



Yukon  
Information  
and Privacy  
Commissioner

## **INQUIRY REPORT**

**Pursuant to Section 52 of the**

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

**Department of Environment  
File ATP20-24R and ATP20-25R**

**Jason Pedlar, B.A., M.A.**

**Information and Privacy Commissioner**

**Department of the Environment**

**February 13, 2023**

## Summary

On October 21, 2019 an applicant (the “Applicant”) made two access requests to the Yukon Department of the Environment (the “Department”) for the following sets of information:

1. *All VHF collar relocation data, in entirety, for grizzly and black bears. This data may span 1980 to present. This should include collar fix data for any bear that was collared in Yukon by Yukon Government; and*
2. *All GPS collar relocation data, in entirety, for grizzly and black bears. This data may span 1980 to present. This should include collar fix data for any bear that was collared in Yukon by Yukon Government.*

The Department refused the Applicant access in full to the responsive records, citing as its authority subparagraphs 21(b) [disclosure harmful to conservation] in both instances. The Department further cited 25(1) [disclosure harmful to personal privacy] with respect to parts of the first set of data. The Applicant requested that the Information and Privacy Commissioner (the “IPC”) review the refusal. Settlement failed to resolve the matter and it proceeded to Inquiry.

The IPC found that the Department is not authorized to rely on subsection 25(1) to refuse to disclose the information sought by the Applicant and recommended that it provide the Applicant with access to the information to which they are entitled.

The IPC also found that the Department is not authorized to rely on subsection 21(b) to refuse to disclose the information sought by the Applicant and recommended that it provide the Applicant with access to the information to which they are entitled.

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## Statutes Cited

*Access to Information and Protection of Privacy Act*, SY 2002, c.9 (the “Act”);

*Access to Information and Protection of Privacy Act*, SY 2018, c.9 (the “New Act”);

*Interpretation Act*, RSY 2002, c.125;

*Wildlife Act*, RSY 2002, c 229;

*Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, S.C. 1992, c.52.

*Species at Risk Act* S.C. 2002, c.29

## Cases and Orders Cited

### Cases

*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R 27;

*Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31

### Orders

Order 01-11, [2001] B.C.I.P.C.D. No 12;

Order 01-52 [2001] B.C.I.P.C.D. No. 55;

Order 01-53 [2001] B.C.I.P.C.D No. 56;

Order 19-02 [2019] B.C.I.P.C.D No. 02;

### Reports

Yukon Inquiry Report ATP15-037AR;

Yukon Inquiry Report ATP15-055AR;

Yukon Inquiry Report ATP16-031AR;

Yukon Inquiry Report ATP20-06R;

Yukon Inquiry Report ATP20-07R; and

Northwest Territories (Energy and Natural Resources) (Re), 2012 CanLII 94606 (NWT IPC).

## Explanatory Note

All sections, subsections, paragraphs and the like referred to in this investigation report are to the Act, unless otherwise stated.

## I BACKGROUND

[1] On October 21, 2019, the Applicant made two access requests for the following information from the Department:

1. *All VHF collar data (e.g., telemetry relocations) from black and grizzly bears, including ground telemetry and aerial telemetry relocation data that may span 1980 to present, and would have been kept in 1 to 4 excel spreadsheets, in 1 to 4 excel workbooks. I am requesting these spreadsheets in full. This information is housed by the Department of Environment. Fulfillment of this request should include, but not be limited to the following data fields: Form, Relocation Type, Aircraft Registration, Pilot, Observer, Date (year, month, day), year, Time Located (24 hr), Time Zone, Time Standardized to PDT, Bear ID, Frequency, Location Quality, Number of Beats, Collar Type, BPM (Beats per Minute, Data upload from GPS collar, Dropped collar (Y or N), Activity, Disturbed by Aircraft (Y or N), Other collars present (Y or N), Other collar Frequency 1, Other collar Frequency 2, Uncollared bears present (Y or N), # Of uncollared bears present, Uncollared bear 1 age, Uncollared bear 1 sex, Uncollared bear 2 age, Uncollared bear 2 sex, Uncollared bear 3 age, Uncollared bear 3 sex, Waypoint Number, Latitude Degree, Latitude Minute, Latitude Second, Latitude Decimal Minute, Latitude, Longitude Degree, Longitude minute, Longitude Decimal Minute, Longitude, Local Area, Habitat, Densite (Y or N), Comments. If other fields are available, please include those in this information request. Please include all data on these spreadsheets, even if fields are blank. I am requesting the information in electronic format (e.g., the excel spreadsheets). January 1, 1980 – October 1, 2019; (the “VHF Data”); and*

2. *All GPS collar relocation data, in entirety, for grizzly and black bears. This data may span 1980 to present. This should include collar fix data for any bear that was collared in Yukon by Yukon Government. The information is contained by the Department of Environment in two to four excel spreadsheets, in two to four excel workbooks. I am requesting these spreadsheets in full. Fulfillment of this request should include any data that was provided from the collar through Argos, Iridium or other remote transmission, as well as through manual download. This will include but not be limited to the following fields: Bear ID, Collar Frequency, Fix #, UTC Date, UTC Time, Year, UTC Month, UTC Day, UTC Hour, UTC Min, UTC second, ap (indicates if AM or PM), Fix Status,*

*Receiver Health, Receiver Backup Battery, Antenna Feed Line, Almanac Status, Velocity East, Velocity North, Velocity Up, Latitude, Longitude, Lat, Long, Altitude, PDOP, HDOP, VDOP, TDOP, Temperature, Activity, Number of SVs. Please provide record of all transmissions and attempted transmissions, even if data was not obtained. If other fields are available, please include those in this information request. I am requesting the information in electronic format (e.g., the excel spreadsheet). January 1, 1980-October 1, 2019. (the "GPS Data")*

[2] Subsequently, the Records Manager assigned file number "A-8027" (the "GPS Access Request") to the GPS Data access request and activated it via an activation letter. The Records Manager then assigned the file number "A-8028" (the "VHF Access Request") to the VHF Data access request and activated it via an activation letter.

[3] On March 25, 2020, the Records Manager advised the Applicant that the Department had identified records responsive to the VHF Access Request (the "VHF Records"), but it was withholding them in full pursuant to the following provision(s):

- Paragraph 21(b) - Disclosure harmful to conservation or heritage site.
- Paragraph 25(1) - Disclosure harmful to personal privacy.

[4] Also on March 25, 2020, the Records Manager advised the Applicant that the Department had identified records responsive to the GPS Access Request (the "GPS Records"), but it was withholding them in full pursuant to the following provision(s):

- Paragraph 21(b) - Disclosure harmful to conservation or heritage site.

[5] On April 20, 2020, the IPC received requests for review from the Applicant in accordance with section 52 and assigned an Informal Case Resolution investigator to attempt settlement.

[6] Subsequently, the IPC assigned file number ATP-24R to the review of the Department's decision regarding the VHF Records and file number ATP-25R to the review of the Department's decision regarding the GPS Records.

[7] By July 3, 2020, the settlement of files ATP-24R and ATP 25R proved unsuccessful. As such, the IPC escalated both matters to Inquiry.

## II JURISDICTION

[8] The authority of the IPC to review the Department's decisions to refuse to provide an applicant with access to records is set out in subsection 48(1).

[9] These Inquiries are required to proceed under the jurisdiction of the Act pursuant to subsection 130(3) of the New Act.

### III INQUIRY PROCESS

[10] On July 10, 2020, the IPC issued written Notices of Inquiry to the parties wherein the issues for review were set out.

[11] Also on July 10, 2020, the IPC issued Notices to Produce Records to the Department. It required the Department to produce a complete, unredacted copy of all records identified as responsive to the GPS Access Request and the VHF Access Request, inclusive of a schedule of records.

