



Yukon
Information
and Privacy
Commissioner

INQUIRY REPORT 2

File ATP16-031AR

Pursuant to section 52 of the

Access to Information and Protection of Privacy Act

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

Department of Environment

September 5, 2019

Summary: This inquiry report (Inquiry Report 2) is a continuation of an Inquiry that began in January of 2017. On September 18, 2017, the Information and Privacy Commissioner (IPC) issued her Inquiry Report (Inquiry Report 1) to the Department of Environment (Department). Afterwards, the Department informed the IPC that it had identified an additional 1,294 pages as responsive to the Applicant's access request and that would have been subject to the IPC's review in Inquiry Report 1. The IPC instructed the Department to review the pages and provide a response in respect of them to the Applicant.

After receiving the additional pages from the Department with information separated or obliterated therein, the Applicant asked the IPC to review whether the Department had authority for the separations or obliterations. The IPC decided to reopen the Inquiry to determine whether the Department had properly exercised its authority for the separations or obliterations. The Department cited a number of provisions under section 25 (unreasonable invasion of personal privacy) of the *Access to Information and Protection of Privacy Act* (ATIPP Act) as its authority for the separations or obliterations.

The IPC found that the Department was required by subsection 25 (1) and subsection 25 (2) or 25 (4) to separate or obliterate the personal information that it separated or obliterated from the additional pages, with the exception of certain personal information where she found that these provisions did not apply. Specifically, she found that subsection 25 (1) did not apply to the 'leave' information about an employee,¹ certain words in two sentences, and to two phone numbers. For the phone numbers, she found in the specific context that they are not personal information under the ATIPP Act because they are not 'personal information about an identifiable individual'.

¹ All references to 'employee' in this Inquiry Report are to an employee of Yukon government unless otherwise stated.

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Additional Statutes Cited

None.

Additional Cases Cited

Court

Edmonton (City) v Alberta (Information and Privacy Commissioner), 2016 ABCA 110.

Information and Privacy Commissioners

Order F2018-09, *Alberta Health Services (Re)*, 2018 CanLII 7268 (AB OIPC).

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 September 18, 2017, I issued Inquiry Report 1² following my review of the decisions made by the Department in respect of an access to information request submitted by the Applicant, dated March 24, 2016, in which the Applicant requested the following.

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

² Inquiry Report 1 is located on the Information and Privacy Commissioner's website at: [https://www.ombudsman.yk.ca/uploads/media/5a6f7acb33902/%7DINQUIRY%20-%20Revised%20Jan%202018%20Final%20%20Inquiry%20Report%20ATP16-031AR%20\(2\).pdf?v1](https://www.ombudsman.yk.ca/uploads/media/5a6f7acb33902/%7DINQUIRY%20-%20Revised%20Jan%202018%20Final%20%20Inquiry%20Report%20ATP16-031AR%20(2).pdf?v1).

[2] The Department initially identified 3,125 pages as being responsive to the Applicant's Access Request. These pages were identified in the Inquiry as the 'Records at Issue'. My findings and recommendations in respect of the exceptions applied to the Records at Issue are set out in Inquiry Report 1.³ After issuing Inquiry Report 1, my office was informed by the Department that it had located an additional 1,294 pages as being responsive to the Access Request (Additional Records).

[3] I instructed the Department to review the Additional Records and to provide the Applicant with a response. For any separations or obliterations made involving personal information, I instructed the Department to refer to Inquiry Report 1 to determine whether subsection 25 (1) applies to any personal information in the Additional Records and to separate or obliterate the information as applicable. I then informed the Applicant that they would receive a response from the Department and that they then could request that I review the decisions made about any separations, obliterations or refusals if they were of the view that they were made without authority. I also informed the parties that I would reopen the Inquiry if the Applicant requests a review of the decisions made by the Department in respect of the Additional Records.

[4] The Department provided its response and a copy of the Additional Records to the Applicant on August 27, 2018. Some personal information was separated or obliterated from the Additional Records. The Applicant requested that my office review the decisions made by the Department in respect of the separations or obliterations. I decided to reopen the Inquiry.

II JURISDICTION

[5] My authority to review the separation or obliteration of information from a record is in paragraph 48 (1)(b).

