains solicitor-client or other legal privileges as provided for in that section. As indicated, subsection 12 (1) requires a public body to refuse to disclose "a record" that would reveal the substance of deliberations of the Executive Council or one of its committees.[22] She stated the following in relation to these principles.

With respect to the severance principle to section 19 of the Act, Senior Adjudicator David Goodis offered the following comments in Order PO-1663:

> *In Minister of Finance [Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner) (1997), 102 O.A.C. 71], the court (at page 77) stated the following with respect to the application of section 10(2) in the context of the section 19 solicitor-client communication privilege exemption:*
>
> > *It is apparent that the effect of the order under review is to compel the Ministry to disclose what it told its legal advisor to obtain legal advice. In my view, that constitutes a derogation of solicitor-client privilege and cannot be supported as a acceptable interpretation of s. 19. Once it is established that a record constitutes a communication to legal counsel for*

[22] In ON FIPPA, a record under subsection 12 (1) includes (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees; (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees; (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented; (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy; (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and (f) draft legislation or regulations.

> > *advice, it is my view that the communication in its entirety is subject to privilege.*
> >
> > *I would hasten to add that this interpretation does not exclude the application of s. 10(2), the severance provision, for there may be records which combine communications to counsel for the purpose of obtaining legal advice with communications for other purposes which are clearly unrelated to legal advice…*
>
> *In my view, none of the records claimed to be exempt under section 19 combines communications to or from counsel for the purpose of obtaining legal advice with communications "for other purposes which are clearly unrelated to legal advice". In addition, neither of the other limitations referred to by the court in Minister of Finance is applicable here. Therefore, I find that the section 10(2) severance provision has no application with respect to Records 2, 5 to 9, and 12 to 18.*

With respect to the issue of severance generally, in Order PO-1727, Senior Adjudicator Goodis discussed the principles to be applied in considering whether severance is appropriate:

> *Where a record contains exempt information, section 10(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information. In Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner) (1997), 102 O.A.C. 71, the Divisional Court stated:*
>
> > *I would note, however, that while the Commissioner has taken an excessively aggressive approach with respect to s. 10(2), the Ministry's position that 49 of the 50 documents were subject to Cabinet privilege and that s. 10(2) has no application whatsoever to the records at issue plainly went too far. The Act requires the institution head to disclose what can be severed and it is contemplated that the severance exercise will be conducted by those most familiar with the records. Had the Ministry made an effort to disclose what is severable, it is possible that the request could have been dealt with much more efficiently and much more expeditiously. While the Commissioner's order is, in my view, patently unreasonable, it should not go unmentioned that the situation before this Court was to some extent produced by the unreasonably hard line taken by the Ministry in its response.*

In my view, it would not be appropriate to this Court's function on judicial review to engage in a detailed record-by-record review of what should and should not be disclosed. That task should be left to the Commissioner in light of the legal principles enunciated here. Accordingly, I will say no more about precisely what, if anything, must be disclosed from the records at issue here.

I would, however, adopt as a helpful guide to the interpretation of s. 10(2) the following passage from the judgment of Jerome A.C.J. in Canada (Information Commissioner) v. Canada (Solicitor General), [1988] 3 F.C. 551 at 558 interpreting the analogous provision in the Access to Information Act, S.C. 1980-81-82-83, c. 111, sch. I, s. 25:

> *One of the considerations which influences me is that these statutes do not, in my view, mandate a surgical process whereby disconnected phrases which do not, by themselves, contain exempt information are picked out of otherwise exempt material and released. There are two problems with this kind of procedure. First, the resulting document may be meaningless or misleading as the information it contains is taken totally out of context. Second, even if not technically exempt, the remaining information may provide clues to the content of the deleted portions. Especially when dealing with personal information, in my opinion, it is preferable to delete an entire passage in order to protect the privacy of the individual rather than disclosing certain non-exempt portions or words.*
>
> *Indeed, Parliament seems to have intended that severance of exempt and non-exempt portions be attempted only when the result is a reasonable fulfilment of the purposes of these statutes. Section 25 of the Access to Information Act, which provides for severance, reads:*
>
> > *Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of an institution is authorized to refuse to disclose under this Act by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains any such information or material.*