[12] On August 12, 2020, the Department provided its submissions to the IPC in response to the Applicant's request for review.

[13] On August 28, 2020, the Applicant provided the IPC with their submissions.

[14] On September 11, 2020, the Department provided its reply to the Applicant's submissions.

### IV ATIPPA BROUGHT INTO FORCE

[15] On April 1, 2021, the New Act was brought into force and the Act was repealed. Section 130 of the New Act states as follows:

*130(1) The commissioner must, without delay after the coming into force of this section, take one of the actions under subsection (2) if*

*(a) The commissioner had received a request for a review made under 48(1), (2) or (4) of the former Act, or a request for a review of a complaint made under subsection 48(3) of the former Act, before coming into force of this section; and*

*(b) the commissioner had not, as of the day on which this section came into force, commenced the review, by means of an inquiry or investigation.*

*(2) The actions for the purpose of subsection (1) are the following:*

*(a) to conduct a review by means of an inquiry of the request for a review or an investigation of the complaint as if the former Act had not been repealed;*

*(b) to treat the request made under the former act as if it had been filed under section 90 of this Act on the day on which section 90 came into force...*

*(3) The former Act (including the requirement for a decision by a public body under subsection 58(1) of the former Act and any appeal to the Court under subsection 59(1) of the former Act) applies as if it had not been repealed in respect of a review of a request or a complaint made under the former Act if the commissioner has not concluded the review by means of an inquiry or investigation on or before the day immediately before the coming into force of this section.*

*(4)...*

[16] Our office received the Applicant's RFR of the Department's decision on the VHF Access Request and GPS Access Request from the Applicant on April 20, 2020, and commenced Inquires into the matters on July 10, 2020, the Inquires had not concluded before the New Act went into effect on April 1, 2021. As such the Act applies to the matters under review.

### III ISSUES

[17] There are two issues as follows:

- 1) Is the Department required by subparagraph 25(1) to withhold the information sought by the Applicant in their VHF Access Request?
- 2) Is the Department authorized by subparagraph 21(b) to withhold the information sought by the Applicant in their VHF Access Request and GPS Access Request?

[18] As subparagraph 25(1) is a mandatory provision and only applies to the VHF Records, I will examine its applicability first.

### IV RECORDS AT ISSUE

[19] The VHF Records in the custody and control of the Department consist of a spreadsheet containing grizzly bear collar data exported to six (6) PDF-formatted pages. The headings in this spreadsheet are generated from the software that accompanies the VHF collars.

[20] The GPS Records in the custody and control of the Department consist of a spreadsheet containing grizzly bear collar data exported to 474 PDF-formatted pages. The headings in this spreadsheet are generated from the software that accompanies the GPS collars.

[21] The information from these collars was obtained by downloading collar information.

[22] The records at issue in this investigation are limited to those containing the information requested by the Applicant in the GPS Access Request and VHF Access Request.

## V BURDEN OF PROOF

[23] Paragraph 54(1)(a) sets out the burden of proof relevant to this Investigation. It states that the burden is on the public body head to prove that an applicant has no right to the records or to the information withheld from the records.

*54(1) In a review resulting from a request under section 48, it is up to the public body to prove  
(a) that the applicant has no right of access to the record...*

## VI SUBMISSIONS OF THE PARTIES

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

[25] The submissions of the parties with regard to the analysis of section 21(b) was identical for both the VHF Records and the GPS Records. As such the matters will be considered together.

## VII ANALYSIS

### **Issue 1 – Is the Department required by subsection 25(1) of the Act to withhold, in part, the VHF Records sought by the Applicant in their VHF Access Request?**

[26] The Department is relying on subparagraph 25(1) to refuse, in part, the Applicant access to the VHF Records. The provision states as follows:

#### ***Relevant Law***

*25 (1) A public body must 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.*

#### ***Analysis***

##### Paragraph 25(1)

[27] Paragraph 25(1) is a mandatory exemption provision; its purpose is to prevent the release of information which may disclose information harmful to personal privacy. If it applies to the

information sought by the Applicant then the Department has no discretion about whether to disclose it; it must not.

[28] For paragraph 25(1) to apply the information requested by the Applicant must be “Personal Information.” “Personal Information” is defined in the Act as “recorded information about an identifiable individual.”

*Is all or part of the information sought by the Applicant “Personal Information”?*

[29] The Department in its original response to the VHF Access Request redacted the entirety of two columns, one entitled “Pilot” and one entitled “Obs”.

[30] The Department makes no representation as to the meaning of “Obs” but I take it to mean observation personnel.

[31] The columns entitled “Pilot” and “Obs” are populated with the last names of the respective personnel.

[32] Section three of the Act defines “Personal Information” as “recorded information about an identifiable individual.” The section goes on to specify that “Personal Information” includes, *inter alia*, “(a) the individual’s name, address or telephone number.”

[33] In light of the foregoing, I find that the “pilots” and “obs” named in the VHF Records to be “Personal Information”.

*Would disclosure of the VHF Records constitute unreasonable invasion of a third party’s personal privacy?*

[34] Disclosure of “Personal Information” to an applicant is not *prima facie* contrary to the Act, only if doing so constitutes an “unreasonable invasion of a third party’s personal privacy.”

[35] As stated above, it is the burden of the Department to prove that a provision of the Act allows or requires them to redact information from the VHF Records. Here the department has claimed a mandatory provision but provided no argument as to how it applies to the VHF Records.

[36] It is unclear to me on the face of it how paragraph 25 applies to the remaining person(s) identified in the VHF Records however as it is a mandatory provision, I must now undertake my own analysis in the absence of submission(s) from the Department.<sup>1</sup>

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<sup>1</sup>ATP16-031AR at para 90

[37] Paragraph 25(2) contains a number of clauses that describe situations in which an unreasonable invasion of a third party's personal privacy is deemed to have occurred. They are as follows:

*(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment, or evaluation;*

*(b) the personal information was compiled and is identifiable as part of an investigation into or an assessment of what to do about, a possible violation of law or a legal obligation, except to the extent that disclosure is necessary to prosecute the violation or to enforce the legal obligation or to continue the investigation;*

*(c) the personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels;*

*(d) the personal information relates to the third party's employment or educational history;*

*(e) the personal information was obtained on a tax return or gathered for the purpose of collecting a tax;*

*(f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness;*

*(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations;*

*(h) the personal information indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations; or*

*(i) the personal information consists of the third party's name together with the third party's address or telephone number and is to be used for mailing lists or solicitations by telephone or other means.*

[38] These provisions constitute rebuttable presumptions which may be overturned.<sup>2</sup> The list is exhaustive.<sup>3</sup>

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<sup>2</sup> ATP15-037AR at para 33

<sup>3</sup> ATP15-055AR at para 44

[39] Paragraph 25(4) then sets out additional considerations which must be canvassed to determine if personal information caught by Paragraph 25(2) should have the rebuttable presumption overturned. Those factors include the following:

- (a) the third party will be exposed unfairly to financial or other harm;*
- (b) the personal information is unlikely to be accurate or reliable;*
- (c) the personal information has been supplied in confidence;*
- (d) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant;*
- (e) the personal information is relevant to a fair determination of the applicant's rights;*
- (f) the disclosure is desirable for the purpose of subjecting the activities of the Government of the Yukon or a public body to public scrutiny; or*
- (g) the disclosure is likely to promote public health and safety*

[40] Failure to find that subsections 25(4)(a) through 25(4)(e) apply will suggest disclosure, as will positive findings of the factors identified in 25(4)(f) and 25(4)(g).

