



Yukon  
Information  
and Privacy  
Commissioner

## **INVESTIGATION REPORT**

**Pursuant to section 66 of the**

***Access to Information and Protection of Privacy Act***

**Department of Economic Development**

**File ATP-ADJ-2022-04-133**

**Rick Smith, Adjudicator**

**Office of the Information and Privacy Commissioner**

**October 26, 2022**

## Summary

After some communication between the Complainant and the ATIPP Office, the ATIPP Office reframed the original Access Request as follows.

*The information I request the worksheet on what immediate and long-term outcomes the applicant met that led to the successful application. This request should be extended to include background statements and presentations to the application that support the conclusions reached. Referring to <https://yukon.ca/edf>, the project criteria examples provided in the government's description of the program do not mention financial need. Financial need is also not a requirement for a successful application. To that end, please be aware that I am not requesting any 3rd party financial business information. Timeframe: December 1, 2020 - November 30, 2021.*

The Department refused the Complainant access in full to the responsive records, citing as its authority the following.<sup>1</sup>

- [Third party personal information] – subsection 70(1), subparagraph 70(3)(a)(iii) and paragraph 70(3)(e), paragraph 70(5)(b), and subparagraphs 70(5)(d)(i) and (iii);
- [Disclosure that reveals advice or recommendations prepared by or for a public body or a minister] – subsection 74(1)(a);
- [Disclosure harmful to economic or financial interests] – subparagraph 75(1)(a)(ii), subparagraph 75(1)(a)(iv) and subparagraph 75(1)(b)(i);
- [Disclosure harmful to third party business interests] – paragraph 77(1)(a), paragraph 77(1)(b) and paragraph 77(1)(c); and
- [Public interest override and mandatory disclosure] – subsection 82(1).

The Complainant requested that the Information and Privacy Commissioner investigate the refusal under the consultation process. Consultation resolved some of the issues and those remaining unresolved proceeded to adjudication.

Section 1 contains the definition of 'personal information'. The Department submitted that the names and signatures of identified individuals in certain records fit within this definition. The Adjudicator found that the names and signatures of individuals acting as representatives for the Department or a business enterprise, including initials, did not fit as asserted but that the names of individuals acting in their own capacity did meet the definition.

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<sup>1</sup> It is our policy only to consider the provisions cited in a public body's final response to an access request. However, due to a clerical error, additional provisions raised during the ICR process and cited in an updated records package sent to the Complainant by the ATIPP Office on behalf of the Department were included as part of the notice of formal investigation. As such, they were considered for purposes of this Investigation Report.

Subsection 70(1), subparagraph 70(3)(a)(iii), paragraph 70(3)(e), paragraph 70(5)(b), and subparagraphs 70(5)(d)(i) and (iii) are mandatory provisions prohibiting the disclosure of a third party's personal information if the public body head determines that disclosure of such information would be an unreasonable invasion of the third party's privacy. The Department provided no submissions on them. However, the Adjudicator evaluated these provisions and found that they did not apply to the records cited by the Department because they were not personal information. The Department also asserted that paragraph 70(2)(c) prohibited the disclosure of third party personal information in a certain record but the Adjudicator found otherwise, except for the names of identified individual within.

Paragraph 74(1)(a) is a discretionary provision allowing the public body head to withhold responsive records from an applicant if they determine that disclosure of the information in the records would reveal advice or recommendations prepared by or for a public body or a minister. The Department provided submissions on the provision and the Adjudicator found that it applied to some information in the records but not to all of them.

Subparagraphs 75(1)(a)(ii) and (iv) and subparagraph 75(1)(b)(i) are discretionary provisions allowing the public body head to withhold responsive records from an applicant if they determine that disclosure of the information in the records could reasonably be expected to harm the financial or economic interests of the Government of Yukon or of a public body, or the ability of the Government of Yukon to manage the economy. The Department provided insufficient submissions on them and therefore the Adjudicator found that the Department could not rely on the provisions to withhold the records it cited.

Paragraphs 77(1)(a), (b) and (c) are discretionary provisions allowing a public body head to withhold responsive records from an applicant if they determine that the information in the records are a trade secret of, or commercial, financial, scientific or technical information of a third party. The Department provided submissions on them but the Adjudicator found that the Department could not rely on the provisions to withhold the records it cited, except for certain records that were not responsive to the Access Request.

Subsection 82(2) is a mandatory provision providing for the disclosure of information, despite it being a disclosure exemption, whether mandatory or discretionary, where the public body head determines that disclosure of the information clearly outweighs the public interest in not disclosing it. The Department provided no submission on it. The Adjudicator evaluated subsection 82(1) and found that it did not apply to the records cited by the Department because he could not make a determination if their disclosure overrode the public interest in not disclosing them.

The Adjudicator recommended that the Department head provide the Complainant with access to the records to which they are entitled, except for the records required to be withheld or that the Complainant did not want.

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## Statutes Cited

*Access to Information and Protection of Privacy Act*, SY 2018, c.9  
*Access to Information and Protection of Privacy Act*, RSY 2002, c.1  
*Freedom of information and Protection of Privacy Act*, RSBC 1996, c.165  
*Interpretation Act*, RSY 2002, c.125

## Cases and Orders Cited

### Cases

*College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII)  
*John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII)  
*Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII)

### Order

Alberta IPC Order F2008-028

### Reports

Nova Scotia IPC Report FI-05-75  
Yukon IPC Inquiry Report ATP18-16R, 17R and 38R  
Yukon IPC Inquiry Report File ATP16-031AR  
Yukon IPC Inquiry Report ATP15-055AR  
Yukon IPC Inquiry Report File ATP13-037AR  
Yukon IPC Investigation Report ATP-ADJ-2022-02-053

## Explanatory Note

All sections, subsections, paragraphs and the like referred to in this investigation report (Investigation Report) are to the *Access to Information and Protection of Privacy Act* (ATIPPA), unless otherwise stated.

## I BACKGROUND

[1] On January 20, 2022, the applicant made an access request for the following information from the Department of the Economic Development (Department).

*The information I request involves evaluation of the \$103,427 renovation grant awarded to Vangorda Enterprises. I request the worksheet on what immediate and long-term outcomes the applicant met that led to the successful application. This request should be extended to include background statements and presentations to the application that support the conclusions reached. Referring to <https://yukon.ca/edf>, the project criteria examples provided in the government's description of the program do not mention financial need. Financial need is also not a requirement for a successful application. To that end, please be aware that I am not requesting any 3rd party financial business information. Timeframe: December 1, 2020 - November 30, 2021. [Emphasis mine]<sup>2</sup>*

(Access Request)

[2] On February 14, 2022, the ATTIP Office advised the applicant that the Department had identified records responsive to the Access Request but it was withholding them in full in accordance with the following provisions.

- Paragraph 77(1)(a) – a disclosure harmful to third party business interests *re* undue financial loss or gain.
- Paragraph 77(1)(c) – a disclosure harmful to third party business interests *re* third party competitive or negotiating position.

[3] On February 24, 2022, the Information and Privacy Commissioner (IPC) received a complaint from the applicant (Complainant) and assigned an Informal Case Resolution investigator to attempt a settlement through a consultation process.

[4] As a result of this process, the Department agreed to release a redacted version of the responsive records to the Complainant and, on April 14, 2022, the ATIPP Office provided the Complainant with an amended response from the Department. It included additions to the provisions they were relying on for withholding the remaining records.<sup>3</sup>

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<sup>2</sup> For purposes of Issue 4 below.

<sup>3</sup> It is our policy only to consider the provisions cited in a public body's final response to an access request. However, due to a clerical error, additional provisions raised during the ICR process and cited in an updated records package sent to the Complainant by the ATIPP Office on behalf of the Department were included as part of the notice of formal investigation. As such, I have considered them for purposes of this Investigation Report.

[5] On April 28, 2022, as the matter could not be fully resolved, the IPC escalated the matter to a formal investigation and assigned an Adjudicator to it.

## II ISSUES

[6] There are four issues as follows.<sup>4</sup>

- 1) Is the Department Head authorised by subsection 70(1), subparagraph 70(3)(a)(iii) and paragraph 70(3)(e) to withhold the information sought by the Complainant in their Access Request?
- 2) Is the Department Head authorised by subsection 74(1)(a) to withhold the information sought by the Complainant in their Access Request?
- 3) Is the Department Head authorised by subparagraph 75(1)(a)(ii), subparagraph 75(1)(a)(iv) and subparagraph 75(1)(b)(i) to withhold the information sought by the Complainant in their Access Request?
- 4) Is the Department Head authorised by paragraph 77(1)(a), paragraph 77(1)(b) and paragraph 77(1)(c) to withhold the information sought by the Complainant in their Access Request?

## III RECORDS AT ISSUE

[7] The set of records at issue in this Investigation are those referred to in the Department-supplied table below.<sup>5</sup>

<b>Record</b>	<b>Page</b>	<b>Number of Pages</b>	<b>Type of Record</b>	<b>Severed or Refused</b>	<b>Exceptions Claimed</b>
2	2	1	Email	S	77(1)(a), (b), (c)
3	3-12	10	Email attachment	S	70(1) 77(1)(a), (b), (c)

<sup>4</sup> These are the main issues; however, I will add two others for reasons that will become apparent in this Investigation Report. They are entitled 'Preliminary Issue' in advance of Issue 1 and 'Override Issue' following Issue 4.

<sup>5</sup> Record 15 was supplied by the Department on October 18, 2022, and has been incorporated into the original Record at Issues table.

4	13-30	18	Email attachment	S	70(1) 77(1)(a), (b), (c)
5	31-32	2	Document	S	74(1)(a) 77(1)(a), (b), (c)
6	33-36	4	Document	S	74(1)(a) 75(1)(a)(ii), (iv) 77(1)(a) and (c)
7	37-40	4	Document	S	74(1)(a) 75(1)(a)(ii), (iv) 75(1)(b)(i) 77(1)(a), (b), (c)
8	41	1	Document	S	70(1) 74(1)(a) 75(1)(a)(ii), (iv) 77(1)(a), (b), (c)
9	42-44	3	Email	S	77(1)(a), (b), (c)
10	45-48	4	Document	S	70(1) 70(3)(a)(iii) 74(1)(a) 75(1)(a)(ii), (iv) 75(1)(b)(i) 77(1)(a), (b), (c)
12	50-52	3	Email attachment	S	74(1)(a) 75(1)(a)(ii), (iv) 75(1)(b)(i) 77(1)(a), (b), (c)
13	53	1	Email attachment	S	74(1)(a) 75(1)(a)(ii), (iv) 75(1)(b)(i) 77(1)(a), (b), (c)

14	54-55	1	Email attachment	S	70(1) 70(3)(a)(iii) 70(3)(e)
15	56-60	5	Document	R	77(1)(a), (b), (c)

(collectively, the Records).

[8] Since the table does not indicate which parts of the Records at Issue have been redacted, and since the Department is applying several exemption provisions to multiple and often overlapping records, I will now describe each of the documents, although I will only use generalised statements to impart the contents.

#### Record 2

[9] This is a one-page email from [trevor@vangorda.com](mailto:trevor@vangorda.com) to [EDF@yukon.ca](mailto:EDF@yukon.ca), dated June 15, 2021 @ 1627 hours.<sup>6</sup> The redacted portion is a reference in the email body to the subject headings in three attached documents listed below it. There are also subject heading redactions in each of the three attachments. The three attachments are listed as follows.

- 1) File: Vangorda Enterprises C-Store Relocation & Expansion – [redacted subject heading] EDF Application – June 2021.pdf
- 2) File: Vangorda Enterprises C-Store Relocation & Expansion – [redacted subject heading] EDF Application – June 2021.pdf
- 3) File: Vangorda Enterprises C-Store Relocation & Expansion – [redacted subject heading] EDF Application – June 2021.pdf

#### Record 2 Attachments

[10] The Department, in respect of Record 2, did not provide Attachments 2 and 3 to the Adjudicator until October 18, 2022.

[11] Attachment 1 is Record 14 and will be addressed under that heading (Record 14) below.

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<sup>6</sup> Page 2 of the Records at Issue.

[12] Attachment 2 was withheld in its entirety and comprises the second set of records at issue. For consistency, I will re-number this attachment as Record 15 and will address it under that heading (Record 15) below.<sup>7</sup>

[13] Attachment 3 was released to the Complainant in full. For reasons that will immediately become apparent, I will address and dispose of it now. When the Department provided me with this attachment on October 18, 2022, none of its pages 61 to 60 were redacted because, as indicated by the Department, these pages were released to the Complainant.

[14] It follows, therefore, that the redacted subject heading of this attachment referred to in the body the email comprising Record 2, as well as the subject heading in the third file attachment reference below the email, cannot be withheld from the Complainant. The Department must release this information.

### Record 3

[15] This is a 10-page Department 'Development Fund Application', as submitted by VanGorda Enterprises Ltd. (VanGorda) to the Department.<sup>8</sup> The redacted portions are as follows, as per their respective unredacted headings.

- Under 'Project Summary', total project costs, total eligible capital expenditures and project start/end dates.
- Under 'Project background', a descriptive outline of the project.
- Under 'Project outcomes', a description of anticipation impacts and successes.
- Under 'Project risks and mitigations', a description of such.
- Under 'Project timeline', a series of dates that correspond to eight subheadings (*e.g.*, 'Demolition', 'Electrical upgrades', etc.).
- Under 'Project item', project costs, EDF [funding] request, proponent cash distribution, proponent donation, other funding, +/-variance, and total project costs.
- Under 'Acknowledgement of funding', the funding applicant's signature.
- Under 'Attachment #1 Project background', a full-page description of such, excepting three sentences and a portion of a fourth one.