> *Disconnected snippets of releasable information taken from otherwise exempt passages are not, in my view, reasonably severable.*

Similarly, in Montana Band of Indians v. Canada (Minister of Indian & Northern Affairs) (1988), 1988 CanLII 5630 (FC), 51 D.L.R. (4th) 306 at 320, Jerome A.C.J. stated:

> *To attempt to comply with s. 25 would result in the release of an entirely blacked-out document with, at most, two or three lines showing. Without the context of the rest of the statement, such information would be worthless. The effort such severance would require on the part of the department is not proportionate to the quality of access it would provide.*[23]

[Emphasis in original.]

SK FIPPA

[58] Subsection 16 (1) of SK FIPPA states that "[a] head shall refuse to give access to a record that discloses a confidence of the Executive Council."[24]

[59] Section 8 of SK FIPPA states that "[w]here a record contains information to which an applicant is refused access, the head shall give access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access."

[60] Saskatchewan's Information and Privacy Commissioner has in numerous decisions, reached the conclusion that if information that qualifies as a cabinet confidence can be severed from a record subject to an access request, the remainder must be provided to the applicant in accordance with the requirement in section 8 of SK FIPPA.[25]

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[23] Ministry of Finance, 2002 CanLII 46488 (ON IPC), at pp. 8 to 11.

[24] Included in the list of records under subsection 16 (1) of SK FIPPA are: (a) records created to present advice, proposals, recommendations, analyses or policy options to the Executive Council or any of its committees; (b) agendas or minutes of the Executive Council or any of its committees, or records that record deliberations or decisions of the Executive Council or any of its committees; (c) records of consultations among members of the Executive Council on matters that relate to the making of government decisions or the formulation of government policy, or records that reflect those consultations; (d) records that contain briefings to members of the Executive Council in relation to matters that: (i) are before, or are proposed to be brought before, the Executive Council or any of its committees; or (ii) are the subject of consultations described in clause (c).

[25] See for example CanLII 37987, 39750. 45364, 37983, 37986, 37984 and 34263 (SK IPC).

[61] Whether subsection 5 (2) applies to records containing cabinet confidences must be determined taking into account the purposes of the ATIPP Act, its scheme and intention of Parliament. The purposes in paragraphs 1 (1)(a) and (c) are relevant. They state as follows.

> *1(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by*
>
> *(a) giving the public a right of access to records;*
>
> *(c) specifying limited exceptions to the rights of access;*

[62] Subsection 5 (1) establishes the "right of access" that a person has when they make a request for access to information following the process set out in section 6. This right is to "any record in the custody or under the control of a public body, including a record containing personal information about the applicant." Subsection 5 (2) qualifies this right by limiting it to information that is not excepted from disclosure under Part 2, the access to information provisions in the ATIPP Act, of which there are only 11. The majority of the exceptions are discretionary, whereas only a few, including the cabinet confidence exception, are mandatory.

[63] A citizen's right to access information held by public bodies has been found by our courts to be fundamental to a citizen's ability to exercise their democratic rights and hold public bodies to account. The exceptions to the right of access have been interpreted by the courts narrowly so as to preserve the right of access to information. The exercise the courts have consistently undertaken to determine the approach in interpreting an exception is to examine the underlying interest to be protected by the exception and balance that interest against the public's right to access information.

[64] Applying this approach, in my view the proper balance to be achieved is to interpret the access to information provisions of the ATIPP Act, including subsections 5 (2) and 15 (1), in such a manner so as to maximize the right of access to information by limiting exemptions to this right only to the degree that it is necessary to protect the underlying interest in the exception.