[41] Finally, paragraph 25(3) sets out circumstances under which a disclosure of personal information is deemed not to be an unreasonable invasion of privacy. These circumstances are as follows:

- (a) the third party has, in writing, consented to or requested the disclosure;*
- (b) there are compelling circumstances affecting anyone's health or safety and notice of disclosure is mailed to the last known address of the third party;*
- (c) an enactment of the Yukon or Canada authorizes the disclosure;*
- (d) the disclosure is for a research or statistical purpose in accordance with section 38;*

*(e) the information is about the third party's position, functions or salary range as an officer, employee or member of a public body or as a member of a Minister's staff;*

*(f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body;*

*(g) the information is a description of property and its assessment under the Assessment and Taxation Act;*

*(h) the information is about expenses incurred by the third party while travelling at the expense of a public body;*

*(i) the disclosure reveals details of a licence, permit, or other similar discretionary benefit granted to the third party by a public body, not including personal information supplied in support of the application for the benefit; or*

*(j) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, not including personal information that is supplied in support of the application for the benefit or is referred to in paragraph(3)(c).*

[42] The provisions of paragraph 22 of the British Columbia FIPPA are similar to the provisions of paragraph 25 of the Act. The order of operations for how the subparagraphs interact under FIPPA in British Columbia has been repeatedly considered<sup>4</sup> and can be summarized as follows (adapted for application to the Act):

- i. The section only applies to "Personal Information" as defined by the Act;
- ii. If any provision of paragraph 25(3) applies, there is no unreasonable invasion of third-party privacy and no further analysis is required;
- iii. If no provision of paragraph 25(3) applies, determine if any provision of paragraph 25(2) applies; then
- iv. Conduct an analysis of the considerations described in paragraph 25(4) to determine if the presumption under paragraph 25(2) should be rebutted; or

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<sup>4</sup> See Orders 01-53, 2001 CanLii 21607 (BCIPC) at paras 22-24; F19-02 2019 BCIPC 02

- v. If no provision of paragraph 25(2) applies, conduct an analysis of the considerations described in paragraph 25(4) to determine if an unreasonable invasion of third-party privacy exists on unenumerated grounds.

[43] I find this to be the proper order of operations in interpreting the provisions of paragraph 25 of the Act and will apply it here.

[44] The Department states that some of the people identified in the fields labelled "Pilot" and "Obs" are Government of Yukon employees, and some are not.

[45] As such I find that paragraph 25(3)(e) is engaged and the release of names which are, or were, Government of Yukon employees is not an unreasonable invasion of third party privacy.

[46] In any event, the Department has submitted that it will release the names of Government of Yukon employees and argues that the remainder of the names of personnel not employed directly by the Government of Yukon should continue to be redacted pursuant to paragraph 25(1).

[47] The Department makes no submissions as to the capacity in which the remaining names are affiliated with the Department or Government of Yukon. Further the Department makes no submission as to which provision of paragraph 25 they believe applies to the remaining names.

[48] The Applicant makes no submissions in their materials on information redacted pursuant to paragraph 25(1).

[49] In the absence of any evidence to the contrary, I can only come to the conclusion that the remainder of the persons named in the VHF Records were either engaged directly by the Department on a contractual basis or that they are employees of a company engaged by the Department on a contractual basis.

[50] In the event of the former, I find that paragraph 25(3)(f) is engaged and the release of the remainder of the names in the VHF Records cannot constitute an unreasonable invasion of third-party privacy. In the event of the latter, where paragraph 25(3)(f) does not apply, I will conduct the remainder of the section 25 analysis.

[51] In ATP13-037AR the IPC considered the question of release of names without any further identifying information, and found as follows:

*[131] As is the case with Alberta's section 17, subsection 25(2) does not create a rebuttable presumption that the release of third party's name to an applicant would constitute an unreasonable invasion of the third party's personal privacy. Among the*

*circumstances listed in subsection 25(3) not to constitute an unreasonable invasion of personal privacy, release of a third party's name does not appear. However, the circumstances listed in subsection 25(2) and (3) are non-exhaustive.*

[52] As paragraph 25(2) does not apply to the release of names with no further identifying information, the final step of the analysis is to determine if the considerations in paragraph 25(4) warrant redaction on unenumerated grounds.

[53] In the absence of any submissions to the contrary, I cannot find that 25(4)(a-e) or 25(4)(g) apply to the current circumstances. I do find that paragraph 25(4)(f) applies in that disclosure of records is generally desirable for the purpose of subjecting the activities of the Government of Yukon or the Department to public scrutiny.

[54] As paragraph 25(4) is non-exhaustive, and section 17 of Alberta's FOIPPA is similar to our paragraph 25, I also consider the comprehensive findings of Alberta's IPC Wade Riordan Raaflaub in Order F2008-028 wherein he states at paragraphs 53 and 54:

*... many previous orders of this Office have made it clear that, as a general rule, disclosure of the names, job titles and signatures of individuals acting in what I shall variably call a "representative", "work-related" or "non-personal" capacity is not an unreasonable invasion of their personal privacy. I note the following principles in particular (with my emphases in italics):*

- *Disclosure of the names, job titles and/or signatures of individuals is not an unreasonable invasion of personal privacy where they were acting in formal or representative capacities (Order 2000-005 at para. 116; Order F2003-004 at paras. 264 and 265; Order F2005-016 at paras. 109 and 110; Order F2006-008 at para. 42; Order F2008-009 at para. 89).*
- *Disclosure of the names, job titles and/or signatures of individuals acting in their professional capacities is not an unreasonable invasion of personal privacy (Order 2001-013 at para. 88; Order F2003-002 at para. 62; Order F2003-004 at paras. 264 and 265).*
- *The fact that individuals were acting in their official capacities, or signed or received documents in their capacities as public officials, weighs in favour of a finding that the disclosure of information would not be an unreasonable invasion of personal privacy (Order F2006-008 at para. 46; Order F2007-013 at para. 53; Order F2007-025 at para. 59; Order F2007-029 at paras. 25 to 27).*

- *Where third parties were acting in their employment capacities, or their personal information exists as a consequence of their activities as staff performing their duties or as a function of their employment, this is a relevant circumstance weighing in favour of disclosure (Order F2003-005 at para. 96; Order F2004-015 at para. 96; Order F2007-021 at para. 98; Order F2008-016 at para. 93).*

*[para 54] I further note that the foregoing principles have been applied not only to the information of employees of the particular public body that is a party to the inquiry, but also to that of employees of other public bodies (Order F2004-026 at paras. 100 and 120), representatives of organizations and entities that are not public bodies (Order F2008-009 at para. 89; Order F2008-016 at para. 93), individuals acting on behalf of private third party businesses (Order 2000-005 at para. 115; Order F2003-004 at para. 265), individuals performing services by contract (Order F2004-026 at paras. 100 and 120), and individuals acting in a sole or independent capacity, such as lawyers and commissioners for oaths (Order 2001-013 at paras. 87 and 88; Order F2003-002 at para. 61). In my view, therefore, it does not matter who the particular individual is in order to conclude, generally, that section 17 does not apply to personal information that merely reveals that an individual did something in a formal, representative, professional, official, public or employment capacity.*

## Conclusion

[55] In light of the forgoing, I find that, in the event the remaining names are employees of a company contracted by the Department, the disclosure of their names would not constitute an unreasonable invasion of a third party's privacy.