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<sup>7</sup> The Department originally labelled it as 'record 2' in its October 18, 2022 package.

<sup>8</sup> Pages 3-12 of the Records at Issue.

- Under 'Attachment #2 Project Fund Objectives Description', a full-page description of such.

#### Record 4

[16] This is an 18-page series of documents consisting of estimates or quotes for goods and services from other businesses, as submitted by VanGorda to the Department.<sup>9</sup> The first page, an in-kind/donation estimate prepared by VanGorda, is partially redacted. Such redactions consist of the respective quantity of hours, unit prices and total costs associated with the estimate, as well as the company estimator's signature. The remaining pages are fully redacted.

#### Record 5

[17] This is a two-page score-based assessment document prepared by the Department concerning the VanGorda funding application. It contains only one small redaction under the unredacted column heading 'Primary Considerations' and the generic sub-column heading 'New Benefit to Yukoners'<sup>10</sup> but does not include the redacted information's assessment score.

#### Record 6

[18] This consists of the following two documents.

[19] The first is a three-page score-based spreadsheet entitled, 'Ranking Exercise' that links together horizontally. As such, it consists of 32 horizontal columns, containing the funding application file number, the name of the applicant, the same generic 'sub-headings' found in Record 5, as well as two score columns and two other columns entitled, 'PRC Suggested Yes/No and Ranking 1 2 3 4 5' and 'PRC Suggested Project Requests', respectively.<sup>11</sup> None of these headings have been redacted. The latter two columns are each concluded by a cell, the first called 'TOTAL PRC Suggestion', which is not redacted, and the second containing a redacted total \$\$ amount for all the funding applications.

[20] The document also contains, below the horizontal headings, 16 sequentially-numbered entries (*e.g.*, EDF# XXXX) consisting of various business enterprises that submitted funding applications to the Department. All these entries and their ranking criteria have been redacted except for VanGorda.<sup>12</sup>

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<sup>9</sup> Pages 13-30 of the Records at Issue.

<sup>10</sup> Pages 31-32 of the Records at Issue.

<sup>11</sup> 'PRC' is an acronym for the Department's 'Peer Review Committee' which reviews project funding applications. This Investigation Report will use the term PRC in this context.

<sup>12</sup> Pages 33-36 of the Records at Issue.

[21] The second document is a one-page score-based spreadsheet with no overarching title. However, it consists of 14 horizontal columns containing such headings as the funding application file number, the name of the applicant, scoring categories with a possible maximum score (e.g., 'Immediate Benefit/22' or 'Secondary Considerations/10'), score columns and two other columns entitled, 'PRC Suggested Yes/No and Ranking 1 2 3 4 5' and 'PRC Suggested Project Requests', respectively. Everything is redacted except for the first 12 headings and how VanGorda scored in each of those categories.

#### Record 7

[22] This is a four-page document containing Department 'Review Committee Minutes' from July 23, 2021, in which certain Department officials attended. The minutes contain reviews of several unrelated enterprise funding applications, all of which have been redacted except the review of the VanGorda funding application.<sup>13</sup>

#### Record 8

[23] This is a one-page document setting out a 'Risk Assessment Matrix' of the funding application, as completed by an identified individual for the Department, in their employment capacity as a senior business development advisor.<sup>14</sup> The information under the heading 'Application of Risk' and the signatures of two Department who either assessed or reviewed the assessment are redacted, all else being unredacted.

#### Record 9

[24] This is a three-page document consisting of three emails.<sup>15</sup>

[25] The first is an acknowledgment email from [vanessa.innes@yukon.ca](mailto:vanessa.innes@yukon.ca) to [trevor@vangorda.com](mailto:trevor@vangorda.com), dated June 30, 2021 @ 0738 hours. It is not redacted.

[26] The second is a reply email from [trevor@vangorda.com](mailto:trevor@vangorda.com) to [vanessa.innes@yukon.ca](mailto:vanessa.innes@yukon.ca), dated June 29, 2021 @ 1905 hours. The substantive text is fully redacted.

[27] The third is an originating email from [vanessa.innes@yukon.ca](mailto:vanessa.innes@yukon.ca) to [trevor@vangorda.com](mailto:trevor@vangorda.com), dated June 29, 2021 @ 1018 hours and includes reference to an attachment entitled 'VanGorda current C-Store #4.jpg'. Neither are redacted.

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<sup>13</sup> Pages 37-40 of the Records at Issue.

<sup>14</sup> Page 41 of the Records at Issue. The identified individual is listed in the YG Directory and appears to be a YG employee.

<sup>15</sup> Pages 42 to 44 of the Records at Issue.

#### Record 10

[28] This is a four-page document entitled 'Economic Development Fund Project Analysis' prepared by the Department and signed by Department officials in response to a Department funding application by VanGorda<sup>16</sup> The redacted portions consist of Department signatures, initials and dollar amounts under the heading 'Project Analysis'. They also consist of dollar amounts under the heading 'Project Budget', as well as information under the headings 'Capacity and Capital Development', 'Project Need', 'Project Description', 'Project Outcomes/Impacts', 'Project Risks and Mitigations' and 'Peer Review Comments'.

#### Record 12

[29] This is a three-page document that was attached to the second email in Record 9.<sup>17</sup> The first page consists of an undecipherable, gray-coloured slate which may be a redaction. The second and third pages are fully redacted.

#### Record 13

[30] This is a one-page document that was attached to an email dated June 25, 2021 @ 1905 hours from [trevor@vangorda.com](mailto:trevor@vangorda.com) to [EDF@yukon.ca](mailto:EDF@yukon.ca).<sup>18</sup> It is fully redacted.

#### Record 14

[31] This consists of two documents listed as attachments to the email constituting Record 2.<sup>19</sup> They are fully redacted.

#### Record 15

[32] This is a four-page document consisting of banking information. It is fully redacted.

## IV JURISDICTION

[33] The authority of the IPC to investigate a complaint is set out in subsection 91(1). The authority of the IPC to delegate an investigation to an Adjudicator is set out in subsection 111(1)(g).

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<sup>16</sup> Pages 45-48 of the Records at Issue.

<sup>17</sup> Pages 50-52 of the Records at Issue.

<sup>18</sup> Page 53 of the Records at Issue.

<sup>19</sup> Pages 54-55 of the Records at Issue.

## V BURDEN OF PROOF

[34] Paragraph 102(c) sets out the burden of proof relevant to this Investigation. It states that the burden is on the public body head to prove that a complainant has no right to the records or to the information withheld from the records.

*102(c) in the case of a complaint made under section 66 that relates to a determination or decision to withhold information or a record under paragraph 64(1)(b), the head who made the determination or decision has the burden of proof of proving that the complainant has no right of access under this Act to the information or record.*

## VI SUBMISSIONS OF THE PARTIES

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

## VII ANALYSIS

Preliminary Issue – Are the signatures contained in Records 4 and 8, the names, signatures and initials contained in Record 10, and the information contained in Record 14 ‘personal information’?

[36] The Department submitted that the signatures contained in the bottom of pages 13, 14 [Record 4] and 41 [Record 8], the names and signatures on pages 45 to 46 [Record 10], as well as the full text on pages 54 to 55 [Record 14], fall within the section 1 definition of ‘personal information’ as it pertains to paragraphs (a) and (l).

[37] The Department made no submissions on Record 10 at page 45 insofar as it contains the redacted signatures of the Director of Business and Industry Development, Department Head and Assistant Deputy Minister, as well as a single set of initials, but I will also address its question of ‘personal information’ below.

### Relevant Law

*‘personal information’ means, subject to section 3, recorded information about an identifiable individual, including*

*(a) their name, ...*

...

*(l) their opinion or view about something other than their opinion or view about another individual; ...*

### Analysis

[38] In my view, whether a signature is personal information is dependent on context and circumstances. In Inquiry Report File ATP13-037AR, the IPC considered whether it would be an unreasonable invasion of personal privacy, under then-section 25 of the former ATIPPA which is similar to section 70 of the new ATIPPA of 2018, to release, amongst other things, the name of an individual acting in a representative capacity for a government or private sector business.<sup>20</sup> The IPC agreed with a decision of the Adjudicator in Alberta IPC Order F2008-028 who determined that the release of such information to an applicant was not an unreasonable invasion of the individual's personal privacy because the name appeared only in the context of acting in a purely representative capacity of a government or private sector business. Of note here is the fact that the Alberta Adjudicator included 'signatures' in his reasoning.<sup>21</sup>

[39] In Inquiry Report File ATP16-031AR, the IPC determined that the name and signature of a Department employee whose name and signature appeared on a grievance form was personal information but, following the Alberta Order, it was not an unreasonable invasion of the third party's privacy because it had been recorded in the course of the third party performing employment responsibilities and acting as a representative of their employee.

[40] I agree with the IPC as to releasing the name of an individual determined to be acting in a representative capacity and, by extension, their signature whether accompanied by a printed name or not.

### Record 4

[41] Pages 13 and 14 are contained in Record 4. The reference to the 'bottom of these pages' is to the redacted signature of one distinct individual and to both the redacted name and signature of a second distinct individual, the first appearing on page 13 and the second appearing on page 14.

[42] On page 13, the evidence shows that the signature is that of an individual acting as a representative of VanGorda and engaged in providing an 'in-kind/donation' estimate for purposes of the funding application. On page 14, the name and signature are that of an

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<sup>20</sup> Inquiry Report File ATP13-037AR at 30-31.

<sup>21</sup> *Ibid.* at 31.

individual acting as a representative of another business enterprise engaged in an activity that could benefit from an approval of the funding application.

[43] Since both these individuals are acting in their capacity as representatives of their business enterprises in respect of pages 13 and 14, it follows that the remaining redacted content of these pages is information of those business enterprises and not the personal information of an identifiable individual.

[44] For these reasons, I make the following two findings.

- 1) The signatures of the two individuals, as well as the name of the second individual, are not personal information as defined by section 1
- 2) The remaining redacted content in pages 13 and 14 are not the personal information of an identifiable individual.

#### Record 8

[45] Page 41 is contained in Record 8. The reference to the 'bottom' of this page is to the redacted signatures of two distinct individuals, one appearing immediately after the other. The printed name of the risk assessor, however, has not been redacted. There is no printed name of the risk assessment reviewer on the record.

[46] In the current circumstances, the original signatures contained in Record 8 verify that the assessment for a public funding application has been duly completed and reviewed by Department officials assigned to such duties. They provided their signatures in their professional capacities as employees of the Department and in the context of executing their responsibilities. The signatures link these employees to the record and serve as evidence of those individuals' respective intent to approve or be bound in a legal capacity to its contents. As such, the signatures are not about identifiable individuals; rather, they are about officials engaged in and bound by their work.

[47] Since both these individuals are acting in their capacity as representatives of the Department in respect of page 41, it follows that the remaining redacted content of this page is information of the Department and not the personal information of an identifiable individual.

[48] For these reasons, I make the following two findings.

- 1) The two signatures are not personal information as defined by section 1.
- 2) The remaining redacted content in page 41 is not the personal information of an identifiable individual.

## Record 10

[49] Pages 45 to 46 are contained in Record 10.

[50] On page 45, there are three redacted signatures, the first belonging to the Director of Business and Industry Development, the second to the Department Head and the third, immediately following, to the Assistant Deputy Minister. There is also one set of initials. All of this occurs in their capacity as representatives of the Department approving the VanGorda funding application. As such, it follows that the remaining redacted content of these pages would be information of the Department and not the personal information of an identifiable individual. However, that is not the end of the matter.

[51] On page 46, there are two redacted printed names, the first of which is immediately underlain by the name of a business enterprise. From this linkage, it is reasonable to infer that the individual is identifying themselves as the representative of the business enterprise.

[52] The second name stands on its own with no modifiers. In the absence of any linkage, the name is the personal information of the identified individual.

[53] For these reasons, I make the following four findings.

- 1) The signatures of the Director of Business and Industry Development, Department Head and the Assistant Deputy Minister acting in their professional capacities are not personal information. I also find the same in respect of the initials.
- 2) The name of the business enterprise representative is not personal information.
- 3) The name of the 'stand alone' individual is personal information.
- 4) The remaining redacted content in pages 45 to 48 is not the personal information of an identifiable individual.

## Record 14

[54] Pages 54 to 55 are contained in Record 14.

[55] On page 54 (Document 1), the author provides their name at the bottom but no signature. They also offer an opinion that supports the funding application by VanGorda, as well as identifying certain individuals in a manner that does not appear elsewhere in the Records.

[56] Paragraph (a) of the section 1 definition of 'personal information' includes a name of an identifiable individual. The name of author of Document 1, as well as the names contained in

the body of the text, stand alone. They are not linked to any representational capacity. Therefore, these names are the personal information of these individuals.

[57] However, the remaining information in page 54, essentially the opinion, is not personal information in the absence of an identifiable individual. There is nothing in the text, given its generalities, that could be attributed to such an individual.

[58] On page 55 (Document 2), the author provides their name, signature and business enterprise in a block at the bottom of the text. They also offer an opinion that supports the funding application. I am of the view that the individual created Document 2 in their capacity as a representative of the business enterprise.

[59] As such, the remaining information in page 55, essentially the opinion, is the information of the business enterprise. It is not the personal information of an identifiable individual.

[60] For these reasons, I make the following three findings.

- 1) The names of the Document 1 author and the other identified individuals are personal information. I will address the issue of possible disclosure in Issue 1 below.
- 2) The name and signature of the Document 2 author and the name of the business enterprise are not personal information.
- 3) The remaining redacted content in Document 2 (*i.e.*, page 55) is not the personal information of an identifiable individual.

