



**Decision**

**File ATP12-037AR  
On Access Request #A-4057**

**Pursuant to section 48 of the  
*Access to Information and Protection of Privacy Act (ATIPP Act)***

**Tim Koepke  
Information and Privacy Commissioner (IPC)**

**Public Body: Department of Justice**

**Date: May 15, 2013**

**Summary:**

The Applicant made a request to the Department of Justice (Public Body) for written records as well as audio and video recordings related to segregation reviews conducted over a specific period of time.

The Public Body identified 80 pages of written records and severed some information from 4 of the 80 pages claiming section 25(1) applied to the severed information. The response also identified audio and video recordings as being located in the search for responsive records and which were provided to the Applicant. The Applicant took no issue with the severing in the written records. However the Applicant alleged the Public Body was refusing to give access to audio and video recordings. The Applicant requested a review pursuant to section 48(1)(a) of the ATIPP Act.

The Public Body subsequently requested the Information and Privacy Commissioner exercise his discretion to refuse to hold an inquiry pursuant to section 52(1) of the ATIPP Act.

In its submission and an affidavit the Public Body identified certain clerical errors in the response provided to the Applicant. It corrected the response indicating it had located 8 responsive audio recordings all of which were provided to the Applicant and that no video recordings were found.

**Decision:**

A refusal requires there to be a record in the custody and control of the Public Body identified as responsive to the request about which a decision is made to refuse access to all or part of the record based on specific exception set out in the Act. Jurisdiction to conduct a review and inquiry requires a “refusal” by the Public Body to give access to all or part of the record. A response that says that a record is not found is not a decision under the Act to refuse to give access. The Applicant was provided with the records that were identified as responsive to his request and the Public Body was therefore not refusing to give access to records. In the result, in the circumstances of this case the IPC does not have jurisdiction to conduct an inquiry.

Section 7 and 10 of the ATIPP Act impose a duty on a public body and the records manager to respond to an applicant openly, accurately and completely. In keeping with the objective of the ATIPP Act, this duty requires the Records Manager to inform an applicant when a public body determines there are no records found that are responsive to the request.

Section 42 of the Act authorizes the IPC to conduct investigations of complaints from the public about the administration of the Act. This includes a complaint that there has been an inadequate search for records by the Public Body. This matter will be treated as an investigation into the adequacy of the search for records.

**Statutes Considered:** *Access to Information and Protection of Privacy Act* sections 48(1)(a), 52, 6, 7, 8, 10, 13, 57, 42



## I INTRODUCTION

- [1] As Information and Privacy Commissioner (IPC) I received a request from the Applicant to review the Public Body's response to Request for Records #A-4057. The request for review was made pursuant to section 48(1)(a) and (b) of the ATIPP Act.
- [2] Section 48(1)(a) allows an applicant to request a review by the IPC of a refusal by a public body to grant access to a record. Section 48(1)(b) allows an applicant to request a review of a decision by a public body to separate or obliterate information from the record.

## II BACKGROUND

### Access Request

- [3] On July 19, 2012, the Applicant made a Request for Access to Records from Whitehorse Correctional Centre. The Applicant was seeking the following:

*Request all information pertaining to administrative detention in segregation reviews: Please include all documents, audio tapes, video tapes surrounding the following dates & times.*

2012 04 12 at 17:00 HRS  
2012 04 10 at 17:00 HRS  
2012 04 20 at 17:00 HRS  
2012 04 24 at 18:24 HRS  
2012 04 28 at 18:24 HRS  
2012 04 30 at 16:23 HRS  
2012 05 10 at 16:23 HRS  
2012 05 11 at 16:23 HRS  
2012 05 12 at 16:23 HRS  
2012 05 13 at 16:00 HRS  
2012 05 14 at 16:15 HRS  
2012 05 18 at 16:15 HRS  
2012 05 21 at 18:00 HRS  
2012 06 05 at 18:00 HRS  
2012 06 14 at 16:00 HRS  
2012 06 17 at 16:00 HRS  
2012 07 02 at 17:00 HRS  
2012 07 05 at 17:00 HRS



*All cell footage from disciplinary hearings. Video footage from [REDACTED] [REDACTED]. On [REDACTED] (date all my legal documents were confiscated and held prior to my Court appearance [REDACTED].)*

*Hand held camera footage of me taken when I was transported (re-located) to segregation from E-Unit.*

*Unit video footage of same occurrence.*

*Segregation footage of same occurrence.*

*Video footage from D Unit prior to myself leaving for Court on [REDACTED] [REDACTED].*