## **Issue 2 – Is the Department authorised by subsection 21(b) of the Act to withhold the GPS Records and VHF Records sought by the Applicant in their Access Requests?**

[56] The Department is relying on subparagraph 21(b) to refuse the Applicant access to the GPS Records and VHF Records. The provision states as follows:

### ***Relevant Law***

*21 A public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to result in damage to, or interfere with the conservation of*

*(b) a species of plants, animals or invertebrates that is endangered, threatened or vulnerable in the Yukon or in any one or more regions of the Yukon; or...*

## **Analysis**

### Paragraph 21(b)

[57] Paragraph 21(b) is a discretionary exemption provision; its purpose is to prevent the release of information which may damage or interfere with the conservation of species at risk within the Yukon.

[58] In Yukon Inquiry Report ATP20-06R, the IPC set out the test for a public body to meet in order to rely on paragraph 21(b). The test is as follows:

*[103] In order for the Department to be able to rely on this provision to refuse the Applicant access to the information requested about the Porcupine caribou herd, it will have to prove that:*

*(a) disclosure of this information could reasonably be expected to result in 'probable' damage to, or interfere with the conservation of;*

*(b) a species of...animals that is endangered, threatened or vulnerable in Yukon or in any one or more regions of Yukon; and*

*(c) that upon determining that subsection 21 (b) applies to the information, that it exercised its discretion [reasonably] in deciding to refuse the Applicant with access to the information they requested.*

[59] As it constitutes the initial threshold of the test, I will examine part (b) first.

*Are black bears (Ursus americanus) and/or grizzly bears (Ursus arctos) a species of animal?*

[60] Neither the Department nor the Applicant have made submissions as to whether black bears and/or grizzly bears constitute a species of animals. Despite this, the IPC takes notice of the fact that each variety of bear in question constitutes a species of animal.

*What does it mean for a species to be endangered, threatened or vulnerable in the Yukon or in any one or more regions of the Yukon?*

[61] In Yukon Inquiry Report ATP20-06R,<sup>5</sup> the IPC examined these three terms, stating as follows:

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<sup>5</sup> Inquiry Report ATP20-06R at pages 36-41.

[118] *The terms ‘endangered, threatened or vulnerable’ are qualified in [paragraph 21(b)] by the species that they refer to; in this case, ‘animals’. They are further qualified by the words “reasonably be expected to result in [probable] damage to, or interfere with the conservation of” in section 21. Taken together, these provisions exist to protect against damage to or interference with the conservation of species that are endangered, threatened or vulnerable, where it is probable that the damage or interference will occur because information about them is disclosed to an applicant.*

[119] *The conservation of animal species is a specialized field. It is within this field that animals are classified as endangered, threatened, vulnerable, or otherwise. Based on my review of the evidence, it appears that the classification of an animal species drives conservation efforts. As such, it is within this field that these terms must be defined.*

[134] *For purposes of [paragraph] 21(b)], I find, based on COSEWIC definitions, that for animal species, the meanings of ‘endangered’ and ‘threatened’ are as follows:*

*‘Endangered’ means an animal species facing imminent extirpation or extinction.*

*‘Threatened’ means an animal species that is likely to become endangered if nothing is done to reverse the factors leading to its extirpation or extinction.*

[136] *...I find that the meaning of ‘vulnerable’ for the purposes of paragraph 21(b) is:*

*‘Vulnerable’ means an animal species that may become threatened or endangered because of a combination of biological characteristics and identified threats.*

[62] Neither the Applicant nor the Department have made submissions on the definition of ‘endangered’ or ‘threatened’ and as such the terms shall be used here as previously defined.

[63] Both the Applicant and the Department have made submissions on the meaning of the term ‘vulnerable’.

[64] The Department suggests that vulnerable be taken to mean its dictionary definition, being **“vulnerable (to somebody/something) weak and easily hurt physically or emotionally.”** [original emphasis]

[65] The Department goes on to suggest that “Using this definition, grizzly and black bears are vulnerable at certain phases of their lifecycles...”<sup>6</sup> such as their “prolonged denning period,

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<sup>6</sup> Para 13

beginning in the fall and not reemerging until the spring (ranging between 4 to 7 months). During this period they will hibernate or nurse their cubs.”<sup>7</sup>

[66] In response, the Applicant submits that such an expansion of the term would lead to all species of animals being considered vulnerable and that other jurisdictions use a narrower interpretation of the term.

[67] While I respect the ingenuity of the Department’s argument, I must agree with the Applicant. If the Yukon Legislature had wanted paragraph 21(b) to apply to all animals, then it would have done so. Instead, there is clear intent for the clause to apply to a subsection of all animals in the Yukon.

[68] As such I see no reason to deviate from the definition of ‘vulnerable’ established by my predecessor in Inquiry Report ATP20-06R as set out above.

[69] The Department submits in its Reply that:

*[A] species designated as vulnerable by COSEWIC, or which is protected under other federal statutes, such as the Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act, which protects species listed under the Convention on International Trade in Endangered Species of Wild Fauna and Flora, meets the legal test for “a species of plants, animal or invertebrates that is endangered, threatened or vulnerable in the Yukon or in any one or more regions of the Yukon” under s.21 of ATIPP.*<sup>8</sup>

[70] In support of this proposition, the Department quotes the British Columbia Information and Privacy Commissioner Loukidelis in Order 01-52, [2001] BCIPCD No. 55 where the Commissioner states “I consider that, **in the absence of evidence to the contrary**, a species designated as vulnerable by COSEWIC or blue-listed by CDC would qualify as vulnerable for the purposes of s.18(b)”<sup>9</sup> [emphasis added].

[71] The Department further cites Northwest Territories Information and Privacy Commissioner Review Report 12-113 (dated December 4, 2012) wherein the Commissioner states “... that the polar bear is a species that has challenges and is at some danger in terms of its survival. **This is apparent from the COSEWIC assessment** and analysis done by the federal equivalent to the Northwest Territories’ SARC.”<sup>10</sup> [emphasis added]

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<sup>7</sup> Para 16

<sup>8</sup> Para 8(g)

<sup>9</sup> Order 01-52, [2001] BCIPCD No. 55, at para 44

<sup>10</sup> Northwest Territories (Energy and Natural Resources)(Re), 2012 Canlii 94606 (NWT IPC)

[72] Finally, the Department notes that “Canada implements the protection of the species listed under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (“CITIES”) through Schedule 1 of the *Wild Animal and Plant Trade Regulations*” and goes on to indicate that bears are listed in s.1.1.2.14(1) of Part 1 therein.

[73] CITIES is an international agreement between member countries to help ensure that trade of plant and animal specimens is not harmful for the survival of the species.

[74] To accomplish this goal, CITIES contains three appendices – I, II, and III. Appendix I “lists the species that are the most endangered among CITIES-listed animals and plants.”<sup>11</sup> Appendix II lists species that are “not necessarily now threatened with extinction but may become so unless trade is closely controlled. It also includes so-called ‘look-alike species’ (*i.e.*, species whose specimens in trade look like that of species listed for conservation reasons”).<sup>12</sup> Appendix III “is a list of species included at the request of a Party [to the convention] that already regulates trade in the species and that needs the cooperation of other countries to prevent unsustainable or illegal exploitation.”<sup>13</sup>

[75] Species listed in each of the CITIES appendices are afforded varying levels of protection by member states depending on which appendix they are listed in.

[76] Canada is a signatory party to CITIES.<sup>14</sup>

[77] As noted by the Department, the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act* is how Canada implements its obligations under CITIES. The *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act* purports to “protect certain species of animals and plants, particularly by implementing the [CITIES] Convention and regulating international and interprovincial trade in animals and plants.”<sup>15</sup>

[78] The *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act* makes no claim to evaluate, designate, or classify species of animals beyond identifying the extent to which they are described under CITIES.

