



Yukon  
Information  
and Privacy  
Commissioner

## **INVESTIGATION REPORT**

**Pursuant to section 66 of the  
*Access to Information and Protection of Privacy Act***

**Department of Highways & Public Works**

**File ATP-ADJ-2023-05-183**

**Rick Smith, Adjudicator**

**Office of the Information and Privacy Commissioner**

**November 6, 2023**

## Summary

On January 25, 2023, the Yukon Government ATIPP Coordinator sent an activation letter to the complainant (Complainant) in respect of their access request as follows.

Access Request #22-650

*I would like to see all the pertinent information required to be able to determine the basis for how the final scoring was arrived at for the two bidders for the Dawson Sawmill renovation. This would include bidders responses and the scores for those responses.  
Timeframe: February 1, 2022 -June 15, 2022 (Access Request)*

On March 6, 2023, the ATIPP Coordinator advised the Complainant that the Department of Highways & Public Works (Department) would partially disclose responsive information and withhold the rest (Records).

The Department cited as its authority for withholding the Records the following provisions:

- Subsection 70(1) [Third party personal information];
- Paragraph 74(1)(a) [advice and recommendations]; and
- Subsection 77(1), including paragraphs 77(1)(a-c) [Disclosure harmful to third party business interests].

The Complainant requested that the Information and Privacy Commissioner (IPC) investigate the refusal under the consultation process. Consultation resolved some of the issues and those that remained unresolved proceeded to adjudication by an IPC adjudicator (Adjudicator).

The Adjudicator recommended that the Department head provide the Complainant with access to the Records to which they are entitled, except for those required to be withheld. The [Recommendations](#) are detailed here. [Observations](#) were also made.

# Table of Contents

Summary ..... 2

Statutes and Regulations Cited ..... 4

ATIPPA Sections, Subsections and Paragraphs Cited ..... 4

Cases, Orders and Reports Cited ..... 4

Explanatory Note ..... 4

Jurisdiction ..... 5

Burden of Proof..... 5

I BACKGROUND ..... 5

II INVESTIGATIVE PROCESS ..... 5

III ISSUES..... 6

IV SUBMISSIONS OF THE PARTIES ..... 6

V RECORDS AT ISSUE ..... 7

VI DISCUSSION OF THE ISSUES ..... 10

Issue 1 – Can the Department rely on subsection 70(1) to withhold the information sought by the Complainant in their Access Request?..... 10

Issue 2 – Is the Department authorized by paragraph 74(1)(a) to withhold the information sought by the Complainant in their Access Request?..... 25

Issue 3 – Is the Department authorized by subsection 77(1) to withhold the information sought by the Complainant in their Access Request?..... 27

Issue 4 – Can the Department Head rely on section 82 to deny access to any of the information sought by the Complainant in their Access Request? ..... 47

VII FINDINGS ..... 48

VIII RECOMMENDATIONS ..... 52

IX OBSERVATIONS ..... 52

Department Head’s Response to Recommendations..... 52

Complainant’s Right to Court Review ..... 53

## Statutes and Regulations Cited

*Access to Information and Protection of Privacy Act, SY 2018, c.9*

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

## ATIPPA Sections, Subsections and Paragraphs Cited

Sections 1, 70, 74, 77, 82

Subsections 3(a), 70(1) to (5), 74(1), 77(1) and (3)

Paragraphs 70(2)(c), 74(1)(a), 77(1)(a) to (c), 77(2)(a) and (b), 77(3)(a) to (d)

Subparagraphs 70(3)(a)(iii), 77(5)(d)(i) to (iii)

Section 19 (*Access to information and the Protection of Privacy Regulation*)

## Cases, Orders and Reports Cited

### Cases

None cited.

### Order

*Ontario IPC Reconsideration Order R-980015*

### Reports

*Saskatchewan Information and Privacy Commissioner Review Report LA-2012-002*

*Yukon Inquiry Report ATP15-055AR*

*Yukon Inquiry Report ATP20-06R*

*Yukon Investigation Report ATP-ADJ-2022-04-133*

## 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.

## Jurisdiction

My authority to investigate the decision by public body head to refuse to provide the Complainant with the responsive records or withhold information from a record is set out in subsections 91 (1) and (2).

## Burden of Proof

Paragraph 102(c) 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.

## I BACKGROUND

[1] On January 25, 2023, the Yukon Government ATIPP Coordinator sent an activation letter to the complainant (Complainant) accepting their access request for the following information from the Department of Highways and Public Works (Department).

Access Request #22-650

*I would like to see all the pertinent information required to be able to determine the basis for how the final scoring was arrived at for the two bidders for the Dawson Sawmill renovation. This would include bidders responses and the scores for those responses.  
Timeframe: February 1, 2022 -June 15, 2022 (Access Request)*

[2] On March 6, 2023, the ATIPP Coordinator advised the Complainant that the Department would partially disclose responsive information in respect of the Access Request and withhold the remainder.

## II INVESTIGATIVE PROCESS

[3] On March 14, 2023, the Information and Privacy Commissioner (IPC) received a complaint from the Complainant pursuant to sections 66 and 90 in respect of the Department's response to the Access Request. It stated that the Complainant believed that the Department withheld access to information that it was not authorized to withhold.

[4] On May 15, 2023, the IPC advised the Complainant and the Department that the matter could not be resolved informally and was now referring it to formal investigation. The IPC then issued a written Notice of Investigation to the parties (Investigation).

[5] Also on May 15, 2023, the IPC issued to the Minister of Highways and Public Works (Department Head) a Notice to Produce Records (NTPR) requesting a complete copy of all records identified as responsive to the Access Request, inclusive of a schedule of records.

[6] On May 24, 2023, the Department provided the IPC with a package that contained the requested records and schedule responsive to the NTPR.

[7] On June 12, 2023, the Department provided the IPC with its submission.

[8] On June 13, 2023, the Complainant provided the IPC with its submission.

### III ISSUES

[9] There are four issues.

- 1) Is the Department Head required by subsection 70(1) to withhold the information sought by the Complainant in their Access Request?
- 2) Is the Department Head authorized by paragraph 74(1)(a) to withhold the information sought by the Complainant in their Access Request?
- 3) Is the Department Head authorized by subsection 77(1) to withhold the information sought by the Complainant in their Access Request?
- 4) Is the Department Head required by section 82 to grant access to any of the information sought by the Complainant in their Access Request?

### IV SUBMISSIONS OF THE PARTIES

[10] The submissions of the Department Head are addressed in the issues as applicable.

[11] The Complainant provided a brief submission as follows. This will be addressed in the issues as applicable.

*In light of the fact that the contract was awarded to the bidder that had zero First Nation participation, zero local workers, are not a local company and whose bid was a full 50% higher than the other bidder who had 50% First Nation participation, had 100% local employment and is a 100% local company, I feel the department is completely stonewalling to keep their decision making/awarding of the contract in question from scrutiny and as such would ask that this be once again elevated to the next level of this process.*

## V RECORDS AT ISSUE

[12] The responsive records included bid tender submissions and attachments from two businesses, internal Yukon Government (YG) evaluation and scoring information and miscellaneous internal emails regarding the bid process.

[13] The two businesses are Ketz Construction Corporation Limited (Ketz) and Wildstone Construction Group (Wildstone). The individuals providing responses to the 'request for proposals' are acting for these businesses.

[14] The set of records at issue in this Investigation are those referred to in the Department-supplied table below (Schedule of Records Table), noting that I have only listed those pages containing redactions or withheld entirely. I have also included the exception sections contained in the Department's submission.