*All C.O. Reports surrounding all above dated incidents and reviews.*

- [4] At the request of the Public Body, the Records Manager granted the Public Body several extensions to the statutory time limit for responding to the request for access. On December 4, 2012 the Public Body provided its response to the access request. At this time it also released the 80 pages of records identified as responsive to the Applicant.
- [5] On January 16, 2013 the Public Body subsequently amended its response to the access request, which read as follows:

*The Department of Justice has amended their final response on your ATIPP Request #A-4057.*

*Access Granted in Part*

*The Department of Justice has granted access, in part, to your request for records. Information has been severed from the records in accordance with section(s) 25(1) of the ATIPP Act which states:*

*A public body may refuse to disclose personal information about a third party to an applicant if the disclosure would be an unreasonable invasion of the third party's personal privacy.*

*A total of 80 pages of records, a memory stick (with video records) and 11 audio recordings related to this request were released on December 4, 2012. The following 4 pages were partially severed in accordance with section 25(1) of the ATIPP Act.*



<b>Name of Document</b>	<b>Date of document</b>
Information Report	Apr 10, 26, Jun 14(x2), 2012

*A full review of all electronic and paper files was conducted in an effort to fulfill this request including a search of archived records.*

- [6] On December 17, 2012 the Applicant requested a review of the Public Body's decision maintaining that the Public Body had improperly severed information in the records released to him and had refused to grant access to some of the requested records specifically audio and video recordings.<sup>1</sup>

## **II REQUEST FOR REVIEW**

- [7] On January 23, 2013 I notified the Public Body of the request for review as required by section 50 of the ATIPP Act. Pursuant to section 51, I authorized mediation to try to settle the matter under review. Mediation was not successful. However, the Applicant withdrew the request made pursuant to section 48(b) for review of the information severed pursuant to section 25(1) on 4 pages of the 80 pages of written records. The request made pursuant to section 48(a) for a review of the refusal by the public body to grant access to records proceeded to the inquiry stage.

## **III APPLICATION BY PUBLIC BODY NOT TO PROCEED TO INQUIRY**

- [8] On February 8, 2013 the Public Body made a request pursuant to section 52(1) that I exercise my discretion to decline to conduct an inquiry saying the request for review did not have any merit.<sup>2</sup>
- [9] Section 52 of the ATIPP Act says that if the matter is not settled under section 51 the commissioner "may" conduct an inquiry. The use of the word "may" in this section confers a discretion that allows me to decide whether or not to proceed to inquiry in a particular case.
- [10] On February 11, 2013 I gave notice to the Applicant of the Public Body's request and sought submissions from both parties.<sup>3</sup> I received submissions from both parties.<sup>4</sup>

<sup>1</sup> Letter from the Applicant received by the IPC December 17, 2012.

<sup>2</sup> Letter dated February 8, 2013 from the Public Body.

<sup>3</sup> Notice of Application dated February 11, 2013.

<sup>4</sup> Letter dated February 27, 2013 from the Public Body. Letter from the Applicant dated February 17, 2013.



## **Records at Issue**

- [11] It was not clear from the response provided to the Applicant what records were at issue in the inquiry that needed to be clarified before moving to consider the Public Body's application.
- [12] First, the initial and revised response provided to the Applicant only identified records that were located in relation to the various requests for records. It said nothing about the specific requests where no responsive records were found. With its submission, the Public Body provided a detailed schedule of records ("the Schedule") which in addition to identifying the records located that were responsive to a specific request, specifically identified the requests where no records were found.<sup>5</sup>
- [13] Secondly, the Schedule also indicated that in relation to the video records requested "no records were found." This conflicted with information provided in the initial and revised response that the Applicant had been provided with a memory stick containing "video recordings" and "11 audio recordings".<sup>6</sup>
- [14] Finally, the Applicant had acknowledged receiving audio records but not the 11 identified in the responses.
- [15] I sought clarification from the Public Body as to the correct response. I asked for confirmation of all of the records including video and audio records that were identified as responsive to the request and provided to the Applicant as well as any responsive records to which access was not granted. In reply the Public Body provided an affidavit from the ATIPP Coordinator responsible for preparing both the initial response and revised response to the Records Manager who, under section 13 of the Act, is responsible for responding to the Applicant.<sup>7</sup>
- [16] The ATIPP Coordinator's affidavit confirms the Schedule correctly identifies the records requested and the results of the search for records. The Affidavit also confirmed there were clerical errors made in the initial and revised response in relation to the audio and video recordings identified as responsive to the request. The ATIPP Coordinator indicated that the Applicant was provided with 8 not 11 audio recordings and that no video recordings were identified as responsive to the request.<sup>8</sup>

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<sup>5</sup> Public Body submission dated February 17, 2013 ("the Schedule").

