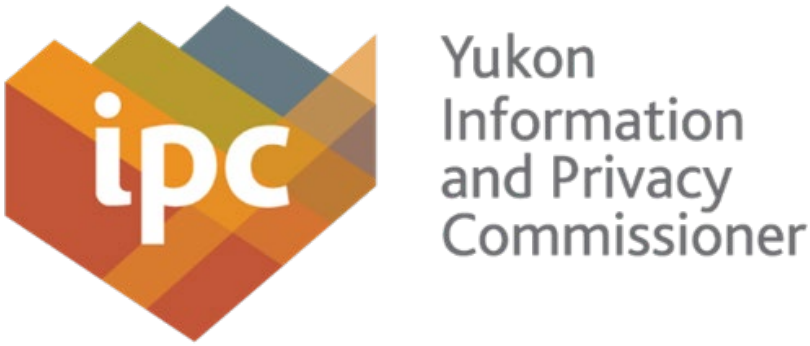

INVESTIGATION REPORT

Pursuant to section 66 of the

Access to Information and Protection of Privacy Act

Department of Environment

File ATP-ADJ-2025-05-096

Rick Smith, Adjudicator

September 4, 2025

Summary

On November 7, 2024, the ATIPPA Office activated an Access Request made by an individual (Complainant) who requested records that they believed to be in the custody or control of the Department of Environment (Public Body). Later, on February 17, 2025, 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 was withholding certain records.

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 (See Records Table below), so the IPC moved from consultation to formal investigation, as per 94(4)(b), and assigned an adjudicator to the matter.

As its authority, the Public Body cited 70(1), 72(1)(b)(i), 72(1)(b)(vi), 73(a), 74(1)(a), 76(1), 77(1)(b), for withholding the Records at issue from the Complainant. The Complainant then made their submission, to which the Public Body made its reply submission.

The Complainant did not seek the Records that would have required an analysis of 70(3)(a)(iii) as set forth in Issue 1. Similarly, the Complainant did not seek the Record that would have required an analysis of 72(1)(b)(vi) as set forth in Issue 3.

In examining Issues 2, 4, 5, 6, and 7, the Adjudicator found that the Public Body was not authorized to rely on 72(1)(b)(i), 73(a), 74(1)(a), 76(1), and 77(1)(b) to withhold from the Complainant all of the Records at issue.

In examining Issue 8 in respect of 82(1), the Adjudicator found that the public interest in disclosing the Records did not clearly outweigh the public interest in withholding them from disclosure under the provisions cited above.

The Adjudicator provided a table of findings to the Public Body with recommendations for the disclosure of some Records that, in the Adjudicator's opinion, were inappropriately withheld and, therefore, not in compliance with the ATIPPA.

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Complaint

An individual (Complainant) made an access request for records that they believed to be in the custody or control of the Department of Environment (Public Body), as follows.

> *The Access Request stated: Email correspondence between staff in the Department of Environment's fish and wildlife branch and staff in the Department of Energy, Mines and Resources about the government response to the Victoria Gold heap leach facility failure.*[1] *I would like to try further* [sic] *narrow the request by only including records to/from* [redacted names]*, should any exist. Timeframe: June 24, 2024 – November 21, 2024.*
>
> (Access Request)

On November 27, 2024, the ATIPPA Office activated the Access Request, assigned file number 24- 504 to it, and then forwarded it to the Public Body.

On February 17, 2025, 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 was withholding certain records.

On February 28, 2025, 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 initially assigned it file number ATP-COM-2024-08-217.

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).

ATIPPA Sections Cited

The following ATIPPA sections are cited in this investigation report (Investigation Report):

- 70, 70(1), 70(3), 70(3)(a)(iii), 70(4), 70(5)
- 72(1), 72(1)(b)(i), 72(1)(b)(vi)
- 73(a)

[1] The Public Body uses the term 'Victoria Gold' in its submissions to refer to its legal name, 'Victoria Gold Corp.' For consistency, I will use the term 'Victoria Gold' throughout this Investigation Report.

- 74(1)(a)
- 76(1)
- 77(1)(b)
- 82(1), 82(2)
- 102(c)

Statutes Cited

Access to Information and Protection of Privacy Act, SY 2018, c.9, https://laws.yukon.ca/cms/images/LEGISLATION/PRINCIPAL/2018/2018-0009/2018-0009_2.pdf.

Access to Information and Protection of Privacy Act Regulation, OIC 2021/025, https://laws.yukon.ca/cms/images/LEGISLATION/SUBORDINATE/2021/2021-0025/2021-0025_7.pdf.

Interpretation Act, RSY 2002, c.125, https://laws.yukon.ca/cms/images/LEGISLATION/PRINCIPAL/2002/2002-0125/2002-0125_6.pdf.

Cases, Orders and Reports Cited

Cases

Blank v. Canada (Minister of Justice), 2006 SCC 39 (CanLII), [2006] 2 SCR 319, https://canlii.ca/t/1p7qn. Accessed July 18, 2025.

Doe v. Ontario (Finance), 2014 SCC 36, https://canlii.ca/t/g6sg3. Accessed July 18, 2025.

Merck Frosst Ltd. v. Canada (Health), 2012 SCC 3, https://canlii.ca/t/fpvd1. Accessed July 18, 2025.

Lizotte v. Aviva Insurance Company of Canada, 2016 SCC 52 (CanLII), 404 DLR (4th) 389, https://canlii.ca/t/gvskp. Accessed July 18, 2025.

Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner), 2014 SCC 31, https://canlii.ca/t/g6lzb. Accessed July 18, 2025.

Solosky v. The Queen, 1979 CanLII 9 (SCC), [1980] 1 SCR 821, https://canlii.ca/t/1mjtq. Accessed July 18, 2025.

Reports

Inquiry Report ATP15-055AR (Yukon), https://yukonaccountability.ca/sites/default/files/reports/ATP15-055AR%20Final%20Inquiry%20Report_Redacted.pdf.

Inquiry Report ATP20-60R (Yukon), https://yukonaccountability.ca/sites/default/files/reports/ATP20-06R%20Inquiry%20Report.pdf.

Investigation Report ATP-ADJ-2022-04-133 (Yukon), https://yukonaccountability.ca/sites/default/files/reports/ATP-ADJ-2022-04-133%20Investigation%20Report%20for%20website%2026%20Oct-22%20updated%20July%2031%202023.pdf.

Yukon *Investigation Report ATP-ADJ-2023-05-183* (Yukon), https://yukonaccountability.ca/sites/default/files/reports/ATP-ADJ-2023-05-183%20Investigation%20Report%20--%2006%20Nov-23%20Final_Redacted.pdf.

Explanatory Note

All sections, subsections, paragraphs and the like referred to in this 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 (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 Public Body made its submission on June 5, 2025 (PB Submission). The Complainant made their submission on June12 (COM Submission). The Public Body replied to the Complainant's submission on June 16 (PB Reply Submission).

The submissions of the Public Body and Complainant are generally set out in the 'Analysis'

sections of this Investigation Report, as may be relevant to each issue.

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 May 5, 2025, the IPC issued the Public Body and the Complainant with a Notice of Written Investigation under new file number ATP-ADJ-2025-05-096 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 #25-504, unredacted" and an accompanying schedule of records.

II ISSUES

[7] There are eight issues:

1) Is the PB Head authorized by 70(3)(a)(iii) to withhold the Records?

2) Is the PB Head authorized by 72(1)(b)(i) to withhold the Records?

3) Is the PB Head authorized by 72(1)(b)(vi) to withhold the Records?

4) Is the PB Head authorized by 73(a) to withhold the Records?

5) Is the PB Head authorized by 74(1)(a) to withhold the Records?

6) Is the PB Head authorized by 76(1) to withhold the Records?

7) Is the PB Head authorized by 77(1)(b) to withhold the Records?

8) Does 82(1) override the PB Head's authority to withhold the Records?

