

**INQUIRY REPORT
File# 09-003AR****Tracy-Anne McPhee
Information and Privacy Commissioner (IPC)****Public Body: PUBLIC SERVICE COMMISSION
Date: March 16, 2012**

Summary: The Applicant made a request to the Public Service Commission (PSC) for the amount of "performance pay" paid to each Deputy Minister in the years 2002-03 to 2008-09. The PSC refused access to the information relying on the personal privacy exceptions in section 25(1) and 25(2)(d), (f), and (g) that disclosure is an unreasonable invasion of a third party's personal privacy. The PSC argued there were no relevant circumstances in section 25(4) weighing in favour of disclosure of the information.

The Applicant argued that disclosure of this information was authorized by section 25(3) and release of the information is not an unreasonable invasion of personal privacy. The Applicant also argued that even if disclosure of the information is an unreasonable invasion of personal privacy, section 25(4)(f) weighs in favour of disclosing the personal information because it is desirable for the purpose of subjecting the activities of Government of Yukon to public scrutiny.

Finding: The IPC confirmed that the PSC was required to refuse access to the information requested according to section 25(2)(g). The IPC found that section 25(4)(f) did not, in the circumstances of this case, favour disclosure of the personal information for the purpose of achieving public scrutiny.

Statutes Considered: *Access to Information and Protection of Privacy Act*, R.S.Y. 2002, c. 1, sections 25(1) and 25(2)(d), (f), and (g), 25(3)(j) and 25(4)(f), 54(1)(a), 57(2)(c).

Cases Considered: CBC et al v. The Commissioner of the NWT 2006 NWTSC 33 (CanLII)
Dagg v. Canada (Minister of Finance) 1997 CanLII 358 (SCC)
University of Alberta v. Alberta (Information and Privacy Commissioner), 2009 ABQB 112 (CanLII)
Alberta Information and Privacy Commissioner Order F2008-010

I INTRODUCTION

- [1] The Applicant asked the Public Service Commission for access to:
- Individual salaries paid to each deputy minister from 2002-03 to 2008-09; and
 - Individual performance pay paid to each deputy minister from 2002-03 to 2008-09.
- [2] The PSC responded to the Applicant refusing access to that information on the grounds that the information was the personal information of third party individuals and pursuant to sections 25(1), 25(2) (d), (f) and (g) of the *Access to Information and Protection of Privacy Act (ATIPPA Act)* the department was required to refuse to disclose the requested information.

- [3] The Applicant asked the IPC to review the decision to refuse to disclose the information.

Mediation

- [4] Mediation was authorized and resulted in the Applicant withdrawing the request for access to the individual salaries paid to each Deputy Minister. The request was narrowed in scope to the percentage amount of performance pay granted to each deputy minister identified by name for the period 2002-03 to 2008-09.

II ISSUES

- [5] The two questions I must decide are:
1. Is the PSC required by section 25 to refuse access because disclosure of the requested information would be an unreasonable invasion of a third party's personal privacy?
 2. If so, does section 25(4)(f) operate to require the PSC to disclose the personal information for the purpose of subjecting the activities of the Government of the Yukon or a public body to public scrutiny?

III DISCUSSION

Records in Dispute

- [6] The parties agreed that given the volume of records caught by the request and the Applicant's interest only in specific information from those records (the year, the name of the deputy minister, and the percentage amount of performance pay paid in each of the years 2002-2003 to 2008-09) the PSC would create a record that included only that information.
- [7] For the purpose of this Inquiry, the PSC created two sample records containing the requested information. Preparation of the sample records was done by agreement of the parties.

- [8] The sample record was provided to the IPC. At no time was the sample record or any of its contents disclosed to the Applicant by the IPC or any of her delegated staff.

Burden of Proof

- [9] According to section 54(1)(a) of the ATIPP Act the public body, PSC must prove that the Applicant has no right of access to the records in dispute.

