



Yukon
Information
and Privacy
Commissioner

INQUIRY REPORT

**Pursuant to Section 52 of the
*Access to Information and Protection of Privacy Act***

**Department of Finance
File ATP19-67R, ATP19-68R, ATP19-73R, and ATP19-76R**

**Jason Pedlar, B.A., M.A.
Information and Privacy Commissioner**

December 18, 2023

Summary

In November of 2018, an applicant (the “Applicant”) made ten access requests to the Yukon Department of Finance (the “Department”) for the following sets of information:

- i. *All emails sent and received by the Deputy Minister [of Finance] between October 1st, 2018 and October 3rd, 2018;*
- ii. *Any emails sent or received by the ADM, Economics, Fiscal Policy & Statistics between October 25th, 2018 and November 7th, 2018 that reference ‘carbon tax’ or ‘carbon pricing’;*
- iii. *Any emails sent or received by anyone with the title ‘Management Board Analyst’ to different departments between August 6th, 2018 and August 13th, 2018;*
- iv. *Any emails sent or received by the Director, Management Board Secretariat to a different department between August 6th 2018 and August 13th, 2018;*
- v. *Any emails sent or received by the Capital Planning Analyst to a different department between October 1st and October 12th, 2018;*
- vi. *Any emails sent or received by anyone with the title ‘Management Board Analyst’ to a different department between October 1st, 2018 and October 12th, 2018;*
- vii. *Any emails sent or received by the Tax Policy Analyst in the Economics, Fiscal Policy & Statistics Branch referencing ‘carbon pricing’, ‘carbon tax’, or “fees” between October 22nd, 2018 and October 31st, 2018;*
- viii. *Any emails received by the Executive Assistant to the Deputy Minister between November 5th, 2018 and November 7th, 2018;*
- ix. *Any Documents produced by, distributed by or shared with the Director, Fiscal Relations between October 1st, 2018 and November 7th, 2018; and*
- x. *Emails to and from the ADM of Economics, Fiscal Policy and Statistics between August 10 and August 14 inclusive.*

The Department refused the Applicant access, in whole or in part, to the responsive records, citing as its authority subparagraphs 15(1)(a), 15(1)(b), 15(1)(c), 15(1)(d)(i), 15(1)(d)(ii), 16(1)(a), 16(1)(b), 16(1)(c), 16(1)(d), 17(1)(b), 17(1)(c), 17(1)(e), 20(1)(a), and 25(1).

The Applicant requested that the Information and Privacy Commissioner (the “IPC”) review the refusal. Settlement failed to resolve the matter and it proceeded to Inquiry.

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Statutes Cited

Access to Information and Protection of Privacy Act, SY 2002, c.9 (the “Act”);

Access to Information and Protection of Privacy Act, SY 2018, c.9 (the “New Act”);

Interpretation Act, RSY 2002, c.125;

Cases and Orders Cited

Cases

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R 27;

Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner), 2014 SCC 31;

Canadian Council of Christian Charities v. Canada (Minister of Finance), 1999 4 FC 245;

John Doe v. Ontario (Finance), 2014 SCC 36, [2014] 2 SCR 3.

Orders

Reports

ATP17-36R

ATP18-25R

ATP20-06R

Explanatory Note

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

I BACKGROUND

[1] In November of 2018, the Applicant made ten access requests for the following information from the Department:

- i. *All emails sent and received by the Deputy Minister [of Finance] between October 1st, 2018 and October 3rd, 2018 (the “First Request”);*

- ii. *Any emails sent or received by the ADM, Economics, Fiscal Policy & Statistics between October 25th, 2018 and November 7th, 2018 that reference 'carbon tax' or 'carbon pricing' (the "Second Request");*
- iii. *Any emails sent or received by anyone with the title 'Management Board Analyst' to different departments between August 6th, 2018 and August 13th, 2018 (the "Third Request");*
- iv. *Any emails sent or received by the Director, Management Board Secretariat to a different department between August 6th 2018 and August 13th, 2018 (the "Fourth Request");*
- v. *Any emails sent or received by the Capital Planning Analyst to a different department between October 1st and October 12th, 2018 (the "Fifth Request");*
- vi. *Any emails sent or received by anyone with the title 'Management Board Analyst' to a different department between October 1st, 2018 and October 12th, 2018 (the "Sixth Request");*
- vii. *Any emails sent or received by the Tax Policy Analyst in the Economics, Fiscal Policy & Statistics Branch referencing 'carbon pricing', 'carbon tax', or "fees" between October 22nd, 2018 and October 31st, 2018 (the "Seventh Request");*
- viii. *Any emails received by the Executive Assistant to the Deputy Minister between November 5th, 2018 and November 7th, 2018 (the "Eighth Request");*
- ix. *Any Documents produced by, distributed by or shared with the Director, Fiscal Relations between October 1st, 2018 and November 7th, 2018 (the "Ninth Request"); and*
- x. *Emails to and from the ADM of Economics, Fiscal Policy and Statistics between August 10 and August 14 inclusive (the "Tenth Request");*