<sup>6</sup> Ibid

<sup>7</sup> Affidavit of ATIPP Coordinator Department of Justice dated March 11, 2013.

<sup>8</sup> Ibid



## Audio Recordings

- [17] The initial response from the Records Manager indicated there were 11 audio recordings responsive to the request.<sup>9</sup> The Applicant in his submission confirmed receiving a memory stick containing audio recordings but indicated it did not contain 11 recordings. The Applicant did not indicate the number of recordings contained on the memory stick.<sup>10</sup>
- [18] In the sworn affidavit, the ATIPP Coordinator indicated the response indicating 11 audio recordings were provided to the Applicant contained a clerical error. The ATIPP Coordinator indicated the Public Body's search initially identified 11 audio recordings related to reviews but determined three of the recordings were related to reviews held in August, 2013 which was outside the scope of the Applicant's request for audio recordings of reviews between April 12, 2012 and July 12, 2012.<sup>11</sup> The ATIPP Coordinator confirmed that the memory stick which was provided to the Applicant contained 8 audio recordings identified as responsive within the scope of the Applicant's request.
- [19] The sworn evidence of the ATIPP Coordinator satisfies me that the reference to 11 audio recordings was a clerical error and that 8 audio recordings were identified as responsive to the request and provided to the Applicant. Given the Applicant was provided with the 8 audio recordings, I am satisfied that this aspect of the request for access to information was granted in full by the Public Body.<sup>12</sup>

## Video Records

- [20] The initial and revised response provided by the Records Manager referred to a memory stick containing "video recordings". The sworn Affidavit provided by the ATIPP Coordinator indicates a clerical error was made in the initial and revised response with respect to video recordings. The ATIPP Coordinator deposes that the response:

*...should have included the word "audio" instead of "video" as no video records were found only audio records.<sup>13</sup>*

- [21] The Schedule also provides more information in relation to the requested video recordings. It indicates that in relation to each of the requests for video recordings set out in the access request, the response is "no record found".

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<sup>9</sup> Public Body submission dated December 4, 2012.

<sup>10</sup> Applicant submission dated February 17, 2013.

<sup>11</sup> Request for Access to Records #A-4057.

<sup>12</sup> Affidavit of ATIPP Coordinator Department of Justice dated March 11, 2013.

<sup>13</sup> Affidavit of ATIPP Coordinator Department of Justice dated March 11, 2013 at Para 2.



[22] In its submission the Public Body offers the following explanation in relation to the response that no video records were found:

*...DVR system that records video at the Whitehorse Correctional Centre does not have enough memory to hold all recorded information indefinitely. The system allows for access to video recordings for up to a month and then records over the oldest information as space requires. ...If a request for video footage is made within a month of the recording taking place, the video may be extracted and saved indefinitely. None of the video recordings requested by the applicant were on the recording system at the time the search for information was undertaken.<sup>14</sup>*

[23] The Applicant submits that additional video records exist in relation to the request for information about “administrative detention in segregation reviews” that the Public Body has refused to release to him.<sup>15 16</sup> The Applicant writes:

*It is my belief these records exist due to the fact that it is mandatory that WCC management conduct these reviews, and there must be a record of each review.*

*and*

*Video tapes surrounding the administrative detention in segregation reviews*

*All cell footage from disciplinary hearings.*

*Video footage from [REDACTED]. On [REDACTED] [REDACTED] (date all my legal documents were confiscated and held prior to [REDACTED].)*

*Hand held camera footage of me taken when I was transported (re-located) to segregation from E-Unit.*

*Unit video footage of same occurrence.*

*Segregation footage of same occurrence.*

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<sup>14</sup> Public Body submission dated February 17, 2013 (“the Schedule”).

<sup>15</sup> Request for Review submitted by the Applicant December 14, 2012.

<sup>16</sup> Applicant’s submission dated February 17, 2013.



*Video footage from D Unit prior to myself leaving for Court on [REDACTED]*

- [24] The Applicant's statement that the Public Body is refusing to grant access to the video records is based on a belief that the records exist given that the reviews are mandatory under the *Corrections Act*.
- [25] The ATIPP Coordinator in the Schedule and in a sworn affidavit has confirmed the reference to a video recording was a clerical error. The sworn evidence is that no video recordings were identified as responsive to the request. Based on my review of both parties' submissions and the affidavit of the ATIPP Coordinator, I am satisfied that the response in relation to the request for video recordings is that no records were found.<sup>17</sup>
- [26] In this case the Applicant came to believe that the Public Body had certain records that the Public Body was refusing to give access to. His belief is understandable given the errors in the response and the failure to provide any information about the results of the search in relation to requested information where no records were found. The Applicant believed that responsive records existed and thus made a request for review to this Office, thereby occasioning this inquiry. However I have determined that there are no records identified as responsive to the request that the Public Body is refusing to release to the Applicant.