Operation of Section 25

- [10] Section 25 of the ATIPP Act deals with personal information of a third party. Section 25(1) requires a public body to refuse access to personal information where its disclosure would be an unreasonable invasion of a third party's personal privacy.
- [11] Section 25(2) creates a presumption that certain kinds of information, if disclosed, **would be** an unreasonable invasion of a third party's privacy and provides examples. Section 25(3) on the other hand creates a presumption that certain kinds of information, if disclosed, **would not be** an unreasonable invasion of a third party's privacy. Neither of these sections contains an exhaustive list of personal information.
- [12] Section 25 does not prevent disclosure of all third party personal information. It requires a public body to assess the nature of the personal information in deciding whether or not disclosure would be an unreasonable invasion of personal privacy.
- [13] Section 25(4) must also be considered in making a decision about disclosing personal information. Section 25(4) requires a public body, before refusing to disclose the personal information, to consider all the relevant circumstances listed in that section weighing for and against disclosure. This section makes clear that the presumptions against disclosure in section 25(2) can be rebutted having regard to all the relevant circumstances. In other words the examples of personal information in section 25(2) are not an absolute bar to disclosure but must be considered in light of the circumstances set out in section 25(4).
- [14] Section 25 is structured to strike the balance between the competing interests of access rights and protection of personal privacy.

- [15] Both sections 25(2) and 25(3) deal with, among other things, types of employment information. A decision of the Northwest Territories Supreme Court¹ helps in understanding the distinction between the kind of personal employment information exempt from disclosure in 25(2) (unreasonable invasion) and the kind of information that is not exempt from disclosure in 25(3) (not an unreasonable invasion). Judge Vertes describes the distinction between “specific” and “general” information. For example, specific information such as the third party’s employment history and income cannot be disclosed under 25(2). General information such as the third party’s job classification or salary range can be disclosed under 25(3).
- [16] The Supreme Court of Canada in Dagg v. Canada (Minister of Finance)² described the distinction in similar terms. The Supreme Court said information which is “generic” to a position or function which incidentally reveals something about a person is disclosable. “Subjective” information, relating primarily to an individual him or herself or to the manner in which he or she chooses to perform employment, is not disclosable.
- [17] This distinction represents the legislature’s choice in attempting to balance the public interests in disclosure of how government spends its money against the privacy rights of its employees.³

PSC Submissions

- [18] The PSC says it is required to refuse access to the requested records under sections 25(1) and 25(2) of the ATIPP Act. Specifically the PSC says that the personal information in dispute falls under section 25 (2)
- *(d) relates to a third party’s employment history;*
 - *(f) describes a third party’s finances and income; and*
 - *(g) consists of personnel evaluations*

¹ CBC et al v. The Commissioner of the NWT 2006 NWTSC 33 (CanLII) at para 29

² Dagg v. Canada (Minister of Finance) 1997 CanLII 358 (SCC), paras 12, 94 and 95. The federal privacy and access scheme operates differently than that of the Yukon. However the courts were considering an exclusion for certain kind of employment information and what is relevant from this decision is the distinction adopted by both the majority and the dissenting minority between information that is subject to disclosure and that which is not disclosable.

³ Supra note 1

and disclosure of the personal information is presumed to be an unreasonable invasion of personal privacy and according to section 25(1) must not be disclosed.

- [19] The PSC also submits that none of the relevant circumstances in section 25(4) weighing in favour of disclosing the personal information apply in this case.

Applicant Submissions

- [20] The Applicant submits that the requested information falls under section 25(3)(j) in that it reveals details of a discretionary benefit of a financial nature granted to the third party by a public body and disclosure of this information is not an unreasonable invasion of a third party's personal privacy.
- [21] The Applicant also submits that even if disclosure is an unreasonable invasion of personal privacy, section 25(4)(f) weighs in favour of disclosing it because it is desirable for the purpose of subjecting the activities of Government of Yukon or a public body to public scrutiny.

IV ANALYSIS

- [22] The first step in the analysis of this Inquiry is to determine the nature of the information that is being requested.

What is Performance Pay and how is it determined?

- [23] The PSC attached a document to its Affidavit entitled "Section M Government of Yukon Conditions of Employment for Excluded Groups: Managers, Legal Officers, and Deputy Ministers" (Section M). This document sets out the terms and conditions of employment for certain employees including deputy ministers. Among other things, it specifically sets out the terms and conditions of performance pay. Information relevant for this Inquiry is found at pages 4, 6, 13, 14, 42 and 43 of Section M.

Section M

- [24] Salary administration for deputy ministers is determined by the provisions of Section M.

- [25] The objectives of performance pay for deputy ministers and how it is determined are set out as follows:

Objectives of the pay plan for Deputy Ministers are:

To reward Deputy Ministers on a basis which reflects Cabinet's judgement of their worth; and

To permit greater flexibility of assignment (in accordance with Cabinet's perceived needs and priorities) than is possible under a conventional job evaluation plan.

