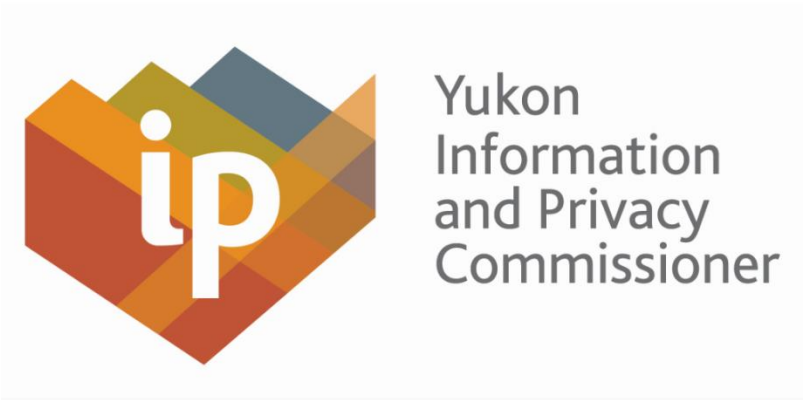

INVESTIGATION REPORT

Pursuant to section 66 of the

Access to Information and Protection of Privacy Act

Department of Economic Development

File ATP-ADJ-2024-10-275

Rick Smith, Adjudicator

Office of the Information and Privacy Commissioner

January 14, 2025

Summary

On June 7, 2024, an individual (Complainant) made an access request for records that they believed to be in the custody or control of the Department of Economic Development (Public Body). Later, on August 22, 2024, the Public Body provided its final response to the Complainant via the ATIPP Office. It advised that, having identified records responsive to the Access Request, it would grant partial access to some records but would withhold others in full.

Following a complaint to the Information and Privacy Commissioner (IPC), the IPC notified the Complainant and the Public Body about first conducting a consultation, as per section 93, in an attempt to find resolution. As part of this process, the Public Body agreed to disclose certain information to the Complainant. However, it did not agree to disclose the remaining records (Program Area Records and Record 115), so the IPC moved from consultation to formal investigation, as per paragraph 94(4)(b), and assigned an adjudicator to the matter.

As its authority, the Public Body cited subsection 70(1) and subparagraph 75(1)(a)(ii) for withholding the Records at issue from the Complainant. The Complainant made no submissions on their position regarding the Investigation. The Public Body made limited submissions but provided no supporting affidavit evidence or data to support the claims it made. Specifically, the Public Body made no submissions on subsection 70(1), but it did provide submissions on subparagraph 75(1)(a)(ii). In addition, it made no submissions on subsection 82(1).

Since subsection 70(1) is a mandatory exclusion provision, the Adjudicator conducted the required analysis in place of the Public Body. Similarly, since subsection 82(1) requires mandatory disclosure if it is clearly in the public interest, the Adjudicator also conducted the necessary analysis in place of the Public Body.

The Adjudicator found that the Public Body was authorized to rely on subsection 70(1) to withhold the third party personal information contained in the Program Area Records from the Complainant, but it was not authorized to withhold the name and title of the 'authorized officer' contained in the Program Area Records nor the template comprising the Program Area Records.

The Adjudicator also found that the Public Body was not authorized by subparagraph 75(1)(a)(ii) to withhold Record 115 from the Complainant.

Finally, the Adjudicator found that subsection 82(1) did not apply to the Program Area Records and Record 115.

The Adjudicator recommended that the Public Body disclose the Program Area Records, except the third party personal information within, and Record 115 to the Complainant.

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Complaint

On June 7, 2024, an individual (Complainant) made an access request for records that they believed to be in the custody or control of the Department of Economic Development (Public Body), as follows.

> *I am requesting any email correspondence sent, documents produced by,* [sic] *staff regarding Yukon government's Immigration programs during the dates provided. Timeframe: June 3, 2024 – June 6, 2024.* (Access Request)

On June 13, 2024, the ATIPPA Office activated the Access Request, assigned it file number 24-152, and forwarded it to the Public Body.