III RECORDS AT ISSUE

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

Record #	Page #	# of Pages	Record Type	Severed (S) Refused (R)	Exceptions Claimed
001.1	0002-0004	3	email	S	73(a) 77(1)(b)
007-01	0014-0015	2	email attachment 1	R	77(1)(b)
007-02	0016-0019	4	email attachment 2	R	77(1)(b)
008	0020-0021	2	email	S	76(1) 77(1)(b)
010[2]	0023-0024	2	email	S	76(1) 77(1)(b)
011	0026-0028	3	email	S	77(1)(b)
013	0030-0031	2	email	S	74(1)(a) 76(1) 77(1)(b)
018-01	0042-0049	8	email attachment	S	74(1)(a)
020-01	0056-0068	13	presentation	R	76(1) 77(1)(b)

[2] The Records Table initially identified this Record as '01'. This was obviously a typo so I have corrected it to '10' and use this correction throughout this Investigation Report.

022	0072	1	email	S	76(1)
023	0074	1	email	S	74(1)(a) 76(1)
031	0082	1	email	S	72(1)(b)(vi)
044.1	0109	1	email	S	76(1)
044.1-02	0114	1	email	S	76(1)
044.1-02.1	0116-0123	8	email attachment	R	70(1) 72(1)(b)(i)
044.1-03	0124-0125	2	email	S	76(1)
044.1-04	0126	1	email	S	74(1)(a) 76(1)
048.2	0131	1	email	S	77(1)(b)
050	0132, 0134	2	email	S	70(1) 72(1)(b)(i) 74(1)(a) 76(1)
050.1	0179, 0181	2	email	S	70(1)
050.4	0187	1	email	S	74(1)(a)
050.5	0191	1	email	S	70(1)
050.5-01	0193-0205	13	email attachment	R	77(1)(b)

(collectively, Records Table)

IV DISCUSSION OF THE ISSUES

Issue 1 – Is the Public Body authorized to rely on 70(3)(a)(iii) to withhold the Records?

[9] Section 70 is a mandatory provision. If a public body cites its reliance on such a provision, it then has a duty to make an appropriate submission.

[10] 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.

[11] If such release is at issue, section 70 then involves a weighing consideration. In other words, the PB Head is obliged to determine if the presumption against disclosure is rebutted after considering 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

[12] Subsection 70(1) states:

> *(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.*

[13] Paragraph 70(3)(a)(iii) states:

> *(3) Each of the following types of disclosure of a third party's personal information is considered to be an unreasonable invasion of the third party's privacy*
>
> *a) the disclosure of information about…*
>
> *(iii) the education or employment history of the third party,…*

Analysis

[14] In turning to the above table, three of the applicable Records are generally described as 'emails' and one as an 'email attachment' (Issue 1 Records). They are identified in the

Records Table as 044.1-02.1, 050, 050.1, and 050.5.

[15] The Public Body asserted in its PB Submission, with reasons, that the PB Head did not have to disclose the Issue I Records as they apply to third party personal information.

[16] The Complainant stated in their COM Submission that they were not interested in obtaining this information and did not seek their release.

[17] As such, Issue 1 has no further relevance and I will no longer consider it.

Issue 2 – Is the Public Body authorized to rely on 72(1)(b)(i) to withhold the Records?

[18] In turning to the above table, two of the applicable Records are generally described as emails and one as an email attachment (Issue 2 Records). They are identified in the Records Table as 044.1-02.1 and 050.

[19] Record 044.1-02.1 is a completely redacted document.

[20] Record 050 consists of two emails:

1) In the first one, part of a sentence in the third paragraph is redacted, as well as part of a sentence in the sixth paragraph.

2) In the second one, part of a sentence in the third paragraph is redacted.

Relevant Law

[21] The relevant portions of section 72 are as follows:

> *(1) … the head of a responsive public body may deny an applicant access to information held by the responsive public body if the head determines that disclosure of the information*
>
> *…*
>
> *b) could reasonably be expected to*
>
> *(i) interfere with a law enforcement matter, …*

[22] Section 1 defines 'law enforcement' to mean:

…

b) a police, security intelligence, criminal or regulatory investigation, including the complaint that initiates the investigation, that leads or could lead to a penalty or sanction being imposed, …

Analysis

Paragraph 72(1)(b)(i)

[23] This is a discretionary, harms-based exemption provision, the purpose of which is to provide a public body with the means to safeguard the release of information that may interfere with ongoing law enforcement matters, as defined above.

Is there a law enforcement matter?

[24] The Public Body, in its PB Submission introduction, stated that [the access request] was for[3]

records associated with the heap leach failure at the Eagle Gold Mine run by Victoria Gold Inc. The cause of the heap leach failure is still being investigated. A Receiver was appointed over Victoria Gold Corp. by the court to ensure an orderly continuation of the business with a principal focus on efforts to remediate the impacts of that failure. The Government of Yukon … is the interim receivership lender. [emphasis added]

[25] The Public Body also stated,[4]

It has been publicly communicated in numerous ways that there are ongoing investigations into the causes and factors that contributed to the heap-leach failure at the Victoria Gold Eagle Gold mine." [emphasis added]

[26] It then stated,[5]

The Department of Energy, Mines and Resources and Environment are each separately responsible for regulatory inspection and enforcement under the Quartz Mining Act, Waters Act, and Environment Act, which may lead to additional measures including directions, orders and charges. Additionally, the Receiver[6] has launched an independent

[3] PB Submission at p.1.
[4] *Ibid.* at p.4.
[5] *Ibid.*
[6] The Receiver and manager is PricewaterhouseCoopers as per a Receivership Order issued by the Ontario Superior Court of Justice (Commercial List) on August 14, 2024.

technical review of the Eagle Gold mine heap leach failure to determine the 'causes of failure to inform future decisions'."

[27] The definition of 'law enforcement' consists of two parts: it includes (1) a regulatory investigation (2) that leads or could lead to a penalty or sanction being imposed. The Cambridge Online dictionary defines 'investigation' as "the act or process of examining a crime, problem, statement, etc. carefully, especially to discover the truth."[7] In my view, such a process would include inquiry and observations. All of this would have to lead or have the potential to lead to the above punitive result.

[28] The Complainant, in their COM Submission, stated that the "Independent Review Board, inclusive of its Technical Advisors" (IRB) does not meet this definition because it could not, in essence, impose or suggest to impose any penalties or sanctions. They further stated that the IRB is separate and distinct from any other investigations or reviews, as well as being autonomous from the Yukon government (YG).[8]

[29] From the evidence, I have determined that the IRB consists of "a group of peer reviewers appointed to provide independent, expert oversight, opinion, and advice to a proponent on the design, construction, operational management and closure of a [Mine Waste Management Facility]."[9]

[30] The Public Body, in its PB Reply Submission, stated, "… the [R]ecords do not contain information related to the [IRB] or the review undertaken. The [Public Body] noted the [IRB] … as one of many investigative initiatives being undertaken in relation to this file that has been communicated to the public."[10]

[31] While I agree that the IRB is excluded from the law enforcement definition because it does not meet the second part of the definition, I am unable to conclude that there is any investigation that meets the definition. The PB Submission refers to 'investigations' and states that the [Issue 2 Records] are "clearly law enforcement because [they] relate to the investigations … that are associated with the law enforcement matter."[11] The COM Submission did not speak to this.

[32] s.v. word

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[7] "Investigation" Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/investigation. Accessed July 18, 2025.
[8] COM Submission at Item 2.
[9] https://yukon.ca/sites/default/files/emr/emr-guidelines-mine-waste-management-facilities.pdf at p.34.
[10] PB Reply Submission at p.1.
[11] PB Submission at p 3.

[33] In my view, it is not the type of information at issue; rather, it is whether the effect of its disclosure could be reasonably expected to interfere with a law enforcement matter. In examining the Issue 2 Records, they do not constitute 'law enforcement' in their own right.

The content in Record 044.1-02.1 would not reasonably lead a reader to think it has anything to do with 'law enforcement' nor does it contain any reference to that effect. The subject matter in both emails comprising Record 050 contain information that might lead to something of a law enforcement nature but not in and of themselves. An assertion that these Records are clearly 'law enforcement' implies a self-evident connection that, in my view, is not there.