48(1) A person who makes a request under section 6 for access to a record may request the commissioner to review

(b) a decision by the public body to separate or obliterate information from the record;

³ Inquiry Report 1 is located on the Information and Privacy Commissioner's website at: [https://www.ombudsman.yk.ca/uploads/media/5a6f7acb33902/%7DINQUIRY%20-%20Revised%20Jan%202018%20Final%20%20Inquiry%20Report%20ATP16-031AR%20\(2\).pdf?v1](https://www.ombudsman.yk.ca/uploads/media/5a6f7acb33902/%7DINQUIRY%20-%20Revised%20Jan%202018%20Final%20%20Inquiry%20Report%20ATP16-031AR%20(2).pdf?v1).

III INQUIRY PROCESS AND SUBMISSIONS

[6] The parties were notified that I was reopening the Inquiry and both were invited to make submissions. The Applicant did not make submissions. The Department provided me with a schedule of records setting out the exceptions that it had applied to the information separated or obliterated, together with a copy of the records with the information revealed for my review. The Department relied on subsection 25 (1) to refuse access to the information that was separated or obliterated. This provision requires the Department to refuse access to personal information where it would amount to an unreasonable invasion of the personal privacy of an individual to disclose the information to an applicant. The Department did not provide me with any submissions about the application of this provision to the separations or obliterations.

IV RECORDS AT ISSUE

[7] The records at issue for the continuation of the Inquiry are the Additional Records.

V ISSUES

[8] The issue for the continuation of the Inquiry is as follows.

Do subsections 25 (1), together with 25 (2) or 25 (4), apply to the information separated or obliterated from the Additional Records?

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 the information that was separated or obliterated from the Additional Records.

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

(a) that the applicant has no right of access to the record or the part of it in question...

VII ANALYSIS

[10] Following my review of the exceptions applied to the Additional Records, I was able to determine that the Department is authorized to rely on the provisions cited under section 25 for the majority of the information separated or obliterated from the pages, with the exception of the following.

- a. The information on pages 3675 and 3679 qualify as an employee's personal information. The personal information reveals that an employee was on leave. There is no indication as to why the employee was on leave or the duration. Given this, I am of the view that disclosure of this personal information to the Applicant will not amount to an unreasonable invasion of this employee's personal privacy.
- b. On pages 3734 and 3744, there is a duplicate email. Words from the same sentence on both pages are separated or obliterated. There are more words separated or obliterated from the sentence on page 3734 than on page 3744. I agree with the Department that the information separated or obliterated from the pages is personal information about an employee. I agree with the Department that the provisions cited apply to the personal information removed from page 3744. I disagree with the Department that the provisions cited apply to the extra words that are separated or obliterated from page 3734.
- c. On page 3513, the Department separated or obliterated words from a comment in a document. The information that is separated or obliterated qualifies as personal information. I agree that the provisions cited apply to some of the words but not all of them. I will provide a copy of the record to the Department identifying the words to which the provisions cited do not apply.

[11] I was unable to determine from my review of the information that is separated or obliterated from pages 2755 and 2756 if the provisions cited apply. The information separated or obliterated from the pages is the name of an individual and where they live, along with four phone numbers. The provisions relied upon by the Department for the separations or obliterations are subsections 25 (1) and 25 (4). On August 6, 2019, I requested that the Department provide me with additional evidence about the information separated or obliterated and the provisions relied upon. The evidence sought was provided by the Department on August 15, 2019.

[12] The Department provided the following evidence about the information separated or obliterated from these pages.

- a. The individual named in the record and where they live is an individual who is not an employee of Yukon government (YG).⁴ One of the phone numbers in the record belongs to this individual.⁵
- b. The remaining three phone numbers are as follows.
 - i. The first phone number that appears on page 2755 is the personal cell phone number of an employee.⁶ The employee verified this information. They also verified that, at the time the record was created, they had both a personal cell phone and work-issued cell phone.⁷
 - ii. The second phone number appearing next to the first phone number on the same page is one that an employee indicated might have been their work phone number when working at a YG office. The employee confirmed that this phone number is not their current work phone number.⁸
 - iii. The third phone number appearing on page 2756 is a cell phone number that was recorded incorrectly. The phone number is attributed to an employee in the record and was intended to relay this employee's work-issued cell phone number to another employee. The employee, whose cell phone number it was intended to be, verified that their work-issued cell phone number is not the one that appears in the record.⁹

[13] I am satisfied, from the evidence provided by the Department, that the name, address and phone number of the non-YG employee qualify as this individual's personal information. I am also satisfied that disclosing this personal information to the Applicant would amount to an unreasonable invasion of the individual's personal privacy and agree with the Department that subsections 25 (1) and 25 (4) apply to this personal information.