<b>Record</b>	<b>Page</b>	<b>Number of Pages</b>	<b>Type of Record</b>	<b>Severed or Withheld</b>	<b>Exceptions Claimed</b>
<b>1</b>	1	1	Email with five attachments	S	74(1)(a) 77(1)(a) 77(1)(b) 77(1)(c)
	6-8	3	Evaluation breakdown and scoring	S	77(1)(a) 77(1)(b) 77(1)(c)
	10	1	Wildstone bid attachment – proposed project plan	W	77(1)(a) 77(1)(b) 77(1)(c)
	12-20	9	Wildstone bid submission	S	70(1) 77(1)(a) 77(1)(b) 77(1)(c)

	24-26	3	Ketza bid attachment – proposed project plan	W	77(1)(a) 77(1)(b) 77(1)(c)
	28-37	10	Ketza bid submission	S	70(1) 77(1)(a) 77(1)(b) 77(1)(c)
<b>2</b>	42	1	Email with one attachment	S	77(1)(a) 77(1)(b) 77(1)(c)
	44-47	4	Evaluation breakdown and scoring	S	77(1)(a) 77(1)(b) 77(1)(c)
<b>3</b>	63	1	Wildstone bid attachment – proposed project plan	W	77(1)(a) 77(1)(b) 77(1)(c)
<b>4</b>	65-73	10	Wildstone bid submission	S	70(1) 77(1)(a) 77(1)(b) 77(1)(c)
<b>5</b>	77-80	4	Ketza bid attachment – proposed project plan	W	77(1)(a) 77(1)(b) 77(1)(c)
<b>6</b>	82-91	10	Ketza bid submission	S	70(1) 77(1)(a) 77(1)(b) 77(1)(c)
<b>7</b>	96	1	Wildstone bid attachment – proposed project plan	W	77(1)(a) 77(1)(b) 77(1)(c)

<b>8</b>	97-98	2	Wildstone bid bond	W	77(1)(a) 77(1)(b) 77(1)(c)
<b>9</b>	100-110	11	Wildstone bid submission	S	70(1) 77(1)(a) 77(1)(b) 77(1)(c)
<b>10</b>	114-117	4	Ketza bid attachment – proposed project plan	W	77(1)(a) 77(1)(b) 77(1)(c)
<b>11</b>	118-119	2	Ketza bid bond	W	77(1)(b) 77(1)(c)
<b>12</b>	121-132	12	Ketza bid submission	S	70(1) 77(1)(a) 77(1)(b) 77(1)(c)
<b>13</b>	136-138	3	Scoring matrix	S	77(1)(a) 77(1)(b) 77(1)(c)
<b>14</b>	140-141	2	Ketza evaluation	S	77(1)(a) 77(1)(b) 77(1)(c)
<b>15</b>	152	1	Email with one attachment	S	77(1)(a) 77(1)(b) 77(1)(c)
	153-154	2	Detailed scoring evaluation	S	77(1)(a) 77(1)(b) 77(1)(c)

16	155	1	Email	S	77(1)(a) 77(1)(b) 77(1)(c)
17	180-181	2	Bid value redaction summary	S	77(1)(a) 77(1)(b) 77(1)(c)

(collectively, the Records).

## VI DISCUSSION OF THE ISSUES

Issue 1 – Can the Department rely on subsection 70(1) to withhold the information sought by the Complainant in their Access Request?

[15] The Department is relying on this provision to withhold from the Complainant the following.

- Record 1 at pages 12-20 and pages 28-37;
- Record 4 at pages 65-73;
- Record 6 at pages 82-91;
- Record 9 at pages 100-110; and
- Record 12 at pages 121-132.

### Relevant Law

#### **Section 1**

[16] Section 1 contains ATIPPA definitions. The following are relevant.

‘Personal information’ means, subject to section 3, recorded information about an identifiable individual. This includes, for example, their name.

‘Business contact information’ of an individual means information that makes it possible to contact the individual at their place of business. It includes the individual’s name, position, title, business phone number and business email address.

***Subsection 3(a)***

[17] Section 3 sets out exceptions to the personal information of an individual. Subsection 3(a) is relevant.

‘Third party’, in respect of an access request, means a person other than the applicant or the responsive public body.

***Subsection 70(1)***

[18] Subsection 70(1) is a mandatory exemption provision, incumbent on the public body head, to protect the privacy of a third party by not disclosing personal information that, if disclosed, would amount to an unreasonable invasion of that privacy.

[19] 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 so an oral conversation would not suffice. It must be about an individual (*i.e.*, a ‘natural person’) so information about a group, organization or corporation would not be personal information. It must also be about an identifiable individual.

***Subsection 70(2)***

[20] 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:

- 1) 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 them in relation to the disclosure, including any factors referred to in subsection 70(5) that are applicable in the circumstances;
- 2) disclosures set out in subsection 70(4) that are deemed not to be an unreasonable invasion of a third party’s privacy; and
- 3) 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 them in relation to the disclosure, including any factors referred to in subsection 70(5) that are applicable in the circumstances.

***Subsection 70(3)***

[21] This provision sets out the type 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.

***Subsection 70(4)***

[22] 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)***

[23] This provision sets out the factors that the public body head must weigh in determining whether the presumption that disclosure of personal information would amount to an unreasonable invasion of a third party's privacy can be rebutted. The enumerated factors are non-exhaustive. As such, the public body head must consider all the relevant circumstances known to them and applicable in the circumstances, noting that some would suggest that disclosure of the responsive records could occur while others suggest that they should be withheld.

***Application***

[24] The following test applies in respect of subsection 70(1).

- 1) Are the Records held by the Department?

If yes, then proceed to Step 2.

- 2) Are the Records personal information?

If yes, then proceed to Step 3.

- 3) Is the disclosure of these Records a reasonable or unreasonable invasion of a third party's privacy?

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

If yes, then these Records are a reasonable invasion of privacy and the Department Head cannot rely on paragraph 70(1) to withhold the Record.

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

If yes, then proceed to Step 3(c).

- c) Do any relevant factors known to the Department Head, including those in subsection 70(5) and the subtest within, apply to rebut the presumption that disclosure is an unreasonable invasion of a third party's privacy?

Subtest – In considering these factors, do those in paragraph 70(5)(e) outweigh those in paragraphs 70(5)(a-d)?

If no to Step 3(c), then the Department Head has not rebutted the presumption and can rely on paragraph 70(1) to withhold the Record.

- d) Are the Records of a type of personal information other that described in subsections 70(3) or (4)?

If yes, then proceed to Step 3(e).

- e) Do any of the relevant factors known to the Department Head, including those in 70(5) and the subtest within, apply in the circumstances?

Subtest – In considering these factors, do those in paragraph 70(5)(e) outweigh those in paragraphs 70(5)(a-d)?

If no, then the Department Head can rely on paragraph 70(1) to withhold the Record.

### Analysis

[25] The Department provided submissions in support of its subsection 70(1) assertion. I will only address those parts of the test that are relevant to the Records.

#### ***Are the Records held by the Department?***

[26] The Department submitted that it holds the Records containing personal information.

[27] I am satisfied that the following Records are held by the Department, as produced for purposes of this subsection 70(1) analysis.

- Record 1 at pages 12-20, and 28-37;
- Record 4 at pages 66-73;
- Record 6 at pages 82-91;
- Record 9 at pages 100-110; and
- Record 12 at pages 121-132.

***Are the Records personal information?***

[28] 'Personal information' is defined in section 1. Such information must be about an identifiable individual, including recorded information set out in a non-exhaustive list of examples.

[29] I have examined the above Records and am of the view, as asserted by the Department, that only the following three types are at issue; namely, business contact information and those of an educational or employment history. I will address each type in turn.

**[30] Internet Protocol Addresses**

[31] According to the Department's submission, Records 1 at pages 12 and 28; Record 4 at page 65; Record 6 at page 82; Record 9 at page 100; and Record 12 at page 121 identify the location of the computers on which Ketza and Wildstone made their submissions.

[32] The Records at issue contain the unredacted names and email addresses of certain individuals acting on behalf of these businesses. These are immediately followed by the respective redacted IP addresses.

[33] Since the definition of 'business contact information' of an individual non-exhaustively sets out how they can be contacted at their place of business and such information, according to subsection 3(a), is not considered to be an individual's personal information, I am of the view that such business contact information could include the business's IP address. I find, therefore, that the IP addresses in the following Records are not personal information.

- Records 1 at pages 12 and 28;
- Record 4 at page 65;
- Record 6 at page 82;
- Record 9 at page 100; and

- Record 12 at page 121.

[34] **Department ‘Key Personnel – Qualifications and Experience’ Table**

[35] The Department ‘Key Personnel – Qualifications and Experience’ table (Line Item Table) is a standard template and only varies in four cases by the singular addition in that title of either ‘Architect’, ‘Designer Builder project manager or project lead’, ‘Mechanical Engineer’, or ‘Electrical Engineer’. For example, the former would be entitled “Key Personnel – Qualifications and Experience – Architect”.

[36] The Line Item Table also consists of six ‘Line Items’, each of which requests information of a certain type. For example, Line Item 1 states, “Provide the individual’s name and note if this individual is the prime consultant or the Owner’s main contact.” Line Item 2 states, “Provide the individual’s professional designations/credentials.” Line Item 3 states, “Provide the individual’s years of experience that are relevant to the role.” Each of these six Line Item directions are repeated in the above ‘architect, designer builder’, etc. versions in the Records before me.