[2] Subsequently, the Records Manager assigned file numbers to the requests as follows:

- i. The First Request: Access Request No. A-7450;
- ii. The Second Request: Access Request No. A-7457;
- iii. The Third Request: Access Request No. A-7458;
- iv. The Fourth Request: Access Request No. A-7459;
- v. The Fifth Request: Access Request No. A-7460;
- vi. The Sixth Request: Access Request No. A-7461;
- vii. The Seventh Request: Access Request No. A-7462;
- viii. The Eighth Request: Access Request No. A-7464;
- ix. The Ninth Request: Access Request No. A-7469; and
- x. The Tenth Request: Access Request No. A-7476.

[3] This report will deal with requests numbered A-7450, A-7457, A-7462, and A-7476 (together the "Access Requests").

[4] The Records Manager subsequently advised the Applicant that the Department had identified records responsive to A-7450, but it was withholding them in full pursuant to the following provision(s):

- 15(1)(c);
- 15(1)(d)(ii); and
- 16(1)(c);

[5] The Records Manager also advised the Applicant that the Department had identified records responsive to A-7457, but it was withholding them in full pursuant to the following provision(s):

- 15(1)(c);
- 15(1)(d)(i);
- 15(1)(d)(ii);
- 16(1)(a);
- 16(1)(b); and
- 16(1)(c);

[6] The Records Manager further advised the Applicant that the Department had identified records responsive to A-7462, but it was withholding them in full pursuant to the following provision(s):

- 15(1)(d)(i);
- 15(1)(d)(ii);
- 16(1)(b); and
- 16(1)(c);

[7] The Records Manager finally advised the Applicant that the Department had identified records responsive to A-7476, but it was withholding them in full pursuant to the following provision(s):

- 15(1)(c);
- 15(1)(d)(i);
- 15(1)(d)(ii);
- 16(1)(a);
- 16(1)(b);
- 16(1)(c); and

- 25(1).

[8] On January 3, 2019, the IPC received requests for review from the Applicant in accordance with section 52 and assigned an Informal Case Resolution investigator to attempt settlement.

[9] Subsequently, the IPC assigned file numbers as follows:

- IPC File No. ATP19-67R to A-7450;
- IPC File No. ATP19-68R to A-7457;
- IPC File No. ATP19-73R to A-7462; and
- IPC File No. ATP19-76R to A-7476. (together the “IPC Files”)

[10] From January 3, 2019 to May 2, 2019, the IPC attempted settlement of the IPC Files but we did not receive the records in an acceptable format and with sufficient detail explaining the Department’s rationale for refusing access to the records in full or in part. We also learned that the Department had not done a line-by-line review of the records at the time of responding to the access requests and was not aware it was required to release any parts of a record where there was not an exception to the right of access.

[11] As such, the IPC escalated all four files to Inquiry.

II JURISDICTION

[12] The authority of the IPC to review the Department’s decisions to refuse to provide an applicant with access to records is set out in subsection 48(1).

[13] These Inquiries are required to proceed under the jurisdiction of the Act pursuant to subsection 130(3) of the New Act.

III INQUIRY PROCESS

[14] On May 2, 2019, the IPC issued written Notices of Inquiry to the parties wherein the issues for review were set out.

[15] Also on May 2, 2019, the IPC issued Notices to Produce Records to the Department. It required the Department to produce a complete, unredacted copy of all records identified as responsive to the Access Requests, inclusive of a schedule of records.

[16] Issues with the organization, formatting, and completeness of the Records produced by the Department persisted throughout the Inquiry process.

[17] On August May 24, 2019, the Department provided its submissions to the IPC in response to the Applicant's request for review.

[18] The Applicant provided the IPC with no submissions.