⁴ Letter from the Department dated August 15, 2019, at p.1.

⁵ *Ibid.*, at p.2.

⁶ *Ibid.*

⁷ Email from employee to Department dated August 9, 2019.

⁸ *Ibid.*

⁹ *Ibid.*

[14] I am also satisfied from the evidence that the employee's personal cell phone number is their personal information and that, in this case,¹⁰ disclosure of this personal information to the Applicant would amount to an unreasonable invasion of the employee's personal privacy. I agree with the Department that subsections 25 (1) and 25 (4) apply to this information.

[15] For the following reasons, I am not satisfied that the other two phone numbers, the work phone number and the work-issued cell phone number, qualify as personal information.

[16] The work-issued cell phone number that is recorded in the record is incorrect. The employee identified that the other phone number 'might' have been a former work phone number but was uncertain. The Department provided the following evidence about this phone number.

An employee of the Department "called the number...and a female answered "hello" and I said "is this the [YG office] and she said "No" and hung up the phone. This is clearly a private number..."

[17] Having reviewed the content of the pages, neither of these phone numbers identify any individual. One phone number is recorded incorrectly and cannot, therefore, be attributed to the individual identified in the record. There is no other evidence in the pages that this phone number is attributable to any other individual. As for the other phone number, the evidence is that it 'might' have been a work phone number for an employee and that when the phone number was called, the person who answered confirmed it was not for the specific YG office mentioned. There is no evidence in the pages or otherwise that this phone number belongs to an individual. This phone number may be associated with an office or business. The fact that the person receiving the call confirmed it was not the specific YG office mentioned does not rule out that it could be associated with another business or office, or that it was being used by the person for work purposes.

[18] The definition of personal information in the ATIPP Act is "recorded information about an identifiable individual." Included in the list below the definition is "the individual's name, address, or telephone number." For information to qualify as personal information, it must be 'about' an identifiable individual. The two phone numbers that appear in the records are not about an identifiable individual for two reasons. First, there is no individual attributable to either of the phone numbers in the pages or otherwise. Second, there is no evidence that there is a personal dimension to the phone numbers, as they do not reveal anything personal about

¹⁰ Had I determined that the employee was participating in a 'bring-your-own device' program operated by YG in respect of their personal cell phone, I may have found differently. I was able to infer from the evidence that this employee was not participating in this program, given that they had a work-issued cell phone.

any individual. Based on the evidence, it is impossible for me to find that these two phone numbers qualify as personal information and I find they do not.

[19] My finding is bolstered by a decision reached by Adjudicator Cunningham, an adjudicator for Alberta's Office of the Information and Privacy Commissioner, in Order F2018-09, in which she was required to determine if a cell phone number qualified as personal information under Alberta's *Freedom of Information and Protection of Privacy Act* (AB FOIPPA).¹¹

[20] The facts before Cunningham were that a public body provided a copy of a 911 call to an applicant but severed the cell phone number of the person who made the 911 call. The exception applied by the public body was subsection 17 (1) of AB FOIPPA (disclosure harmful to personal privacy). Cunningham determined that the cell phone number is not personal information as defined in AB FOIPPA. The definition of personal information in AB FOIPPA is "recorded information about an identifiable individual" and includes "the individual's name, home or business address or home or business telephone number."

[21] In reaching her decision, Cunningham cited an Alberta Court of Appeal decision¹² wherein the Court stated that "personal information has to be essentially 'about a person', and not 'about an object', even though most objects or properties have some relationship with persons...the line between the two is imprecise. Where the information related to property, but also had a 'personal dimension', it might sometimes properly be characterized as 'personal information'."¹³

[22] Cunningham then applied the principles identified by the Court of Appeal to the cell phone number that was separated or obliterated from the records. Her findings and reasons for reaching the conclusion that the cell phone number is not personal information follow.