[37] **Education History of Various Individuals**

[38] According to the Department’s submission, Records 1 at pages 13-20 and 29-37, Record 4 at pages 66-73, Record 6 at pages 83-91, Record 9 at pages 103-110, and Record 12 at pages 124-132 contain the educational history of various individuals working for Ketzka and Wildstone, including their respective subcontractors. The submission also describes their ‘education history’ as the individuals’ professional designations and credentials, highest level of education attained and the names of the education institution(s) attended.

[39] Each of these Records is set out on a standard six Line Item Table described above.

[40] The definition of ‘personal information’ includes recorded information about an identifiable individual’s (g) education status or history. In my view, this information must contain some significant part of the individual’s educational history and formal training, such as the names of the institutions attended, courses taken and grade points received.

[41] Line Item 2 (unredacted), in the case of all of them, requires disclosure of their professional designations/credentials. This information is not personal information within the meaning of the definition of the term because it merely sets out generic expertise, such as ‘professional mechanical engineer’. Moreover, the information so provided does not constitute a significant part of their educational history or formal training.

[42] Of all the redacted Records submitted as containing the educational history of various individuals, I can find only one instance where an individual has disclosed their educational institution and degree obtained from it in conjunction with other unrelated information. While this information does not include enrollment details and grades received, I am of the view that it does form a significant part of the individual's educational history and is not, for example, merely information that they, along with others, attended a certain institution at a certain point in time.

[43] For this reason, the only Records in the context of educational history that constitute personal information are the following.

- Record 1 Line Item 6 at page 13 (first sentence);
- Record 4 Line Item 6 at page 66 (first sentence); and
- Record 9 Line Item 6 at page 103 (first sentence).

[44] **Employment History of Various Individuals**

[45] According to the Department's submission, Records 1 at pages 13-20 and 29-37, Record 4 at pages 66-73, Record 6 at pages 83-91, Record 9 at pages 103-110, and Record 12 at pages 124-132 also contain the employment history of various individuals working for Ketz and Wildstone, including their respective subcontractors. The submission also describes their 'employment history' as the number of years working in the industry, current employment status and the number of years working for their current employer, job title and specific employment responsibilities.

[46] Recall that personal information does not include business contact information. As such, it does not include the name, position, title, contact information or the designation of an individual that identifies them in a professional or business capacity. However, if information relates to an individual in a professional or business capacity, it could still qualify as personal information if it contains something of a personal nature about them and it can be reasonably expected that its disclosure could identify them.

[47] The definition of 'personal information' includes recorded information about an identifiable individual's (g) employment status or history. In my view, this refers to a full or partial chronology of information contained, for example, in an HR file. Such information may include a resumé, performance reviews, leave transactions, disciplinary actions and exit reasons. However, it does not refer to information relating to the position, function or responsibilities of an individual because they relate more to an individual's job description. I am

supported in this view by the SK-IPC *Review Report LA-2012-002*. The SK-IPC looked at information that might appear to contain the employment history of an individual. In doing so, they quoted the following from *Ontario IPC Reconsideration Order R-980015*. [para. 20]

*The Commissioner's orders have established that, as a general rule, a record containing information generated by or otherwise associated with an individual in the normal course of performing his or her professional or employment responsibilities, whether in a public or a private sector setting, is not the individual's personal information simply because his or her name appears on the document.*

[48] And further,

*The Commissioner's orders have consistently found that discrete pieces of information which might reveal information about a particular episode in a person's employment do not constitute "employment history".*

[49] The SK-IPC also quoted from the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)* as follows. [para. 25]

*Generally speaking, information relating to the position, function or responsibilities of an individual will consist of the kind of information disclosed in a job description. ...* [para. 95]

*It will comprise the terms and conditions associated with a particular position, including such information as qualifications, duties, responsibilities, hours of work and salary range.*

[para. 6]

[50] I have reviewed the Wildstone and Ketza Records that the Department submitted as being the employment history of various individuals. Recall that Line Item 2 (unredacted), in the case of all of them, requires disclosure of their professional designations/credentials. This is not personal information within the meaning of the definition of the term. This information merely identifies an individual in their professional or business capacity.

[51] *Line Item Table*

[52] As previously stated, there is a standard Line Item Table, each of which is filled in by the respective Ketza and Wildstone architects, designer builder project manager or project lead, mechanical engineer' and electrical engineer'.

[53] Line Item 3, in the case of all the filled in table areas, requires information about their respective years of experience relevant to their role. The Department has redacted this information. In my view, other than the included names, this is information normally associated

with an individual's professional or employment duties. For example, "I am a licensed architect with X years of experience in renovating historic buildings." It is also information that can be associated with a job description or position requiring a stated level of experience. However, it must be examined in the context of the entire Record. Notwithstanding my comments about Line Items 1 and 2, Line Item 3 is a continuation of information provided by individuals to convince that the Department that, given the circumstances, they are suitably qualified to be awarded the bid. As such, this is personal information.

[54] Line Item 4, in the case of all the filled in table areas, requires details on their commitment to deliver the project, such as how long they will be on site and what internal, qualified resources they will bring to bear. In examining all their responses, the information provided speaks to how each of them will meet that commitment in their respective roles. This is not information that would otherwise be disclosed, for example, in a job description. It is information that about how that individual will bring to bear their unique qualifications, experience and resources on the project at hand. This information is personal in nature.

[55] Line Item 5, in the case of all the filled in table areas, requires details of their experience on three projects relatable to the sawmill office renovation 'request for proposal'. In examining all their responses, the information identifies specific projects and scope, the individuals' roles and responsibilities, timeframes, budgets and outcomes. This is the type of information that can, for example, be found on an extensive resumé, provided in the course of a job interview or, in this case, set out for purposes of a 'request for proposal'. It is about how each individual, in their professional capacity, brought their experience to a stated project and how it turned out as a result. This is information about an identifiable individual. As such, it is personal in nature.

[56] Line Item 6, in the case of all the individuals, requires details of their experience on the type of cold temperatures and remoteness faced in Yukon. In examining their responses, the information provided is varied. Some of it identifies the experience of a specific individual working in the North, inclusive of Yukon, over a substantial period. Some of it just lists the experience itself with no mention made to anyone, although the bullet points are specific enough to be attributed directly to an individual and not to some other entity. One example uses the first-person plural pronoun 'we' and no other identifier, and another uses company names or refers to a 'team', but the information is inclusive enough to be attributed to the named individual, as well as to others.

[57] For these reasons, I am of the view that the following Records in the Line Item Tables contain personal information.

- Record 1 at pages 13-17 and 29-33;
- Record 4 at pages 66-70;
- Record 6 at pages 83-87;
- Record 9 at pages 103-107; and
- Record 12 at pages 124-128.

[58] In addition to the Line Item Table, there are four other tables that accompany the Line item Table. Ketzka and Wildstone are each required by the Department to fill them in. These tables are Record 1 at pages 18-20 and 37, Record 4 at page 71-73, Record 6 at pages 88-90, Record 9 at pages 108-110 and Record 12 at page 129-132.

1) Methodology – Project Plan and Risk Mitigation Table

*Proponents should tailor their responses to address the specific scope of work in this tender.*

2) Methodology – Schedule Table

*Provide information on how the project will be completed.*

3) Northern Knowledge and Experience Table

*The proponent should demonstrate their experience working in the North by providing information related to the following: [form]*

4) First Nation Participation Table

*Submit a Yukon First Nation Participation Plan which includes: [form]*

[59] The information provided by the proponents shows how they will meet the objectives required. No individuals are identified or alluded to in the content. I am of the view, therefore, that none of this information, if disclosed, could reasonably be expected to identify an individual in a personal capacity. It relates entirely to the professional and business capacity of Ketzka and Wildstone to meet the 'request for proposals' requirements.

[60] For these reasons, I am of the view that the following Records do not contain personal information.

- Record 1 at pages 18-20 and 33-37;
- Record 4 at pages 71-73;
- Record 6 at pages 87-91;
- Record 9 at pages 108-110;
- Record 12 at pages 128-132.

***Is the disclosure of these Records a reasonable or unreasonable invasion of a third party's privacy?***

[61] This is the key question because there may be good reason why the personal information of a third party should be disclosed or not disclosed. The Department Head must decide in favour of one or the other outcome in accordance with three different types of personal information as follows.