IV ATIPPA BROUGHT INTO FORCE

[19] On April 1, 2021, the New Act was brought into force and the Act was repealed. Section 130 of the New Act states as follows:

130(1) The commissioner must, without delay after the coming into force of this section, take one of the actions under subsection (2) if

(a) The commissioner had received a request for a review made under 48(1), (2) or (4) of the former Act, or a request for a review of a complaint made under subsection 48(3) of the former Act, before coming into force of this section; and

(b) the commissioner had not, as of the day on which this section came into force, commenced the review, by means of an inquiry or investigation.

(2) The actions for the purpose of subsection (1) are the following:

(a) to conduct a review by means of an inquiry of the request for a review or an investigation of the complaint as if the former Act had not been repealed;

(b) to treat the request made under the former act as if it had been filed under section 90 of this Act on the day on which section 90 came into force...

(3) The former Act (including the requirement for a decision by a public body under subsection 58(1) of the former Act and any appeal to the Court under subsection 59(1) of the former Act) applies as if it had not been repealed in respect of a review of a request or a complaint made under the former Act if the commissioner has not concluded the review by means of an inquiry or investigation on or before the day immediately before the coming into force of this section.

(4)...

[20] Our office received the Applicant's Request for Inquiry of the Department's decision on the Access Requests from the Applicant on April 11, 2019 and commenced Inquires into the

matters on May 2, 2019. The Inquires had not concluded before the New Act went into effect on April 1, 2021. As such the Act applies to the matters under review.

III ISSUES

[21] There are seven issues as follows:

- 1) Is the Department required by subparagraph 15(1)(c) to withhold the information sought by the Applicant in ATP19-67R, ATP19-68R, and ATP19-76R?
- 2) Is the Department required by subparagraph 15(1)(d)(i) to withhold the information sought by the Applicant in ATP19-68R, ATP19-73R, and ATP19-76R?
- 3) Is the Department required by subparagraph 15(d)(ii) to withhold the information sought by the Applicant in the Access Requests?
- 4) Is the Department authorized by subparagraph 16(1)(a) to withhold the information sought by the Applicant in ATP-67R and ATP19-76R?
- 5) Is the Department authorized by subparagraph 16(1)(b) to withhold the information sought by the Applicant in ATP-68R, ATP-73R, and ATP19-76R?
- 6) Is the Department authorized by subparagraph 16(1)(c) to withhold the information sought by the Applicant in the Access Requests?
- 7) Is the Department required by subparagraph 25(1) to withhold the information sought by the Applicant in ATP19-76R?

IV RECORDS AT ISSUE

[22] The records responsive to ATP19-67R in the custody and control of the Department consist of records exported to 119 PDF-formatted pages.

[23] The records responsive to ATP19-68R in the custody and control of the Department consist of records exported to 143 PDF-formatted pages.

[24] The records responsive to ATP19-73R in the custody and control of the Department consist of records exported to 204 PDF-formatted pages.

[25] The records responsive to ATP19-66R in the custody and control of the Department consist of records exported to 151 PDF-formatted pages. (together the "Records")

V BURDEN OF PROOF

[26] Paragraph 54(1)(a) sets out the burden of proof relevant to this Inquiry. It states that the burden is on the public body head to prove that an applicant has no right to the records or to the information withheld from the 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...

VI SUBMISSIONS OF THE PARTIES

[27] The submissions of the Department and the Applicant are set out in the Analysis sections of this Inquiry Report, as may be relevant to each issue.

VII ANALYSIS

Issue 1 – Is the Department required by subsection 15(1)(c) of the Act to withhold, in full, 92 pages of the Records responsive to Access Request No. A-7450 and 16 pages of the Records responsive to the Access Request No. A-7457 which were sought by the Applicant in their Access Requests?

[28] The Department is relying on subparagraph 15(1)(c) to refuse, in part, the Applicant access to the Records. The provision states as follows:

Relevant Law

15 (1) A public body must refuse to disclose a record to an applicant in the disclosure would reveal a confidence of the Executive Council or any of its committees including:

(c) a record used for or reflecting consultation among ministers on matters relating to the making of government decisions or the formulation of government policy;

Analysis

Paragraph 15(1)(c)

[29] Paragraph 5 establishes the Applicant's right to access records in the custody or control of a department which is identified as a public body in the Act. The Department is a public body identified in the Act and the Records are in the custody and control of the Department.

[30] Only if an exception identified in Part 2 of the Act applies, may the Department deny the Applicant the right of access to the Records. The Department relies, *inter alia* on paragraph 15(1)(c) of Part 2.