(Section M, Part 15, page 42)

Performance Pay

The performance rating provided to a Deputy Minister, and the amount of performance pay awarded is subject to the decision of Cabinet or the Premier on behalf of Cabinet.

A Deputy Minister may be granted performance pay when his/her conduct and performance has been satisfactory.

(Section M, Part 15, page 43)

- [26] Section M also identifies levels of performance and the quantum of performance pay to managers within a salary range as an increase to their annual salary. The levels of performance are as follows:

Levels of Performance

- *Developing 0-2 % - Performance meets some and is below other requirements for the objectives. There is a need for further improvement or experience on the job before performance fully meets the expected objectives.*
- *Fully Contributing 2-4% - Performance is consistently solid and reliable. Performance fully meets objectives in key areas and sometimes exceeds requirements.*

- *Outstanding 4-8% - Performance consistently exceeds requirements in all core objectives and exceeds most defined expectations. Individual demonstrates a model of excellence for others. Peers, direct reports and/or higher level management can readily recognize this level of performance.*

(Section M, Part 4, page 14)

- [27] How performance pay will be paid and/or increases a deputy minister's annual salary is set out in Section M. Affidavit evidence submitted by PSC explains that performance pay that is awarded in the form of a salary increase is done as a permanent increase to salary. A review of Section M reveals that a salary increase, following an evaluation of the individuals work performance, is the manner in which a deputy minister moves through the salary range for their position.

Eligibility for Performance Pay

Managers (including deputy ministers) below the maximum of their annual salary range on October 1 are eligible for an increase in their annual salary.

Managers (including deputy ministers) at the maximum of their annual salary range on October 1 whose performance is rated at the outstanding level are eligible for a cash payment but are not eligible for an increase in their annual salary.

(Section M, Part 4, page 13)

V DISCUSSION OF ISSUES

Is the information in dispute personal information?

- [28] For the purposes of this Inquiry the parties agreed that the information requested is "personal information" of a third party as defined in section 3 the Act.
- [29] I agree. Personal information is defined as recorded information about an "identifiable" individual including the individual's "name" and information about the "individual's financial history". The information requested by the Applicant including the deputy minister's name and amount or percentage of performance pay,

is personal information about an identifiable individual within the meaning of section 3.

Is disclosing the information an unreasonable invasion of personal privacy?

[30] The PSC submits that the amount of performance pay paid to each deputy minister is information that relates to employment history (section 25(2)(d)), is information that reveals detail of income (section 25(2)(f)) and is information that 25(2)(g) information that is a personnel evaluation. The PSC claims that it is required to refuse access to the requested information because disclosure is an unreasonable invasion of personal privacy (section 25(1)).

[31] The Applicant submits that disclosure of this information was authorized by section 25(3) and release of the information is therefore not an unreasonable invasion of personal privacy.

[32] The analysis must address the following questions:

1. Does the performance pay information consist of a personnel evaluation, employment history or describe income?
2. Is performance pay a discretionary benefit?
3. Is disclosure desirable to subject government or a public body to public scrutiny?

Is performance pay information a personnel evaluation?

[33] On this point the PSC argues:

Releasing the information about specific deputy ministers would reveal to the Applicant whether a particular deputy minister's performance was satisfactory or not. That is clearly a personnel evaluation and to release the information would be an unreasonable invasion of the third party's personal privacy. The Applicant would through this indirect mechanism become privy to information about

*employee performance that he would not be able to access directly.*⁴

- [34] The PSC says the information requested would reveal the performance evaluation of each deputy minister over the length of their employment with Yukon Government from 2002 to the end of the 2008-09 fiscal years. The Applicant makes no specific argument about the information being a personnel evaluation other than to characterize performance pay as a discretionary benefit, which I will come to in a moment.
- [35] Section M clearly says that performance pay is based on an evaluation of an individual's conduct and performance in a given year. The performance or conduct of each individual deputy minister is measured against certain identified objectives. Performance pay is based on the assessment or evaluation of his or her success in achieving the objectives. This assessment is bench marked to a level of performance. The percentage amount of performance pay, between 0% and 8%, depends on an evaluation of the level of performance achieved in a given year.
- [36] The sample record prepared in this case includes a year, a deputy minister's name, and the percentage amount of performance pay each received. Disclosing the amount of performance pay for a named deputy minister would indirectly reveal information about the personnel evaluation of that deputy minister for the time period in question. It would reveal how the Cabinet or Premier rated his or her performance in a given year. A deputy minister that received the maximum 4% to 8% performance pay clearly met the performance expectations. A deputy minister that received no performance pay did not.
- [37] In addition, disclosing that information for several years would reveal how an employee was meeting their objectives over an extended period of time and how they were doing in comparison to others in similar positions. Disclosure of the requested information would reveal specific information about how an identified individual person did their job over time.