[65] As I stated above, the underlying interest in subsection 15 (1) is to protect the confidentiality of Cabinet decision-making in order to promote good government. The exception in subsection 15 (1) ensures that cabinet confidences that are contained in records that are in the custody or control of Yukon government public bodies will not be made public through the access to information regime. The paragraphs in subsection15 (1) clarify the 'information' that qualifies as a cabinet confidence.

[66] Paragraph (a) specifies that any record, including an agenda and minute, containing the deliberations or decisions of the Executive Council or any of it committees must be protected. Paragraph (b) specifies that any record containing advice, analyses, policy option, proposals, recommendations, or requests that were submitted or were prepared for submission to the Executive Council or any of its committees must be protected. Paragraph (c) specifies that any record containing information that reflects consultation among Ministers on matters relating to the making of government decisions or the formulation of government policy must be protected. Paragraph (d) specifies that a record containing information prepared to brief a Minister in relation to the matters identified in subparagraphs (i) and (ii) must be protected.

[67] Subsection 15 (1) makes it clear that any record containing a cabinet confidence listed in paragraphs (a) through (d), or otherwise, must not be disclosed to an applicant. However, in order to maximize the right of access to information and achieve the proper balance between this right and protecting cabinet confidences, subsection 5 (2) must be interpreted such that it operates to ensure that an applicant retains their right of access to that portion of the record that the exception in subsection 15 (1) does not apply to. In my view, this interpretation accords with ATIPP Act's purposes, scheme and intention of Parliament.

[68] My decision in this regard is bolstered by the decisions above noted that arrived at the same conclusion when interpreting similar provisions in ON FIPPA and SK FIPPA. I will add that I agree with the conclusion reached by Jerome A.C.J. in *Canada (Information Commissioner) v. Canada (Solicitor General)*[26] that the removal of information that does not qualify as a cabinet confidence in a record does not require surgical precision. Information forming part of a cabinet confidence that is not technically exempt should not be disclosed to an applicant where it forms part of the cabinet confidence information. This is necessary to avoid the risk of the non-exempt information being taken out of context or providing clues as to the content of the cabinet confidence.

[69] I also agree, but for slightly different reasons, with Jerome, J.C.A. that where the bulk of a record that contains a cabinet confidence is separated or obliterated such that the remaining information is worthless, the record is no longer reasonably severable and subsection 5 (2) has no application. In my view, the remaining information in a severed record will only become worthless where the remaining content is no longer responsive to an applicant's access request.

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[26] *Canada (Information Commissioner) v. Canada (Solicitor General)*, [1988] 3 F.C. 551 at 558.

[70] Applying the foregoing to the information that I determined subsection 15 (1) or any of its paragraphs does not apply, the only information remaining in the 8 Records is as follows:

1. in Record 004, the department name, analyst information, decision body, and date;
2. in Record 006, the "to", "from" and "date" information, the signature information, and the footer information; and
3. in Record 009, the date information and signature information.

[71] As indicated above, the Applicant's Access Request was for "[m]emoranda or emails regarding the proposed amendments to the Elevator and Fixed Conveyances Act. Timeline: January 1, 2013 to present." [My emphasis]

[72] The remaining information in Records 004, 006 and 009 does not contain any information about the proposed amendments to the *Elevator and Fixed Conveyances Act*. Therefore, in my view the remaining information is not reasonably severable from these Records and I find that subsection 5 (2) does not apply to them.

Issue Two: Is the Department authorized by paragraph 16 (1)(a) of the ATIPP Act to separate or obliterate information from Record 003?

[73] Record 003 is an email between Department employees that references two documents prepared for the Minister and attaches them. In the body of the email is a conversation between these employees about the handling of documents. The Department separated or obliterated the conversation from this Record and is relying on paragraph 16 (1)(a) as its authority to do so.

[74] The Department submitted the following about its reliance on this paragraph.