[31] While some sections of Part 2 are discretionary, paragraph 15(1)(c) is a mandatory exemption provision. Its purpose is to prevent the release of information which may disclose a confidence of the Executive Council. If it applies to the information sought by the Applicant, then the Department has no discretion about whether to disclose it; it must not.

[32] For paragraph 15(1)(c) to apply the information requested by the Applicant must be “a record used for or reflecting consultation among Ministers on matters relating to the making of government decisions or the formulation of government policy.”

[33] This office has not previously interpreted the meaning of paragraph 15(1)(c).

[34] The term “reflecting” has a number of definitions however I find the most appropriate one to reads as follows: “to show, express, or make apparent.”

[35] The terms “government decisions” and “formulation of government policy” were considered in the context of paragraph 16(1)(b) in ATP17-36¹. There the Commissioner found that such decisions and formulations were equivalent to “Consultations and Deliberations.”

[36] In order for a Record to contain “Consultations” or “Deliberations” the information contained within it must:

- i. Be sought or expected, or be part of the responsibility of a person by virtue of that person’s position;
- ii. Be directed toward taking an action; and
- iii. Be made to someone or involve someone in the case of deliberations between employee who can take or implement the action².

[37] Having reviewed and examined the Records, I find that the 108 pages over which a paragraph 15(1)(c) exemption was claimed fulfill the criteria of the section.

[38] Any documents found to be properly withheld under paragraph 15(1)(c) are further subject to a paragraph 15(2) analysis.

¹ At para 44.

² *Ibid.*

[39] Paragraph 15(2) reads:

(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 a 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.

[40] On the face of it, neither 15(2)(a) or 15(2)(b) apply to the Records. Application of 15(2)(c) however, requires further analysis.

[41] Having reviewed the Records, I find the following record constitutes background information, explanations, or analysis to a decision that was implemented or made public as of November 5, 2018:

- i. Pages 84 through 97 in Record 28 of ATP19-67R.

Conclusion

[42] In light of the forgoing, I find that, the Records over which the Department has withheld pursuant to paragraph 15(1)(c) have been properly claimed, excepting only pages 84 through 97 in Record 28 of ATP19-76R.

Issue 2 – Is the Department required by subsection 15(1)(d)(i) of the Act to withhold, in full, 3 pages of the Records responsive to Access Request No. A-7457, 65 pages of the Records responsive to the Access Request No. A-7462, and 26 pages of the Records responsive to Access Request No. A-7476 which were sought by the Applicant in their Access Requests?

[43] The Department is relying on subparagraph 15(1)(d)(i) to refuse, in part, the Applicant access to the Records. The provision states as follows:

Relevant Law

15 (1) A public body must refuse to disclose a record to an applicant in 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;

Analysis

Paragraph 15(1)(d)(i)

[44] Paragraph 5 establishes the Applicant's right to access records in the custody or control of a department which is identified as a public body in the Act. The Department is a public body identified in the Act and the Records are in the custody and control of the Department.

[45] Only if an exception identified in Part 2 of the Act applies, may the Department deny the Applicant the right of access to the Records. The Department relies, *inter alia* on paragraph 15(1)(d)(i) of Part 2.

[46] While some sections of Part 2 are discretionary, paragraph 15(1)(d)(i) is a mandatory exemption provision. Its purpose is to prevent the release of information which may disclose a confidence of the Executive Council. If it applies to the information sought by the Applicant, then the Department has no discretion about whether to disclose it; it must not.

[47] Having reviewed and examined the Records, I find that the 94 pages over which a paragraph 15(1)(d)(i) exemption was claimed fulfill the criteria of the section.

[48] Any documents found to be properly withheld under paragraph 15(1)(d)(i) are further subject to a paragraph 15(2) analysis.

[49] Paragraph 15(2) reads:

(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 a 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.

[50] On the face of it, neither 15(2)(a) or 15(2)(b) apply to the Records. Application of 15(2)(c) however, requires further analysis.

[51] Having reviewed the Records, I find several records which may constitute background information, explanations, or analysis however, the decisions to which they refer were not implemented or made public as of November 5, 2018.

Conclusion

[52] In light of the forgoing, I find that, the Records over which the Department has withheld pursuant to paragraph 15(1)(d)(i) have been properly claimed and no paragraph 15(2) exception applies.