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<sup>11</sup> <https://cites.org/eng/app/index.php>

<sup>12</sup> *ibid*

<sup>13</sup> *ibid*

<sup>14</sup> see <https://cites.org/eng/disc/parties/chronolo.php>

<sup>15</sup> *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act* (S.C. 1992, c.52) at para 4

[79] CITIES appendices I, II, and III contain species of flora and fauna whose status range from endangered to plentiful. The *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act* regulations list every species of flora and fauna found in all three of the CITIES appendices and indicate which CITIES appendix the species is found under.

[80] The Department suggests that merely by being listed in the regulations of the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, a species meets the legal test for endangered, threatened or vulnerable with no reference to which CITIES appendix the species appears in.

[81] As CITIES appendices II and III may contain species that are not endangered, threatened or vulnerable, it cannot be the case that the mere inclusion of a given species in the regulations of the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act* must necessarily meet the legal test for endangered, threatened, or vulnerable for the purposes of paragraph 21(b).

[82] I would agree with the Department and the writings of Commissioner Loukidelis that the designation of a species as vulnerable by COSEWIC or the federal *Species at Risk Act*<sup>16</sup> ('SARA') creates a *prima facie* or rebuttable presumption that the species in question is endangered, threatened or vulnerable. I would extend this presumption to species recognized in Appendix I of CITIES as well.

[83] This aligns with the findings of the former Yukon IPC in Inquiry Report ATP20-07R wherein she states:

*[...] a determination by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) that an animal species classified by them as endangered, threatened or a species of special concern would suffice to meet this part of the subsection 21 (b) test. I further determined that the classification of a species at risk under the Federal [sic] Species at Risk Act (SARA) would also suffice, as would a designation of an animal as specially protected wildlife under the Yukon's Wildlife Act and Wildlife Regulation.<sup>17</sup>*

[84] Finally, the term 'in the Yukon or in any one or more regions of the Yukon' has been interpreted by my office as follows:

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<sup>16</sup> *Species at Risk Act* (S.C. 2002, c.29)

<sup>17</sup> at para 28

[26] I also found that the inclusion of these words limits the applicability of the exception to information in the custody or control of a public body that is **about species found in Yukon**. For animal species, it would be those species whose habitat **includes** lands within the geographical bounds of Yukon. The provision would not apply to **information** in the custody or control of a public body that is about a species 'endangered, threatened or vulnerable' beyond those boundaries.<sup>18</sup> [emphasis added]

[85] I take the above to mean that paragraph 21(b) applies to any animal that is considered endangered, threatened or vulnerable and also has habitat that includes land within the geographical bounds of the Yukon. It does not mean that the population of a species within the Yukon must be endangered, threatened or vulnerable for paragraph 21(b) to apply.

*Are black bears endangered, threatened or vulnerable in the Yukon or in any one or more of its regions?*

[86] The submissions of the Department on black bears rely on its expanded definition of 'vulnerable' as well as their inclusion in the regulations of the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*.

[87] The Applicant submits that "black bears have no status designation, in Yukon or anywhere else globally."

[88] Bears (*Ursidae spp.*) (all species) are listed in Appendix II of CITIES.<sup>19</sup> However, black bears are not specifically listed in any Appendix to CITIES. As such, bears (all species) are listed in the regulations to the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*.

[89] The Applicant submits that the inclusion of bears (all species) has to do with so-called 'look-alike species' and not because of any vulnerability. The Department makes no submission on the reason for the inclusion of bears (all species) in CITIES Appendix II.

[90] As discussed above, inclusion in the regulations of the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act* cannot be sufficient evidence on its own for a species to be considered endangered, threatened or vulnerable.

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<sup>18</sup> *ibid*

<sup>19</sup> <https://cites.org/eng/app/appendices.php>

[91] The Department bears the burden of proof but has provided no submissions regarding the actual numbers of black bears in the Yukon, nor whether the population numbers support an endangered, threatened, or vulnerable designation.

[92] As such, I cannot find that black bears are endangered, threatened, or vulnerable in the Yukon or in any one or more of its regions.

*Are grizzly bears endangered, threatened or vulnerable in the Yukon or in any one or more of its regions?*

[93] The Department submits three grounds on which grizzly bears (western population) are vulnerable in the Yukon, or in any one or more of its regions. Two of which, being by way of an expanded definition of 'vulnerable' and by virtue of their inclusion in the regulation to the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, have been addressed above.

[94] The third ground is the designation of grizzly bears as a species of 'Special Concern' under Part 4 of Schedule 1 of SARA.

[95] The Applicant notes that the grizzly bear is not listed as a specially protected species of wildlife by the Yukon *Wildlife Act*, which is the territorial equivalent of SARA.

[96] The Applicant further notes that the "Conservation plan for grizzly bears in Yukon" document produced by the Yukon Fish and Wildlife Management Board describes the population in the Yukon as "Stable."

[97] The Applicant also suggests that 'traditional knowledge studies' have defined the grizzly bear population in the Yukon as 'abundant'; however, the reference given refers only to the population in the Yukon north slope region.

[98] I note that Natureserve, referenced with approval by the IPC in Yukon Inquiry Report ATP20-07R<sup>20</sup>, lists grizzly bears in the Yukon as vulnerable<sup>21</sup>, their definition of which is "at moderate risk of extinction or collapse due to a fairly restricted range, relatively few populations or occurrences, recent and widespread declines, threats, or other factors."<sup>22</sup>

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<sup>20</sup> at Para 39

<sup>21</sup> [https://explorer.natureserve.org/Taxon/ELEMENT\\_GLOBAL.2.102187/Ursus\\_arctos](https://explorer.natureserve.org/Taxon/ELEMENT_GLOBAL.2.102187/Ursus_arctos)

<sup>22</sup> <https://explorer.natureserve.org/AboutTheData/DataTypes/ConservationStatusCategories>

[99] While the burden to prove that grizzly bears are an ‘endangered, threatened or vulnerable’ species in any one or more regions of the Yukon falls on the Department, it has met the test by demonstrating that grizzly bears are designated as a species of Special Concern pursuant to Part 4 of Schedule 1 of SARA.

[100] I find the Applicant’s submissions insufficient to overturn the rebuttable presumption enjoyed by the Department on this point. As such I find that grizzly bears are vulnerable in the Yukon, or in one or more of its regions.

*Would disclosure of the GPS Records or VHF Records reasonably be expected to result in ‘a reasonable expectation of probable damage’ to grizzly bears?*

[101] As black bears are not endangered, threatened, or vulnerable, it is not necessary to discuss whether release of the VHF Records and GPS Records may result in damage to the species.

[102] In Yukon Inquiry Report ATP15-055AR, the IPC stated that whenever the words ‘reasonably expected’ appear in the Act, the word ‘probable’ ought to be added to ensure the middle ground between ‘that which is merely possible’ and ‘that which is probable’ is achieved. This interpretation is based on a decision by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* [‘Ontario CSCS’]. It stated the following about how these words are to be interpreted:<sup>23</sup>

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

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<sup>23</sup> 2014 SCC 31 (CanLII), at para. 54.

[103] It is unnecessary to show, on a balance of probabilities, that the harm will occur if the information is disclosed.<sup>24</sup> However, a public body must demonstrate that the risk of harm is well beyond the merely possible or speculative. It does not have to demonstrate that harm is probable but there needs to be a reasonable basis for believing that the harm will result.<sup>25</sup>

[104] In this instance, the ‘harm’ referred to by the SCC in *Ontario CSCS/Merck Frosst* is “Damage to a species... that is endangered, threatened or vulnerable in the Yukon or in any one or more regions of the Yukon.”