[34] The PB Submission makes no reference to a specific 'regulatory' investigation that leads or could lead to a punitive result. Stating that "It has been publicly communicated in numerous ways that there are ongoing investigations into the causes and factors that contributed to the heap-leach failure at the [Victoria Gold] Eagle Mine"[12] or that "The Departments of Energy, Mines and Resources and Environment are each separately responsible for regulatory inspection and enforcement under the *Quartz Mining Act*, and *Environment Act*, which may lead to additional measures including directions, orders and charges,"[13] is not sufficient to meet the 'law enforcement' definition.

[35] Since the essence or substance of 72(1)(b)(i) is a law enforcement matter, it follows that the Public Body has not met its burden of proof in respect of its meaning.

Conclusion

[36] The Public Body is not authorized to rely on subparagraph 72(1)(b)(i) to withhold the Issue 2 Records from the Complainant.

Issue 3 – Is the Public Body authorized by subsection 72(1)(b)(vi) to withhold the Records?

[37] In turning to the above table, the applicable Record is generally described as an email (Issue 3 Record). It is identified in the Records Table as 031.

[38] Record 031 consists of a 'Microsoft Teams' ('Join the meeting now') document. The passcode, 'dial-in' phone number and phone conference ID are completely redacted.

[12] *Ibid.*, at p.4.
[13] *Ibid.*

Relevant Law

[39] The relevant portions of section 72 are as follows:

> *(1) … the head of a responsive public body may deny an applicant access to information held by the responsive public body if the head determines that disclosure of the information*
>
> *…*
>
> *b) could reasonably be expected to*
>
> *(vi) adversely affect the security of property or a system, including a building, vehicle, computer system or communications system, …*

Analysis

[40] The Complainant, in their COM Submission, stated that they were not interested in obtaining Microsoft Teams meeting links nor sought the release of those portions of the records [in this case, Record 031].[14]

[41] As such, Issue 3 has no further relevance and I will no longer consider it.

Issue 4 – Is the Public Body authorized by subsection 73(a) to withhold the Record?

[42] In turning to the above table, the applicable Record is generally described as an email (Issue 4 Record). It is identified in the Records Table as 001.1.

[43] Record 001.1 consists of two emails:

1) The first was sent by a Kelli Taylor, Assistant Deputy Minister, Strategic Initiatives and Partnerships, Department of Energy, Mines and Resources, to 14 recipients on November 13, 2024 @ 6:22 pm. The subject line is identified as 'Eagle Update – Next phase of technical work'. Most of the fourth paragraph is redacted.

2) The second email was sent by a Lauren Haney to six recipients on November 8, 2024 @ 6:40 am. The subject line and body are completely redacted.

[14] COM Submission at p.1.

Relevant Law

[44] The relevant portions of section 73 are as follows:

> *The head of a responsive public body may deny an applicant access to information held by the responsive public body that*
>
> *a) is subject to a legal privilege of a public body or any other person; …*

Analysis

Subsection 73(a)

[45] This is a discretionary, class-based exemption that allows a public body, in response to an access request, to deny access to any of its records containing information that is subject to a legal privilege of the public body or a person. Its intent is to ensure that information privileged at law in a public body's custody or control is protected from disclosure in much the same way an individual's information is similarly protected by their legal counsel.

[46] The Issue 3 Record at hand is Record 001.1. The Records Table contains no other paragraph 73(a) reference to other Records.

[47] However, the Public Body, in its PB Submission, stated that "the records package as a whole is solicitor-client and litigation privileged because it forms part of a continuum of communication between and amongst YG and YG's legal counsel in light of this matter as it currently stands before the court."[15]

[48] It also stated that it assigned several lawyers to this matter [*i.e.,* Victoria Gold Eagle Mine heap-leach failure] in view of its importance to YG"[16] and that "solicitor-client privilege clearly extends much more broadly to the records package as a whole, because these records form part of a continuum of communication between a client (YG) and their legal counsel for the purpose of seeking legal advice about the information on the pages noted above."[17]

[49] In examining the applicability of paragraph 73(a), I can only consider a Record initially identified in the Records Table and applied at the time of the Public Body's (through the ATIPPA Office) final decision response to the Complainant. I will not consider

[15] PB Submission at p.5.
[16] *Ibid.*
[17] *Ibid.*

any assertion subsequently added in the PB Submission about other Records in respect of this provision.

[50] Given Record 001.1, I will address each type of privilege in turn.

Solicitor-client privilege

[51] Solicitor-client privilege, as recognized by the SCC in *Solosky v. The Queen*, CanLII 9 (SCC), [1980] 1 SCR 821, is a substantive rule of law that consists of the permanent right to engage counsel and obtain legal advice without fear of disclosure of the communications to any other person.

[52] Solicitor-client privilege belongs to the client and is not open to anyone else to waive it. In essence, it is meant to encourage a full, frank disclosure of all information that a solicitor requires to provide confidential legal assistance to a client.

[53] For solicitor-client privilege to apply, a public body must show that the communication occurred between the client and solicitor, it was made in confidence, and it was done in the course of seeking such advice. This must be claimed on a document-by-document basis.

Is the Issue 3 Record a communication between solicitor and client?

[54] As stated above, Record 001.1 consists of two emails.

[55] The Public Body, in its PB Submission, stated that "This information was … provided to legal counsel in some capacity, written or verbal, in the course of providing legal services to clients."[18] Although somewhat ambiguous, I am of the view that 'this information' refers to the information in Record 001.1.

[56] YG has a Legal Services Branch that provides legal counsel internally.[19] Given the above PB Submission statement, I am of the view that the client is the Public Body, although subsumed into YG. In that 'whole-of-government' context, there appears to be a solicitor-client relationship between the Authority/YG (Client) and some Legal Services lawyer[20] (YG Counsel).

[57] It is unclear, however, whether a Legal Services lawyer was in communication

[18] *Ibid.*
[19] https://yukon.ca/en/your-government/find-out-what-government-doing/find-out-what-legal-services-groups-are-within
[20] Or an outside legal counsel duly retained by the Legal Services Branch.

either orally or in writing with the Client directly in respect of Record 001.1. There are redactions in each of the two emails but there is nothing in the PB Submission to indicate, for example, who made them, whether a meeting occurred between them, whether correspondence exists between them, whether a legal file was opened or appended, whether legal advice was given, whether instructions were given in respect of the redactions, or whether they were part of a continuum of communication in respect of any legal advice given to the Client.

[58] As such, I cannot determine if Record 001.1 is a communication between the Client and YG Counsel.

[59] I will now turn to litigation privilege.

Litigation privilege

[60] Litigation privilege is set out in the SCC decision *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII), [2006] 2 SCR 319 [*Blank*], and updated by *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 (CanLII), 404 DLR (4th) 389 [*Lizotte*]. It is a class privilege in which the onus is on the party claiming this privilege to establish, on a balance of probabilities, that a record has been prepared in contemplation of pending or the reasonable prospect of litigation, and for the dominant purpose of that litigation.[21]

[61] The purpose of litigation privilege is to ensure the efficacy of the adversarial process by providing the litigant and their counsel with a 'zone of privacy' in which to prepare a case to the client's best advantage.[22] In short, parties to a litigation must be left to prepare their respective positions in private without fear of adversarial interference or premature disclosure.[23]

[62] Litigation privilege applies to anyone (including administrative investigators). There is no need for a case-by-case weighing of interests, and it ends with the resolution of the action or any closely related proceedings.

Was Record 001.1 prepared in contemplation of litigation that is in 'reasonable prospect'?

[63] The BC Court of Appeal, in *Hamalainen v. Sippola*, [1992] 2 WWR 132,

[21] *Lizotte* at para. 33.
[22] *Blank* at para. 34.
[23] *Ibid.*, at para. 27.

https://canlii.ca/t/1d8ms[24] set out the 'reasonable prospect' test[25] and defined the term as follows:[26]

> *… litigation can properly be said to be in reasonable prospect when a reasonable person, possessed of all pertinent information including that peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without it.*

[64] The Public Body, in its PB Submission, asserted that there was a reasonable prospect of litigation because there is evidence of court proceedings and Receiver involvement over the receivership. It then stated that such evidence could be "easily found in the online via YG News Releases: Search | Yukon.ca "Victoria Gold" and/or internet search: yukon government victoria gold court - Search."[27]

[65] I visited those sites. The first is a YG site that contains 694 results concerning various matters about Victoria Gold in respect of, for example, the heap leach-failure, heap-leach failure updates, liens, habitat monitoring, technical briefings, receivership, hunting/recreation activities in the vicinity, ministerial and premier statements, and evacuation alerts in the vicinity.