Issue 3 – Is the Department required by subsection 15(1)(d)(ii) of the Act to withhold, in full, 9 pages of the Records responsive to Access Request No. A-7450, 70 pages of the Records responsive to the Access Request No. A-7457, 90 pages of the Records responsive to Access Request No. A-7462, and 5 pages of the Records responsive to Access Request No. A-7476 which were sought by the Applicant in their Access Requests?

[53] The Department is relying on subparagraph 15(1)(d)(ii) to refuse, in part, the Applicant access to the Records. The provision states as follows:

Relevant Law

15 (1) A public body must refuse to disclose a record to an applicant in 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:

(ii) are the subject of consultations among Ministers relating to the making of government decisions or the formulation of government policy;

AnalysisParagraph 15(1)(d)(ii)

[54] Paragraph 5 establishes the Applicant's right to access records in the custody or control of a department which is identified as a public body in the Act. The Department is a public body identified in the Act and the Records are in the custody and control of the Department.

[55] Only if an exception identified in Part 2 of the Act applies, may the Department deprive the Applicant of their right to access the Records. The Department relies, *inter alia* on paragraph 15(1)(d)(ii) of Part 2.

[56] While some sections of Part 2 are discretionary, paragraph 15(1)(d)(ii) is a mandatory exemption provision. Its purpose is to prevent the release of information which may disclose a confidence of the Executive Council. If it applies to the information sought by the Applicant, then the Department has no discretion about whether to disclose it; it must not.

[57] Having reviewed and examined the Records, I find that the 174 pages over which a paragraph 15(1)(d)(ii) exemption was claimed fulfill the criteria of the section.

[58] Any documents found to be properly withheld under paragraph 15(1)(d)(ii) are further subject to a paragraph 15(2) analysis.

[59] Paragraph 15(2) reads:

(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 a 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.

[60] On the face of it, neither 15(2)(a) or 15(2)(b) apply to the Records. Application of 15(2)(c) however, requires further analysis.

[61] Having reviewed the Records, I find several records which may constitute background information, explanations, or analysis however, the decisions to which they refer were not implemented or made public as of November 5, 2018.

Conclusion

[62] In light of the forgoing, I find that the Records over which the Department has withheld pursuant to paragraph 15(1)(d)(ii) have been properly claimed and no paragraph 15(2) exception applies.

Issue 4 – Is the Department authorized by subsection 16(1)(a) of the Act to withhold, in full, 4 pages of the Records responsive to the Access Request No. A-7457 and 2 pages of the Records responsive to Access Request No. A-7476 which were sought by the Applicant in their Access Requests?

[63] The Department is relying on subparagraph 16(1)(a) to refuse, in part, the Applicant access to the Records. The provision states as follows:

Relevant Law

16 (1) A public body may refuse to disclose information to an applicant if the disclosure would reveal...

(a) advice, proposals, recommendations, analysis or policy options developed by or for a public body or a Minister;

Analysis

Paragraph 16(1)(a)

[64] Paragraph 5 establishes the Applicant's right to access records in the custody or control of a department which is identified as a public body in the Act. The Department is a public body identified in the Act and the Records are in the custody and control of the Department.

[65] Only if an exception identified in Part 2 of the Act applies, may the Department deprive the Applicant of their right to access the Records. The Department relies, *inter alia* on paragraph 16(1)(a) of Part 2.

[66] Paragraph 16(1)(a) is a discretionary exemption provision; its purpose is to prevent the release of information which may reveal advice, proposals, recommendations, analysis or policy options developed for a public body or Minister.

[67] Having reviewed and examined the Records, I find that the 6 pages over which a paragraph 16(1)(a) exemption was claimed fulfill the criteria of the section with the exception of page 77 of Record 15 in ATP19-68R.

[68] Any information found to be properly withheld under paragraph 16(1)(a) are further subject to a paragraph 16(2) analysis.

[69] Paragraph 16(2) reads:

(2) A public body must not refuse to disclose under subsection (1)

(a) [Repealed S.Y. 2012, c.18, s.4];

(b) a public opinion poll;

(c) a statistical survey;

(d) an appraisal of the value or condition of property;

(e) an economic forecast;

(f) an environmental impact statement or similar information;

(g) a consumer test report or a report of a test carried out on a product to test equipment of the public body;

(h) the final report of a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body;

(i) a final report on the results of field research undertaken before a policy proposal is formulated;

(j) a final report of a task force, committee, council, or similar body that has been established to consider any matter and make reports or recommendations to a public body;

(k) information that the public body has cited publicly as the basis for making a decision or formulating a policy;

(l) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant;

(m) an instruction or guideline issued to the officers or employees of the public body, or a substantive rule or statement of policy that has been adopted by the public body, for the purpose of interpreting an enactment or administering a program or activity that affects the rights of the applicant; or

(n) a final report or final audit on the performance or efficiency of the public body or any of its programs or policies, except where the information is a report or appraisal of the performance of an individual who is or was an officer or employee of the public body.