On August 22, 2024, the Public Body provided its final response to the Complainant via the ATIPP Office. It advised that, having identified records responsive to the Access Request, it would grant partial access to some records but would withhold others in full.

Later that same date, the Office of the Information and Privacy Commissioner (IPC) received a complaint from the Complainant in accordance with sections 66 and 90 of the *Access to Information and Protection of Privacy Act* (ATIPPA) and assigned it file number ATP-COM-2024-08-217 (Complaint).

Jurisdiction

The Authority of the IPC to review the Public Body's decision(s) to refuse to provide an applicant with access to records is set out in ATIPPA subsections 91(1) and 91(2).

Statutes Cited

Access to Information and Protection of Privacy Act, SY 2018, c.9 (ATIPPA)

Cases, Orders and Reports Cited

Cases

Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner) [Ontario CSCS] 2014 SCC 31 (CanLII)

Orders

Alberta *IPC Order 2000-031*

Alberta *IPC Order F2006-010*

Alberta IPC Order F2008-028

Yukon *ATP-ADJ-2022-02-053*

Yukon *Inquiry Report ATP15-055AR*

Yukon *Inquiry Report ATP18-16R, 17R and 38R*

Reports

Prince Edward Island (Economic Development and Tourism) (Re), 2015 CanLII 66639 (PE IPC)

Explanatory Note

All sections, subsections, paragraphs and the like referred to in this investigation report (Investigation Report) are to the ATIPPA, unless otherwise stated.

All references to a 'public body' mean a public body as defined in the ATIPPA.

References to specific emails will only identify third parties outside the Public Body by a letter, such as 'X', 'Y' or 'Z', as the case may be, for privacy protection purposes.

Burden of Proof

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

Submissions of the Parties

The submissions of the Public Body are generally set out in the 'Analysis' sections of this Investigation Report, as may be relevant to each issue. The Complainant made no submissions.

I BACKGROUND

[1] On receiving the Complaint, the IPC decided to investigate the matter.

[2] The IPC then notified the Complainant and the Public Body about first conducting a consultation, as per section 93, in an attempt to find resolution.

[3] As part of this process, the Public Body agreed to disclose certain information to the Complainant.

[4] However, it did not agree to disclose the remaining records (Records) so the IPC moved from consultation to formal investigation, as per paragraph 94(4)(b).

[5] As such, on October 25, 2024, the IPC issued the Public Body and the Complainant with a 'Notice of Written Investigation' under new file number ATP-ADJ-2024-10-275 (Investigation) and called for submissions.

[6] The IPC also issued the Public Body with a Notice To Produce Records requesting a "complete copy of all the records identified as responsive to Request for Access to Records #24-152, unredacted" and an accompanying 'schedule of records'.

II ISSUES

[7] There are three issues:

1) Is the PB Head authorized by subsection 70(1) to withhold the Records?

2) Is the PB Head authorized by subparagraph 75(1)(a)(ii) to withhold the Records?

3) Is the PB Head required by subsection 82(1) to disclose the Records?

III RECORDS AT ISSUE

[8] The Records at issue in this Investigation are contained in the following table.

Page #	Number of Pages	Type of Record	Severed (S) or Refused (R)	Exceptions Claimed
Unnumbered	4	Program area record	R	Subsection 70(1)
115	1	Email attachment	S	Subparagraph 75(1)(a)(ii)

[9] In its submissions on the above Records, the Authority also cited paragraph 79(1)(i) as a reason for redacting them. However, it did not cite this provision in the August 22, 2024, letter of refusal to the Complainant. Because the Public Body did not rely on this discretionary provision when responding to the Access Request and because a later citation is not in accordance with our practice, I will not consider it in this Investigation Report.

IV DISCUSSION OF THE ISSUES

Issue 1 – Is the Public Body authorized to rely on subsection 70(1) to withhold the Records?

[10] In turning to the above table, the applicable Records are described as 'program area records' consisting of four unnumbered pages (Program Area Records). Since the Public Body has withheld each of them in full, I can only state that they all constitute some form of repetitive template, contain third party information, and set out administrative authentication information.