Before dealing with the implication for this finding that there are no records that the Public Body is refusing to release to the Applicant for this inquiry, I want to consider what is required of a public body when responding to an Applicant.

**Was the response to the Applicant's request adequate in terms of the Act?**

- [27] Under section 6 access requests are made to the records manager who passes the request on to the Public Body that has custody and control of the record for a response.
- [28] Section 7 requires the records manager to respond openly accurately and completely to an Applicant.
- [29] Section 10 requires the public body to make a reasonable effort to enable the records manager to respond openly accurately and completely.

*7 The records manager must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

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<sup>17</sup> Affidavit of ATIPP Coordinator Department of Justice dated March 11, 2013.



**10** *The public body that has the record in its custody or control must make every reasonable effort to assist the records manager and enable the records manager to respond to each applicant openly, accurately and completely.*

- [30] To understand what that means these sections must be read in conjunction with the purposes of the Act. Section 1(1) sets out the purposes and the relevant part is as follows:

*The purposes of the Act are to make the public bodies more accountable to the public and to protect personal privacy by*

- (a) giving the public a right of access to records;*
- (b) giving individuals a right of access to,... personal information about themselves;*
- (c) specifying the limited exceptions to the rights of access;*
- (d)...and*

- [31] The objective of the legislation is to require public bodies to give up information unless there is an explicit legislated reason why they should not. An applicant has little or no idea what information a public body may have or where it will be found. In this respect public bodies hold all the cards so to speak. For this reason sections 7 and 10 place a positive duty on public bodies and the records manager to respond openly, accurately and completely. This duty includes telling an Applicant when records are not found or do not exist.

- [32] Section 13 requires the records manager to communicate the response to the applicant and describes the requirements for the records manager's response to an applicant.

**13(1)** *In a response under section 11, the records manager must tell the applicant*

- (a) whether or not the applicant is entitled to access to the record or to part of the record;*
- (b) if the applicant is entitled to access, where, when and how access will be given; and*
- (c) if access to the record or to part of the record is refused,*
  - (i) the reasons for the refusal and the provision of this Act on which the refusal is based,*
  - (ii) the title, business address and business telephone*



*number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and*  
*(iii) that the applicant may ask for a review under section 48.*

**(2)** *Despite clause (1)(c)(i), a public body may refuse to confirm or deny the existence of*

*(a) a record referred to in section 19.1,*

*(b) a record containing information described in section 19 or section 19.1, or*

*(c) a record containing personal information about the applicant or a third party.*

[33] Section 13(1) does not specifically require the records manager to inform the applicant when a public body says it cannot find a record or that a record does not exist. However I find support for my conclusion that the section 7 and 10 duty to respond includes a requirement to identify records that are not found or do not exist by virtue of section 13(2). Section 13(2) is very specific. It stipulates the limited circumstances under which a public body can remain silent about the existence of a record. Outside of those circumstances the public body is required to confirm the existence or non-existence of records.

[34] In summary, in keeping with the spirit and the intent of the Act, where the public body has identified that records are not found or do not exist, it has a duty to provide that information to the records manager who has a duty to similarly provide that information in the response to the applicant. If a record has been requested but the public body does not have it then logically the applicant is entitled to know that. In addition, a public body should ensure that where it does not have records responsive to an access request, it provides some explanation as to why this is the case to the applicant in its response letter. Such explanations can assist applicants in understanding the public body's position that no responsive records are found or exist.

**Application to exercise discretion to decline to conduct an inquiry.**

[35] I turn now to the Public Body's request that I exercise my discretion to decline to conduct an inquiry. This request assumes I have jurisdiction under the Act to conduct an inquiry in this case. As I explain below I am of the opinion that I do not have jurisdiction to do so in the circumstances of this case.



[36] The evidence confirms the Public Body has provided the Applicant with the records which exist that were identified as responsive to his request. It also confirms that in relation to the other information the Applicant requested it did not find any records.

[37] In coming to my conclusion I do not have jurisdiction, I considered section 48(1)(a) and sections 1, 8 and 57 of the ATIPP Act. I have included the relevant parts of the sections here to assist in understanding my conclusion.