[70] The term ‘economic forecast’ has not been previously defined by this office. In its absence, I define the term as follows:

“A record which reflects an attempt to anticipate or predict future conditions or outcomes related to any element of economic activity.”

[71] Pages 78 to 80 of Record 15 in ATP19-68R/A-7457 is a document titled “Economic Impact of Carbon Pricing” which describes the potential economic impact of the implementation of a carbon tax in the Yukon. It includes a statement of impact, description of primary variables, and caveats. For the purposes of paragraph 16(2)(e), I find this document falls within the meaning of a ‘economic forecast’.

[72] Having reviewed the Records, I find that the following records constitute records which the Department must not refuse to disclose on consideration of paragraph 16(2):

- i. Pages 78 through 80 of Record 15 in ATP19-68R/A-7457 per 16(2)(e).

Conclusion

[73] In light of the forgoing, I find that, the majority of the Records over which the Department has withheld pursuant to paragraph 16(1)(a) have been properly claimed. The remainder, identified above, to which paragraph 16(2) applies, are to be released to the Applicant.

Issue 5 – Is the Department authorized by subsection 16(1)(b) of the Act to withhold, in full, 44 pages of the Records responsive to the Access Request No. A-7457, 28 pages of the Records responsive to Access Request No. A-7462, and 64 pages of the Records responsive to Access Request No. A-7476 which were sought by the Applicant in their Access Requests?

[74] The Department is relying on subparagraph 16(1)(b) to refuse, in part, the Applicant access to the Records. The provision states as follows:

Relevant Law

16 (1) A public body may refuse to disclose information to an applicant if the disclosure would reveal...

(b) consultations or deliberations involving officers or employees of a public body or a Minister relating to the making of government decisions or the formulation of government policy;

Analysis

Paragraph 16(1)(b)

[75] Paragraph 5 establishes the Applicant's right to access records in the custody or control of a department which is identified as a public body in the Act. The Department is a public body identified in the Act and the Records are in the custody and control of the Department.

[76] Only if an exception identified in Part 2 of the Act applies, may the Department deprive the Applicant of their right to access the Records. The Department relies, *inter alia* on paragraph 16(1)(b) of Part 2.

[77] Paragraph 16(1)(b) is a discretionary exemption provision; its purpose is to prevent the release of information which may reveal deliberations between officers and employees of a public body or Ministers.

[78] Having reviewed and examined the Records, I find that all but two of the 136 pages over which a paragraph 16(1)(b) exemption was claimed fulfill the criteria of the section. The two exceptions being Record 6 of ATP19-73R and Record 16 of ATP19-76.

[79] Any documents found to be properly withheld under paragraph 16(1)(b) are further subject to a paragraph 16(2) analysis.

[80] Paragraph 16(2) reads:

(2) A public body must not refuse to disclose under subsection (1)

(a) [Repealed S.Y. 2012, c.18, s.4];

(b) a public opinion poll;

(c) a statistical survey;

(d) an appraisal of the value or condition of property;

(e) an economic forecast;

(f) an environmental impact statement or similar information;

(g) a consumer test report or a report of a test carried out on a product to test equipment of the public body;

(h) the final report of a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body;

(i) a final report on the results of field research undertaken before a policy proposal is formulated;

(j) a final report of a task force, committee, council, or similar body that has been established to consider any matter and make reports or recommendations to a public body;

(k) information that the public body has cited publicly as the basis for making a decision or formulating a policy;

(l) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant;

(m) an instruction or guideline issued to the officers or employees of the public body, or a substantive rule or statement of policy that has been adopted by the public body, for the purpose of interpreting an enactment or administering a program or activity that affects the rights of the applicant; or

(n) a final report or final audit on the performance or efficiency of the public body or any of its programs or policies, except where the information is a report or appraisal of the performance of an individual who is or was an officer or employee of the public body.