[66] The second is essentially a collection of media news stories concerning Victoria Gold and YG in respect of, for example, receivership, mine sale, and heap-leach failure updates.

[67] In the case at hand, the Public Body has an onus to establish, on a balance of probabilities, that it prepared Record 001.1 in contemplation of pending or the reasonable prospect of litigation. There is, however, no specific evidence in the PB Submission that would lead me to conclude that, for purposes of claiming litigation privilege over Record 001.1, litigation is either pending or is at least a reasonable prospect.

[68] The Public Body, in its PB Submission, also asserted that it claimed this privilege given the Attorney General's assignment of full-time legal counsels, the triggering the undertaking of regulatory investigations and the filing of court action in relation to the law enforcement matter for the Victoria Gold heap leach failure.[28] I infer from this that,

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[24].Accessed on July 18, 2025.
[25] *Ibid*., at p.12.
[26] *Ibid*., at p.13.
[27] PB Submission at p.6.
[28] *Ibid.,* at p.7.

according to the Public Body, litigation was a reasonable prospect from the outset and, as such, its claim of privilege must succeed. However, the Public Body offers no specificity in respect of Record 001.1.

[69] In my view, the Public Body has not met its onus. Therefore, I need not consider the second test of 'dominant purpose'.

Conclusion

[70] The Public Body is not authorized to rely on subparagraph 73(a) to withhold the Issue 4 Record from the Complainant.

Issue 5 – Is the Public Body authorized by subsection 74(1)(a) to withhold the Records?

[71] In turning to the above table, five of the applicable Records are generally described as emails and one as an email attachment (Issue 5 Records). The Issue 5 Records are identified in the Records Table as 013, 018-01, 023, 044.1-04, 050, and 050.4.

[72] Record 013 consists of two emails:

1) The first was sent by a John Ryder to one recipient on October 11, 2024 @ 4:36 pm. The subject line is identified as 'RE: Mitigations or directions involving W22, and its associated steps'. The second paragraph (one sentence) is completely redacted. Most of the third paragraph is redacted.

2) The second email was sent by a Robert Perry to one recipient on October 11, 2024 @ 3:30 pm. The subject line is the same Record 013. Part of the first paragraph is redacted. In addition, there is an appendix identified as 'Standing Meetings', the 'Monday' meeting of which is completely redacted.

[73] Record 018-01 consists of a document identified as 'DRAFT for discussion purposes'. It is comprised of a body of information that describes events and issues to which, in some cases, comments are made/appended. Both are completely redacted.

[74] Record 023 consists of an email sent by a John Ryder to one recipient on September 17, 2024 @ 9:30 am. The subject line is identified as 'Vic Gold fish weir locations and monitoring request'. Part of the first paragraph is redacted.

[75] Record 044.1-04 consists of an email sent by a John Ryder to one recipient on August 25, 2024 @ 11:41 am. The subject line is identified as 'Fed: DEM Fish group

agenda'. Part of the first paragraph is redacted. The second paragraph is completely redacted.

[76] Record 050 consists of two emails:

1) In the first one, part of a sentence in the third paragraph is redacted, as well as part of a sentence in the sixth paragraph.

2) In the second one, part of a sentence in the third paragraph is redacted.

[77] Record 050.4 appears to consist of an email fragment sent by a John Ryder to an unidentified recipient. The date, time, and subject line are also unidentified. Part of the sentence in the third paragraph is redacted.

Relevant Law

[78] The relevant portions of section 74 are as follows:

> *… the head of a responsive public body may deny an applicant access to information held by the responsive public body if the head determines that disclosure of the information would reveal*
>
> *a) advice or recommendations prepared by or for a public body or a minister; …*

Analysis

Paragraph 74(1)(a)

[79] This is a discretionary, class-based exemption provision, the purpose of which is to protect the candid exchange of views in a deliberative process involving public body officials or the PB Head.

[80] It authorizes that the PB Head may refuse to disclose information to an applicant if disclosure of the information to them could reveal advice or 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 that are themselves the advice or recommendations being made.

[81] 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?

[82] In *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."

[83] 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 [Public Body] the [PB Head] for purposes of paragraph 74(1)(a), but that responsibility that generally falls to the deputy minister as per section 17 of the *Interpretation Act*.

[84] 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."

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

Does the information qualify as advice or recommendations?

[86] The Public Body, in its PB Submission, provided a more extended definition of 'advice' than what I used in *Investigation Report ATP-ADJ-2023-05-183* and have reproduced above.[29]

> *Advice may be also defined as: communication as to which courses of action are preferred or desirable; based on analysis of a situation or issue that may require action*

[29] PB Submission at p.9. It cited four sources for its definition: *Ministry of Agriculture and Food, Re*, 2001 CanLII 21569 (BC IPC) *Saskatchewan Power Corporation (Re)*, 2017 CanLII 44823 (SK IPC) *Prince Edward Island (Department of Finance and Municipal Affairs) (Re)*, 2010 CanLII 97257 (PE IPC); Alberta Information and Privacy Commissioner, *Order 96-006*.

and/or the presentation of options for future action; guidance or recommendations that are sought that is part of the responsibility of a person's role or position. It may include direction toward taking an action for making a decision; and made to someone who can take or implement the action. It may also include suggestions for a particular course of action and a view as to the rationale.

[87] The Public Body supported this with a caution taken from the Supreme Court of Canada in *John Doe v. Ontario (Finance)*, 2014 SCC 36[30] [*John Doe*] to the effect that political neutrality, both actual and perceived, is a hallmark of the Canadian civil service and therefore requires a public servant to provide advice and recommendations that are full, free and frank. If such advice and recommendations were required to be disclosed, especially in controversial matters, a risk may arise of self-censorship and partisan considerations, whether real or perceived, that factor into that public servant's participation in the decision-making process.

[88] Having taken these types of considerations into account when I defined 'advice' in *Investigation Report ATP-ADJ-2023-05-183*, I purposely stated that it was inclusive in nature. As such, I take no issue with these submissions. However, I reiterate that a statement of fact not leading to a course action or presentation of options is not advice unless such statements are entwined with the advice to an extent where the two cannot reasonably be disconnected.

[89] In responding the question (*i.e.,* does the information qualify as advice or recommendations), the Public Body took the position that "… the information in the records is a continuum of discussions that are 'full, free and frank', and that also includes confidential information to support discussions that lead to advice and/or recommendations, as defined above."[31] The Complainant took no position.

[90] I now turn to an examination of each of the Issue 5 Records, noting that there two parts to the 'advice' definition: is there evidence of an analysis of a situation or issue that may require action and the presentation of options and, if yes, has some form of guidance been provided? Similarly, in the case of a 'recommendation', is there evidence of a suggested action or series of actions that, if chosen, is intended to achieve a planned outcome?

[91] Record 013:

[30] *John Doe* at para. 45.
[31] PB Submission at p.10.

Email 1:

- The first and second redactions offer guidance in the form of suggested courses of action based on a situation/issue analysis.

Email 2:

- The first redaction is a statement of fact.
- The second and third redactions offer guidance in the form of suggested courses of action based on a situation/issue analysis.
- The email addendum containing the Monday Standing Meeting information comprises statements of fact. They contain no guidance based a situation/issue analysis.