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

[62] Recall that this provision sets out the type of personal information that, if disclosed, is not an unreasonable invasion of a third party's privacy.

[63] The Department submitted that none of the personal information at issue is described in subsection 70(4).

[64] I agree with the Department. In examining all the Records containing personal information, I am satisfied that none is of a type specified in subsection 70(4).

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

[65] Recall that this provision sets out the type of personal information that, if disclosed, is deemed to be an unreasonable invasion of a third party's privacy.

[66] In examining the types of personal information set out in subsection 70(3), I am of the view that the personal information in these Records relates to the education or employment history contemplated by subparagraph 70(3)(a)(iii).

***Has the Public Body Head rebutted the presumed unreasonable invasion of privacy – having weighed all relevant factors known to them in relation to the disclosure, including any factors referred to in 70(5) applicable in the circumstances?***

[67] There is no evidence before me concerning any relevant and applicable factors known to the Department Head outside subsection 70(5). Therefore, I will now analyze that provision to decide whether the presumption that disclosing the personal information of a third party is an unreasonable invasion of their privacy can be rebutted. If such rebuttal occurs, then the personal information should be disclosed.

[68] Subsection 70(5) sets out five paragraphs, each of which must be weighed in the circumstances. In weighing them, the Department Head must determine if the factors in paragraphs 70(5)(a-d) are outweighed by the 'public interest' factors in paragraph 70(5)(e).

[69] I will only set out the relevant ones in the order enumerated in the paragraphs 70(a-e), noting that they do not comprise an exhaustive list.

[70] **The type and sensitivity of the personal information that would be disclosed**

[71] These factors are set out in paragraph 70(5)(a). The Department submitted that the personal information at issue has a low sensitivity but did not elaborate on what that means.

[72] The type of personal information before me, as provided by the various individuals in the Line Item directions, describes how each of them will apply their qualifications and experience to the sawmill office renovation should they be awarded the winning bid. It also describes how each is similar or different from the other. In my view, this process raises the level of sensitivity of the personal information provided to something more than 'low', especially where its disclosure could be combined with the non-redacted information to present a fuller picture of how each proponent has sought to win the bid.

[73] This brings into consideration the risk threshold, essentially, the point at which risk becomes unacceptable and requires a corrective action. In assessing this threshold, it is not sufficient to merely speculate. The effects must demonstrably be more probable than not. From the personal information provided, however, it is impossible to determine the nature of the individuals' respective tolerances. Similarly, it is impossible to determine the measurable adverse effects on each of them.

[74] I am of the view that this type of personal information, as described, is at least moderate in sensitivity on a scale from mild (low) to moderate (medium) to severe (high). If this were the only factor that a public body head must consider, which it is not, then it is my opinion that a moderate degree of sensitivity in this case does not rebut the non-disclosure presumption.

**[75] Whether the disclosure would unfairly expose the third party to financial or other harm, would unfairly damage the reputation of any person referred to in a record containing the personal information, or 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**

[76] These factors are set out in paragraph 70(5)(d). The Department submitted that disclosure of the personal information would unfairly expose the respective third parties to financial or other harm, but it did not elaborate on this submission, nor did it provide any submissions in respect of reputation damage or personal information held in confidence.

[77] However, it stated in Item 2 'Facts and Evidence' at page 2 of its overall submission that it asked Ketza and Wildstone to provide additional information. These two entities subsequently provided their comments on May 21, 2023, as contained in Exhibit C of a sworn Affidavit provided by Lyndsey Beal, Manager of Access & Privacy, ATIPP Office, on June 12, 2023 (Beal Affidavit). The Department characterized all the responses as 'strongly objecting to disclosure' of the Records at issue.

[78] There is nothing in section 70 that expressly permits a public body head to consult with third parties about their views on the personal information in the Records at issue. However, in considering whether the presumption that disclosure of the type described in subsection 70(3) would be an unreasonable invasion of a third party's privacy can be rebutted, a public body head must weigh all factors known to them, including those set out in subsection 70(5).

[79] I considered three relevant factors in subject 70(5): 'financial or other harm', 'reputational damage' and 'held in confidence'.

[80] 'Financial harm', in my view, is the impairment of an individual's financial position, including their ability to manage their assets and liabilities and their ability to protect their financial interests. Such harm could include monetary loss or the loss of monetized assets. However, the harm does not necessarily have to be financial in nature. For example, 'other harm' could involve the disruption of a relationship enjoyed by the individual. In certain situations, financial or other harm may be read together because there can be situations in which an individual is unfairly exposed to a monetary loss or an injury of a similar nature.

[81] In addition, the financial or other harm does not have to occur; rather, unfair exposure to it is sufficient. 'Unfair' in this context means without authority, a rational explanation or impartiality.

[82] 'Damaging the reputation of an individual' means to harm, injure or adversely affect what is said or believed about their character, essentially the mental and moral qualities that are distinctive to that individual. Such damage can occur very quickly, can be other than factually based, can cause significant harm and be wide in scope.

[83] There must, however, be a direct link between the disclosure of the personal information and the reputational damage that would result. In addition, the disclosure must unfairly damage the individual's reputation. 'Unfair' in this context means without authority, a rational explanation or impartiality.

[84] **Financial or other harm and reputational damage**

[85] While the Records before me are each tied to a collective financial interest in either Ketzra or Wildstone winning the bid, neither the Department and nor the proponents provided any evidence to underpin their respective assertions. Neither did any of them make assertions, supported by evidence, that there is a direct link between their disclosure and any resultant reputational damage. As such, I had nothing substantial with which to weigh and probe.

[86] **Confirmed to be held in confidence**

[87] The term 'in confidence' usually describes a relationship of mutual trust in which private matters are provided in the understanding, either implicitly or explicitly, that they will be kept confidential or were provided under circumstances that would create a reasonable expectation of non-disclosure.

[88] Since the Department confirmed that it did not receive any Records in confidence, it follows that it could not hold them in confidence, and I need go no further. [I will address the issue of 'confidence' in the 'Observation' segment at the end of this Investigation Report.]

[89] *Whether the disclosure would subject a program or activity, specialized service or data-linking activity of a public body to public scrutiny, would be likely to promote public health and safety, the disclosure is authorized or required by a statute or regulation, the disclosure would assist in researching or validating the claims, disputes or grievances of Aboriginal peoples, and be relevant to a determination of the applicant's rights.*

[90] **Public interest factors**

[91] These factors are set out in paragraph 70(5)(e). They constitute those public interest reasons why it would not be an unreasonable invasion of a third party's privacy if they applied

to any Records at issue because they outweighed the factors set out [in this case] in paragraphs 70(5)(a) and (d).

[92] The Department submitted that none of these public interest factors apply. I have examined them in relation to paragraphs 70(5)(a-d) and agree. As such, the answer to this subtest is no.

***Having weighed the relevant and applicable factors, has the presumption that disclosure of these Records is an unreasonable invasion of a third party's privacy been rebutted?***

[93] For the above reasons, I am of the view that the presumption is not rebutted.

***Are the Records of a type of personal information other than that described in subsections 70(3) and (4)?***

[94] Recall that this provision sets out the type of personal information that, if disclosed, is deemed to be an unreasonable invasion of a third party's privacy.

[95] The Department made no submissions and, in examining the Records, I am of the view that none is of a type specified above.

### Conclusion

[96] For the reasons given, the Department must withhold the following Records:

- Record 1 at pages 13-17 and 29-33;
- Record 4 at pages 66-70;
- Record 6 at pages 83-87;
- Record 9 at pages 103-107; and
- Record 12 at pages 124-128.

[97] For the reasons given, the Department cannot rely on subsection 70(1) to withhold the following Records.

- Records 1 at pages 12, 18-20, 28 and 33-37;
- Record 4 at pages 65 and 71-73;
- Record 6 at pages 82 and 87-91;

- Record 9 at pages 100 and 108-110; and
- Record 12 at pages 121 and 128-132.

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

[98] The Department is relying on this provision to withhold from the Complainant the following.

- Record 1 (page 1).

### Relevant Law

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

[99] 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 public body head. It authorizes that 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.

[100] 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?

### Analysis

[101] In Yukon Investigation Report ATP-ADJ-2022-04-133, the IPC considered the terms ‘advice’ and ‘recommendation’ and adopted the following non-exhaustive definitions for purposes of paragraph 74(1)(a).

‘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.”