[11] Although the Public Body cited subsection 70(1) as a reason to refuse disclosure of the Program Area Records to the Complainant, it made no submissions. Section 70 is a mandatory provision. If a public body cites its reliance on such a provision, it has a duty to make an appropriate submission. Because the Complainant is entitled to know if it applies to any of the Program Area Records at issue, I am placed in the unwarranted position of having to put forth my own analysis.

[12] Section 70 is found in Division 8 'Information to which access is prohibited'. Its purpose is to prevent the release of third party personal information, as defined by the ATIPPA, that would constitute an unreasonable invasion of that third party's privacy.

[13] If such release is at issue, section 70 then involves a 'weighing'. In other words, the PB Head is obliged to determine if the presumption against disclosure is rebutted after a consideration of several prescribed factors. Based on this consideration and the coming to a determination about the reasonableness of the invasion, the PB Head either releases or withholds the third party personal information.

Relevant Law

[14] The relevant portions of section 70 are as follows:

> *(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 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 <u>any other type of disclosure of a third party's personal information</u>, the head must <u>weigh</u> 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.

…

(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,

(iv) the disclosure would assist in researching or validating the claims, disputes or grievances of Aboriginal peoples,

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

[Emphasis added]

Analysis

[15] I begin by stating that the Public Body cannot rely on section 70 to justify withholding the Program Area Records in full because it only applies to third party personal information. Any other type of information is not caught by this provision.

[16] In previously noting that the Public Body made no submissions about section 70, it follows that the PB Head did not conduct the 'weighing' analysis set out in subsection 70(2) to determine if the presumption against disclosure is rebutted. To that end, I have no evidence on which to place more weight on one particular factor as opposed to another, as contained in subsection 70(5).

[17] However, I will proceed on the basis of the information before me.

[18] Section 70 only applies if the Public Body is holding a third party's 'personal information' and its disclosure amounted to an 'unreasonable invasion of their privacy'.

Are the Records held by the Public Body?

[19] Since the Program Area Records at issue are in the custody or control of the Public Body, I find that they are held by the Public Body, as contemplated by subsection 70(1).

Do the Records contain Third Party Personal Information?

[20] Section 1 defines 'personal information'. The relevant portions are as follows:

"personal information" means, subject to section 3, recorded information about an identifiable individual, including[1]

(a) their name,

…

(c) their age, sex, gender identity or expression, or sexual orientation,

…

(e) their race, ethnicity or nationality

…

(g) information about their marital, family, education or employment status or history,

…

(j) a personal unique identifier that has been assigned to them,

…

[21] In examining the information in each of the Program Area Records, I find that they contain the type of personal information about third parties as contemplated by subsections 1(a, c, g, and j).

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

[22] Subsection 70(4) sets out certain types of a third party's personal information the disclosure of which would not be an unreasonable invasion of their privacy. In examining this provision, I find nothing within it that applies to the Program Area Records.

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

[23] Subsection 70(3) sets out certain types of a third party's personal information the disclosure of which would be an unreasonable invasion of their privacy. In examining this provision, I find nothing within it that applies to the Program Area Records.

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

[1] The reference in the provision to 'section 3' is irrelevant for purposes of this analysis.

[24] In examining the third party personal information in each of the Program Area Records, the answer is yes.

What are the known and relevant factors, including any applicable factors in subsection 70(5), that must be weighed to determine if disclosure of the personal information would be an unreasonable invasion of the third party's privacy?

[25] In the absence of submissions from the Public Body on section 70, the only evidence I have before me are the Program Area Records themselves. As such, my analysis cannot take into consideration any relevant factors beyond those enumerated in subsection 70(5).

[26] There are 11 factors set out in this provision. However, factors 70(5)(d)(ii-iii) and 70(5)(e)(ii-v) are not relevant. I will therefore proceed accordingly.

[27] Factor 70(5)(a) weighs against disclosure. Names, gender identity, nationality, family information, and marital information contained in the Program Area Records are sensitive personal information.