It is unclear, on the evidence, and the context in which the cell phone number appears, whether the cell phone number the Applicant requests belongs to, or is associated with, an identifiable individual, as required by section 1(n). This is because the owner of the cell phone and the function of the cell phone (whether for business or personal use) is not to be found in the evidence before me. The 911 caller identifies herself as a support worker providing support services on behalf of an agency; however, it is unclear whether the cell phone number she used is associated with her as a representative of the agency for which she provides support services, or is her own personal cell phone, or

¹¹ Order F2018-09, Alberta Health Services (Re), 2018 CanLII 7268 (AB OIPC).

¹² *Edmonton (City) v Alberta (Information and Privacy Commissioner)*, 2016 ABCA 110.

¹³ Order F2018-09, at para. 17.

alternatively, was borrowed from someone else. It is also unknown whether the cell phone number continues to be in service. If it is out of service, it may not be associated with an identifiable individual.

While the records indicate that a particular cell phone number was used to contact 911, it is unknown whether the cell phone number belonged to an identifiable individual or to an organization or public agency. If the cell phone number belonged to an identifiable individual, it is also unknown whether the cell phone number is in service. If the cell phone number belonged to an organization or public entity, it is unknown whether the individual who called 911 also used the phone for personal purposes, with the result that the cell phone number might have a personal dimension and be personal information, or whether the support worker used the cell phone only as a representative of an organization or public entity, in which case the cell phone number would not have a personal dimension.

There is no presumption or rule that a cell phone number is personal information. A cell phone number will be personal information if it can be associated with an identifiable individual acting in a personal capacity...

In the present case, a cell phone number appears in the records without any information as to the identity of the caller or the owner of the cell phone. While the 911 call was made in the support worker's role as a support worker, it is unknown whether the cell phone she used to make the call was her personal phone, or whether it belonged to her employer and was only to be used in a representative capacity, or whether it belonged to someone else. Without knowing this information, it is impossible to say that the cell phone number is personal information.

I acknowledge that section 1(n) specifically includes "information about an identifiable individual, including, the individual's name, home or business address or home or business telephone number"; however, it is unknown whether the cell phone number in this case is that of an identifiable individual, or could convey information about an identifiable individual. As a result, section 1(n) does not enable me to find that the cell phone number is personal information.¹⁴

¹⁴ *Ibid.*, at paras. 18 to 23.

VIII FINDINGS

[23] On the issue before me, I find that the Department is authorized to rely on the provisions of section 25 that it cited for all the separations and obliterations on all the pages of the Additional Records, with the exception of the following:

- a. I find the Department is not authorized to rely on the provisions cited to separate or obliterate the personal information from pages 3675 and 3679 (subsections 25 (1) and 25 (4) for both);
- b. I find the Department is not authorized to rely on the provisions cited to separate or obliterate the personal information identified by me on pages 3734 (subsections 25 (1) and 25 (4)) and 3513 (subsection 25 (1) and subparagraphs 25 (4)(a) and (d)); and
- c. I find the Department is not authorized to rely on the provisions cited to separate or obliterate the two phone numbers identified by me on pages 2755 and 2756 (subsections 25 (1) and 25 (4) for both).

IX CONFIRMATION AND RECOMMENDATION

[24] On the issue before me, I confirm that the Department must refuse access to the personal information separated or obliterated from the pages of the Additional Records with the exception of the following:

- a. the personal information separated or obliterated from pages 3675 and 3679;
- b. the personal information identified by me on pages 3734 and 3513; and
- c. the phone numbers identified by me on pages 2755 and 2756.

[25] On the issue before me, I recommend that the Department give the Applicant access to the following personal information that was separated or obliterated from the specified pages of the Additional Records:

- a. the personal information on pages 3675 and 3679;
- b. the personal information identified by me on pages 3734 and 3513; and
- c. the phone numbers identified by me on pages 2755 and 2756.

Public Body's Decision after Review

[26] Section 58 of the Act requires the Department to decide, within 30 days of receiving this Inquiry Report 2, whether to follow my recommendations. The Department must give written notice of its decision to me and the parties who received a copy of this Inquiry Report 2, noted on the distribution list below.

[27] If the Department does not give notice of its decision within 30 days of receiving this Inquiry Report 2, then it is deemed to have refused to follow my recommendations.

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

Applicants' Right of Appeal

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

[30] 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.

[31] 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."

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

ORIGINAL SIGNED

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

Distribution List:

- Public Body
- Applicant