[81] Having reviewed the Records, I find that none of the records constitute records which the Department must not refuse to disclose on consideration of paragraph 16(2).

Conclusion

[82] In light of the forgoing, I find that, the Records over which the Department has withheld pursuant to paragraph 16(1)(b) have been properly claimed.

Issue 6 – Is the Department authorized by subsection 16(1)(c) of the Act to withhold, in full, 19 pages of the Records responsive to Access Request No. A-7450, 6 pages of the Records responsive to the Access Request No. A-7457, 21 pages of the Records responsive to Access Request No. A-7462, and 36 pages of the Records responsive to Access Request No. A-7476 which were sought by the Applicant in their Access Requests?

[83] The Department is relying on subparagraph 16(1)(c) to refuse, in part, the Applicant access to the Records. The provision states as follows:

Relevant Law

16 (1) A public body may refuse to disclose information to an applicant if the disclosure would reveal...

(c) a pending policy or budgetary decision of a public body;

Analysis

Paragraph 16(1)(c)

[84] Paragraph 5 establishes the Applicant's right to access records in the custody or control of a department which is identified as a public body in the Act. The Department is a public body identified in the Act and the Records are in the custody and control of the Department.

[85] Only if an exception identified in Part 2 of the Act applies, may the Department deprive the Applicant of their right to access the Records. The Department relies, *inter alia* on paragraph 16(1)(a) of Part 2.

[86] Paragraph 16(1)(c) is a discretionary exemption provision; its purpose is to prevent the release of information which may reveal pending policy or budgetary decisions.

[87] Having reviewed and examined the Records, I find that the 64 pages over which a paragraph 16(1)(c) exemption was claimed fulfill the criteria of the section.

[88] Any documents found to be properly withheld under paragraph 16(1)(c) are further subject to a paragraph 16(2) analysis.

[89] Paragraph 16(2) reads:

(2) A public body must not refuse to disclose under subsection (1)

(a) [Repealed S.Y. 2012, c.18, s.4];

(b) a public opinion poll;

(c) a statistical survey;

(d) an appraisal of the value or condition of property;

(e) an economic forecast;

(f) an environmental impact statement or similar information;

(g) a consumer test report or a report of a test carried out on a product to test equipment of the public body;

(h) the final report of a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body;

(i) a final report on the results of field research undertaken before a policy proposal is formulated;

(j) a final report of a task force, committee, council, or similar body that has been established to consider any matter and make reports or recommendations to a public body;

(k) information that the public body has cited publicly as the basis for making a decision or formulating a policy;

(l) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant;

(m) an instruction or guideline issued to the officers or employees of the public body, or a substantive rule or statement of policy that has been adopted by the public body, for the purpose of interpreting an enactment or administering a program or activity that affects the rights of the applicant; or

(n) a final report or final audit on the performance or efficiency of the public body or any of its programs or policies, except where the information is a report or appraisal of the performance of an individual who is or was an officer or employee of the public body.

[90] Having reviewed the Records, I find that none of the records constitute records which the Department must not refuse to disclose on consideration of paragraph 16(2).

Conclusion

[91] In light of the forgoing, I find that the Records over which the Department has withheld pursuant to paragraph 16(1)(c) have been properly claimed.

Issue 7 – Is the Department required by subsection 25(1) of the Act to withhold, in full, 2 pages of the Records responsive to Access Request No. A-7476 which were sought by the Applicant in their Access Requests?

[92] The Department is relying on subparagraph 25(1) to refuse, in part, the Applicant access to the Records. The provision states as follows:

Relevant Law

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

Analysis

Paragraph 25(1)

[93] Paragraph 5 establishes the Applicant's right to access records in the custody or control of a department which is identified as a public body in the Act. The Department is a public body identified in the Act and the Records are in the custody and control of the Department.

[94] Only if an exception identified in Part 2 of the Act applies, may the Department deny the Applicant of their right to access the Records. The Department relies, *inter alia* on paragraph 25(1) of Part 2.

[95] Paragraph 25(1) is a mandatory exemption provision; its purpose is to prevent the unreasonable release of third-party information.

[96] The Department alleges that two pages, consisting of one record (Record 30) contained in ATP19-746/A-7476, are subject to paragraph 25(1) however it provides no argument in its submissions on the point.

[97] On review of the Record, it appears to be an email exchange between two YG employees indicating that one had signed up to volunteer for a cause. It is unclear in what capacity.