[28] Factor 70(5)(b) weighs against disclosure. The relationship between the individuals and the Public Body is one of a high standard of care because the individuals depend heavily on the Public Body to maintain their Canadian residency status. Such vulnerability in this relationship creates a preference against disclosure.

[29] Factor 70(5)(c) does not weigh against disclosure. The Program Area Records are internal to the Public Body but reflect, for the most part, their official counterparts. As such, they are essentially accurate and reliable.

[30] Factor 70(5)(d)(i) does not weigh against disclosure. It is possible that disclosure of the Program Area Records could expose the individuals to financial or other harm. However, there is no evidence before me on which to conclude that this exposure is something approaching 'probable' in nature. As such, I am of the view that disclosure would not amount to an unreasonable invasion of their privacy.

[31] Factor 70(5)(e)(i) weighs moderately towards disclosure. The purpose of the ATIPPA is to provide information to the public such that it may hold public bodies accountable in a democratic system. This is in keeping with the spirit of the purpose set out in s.6(e).[2] As such, disclosure could subject the program to public scrutiny but, in my view, disclosure inclusive of

[2] *(6) The purpose of the Act* [is] *(e) to provide the public with a right to access information held by public bodies (subject to specific exceptions) in order to ensure government transparency and to facilitate the public's ability to meaningfully participate in the democratic process*; …

the third party personal information contained in the Program Area Records weighs strongly against disclosure.

[32] On balance, I find that the five relevant factors set out in subsection 70(5) weigh against disclosure of the third party personal information contained in the Program Area Records. As such, disclosure of this information would therefore be an unreasonable invasion of privacy.

[33] I began my analysis of section 70 by stating that the Public Body cannot rely on it to justify withholding the Program Area Records in full because it only applies to third party personal information. However, this provision does not apply to any other type of information.

[34] While I have found that the Public Body cannot disclose any third party personal information contained in the Program Area Records, this is not the case for the remaining information contained in the Program Area Records.

[35] The Program Area Records contain remaining information of two types. One is administrative in nature and the other is structural. The first sets out the name and title of the 'authorized officer' and the date on which they exercised their authority. The second constitutes a template that appears to be created and sanctioned by the Yukon Government (YG). This template forms the basis for each of the four documents.

[36] As to the first type, the section 1 definition of 'business contact information' of an individual is "information that makes it possible to contact the individual at their place of business and includes the individual's name, position, title, business phone number and business email address." This type of information is addressed in subsection 3(a) in that it is not considered to be the personal information of an individual.

As such, the name and title of the 'authorized officer' at issue is not personal information; rather, it is their business contact information and can be accessed, for example, by means of the YG public personnel directory. In my view, the Public Body does not have authority withhold it.

[37] As to the second type, the remaining template is not the personal information of an identifiable individual. While the Public Body made no section 70 submissions, it did state as part of its general submissions on these Program Area Records that it was not proactively inclined to disclose the template due to recent and previous law enforcement investigations, as well as concerns about the potential for fraudulent activity and program integrity.

[38] It added that the template was produced solely for 'internal use' after an external process concludes. It also added that, while some of the templated language could possibly be

disclosed, it asserted that simply providing the 'data elements' (*i.e.,* void of third party personal information') would be enough to give bad actors an opportunity to create a fraudulent template. In its view, it was not willing, therefore, to jeopardize or compromise the integrity of the program by introducing any level of risk.

[39] Despite the Public Body's position on the template, it is something not contemplated by section 70. This provision only applies to a consideration of whether disclosure of third party personal information would amount to an unreasonable invasion of the third party's privacy. As such, the Public Body cannot withhold the template after being stripped of such personal information.

Conclusion

[40] The Public Body is authorized to rely on subsection 70(1) to withhold the third party personal information contained in the Program Area Records from the Complainant. However, it is not authorized to rely on subsection 70(1) to withhold the name and title of the 'authorized officer' contained in the Program Area Records, nor the template itself.

Issue 2 – Is the Public Body authorized to rely on 75(1)(a)(ii) to withhold the Records?