[105] The Department’s assertions with respect to damage that may be caused to grizzly bears can be summarized as follows:

- i. There is economic incentive for the illegal harvest of grizzly bears;
- ii. The release of grizzly bear collar data will result in the discovery of, *inter alia*, grizzly bear habitual denning sites and foraging areas;
- iii. The discovery of habitual denning and foraging areas for grizzly bears will both allow more successful licensed hunting as well as increased levels of illegal harvesting; and
- iv. [the assertion is implied but never concisely stated] Any increase in successful licensed hunting and illegal harvesting levels is *prima facie* damaging to grizzly bears as a species.

[106] In support of its argument, the Department has offered the statutory declaration of Robert Perry – Species Manager, the statutory declaration of Ryan Hennings – Acting director of Fish and Wildlife Branch, Department of Environment, and several appendices.

[107] In support of assertion (i), the Department submits an article as ‘appendix 3E’ regarding the systematic poaching or illegal harvest of black bears in Quebec.

[108] In addition, the Department submits Exhibit ‘A’ to the statutory declaration of Ryan Hennings which consists of five (5) enforcement reports dealing with various charges related to the harvest and sale of black bears. The enforcement reports range in date from 1996 to 2015.

[109] It is unclear whether the Department has no enforcement records that pre-date 1996 or if it chose not to include such records given that Mr. Hennings began his employment as a Conservation Officer with the Government of Yukon in 1996.

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<sup>24</sup> *Ibid.* at para. 52.

<sup>25</sup> *Ibid.* at para. 59.

[110] Mr. Hennings' affidavit states at para 5:

*As conservation officer, then as the District Conservation stationed in the Watson Lake District, I investigated several complaints believed to be involved with the trafficking of bears and bear parts. This included documenting and investigating bear kill sites throughout the district where the claws, paws, skulls or gall bladders of **black bears** were removed from the scene. [emphasis added]*

[111] No evidence or argument is presented by the Department regarding the financial motivation for the illegal harvest of grizzly bears; it is left to the reader to assume that such a market exists by virtue of the market for black bears.

[112] In fact, grizzly bears are mentioned by name only once in both statutory declarations combined; instead, they refer to black bears, or bears generally.

[113] Despite this, Exhibit 3E – being the CBC news article titled “100 Quebec black bears slaughtered as part of gallbladder-trafficking ring, officials say” – states in its first paragraph that “a bear’s gallbladder can sell for up to \$250 – a figure that rises to \$10,000 in Asia (Priscilla Plamondon Lalancette/Radio-Canada).”<sup>26</sup> I take this as evidence that the gallbladder of any bear has some value but it is unclear as to the market, if any, for other parts of a grizzly bear. Given the lack of documentation on this matter, it is also unclear as to the extent to which the market for bears’ gallbladders generally drives the illegal harvest of grizzly bears specifically.

[114] The Applicant makes no submissions on the value, or lack thereof, of illegal grizzly harvest in the Yukon other than to note that the remoteness of the region and existing regulatory enforcement likely render the illegal harvest of grizzly bears in the Yukon unprofitable.

[115] In support of assertion (ii) of the Department’s argument, Mr. Hennings states:

11. *For example, the release of this information would provide the applicants the ability to analyze the data included to identify critical bear habitats, their use, and patterns throughout the year to exploit bear populations for illegal or commercial gain, or distribute to other parties for these purposes.*

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<sup>26</sup> <https://www.cbc.ca/news/canada/montreal/black-bear-poaching-ring-1.4754071>

[116] As well, Mr. Perry states:

9. *The following are specific concerns regarding the release of bear tracking data as it pertains to their vulnerability:*
  - a) *Bears are creature of habit and will repeatedly traverse over, or will return to, locations previously visited;*
  - b) *During the winter both grizzly and black bears hibernate for prolonged periods. This sedentary behaviour makes them particularly vulnerable to exploitation (see case studies attached to the Public Body's Initial Submissions). Often these hibernation sites are preferred locations which are used repeatedly;*
  - c) *Bears also repeatedly use favoured grazing or feeding areas;*
  - d) *As it pertains to the location data, these behavior traits place bears at particular risk because hunters and poachers can exploit the information to identify when and where bears are present;*

[117] In response, the Applicant states:

*This raises another issue related to the granularity of the information. That is, if I were interested in hunting a bear, what does all this information get me that I don't already have? Keep in mind many or most of the animals represented by the data are already dead. Bears do not repeatedly use the exact same spot (i.e., meter) at the exact same time each year. Females with cubs, who have the least motility among bear cohorts roam over 9km<sup>2</sup> per day. Bears may use different areas from year to year. There is significant variation in the timing of when they emerge from a den and where they forage each year. The variation can be hard to predict and the species are wide ranging.*

[118] The Department in its reply concedes that bears do not return to the same den, but rather that they "repeatedly return to the same denning area."

[119] Neither the Applicant nor the Department make any submissions on the likelihood of a grizzly bear to use, or re-use, the den or denning area, of another bear once it has moved on from that location or died.

[120] I am satisfied by the Department's submissions that the GPS Records and VHF Records contain sufficient data, at discrete enough resolution, to allow for the identification of habitual grizzly bear denning and foraging areas, if not specific sites.

[121] Assertion (iii) of the Department's argument claims that the release of such habitual grizzly bear denning areas and foraging sites will allow for greater success by both licensed and unlicensed hunters.

[122] The Applicant notes, and my review corroborates, that the Department submits no data regarding the illegal harvest of grizzly bears other than to state that it happens and will increase should the VHF Records or GPS Records be released to the public.

[123] Similarly, the Department provides no data regarding licensed grizzly bear harvest, such as what percentage is currently successful, and the extent to which it believes that would increase should the VHF Records and GPS Records be released.

[124] By contrast, the Applicant submits that:

*[T]he primary factor that drives the intensity of legal or illegal harvest [of grizzly bears] across North America is road access. Wildlife populations that have limited road access into their ranges experience very little harvest pressure, regardless of availability of information on their location. Bear populations in Yukon that experience higher harvest pressure are those that have roads. This is evidence from research conducted in Yukon (e.g., <https://prism.ucalgary.ca/handle/1880/102032>) and from Yukon's kill data.*

[125] This appears corroborated by the Department's submissions at para 15 where it quotes the 2012 COSEWIC Assessment and Status Report, with no page or paragraph reference, that "highly sensitive to human disturbance and [are] subject to high mortality risk in areas of human activity and **where roads create access.**" [emphasis added]

[126] In further reply, the Applicant states that "historical location information for animals only allows a hunter to 'estimate' an animal's present location. There is no guarantee that an animal will be in the location it last stood, or in the 'estimated' area. An animal may use a general area..." and that "This is no[t] real time data; therefore, I cannot track to an animal wearing a collar, and I cannot find the exact location an animal will be at any given time. I can only use the data to approximate where animals have been ten years prior."

[127] Much was made in the submissions of both parties regarding the existence of other data freely available that may render the GPS Records and VHF Records redundant. The Applicant suggests part of the harm test is that "disclosure of the information must supply individuals with an opportunity *they would not otherwise have*" (emphasis in original) and while this

phrase does appear in the writing of Commissioner Loukidelis, a careful examination of the context reveals that it was in fact an argument put forth by the City in Order 01-11, [2001] B.C.I.P.C.D. No 12, and never adopted by the Commissioner in that order or subsequently.

[128] While not grounds on its own, the extent to which alternate information is available regarding the location of a species may speak to the probability of damage that release of additional information may have. If, for example, a species which had been previously considered to be extinct in the Yukon was discovered by the Department, and known only to the Department, the possibility that release of its location may cause damage to the species would be high. This is contrasted against a situation where there is abundant information available regarding the location(s) of a species. In that case, the possibility of damage to the species resulting from the release of those records would be greatly diminished.