[92] Record 018-01:

- The redacted body of information consists entirely of statements of fact concerning events and issues. It contains no guidance based on a situation/issue analysis.
- There are also comments in a separate column appended to certain parts of the body. I have examined each of them and conclude as follows:
    - Comment 1 on p.0043 – It offers guidance in the form of a suggested course of action based on a situation/issue analysis.
    - Comments 1 and 2 on p.0045 – They are statements of fact without advice or recommendation.
    - Comments 3-5 on p.0045 – They offer guidance in the form of suggested courses of action based on a situation/issue analysis.
    - Comment 1 on p.0046 – It is a statement of fact without advice or recommendation.
    - Comments 2-8 on p.0046 – They offer guidance in the form of suggested courses of action based on a situation/issue analysis.
    - Comments 1 and 2 on p.0048 – They are statements of fact without advice or recommendation.

- Comment 1 on p.0049 – It is a statement of fact without advice or recommendation.

[93] Record 023:

- The redaction comprises a statement of fact. It contains no guidance based a situation/issue analysis.

[94] Record 044.1-04:

- The first redaction comprises a statement of fact. It contains no guidance based a situation/issue analysis.
- The second redactions offer guidance in the form of a recommendation that, if chosen, is intended to achieve a planned outcome.

[95] Record 050:

- The first and second redactions comprise statements of fact. They contain no guidance based on a situational/issue analysis.

[96] Record 050.4:

- The redaction comprises a statement of fact. It contains no guidance based on a situational/issue analysis.

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

[97] The Public Body, in its PB Submission, stated that "the [Records were] prepared and shared with the [P]ublic [B]ody and Minister."[32]

[98] Since there is no evidence to the contrary, I am satisfied that the Issue 5 Records were prepared by or for the Public Body and its Minister.

Conclusion

[99] The Public Body is authorized to rely on subparagraph 74(1)(a) to withhold the following Issue 5 Records from the Complainant:

- Record 013:
  - *Email 1*

[32] PB Submission at p.10.

- *Email 2:*
  - Second and third redactions

- Record 018-01:
  - The following comments and the passages that they capture:
    - Comment 1 on p.0043
    - Comments 3-5 on p.0045
    - Comment 2-8 on p.0046

- Record 044.1-04:
  - Second redaction

[100] However, the Public Body is not authorized to rely on subparagraph 74(1)(a) to withhold the following Issue 5 Records from the Complainant:

- Record 013:
  - *Email 2:*
    - First redaction and the email addendum

- Record 018-01:
  - Redacted body of information
  - The following comments and those passages captured by each of them:
    - Comments 1 and 2 – p.0045
    - Comment 1 – p.0046
    - Comments 1 and 2 – p.0048
    - Comment 1 – p.0049

- Record 023

- Record 44.1-04:
  - First redaction

- Record 050
- Record 050.5

Issue 6 – Is the Public Body authorized by subsection 76(1) to withhold the Records?

[101] In turning to the above table, ten of the applicable Records are generally described as emails and one as a presentation (Issue 6 Records). The Issue 6 Records are identified in the Records Table as 013, 020-01, 022, 023, 044.1, 044.1-02, 044.1-03, 044.1-04, and 050.

[102] Record 013, as stated above, consists of two emails:

1) In the first one, the second paragraph (one sentence) is completely redacted. Most of the third paragraph is completely redacted.

2) In the second one, part of the first paragraph is redacted. In addition, there is an appendix identified as 'Standing Meetings', the 'Monday' meeting of which is completely redacted.

[103] Record 020-01 consists of two proprietary third party maps and associated data.

[104] Record 022 consists of an email sent by an Erin Dowd on September 23, 2024 @ 3:40 pm. The subject line is identified as 'RE: Fish weir removal'. Part of the first paragraph is redacted.

[105] Record 023 consists of an email. Part of the first paragraph is redacted.

[106] Record 044.1 appears to consist of a single sentence from an email unidentified as to date, time, recipient, and subject line. The sender is identified as a Marc Cattet, 'Director, Fish and Wildlife', for the Public Body (Marc Cattet). Part of the single sentence is redacted.

[107] Record 044.1-02 consists of an email sent by a John Ryder to two recipients on August 16, 2024 @ 9:26 pm. The subject line is identified as 'DFO FA order to VGC, Aug 2 2024 – request DFO to intervene to HALT release of fish to S. McQuesten River_16Aug2024'. The body is completely redacted.

[108] Record 044.1-03 appears to consist of an email sent by a John Ryder to two recipients on August 16, 2024 @ 9:26 am. The subject line is the same as Record 044.1-02. The body is completely redacted.

[109] Record 044.1-04 consists of an email. Part of the first paragraph is redacted. The second paragraph is completely redacted.

[110] Record 050 consists of two emails:

1) In the first one, part of a sentence in the third paragraph is redacted, as well as part of a sentence in the sixth paragraph.

2) In the second one, part of a sentence in the third paragraph is redacted.

Relevant Law

[111] The relevant portions of section 76 are as follows:

> *… the head of a responsive public body may deny an applicant access to information held by the responsive public body that a public body has not accepted in confidence in the prescribed manner from a government or organization referred to in subsection 68(1) if the head determines that disclosure of the information could reasonably be expected to harm relations between the Government of Yukon or a public body and the other government or organization.* [emphasis added]

[112] Subsection 68(1) states as follows:

> *… the head of a responsive public body must not grant an applicant access to information held by the responsive public body that a public body has, in the prescribed manner, accepted in confidence from*
>
> *(a) the Government of Canada;*
>
> *(b) the government of*
>
> *(i) a province, or*
>
> *(ii) a foreign state;*
>
> *(c) a First Nation government;*
>
> *(d) a municipality;*
>
> *(e) an organization representing one or more governments; or*
>
> *(f) an international organization of states.*

Analysis

Section 76(1)

[113] This is a class- and harm-based provision, the purpose of which is to allow a public body to refuse to disclose information that could harm intergovernmental relations or the intergovernmental supply of information as between YG or a public body and the other governmental or organizational party. The information at issue must be information other than that accepted by the public body in confidence as per subsection 68(1) [Confidential information from another government].

[114] This provision recognizes that the YG and the Public Body create and collect records in their interactions with other governments or organizations and that these interactions sometimes require protection in both a formal and working context.

[115] The IPC stated in *Inquiry Report ATP15-055AR,* and subsequently adopted in *Investigation Report ATP-ADJ-2022-04-133*, 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), https://canlii.ca/t/g6lzb[33] at paragraph 54] [*CSSC*]:

> *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… 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 Test)[34]

[116] As such, it is unnecessary to show, on a balance of probabilities, that the harm will occur if the information is disclosed.[35] However, a public body must demonstrate that the

[33].Accessed July 18, 2025.
[34] *Merck Frosst Ltd. v. Canada (Health),* 2012 SCC 3, https://canlii.ca/t/fpvd1. Accessed July 18, 2025.
[35] *CSSC* at para. 52

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.[36]

[117] In the context of subsection 76(1), it is up to the Public Body to meet the Merck Test by proving 'well beyond' or 'considerably above' the mere possibility that disclosure of the Issue 6 Records would harm relations between the Government of Yukon or a public body and the other government or organization. To that end, it must provide comprehensive and compelling evidence about the reasonable likelihood of harm because it is not self-evident. This requires a precise description.

[118] The following two-part test can therefore be applied:

1) Did the Public Body, in the prescribed manner, accept the Issue 6 Records in confidence from a government or organization referred to in subsection 68(1)?

2) If no, then could disclosure of the Issue 6 Records reasonably be expected to harm relations between YG or the Public Body and the other government or organization?

Did the Public Body, in the prescribed manner, accept the Issue 6 Records in confidence from a government or organization referred to in subsection 68(1)?

[119] The Public Body, in its PB Submission, stated that the [Victoria Gold] heap-leach failure required urgent action to address it in the form of quick, frank and transparent discussions about risks, processes, advice and decision without having to be less than candid, or 'sanitize' their comments, or risk other third party backlash where there is a risk of disclosure.[37] As such, the information given by third parties in this instance was given to YG with the implicit understanding that the communication was 'internal'.[38]

[120] While I accept that the third parties provided information to YG that would otherwise not be made publicly available, the subsection 76(1) does not support this assertion.