[102] In the same report, the IPC considered the terms ‘public body’ and ‘ministerial body’ and determined that the Department is a ministerial body and therefore a public body. This makes the Minister responsible for the Department the ‘Department Head’ for purposes of paragraph 74(1)(a), but that responsibility that generally falls to the deputy minister as per the Minister’s delegation powers under subsection 2.4(1) of the *Government Organisation Act*.

[103] The IPC also considered the term ‘prepared by or for’ and adopted the following definition for purposes 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 minister, in the process leading up to and including the provision of advice or recommendations.’

[104] This Investigation Report will use these terms as applicable.

[105] Before I continue, I observe that there are two ‘Schedule of Records’ documents provided by the Department to the IPC concerning its assertion of the paragraph 74(1)(a) ‘advice’ exception. The first claims an exception to Record 1 at page 1. The second is entitled ‘Schedule of Records – Amended’ and adds six more Records claiming to be excepted by this provision. The evidence shows that the IPC received the original ‘Schedule of Records’ on May 19, 2023, and the amended version was contained in its June 12, 2023 submission and identified as Appendix E. I will briefly address the issue of the amended version here.

[106] The IPC has a policy concerning the receipt of records and submissions in respect of discretionary provisions such as section 74. Put simply, the IPC only reviews the discretionary provisions that a public body has relied on in respect of the original access request. This is made known to the public body during the Consultation process. As such, I will only examine Record 1 at page 1 for the purposes of this Investigation Report.

[107] Recall that Record 1 at page 1 contains an internal undated Department email inclusive of five attachments. There are three redactions are as follows.

- 1) A sentence concerning an evaluation component;
- 2) A percentage figure concerning the significance of this evaluation stage; and
- 3) a scoring metric used for four identified questions (*i.e.*, questions 1,7, 13 and 19).

[108] The Department stated that it followed the IPC’s two-part test set out above in paragraph 100 of this Investigation Report.

***Does the information qualify as advice or recommendations?***

[109] The Department submitted that Record 1 [page 1] contain[s] information that is ‘advice’. This Record 1 is an internal undated Department email entitled ‘RFP-2021-12-1228 Sawmill Fit Up Evaluation Consensus Meeting’ and contains three redactions. The first is a sentence concerning an evaluation component, the second is a percentage figure concerning the significance of this evaluation stage and the third is a scoring metric used for four stated questions.

[110] In examining this Record, I am satisfied that the first redacted sentence can be characterized as containing advice offered to Department officials and therefore the first part of this test has been met.

[111] In examining the remaining redactions, I can see nothing in them that would constitute advice or, for that matter, a recommendation. They are both statements of fact and, as such, do not meet the first part of the test.

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

[112] The Department submitted that its employees prepared this Record, that it involved a Department decision-maker and that it represented the recommendation made by the ‘evaluation committee’. While I found that the Record only contained advice, I also examined several supporting documents, including those in appendices B, C and D, as well as the factors set out in subsection 74(2). I am satisfied that the first redacted sentence in Record 1 at page 1 was advice prepared by and for the Department.

Conclusion

[113] The Department is authorized to rely on paragraph 74(1)(a) to withhold the information in the first redacted sentence in Record 1 at page 1 because it meets the two-part test.

[114] The Department is not authorized, however, to rely on paragraph 74(1)(a) to withhold the information in the remaining two redactions because they are simply statements of fact and therefore not advice.

Issue 3 – Is the Department authorized by subsection 77(1) to withhold the information sought by the Complainant in their Access Request?

[115] The Department is relying on this provision in the Schedule of Records to withhold from the Complainant the redactions on the following.

- Records 1 at pages 1, 6-8, 10, 12-20, 24-26 and 28-37;
- Record 2 at pages 42 and 44-47;
- Record 3 at page 63;
- Record 4 at pages 65-73.
- Record 5 at pages 77-80;
- Record 6 at page 82-91.
- Record 7 at page 96;
- Record 8 at pages 97-98;
- Record 9 at pages 100-110;
- Record 10 at pages 114-117;
- Record 11 at pages 118-119;
- Record 12 at pages 121-132;
- Record 13 at pages 136-138;
- Record 14 at pages 140-141;
- Record 15 at pages 152 and 153-154;
- Record 16 at page 155; and
- Record 17 at pages 180-181.

### Relevant Law

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

[116] 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 in nature.

[117] 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?

[118] If the answers to these three questions is yes, then the public body head can withhold from the applicant this otherwise disclosable information if they decide, as in this case, that disclosure of this information could 'reasonably be expected' to:

- [77(1)(a)] – result in undue financial loss or gain to a person or entity;
- [77(1)(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 continues to be supplied to the responsive public body; or
- [77(1)(c)] – significantly harm the competitive or negotiating position of the third party.

[119] In Yukon Inquiry Report ATP15-055AR and subsequently adopted in Yukon Investigation Report ATP-ADJ-2022-04-133, the IPC stated that whenever the words 'reasonably expected' appear in the ATIPPA, 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)* [2014 SCC 31 (CanLII), at paragraph 54] [CSSC].

[120] As such, it is unnecessary to show, on a balance of probabilities, that the harm will occur if the information is disclosed [CSSC paragraph 52]. 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 [CSSC paragraph 59]. It follows that where it is determined by the public body head that disclosing the requested information to the applicant will likely cause probable harm to YG or the public body, the subsection is made out.

***Subsection 77(2)***

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

[122] The public body head 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.

- 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?

Analysis

***Application of section 77***

[123] I will now proceed with the analysis of Records 1-17 in respect of paragraphs 77(1)(a), (b) and (c).

[124] Although the Department did not refer to Record 12 in its submissions, I note that it is included in the Schedule of Records in respect of 77(1)(c) so I will address it as part of the whole.

***Is the information held by the Department?***

[125] Because the Department has determined that Records 1-17 are responsive to the Access Request, I am satisfied that these Records are information held by the Department.

***Is the information a trade secret of the third party or their commercial, financial, scientific, or technical information?***

[126] Before I continue, the following Records are not subject to subsection 77(1) because they constitute the Department's evaluation of the respective bids and are therefore not a trade secret of, or commercial, financial, scientific or technical information of, a third party,

- Record 2 at pages 42-43, 44-45, and 46-47;
- Record 13 at pages 136-138;
- Record 14 at pages 140 and 141;
- Record 15 at pages 152, 153 and 154; and
- Record 16 at page 155.
- Record 17 at pages 180 and 181.

[127] In addition, the following Records do not contain third party trade secrets or information of a commercial, financial or technical nature because they do not meet the respective definitions.

- Record 1 at pages 1, 6, 7-8, 12 and 28;
- Record 4 at page 65;
- Record 6 at page 82;
- Record 9 at page 100; and
- Record 12 at page 121.

[128] I will now address each term and their applicability to the remaining Records at issue.

[129] **Trade Secret**

[130] 'Trade secret' is defined in the *Access to information and the Protection of Privacy Regulation*, OIC 2021/25 (ATIPPA Regulation) as follows.

*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.*

[131] In other words, a trade secret is a type of intellectual property that provides its owner with a competitive edge over their competition because it is not generally known outside the owner's control. To be a trade secret, however, it must meet all the above requirements.

[132] Although the ATIPPA Regulation does not apply in its own authority to the issue at hand, I will adopt its contents for purposes of this Investigation Report.

[133] **Commercial and Financial Information**

[134] In Inquiry Report ATP18-16R, 17R and 38R, the IPC defined the terms 'commercial' and 'financial' as follows.<sup>1</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."*

[135] 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>2</sup>

- pricing structures;
- market research;

---

<sup>1</sup> Department of Environment, July 26, 2019 (IPC) at paras. 83 and 88.

<sup>2</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.

[136] Similarly, I also agree that financial information could include the following examples in the SK FOIP Guide.<sup>3</sup>

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

[137] **Scientific Information**

[138] In Yukon Inquiry Report ATP20-06R, the IPC defined 'scientific information' as follows.

*'Scientific information' is information belonging to an organized field of knowledge in the natural, biological or social sciences. In addition, for information to be characterized as*

---

<sup>3</sup> *Ibid.* SK FOIP Guide

*scientific, it must relate to the observation or conclusions derived from a systematic study undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information.*

[139] **Technical Information**

[140] In Yukon Inquiry Report ATP20-06R, the IPC defined 'scientific information' as follows.

*'Technical information' is information belonging to an organized field of knowledge that is prepared by a professional or expert in the field that relates to their field of knowledge. Technical information does not include information that is scientific. Examples of these fields of knowledge are architecture, engineering or electronics.*

[141] **Records 1-17** [My Grouping]

[142] Before I proceed, I will address certain Records.