[129] While not their burden to meet, the Applicant submits several sources which appear to reliably track and/or detail grizzly bear locations in the Yukon. The Department disputes two of the sources, the first being a website named “WildWise” which the Complaint suggests details the location of “grizzly and black bears that were seen in close proximity to residences.” The Department argues in its reply that “...the WildWise website... clearly states that the locations identified within urban areas are not representative of natural habitat use, but indicative of general areas that could benefit from better attraction management.” The Department then quotes the website where it states that the map icons “...represent all of the incidents reported to Yukon Conservation Officer Services beginning in 2012 and ending in 2017 that relate to garbage, compost, bird feeders, and chicken coops” and notes that the website specifies “All coordinates are approximate. We have scrubbed all identifying data...” to come to the conclusion that “these are not illustrations of real time bear locations.” While this is true, and I will note that I put little weight to the content of this site as its locations are scrubbed, the point remains that data surrounding the historic location of bears is available freely.

[130] The second source which the Department challenges is “The Whitehorse Bear Hazard Assessment Map”<sup>27</sup> suggesting that it “is not of a resolution adequate to identify coordinates of bear locations.” Despite this, the document contains a number of maps of which the Applicant sagely notes that “The composite of all of these maps is [such] that one could easily pin point the best locations to look for and poach a bear in the absence of any other information about bears.” On review of the entire Assessment from which the map in question is retrieved, it is

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<sup>27</sup> Whitehorse Bear Hazard Assessment at page 38 (<https://www.whitehorse.ca/wp-content/uploads/2022/04/2015WhitehorseBearHazardAs.pdf>)

apparent that combining the data contained therein would provide extensive, if approximate, ranges over which bears frequent in the Whitehorse area.

[131] The Department does not attempt to rebut any of the other five sources provided by the Applicant. Most notably are a University of Calgary thesis project which uses VHF collar data and purports to locate mother and cub bears to within 30 metres<sup>28</sup> as well as the iNaturalist website which records and maps, *inter alia*, reported grizzly bear sightings to within a metre.

[132] For its part, the Department submits that surrounding jurisdictions also refuse to release data related to bear collar, denning, and foraging areas. This is supported by an unsworn document as 'appendix 4' which appears to list contact persons in various jurisdictions as well as briefly setting out a summary of their respective department's stance on the release of such data. I agree with Commissioner Loukidelis when he states:

*I am not inclined to attach significant evidentiary value to bald statements by wildlife officials in other jurisdictions in support of the Ministry's position in the inquiry or statements by such officials predicting what would or should be the outcome of a similar inquiry in another jurisdiction. Further, the existence of requirements prescribed by an access to information law in another jurisdiction will not constitute evidence of harm in the context of this inquiry.*<sup>29</sup>

[133] Recall that it is the Department's burden to make out that its concerns amount to more than mere speculation. It appears on the evidence before me that the main driver of grizzly bear harvest, both legal and illegal, is road access. This is further corroborated by the 2012 COSEWIC Assessment and Status Report which states, with regard to the Yukon population, that "The absence of spatial restrictions on resident harvest, in combination with all other sources of mortality has placed substantial pressure on [g]rizzly [b]ear populations **adjacent to highways and in areas of higher human density.**"<sup>30</sup> [emphasis added]

[134] In my view, the Department has failed to demonstrate any rational connection between the release of the VHF Records and GPS Records and its proposition that the same will lead to a probable increase in bear harvest, and, if so, to what extent.

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<sup>28</sup> Evaluating the Ecological consequences of human land-use on grizzly bears in southwest Yukon, Canada at <https://prism.ucalgary.ca/handle/1880/102032>

<sup>29</sup> [2001] B.C.I.P.C.D. No. 55, Order 01-52 at para 109

<sup>30</sup> COSEWIC Assessment and Status Report on the Grizzly Bear *Ursus Arctos* Western population Ungava population in Canada, at Pg 52

[135] The extent to which release of the VHF Records and GPS Records may increase legal or illegal grizzly bear harvesting is pertinent for evaluating the final pillar of the Department's argument, something I characterise as assertion (iv). In other words, any such increase constitutes a *prima facie* damage to grizzly bears as a species.

[136] In their submission, the Applicant argues that 'damage' in this context must "refer to harming a habitat, or impairing the health or safety of a population of an endangered, threatened or vulnerable animal or plant species or subspecies." The Applicant goes on to emphasize the point, adding that "This is an important distinction from harming an individual within a population."

[137] The Department made no explicit submission on the definition of 'damage to a species' in either its initial submission or reply.

[138] I must disagree in part with the Applicant's argument. It is clearly possible for a species to be so endangered that damaging a single individual within a population would constitute harm to the entire population. That said, it would be up to the public body in question to make such an argument and it has not been put forward here.

[139] I must also disagree with the argument that the Department appears to make, that any increase in grizzly bear harvest is *prima facie* a damage to the species. It is untenable for the Department to argue on the one hand that any harvest is damaging and, on the other, to allow legal hunting at the same time.

[140] As 'damage to a species' has not been previously defined by the Yukon IPC, I will do so here. The Oxford Languages dictionary defines 'damage' as "physical harm caused to something in such a way as to impair its value, usefulness, or normal function."

[141] To impair the 'value, usefulness, or normal function' of an entire species would require the loss of a number of individuals so great as to be detrimental to the long-term survival of the species. The extent or number of individuals in question must be assessed contextually.

[142] Based on the foregoing, I find the meaning of 'damage to a species' to be as follows. *The significant destruction or loss of habitat for, or the harvest of an unsustainable number of a species of plants, animals or invertebrates that is endangered, threatened or vulnerable.*

[143] Neither the Department nor the Applicant make any submissions suggesting that the release of the GPS or VHF Records will result in loss of habitat for grizzly bears; as such, I will constrain the rest of my analysis to their harvest.

[144] Neither party has made submissions regarding sustainable level of harvest for grizzly bears in the Yukon. However, the 2012 COSEWIC Assessment and Status Report estimates that a harvest of approximately three per cent is sustainable even in sub-optimal reproductive conditions.<sup>31</sup> Taken at the most conservative estimate of grizzly bears in the Yukon – 6,000 – this rate of harvest equates to 180 individuals per year. Table 6 of the 2012 COSEWIC Assessment and Status Report indicates a ‘known mean annual kill’ in the Yukon of 93.2 bears for the period between 1990 and 1999 and 86.8 bears for the period between 2000 and 2009.<sup>32</sup>

[145] Notably, the same table shows no ‘known illegal kills’ occurring in the Yukon between 1990 and 2009.<sup>33</sup> While this may data be incomplete, it underscores the rarity of illegal grizzly kills in the Yukon.

[146] Taken together, the foregoing suggests that to meet its burden, the Department would have to demonstrate that not only would the release of the GPS Records or VHF Records increase hunter success and illegal poaching, but that it would do so to such an extent as to make total grizzly bear harvest unsustainable – in this case more than doubling the mean annual number of grizzly bear kills in the territory.

[147] As such, I cannot find, on the submissions provided, that the release of the VHF Records and GPS Records could reasonably be expected to result in probable damage to the species.

*Would disclosure of the VHF Records or GPS Records reasonably be expected to result in ‘probable’ interference with the conservation of grizzly bears?*

[148] As black bears are not endangered, threatened, or vulnerable, it is not necessary to discuss whether release of the Records may result in interference with their conservation.

[149] To determine if conservation would be interfered with by release of the GPS Records and VHF Records, it will be informative to first define conservation in the context of paragraph 21(b). As the Applicant states in their submissions “defining the concept of conservation is non-trivial to assessing the applicability of this exemption to the access request because the harms

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<sup>31</sup> *ibid* at page 44

<sup>32</sup> *ibid* at page 43

<sup>33</sup> *ibid*

test is against the conservation of the species, not an individual, or even some individuals of a species.”