[121] The Complainant, in their COM Submission, stated that "… government employees are or should at least be aware [through training] that the vast majority of records created in the course of their employment are subject to access-to-information law, regardless of who the intended or listed recipients are at the time the communication is made. … [As

[36] *Ibid.,* at para.59.
[37] PB Submission at p.11.
[38] *Ibid.*

such,] records created in tense situations requiring urgent action does not grant them special exemption from access-to-information law, even if that law wasn't top-of-mind when the records were created."[39]

[122] I infer from this that the Public Body could have availed itself of the prescribed mechanisms to receive information in confidence from another government or business information from a third party, thus protecting it from disclosure, but did not do so. It only claimed the general need for confidentiality, asserting the exigent circumstances of the heap-leach failure.

[123] I am inclined to agree with the Complainant because, in examining sections 18 and 19 of the *Access to Information and Protection of Privacy Act Regulation*, OIC 2021/025, there is nothing that places any unreasonable time-based restrictions on the regulatory process that would, in my view, significantly hinder accepting the Issue 6 Records in confidence and thus protecting them from disclosure.

[124] The only thing that might be a practical hinderance is having to submit the nine Issue 6 Records to the multi-step regulatory process but, if it is as essential as the Public Body asserts to keep each of them confidential for the reasons it states, then the legislation allows for that and would be an end to the matter. There is no evidence, however, that the Public Body even considered this course of action.

[125] Therefore, the Issue 6 Records are not confidential unless the PB Head determines that their disclosure could reasonably be expected to harm the relations set out in the next question.

Could disclosure of the Issue 6 Records reasonably be expected to harm relations between YG or the Public Body and the other government or organization?

[126] In my view, the evidence of harm can be divided into two components, noting that the Public Body would have to prove factual evidence to support its assertions.

[127] I also note that the Public Body referred to YG in its PB Submission. Since YG is a higher level of authority than a public body, it follows that the Public Body must demonstrate disclosure of the Issue 6 Records themselves would harm the conduct of intergovernmental relations and not just those of the Public Body.

[128] <u>How would disclosure of Issue 6 Records themselves cause harm</u>?

[39] COM Submission at Item 5.

[129] The Public Body, in its PB Submission, did not refer specifically to the Issue 6 Records; instead, it made several broad-based statements. I will set them out with some paraphrasing for brevity.

[130] The Public Body asserted that, if the information were disclosed, then the third parties would choose not to be candid in sharing such information with YG due to possible backlash from other third parties or, alternatively, would choose to sanitize their words when sharing information in the future. It also asserted that, in YG making a commitment to treat as confidential all information provided to it, disclosing such information would breach this commitment and compromise the necessity of ensuring the continued free flow of information/communication in terms of managing and coordinating timely efforts in respect of the [heap-leach] file.[40]

[131] In addition, the Public Body asserted that disclosure of the information would very likely harm YG's relationship with both the Receiver and the receivership itself, given the Receiver's role as a court officer and all the various stakeholder interests involved. It also asserted that disclosing the information would risk compromising and potentially eroding both the trust and positive relations between YG and the third parties involved in the [heap-leach] file.[41]

[132] The problem with these assertions is that they are broad in scope; they do not distill to each of the Issue 6 Records. The onus is on the Public Body is to prove 'well beyond' or 'considerably above' the mere possibility that disclosure of the Issue 6 Records would, in and of themselves, cause harm to the relations between YG/Public Body and the Receiver/other stakeholders.

[133] In the absence of such proof-based evidence that I could use to weigh against such Records, it is not up to me to take the Public Body's broad assertions of harm and apply them to each Record, especially in the case of a discretionary exemption.

[134] I will now consider the next component.

[135] <u>What is the harm that would result</u>?

[136] The Public Body asserted that several adverse effects would likely occur if the information were disclosed. If third parties chose to sanitize their comments, then this would degrade the quality of the information being shared with YG. In addition, breaching

[40] PB Submission at p.11.
[41] *Ibid.,* at p.12.

the confidential assurance YG provided to the Receiver by disclosing the information would undermine the trust between them, compromise YG's good faith duty, and very likely result in an end to the [further] sharing of similar information. It could also prejudice a potential future sales process, something that could significantly and detrimentally affect the ability of YG and other stakeholders to recover funds owed to them by the Receiver or Victoria Gold.[42]

[137] The Public Body also asserted that information disclosure would have the significant legal and financial effects of likely undermining the trust and confidence built to date, as well as interfering with the parties' cooperative conduct. This would possibly redirect focus from the urgent issues at hand to repairing relationships.[43]

[138] It also asserted that information disclosure would undermine the foundation of established trust, cooperation and communication because it is important that each [party] has a 'say' in how information is relayed, explicitly or implicitly, in confidence. In addition, it asserted that there is a high probability that significant issues would affect the [heap-leach] investigation in the event of information disclosure.[44]

[139] The problem with these assertions by the Public Body is the same as that above. Given that the onus on the Public Body is to provide evidence well beyond or considerably above the mere possibility that disclosure of the Issue 6 Records, in and of themselves, would cause the type of harm so asserted, broad statements are insufficient.

[140] For these reasons, I am unable to conclude that disclosure of the Issue 6 Records could reasonably be expected to harm relations between YG/Public Body and the Receiver/other stakeholders.

[141] In coming to this result, it is not necessary to weigh the Complainant's reply, in their COM Submission, to the Public Body's concerns that information disclosure could potentially jeopardize a future sales process because any such harm is mitigated by virtues of it already being publicly available, including that via YG, the [Receiver], court document and media reporting.[45]

Conclusion

[142] The Public Body is not authorized to rely on subparagraph 76(1) to withhold the

[42] *Ibid.,* at p.11-12.
[43] *Ibid.,* at p.11.
[44] *Ibid.,* at p.12.
[45] COM Submission at Item 4.

Issue 6 Records from the Complainant.

Issue 7 – Is the Public Body authorized by paragraph 77(1)(b) to withhold the Records?

[143] In turning to the above table, six of the applicable Records are generally described as emails, three as email attachments, and one as a presentation (Issue 7 Records). The Issue 7 Records are identified in the Records Table as 001.1, 007-01, 007-02, 008, 010, 011, 013, 020-01, 048.2, and 050.5-01.

[144] Record 001.1 consists of two emails:

1) In the first one, most of the fourth paragraph is redacted.

2) In the second one, the subject line and body are completely redacted.

[145] Record 007-1 is a proprietary third party document. It is completely redacted.

[146] Record 007-02 is a proprietary third party document. It is completely redacted.

[147] Record 008 consists of an email sent by a Robert Perry to one recipient on October 11, 2024 @ 3:30 pm. Part of the first paragraph is redacted.

[148] Record 010 consists of an email sent by a Robert Perry to one recipient on October 15, 2024 @ 10:01 am. Part of the second paragraph is redacted.

[149] Record 011 consists of four emails:

1) The first was sent by an Erin Dowd to one recipient on October 11, 2024 @ 5:39 pm. The subject line and the first two paragraphs are completely redacted.

2) The second email was sent by an MJ Siahdashti to one recipient on October 11, 2024 @ 5:29 pm. The subject line is completely redacted.

3) The third email was sent by an Erin Dowd to one recipient on October 11, 2024 @ 5:25 pm. The subject line and part of the first paragraph are redacted.

4) The fourth one was sent by an MJ Siahdashti to one recipient on October 11, 2024 @ 2:41 pm. The subject line and body are completely redacted.

[150] Record 013 consists of two emails:

1) In the first one, the second paragraph (one sentence) is completely redacted. Most of the third paragraph is completely redacted.

2) In the second one, part of the first paragraph is redacted. In addition, there is an appendix identified as 'Standing Meetings', the 'Monday' meeting of which is completely redacted.

[151] Record 020-01 consists of two proprietary third party maps and associated data.

[152] Record 048.2 appears to be an email unidentified as to date, time, recipient, and subject line. The sender is identified as a Colleen Arnison. The fourth bullet in the fourth paragraph is completely redacted.

[153] Record 050.5-01 is a proprietary third party document. It is completely redacted.