⁴PSC Initial Submission at p.7 para 27

[38] A similar conclusion was reached by the Alberta Court of Queen's Bench⁵ on judicial review of a decision of the Alberta Information and Privacy Commissioner. The Judge concluded:

This Court finds it difficult to see how the increment is not a performance "evaluation" and, therefore concludes that the Adjudicator's finding was reasonable.

[39] I am satisfied that the performance pay information, as set out in the sample record, would reveal information related to a personnel evaluation as contemplated by section 25(2)(g) and disclosure of it would be an unreasonable invasion personal privacy.

Employment history or income?

[40] It is possible that the requested information could also reveal something about an individual deputy ministers employment history (section 25(2)(d)) or their income (section 25(2)(f)) but I do not have to assess that here. Having concluded that section 25(2)(g) applies to the requested information, I do not need to consider the applicability of the other sections relied on by the PSC to refuse disclosure of the requested information.

Is performance pay a discretionary benefit?

[41] Section 25(3)(j) states:

A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(j) the disclosure reveals details of a discretionary benefit of a financial nature granted to a third party by a public body...

[42] The Applicant's submission is that "performance bonuses" are discretionary benefits. The Applicant notes that the ATIPP Act does not define discretionary benefits but says guidance can be found in a decision of Alberta's Information and Privacy Commissioner in Order F2005-016 at paragraph 42 which is quoted in the submission:

⁵ University of Alberta v. Alberta (Information and Privacy Commissioner), 2009 ABQB 112 (CanLII) para 98

In deciding what constitutes "discretionary benefits", previous Orders of this Office have defined "benefit" to mean, among other things, a favourable or helpful factor in the circumstance, or an advantage... "Discretionary" means that a decision-maker must have a choice as to whether, or how to grant the benefit..."

- [43] I accept the definition set out above but disagree that performance pay, in this case, is a discretionary benefit.
- [44] A review of Section M reveals that performance pay is part of the salary administration process for managers and deputy ministers. Section M requires the assessment to be conducted annually. Performance pay is the manner in which deputy ministers are granted salary increases. Once at the top of the salary range, deputy ministers whose performance is rated outstanding are eligible for a cash payment. In my view, the manner in which it is paid, either as a salary increase or as a cash payment, does not change the fact that performance pay is part of the salary administration for deputy ministers and not a discretionary benefit.
- [45] The Applicant argues that the words "may be granted performance pay" in Section M indicates discretion and concludes that:
- "may" commonly indicates discretion. The employer has a choice as to whether or not to grant a performance bonus. Therefore performance bonuses are discretionary benefits.⁶*
- [46] While there is a limited discretion to decide the percentage amount within the range prescribed for each level of performance, this does not make performance pay a discretionary benefit.
- [47] I disagree with the Applicants assertion that the employer has a choice as to whether or not to grant performance pay. Section M requires that a performance assessment take place on an

⁶ Applicant's Initial Submission, page 2, para 6

annual basis. Section M also defines the levels of performance that must be met and sets out the corresponding percentage amounts of performance pay. These obligations on the part of the employer are not discretionary.

- [48] The impact of the employer's obligations in determining if a payment is a discretionary benefit was considered by Judge Vertes in the CBC case.⁷ Although that case dealt with severance pay pursuant to an employment contract, it was the employer's obligations that were determinative.

*The mere fact that the severance agreement was the subject of negotiation does not derogate from the essential fact that the agreement was contemplated in a pre-existing employment contract and that the terms negotiated were pursuant to the terms of that pre-existing contract. This removes the severance agreement from the discretionary category.*⁸

- [49] I find that performance pay, in the context of this case, is not a discretionary benefit and therefore section 25(3)(j) does not rebut the presumption that disclosure would be an unreasonable invasion of personal privacy.