[143] Records 1-17 contain no scientific information for purposes of this Investigation Report because they do not meet the respective definitions.

[144] **Records 1, 3, 4, 5, 6, 7, 8, 9 and 10** [Department Grouping]

[145] Since I have disposed of the above Records and page numbers, the following remain in this grouping.

- Record 1 at pages 13-17, 18-20, 24-26, 29-33 and 33-37;
- Record 3 at pages 63;
- Record 4 at page 66-70 and 71-73;
- Record 5 at pages 77-80;
- Record 6 at pages 83-87 and 87-91;
- Record 7 at page 96;
- Record 8 at pages 97-98;
- Record 9 at pages 101, 102, 103-107 and 108-110; and
- Record 10 at pages 114-117.

[146] The Department's rationale for its trade secret, commercial and financial assertions in this Record grouping is that the information provided by the third parties identifies internal details about their business structure (including operational practices and project management techniques, business partnerships and staffing resource allocation) that is not publicly available.

[147] *Trade secret*

[148] The assertion by the Department that the Records at issue contain trade secrets is not definitive. Not everything is a trade secret simply because the Department or a third party considers the information to be one. For example, a set of typical skills and knowledge acquired by a person in their profession or business cannot be a trade secret because such things are generally known in the public domain.

[149] That said, I have examined the Records at issue and make the following comments.

[150] In the context of a 'request for proposal', I acknowledge that certain third party information could be a trade secret, such as a particular method or process of construction, a marketing strategy, a specific quantity estimate applied to labour or material pricing, project budgets and so forth. It follows that such trade secrets are important because, as mentioned, they can provide a third party with a competitive advantage by employing something not generally known to others. However, that is not enough on its own. There must be probative evidence that the respective third party met the requirements I have adopted from the ATIPPA Regulation.

[151] To that end, I have established the following test:

- 1) What information is specifically being claimed by the third party as a trade secret?
- 2) Is the information being used (or may be used) in the third party's business for any commercial advantage?
- 3) What independent economic value, real or potential, does the information have to the third party from not being generally known or readily and properly ascertainable by persons who could obtain economic value from its disclosure or use?
- 4) Is the information subject to reasonable efforts by the third party to maintain its secrecy?
- 5) Would disclosure of the information cause harm to the third party or result in improper benefit to some other person/entity?

[152] I also note that if a third party meets this test, then their trade secret protection is lost if they fail to protect that information or it becomes publicly known. In that situation, it follows that the value of the previously protected information could weaken.

[153] In an examination of the remaining Records, I have evidence that Record 1 at pages 10 and 24-26 may be the respective trade secrets of the proponents. Each contains information that sets out a particular method or process of construction and each is submitted as a business proposition to obtain a commercial advantage in a competitive bid process. Each has independent economic value because they represent the respective proponent's unique approach on how to meet the renovative objectives in the 'request for proposals'. Since only one proponent can win the bid award, it follows that their approaches would either have no competitive value if they were known to one another or could be manipulated by the other to create a commercial advantage. Because of the likely probability that, if the respective pages were disclosed, either financial harm would result to each of them or someone would improperly benefit, each proponent has taken reasonable efforts to protect them from such disclosure by placing them in sealed bids.

[154] I am of the view, therefore, that the following Records are trade secrets:

- Record 1 at pages 10 and 24-26;
- Record 3 at page 63;
- Record 7 at page 96; and
- Record 10 at pages 114-117.

[155] However, I have no evidence before me for purposes of determining if the remaining Records are trade secrets. As such, I am unable to make any other findings.

[156] *Commercial information*

[157] On examination of the remaining Records and pages in this grouping, I am of the view there is some merit in the Department's 'business structure' rationale. The information provided by the respective third parties contains what services they will each provide, what business experience and acumen each will bring to the project, what methods each will use to plan and execute the various components of it, what special considerations each will employ in the process, what guarantees each will provide, and what timeframe each will spend to complete the project.

[158] For these reasons, I am of the view that the following Records and pages contain commercial information:

- Record 1 at pages 13-17, 18-20, 24-26, 29-33 and 33-37;
- Record 3 at page 63;
- Record 4 at pages 66-70 and 71-73;
- Record 5 at pages 77-80;
- Record 6 at pages 83-87 and 87-91
- Record 7 at page 96;
- Record 8 at pages 97-98;
- Record 9 at pages 101 [Line Items 1-3 in the Department table entitled 'Yukon First Nation Participation Plan – Labour Levels'], 102, 103-107 and 108-110; and
- Record 10 at pages 114-117.

[159] *Financial information*

[160] Continuing with an examination of the Department's 'business structure' rationale, there is some information in the Records at issue in which monetary and budgetary information is specific to a third party.

[161] For this reason, I am of the view that the following Records and pages contain financial information:

- Record 8 at pages 97-98;
- Record 9 at pages 101 [Line Items 4 and 5 in the Department table entitled 'Yukon First Nation Participation Plan – Labour Levels'] and 102.

[162] *Technical information*

[163] With six exceptions below, Records 1-17 contain no technical information for purposes of this Investigation Report because they do not meet the respective definitions. The following Records, however, fit with the definition of 'technical information':

- Record 1 at pages 10 and 24-26;

- Record 3 at page 63;
- Record 5 at pages 77-80;
- Record 7 at page 96; and
- Record 10 at pages 114-117.

[164] Records 8 and 11 [Department Grouping]

[165] More specifically, the following apply in this grouping.

- Record 8 at pages 97-98; and
- Record 11 at pages 118-119.

[166] I note that the Department's submission inadvertently refers to 'Record 8' as 'Record 9'; however, the Schedule of Records is accurate in respect of Record 8. I have corrected the title of this grouping and will proceed accordingly.

[167] That said, the Department makes no 'trade secret' or 'technical' assertions in this Record grouping. I am of the view, however, that these Records do not contain trade secrets because they are specific to a relationship between each third party and a surety provider. They also do not meet the 'technical' information definition.

[168] The Department's commercial and financial rationale is that these Records constitute an assurance from the surety provider to the Department that the respective third-party bidders are not only qualified but will take their tendering obligations seriously. As such, they will follow through on their commitments.

[169] *Commercial information*

[170] On an examination of these Records, I am of the view that they contain commercial information specific to each third party because they are an aspect of the terms and conditions that each must meet for providing services in respect of the 'request for proposal'.

[171] *Financial information*

[172] On an examination of these Records, I am of the view that they contain financial information specific to each third party because they are a form of monetary resource that addresses financial capability in respect of providing their services.

[173] For these reasons, I am of the view that the following Records and pages contain both commercial and financial information:

- Record 8 at page 97-98; and
- Record 11 at pages 118-119.

[174] **Records 1, 2, 12, 13, 14, 15, 16 and 17** [Department Grouping]

[175] I have disposed of Record 1 except those pages containing trade secrets and information of a commercial or technical nature. I have also disposed of Records 2 and 13-17. Therefore, the following Record remains in this grouping.

- Record 12 at pages 122, 123, 124-128 and 128-132.

[176] The Department's rationale for its trade secret, commercial and financial assertions in this Record grouping is that if a competitor understood why the Department evaluated a proponent as 'low' in a particular area, then it could use that information in future 'requests for proposals' both to undermine that proponent and strengthen their own bid in an effort to 'out compete' them.

[177] The Department does not elaborate on the term 'low', but I note that an unredacted Department table in Record 1 at page 9, seemingly relevant to bid evaluation, contains three headings (*i.e.*, '%'. 'Summary', 'Description') under which a scale is set out from 0% to 100% as follows (paraphrased).

- 100% – 'superlative/surpasses';
- 80% – 'good'/fully meets';
- 60% – 'acceptable/adequate';
- 40% – 'weak/unacceptable';
- 20% – 'seriously deficient/serious problems'; and
- 0% – 'unacceptable'.

[178] However, in the absence of any elaboration by the Department concerning the term 'low', I am unable to put any significant weight on it other than to acknowledge the Department's position on the competitive aspect concerning proponents.

[179] *Trade secret*

[180] On an examination of the Record at issue, I have no evidence before me that I can evaluate for purposes of the five-part 'trade secret' test. As such, I can only conclude that Record 12 at pages 122, 123, 124-128 and 128-132 does not meet the requirements of a trade secret.

[181] *Commercial and Financial Information*

[182] Record 12 at pages 122 and 123 contain numerical values. Pages 124-128 and 128-132 contains bid information. These all fit within the definitions of 'commercial' and 'financial' information.