[41] In turning to the above table at paragraph 8 above, the applicable Record is described as an 'email attachment' consisting of one page identified as '115' (Record 115). This email attachment is essentially a table (Nominee Table) that contains the following non-severed information:

- The name of the Public Body.
- The attachment title – 'Immigration Statistics (Department Programs Only)'.
- The date the Nominee Table was updated – September 15, 2023.
- A left column entitled, 'Nominations by Employer Community' with 15 rural communities and Whitehorse listed below, the 'Total Nominations', and 'Nominees by Gender' (female/male).
- Seven parallel columns to the right. Six are headed by a calendar year (*i.e.,* 2023 to 2018 respectively) and the seventh is entitled, 'Total over 5 years'. Each contains two sub-columns, the first being 'No. of Nominations' and the second being '% of Nominations'. All seven columns contain the numbers and percentages in each of 'Total Nominations' and 'Nominees by Gender'.

[42] The severed parts of the Nominee Table are the numbers and percentages within each of the seven columns that pertain to an individual community from Beaver Creek to Whitehorse (and periphery). Put simply, this information is the number of nominees and their corresponding percentages on a per community basis.

Relevant Law

[43] The relevant portions of section 75 are as follows:

> *(1) … the head of a responsive public body may deny an applicant access to information held by the responsive public body that 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, 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,…*

Analysis

[44] Subsection 75(1) is a discretionary exemption provision, the purpose of which is to protect YG or the public body. It is both class and harm based. It authorizes the PB Head 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 YG or the public body, or the ability of YG to manage the economy. By including the term 'Government of Yukon', it allows for the fact that public bodies, corporately or individually, may have financial or economic information that YG uses to advance its interests, manage the economy or both.

[45] While subsection 75(1) uses the term 'information' in a generic, non-exhaustive manner, subparagraph (a) sets out specific classes of information that are included in this collective term. They are also non-exhaustive.

[46] In Yukon Inquiry Report ATP15-055AR, 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) [Ontario CSCS]. It stated the following about how these words are to be interpreted.[3]

> *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.*

[47] It is unnecessary to show, on a balance of probabilities, that the harm will occur if the information is disclosed.[4] 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.[5]

[48] While this analysis occurred in the context of the former ATIPPA, now replaced by the current one,[6] the disclosure provision in that legislation was of sufficient similarity to subsection 75(1) as to be applicable.[7] As such, where it is determined by the PB 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.

[49] The Public Body provided submissions on subparagraph 75(1)(a)(ii). In examining the provision, it posed the following three questions:

1) Does the information fall into a category of commercial, financial, scientific or technical information?

2) Is the information 'of' YG or the Public Body?

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[3] 2014 SCC 31 (CanLII), at para. 54.
[4] *Ibid.* at para. 52.
[5] *Ibid.* at para. 59.
[6] 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.
[7] See ATP-ADJ-2022-02-053 at paras. 27-28.

3) Does the information have, or is reasonably likely to have, 'monetary value' for YG or the Public Body?

[50] Since I am of the view that these are the correct questions that flow from subparagraph 75(1)(a)(ii), I will address each in turn, noting that the first must be answered in the affirmative before I can proceed to the next one.

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

[51] The Public Body, in its submissions, stated that 'commercial information' is not defined in the ATIPPA. It then put forward a definition of the term from a 2015 Prince Edward Island IPC Order.[8] Since that definition encompasses the same meaning as that defined by the IPC in Inquiry Report ATP18-16R, 17R and 38R, I will reproduce the latter one here.

> *'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, as well as pricing structure, market research, business plans, and customer records of the Government of Yukon or a public body and that has, or is reasonably likely to have, monetary value…* [Emphasis added]

[52] This definition contains two components. The first links commercial information with the acts of buying, selling or exchanging merchandise or services.

[53] Such a connection includes commercial information about a third party (*e.g.,* its associations, history, etc.) and commercial information about YG or a public body' (e.g., their pricing structure, market research, etc.). However, there is no linkage between these two entities other than they each avail themselves of certain types of commercial information.