> *3.6.2. In determining whether section 16 (1)(a) applied to this record, the public body gave consideration to the contents of the record and whether it is related to matters presented to cabinet.*
>
> *3.6.3 Page 003 – The public body found that the severed portion of this record.*
>
> *3.6.4 Contains recommendations to a public body.*
>
> *3.6.5 Contains information that is part of the analysis to support the amendment to the regulations to the Fixed Conveyances Regulations.*

3.6.6. Reflects matters presented to Cabinet for review and decision. As such, information in [sic] *page would reveal cabinet "behind the scenes", thus eroding the sanctuary of cabinet confidence. No one should know if items are before Cabinet or the associated details. Cabinet should have the ability to make decisions without public scrutiny.*

3.6.7 While Justice Stack in Hann was addressing his decision to a cabinet record, one of the cases he cites, John Doe v. Ontario (Finance), 2014 SCC 36 is actually about the discretionary ability to refuse access to information in the Ontario statue [sic] *which is similar to the Yukon's s.16(1). In John Doe, the unanimous judgement of the court was addressing a number of the questions the public body has faced in this request. Particularly relevant was the statement of the court in paragraphs 50-51.*

A public servant may engage in writing any number of drafts before communicating part or all of their content to another person. The nature of the deliberative process is to draft and redraft the advice or recommendations until the writer is sufficiently satisfied that he is prepared to communicate the results to someone else. All the information in those earlier draft informs the end result even if the content of any one draft is not included in the final version.

Protection from disclosure would indeed be illusory if only a communicated document was protected and not prior drafts. It would also be illusory if drafts were only protected where there is evidence that they led to a final, communicated version. In order to achieve the purpose of the exemption, to provide for the full, free and frank participation of public servants or consultants in the deliberative process, the applicability of s.13(1) must be ascertainable as of the time the public servant or consultant prepare the advice or recommendations.

3.6.8 In a professional civil service, it is expected that the civil service will identify and bring forward to the elected decision makers (Cabinet and the Ministers of which it is comprised) issues and problems to be solved. Precisely because it is difficult to identify the point at which a particular record is being prepared for Executive Council or a Minister, we have a discretionary exception for policy work (consultations and deliberations) that relate to those government decision and formulation of government policies.

> *3.6.9 If the case of this record (003) the severed information relates to the process leading up to the submission of documents to the Minister and his subsequent submission of those documents to CCL.*[27]

[75] Paragraph 16 (1)(a) is a discretionary exception to the right of access. It states as follows.

> *16(1) A public body may refuse to disclose information to an applicant if the disclosure would reveal*
>
> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a Minister;*

[76] In order to meet its burden of proof, the Department will need to establish that the information that was separated or obliterated from Record 003 qualifies as "advice, proposals, recommendations, analyses or policy options" and that the Record was "developed by or for a public body or a Minister."

[77] In Inquiry Report ATP17-36R,[28] I stated the following about the exception to the right of access in paragraphs 16 (1)(a) and (b).

> *…the purpose of allowing public bodies to except, from the right of access, records containing "advice", "consultation" or "deliberations" in certain and limited circumstances, as between employees of public bodies or a Minister, is to facilitate the free flow of information among these individuals so they may arrive at well reasoned decisions without fear of public judgement or other embarrassing ramifications.*
>
> *This is consistent with purposes of the ATIPP Act which are to give the public a right to access public body information subject only to limited and specific exceptions. The circumstances that must be present for these exceptions identified by the AB IPC contribute to the narrowing of these exceptions such that they are limited and specific and interfere with the right of access only as necessary to facilitate the free flow of information where certain criteria are met.*[29]
>
> [Footnotes omitted]

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[27] Department's submissions, at pp. 20 and 21.
[28] ATP17-36R, Department of Community Services, November 13, 2018 (YT IPC).
[29] *Ibid.,* at para. 42.