Is disclosure of performance pay information desirable for public scrutiny?

- [50] Having decided that section 25(2)(g) applies to the information in dispute I must now consider whether any of the circumstances in section 25(4) apply here. I agree with the Applicant that the only relevant circumstance in this case is that set out in 25(4)(f) which says that disclosure of the performance pay information is desirable for the purpose of subjecting the activities of the Yukon Government to public scrutiny.
- [51] The PSC submits that they considered the circumstances in section 25(4) before refusing to disclose the requested information. The PSC submits that the desire for public scrutiny is satisfied by the publicly available Section M, conditions of employment, and salary range

⁷ Supra, note 1

⁸ Ibid, para 41

information⁹ combined with some statistical information about performance pay, including the range of percentages paid each year for the last ten years, which was provided to the Applicant in a separate but related access request.¹⁰

- [52] The test for application of section 25(4)(f) has been well considered in other jurisdictions. I agree with the approach taken by both British Columbia and Alberta which is best described as follows:

*For the relevant circumstance relating to public scrutiny to apply, there must be some evidence presented that the activities of a public body have been called into question which necessitates the disclosure of a third party's personal information in order to subject the activities of the public body to public scrutiny.*¹¹

- [53] The Applicant argues that releasing the requested information would allow a comparison between the performance of the deputy minister and the performance of a particular public body.¹² The Applicant does not elaborate on how the requested information would be useful in this regard.

- [54] The sample record reveals information about a specific individual's performance, it does not reveal anything about the public body. Disclosure of a percentage amount of performance pay, be it 8% or 0% reflects an evaluation of the employee's performance but does not reveal any information about whether or not the public body has met its objectives. Comparison of the deputy minister's performance with that of the public body, the stated goal of the Applicant here, is not assisted in any meaningful way by disclosure of the performance pay information.

- [55] The Applicant also argues that many provincial governments in Canada routinely disclose salaries and bonuses of deputy

⁹ PSC initial Submission, page 12, para 42

¹⁰ PSC Reply Submission, page 2, para 5

¹¹ Alberta Information and Privacy Commissioner Order F2008-010 at para 25, referencing Orders F2004-015, para 88 and 97-002, para 94

¹² Applicant's Initial Submission, page 3, para 8

ministers, and that this is evidence that disclosing that information, in this case, would not be damaging to the deputy ministers and I should recommend that the Yukon PSC be held to that standard. Specific reference is made to an Alberta government policy which states that public bodies must routinely disclose details of any discretionary amount such as a bonus, incentive, award or negotiated severance amount. The Applicant characterizes performance pay as a bonus and suggests that the use of the word 'bonus' in the Alberta policy supports the conclusion that performance pay should be disclosed in the Yukon.

- [56] It is often helpful to look to other jurisdictions with similar legislation for guidance, but care must be taken to respect the specific differences in the legislation. Some jurisdictions have made the choice and passed legislation or adopted policy which requires disclosure of specific employment information, such as salaries or performance pay or bonuses. Regardless of what occurs in other jurisdictions, the ATIPP Act governs the kind of personal information that Yukon public bodies are authorized to disclose.
- [57] In order for the scales to tip in favour of disclosing information that has been found to be the personal information of third parties, evidence must be provided to indicate the link between the disclosure and the need for public scrutiny. There must be some explanation of what activity of government is being called into question that necessitates the disclosure of a third party's personal information.
- [58] The Applicant has not provided evidence of any significant public concern or explained how the disclosure of the requested information would allow for public scrutiny of it. Therefore, I do not find that disclosure of the personal information would assist in subjecting the Government of Yukon activities to public scrutiny.

VI CONCLUSION

- [59] For the reasons given above, according to section 57 of the Act, I confirm that the operation of section 25(2)(g) requires the PSC

to refuse to disclose the information in dispute as disclosure would result in an unreasonable invasion of a third party's personal privacy.

[60] I also find that section 25(4)(f) does not, in the circumstances of this case, favour disclosure of the personal information for the purpose of achieving public scrutiny.

VII APPLICANT'S RIGHT OF APPEAL

[61] According to section 59(1)(b) of the ATIPP Act, the Applicant has the right to appeal my decision, that the PSC is required to refuse access to the information requested, to the Yukon Supreme Court.

March 16, 2012

ORIGINAL SIGNED BY

Tracy-Anne McPhee
Yukon Information and Privacy Commissioner

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