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

[183] The Department submitted that the public body accepted none of the information in confidence in the prescribed manner from the respective third parties.

[184] There is no evidence before me that would indicate otherwise. [I will address the issue of 'confidence' in the 'Observation' segment at the end of this Investigation Report.]

***Application to paragraphs 77(1)(a-c)***

[185] Recall that if any information in the responsive Records contains a trade secret, or information of a commercial, financial or technical nature [none is 'scientific'], then the Department Head can withhold from the applicant this otherwise disclosable information provided it then meets the requirements of these three provisions.

[186] I have found that the following Records meet these criteria:

- Record 1 at pages 10, 13-17, 18-20, 24-26, 29-33 and 33-37;
- Record 3 at page 63;
- Record 4 at pages 66-70 and 71-73;
- Record 5 at pages 77-80;
- Record 6 at pages 83-87 and 87-91
- Record 7 at page 96;

- Record 8 at pages 97-98;
- Record 9 at pages 101, 102, 103-107 and 108-110;
- Record 10 at pages 114-117;
- Record 11 at pages 118-119; and
- Record 12 at pages 122, 123, 124-128 and 128-132.

***Could disclosure of the information reasonably be expected to result in undue financial loss or gain to a person or entity? [77(1)(a)]***

[187] The Department submitted that disclosure of Records 1, 3, 4, 5, 6, 7, 8, 9 and 10 would unfairly expose the respective third parties to financial harm. I have already determined which Records apply to this analysis and will proceed accordingly. [see paragraph 186 of this Investigation Report]

[188] Despite the Department's use of the phrase 'unfair exposure to financial harm', the provision concerns 'undue financial loss or gain'. In that context, 'undue' commonly means something that is more than necessary, acceptable or reasonable. It follows, therefore, that financial loss or gain that is not inappropriate or excessive can occur without offending the provision.

[189] The provision also contains the phrase 'reasonably be expected to result in undue financial loss or gain...' The IPC addressed this in *Yukon Investigation Report ATP-ADJ-2022-04-133* [paras 168-172] where they determined that the public body head must demonstrate that the risk of harm is well beyond the merely possible or speculative. While it is not necessary to demonstrate that harm is probable, there must be a reasonable basis for believing that the harm will result.

[190] I have already examined Record 1 at pages 10 and 24-26, Record 3 at page 63, Record 7 at page 96 and Record 10 at pages 114-117 and found them to be trade secrets. They uniquely set out how and when each proponent, if awarded the project, will build it with the stated expertise and resources at their disposal. They are inherently valuable documents because they are designed not only to meet the 'request for proposals' construction requirements, but also to give one proponent a competitive advantage over the other when it comes to the Department choosing the bid winner. The evidence shows that they are not generally known outside either proponent's business or readily accessible by others. They are also the product of

internal development, as well as efforts to maintain their secrecy outside the 'request for proposals' context.

[191] I am therefore of the view that if these Records are disclosed, despite the project having already being awarded, all interested parties including the winner and loser(s) would have proprietary and otherwise secret information that they could use to outbid their competition or turn to other advantage, the outcome of which is more likely than not to result in financial harm to any of them.

[192] As to the remaining Records in this grouping, The Department only submitted that the disclosure of the information would result in financial harm to the respective third parties. It did not elaborate on this assertion.

[193] Because I have no evidence before in respect of this assertion, I am of the view that the remaining Records in this grouping could not reasonably be expected to result in undue financial loss or gain to a person or entity.

[194] **Before denying access to information under subsection 77(1), did the public body head consider the objection of a third party, if any, submitted in accordance with a notice provided to the third party under paragraph 59(1)(a)?**

[195] Recall that paragraph 77(2)(a) requires a public body head, before denying access to information under subsection (1), to consider the objections of a third party, if any, submitted in accordance with due notice to them. I examined the Department questions and the proponents' responses in the Beal Affidavit. The Department characterized all the proponent responses as 'strongly objecting to disclosure' of the Records at issue.

[196] While their comments seem sound in theory, an analysis of them must be contextual. In my view, this context comprises the nature of the issue and the seriousness of the consequences as evaluated by the quantity and quality of evidence needed to meet the 'more probable than not' test underlying the phrase 'could reasonable be expected'.

[197] In this case, the issue is one of whether disclosure of the Records in question could reasonably expected to affect the third parties in the negative ways stated. As such, could consequences of such disclosure be a compromised tender process in which competitors have unfair opportunities to undermine or overpower each other's bid?

[198] It is not enough, however, to make assertions in the absence of being probed for their veracity on the evidence. Mere speculation or the possible likelihood that disclosure of the Records at issue would result in undue financial loss or compromise the integrity of the

evaluation process is insufficient because there must be sound evidence that such consequences are more likely than not to occur. I have no such evidence before me from the Department or in the form of the third party comments. I can therefore place little weight on their substance as presented.

[199] I have no such evidence before me from the Department or in the form of the third party comments with which to apply the test and make a determination. I can therefore place little weight on their substance as presented.

[200] For these reasons, the Department is not authorized to rely on paragraph 77(1)(a) to withhold the Records set out in paragraph 186 of this Investigation Report, except the following trade secret Records:

- Record 1 at pages 10 and 24-26;
- Record 3 at page 63;
- Record 7 at page 96; and
- Record 10 at pages 114-117.

***Could disclosure of the information reasonably be expected to result in similar information no longer being supplied to the responsive public body and is the public body head satisfied that it is in the public interest that similar information continues to be supplied to the responsive public body? [77(1)(b)]***

[201] The Department submitted that this question applied to Records 1-11 and 13-17. I have already determined which Records apply to this analysis and will proceed accordingly. [see paragraph 186 of this Investigation Report]

[202] Given the applicable Records, the Department asserted that disclosure would have this information result because the respective third parties, on consultations, stated that they would be reluctant to bid in the future due to the financial risks that they would be subjected to should the Department disclose their information.

[203] The Department also submitted that it was in the public interest that similar information continues to be supplied to it because it allows for a more competitive bidding process which, in turn, could result in lower project prices.

[204] The Department added that, because the number of available entities in the Yukon market that can do such work is limited, anything that potentially reduces the 'chance' or

'number' of bids can undermine the procurement process. Trust between the bidding community and YG is therefore fundamental to the YG purchasing process, especially when considering any piece that might damage that trust. [I will address the issue of 'confidence' in the 'Observation' segment at the end of this Investigation Report.]

[205] The Department provided no evidence to support its assertions.

**[206] Before denying access to information under subsection 77(1), did the public body head consider the objection of a third party, if any, submitted in accordance with a notice provided to the third party under paragraph 59(1)(a)?**

[207] Recall that the Department consulted with Ketzka and Wildstone to provide additional information. I examined the Department questions and the proponents' responses in the Beal Affidavit. Before I proceed further, I will briefly address an issue raised by Ketzka in response to a Department question about whether the release of the Records containing its information would result in it no longer supplying the Department with similar information in the future (*e.g.*, no longer bidding on future tenders or supplying less information when bidding).

[208] The Department characterized all the proponent responses as 'strongly objecting to disclosure' of the Records at issue. I have already stated that assertions must be supported by evidence that can sufficiently be probed to determine the truth of that being asserted. As mentioned, the evidentiary test to be met is one of middle ground between that which is merely possible and that which is probable; that is, more likely than not to occur.

[209] I have no such evidence before me from the Department or in the form of the third party comments with which to apply the test and make a determination. I can therefore place little weight on their substance as presented.

[210] For these reasons, the Department is not authorized to rely on paragraph 77(1)(b) to withhold the Records set out in paragraph 186 of this Investigation Report.

***Could disclosure of the information reasonably be expected to significantly harm the competitive or negotiating position of the third party? [77(1)(c)]***

[211] The Department submitted that disclosure of Records 1-17 would have this result. I have already determined which Records apply to this analysis and will proceed accordingly. [see paragraph 186 of this Investigation Report]

[212] In its view, such disclosure would allow third parties to obtain an unfair competitive advantage by giving them an unwarranted level of insight into the internal operations of each

other's businesses. It would also undermine their respective competitive advantages because it would not only reveal details of their internal workings and costs, profit margins, and sub-contractor relationships, but also their strengths and weaknesses in respect of their internal operations, all of which could amount to an exploitation opportunity.

[213] In addition, and based on third party consultation, the personal information they provided would be used by their competitors to offer inducements to their employees to leave their current employment and join these competitors.