[54] The second component requires commercial information to have monetary value or a reasonable likelihood of having it.

[55] Given the above, I am of the view that the term 'of the Government of Yukon or a public body' in the definition can be restated as commercial information 'belonging to the Government of Yukon or a public body'. Similarly, the possessive term "third party's" can be restated as commercial information 'of a third party'; that is, belonging to a third party, noting that the section 1 definition of 'third party' does not include the applicant or responsive public body.

[8] *Prince Edward Island (Economic Development and Tourism) (Re*), 2015 CanLII 66639 (PE IPC) at para 29.

[56] In the case at hand, the only commercial information at issue, as held by the Public Body under subsection 75(1), is that belonging only to the Public Body, but is it indeed commercial in nature? If yes, then does it have monetary value?

[57] In turning to the first question, the Public Body submitted that the type of information withheld in Record 115 consists of commercial information as it relates to the economic impact and efficacy of the nomination program that, in turn, contributes to the country's overall social, cultural, and economic benefit. In its view, the information constitutes important and valuable market research collected by YG.

[58] I am unable to see how Record 115 has any commercial effect. The only assertion put forward by the Public on this point is that it relates to "the economic impact and efficacy of the nomination program", itself a public program, but offers no elaboration. How does this fit with what is commonly understood to constitute a goods and services marketplace?

[59] The Public Body adds that the information contained in Record 115 "contributes to the country's overall social, cultural, and economic benefit" but, again, offers nothing more, except to state that the information "constitutes important and valuable market research collected by YG." How does this relate to the buying and selling or exchange of goods or commodities? What is the nature of the competitive market that requires such research?

[60] The Public Body states that its market research, which I take to embody Record 115, does two things. The first informs ongoing intergovernmental decisions regarding this program at both a regional and inter-regional level. The second manifests as a commitment found in a financial agreement between YG and Canada to research and evaluate the program as a means of determining its efficacy and accountability.

[61] Earlier in this Investigation Report, I described Record 115. Put simply, it consists of non-severed information in the form of a one-page Nominee Table that contains nominations by employer, as set out in 15 rural communities and Whitehorse. The severed information in that table contains the number of nominees and their corresponding percentages on a per community basis.

[62] The Cambridge online dictionary defines 'market research' as "the collection and examination of information about things that people buy or might buy and their feelings about things that they have bought."[9] The popular business website, 'Investopedia', states that market research "examines consumer behaviour and trends in the economy to help a business

[9] https://dictionary.cambridge.org/dictionary/english/market-research

develop and fine-tune its business idea and strategy. It helps a business understand its target market by gathering and analyzing data."[10]

[63] I infer from these definitions that market research is basically a commercial tool for setting out a marketing issue, developing a plan, collecting the data, analysing it, and making business decisions in the context of the findings. Put simply, the tool is a composite of activities to allow an enterprise to acquire a competitive advantage by making the best use of its resources, based on the insights gained by the research.

[64] Given this, the evidence before me is public program data belonging to the Public Body and consisting of nominee program numbers by community, but knowing how many nominees/percentage are in each community does not amount, by itself, to commercial information or market research in its own right.

[65] There is no accompanying commercial issue to be resolved, no data analysis of these numbers, and no results provided. The Public Body's assertion that its 'market research' informs ongoing intergovernmental decisions regarding this program at both a regional and inter-regional level is, in my view, incomplete, vague and in no obvious way tied to a marketplace.

[66] In addition, the fact that Record 115 seems to have served an intergovernmental decision process, a commitment of which found its way into an intergovernmental financial agreement, is of no help in demonstrating how Record 115 constitutes commercial information, even if characterized as a form of business market research, which it is not.

[67] For these reasons, I find that Record 115 is not commercial information, inclusive of market research.

[68] As such, it is unnecessary to proceed any further with my section 75 analysis in respect of monetary value.

Conclusion

[69] The Public Body is not authorized to rely on subparagraph 75(1)(a)(ii) to withhold Record 115 from the Complainant.