## Conclusion

[61] The Department is not authorised to rely on the section 1 definition of 'personal information' to withhold from the Complainant the following.

- 1) The portion of Record 4 which contains the signatures of the VanGorda and other business enterprise representatives; consequently, the remaining redacted information.
- 2) That portion of Record 8 which contains the signatures of the risk assessment officer and the reviewer; consequently, the remaining redacted information.
- 3) That portion of Record 10 which contains the signatures of the Director of Business and Industry Development, the Department Head and the Assistant Deputy Minister, as well as the single set of initials; consequently, the remaining redacted information.

- 4) That portion of Record 14 which contains the name and signature of the Document 2 author, as well as the name of the business enterprise; consequently, the remaining redacted information in Document 2.

Issue 1 – Is the Department authorised by subsection 70(1), subparagraph 70(3)(a)(iii) and paragraph 70(3)(e) to withhold the Records sought by the Complainant in their Access Request?

[62] The Department is relying on these provisions to withhold from the Complainant Records 3, 4, 8, 10 and 14. It is also separately relying in its submissions on paragraphs 70(2)(a) and (c), paragraph 70(5)(b), subparagraphs 70(5)(d)(i) and (iii).<sup>22</sup>

[63] The Department is also relying on subsection 82(1) but since it raised this provision in each of the four issues, I will address this after Issue 4 of the Investigation Report under the separate heading ‘Override Issue’.

### Relevant Law

*70(1) The head of a responsive public body must not grant an applicant access to a third party’s personal information held by the responsive public body if the head determines, in accordance with this section, that disclosure of the information would be an unreasonable invasion of the third party’s privacy.*

*(2) The head must make a determination under subsection (1) in accordance with the following:*

*(a) a disclosure of a type described in subsection (3) is presumed to be an unreasonable invasion of a third party’s privacy that may be rebutted only after the head weighs all relevant factors known to the head in relation to the disclosure, including any factors referred to in subsection (5) that are applicable in the circumstances;*

*(b) a disclosure of a type described in subsection (4) is not to be considered an unreasonable invasion of a third party’s privacy;*

*(c) in the case of any other type of disclosure of a third party’s personal information, the head must weigh all relevant factors known to the head in relation to the disclosure, including any factors referred to in subsection (5) that are applicable in the circumstances.*

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<sup>22</sup> *Supra*, note 1.

*(3) Each of the following types of disclosure of a third party's personal information is considered to be an unreasonable invasion of the third party's privacy:*

*(a) the disclosure of information about*

*...*

*(iii) the education or employment history of the third party,*

*...*

*(e) the disclosure of an individual's opinion or view about the third party that has been provided for the purpose of a recommendation, evaluation or character reference in respect of the third party.*

*(4) Each of the following types of disclosure of a third party's personal information is not considered to be an unreasonable invasion of the third party's privacy: ...*

*(5) The following factors are relevant factors to be weighed by the head in relation to a disclosure under subsection (1) (if known to the head and applicable in the circumstances):*

*(a) the type and sensitivity of the personal information that would be disclosed;*

*(b) the relationship, if any, between the third party and the applicant;*

*(c) whether the personal information that would be disclosed is likely to be accurate and reliable;*

*(d) the following factors that are considered to suggest that the disclosure would be an unreasonable invasion of a third party's privacy:*

*(i) the disclosure would unfairly expose the third party to financial or other harm,*

*(ii) the disclosure would unfairly damage the reputation of any person referred to in a record containing the personal information,*

*(iii) the personal information to be disclosed was provided to a public body based on the public body's confirmation that it would hold the information in confidence;*

*(e) the following factors that are considered to suggest that the disclosure would not be an unreasonable invasion of a third party's privacy:*

*(i) the disclosure would subject a program or activity, specialized service or data-linking activity of a public body to public scrutiny,*

*(ii) the disclosure would be likely to promote public health and safety,*

*(iii) the disclosure is authorized or required under an Act of the Legislature (including this Act) or of Parliament, or is authorized or required under a regulation made under such an Act,*

...

*(v) the personal information that would be disclosed is relevant to a determination of the applicant's rights.*

Section 1 defines 'personal information' as follows.

*'personal information' means, subject to section 3, recorded information about an identifiable individual, including*

*(a) their name,*

...

*(l) their opinion or view about something other than their opinion or view about another individual; ...*

Section 1 defines 'third party' as follows.

*'third party' in respect of an access request, means a person other than the applicant or the responsive public body; ...*

## Analysis

### **Subsection 70(1)**

[64] Subsection 70(1) is a mandatory exemption provision, the purpose of which is to protect the privacy of third parties whose personal information may be contained in the records responsive to an access request by an applicant.

[65] The head of a public body has either limited or no discretion about applying the exemption.<sup>23</sup> If the responsive records are covered by the exemption and the conditions for the exercise of discretion are absent, then the public body head cannot disclose it. In other words,

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<sup>23</sup> In Investigation Report ATP-ADJ-2022-02-053, the Adjudicator decided that the Minister responsible for a public body is the public body head. However, exemption decisions are a responsibility generally delegated to the chief executive of a public body.

the head of a public body must not disclose third party personal information when they determine, in accordance with subsections (2), (3), (4) and (5), that it would amount to an unreasonable invasion of the third party's privacy.

[66] Personal information is defined in section 1 as, "subject to section 3, recorded information about an identifiable individual." This means that the information must be recorded, it must be about an individual and it must be about an identifiable individual. As such, it cannot be personal information about a group, organisation or corporation. In short, the protection in subsection 70(1) can only apply to a natural person about whom the information is about.

### ***Subsection 70(2)***

[67] This provision sets out the three factors a public body head must consider under which the disclosure of personal information would or would not amount to an unreasonable invasion of a third party's privacy.

- a) Disclosures set out in subsection 70(3) that are deemed to be an unreasonable invasion of a third party's privacy, noting that this type can be rebutted if the public body head weighs all relevant factors known to the head in relation to the disclosure, including any factors referred to in subsection (5) that are applicable in the circumstances.
- b) Disclosures set out in subsection 70(4) that are deemed not to be an unreasonable invasion of a third party's privacy.
- c) Disclosures of any type not set out in subsections 70(3) and (4), noting that the public body head must weigh all relevant factors known to the head in relation to the disclosure, including any factors referred to in subsection (5) that are applicable in the circumstances.

### ***Subsection 70(3)***

This provision sets out the types of information that, if disclosed, is deemed to be an unreasonable invasion of a third party's privacy. In determining if disclosure of any of this type of information would have such an outcome, the public body head must consider the factors in subsection 70(5), including any other relevant circumstances.

### ***Subparagraph 70(3)(a)(iii)***

[68] Subparagraph 70(3)(a)(iii) is a mandatory exemption provision, the purpose of which is to protect personal information about the education or employment history of the third party.

**Paragraph 70(3)(e)**

[69] Paragraph 70(3)(e), a mandatory exemption provision, the purpose of which is to protect personal recommendations, evaluations and character references about an identifiable individual given by someone other than that individual and held by a public body.

**Subsection 70(4)**

This provision sets out the type of information that, if disclosed, is not an unreasonable invasion of a third party's privacy. In determining if the responsive records fit within this type of information, the public body head cannot rely on subsection 70(1) to refuse disclosure of such personal information. Moreover, the factors set out in subsection 70(5) are not applicable to subsection 70(4).

**Subsection 70(5)**

[70] This provision sets out the factors that the public body head must weigh in determining if disclosure of personal information would amount to an unreasonable invasion of a third party's privacy under paragraphs 70(2)(a) and (c). The factors are non-exhaustive. As such, the public body head must consider all the relevant circumstances, noting that some would suggest that disclosure of the responsive records could occur while others suggest that they should be withheld.

**Application of Subsection 70(1)**

[71] In my view, the following six-part test applies in respect of subsection 70(1).

- 1) Are the Records held by the Department?
- 2) Are the Records of a type of personal information described in subsection 70(3)?<sup>24</sup>
- 3) If yes, then has the presumed unreasonable invasion of privacy been rebutted by the Department Head, having weighed all relevant factors known to them in relation to the disclosure, including any factors referred to in subsection 70(5) applicable in the circumstances?
- 4) Are the Records of a type of personal information described in subsection 70(4)?<sup>25</sup>

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<sup>24</sup> If yes, then this type of personal information is caught by the subsection 70(1) prohibition and should not be disclosed.

<sup>25</sup> The tests in subparagraph 70(3)(a)(iii) and paragraph 70(3)(e) would, if applicable, also be applied.

- 5) Are the Records of any type of personal information not described in subsections 70(3) and (4)?
- 6) If yes, then has the Department Head weighed all relevant factors known to them in relation to the disclosure, including any applicable factors referred to in subsection 70(5)?

[72] The Department provided no submissions on subsection 70(1), subparagraph 70(3)(a)(iii) and paragraph 70(3)(e) other than to quote them. It also quoted paragraph 70(5)(b), as well as subparagraphs 70(5)(d)(i) and (iii) but made no submissions on them.<sup>26</sup> It did, however, provide a brief submission on the section 1 definition of ‘personal information’, as per paragraphs (a) and (l) of the definition in respect of the full text on pages 54 and 55 [Record 14]. I have already addressed Record 14 in this context but will still address Record 14 in the context of subsection 70(1) below.

[73] Because subsection 70(1) is mandatory in nature, I will examine the applicable Records to determine if the Department Head must refuse to disclose them to the Complainant.<sup>27</sup>

*Are the Records held by the Department?*

[74] The Department is relying on these provisions to withhold from the Complainant Records 3, 4, 8, 10 and 14. These Records are in the custody or control of the Department and have been listed in the Records at Issue table at paragraph 14 of this Investigation Report , as well as being produced for purposes of this Investigation. I am satisfied that these five Records are held by the Department.

*Are the Records of a type of personal information described in subsection 70(3)?*

Records 3, 4, 8, 10 and 14

[75] This question is premised on whether these Records contain ‘personal information’, as defined in section 1. Such information must be about an identifiable individual, including, for example, information about an individual’s financial history.

[76] Section 1 sets out the definition of ‘business contact information’ of an individual. It means “information that makes it possible to contact the individual at their place of business

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<sup>26</sup> *Supra*, note 1.

<sup>27</sup> While I acknowledge that the Department made a brief submission on ‘personal information’, it is the Department’s onus to present reasoned submissions on any provision on which it relies, especially a mandatory one. It is not a responsibility that should be transferred to an Adjudicator by assuming that the mere citation of provisions means their alleged applicability speak for themselves.

and includes the individual's name, position, title, business phone number and business email address."

[77] Section 3 states that the business contact information of an individual is not considered to be personal information of that individual.

[78] Record 3 contains the unredacted business contact information of the VanGorda representative submitting the funding application to the Department.

[79] Record 4 contains the unredacted business contact information of the VanGorda representative on page 13. It also contains the redacted business contact information of various business enterprises.

[80] Records 8 and 10 are Department documents and contains no business contact information.

[81] Record 14 does not contain business contact information in Document 1 on page 54. However, it does contain such information in Document 2 on page 55.

[82] Except for Document 1 in Record 14,<sup>28</sup> Records 3, 4, 8, 10 and 14 are the information of the various business enterprises. This information is not personal information. Therefore, subsection 70(3) has no application to them and I need go no further in my subsection 70(1) analysis of them.

[83] I find that Records 3, 4, 8 10 and 14, except Document 1 in Record 14, cannot be a type of personal information for purposes of subsection 70(1), subsection 70(3) and subsection 70(5). They do not apply and, therefore, I need go no further in this analysis in respect of these Records.

#### Record 14 Document 1

[84] As stated, the exception is Document 1 on page 54 in Record 14, something I stated previously that I would address in Issue 1. It contains the personal information of the author and some other individuals in the text, as well as an opinion in support of the VanGorda funding application. I will address Document 1 now.

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<sup>28</sup> I will address this exception shortly.

*Are the Records of a type of personal information described in subsection 70(3)?*

[85] Recall that this type of personal information is an individual's opinion or view about the third party that has been provided for the purpose of a recommendation, evaluation or character reference in respect of the third party.

[86] Based on my previous analysis of subparagraph 70(3)(a)(iii), the Department submitted no evidence in its reliance on this provision concerning Document 1 of Record 14. Although section 70 is a mandatory exception and I must consider its application to Document 1 of Record 14, I do not have to do the work of the Department, especially in view of its burden of proof. In the absence of evidence, I am unable to reach any conclusion in respect of subparagraph 70(3)(a)(iii).

[87] Based on my previous analysis of paragraph 70(3)(e), I am of the view that Document 1 of Record 14 does not meet this provision. The disclosure by the Department of the Document 1 author's personal information must first be an opinion or view by an individual about the Document 1 author. It is not an opinion or view by the Document 1 author. As such, I need go no further in my subsection 70(3) analysis. This includes any analysis in respect of paragraph 70(2)(a).

*Are the Records of a type of personal information described in subsection 70(4)?*

[88] On a reading of this provision, I cannot see how it applies to Document 1 of Record 14. For example, there is no evidence that the Document 1 author consented to its disclosure in writing. They are not an employee of the Department. It is not personal information authorised or required to be disclosed by a statute or regulation, and so forth.

*Are the Records of any type of personal information not described in subsections 70(3) and (4)?*

[89] Since Document 1 of Record 14 is not described in these subsections, it is caught by paragraph 70(2)(c).