Relevant Law

[154] The relevant portions of section 77 are as follows:

> *(1) Subject to subsections (2) and (3), the head of a responsive public body may deny an applicant access to information held by the responsive public body that is a trade secret of, or commercial, financial, scientific or technical information of, a third party that a public body has not accepted in confidence in the prescribed manner from the third party if*
>
> *…*
>
> *(b) the head determines that disclosure of the information could reasonably be expected to result in similar information no longer being supplied to the responsive public body and the head is satisfied that it is in the public interest that similar information continue to be supplied to the responsive public body; …*
>
> *(2) Before denying access to information under subsection (1), the head of a responsive public body must consider*
>
> *(a) the objections of a third party, if any, submitted in accordance with a notice provided to the third party under paragraph 59(1)(a); and*
>
> *b) whether, despite any objections, granting the applicant access to the information would promote public health or safety.*
>
> *(3) The head of a responsive public body must grant an applicant access to information*

referred to in subsection (1) if

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

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

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

(d) the information is publicly available information.

Analysis

[155] Subsection 77(1)

[156] This is a class- and harm-based provision, the purpose of which is to allow a public body to protect the 'business' interests of a third party, certain information of which the public body 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.

[157] 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?

[158] If the answers to these three questions is yes, then, subject to subsections 77(2) and (3), the PB 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)(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; …*

[159] Such a determination must meet the Merck Test and the Public Body's burden of proof. To reiterate in the context of paragraph 77(1)(b), it is up to the Public Body to

prove well beyond or considerably above the mere possibility that the above harm will occur if the Issue 7 Records were disclosed.

[160] Subsection 77(2)

[161] 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 PB 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?

[162] Subsection 77(3)

[163] The PB 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?

[164] I will now examine the Issue 7 records in respect of paragraph 77(1)(b).

Is the information held by the Department?

[165] Because the Public Body has determined that the Issue 7 Records are responsive to the Access Request, I am satisfied that these Records are information held by the Public Body.

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

[166] Before I continue, the following Records are not subject to subsection 77(1) because they constitute the Public Body's internal communications *(i.e.,* emails) and are therefore not a trade secret of, or commercial, financial, scientific or technical information of, a third party:

- Record 001.1
- Record 008
- Record 01
- Record 13

[167] 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 007-01
- Record 007-02
- Record 50.5-01

[168] I will now address each term and their applicability to the remaining Records at issue (*i.e.,* Records 011, 020-01 and 048.2).

[169] **Trade Secret**

[170] '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.

[171] 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.

[172] 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.

[173] The Public Body, in its PB Submission, made general assertions about its commitment to maintain information confidentiality, such that "it is impermissible for information to be used or disclosed by YG in any way without prior authorization and provided no supporting evidence. Disclosing any confidential information would result in YG breaching the assurance provided to the Receiver, effectively undermining the established trust between the parties, compromising YG's duty to act in good faith, and very likely result in similar information no longer being supplied. Additionally, … it could prejudice a potential future sales process and associated recovery for YG and other stakeholders. This is an unacceptable risk in light of the context of this [heap-leach] file."[46]

[174] However, it made no specific trade secret assertions and provided no associated, supporting evidence in respect of Records 011, 020-01 and 048.2. Since subsection 77(1) is a discretionary provision and the burden of proof is on the Public Body, I find that it has not met this burden and, therefore, these Records are not trade secrets of a third party.

[175] **Commercial and Financial Information**

[176] In *Investigation Report ATP-ADJ-2022-04-133*, the IPC defined the terms 'commercial' and 'financial' as follows.[47]

'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."

[46] PB Submission at p.13.
[47] Department of Economic Development, October 26, 2022 (IPC) at para. 179.

[177] The Public Body, in its PB Submission, made no specific commercial or financial information assertions and provided no associated, supporting evidence in respect of Records 011, 020-01 and 048.2. Since subsection 77(1) is a discretionary provision and the burden of proof is on the Public Body, I find that it has not met this burden and, therefore, these Records are not commercial or financial information of a third party.

[178] **Scientific Information**

[179] In *Inquiry Report ATP20-60R*, 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 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.*

[180] The Public Body, in its PB Submission, made no specific scientific information assertions and provided no associated, supporting evidence in respect of Records 011, 020-01 and 048.2. Since subsection 77(1) is a discretionary provision and the burden of proof is on the Public Body, I find that it has not met this burden and, therefore, these Records are not scientific information of a third party.

[181] **Technical Information**

[182] In the above report, the IPC defined 'technical 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.*

[183] The Public Body, in its PB Submission, made no specific technical information assertions and provided no associated, supporting evidence in respect of Records 011, 020-01 and 048.2. Since subsection 77(1) is a discretionary provision and the burden of proof is on the Public Body, I find that it has not met this burden and, therefore, these Records are not technical information of a third party.

[184] Since the Public Body has not met its burden of proof in respect of Records 011, 020-01 and 048.2, I need go no further in my analysis. In short, there is no basis upon which the PB Head could withhold these Records from the Complainant under paragraph 77(1)(b).

Conclusion

[185] The Public Body is not authorized to rely on subparagraph 77(1)(b) to withhold the Issue 7 Records from the Complainant.

Issue 8 – Does 82(1) override the PB Head's authority to withhold the Records?

[186] This applies to all the Records, 23 in total. In turning to the Records Table, 17 of them are described as emails, five as email attachments, and one as a presentation (Issue 8 Records).

Relevant Law

[187] The relevant portions of section 82 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)*
>
> *(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. [emphasis added]

Analysis

Section 82

[188] This 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.[48]

[189] It applies to all the records at issue. If, for example, an applicant was denied a record under a different exemption provision, then section 82 offers a reconsideration despite the other provision's result. If, in that reconsideration, the record is found to be of a nature that warrants disclosure because the public interest in disclosing it clearly outweighs the public interest in withholding it under a provision in Division 8 or 9, then it must be disclosed. In other words, the effect of section 82 overrides the other result in respect of that record.

[190] If, however, disclosing it did not clearly outweigh the public interest in withholding it under a provision of Division 8 or 9, then section 82 simply falls away. There is no negative consequence in this provision in the absence of a public interest override.

[191] Section 82 should be used with sufficient gravitas because it supersedes all other disclosure exemptions.[49] The PB Head, in making the determination set out in subsection

[48] Black's Law Dictionary (11ed.) defines the adjective 'clear', as meaning "free from doubt; sure; unambiguous." It follows that the adverb 'clearly' carries the same meaning. It also defines the verb 'outweighs' as meaning "to be of more importance or value than (something else)."
[49] The only exception is a section 67 Cabinet confidence.

82(1), must find a balance between the public interest in disclosing information and the public or private interest in not disclosing it.

[192] In addition, exercising this provision 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. This means that the test is rigorous, thus limiting the applicability of section 82.[50]

[193] 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.

[194] 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.[51]

[195] In making such a determination, the PB Head must consider factors in paragraph 82(2)(a)[52] but not factors in paragraph 82(2)(c).

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

1) Is there a level of public interest in the Records?

2) Are the Records likely to be accurate and reliable?

3) Are similar Records available in the public domain?

4) Is a suspicion likely to exist in respect of the Public Body's conduct in relation to the matter to which the Records relate?

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

6) Is the disclosure of the Records likely to result in similar information no longer being supplied to the Public Body?

[197] The Public Body, in its PB Submission, stated that the PB Head considered these [questions/factors] in determining whether the public interest in disclosing the

[50] SK FOIP Guide at p.240.
[51] Some examples are taken from the Service Alberta 'FOIP Guidelines and Practices' at p.229.
[52] Paragraph 82(2)(b) is not relevant.

information clearly outweighed the public interest in withholding it.[53] However, they did not provide any evidence supporting this assertion.

[198] As previously stated, section 82 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 Issue 8 Records, I am placed in the unwarranted position of having to put forth my own analysis.

[199] In view of that, I can only examine the PB Submission to prise out, in its entirety, a public interest context and then apply it to each of the six questions. In doing so, I have to frame an answer in respect of each Issue 8 Record.

Public Interest Context

[200] The term 'public interest' commonly means 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.

[201] 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. In addition, public interest is not private interest.

[202] The PB Submission contains several assertions throughout its length that can be distilled, in my view, to the following points, all of which can be described collectively as the public interest at issue:

- A heap-leach failure occurred at the Eagle Gold Mine run by Victoria Gold, now under receivership. The cause of the failure is under investigation.