[78] The "certain and limited circumstances" referenced in the above passage are those that involve discussions between Yukon government employees about a particular course of action to be taken as it relates to a government initiative or policy, or some other type of decision that may impact on government direction, and which contains advice, analyses, policy options, proposals, recommendations or requests for direction as it relates to the initiative or policy. Conversations of this nature will have substantive content to which subsection 16 (1) may apply.[30] Conversations absent substantive content will not fall into any of the exceptions in this subsection.[31]

[79] The information separated or obliterated from Record 003 is instruction from one Yukon government employee to another about what to do with the documents and speaks to the process of providing them to the Minister. There is nothing substantive about the content of the conversation that would bring the information within the purview of paragraph 16 (1)(a) as a recommendation or otherwise. If the type of information in this Record were subject to the paragraph 16 (1)(a) or 16 (1)(b) exceptions as the Department contends, the right of the public to access information in the custody or control of Yukon government public bodies would be severely circumscribed as conversations, the type of which appears in this Record, occur on a daily basis between government employees and likely form the bulk of information in public bodies' records.

[80] Although I have determined that paragraph 16 (1)(a) does not apply to the information separated or obliterated from Record 003, I am of the view that certain words in the first sentence of the email qualify as a cabinet confidence under subsection 15 (1) that if disclosed would reveal a cabinet confidence to the Applicant.

[81] Based on the foregoing, I find that paragraph 16 (1)(a) does not apply to the information separated or obliterated from Record 003. I further find that subsection 15 (1) applies to certain words in the first sentence of the email.

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[30] Noting here that even if it does, the public body must still exercise its discretion about whether or not disclose the information to the applicant.

[31] Former Alberta Information and Privacy Commissioner, Frank Work, in F2004-025, Alberta Labour Relations Board, September 18, 2006, arrived at a similar conclusion when interpreting a similar provision, paragraph 24 (1)(b) in Alberta's *Freedom of Information and Protection of Privacy Act*. His discussion about the nature of communications that this subjection protects can be found at paras. 78 to 80.

VIII FINDINGS

[82] On the issue before me, I find that:

1. the Department has met its burden of proving that paragraph 15 (1)(b) and subparagraph 15 (1)(d)(i), as above indicated, applies to the majority of the information in the 8 Records;
2. subsection 15 (1) applies to the information, as above indicated in Records 004, 006 and 009;
3. for the reasons indicated, subsection 5 (2) does not apply to the 8 Records;
4. the Department has not met its burden of proving that paragraph 16 (1)(a) applies to the information separated or obliterated from Record 003; and
5. the Department is required by subsection 15 (1) to refuse to provide the Applicant with access to certain words in the first sentence of the email conversation in Record 003.

IX CONFIRMATION/RECOMMENDATION

[83] On the issue before me, I confirm that that the Department is required to refuse to provide the Applicant with access to the whole of Records 002, 004 to 006 and 009 to 012.

[84] On the issue before me, I recommend that the Department provide the Applicant with access to the information separated or obliterated from Record 003 with the exception of the information therein that I found subsection 15 (1) applies to.

Public Body's Decision after Review

[85] Section 58 of the Act requires the Department to decide, within 30 days of receiving this Inquiry Report, whether to follow my recommendation. The Department must give written notice of its decision to me and the Applicant, noted on the distribution list below.

[86] 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 recommendation.

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

Applicants' Right of Appeal

[88] Paragraph 59 (1)(a) gives the Applicant the right to appeal to the Yukon Supreme Court when the Department decides not to follow my recommendation.

[89] Paragraph 59 (1)(b) gives the Applicant the right to appeal to the Yukon Supreme Court my confirmation that the Department is required to refuse to give access to the information identified in the confirmation.

[90] Subsection 59 (3) states that an appeal must be made "by giving written notice of the appeal to the Department within 30 days of the appellant receiving the body's decision."

[91] Sections 59 to 61 set out the requirements for appeal and the authority of the Yukon Supreme Court on appeal.

ORIGINAL SIGNED

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

Distribution List:

- Public Body
- Applicant c/o Office of the IPC