*If yes, then has the Department Head weighed all relevant factors known to them in relation to the disclosure, including any applicable factors referred to in subsection 70(5)?*

[90] Since one of the purposes of ATIPPA is to provide the public with a right to access information held by public bodies (subject to specific exceptions) to ensure government transparency and to facilitate the public's ability to meaningfully participate in the democratic process,<sup>29</sup> it follows that certain personal information about a third party, while amounting to

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<sup>29</sup> Paragraph 6(e).

an unreasonable invasion of their privacy if disclosed, should nonetheless be disclosed under applicable circumstances. Subsection 70(5) sets out a series of non-exhaustive factors that, when considered by the Department Head, tip the disclosure balance in favour of the third party privacy presumption (*i.e.*, no disclosure) or against it. (*i.e.*, disclosure).

[91] These factors include the type and sensitivity of the personal information that would be disclosed, the relationship, if any, between the third party and the applicant, and whether the personal information that would be disclosed is likely to be accurate and reliable. Also included are factors that suggest that disclosure would amount to an unreasonable invasion of the third party's privacy and those that do not amount to such an end.

[92] The Department submitted that the Department's mandate is to develop and administer financial assistance programs designed to support diversification and employment opportunities in response to Yukon's 2015 recession and the world Covid pandemic. In that context, it received and considered a funding application from VanGorda concerning a building renovation to accommodate a new convenience store and office in Faro.<sup>30</sup> Document 1 was submitted in support of this funding application.

[93] According to subsection 70(5), the disclosure of Document 1 is a function of due consideration. In my view, the following five-part test applies.

- 1) What is the type and sensitivity of the personal information at issue?
- 2) Is there a relationship between the third party and the applicant?
- 3) Is the information likely to be accurate and reliable?
- 4) Would the disclosure of this personal information unfairly expose the third party to financial or other harm, damage the reputation of any person referred to in a record containing personal information, or breach a confirmation by the public body that the personal information would be held in confidence?
- 5) Would the disclosure of this personal information subject a program or activity, specialized service or data-linking activity of a public body to public scrutiny, likely promote public health and safety, obey a requirement or authorisation by a statute or regulation, assist in researching or validating the claims, disputes or grievances of Aboriginal peoples, or be relevant to a determination of the applicant's rights?

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<sup>30</sup> Unredacted information on page 4 of Record 4.

[94] The Department only asserted that the information in Document 1<sup>31</sup> was redacted because it was deemed to be an unreasonable invasion of the third party's privacy. However, it provided no evidence in support of its action.

*What is the type and sensitivity of the personal information at issue?*

[95] Document 1 contains the name of the author and their opinion in support of the funding application by VanGorda because of its perceived benefit to Faro, if approved.

[96] Although section 70 is a mandatory exception and I must consider its application to Document 1 of Record 14, in this case in respect of subsection 70(5), I note again that I do not have to do the work of the Department, especially in view of its burden of proof. In the absence of evidence, I am unable to reach any conclusion in respect of this question.

*Is there a relationship between the third party and the applicant?*

[97] There is no evidence to suggest that the Department knows the identity of the applicant. In making an access request, the applicant does not need to identify themselves unless they are making an access request for their own personal information. In the absence of any evidence, it follows that no relationship between the two parties has been established, other than the Document 1 author having been willing to support the VanGorda funding application.

*Is the information likely to be accurate and reliable?*

[98] Although I have Document 1 before me, the Department offered no evidence in answer to this question. I am therefore unable to reach any conclusion in respect of it.

*Would the disclosure of this personal information unfairly expose the third party to financial or other harm, damage the reputation of any person referred to in a record containing personal information, or breach a confirmation by the public body that the personal information would be held in confidence?*

[99] It is not enough to speculate that such outcome could occur; there must be evidence that harm or damage are more likely than not to occur if disclosure were to occur. There is no such evidence before me. There is also no evidence that Document 1 was received by the Department in confidence as per section 19 of the *Access to Information and Protection of Privacy Regulation*.

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<sup>31</sup> It made the same assertion in respect of Document 2 but I have already addressed that.

*Would the disclosure of this personal information subject a program or activity, specialized service or data-linking activity of a public body to public scrutiny, likely promote public health and safety, obey a requirement or authorisation by a statute or regulation, assist in researching or validating the claims, disputes or grievances of Aboriginal peoples, or be relevant to a determination of the applicant's rights?*

[100] The Department offered no evidence in answer to this question. I am therefore unable to reach any conclusion in respect of it.<sup>32</sup>

[101] Given this in respect of subsection 70(5), I am unable to determine if the Department Head made a decision in accordance with paragraph 70(2)(c) such that they could disclose Document 1 of Record 14.

[102] I find that Document 1 of Record 14 is a type of personal information for purposes of subsection 70(1). However, I have insufficient or no evidence to assist me in determining whether Document 1 can be disclosed. That said, the Department cannot rely on its evidentiary shortcomings to rely on subsection 70(1) to withhold from the Complainant Document 1.

[103] Paragraph (a) of the section 1 definition of personal information extends such information to the name of an identifiable individual. I am of the view that the names of the Document 1 author and the other individuals are personal information and should remain redacted. As such, I find that the remaining content of Document 1 cannot be linked to an identifiable individual and is therefore not the personal information of anyone.

### Conclusion

[104] The Department is not authorised to rely on subsection 70(1), subparagraph 70(3)(a)(iii), paragraph 70(3)(e), paragraph 70(5)(b), and subparagraphs 70(5)(d)(i) and (iii) to withhold from the Complainant Records 3, 4, 8, 10 and 14, except Document 1 in Record 14.

[105] The Department is not authorised to rely on paragraph 70(2)(c) to withhold from the Complainant the full text of Document 1 in Record 14, except for the names of the author and the other identified individuals in that text.

Issue 2 – Is the Department authorised by paragraph 74(1)(a) to withhold the Records sought by the Complainant in their Access Request?

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<sup>32</sup> The other factors are irrelevant to the issue at hand.

[106] The Department is relying on these provisions to withhold from the Complainant Records 5, 6, 8, 10, 12 and 13.

### Relevant Law

*74(1) Subject to subsection (2),<sup>33</sup> the head of a responsive public body may deny an applicant access to information held by the responsive public body if the head determines that disclosure of the information would reveal*

*(a) advice or recommendations prepared by or for a public body or a minister; ...*

### Analysis

#### **Paragraph 74(1)(a)**

[107] Paragraph 74(1)(a) is a discretionary, class-based exemption provision, the purpose of which is to protect the exchange of views in a deliberative process involving public body officials or the head of the public body. It authorises the head to refuse to disclose information to an applicant if disclosure of the information to them could reveal advice and recommendations developed by or for a public body or a minister. It does not, however, apply to the decision that resulted in such information; rather, it only applies to the information itself.

[108] The following two-part test can therefore be applied.

- 1) Does the information qualify as advice or recommendations?
- 2) Was the advice or recommendations prepared by or for a public body or a minister?

[109] There are no definitions these two terms in ATIPPA or the *Interpretation Act*. Black's Law Dictionary defines 'advice' as meaning "guidance offered by one person ... to another."<sup>34</sup> The Cambridge Online Dictionary defines it as meaning "an opinion that someone offers you about what you should do or how you should act in a particular situation."<sup>35</sup> The Service Alberta 'FOIP Guidelines and Practices' (AB FOIP Guidelines) states that it may include "the analysis of a situation or issue that may require action and the presentation of options, but not the presentation of facts."<sup>36</sup> In *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, the BC Court of Appeal considered the term and interpreted it as including an opinion that involves exercising judgement and skill to weigh the

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<sup>33</sup> Subsection 74(2) is irrelevant for purposes of this Investigation Report.

<sup>34</sup> *Black's Law Dictionary*, 11<sup>th</sup> ed., s.v. 'advice'.

<sup>35</sup> <https://dictionary.cambridge.org/dictionary/english/advice>.

<sup>36</sup> 2009 ed., c.4 at 179.

significance of matters of fact, including expert opinion on matters of fact, on which a public body must make a decision for future action.<sup>37</sup>

[110] As such, the giving of advice, as a function of guidance in aid of a pending decision, is an implied recommendation. However, its meaning is broader than the term ‘recommendations’. In *John Doe v. Ontario (Finance)*, the Supreme Court of Canada considered ‘advice’ and ‘recommendations’, stating the following.<sup>38</sup>

*[22] The Court of Appeal also found that “[a]dvice’ may be construed more broadly than ‘recommendation’” (para. 29). However, it distinguished these terms by finding that “‘recommendation’ may be understood to ‘relate to a suggested course of action’ more explicitly and pointedly than ‘advice’”, while “[a]dvice’ ... encompass[es] material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation” (ibid.).*

*[24] ... A recommendation, whether express or inferable, is still a recommendation. “[A]dvice” must have a distinct meaning. I agree with Evans J.A. in 3430901 Canada Inc. v. Canada (Minister of Industry), 2001 FCA 254, [2002] 1 F.C. 421 (“Telezone”), that in exempting “advice or recommendations” from disclosure, the legislative intention must be that the term “advice” has a broader meaning than the term “recommendations” (para. 50 (emphasis deleted)). Otherwise, it would be redundant.*

[111] Black’s Law Dictionary defines ‘recommendation’ as meaning “a specific piece of advice about what to do, especially when given officially; a suggestion that someone should choose a particular thing or person that one thinks particularly good or meritorious.”<sup>39</sup> The Cambridge Online Dictionary defines it as meaning, amongst other things, “advice telling someone what the best thing to do is.”<sup>40</sup> The AB FOIP Guidelines states that it may include “suggestions for a course of action as well as the rationale for a suggested course of action.”<sup>41</sup> As such, a recommendation is about suggesting an action or series of actions that, if chosen, is intended to achieve a planned outcome. It is therefore narrower than the definition of ‘advice’.

[112] For purposes of the terms used in paragraph 74(1)(a), I adopt the following non-exhaustive definitions.

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<sup>37</sup> <https://www.canlii.org/en/bc/bcca/doc/2002/2002bcca665/2002bcca665.pdf>. at para. 113.

<sup>38</sup> <https://www.canlii.org/en/ca/scc/doc/2014/2014scc36/2014scc36.pdf>.

<sup>39</sup> *Black’s Law Dictionary*, 11<sup>th</sup> ed., s.v. ‘recommendation’.

<sup>40</sup> <https://dictionary.cambridge.org/dictionary/english/recommendation>.

<sup>41</sup> *Supra*, note 35 at 179.

‘Advice’ includes “guidance offered to a public body or a minister that is based on an analysis of a situation or issue that may require action and the presentation of options, but not the presentation of facts.”

‘Recommendation’ includes “a suggested action or series of actions that, if chosen, is intended to achieve a planned outcome.”

[113] The term ‘public body’ is defined in section 1 as meaning, amongst other things, “a ministerial body.” It also defines a ‘ministerial body’ as including “(a) the office of a minister responsible for a department” and “(b) the department over which the minister responsible presides.” Schedule 1, Part 1 of the *Access to Information and Protection of Privacy Regulation*, sets out a list of ministerial bodies. The Department is a ministerial body and therefore a public body. The Minister responsible for the Department is the Department Head. As such, paragraph 74(1)(a) requires the Department Head to make the disclosure decision, a responsibility that generally falls to the deputy minister.<sup>42</sup>

[114] The term ‘prepared by or for’ is not defined in ATIPPA or the *Interpretation Act*. The BC FOIPPA Manual defines ‘developed by or for’ as meaning that “the advice or recommendations must have been created either 1) within the public body, or 2) outside the public body but for the public body (for example, by a service provider or stakeholder).”<sup>43</sup>

[115] The two terms, ‘develop’ and ‘prepare’ are related to the extent that they connote a process to put something into a state of readiness or generate into being. The process would include not only generating information that constituted advice or recommendations, but the information leading up to the giving of such advice or recommendations. I am of the view, therefore, that the term ‘prepared by or for’ could be substituted for ‘developed by or for’, as it occurs in the BC FOIPPA Manual, without substantive change or adverse implication.

[116] As such, I adopt the following definition of the term ‘prepared by or for’ in respect of paragraph 74(1)(a).

‘Prepared by or for a public body or a minister’ means “advice or recommendations that are generated within the public body, or outside the public body but for the public body or a

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<sup>42</sup> Subject to certain restrictions, a minister may delegate in writing any power, duty or function conferred or imposed on them to any person, as set out in subsection 2.4(1) of the *Government Organisation Act*. As such, ministerial powers are normally delegated totally and exclusively to the chief executive of a public body, subject to the delegation of powers to other officials in the public body.

<sup>43</sup> <https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foipppa-manual/policy-advice-recommendations?keyword=policy>.

minister, in the process leading up to and including the provision of advice or recommendations.’

[117] The Department provided submissions on paragraph 74(1)(a) concerning Records 5, 6, 8, 10, 12 and 13.

*Does the information qualify as advice or recommendations?*

[118] The Department submitted definitions of ‘advice’ and ‘recommendations’ ‘prepared by or for a public body’ based on four examples of cited case law.<sup>44</sup>

[119] In comparing them with the cited Supreme Court of Canada (SCC) definitions of and comments concerning ‘advice’ and ‘recommendations’, as well as the BC FOIPPA Manual definition of ‘developed by or for’ a public body, which I have determined substantively applied to the ATIPPA term ‘prepared by or for’ a public body, I am satisfied that, while they offer variations of the same language, they are nonetheless in accord. I will therefore use the terms as adopted.

[120] The Department submitted that the information contained in pages 31 to 41 and 43 to 53 constitutes advice and recommendations by employees of the Department for the Department.

[121] Pages 31 to 41 are contained in Records 5, 6, 7 and 8.<sup>45</sup> Pages 43 to 53 are contained in Records 10, 12 and 13. I will address each Record accordingly.