[10] https://www.investopedia.com/terms/m/market-research.asp.

Issue 3 – Is the Public Body required by subsection 82(1) to disclose the Records?

[70] The Public Body made no submissions on subsection 82(1). I have already conveyed my views on a public body's duty in this regard but, despite the lack of submissions, I will consider whether this mandatory provision applies to any of the Program Area Records or Record 115.

[71] Subsection 82(1) is a mandatory general override provision, the purpose of which, in considered situations, is to allow the disclosure 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 only exception is a section 67 Cabinet confidence.

[72] 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.

[73] 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.

[74] Examples of 'clear' public interest may include 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.[11]

[75] Examples where the threshold of 'clear' public interest have not been met in include the following situations.[12]

- A public body was not required to disclose records relating the government's involvement in a commercial enterprise, even thought 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,

[11] Some examples are taken from the Service Alberta 'FOIP Guidelines and Practices' at 229.
[12] *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)*.

[76] 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.

[77] In making such a determination, the PB Head must consider factors in paragraph 82(2)(a)[13] but not factors in paragraph 82(2)(c).

[78] 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?

Relevant Law

[79] The relevant portions of subsection 82(1) are as follows:

(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)

[13] Paragraph 82(2)(b) is not relevant.

(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;

…

(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.

Analysis

[80] I will apply the above six-part test in coming to a determination.

Is there a level of public interest in the information?

[81] 'Public interest' is something that affects a significant part of the general public, such as the on-going need for governmental financial accountability or an appropriate oversight of programs and services. The term 'level' of public interest implies a threshold below which there is not sufficient cause for response and above which there is a need for suitable action.

[82] To determine if the information at issue is above or below the threshold, I am of the view that it falls on a casual and reasonable observer, with knowledge of that information and

the related circumstances, to conclude whether the interest demonstrated by the public in the matter is forceful and persuasive, or something less. As such, this must be a contextual and fact-based determination.

[83] The only evidence of public interest in this matter 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 requiring a suitable action; that is, disclosing the Program Area Records and Record 115 due to the public interest disclosure override, is not met.

Is the information likely to be accurate and reliable?

[84] All the Program Area Records and Record 115 present as being accurate and reliable because they contain information integral to the functioning of the program area described above and have been prepared by the Public Body to that end.

Is similar information available in the public domain?

[85] 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?

[86] 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. However, in the absence of 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?

[87] The term 'likely' imports a degree of probability into the question. This implies a 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.

[88] I note that the term 'information' would also include the personal information of an identifiable individual.

[89] That said, there is no evidence before me that I could use to determine if disclosing this information may be harmful to a person about whom the information is about, the Public Body,

or YG. Therefore, I cannot assess whether the Public Body has met its burden of proof and I need go no further in my analysis.

Conclusion

[90] Because I am unable to make a determination concerning the disclosure of the Program Area Records and Record 115, subsection 82(1) does not apply to them.

V FINDINGS

[91] In summary, I make the following findings.

Issue 1

[92] I find that the Public Body is required by subsection 70(1) to withhold the third party personal information contained in the Program Area Records from the Complainant.

[93] I also find that the Public Body is not authorized to rely on subsection 70(1) to withhold the name and title of the 'authorized officer' contained in the Program Area Records nor the template itself.

Issue 2

[94] I find that the Public Body is not authorized to rely on subparagraph 75(1)(a)(ii) to withhold the severed information in Record 115 from the Complainant.

Issue 3

[95] I find that subsection 82(1) does not apply to the Program Area Records or Record 115.

VI RECOMMENDATIONS

[96] I recommend that the PB Head discloses to the Complainant the following:

1) The Program Area Records, except the third party personal information contained within.

2) Record 115 in full.

PB Head's Response to Investigation Report

[97] Section 104 requires the PB 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).*

[98] Subsection 104(3) authorizes the Public Body 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*

[99] Subsection 104(5) deems the PB 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 to Court Review

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

[redacted]

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

Distribution List:

- Public Body Head
- Complainant