**48(1)** *A person who makes a request under section 6 for access to a record may request the commissioner to review*

*(a) a refusal by the public body to grant access to the record;*

.....

**1(1)** *The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by*

*(e) providing for an independent review of decisions made under this Act.*

.....

**8** *Although the request under section 6 is to be made to the records manager and the records manager is to communicate the response to the applicant, the public body that has the control or custody of the record has the power to decide in compliance with this Act*

*(a) what the response is to be; and*

*(b) which of its officers or employees is to deal with the request and decide on the response.*

.....

**57(1)** *After completing a review under section 48, the commissioner must prepare a report setting out the commissioner's findings, recommendations, and reasons for those findings and recommendations.*

**(2)** *If the review is of a decision of a public body to give or to refuse access to all or part of a record, the commissioner must decide whether the public body is required or authorized to refuse access and*



*(a) if the commissioner determines that the public body is neither authorized nor required to refuse the access, the commissioner must recommend that the public body give the applicant the access the applicant is entitled to;*

*(b) if the commissioner determines that the public body is authorized to refuse the access, the commissioner may*

*(i) recommend that the public body reconsider its decision, or*

*(ii) affirm that the public body should continue to refuse the access; or*

*(c) if the commissioner determines that the public body is required to refuse the access, the commissioner must confirm that the public body is required to refuse the access.*

- [38] Section 48(1)(a) gives me jurisdiction to review a refusal by a public body to grant access to a record when a person makes a request for access. Jurisdiction to receive a request for review and conduct an inquiry therefore requires a "refusal" by the Public Body to give access to all or part of a record. The question here is whether there has been a refusal by the Public Body to grant access when the response is no record found. If there has not been a "refusal" I do not have jurisdiction to conduct an inquiry.
- [39] Section 1(1)(e) of the Act speaks of providing "an independent review of decisions made under the Act." This refers among other things to my role as Commissioner pursuant to Part 5 of the Act to conduct reviews and inquiries where a decision has been made giving or refusing access to all or part of a record. The key word in section 1(1) is "decisions".
- [40] Section 8 deals with who decides about access. It gives the public body that has custody and control of the record authority to respond to the request and decide, in compliance with the Act, what the response is to be.
- [41] Section 57 says where the review is of a "decision to refuse access to all or part of a record" the Commissioner must decide whether the public body is authorized or required to refuse access under the Act. The Act in sections 2 and 15 – 28 sets out the specific and limited exceptions authorizing or requiring a public body to refuse access to a record.
- [42] Read together these sections confirm that a refusal requires there to be a record in the custody and control of the public body identified by the Public Body as responsive to the request about which a decision is made to refuse to give access to all or part of the record based on specific provisions of the Act. In my view a response which says that a record was not found is not a decision under the Act to refuse to give access. It is simply a statement of fact.



- [43] Having decided that a response of “no record found” is not a decision under the Act to refuse to give access then the conclusion in this case must be that there has not been a refusal by the Public Body to grant access to records. In the result, I do not have jurisdiction to proceed with a review under Part 5 section 48(1)(a) of the Act.
- [44] This begs the question of what an applicant can do if he or she feels the public body has not been diligent in its search or is not credible in saying a record cannot be found. There is a mechanism in the Act for dealing with concerns about the adequacy of a search for records. Section 42 of the Act authorizes me to conduct investigations of complaints from the public about the administration of the Act. This includes a complaint that there has been an inadequate search for records by the Public Body. In any case where the response to an access request is no records found and there is some reason to question that response, I can receive a complaint from the Applicant, investigate the complaint and report on the investigation.
- [45] It is my intention to treat the Applicant’s request as a section 42 complaint about the administration of the ATIPP Act and the adequacy of the search for records. In its explanation about the video records, the Public Body indicates that if a request for video footage is made within a month of the recording taking place, the video may be extracted and saved indefinitely. The Applicant requested the video footage from [REDACTED]. His request for access to this record was made July 12, 2012 less than one month later. The explanation offered as to why this video recording was not located does not apply given the date this record was requested. This is reason to question the adequacy of the search and conduct an investigation.

## VI DECISION

I do not have jurisdiction to proceed with an inquiry under Part 5 section 48(1)(a) of the *Access to Information and Protection of Privacy Act* in the circumstances of this case.

May 15, 2013

ORIGINAL SIGNED BY

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Tim Koepke  
Yukon Information and Privacy Commissioner

Distribution List:

- Public Body – Justice
- Applicant
- Records Manager