## Record 5

[122] Recall that Record 5 is a two-page score-based assessment document prepared by the Department and contains only one small redaction under the unredacted column heading ‘Primary Considerations’ and the generic sub-column heading ‘New Benefit to Yukoners’.

[123] The Cambridge online dictionary defines ‘assessment’ as “the act of judging or deciding the amount, value, quality, or importance of something, or the judgment or decision that is made.”<sup>46</sup>

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<sup>44</sup> They are *Saskatchewan Power Corporation, Re*, 2017 CanLII 44823 (SK IPC); *Ministry of Agriculture and Food, Re*, 2002 CanLII 21569, @ para. 22; *Prince Edward Island (Department of Finance and Municipal Affairs), Re*, 2010 CanLII 97257 (PEI IPC); and Alberta Information and Privacy Commissioner, Order 96-006.

<sup>45</sup> Pages 37 to 40 are contained in Record 7. This Record is not at issue and therefore is not part of this analysis.

<sup>46</sup> <https://dictionary.cambridge.org/dictionary/english/assessment>.

[124] The redacted information is what it appears to be: an assessment that adds up to a particular score which, in turn reflects a total possible score, the difference of which may or may not indicate a decision threshold.

[125] For these reasons, I find that the redacted information in Record 5 is neither advice nor a recommendation. I need not proceed with the second test.

#### Record 6

[126] Recall that Record 6 consists of two documents. The first is a three-page score-based spreadsheet entitled, 'Ranking Exercise' that links together under horizontal headings. The second document is a one-page score-based spreadsheet with no overarching title that also links together under horizontal headings. In both these documents, all but the last two headings and their respective column information under each consist of sequentially-numbered EDF#, applicants and ranking scores. Except for the respective VanGorda entries, everything is redacted.

[127] I am of the view that this information is neither advice nor recommendations; it is a numerical assessment under various horizontal headings, except for the last two in each document.

[128] The last two headings of each document are entitled, respectively on pages 35 and 36, 'PRC Suggested Yes/No and Rankings 1 2 3 4 5' and the 'PRC Suggested Project Requests'. The column under the first heading contains 'yes/no' suggestions or suggested numerical scores. The column under the second heading contains various finding amounts or a written comment about an amount. These appear to be more than ranking assessments; they are suggestions on which a decision is to be made. As such, I am of the view that the information in each of last two 'PRC' columns on pages 35 and 36 at least constitute a form of brief advice to the Department or, to the extent there is a specified amount, a recommendation.

[129] For these reasons, I find the following.

- 1) The business enterprise identifiers and ranking scores in both documents are neither advice nor recommendation. I need not proceed with the second test.
- 2) The information in the last two 'PRC' columns in both documents on pages 35 and 36 constitutes either advice or recommendations. I will now proceed to the second test.

*Was the advice or recommendations prepared by or for a public body or a minister?*

[130] Record 6 shows evidence that it was prepared by the Department to assist in evaluating the VanGorda funding application by the PRC. The last two columns of each document, are entitled, as previously mentioned, 'PRC Suggested Yes/No and Rankings 1 2 3 4 5' and 'PRC Suggested Project Requests', under which is information pertaining to each funding application. The PRC is an evaluation entity within the Department. There is no evidence to suggest that Record 6 was not prepared by or for the Department.

[131] For this reason, I find that the information in the last two columns of both documents in Record 6 on pages 35 and 36 was prepared by the Department.

#### Record 7

[132] Recall that this four-page document contains Department minutes from July 23, 2021, setting out a review of funding applications of various business enterprises, all of which is redacted except for the VanGorda funding application.

[133] The minutes constitute, in my view, a record of facts concerning each funding application. It indicates the respective positions of the PRC, its concerns and the actions it took by way of deferral, advice or recommendations. The latter actions, to the extent that they refer to advice or recommendations, are merely reports of such action. They are neither advice nor recommendations in their own right.

[134] For these reasons, I find that the information contained does not constitute any advice or recommendations. I need not proceed with the second test.

#### Record 8

[135] Recall that this is a one-page document setting out a 'Risk Assessment Matrix' of the funding application, as completed by an identified individual for the Department, in their employment capacity as a senior business development advisor.<sup>47</sup> The redacted information is twofold. The first occurs under the table heading 'Justification of Risk' and the second is the signatures of both the 'risk assessor' and the 'risk assessment reviewer', which I have already addressed.

[136] The information contained under the first heading is, in my view, an assessment of the project at issue containing, as it does, the risk assessor's successive and total estimations of the various types of risk with which the Department weighs such funding applications.

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<sup>47</sup> Page 41 of the Records at Issue. Recall that the identified individual is listed in the YG Directory as a 'senior business development officer' in the Department's Operation Division, Business and Industry Development Branch (see <https://eservices.gov.yk.ca/en/find-employee/employee-detail/Vanessa.Innes>).

[137] Such an assessment is neither advice nor recommendation because it provides no guidance to a decision-maker that is based on an analysis of a situation or issue that may require action and the presentation of options.

[138] For these reasons, I find that the information contained under the heading 'Justification of Risk' does not constitute any advice or recommendation by the risk assessor. I need not proceed with the second test.

#### Record 10

[139] I have previously adopted a definition of 'advice' to include "guidance offered to a public body or a minister that is based on an analysis of a situation or issue that may require action and the presentation of options, but not the presentation of facts" [emphasis mine].<sup>48</sup> As such, I am of the view that the following information constitutes facts.

- On page 45, the dollar amounts redacted under the heading 'Project Analysis' and those redacted in the table on page two under the heading 'Project Budget', including that under the heading 'Total Ineligible Expenses'.
- On page 45, the decision by the Department Head and Assistant Deputy Minister, as well as the dollar amounts that flow because of their decision.
- On page 46, the information under the heading 'Capacity and Capital Development'.
- On page 46, the information under 'Project Need'.<sup>49</sup>
- On page 47, the information under the heading 'Project Description'.
- On page 47, the information under the heading 'Project Outcomes/Impacts'.
- On page 47, the information under the heading 'Project Risks and Mitigations'.
- On page 48, the information under the heading 'Peer Review Comments'.

[140] For these reasons, I find that the redacted information on pages 45 to 48, except for the information under 'Appendix D' on page 46 which I have already addressed, are facts and not advice or recommendations. I need not proceed with the second test.

#### Record 12

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<sup>48</sup> There is no matter of 'recommendation' to consider in respect of Record 10.

<sup>49</sup> I have already addressed in the Preliminary Issue the information under the heading 'Appendix D'.

[141] Recall that this is a three-page document that consists of an undecipherable, gray-coloured slate and two hand-drawn renderings, the first of a floor plan and the second of a foundation plan. There is no evidence to suggest or support the giving of advice or the making of recommendations in respect of these documents; they present as facts.

[142] For this reason, I find that the information in Record 12 is factual. It is neither advice nor recommendation. I need not proceed with the second test.

### Record 13

[143] Recall that this is a one-page document that consists of four marked photographs of interior building spaces. There is no evidence to suggest or support the giving of advice or the making of recommendations in respect of this document; the photographs within present as facts.

[144] For this reason, I find that the information in Record 13 is factual. It is neither advice nor a recommendation. I need not proceed with the second test.

### Conclusion

[145] The Department cannot reply on paragraph 74(1)(a) to withhold from the Complainant the following.

- 1) Records 5, 7, 8, 10, 12 and 13.<sup>50</sup>
- 2) Record 6, except for the information in the last two columns on pages 35 and 36.

Issue 3 – Is the Department authorised by subparagraph 75(1)(a)(ii), subparagraph 75(1)(a)(iv) and subparagraph 75(1)(b)(i) to withhold the Records sought by the Complainant in their Access Request?

[146] The Department is relying on these provisions to withhold from the Complainant Records 6, 7, 8, 10, 12 and 13.

### Relevant Law

*75(1) Subject to subsection (2),<sup>51</sup> the head of a responsive public body may deny an applicant access to information held by the responsive public body that could reasonably be*

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<sup>50</sup> Except for the name of the ‘stand-alone’ individual in ‘Appendix D’ on page 46 which I have already addressed in the Preliminary Issue.

<sup>51</sup> Subsection 75(2) is irrelevant for purposes of this Investigation Report.

*expected to harm the financial or economic interests of the Government of Yukon or of a public body, or the ability of the Government of Yukon to manage the economy, including the following information:*

*(a) information that is*

*...*

*(ii) commercial, financial, scientific or technical information of the Government of Yukon or a public body and that has, or is reasonably likely to have, monetary value, ...*

*(b) information the disclosure of which the head determines could reasonably be expected to*

*(i) prejudice the financial or economic interests of the Government of Yukon or a public body, ...*

## Analysis

### **Subsection 75(1)**

[147] Subsection 75(1) is a discretionary exemption provision, the purpose of which is to protect the Yukon government or the Department. It is both class and harm-based. It authorizes the head of a public body to refuse to disclose information to an applicant if disclosure of the information to them could reasonably be expected to harm the financial or economic interests of the Yukon government or the Department, or the ability of the Yukon government to manage the economy. By including the term ‘Yukon government’, it allows for the fact that public bodies, corporately or individually, may have financial or economic information that the Yukon government uses to advance its interests, manage the economy or both.

[148] While subsection 75(1) uses the term ‘information’ in a generic, non-exhaustive manner, paragraphs (a) and (b) set out specific classes of information that are included in this collective term. They are also non-exhaustive.

### **Subparagraph 75(1)(a)(ii)**

[149] This subparagraph sets out information of a class that is commercial, financial, scientific or technical. The following three-part test can therefore be applied, as taken from the provision.

- 1) Does the information contain ‘financial, commercial, scientific or technical’ information?
- 2) Is the information ‘of’ the Yukon government or the Department?

- 3) Does the information have 'monetary value' for the Yukon government or the public body, or is it reasonably likely to have such value?

***Subparagraph 75(1)(a)(iv)***

[150] In asserting that it is reasonable to conclude that the disclosure of the Records would harm the financial or economic interests of the Yukon government or the public body, or the ability of the Yukon government to manage the economy, the Department also relies on subparagraph 75(1)(a)(iv) to withhold the Records from the Complainant.

[151] The following two-part test can therefore be applied.

- 1) Does the record contain positions, plans, procedures or instructions, or estimates or criteria that relate to negotiations?
- 2) Were the positions, plans, procedures or instructions, estimates or criteria developed for the purpose of contractual or other negotiations by or on behalf of the Yukon government or the Department?

***Subparagraph 75(1)(b)(i)***

[152] Subparagraph 75(1)(b)(i) sets out the type of information, that if disclosed by the head of the public body to the applicant, could reasonably be expected to prejudice the financial or economic interests of the Yukon government or the public body.

[153] The following test can therefore be applied.

Could disclosure reasonably be expected to prejudice the financial or economic interests of the Yukon government or the public body?

***Application of Subparagraph 75(1)(a)(ii)***

[154] The Department submitted that YG's platform commitment and ensuing budget mandate was a high priority and submitted evidence in support of it. While this may guide the Department in the conduct of its funding program, it cannot supersede ATIPPA which legally governs the access of information and the protection of privacy; ATIPPA binds the Department.

**Records 7 and 10**

[155] The Department also submitted that the information on pages 37 to 40 [Record 7] and pages 45 to 10 [Record 10] was redacted because it was held by the Department and was proprietary in that it held monetary value. The Department offered, as evidence of this latter

assertion, the successful VanGorda funding application that would have been implemented but for increased inflation costs.

*Does the information contain 'financial, commercial, scientific or technical' information?*

[156] For the Department to rely on subparagraph 75(1)(a)(ii), it must meet the three-part test, the first of which is to provide evidence as to the nature of the information at issue. Even if I were persuaded that the information was held by the Department and that it held monetary value, the test must proceed sequentially. In not providing any evidence in support of the first question, I am unable to proceed.

[157] For these reasons, I find that I am unable to determine what type of information is contained in Records 7 and 10. I need not proceed with any further analysis.

***Application of Subparagraph 75(1)(a)(iv)***

[158] The Department made no submissions about Records 6, 7, 8, 10, 12 and 13 in respect of this provision. As such, I am unable to proceed.<sup>52</sup>

[159] For this reason, I find that I am unable to determine what type of information is contained in Records 6, 7, 8, 10, 12 and 13. I need not proceed with any further analysis.

***Application of Subparagraph 75(1)(b)(i)***

[160] The Department made no submissions about Records 7, 10, 12 and 13 in respect of this provision. As such, I am unable to proceed.<sup>53</sup>

[161] For this reason, I find that I am unable to determine what type of information is contained in Records 7, 10, 12 and 13. I need not proceed with any further analysis.

Conclusion

[162] The Department cannot rely on subparagraph 75(1)(a)(ii), subparagraph 75(1)(a)(iv) and subparagraph 75(1)(b)(i) to withhold from the Complainant Records 6, 7, 8, 10, 12 and 13.

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<sup>52</sup> *Supra*, note 27.

<sup>53</sup> *Ibid*.

Issue 4 – Is the Department authorised by paragraph 77(1)(a), paragraph 77(1)(b) and paragraph 77(1)(c) to withhold the Records sought by the Complainant in their Access Request?