[214] However, the Department provided no evidence to support its assertions.

**[215] Before denying access to information under subsection 77(1), did the public body head consider the objection of a third party, if any, submitted in accordance with a notice provided to the third party under paragraph 59(1)(a)?**

[216] As previously stated, the Department consulted with Ketzka and Wildstone to provide additional information, all of which is contained in the Beal Affidavit and characterized by the Department as 'strongly objecting to disclosure' of the Records at issue.

[217] The issue in this instance is the same as it is for paragraphs 77(1)(a) and (b): whether disclosure of the Records in question could reasonably be expected to affect the third parties in the negative ways stated. As such, could the consequences of such disclosure also be the same: a possibly compromised tender process in which competitors have unfair opportunities to undermine or overpower each other's bid?

[218] The Department's submissions and the proponent assertions in respect of paragraph 77(1)(c) seem sound in theory but they must be supported by evidence that can sufficiently be probed to determine the truth of that being asserted. As above, I have no such evidence before me with which to determine whether the consequences asserted by the Department and third parties are more likely than not to occur. I can therefore place little weight on their substance as presented.

[219] For these reasons, I can only conclude that the Department is not authorized to rely on paragraph 77(1)(c) to withhold Records set out in paragraph 186 of this Investigation Report.

**[220] Before denying access to information under subsection 77(1), did the public body head consider whether, despite any objections, granting an applicant access to the information would promote public health or safety?**

[221] The Department submitted that it made no determination in this respect.

[222] I agree with the approach taken by the Department and am of the view that the question has no relevance to the records at issue.

***Is any of the information subject to subsection 77(3)?***

[223] Recall that this provision requires a public body head to grant the applicant access to information referred to in subsection 77(1) if the answer to any of the questions comprising the following four part-part test is 'yes'.

- 1) Did the third party consent, in writing, to the disclosure of the information?
- 2) Did the third party make the information available to the public?
- 3) Is there any legislation that authorizes or requires disclosure of the information?
- 4) Is the information publicly available?

[224] There is no evidence put forward by the Department to any of those effects. As such, I am of the view that subsection 77(3) does not apply to the Records at issue.

Conclusion

For the above reasons, I make the following conclusions.

- 1) The Department is authorized to rely on subsection 77(1) to withhold the following Records:
  - Record 1 at pages 10 and 24-26;
  - Record 3 at page 63;
  - Record 7 at page 96; and
  - Record 10 at pages 114-117.
- 2) The Department is not authorized to rely on subsection 77(1) to withhold the following Records:
  - Record 1 at pages 1, 6, 7-8, 12, 13-17, 18-20, 28, 29-33 and 33-37;
  - Record 2 at pages 42-43, 44-45, and 46-47;
  - Record 4 at page 65, 66-70 and 71-73;

- Record 6 at page 82, 83-87 and 87-91
- Record 8 at pages 97-98;
- Record 9 at page 100, 101, 102, 103-107 and 108-110;
- Record 11 at pages 118-119;
- Record 12 at page 121, 122, 123, 124-128 and 128-132;
- Record 13 at pages 136-138;
- Record 14 at pages 140 and 141;
- Record 15 at pages 152, 153 and 154;
- Record 16 at page 155; and
- Record 17 at pages 180 and 181.

Issue 4 – Can the Department Head rely on section 82 to deny access to any of the information sought by the Complainant in their Access Request?

#### Relevant Law

##### **Section 82**

[225] This mandatory provision requires a public body head to disclose information where disclosure is clearly in the public interest. It overrides all other ATIPPA access provisions excluding Cabinet confidences. As such, it represents a particularly important exception to privacy protection because it could involve a significant invasion into such protection.

[226] Exercising this provision requires the public body head to determine if the public interest in disclosing the information clearly outweighs the public interest in withholding it. Making this determination requires the public body head consider contextual factors and, in the case of third party confidential business information (which is not at issue in this Investigation Report), to consider additional factors. It also requires the public body head not to consider enumerated factors.

[227] As such, the following six-part test applies:

- 1) What is the level of public interest in having access to the information in the Records?

- 2) If the Records are disclosed, is the information in them likely to be accurate and reliable?
- 3) Is the information in the Records similar to information in the public domain?
- 4) Does any suspicion likely exist whether in respect of a public body's conduct in relation to the matter to which the information relates?
- 5) Would any harm to a person, public body or government likely to result from disclosure of the information in the Records and, if yes, what is the significance and type of the harm?
- 6) Would disclosure of the information in the Records likely result in similar information no longer being supplied to a public body?

### Analysis

[228] The Department made no submissions on section 82 so I have examined those Records that, in my view, must not be disclosed to the applicant. However, I have no evidence before me with which to provide answer to the test.

### Conclusion

[229] I find that the Department Head cannot rely on section 82 to provide access to any of the information sought by the Complainant in their Access Request that has been appropriately withheld.

## VII FINDINGS

[230] In summary, I make the following findings in respect of subsection 70(1), paragraph 74(1)(a) and subsection 77(1) set out for convenience in the table below. 'Applies' means the applicable provision that can be relied on as an authority, 'W' means 'withhold' and 'D' means 'disclose'.

[231] I have identified the Records that the Department has the necessary authority to withhold from the applicant and those that must be disclosed.

[232] Since the Complainant stated in their Access Request that they wanted, amongst other things, scoring information, I have identified, as described by the Department, those particular documents in the table for sake of convenience. However, that identification does not, in any way, preclude the disclosure of the other Records that the Department cannot withhold.

Record	Page	70(1)	74(1)(a)	77(1)	Withhold	Disclose
1	1 (1 <sup>st</sup> redaction)		Applies		W	
	1 (2 <sup>nd</sup> and 3 <sup>rd</sup> redactions)					D
	6 [evaluation breakdown and scoring]					D
	7-8 [evaluation breakdown and scoring]					D
	10			Applies	W	
	12					D
	13-17	Applies			W	
	18-20					D
	24-26			Applies	W	
	28					D
	29-33	Applies			W	
	33-37					D
2	42-43					D

	44-45 [scoring]					D
	46-47 [scoring]					D
3	63			Applies	W	
4	65					D
	66-70	Applies			W	
	71-73					D
5	77-80			Applies	W	
6	82					D
	83-87	Applies			W	
	87-91					D
7	96			Applies	W	
8	97-98					D
9	100					D
	101					D
	102					D
	103-107	Applies			W	
	108-110					D
10	114-117			Applies	W	
11	118-119					D
12	121					D
	122					D

	123					D
	124-128	Applies			W	
	128-132					D
13	136-137 [scoring matrix]					D
14	140 [scoring matrix]					D
	141 [scoring]					D
15	152 [email with scoring table]					D
	153 [detailed scoring evaluation]					D
	154 [detailed scoring evaluation]					D
16	155 [detailed scoring evaluation]					D
17	180					D
	181					D

## VIII RECOMMENDATIONS

[233] I recommend that the Department Head discloses to the Complainant all Records except those identified in the above table to 'withhold' ('W').

## IX OBSERVATIONS

[234] The Department acknowledged in its submission that it did not receive any of the responsive Records in confidence in the context of section 77. It did, however, draw my attention to the value of the Records that could be placed on them not only by Ketzka and Wildstone but by their competitors, in addition to the time, effort and expense expended to develop the information contained in their responses to the 'request for proposals'.

[235] Under ATIPPA SY 2002 (Old ATIPPA), a public body could refuse to disclose to an applicant certain information that was supplied, explicitly or implicitly, in confidence to the public body by a third party. However, this is not the case under the new ATIPPA of 2018, the legislation that governs this Investigation.

[236] In this statute, which entirely replaced the Old ATIPPA, the Legislature overtly provided for a regulatory procedure governing how information that is, for example, 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 ATIPPA Regulation and is the only mechanism for doing so. Outside this procedure, there is nothing akin to the 'deemed confidence' of the Old ATIPPA.

## Department Head's Response to Recommendations

[237] On receipt of an investigation report, section 104 governs the Department Head's response to it.

[238] Any response by the Department Head in respect of section 104 will be published on the IPC website in addition to the Investigation Report.

## Complainant's Right of Court Review

[239] If the Department Head rejects a recommendation in an investigation report, or is considered to have done so, subsection 105(1) gives a complainant the right to apply to the Yukon Supreme Court for a review of the decision or matter to which the recommendation relates.

### **ORIGINAL SIGNED**

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

### Distribution List:

- Department Head
- Complainant