[98] While it is unclear to me how this record was flagged as responsive to Access Request No. A-7476, it is clear, per paragraph 25(3)(e), that revealing government employee names is not an unreasonable invasion of their privacy, given the public nature of their work.

[99] The email exchange does not indicate what date, in what capacity, or where the person in question will be volunteering, simply that they have signed up to do so. After the fact, the only information to be gleaned from the exchange is that the employee in question signed up. Even their actual attendance on the date is in question.

[100] As such I cannot find that release of the record in question would constitute an unreasonable invasion of third-party privacy.

Conclusion

[101] For these reasons, I find that the Department has not established that disclosure of the Records claimed under s.25(1) could be expected to result in an unreasonable invasion of personal privacy. The Department is therefore not authorized to refuse to disclose same Records.

VIII FINDINGS

Issue 1

[102] Excepting only pages 84 through 97 in Record 28 of ATP19-76R, the Department is required by subsection 15(1)(c) of the Act to withhold, in full, 92 pages of the Records responsive to Access Request No. A-7450 and 16 pages of the Records responsive to the Access Request No. A-7457.

Issue 2

[103] The Department is required by subsection 15(1)(d)(i) of the Act to withhold, in full, 3 pages of the Records responsive to Access Request No. A-7457, 65 pages of the Records responsive to the Access Request No. A-7462, and 26 pages of the Records responsive to Access Request No. A-7476.

Issue 3

[104] The Department is required by subsection 15(1)(d)(ii) of the Act to withhold, in full, 9 pages of the Records responsive to Access Request No. A-7450, 70 pages of the Records responsive to the Access Request No. A-7457, 90 pages of the Records responsive to Access Request No. A-7462, and 5 pages of the Records responsive to Access Request No. A-7476.

Issue 4

[105] The Department is authorized by subsection 16(1)(a) of the Act to withhold, in full, 2 pages of the Records responsive to Access Request No. A-7476.

Issue 5

[106] The Department is authorized by subsection 16(1)(b) of the Act to withhold, in full, 44 pages of the Records responsive to the Access Request No. A-7457, 28 pages of the Records responsive to Access Request No. A-7462, excepting Record 6, and 64 pages of the Records responsive to Access Request No. A-7476, excepting Record 16.

Issue 6

[107] The Department is authorized by subsection 16(1)(c) of the Act to withhold, in full, 18 pages of the Records responsive to Access Request No. A-7450, 6 pages of the Records responsive to the Access Request No. A-7457, 21 pages of the Records responsive to Access Request No. A-7462, and 36 pages of the Records responsive to Access Request No. A-7476.

Issue 7

[108] I find that the Department Head is not required by subparagraph 25(1) to refuse to disclose any part of the Records to the Applicant.

IX RECOMMENDATIONS

Issue 1

[109] The Department release pages 84 through 97 in Record 28 of A-7450 and continue to withhold the balance of 92 pages of the Records responsive to Access Request No. A-7450 and 16 pages of the Records responsive to the Access Request No. A-7457.

Issue 2

[110] The Department continue to withhold, in full, 3 pages of the Records responsive to Access Request No. A-7457, 65 pages of the Records responsive to the Access Request No. A-7462, and 26 pages of the Records responsive to Access Request No. A-7476.

Issue 3

[111] The Department continue to withhold, in full, 9 pages of the Records responsive to Access Request No. A-7450, 70 pages of the Records responsive to the Access Request No. A-7457, 90 pages of the Records responsive to Access Request No. A-7462, and 5 pages of the Records responsive to Access Request No. A-7476.

Issue 4

[112] The Department release pages 77 through 80 in Record 15 of ATP19-68R/A-7457.

Issue 5

[113] The Department continue to withhold the Records over which the Department has claimed paragraph 16(1)(b).

Issue 6

[114] While the Department is authorized to withhold, I make no recommendation on the exercise of discretion to do so.

Issue 7

[115] As subparagraph 25(1) does not apply, I recommend that the Department Head disclose the relevant Records, as requested.

Department Head's Response to Inquiry Report

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

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

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

Applicant's Right of Appeal

[119] Paragraph 59(1)(a) gives the Applicant the right to appeal to the Yukon Supreme Court if the Department Head rejects a recommendation or is considered to have done so.

ORIGINAL SIGNED

Jason Pedlar, B.A., M.A.
Information and Privacy Commissioner
Office of the Information and Privacy Commissioner

Distribution List:

- Department Head
- Applicant