[163] The Department is relying on these provisions to withhold from the Complainant Records 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13 and 15.<sup>54</sup>

[164] The Department is also relying on paragraphs 77(2)(a) and (b) in respect of these Records, except Record 15.<sup>55</sup>

### Relevant Law

*77(1) Subject to subsections (2) and (3), the head of a responsive public body may deny an applicant access to information held by the responsive public body that is a trade secret of, or commercial, financial, scientific or technical information of, a third party that a public body has not accepted in confidence in the prescribed manner from the third party if*

*(a) the head determines that disclosure of the information could reasonably be expected to result in undue financial loss or gain to a person or entity;*

*(b) the head determines that disclosure of the information could reasonably be expected to result in similar information no longer being supplied to the responsive public body and the head is satisfied that it is in the public interest that similar information continue to be supplied to the responsive public body;*

*(c) the head determines that disclosure of the information could reasonably be expected to significantly harm the competitive or negotiating position of the third party; ...*

*(2) Before denying access to information under subsection (1), the head of a responsive public body must consider*

*(a) the objections of a third party, if any, submitted in accordance with a notice provided to the third party under paragraph 59(1)(a); and*

*(b) whether, despite any objections, granting the applicant access to the information would promote public health or safety.*

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<sup>54</sup> The Department made no submissions in respect of Record 15. In addition, the Department is not relying on paragraph 77 (1)(b) for Record 6.

<sup>55</sup> *Supra*, note 1.

*(3) The head of a responsive public body must grant an applicant access to information referred to in subsection (1) if*

*(a) the third party consents, in writing, to the disclosure;*

*(b) the third party has made the information available to the public;*

*(c) an Act of the Legislature or of Parliament authorizes or requires the disclosure of the information; or*

*(d) the information is publicly available information.*

***Access to information and the Protection of Privacy Regulation, OIC 2021/25***

*1(1) 'trade secret' means information, including a formula, pattern, compilation, program, device, product, method, technique or process, that*

*(a) is used, or may be used, in business or for any commercial advantage,*

*(b) derives independent economic value, either actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use,*

*(c) is the subject of reasonable efforts to prevent it from becoming generally known, and*

*(d) the disclosure of which would result in harm or improper benefit.*

*19(1) For the purpose of subsection 69(1) of the Act, before a public body accepts a trade secret of, or the commercial, financial, scientific or technical information of, a third party in confidence*

*(a) the head of the public body must advise the third party*

*(i) that paragraph permits the public trade secrets and 69(1)(a) of the Act body to accept only commercial, financial scientific or technical information in confidence, and*

*(ii) whether, in the context in which the trade secret or information is being provided, there are any types or classes of information that the public body will not accept in confidence;*

*(b) the third party must identify the trade secret or information that it wants the public body to accept in confidence; and*

*(c) the head of the public body must consider*

*(i) whether the trade secret or information would be provided if it were not accepted in confidence, and*

*(ii) whether the information was required to be provided under an enactment.*

*(2) For the purpose of paragraph 69(1)(a) of the Act, a public body may accept a trade secret if, or the commercial, financial, scientific or technical information of, a third party in confidence in the following manner:*

*(a) the public body must identify the trade secret or information that it accepts in confidence by making a physical or electronic notation*

*(i) in or on the information within the record in which it is contained, or*

*(ii) in or on the record that contains the information;*

*(b) the public body must provide the third party with a written receipt that*

*(i) confirms that the public body accepts the trade secret or commercial, financial, scientific or technical information in confidence, or*

*(ii) specifies*

*(A) the name of the third party that provided the public body with the trade secret or information,*

*(B) the types or classes of information that comprise the trade secret or information that the public body accepts in confidence,*

*(C) if applicable, the program or activity of the public body that accepts the trade secret or information in confidence on behalf of the public body, and*

*(D) if applicable, the name and position of the employee who is responsible for the program or activity referred to in clause (C),*

*(iii) If the trade secret or information was required to be provided under an enactment, sets out the provision of the enactment under which it was provided, and*

*(iv) sets out the public body's reasons for agreeing to accept the trade secret or information in confidence, including the reasons why the public body considers that access to the trade secret or information should be prohibited.*

*(3) The notation referred to in paragraph (2)(a) may be a symbol or mark that the public body has adopted. In writing, for the purpose of indicating that information has been accepted in confidence.*

*(4) The receipt provided under paragraph (2)(b) must be signed*

*(a) by the head of the public body, unless paragraph (b) applies; or*

*(b) by the employee referred to in clause (2)(b)(ii)(D).*

*(5) For greater certainty*

*(a) a receipt provided under paragraph (2)(b) is not considered to be part of the information or record to which it relates; and*

*(b) a copy of the receipt must be provided without being redacted in respect of records to which it relates that are responsive to an access request.*

*(6) A public body that provides a receipt under paragraph (2)(b) must*

*(a) retain a copy of the receipt for as long as the public body holds the trade secret or information as information that has been accepted in confidence and for one year afterwards; and*

*(b) store the copy of the receipt with the information or record, as the case may be.*

*(7) A third party that provided a record containing a trade secret or commercial, financial, scientific or technical information that a public body has accepted in confidence may provide the public body with a written request that the third party does not want section 69 of the Act to apply to the trade secret or information in the record on or after a specified date.*

*(8) Within 110 business days after the day on which the public body receives a request under subsection (7), the head of the public body must*

*(a) decide whether to*

*(i) grant the request, or*

*(ii) refuse the request;*

*(b) if the head's decision is to refuse the request, provide the party with reasons for their decision; and*

*(c) if the head's decision is to grant the request*

*(i) provide for the notation referred to in paragraph (2)(a) to be invalidated as of the date specified in the request or as soon as practicable after that date,*

*(ii) provide the third party with a receipt confirming that the notation referred to in paragraph (2)(a) has been or will be invalidated as of a particular date, and*

*(iii) retain a copy of the receipt provided under subparagraph (ii) for one year after it is provided to the third party.*

*(9) If the head of a public body provides a third party with a receipt under subparagraph (8)(c)(ii), the trade secret or information to which the notation relates is not considered as a trade secret or information that the public body has accepted in confidence for the purpose of subsection 69(1) of the Act on and after the day on which the notation is invalidated.*

## Analysis

### **Subsection 77(1)**

[165] Subsection 77(1) is a class and harm-based provision, the purpose of which is to allow the Department to protect the ‘business’ interests of a third party, certain information of which the Department has not received in confidence in a prescribed manner. The types of information set out by this provision consist of a trade secret of the third party or any of its information that is commercial, financial, scientific or technical nature.

[166] The following three-part test can therefore be applied.

- 1) Is the information held by the public body?
- 2) Is the information a trade secret of, or commercial, financial, scientific or technical information of, a third party?
- 3) Was the information not accepted by the public body in confidence in the prescribed manner from the third party?

[167] If the answers to these three questions is yes, then the head of the public body can withhold from the applicant this otherwise releasable information if they decide, as set out in paragraphs 77(1)(a), (b) and (c), that disclosure of this information could ‘reasonably be expected’ to:

- a) result in undue financial loss or gain to a person or entity;

- b) result in similar information no longer being supplied to the responsive public body and the head is satisfied that it is in the public interest that similar information continue to be supplied to the responsive public body; or
- c) significantly harm the competitive or negotiating position of the third party.<sup>56</sup>

[168] In Yukon Inquiry Report ATP15-055AR, the IPC stated that whenever the words ‘reasonably expected’ appear in the ATIPP Act, the word ‘probable’ should be added to ensure the middle ground between ‘that which is merely possible’ and ‘that which is probable’ is achieved. This interpretation is based on a decision by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* [Ontario CSCS]. It stated the following about how these words are to be interpreted.<sup>57</sup>

*This Court in Merck Frosst adopted the “reasonable expectation of probable harm” formulation and it should be used wherever the “could reasonably be expected to” language is used in access to information statutes. As the Court in Merck Frosst emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This Inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”: Merck Frosst, at para. 94, citing F.H. v. McDougall, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.*

[169] It is unnecessary to show, on a balance of probabilities, that the harm will occur if the information is disclosed.<sup>58</sup> However, a public body must demonstrate that the risk of harm is well beyond the merely possible or speculative. It does not have to demonstrate that harm is probable but there needs to be a reasonable basis for believing that the harm will result.<sup>59</sup>

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<sup>56</sup> There is a fourth consideration but it is irrelevant to this Investigation Report.

<sup>57</sup> 2014 SCC 31 (CanLII), at para. 54.

<sup>58</sup> *Ibid.* at para. 52.

<sup>59</sup> *Ibid.* at para. 59.

[170] When the IPC made these statements, she was interpreting that part of then subsection 17(1) of the former ATIPPA.<sup>60</sup> It stated as follows.

*17(1) A public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the Government of the Yukon or the ability of that Government to manage the economy, including the following information...*

[171] Except for the term ‘head of a public body’, subsection 77(1) of the new ATIPPA of 2018 is very similar to then subsection 17(1) in that it is harm-based. It follows that where it is determined by the head of a public body that disclosing the requested information to the applicant will likely cause probable harm to the Yukon government or the public body, the subsection is made out.

[172] The head of a public body must demonstrate that the risk of harm is well beyond the merely possible or speculative. They does not have to demonstrate that harm is probable but there needs to be a reasonable basis for believing that the harm will result.

### ***Subsection 77(2)***

[173] Before withholding from an applicant information under subsection 77(1) on the basis of deciding that disclosure of the information could reasonably be expected to result in a particular harm, the head of a public body must then consider the following two things, as per paragraphs 77(2)(a) and (b). They can be posed as questions.

- 1) Are there any third party objections submitted in accordance with a notice provided to the third party under paragraph 59(1)(a)?
- 2) Despite any such objections, does granting the applicant access to the information promote public health or safety?

### ***Subsection 77(3)***

[174] The head of a public body must grant the applicant access to the information under subsection 77(1) if any one of the following four things occur, as per paragraphs 77(3)(a), (b) (c) or (d). They can be posed as questions in which a positive answer to only one of them triggers the provision.

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<sup>60</sup> Section 128 defines ‘former [ATIPPA]’ to mean the *Access to Information and Protection of Privacy Act*, RSY 2002, c.1. It was repealed and replaced by ATIPPA, RSY, 2018, c.9. This Investigation Report will consequently use the term ‘Former ATIPPA’ as the case may be.

- 1) Did the third party consent in writing to the disclosure?
- 2) Did the third party make the information available to the public?
- 3) Does an Act or regulation, either federal or territorial, authorise or require disclosure of the information?
- 4) Is the information publicly available?

***Application of paragraphs 77(1)(a), (b) and (c)***

[175] The Department made the following submissions about Records 2, 3, 4, 5, 6, 7, 8, 9, 10, 12 and 13 in respect of paragraphs 77(1)(a), (b) and (c).

- Tab 4 of the evidence binder documents an email exchange between the Department and VanGorda's in which VanGorda sets out two objections to the Access Request as per paragraphs 77(1)(a) and (c). The submission also quotes paragraph 77(2)(a).<sup>61</sup>
- Paragraph 77(2)(b) does not apply the issue at hand.<sup>62</sup>
- Pages 4 to 30 [contained in Records 3 and 4] fall within the definitions of 'commercial' and 'financial' information as set out in two cases but makes no further submissions on the evidence.<sup>63</sup>
- 'Deemed confidential' in respect of pages 4 to 30 [Records 3 and 4] applies.<sup>64</sup>
- Undue financial loss could reasonably be expected since there are less than seven businesses in Faro working within the same or similar industry as VanGorda. Since the redacted information is VanGorda's proprietary information (*i.e.*, preferred supplier[s] and agreed-upon pricing structure[s]), disclosure may reveal a competitive position that could possibly result in undue financial loss to VanGorda and, conversely, a possible gain to a person or entity.

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<sup>61</sup> *Supra*, note 1.

<sup>62</sup> *Ibid.*

<sup>63</sup> The two cases are *Ontario First Nations Ltd Partnership v. Ontario (Information and Privacy Commissioner)*, (2006) 209 OAC 158 at para 9 (ON Sup Ct J) in respect of the first definition and both *William Osler health System – Brampton Campus (Re)*, 2020 CanLII 28076 (ON IPC), at para 20 and *Toronto (City) (Re)*, 1994 CanLII 6898 (ON IPC), at part one, in respect of the second definition.

<sup>64</sup> For the reasons given below, this issue will not arise in the body of this Investigation Report. However, I will make some extraneous comments about it under the heading 'Observation' that follows the conclusion of the Investigation Report.

- Similar information no longer being supplied to the Department could reasonably be expected because it was an oversight by the Department during the COVID pandemic that the ATIPPA [of 2018] formalised process for accepting third party 'business' information in confidence was not implemented. Further, the historic policy practices of implicitly and/or explicitly accepting proponent funding applications in confidence as per ATIPPA, raise concern that adherence to the [Complainant's] request, a deviation of practice creates a temporary 'loop-hole' to gain advantage within Yukon's small business community.<sup>65</sup>
- Significant harm to the competitive position of VanGorda could reasonably be expected to occur. The Department then sets out how to access the significance of this harm and the applicable tests often relied on by the Alberta IPC, as well as supporting comments from the AB FOIP Guidelines. This applies to the information on pages 4 to 30 [Records 3 and 4].

[176] The Department also made following submissions about Record 15 in respect of paragraphs 77(1)(a), (b) and (c).

- Disclosing VanGorda's commercial, trade secret and financial information would result in an expectation of harm to [its] competitive position. Knowing the types of documents being submitted with the application would risk harm from competitor businesses [that] did not apply and impact the applicant's standing in the public.
- Request to disclose is refused on the grounds of mandatory protection of commercial, trade secrets and financial information. The information provided in the emails and submitted documents forms part of the application, which is about commercial and development activities and is competitively sensitive. The information includes information regarding prices, costs, methods, plans, and strategies to target customers. This information has not been previously disclosed and would impair the [Department's] future ability to obtain necessary information for the successful delivery of the programs. Commercial, trade secret and financial Information is 'controlled' by [VanGorda] and includes but is not limited to:
  - i) commercialization plans, strategic and implementation;
  - ii) the unique selling proposition and understanding of competitor's positioning;

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<sup>65</sup> I am of the view that the 'ATIPPA' reference is to the repealed ATIPPA of 2002. As previously stated, I will address this later under the heading 'Observation'.

iii) analysis of market; and

iv) terms of contractual arrangements.