- Urgent crisis management has been required to address this failure which, of necessity, must enable those parties involved to have quick, frank and transparent discussions about risks, processes, advice and decisions.

[53] PB Submission at p.14.

- A Receiver has been appointed over Victoria Gold by the court to ensure an orderly continuation of the business with a principal focus on efforts to remediate the effects of the heap-leach failure. YG is the interim receivership lender.

- Due to the sensitivity and gravity of the matter, disclosing the Issue 8 Records would result in YG breaching its confidentiality assurances given to third parties. Such a breach could:

    - undermine the established trust and cooperation it has with these parties, thus risking any future information sharing forbearance, or sharing 'sanitized' information;

    - compromise the integrity of the investigation and the laying of any possible charges;

    - potentially prejudice the current court process;

    - potentially prejudice a future sales process and associated YG/stakeholder funds recovery from the Receiver or Victoria Gold.[54]

Is there a level of public interest in the Records?

[203] This factor requires me to consider a public interest threshold below which there is not sufficient cause for response and above which there is a need for suitable action. In doing so, I have to put myself in the place of a casual and reasonable observer who, with knowledge of that information and the related circumstances, can conclude whether the interest demonstrated by the public in the matter is forceful and persuasive, or something less.

[204] I have reviewed each of the Issue 8 Records and have determined that none of them rise to the level of public interest that warrants disclosure (*i.e.,* overrides the exemptions). The point of disclosure is to enable the public to form opinions and choose political courses of action based on its content. However, as provided in the PB Submission, there is a plethora of online evidence concerning, for example, the heap leach-failure, heap-leach failure updates, liens, habitat monitoring, technical briefings, receivership, hunting/recreation activities in the vicinity, ministerial and premier

[54] YG is a secured creditor. PB Submission at p.13.

statements, and evacuation alerts in the vicinity.

[205] As such, disclosing the Issue 8 Records would not substantially serve the purpose of informing the public about the activities being taken to address the heap-leach failure and would not noticeably add important information to that already publicly available.

Are the Records likely to be accurate and reliable?

[206] All Issue 8 Records are in the custody and control of the Public Body and contain information concerning the heap-leach failure. These include, for example, comments and opinions. However, I have no way of determining whether they are likely to be accurate and reliable.

Are similar Records available in the public domain?

[207] Although the Public Body asserted that there is myriad information available in the public domain, it provided no evidence in the PB Submission about any similarity to the Issue 8 Records.

[208] The Complainant, in their COM Submission, stated that a "high volume of information about the June 24, 2024 heap leach failure and the aftermath is already, or will soon be, available to the public."[55] To that end, they provided several examples in the form of YG 'press' conferences since the heap leach failure, Victoria Gold update webpages,[56] and reports posted to the Yukon Water Board's 'Waterline' webpage. However, they provided no evidence about any similarity to the Issue 8 Records.

[209] As such, I am unable to make a determination in respect of this question.

Is a suspicion likely to exist in respect of the Public Body's conduct in relation to the matter to which the Records relate?

[210] 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.

[211] Neither the Public Body nor the Complainant raised any notion of 'suspicion' in their submissions. In my own examination of each Issue 8 Record, I can find no evidence or inference that would persuade me answer the question in the affirmative.

[55] COM Submission at Item 3.
[56] One maintained by YG, one by the First Nation of Na-Cho Nyäk Dun and another by the Receiver.

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

[212] The term 'likely' raises the Merck Test because the question 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.

[213] The Public Body, in its PB Submission, asserted that, having made a commitment to the other parties to protect the confidentiality of the Issue 8 Records supplied to it, a breach brought on by disclosure could have several harmful consequences, the significance of which could significantly endanger ongoing efforts to address and mitigate both the environmental and financial effects of the heap-leach failure.

[214] I have already set out these consequences as part of the 'Public Interest Context' above but will briefly reiterate them. They consist of possible broken trust that risks the flow of value information, investigation compromise, court process interference, and future mine sale/funds recovery jeopardy.

[215] The Complainant, in their COM Submission, did not address the likelihood of harm directly. However, they stated that the IRB's work, in its Terms of Reference, would not impede other investigations, there is already a high volume of information publicly available, and the court process is almost entirely judge-alone. Together, these greatly reduce any risk of compromise due to disclosure.

[216] I have examined the Issue 8 Records in this regard. Each is granular in nature. They are comprised of specific plans, activity and status reports, logistics, comments, opinions, applications and maps, all of which appear to deal with operational planning and events rather than higher-level strategic planning and execution.

[217] If these were disclosed, then it is likely possible, in my view, for members of the general public to examine them with a critical lens that leads to a misreading of or undue interference with the larger strategies in place to resolve the environmental, legal and fiscal issues stemming from the heap-leach failure.

[218] In weighing 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, the

answer to this question is yes.

Is the disclosure of the Records likely to result in similar information no longer being supplied to the Public Body?

[219] The Public Body, in its PB Submission, asserted that it was highly likely that disclosure of the Issue 8 Records would have this effect but did not offer specific evidence in respect of each Record.

[220] As such, I am unable to make a determination in respect of this question.

Conclusion

[221] In considering these six questions [factors], together with the evidence before me, I find on a balance of probabilities that the public interest in disclosing the Issue 8 Records under 82(1) clearly does not outweigh the public interest in withholding them from disclosure. In other words, the public interest in this case is served by not disclosing these records.

V FINDINGS

[222] In summary, I find that the Public Body must disclose the following Records to the Complainant (in table form for ease of reference):

Issue	Provision	Records to be disclosed	Pages
1	70(3)(a)(iii)	N/A	
2	72(1)(b)(i)	044.1-02 050	0114 0132, 0134
3	72(1)(b)(vi)	N/A	
4	73(a)	001.1	0002-0004

5	74(1)(a)	013 • Email 2 o First redaction o Addendum ('Standing Meetings: Monday') 018-01 • Redacted body of information • The following comments and those passages captured by each of them: o Comments 1 and 2 on p.0045 o Comment 1 on p.0046 o Comments 1 and 2 on p.0048 o Comment 1 on p.0049 023 44.1-04 • First redaction 050 050.4	 0030 0031 0042-0049 0045 0046 0048 0049 0074 0126 0132, 0134 0187

6	76(1)	013 020-01 022 023 044.1 044.1-02 044.1-03 044.1-04 050	0030-0031 0056-0068 0072 0074 0109 0114 0125 0126 0132, 0134
7	77(1)(b)	001.1 007-01 007-02 008 010 011 013 020-01 048.2 050.5-01.	0002-0004 0014-0015 0016-0019 0020-0021 0023-0024 0026-0028 0030-0031 0056-0068 0131 0193-0205
8	82(1)	N/A	N/A

VI RECOMMENDATIONS

[223] I recommend that the Public Body discloses the Records identified in the above table under 'V FINDINGS'.

Observation

[224] The Public Body, in its PB Submission, stated that the heap-leach failure required 'urgent crisis management'. As such, it made a commitment to preserve and maintain confidential information that it accepted to address this issue. That commitment, in its view, made it 'impermissible' for YG to disclose this information without prior authorization.

[225] I have already addressed the mechanism for receiving information in confidence vis-à-vis sections 18 and 19 of the *Access to Information and Protection of Privacy Act Regulation*, OIC 2021/025 and need not repeat myself. I also made a similar observation in *Investigation Report ATP-ADJ-2023-05-183*.[57]

[226] This mechanism exists for a reason. If YG continues to find itself in the 'urgent crisis management' situation it describes or a new one arises in connection with the heap-leach failure, then YG needs to consider how best to protect its ongoing receipt of information. I suggest, therefore, that it carefully consider these regulatory sections before risking further disclosure of allegedly sensitive Records or, in the alternative, ensure that any ATIPPA exemptions it may claim in the future meet the Merck Test where applicable.

PB Head's Response to Investigation Report

[227] 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*

[57] See p.52.

(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).

[228] 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

[229] 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

[230] 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.

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

Distribution List:

- Public Body Head
- Complainant