- This information provides [VanGorda] with a commercial advantage over its competitors and releasing it would provide full knowledge of its strategies to target customers to its competitors. [VanGorda] submitted [this information] with reasonable effort to prevent it from becoming generally known and disclosure would result in loss of competitive advantage.

[177] I will now proceed with the analysis of Records 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13 and 15 in respect of paragraphs 77(1)(a), (b) and (c).

*Is the information held by the Department?*

[178] Because the Department has determined that Records 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13 and 15 are responsive to the Access Request, I am satisfied that these Records are information held by the Department.

*Does the information contain 'financial, commercial, scientific or technical' information?*

[179] In Inquiry Report ATP18-16R, 17R and 38R, the IPC defined the terms 'commercial' and 'financial' as follows.<sup>66</sup>

*'Commercial information'... means "information that relates to the buying and selling or exchange of merchandise or services and includes a third party's associations, history, references, bonding and insurance policies..."*

*'Financial information' means "information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs."*

[180] In my view, commercial information could also include the following examples set in Chapter 4 of the Saskatchewan 'Guide to FOIP' publication (SK FOIP Guide).<sup>67</sup>

- pricing structures;
- market research;

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<sup>66</sup> Department of Environment, July 26, 2019 (IPC) at paras. 83 and 88.

<sup>67</sup> IPC Guide to FOIP, Chapter 4: Exemptions from the Right of Access, April 30, 2021, at 198.

- business plans;
- customer records;
- offers of products and services a third-party business proposes to supply or perform;
- a third-party business's experiences in commercial activities where this information has commercial value;
- terms and conditions for providing services and products by a third-party;
- lists of customers, suppliers or sub-contractors compiled by a third-party business for its use in its commercial activities or enterprises – such lists may take time and effort to compile, if not skill;
- methods a third-party business proposes to use to supply goods and services; and
- numbers of hours a third-party business proposes to take to complete contracted work or tasks.

[181] Similarly, I also agree that financial information could include the following examples in the SK FOIP Guide.<sup>68</sup>

- financial capabilities;
- assets and liabilities (past or present);
- financial forecasts;
- investment strategies;
- budgets; and
- profit/loss statements.

#### Records 3 and 4

[182] The Department submitted that Records 3 and 4 are both financial and commercial information as per the references set out in three common law cases.

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<sup>68</sup> *Ibid.* SK FOIP Guide

[183] On an examination of Records 3 and 4, I am of the view that Record 3, at page 9, and Record 4, at pages 13, 14, 15, 17, 18-21, 22, 23, 26, and 27-30, contain commercial and financial information that fits within these definitions.

Records 2, 5, 6, 7, 8, 9, 10, 12 and 13

[184] The Department made no submissions whether Records 2, 5, 6, 7, 8, 9, 10, 12 and 13 were financial or commercial information.

[185] On an examination of these Records, I am of the view that these commercial and financial definitions would include certain types of information contained in one of these Records.

[186] Only Record 10, at pages 45 to 46, contains commercial and financial information that fits within these commercial and financial definitions.

[187] The remaining Records do not contain such information and I need go no further in respect of them.

Record 15

[188] The Department made no submissions on whether Record 15 was financial or commercial information. On an examination of Record 15, it is, however, clear that it solely contains banking information, such as account transactions over a given period. In my view, it fits within the definition of 'financial information'.

[189] I am of the view that Record 15 contains financial but not commercial information.

*Was the information not accepted by the Department in confidence in the prescribed manner from the third party?*

Records 3 and 4

[190] The Department submitted that Records 3 and 4 were received in 'deemed confidence' but, as will be addressed in the "observation" segment at the end of this Investigation Report, such a concept has no effect in ATIPPA. That said, it also admitted in submission that it did not avail itself of the sole regulatory mechanism under which information can be treated as confidential. It follows, therefore, that Records 3 and 4 were not accepted by the Department in confidence.

[191] The Department Head can withhold from the Complainant Records 3 and 4, if they decide, subject to subsections 77(2) and (3), that these Records could reasonably be expected to result in the types of harm set out in paragraphs 77(1)(a), (b) and (c).

Records 2, 5, 6, 7, 8, 9, 10, 12 and 13

[192] The Department made no submissions about the confidentiality of these particular Records other than to make a general statement at clause 25 that “all applications for funding programs submitted by proponents to the public body are and have been received and held in confidence, subject to the provisions of [ATIPPA].” Because the Department did not follow the ‘confidential’ regulatory mechanism in ATIPPA, it follows that these Records were not accepted in confidence.

[193] The Department Head can withhold from the Complainant Records 2, 5, 6, 7, 8, 9, 10, 12 and 13 if they decide, subject to subsections 77(2) and (3), that these Records could reasonably be expected to result in the types of harm set out in paragraphs 77(1)(a), (b) and (c).

Record 15

[194] The Department made no submissions in respect of this question.

[195] However, for these reasons in respect of confidentiality, the Department Head can withhold from the Complainant Record 15 if they decide, subject to subsections 77(2) and (3), that this Record could reasonably be expected to result in the types of harm set out in paragraphs 77(1)(a), (b) and (c).

***Subsection 77(1) Harm-based Evaluation***

[196] The harm-based questions are as follows.

*Could disclosure of the information contained in these Records reasonably be expected to:*

- 1) result in undue financial loss or gain to a person or entity;*
- 2) result in similar information no longer being supplied to the responsive public body where the head is satisfied that it is in the public interest that similar information continue to be supplied to the responsive public body; or*
- 3) significantly harm the competitive or negotiating position of the third party?*

[197] Recall, however, that the head of a public body, as per *Ontario CSCS* in quoting *Merck*,<sup>69</sup> must demonstrate that the risk of harm is well beyond the merely possible or speculative. They does not have to demonstrate that harm is probable but there needs to be a reasonable basis for believing that the harm will result.

Records 2, 3, 4, 5, 6, 7, 8, 9, 10, 12 and 13

[198] The Department asserted, in respect of undue financial loss or gain, that there are less than seven businesses in Faro working within the same or similar industry as VanGorda. Since the redacted information is VanGorda's proprietary information, including preferred suppliers and agreed-upon pricing structures, disclosure could reveal a competitive position that could possibly result in undue financial loss to VanGorda and, conversely, a possible gain to a person or entity.

[199] It also asserted, in respect of similar information no longer being supplied to the Department [that the Department Head continued to need], that it was an oversight by the Department during the COVID pandemic not to accept the VanGorda information in accordance with ATIPPA [of 2018] regulatory process governing 'confidentiality' and that it relied on its long-standing policy [as per the repealed ATIPPA] to treat this information as confidential.<sup>70</sup> As such, releasing this information to the Complainant would allow them to have what should otherwise be confidential information, thus giving them an advantage within Yukon's small business community.

[200] The Department further asserted, in respect of significant harm to a third party's competitive position, that the applicable tests often relied on by the Alberta IPC, as well as supporting comments from the AB FOIP Guidelines, applied to these Records.

[201] I am of the view that none of these assertions meet the evidence bar established in *Ontario CSCS* as per *Merck*. As such, I need go no further in my analysis.

[202] However, on examination of the Access Request, I note that the Complainant stated, "...please be aware that I am not requesting any 3rd party financial business-information."

[203] I have found that Record 3, at page 9, Record 4, at pages 13, 14, 15, 17, 18-21, 22, 23, 26, and 27-30, and Record 10, at pages 45 to 46, contains commercial and financial information.

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<sup>69</sup> *Supra*, note 57.

<sup>70</sup> Recall that I will address the issue of 'deemed confidentiality' under the heading 'Observation' at the end of this Investigation Report.

[204] The information in Record 3, at page 9, is simultaneously both commercial and financial in nature.

[205] The information in Record 4, at all the pages quoted, is commercial in nature; not financial.

[206] The following information in Record 10 is financial in nature.

- Page 45, the dollar amounts under the headings 'Total Project Costs' and 'Sources of Funds: (Requested)'; specifically, 'Proponent Cash' and 'Other Proponent In-kind'.
- Page 46, the dollar amounts under the heading 'Project Budget' and 'Total Ineligible Expenses'.
- Page 46, the dollar amount under the heading 'Project Need'.

[207] Given the Complainant's 'business information' statement in their Access Request, I am of the view that the Department can withhold from the Complainant the financial information in Records 3, at page 9, and Record 10, at pages 45 to 46, because the Complainant clearly does not want them.

#### Record 15

[208] The Department made no assertions about Record 15 in respect of undue financial loss or gain other than stating that release of the VanGorda's information contained in the Records [inclusive of Record 15] would give VanGorda's competitors knowledge to harm VanGorda and cause its standing in the community to be impacted. I interpret 'standing' to mean 'goodwill' since undue financial loss or gain must be monetary in nature and monetary includes both revenue and corporate reputation or goodwill.

[209] It also made no assertions about Record 15 in respect of similar information no longer being supplied to the Department [that the Department Head continued to need] other than stating that the financial and commercial information contained in the Records [inclusive of Record 15] was highly sensitive, including as it does information regarding prices, costs, methods, plans, and strategies to target customers. Release of this information would impair the Department's future ability to obtain necessary information for the successful delivery of the programs.

[210] The Department also made no assertions about Record 15 in respect of significant harm to a third party's competitive position, other than stating that VanGorda's information contained in the Records [inclusive of Record 15] provides it with a commercial advantage over

its competitors and that its release would fully reveal its strategies to target customers, thus resulting in a loss of VanGorda's competitive advantage.

[211] I am of the view that none of these assertions meet the evidence bar established in *Ontario CSCS* as per *Merck*. As such, I need go no further in my analysis.

[212] Recall, however, that the Complainant stated in their Access Request, "...please be aware that I am not requesting any 3rd party financial business information."

[213] Since I am of the view that Record 15 contains VanGorda banking information in the form of account transactions over a given period, I am of the view that the Department can withhold from the Complainant Record 15 because the Complainant clearly does not want it.

#### ***Application of paragraphs 77(2)(a) and (b)***

[214] The Department submitted that Tab 4 of the evidence binder documented an email exchange between the Department and VanGorda's in which VanGorda set out two objections to the Access Request as per paragraphs 77(2)(a). It also submitted that paragraph 77(2)(b) did not apply to the Records 2, 3, 4, 5, 6, 7, 8, 9, 10, 12 and 13.

[215] The emails referred to in Tab 4 are not emails in the Records at Issue. Moreover, the Department provided no evidence as to how this information is relevant to Records 2, 3, 4, 5, 6, 7, 8, 9, 10, 12 and 13 in respect of these provisions. For these reasons, I need go no further in my analysis. In addition, there is no issue in respect of paragraph 77(2)(b).

#### **Conclusion**

[216] The Department cannot rely on paragraphs 77(1)(a), (b) and (c), as well as paragraphs 77(2)(a) and (b), to withhold from the Complainant Records 2, 3, 4, 5, 6, 7, 8, 9, 10, 12 and 13.

[217] The Department is authorised, however, to withhold from the Complainant the following.

- Record 3, at page 9 (dollar amounts only).
- Record 10, at pages 45 to 46 (dollar amounts only).
- Record 15.

Override Issue – Is the Department authorised by subsection 82(1) to withhold the Records sought by the Complainant in their Access Request?

**Subsection 82(1)**

[218] The Department also asserted that subsection 82(1) did not override its decision to withhold from the Complainant Records 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13 and 14. I will include Record 15.

Relevant Law

*82(1) Despite any provision of Division 8 or 9 other than section 67, the head of a responsive public body must not deny an applicant access to information in relation to which the head, after consideration of the factors listed in paragraphs (2)(a) and (b), determines that the public interest in disclosing the information clearly outweighs the public interest in withholding the information from disclosure.*

*(2) In determining whether the public interest in disclosing the information clearly outweighs the public interest in withholding it under subsection (1)*

*(a) the head must consider the following factors:*

*(i) the level of public interest in the information,*

*(ii) whether the information is likely to be accurate and reliable,*

*(iii) whether similar information is in the public domain,*

*(iv) whether suspicion is likely to exist in respect of a public body's conduct in relation to the matter to which the information relates,*

*(v) if harm to a person, public body or government is likely to result from disclosure of the information, the significance and type of the harm,*

*(vi) whether the disclosure of the information is likely to result in similar information no longer being supplied to a public body;*

*(b)...*

*(c) the head must not consider the following factors:*

*(i) the applicant's identity or motive for requesting access to the information,*

*(ii) whether the medium in which the information is available would, if the information were disclosed in that medium, contribute to misunderstanding of the information by the applicant or the public,*

*(iii) whether there are means, other than through submitting an access request, for the applicant or the public to become aware of the information or know that it exists.*

[219] Subsection 82(1) is a mandatory general override provision, the purpose of which, in considered situations, is to allow the disclosure, except for Cabinet confidences, of information, otherwise subject to mandatory or discretionary non-disclosure, where disclosure in the public interest clearly outweighs non-disclosure in the public interest. The use of this subsection should be used sparingly and with sufficient gravitas because it overrides all other disclosure exemptions except, as previously stated, Cabinet confidences in section 67.

[220] The determination must be made on a case-by-case basis, the outcome of which is that disclosure of the information must 'clearly' be in the public interest. Given this intentional statutory language, I am of the view that the matter must be one of compelling or strong public interest and not something of mere attraction or curiosity to the public, be it a single individual or a group of individuals.

[221] Examples of 'clear' public interest are situations in which disclosure of information aids the public in issues of escaped and dangerous inmates, active shooters, child molesters, serious contagious diseases, imminent environmental dangers to life, health and safety, gross misuse of public assets or funds and so forth.<sup>71</sup>

[222] Examples where the threshold of 'clear' public interest have not been met in Alberta include the following situations.<sup>72</sup>

- A public body was not required to disclose records relating the government's involvement in a commercial enterprise, even though the Commissioner found that this was a matter of compelling public interest. The public interest requirement had been satisfied when the Auditor General's report on the matter was publicly released (*IPC Order 2000-031*).
- A public body was not required to disclose information about the payouts and severance pays of former police chiefs. The spending of public funds does not, by itself,

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<sup>71</sup> Some examples are taken from the Service Alberta 'FOIP Guidelines and Practices' at 229.

<sup>72</sup> *Ibid.* at 229-230. AB FOIP Guidelines

create a matter of public interest that overrides the exceptions in the *FOIP Act* that permit a public body to refuse disclosure (*IPC Order F2006-010*).

[223] Given these examples, it is evident that the determination set out in subsection 82(1) requires a balancing between the public interest in disclosing information and the public or private interest in not disclosing it.

[224] In making such a determination, the head of a public body must consider factors in paragraphs 82(2)(a) and (b) but not factors in paragraph 82(2)(c).

[225] The following six-part test can therefore be applied.

- 1) Is there a level of public interest in the information?
- 2) Is the information likely to be accurate and reliable?
- 3) Is similar information available in the public domain?
- 4) Is a suspicion likely to exist in respect of a public body's conduct in relation to the matter to which the information relates?
- 5) Is it likely that harm to a person, public body or government will result from disclosure of the information and, if so, what is the significance and type of the harm?
- 6) Is the disclosure of the information likely to result in similar information no longer being supplied to a public body?

***Application of subsection 82(1)***

[226] The Department asserted that subsection 82(1) did not provide a 'clearly outweighs' override but offered no submissions on the matter.<sup>73</sup> Because this section is mandatory in nature, I must examine Records 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14 and 15 to determine if the Department Head must disclose them to the Complainant, noting that the Complainant made no submissions on this provision.

*Is there a level of public interest in the information?*

[227] The term 'level' implies a planar threshold below which is *de minimus* in nature and above which is of sufficient significance as to be taken into consideration. I am therefore of the view that this threshold is one in which a casual and reasonable observer with knowledge of the information at issue and the related circumstances would conclude that the interest

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<sup>73</sup> *Supra*, note 27.

demonstrated by the public in the matter is forceful and persuasive. As such, this must be a contextual and fact-based determination.

[228] The only evidence of public interest stems from the Complainant via their Access Request. Given the restraint imposed by paragraph 82(2)(c) and the absence of any other evidence, the threshold is not met.

*Is the information likely to be accurate and reliable?*

[229] All the Records present as being accurate and reliable because the funding application has been the subject of Department assessment in the knowledge that the Department is subject to laws, policy and practices in the discretionary award of public funds to an applicant.

*Is similar information available in the public domain?*

[230] There is no evidence before me to allow for a determination.

*Is a suspicion likely to exist in respect of a public body's conduct in relation to the matter to which the information relates?*

[231] The term 'suspicion' can be taken, for example, as a state of mind that something is or may be true or that something is or may be wrong. Given the restraint imposed by paragraph 82(2)(c) and the absence of any other evidence, I am unable to make a determination.

*Is it likely that harm to a person, public body or government will result from disclosure of the information and, if so, what is the significance and type of the harm?*

[232] The term 'likely' imports a degree of probability into the question. This implies a statistical scale that ranges from theoretical possibility to certainty, along which path the 'more likely than not' occurrence of something marginally precedes its actual probability. As such, it requires a weighing of evidence to determine the likelihood of harmful occurrence to the specified entities and a further weighing to determine the nature of that harm and its seriousness to them. I note that the term 'information' would include the personal information of an identifiable individual and the information of an artificial person such as VanGorda which, as previously stated, cannot include personal information.

[233] There is no substantive evidence before me to decide in respect of Records 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14 and 15. I acknowledge that VanGorda applied for project funding from the Department and provided, for example, both the stated component cost of the project, as well as the funding sought in each category. It also provided specific monetary information in respect of cash, payment-in-kind and inventory. I also acknowledge that the Department,

charged with a legal responsibility for being accountable for the outlay of public funds, assessed the information according to its program policies and practices and made fiscal decisions accordingly. It can be inferred that the rigour with which the Department conducted its assessment in reaching such decisions reflected on YG in respect of the public's confidence in its integrity.

[234] I further acknowledge that the Department submitted that there was a probable likelihood of a breach in confidence and harm to VanGorda. This would harm the Department's economic interests by eroding public trust and confidence in its financial assistance programs. However, it offered no evidence of this likelihood.

[235] Disclosing this information may be harmful to VanGorda, the Department, the Yukon government (YG) or to all of them but it is not for me to speculate about the likelihood of that harm. That is a matter of evidence and there is none before me to assess whether the Department has met its burden of proof. As such, I need go no further in my analysis.

[236] For these reasons, I am unable to make a determination concerning the disclosure of Records 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14 and 15. To be clear, this is not a finding in which the Department was successful in its submission that it could rely on subsection 82(1) not to disclose these Records; rather, it is a finding that I could not make a determination one way or the other.

## Conclusion

[237] Subsection 82(1) does not apply to Records 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14 and 15.

## IX FINDINGS

### **Preliminary Issue**

[238] I find that the Department Head is not authorised to rely on the section 1 definition of 'personal information' to withhold from the Complainant the following.

- 1) That portion of Record 4 which contains the signature of the VanGorda representative, as well as the name and signature of the other business enterprise representative.
- 2) That portion of Record 8 which contains the signatures of the risk assessment officer and the reviewer.

- 3) That portion of Record 10 which contains the signatures of the Director of Business and Industry Development, the Department Head and the Assistant Deputy Minister, as well as the single set of initials.
- 4) That portion of Record 14 which contains the name and signature of the Document 2 author, as well as the name of business enterprise therein.

#### **Issue 1**

[239] I find that the Department Head is not authorised to rely on subsection 70(1), subparagraph 70(3)(a)(iii), paragraph 70(3)(e), and subparagraphs 70(5)(d)(i) and (iii) to withhold from the Complainant Records 3, 4, 8, 10 and 14 (Document 2).

[240] I find that the Department Head is not authorised to rely on paragraph 70(2)(c) to withhold from the Complainant the full text of Record 14 (Document 1), except for the names of the author and the other identified individuals in that text.

#### **Issue 2**

[241] I find that the Department Head is not authorised to rely on paragraph 74(1)(a) to withhold from the Complainant the following.

- 1) Records 5, 7, 8, 10, 12 and 13.
- 2) Record 6, except for the last two columns of both documents.

#### **Issue 3**

[242] I find that the Department is not authorised to rely on subparagraphs 75(1)(a)(i) and (iv) and subparagraph 75(1)(b)(i) to withhold from the Complainant Records 6, 7, 8, 10, 12 and 13.

#### **Issue 4**

[243] I find that the Department is not authorised to rely on subsection 77(1) nor its paragraphs to withhold from the Complainant Records 2 (Attachment 3), 5, 6, 7, 8, 9, 10, 12 and 13.

[244] I find that the Department can withhold the dollar amounts in Record 3 (at page 9) and Record 10 (at pages 45 and 46).

## Override Issue

[245] I find that the Department Head is not authorised to rely on subsection 82(1) to withhold from the Complainant Records 2 (Attachment 3), 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14 and 15.

## X RECOMMENDATIONS

[246] I recommend that the Department Head discloses to the Complainant the following.

- 1) Record 2 (Attachment 3 redactions on page 2).
- 2) Record 3 (redactions on pages 3 to 12), except for the dollars amounts on page 9.
- 3) Record 4 (redactions on pages 13 to 30).
- 4) Record 5 (redactions on pages 31 to 32).
- 5) Record 6 (redactions on pages 33 to 36), except for the last two columns on each of pages 35 and 36. For greater certainty, these columns are entitled, respectively, 'PRC Suggested Yes/No and Ranking 1 2 3 4 5' and 'PRC Suggested Project Requests'.
- 6) Record 7 (redactions on pages 37 to 40).
- 7) Record 8 (redactions on page 41).
- 8) Record 9 (redactions on pages 42 to 43).
- 9) Record 10 (redactions on pages 45 to 48), except for the name of the 'stand-alone' individual in 'Appendix D' on page 46, and the dollar amounts on pages 45 and 46.
- 10) Record 12 (redactions on pages 50 to 53).<sup>74</sup>
- 11) Record 13 (redactions on page 53).
- 12) Record 14 (redactions on pages 54 to 55), except for except for the names of the Document 1 author and the other identified individuals in that text, all of which occurs on page 54.

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<sup>74</sup> It is unclear if page 50 is redacted but, in any case, it is indecipherable and should be disclosed if it were redacted.

## Department Head's Response to Investigation Report

[247] Section 104 requires the Department Head to do the following after receiving the Investigation report.

*104(1) Not later than 15 business days after the day on which an investigation report is provided to a respondent under subparagraph 101(b)(ii), the respondent must, in respect of each recommendation set out in the investigation report*

*(a) decide whether to*

*(i) accept the recommendation in accordance with subsection (2), or*

*(ii) reject the recommendation; and*

*(b) provide*

*(i) a notice to the complainant that includes*

*(A) their decision, and*

*(B) in the case of the rejection of a recommendation, their reasons for the rejection and a statement notifying the complainant of their right to apply to the Court for a review of the decision or matter to which the recommendation relates, and*

*(ii) a copy of the notice to the commissioner.*

*(2) If a respondent accepts a recommendation set out in an investigation report, the respondent must comply with the recommendation not later than*

*(a) if the respondent is the access and privacy officer, 15 business days after the day on which the notice of acceptance under subparagraph (1)(b)(i) is provided to the complainant; or*

*(b) if the respondent is the head of a public body*

*(i) 15 business days after the day on which the notice of acceptance under subparagraph (1)(b)(i) is provided to the complainant, or*

*(ii) if an extension is granted by the commissioner under subparagraph (4)(a)(i), the date specified in the notice of extension provided under paragraph (4)(b).*

[248] Subsection 104(3) authorises the Department Head to seek an extension of the time to comply with a recommendation as follows.

*(3) If the head of a public body reasonably believes that the public body is unable to comply with a recommendation in accordance with subparagraph (2)(b)(i), the head may, not later than 10 business days before the end of the period referred to in that subparagraph, make a written request to the commissioner for an extension of the time within which the head must comply with the recommendation*

[249] Subsection 104(5) deems the Department Head to have rejected a recommendation if they do not provide notice as required or does not comply with it in accordance with the specified timeframes.

## Complainant's Right of Appeal

[250] Subsection 104(5) gives the Complainant the right to appeal to the Yukon Supreme Court if the Department Head rejects a recommendation or is considered to have done so, in accordance with the time limits set out in paragraphs (a) through (c).

### **ORIGINAL SIGNED**

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Rick Smith, BA, MCP, LLB  
Adjudicator, Office of the Information and Privacy Commissioner

#### Distribution List:

- Department Head
- Complainant

## Observation

[251] I will address the issue of ‘deemed confidentiality’ raised in submission by the Department. Given the tests that apply to paragraphs 77(1)(a), (b) and (c) and for the reasons given in Issue 4, it would not otherwise appear despite its importance.

[252] The Department submitted, in respect of Records 3 and 4, that all funding applications provided to the Department by various applicants are received and held in confidence, subject to the provisions of ATIPPA. To that end, the Department referred me to YG funding program edits, cited case law concerning ‘deemed confidentiality’ and its applied criteria, made an alternative assertion concerning potential ‘confidence breaches’, and drew attention to the value of the Records that could be placed on them not only by VanGorda but to its competitors, in addition to the time, effort and expense expended to develop the information contained in the funding application.

[253] Paragraph 24(1)(b) of ATIPPA SY 2002 (Old ATIPPA) allowed a public body to refuse to disclose to an applicant certain information (b) that was supplied, explicitly or implicitly, in confidence to the public body by a third party. None of the Old ATIPPA regulations addressed the term ‘confidentiality’.

[254] In my view, the cited case law and Department assertions might apply to Records 3 and 4 if they were governed by the Old ATIPPA. However, this is not the case under the new ATIPPA of 2018. In this statute, which entirely replaced the Old ATIPPA, the Legislature overtly provided for a regulatory procedure governing how information that is either a ‘trade secret of, or commercial, financial, scientific or technical information of’ a third party is to be received and accepted by a public body in confidence. As previously stated, that ‘third party’ procedure is set out in section 19 of the *Access to Information and Protection of Privacy Regulation* and is the only mechanism for doing so. It follows that there is no room for the blanket importation of ‘deemed confidence’ in the current ATIPPA and the Department could not be able to rely on this concept to withhold from the Complainant disclosure of Records 3 and 4.

[255] That said, the Department further submitted that while it professed an oversight in not following the prescribed [regulatory] procedure, it asserted that the Complainant should not take advantage of what it termed a ‘temporary loop-hole’ to access the information. Notwithstanding my previous comments, it is certainly not for the Department, in acknowledging its oversight, to assert that this mistake created a temporary loop-hole for the Complainant when no such loop-hole exists in ATIPPA. I state this also noting that VanGorda, in submitting its funding application to the Department, knew that all or part of it could be made available to the public by the Department in accordance with ATIPPA. Page 10 of Record 3

clearly contains this ATIPPA acknowledgement under which follows the signature of the VanGorda representative.