[150] The Applicant submits that conservation, in the context of paragraph 21(b), means “the safeguarding of a resource for the future by active physical preservation and/or legal protection” and that interference with conservation means “any activity that might threaten the continued existence of a population.”

[151] The Department makes no submission on the definition of ‘conservation’ other than to suggest that due to uncertainty surrounding the actual population of grizzly bears in the Yukon, a cautionary approach is warranted.

[152] The definition of ‘conservation’ was set out by the then IPC in Yukon Inquiry Report ATP20-06R as follows:

*...I find that ‘conservation’ means an action, by legal or other means, that is taken to preserve, protect or restore any of the things identified in subsections (a) through (c) of section 21 to promote or enhance the continued existence of that thing. In my view, this interpretation accords with the purpose of the ATIPP Act, its scheme, object, and intention of Parliament.<sup>34</sup>*

[153] I find the Applicant’s definition similar enough to not warrant any modification to the existing definition. I further find that the Applicant’s definition of interference with conservation is incomplete.

[154] This Office has yet to interpret what it means to interfere with the conservation of a species. While damaging a species, as defined above, must certainly constitute interference with its conservation, it is apparent that the test must encompass more than that, or the Legislature would have only included one ground on which paragraph 21(b) applies.

[155] Irrespective of the subsequent analysis, it is ultimately the Department’s burden to demonstrate that a release of information would constitute interference with conservation. Though not submitted expressly, the Department has raised several issues which deserve to be examined as to whether they rise to the level of interference with conservation.

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<sup>34</sup> at para 144

[156] In his statutory declaration, Mr. Hennings states that:

*This data, if released with no oversight or control maintained by the Department, could be used for **nefarious activities** by individuals or business to exploit bear populations in the Yukon. To be clear, **nefarious is any use of this information for person or commercial interest which do not align with the Government of Yukon wildlife management objectives or Minister of Environment defined objectives...***<sup>35</sup> [emphasis added]

[157] I find Mr. Hennings' position to be overstated. It is both entirely reasonable and possible that an applicant could not be aligned with the Government of Yukon wildlife management objective, or the Minister of Environment's defined objectives, for non-nefarious reasons. These reasons could take any number of forms, such as the belief that conservation measures are not stringent enough. As Commissioner Loukidelis states at para 85 of Order 01-52:

*In my view, it does not sit well for the Ministry to object, as its submissions implicitly do, to disclosure under the Act on the basis that the disputed information will be used to publicly criticize the work of the Ministry. It is entirely appropriate for an applicant – and especially public interest groups – to exercise the right of access under the Act in order to obtain information for the purposes of assessing and criticizing the performance of government.*

[158] And further at para 86:

*The Ministry's case is not, however, enhanced by thinly veiled accusations, in the above-noted paragraphs, about the competence and sincerity of the applicants and their motive and evidence, apparently because they do not agree with the Ministry's perspective.*

[159] It is not within the purview of the Department to deny an applicant access to records simply because it may find the motivations of the applicant to be unfavourable or 'nefarious'. It is also not tenable for the Department to argue that any use of data that is not strictly aligned with "the Government of Yukon wildlife management objective or Minister of Environment defined objectives" to be interference with conservation of a species on that bare fact alone.

[160] Mr. Hennings also states that "...there is a high risk of harm to bear management efforts by the Department of the Environment associated with the release of this information to the applicant."<sup>36</sup> This statement is presented with no further mention of the bear management efforts to which he is referring. It is possible, though no submissions were made on the point, that the Department has other and further efforts beyond simply managing harvest. Some

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<sup>35</sup> at para 10

<sup>36</sup> at para 9

indication of what these efforts are and how the release of the GPS Records or VHS Records would hamper them may have been informative in determining if such a release may interfere with grizzly bear conservation.

[161] In his statutory declaration, Mr. Perry states, at para 5:

*GPS and VHF tracking data provides real or near-real time locations of animals. Therefore biologists are concerned that unfettered access by the general public to such information may **compromise their studies** as well as expose animals to harm during their most vulnerable periods.* [emphasis added]

[162] And at para 8:

*Access to tracking data can also be exploited by tourist groups and photographers to enhance wildlife viewing opportunities. Such encounters with people can **habituate wildlife to human interaction**, which at a minimum **alters the animal's natural behaviour**, thus **negatively influencing research findings** but also may lead **to human-wildlife conflict**;* [emphasis added]

[163] Scientific research is a fundamental component of conservation. Without appropriate knowledge regarding the subject of a particular conservation effort, those efforts may be rendered wasteful at best and counter productive at worst. I take the concerns of Mr. Perry to be well founded and would find that obstruction of *ongoing* scientific research to constitute an interference with conservation for the purpose of paragraph 21(b). For greater clarity, the reproduction of data cannot constitute an obstruction of scientific research in and of itself due to the non-excludable nature of data. Instead, the Department would need to demonstrate some real, tangible connection between the release of data and disruption of ongoing, in the field, research. While the spectre of such disruption has been raised here, no evidence or supporting documentation has been provided to substantiate the claim.

[164] Of similar concern is the habituation of wildlife to human interaction. The Department suggests that it can lead to increased human-wildlife conflict and the alteration of an animal's natural behaviour. It is apparent that the alteration of natural behaviour and an increase in human-wildlife conflict is antithetical to the conservation of a species. This submission is not contested by the materials of the Applicant except to note that the remoteness of the Yukon, and relative lack of roadways, limits human-bear interactions.

[165] Again, the Department has raised the spectre of an issue which may justify redaction of the VHF Records or GPS Records, in whole or in part, but has provided no evidence beyond its mere assertion. To reiterate, the former IPC stated in Inquiry Report ATP20-06R that to meet the 'probable' part of the subsection 21 (b) test, the Department must "**provide evidence** well beyond or considerably above a mere possibility of harm to reach that middle ground."  
[emphasis added]

[166] Considering the foregoing, there is no evidence to support a finding that release of the VHF Records or GPS Records will cause any harm by the way of interference with the conservation of a species of plants, animals, or invertebrates that is endangered, threatened or vulnerable in the Yukon or in any one or more regions of the Yukon.

*Did the Department exercise its discretion [reasonably] in deciding to refuse the Applicant with access to the information they requested?*

[167] As I have found above that the Department is not entitled to rely on paragraph 21(b), it is not necessary to analyse whether such discretion was reasonably acted upon.

### Conclusion

[168] For these reasons, I find that the Department has not established that disclosure of the VHF Records or GPS Records could reasonably be expected to result in damage to, or interfere with conservation of, black bear and/or grizzly bear populations under paragraph 21(b). The Department is therefore not authorized to refuse to disclose the VHF Records and GPS Records.

## VIII FINDINGS

### **Issue 1**

[169] For the purposes of file ATP-24R, I find that the Department Head is not required by subparagraph 25(1) to refuse to disclose the VHF Records to the Applicant.

### **Issue 2**

[170] With regard to both file ATP-24R and ATP-25R, I find that the Department Head is not authorized to rely on subparagraph 21(b) to refuse to disclose the GPS Records and VHF Records to the Applicant.

## IX RECOMMENDATIONS

### Issue 1

[171] As subparagraph 25(1) does not apply, I recommend that the Department Head disclose the VHF Records to the Applicant in Excel file format, as requested.

### Issue 2

[172] As subparagraph 21(b) does not apply, I recommend that the Department Head disclose the GPS Records and VHF Records to the Applicant in Excel file format, as requested.

## Department Head's Response to Investigation Report

[173] Section 58 of the Act require the Department to decide, within 30 days of receiving this Inquiry Report, whether to follow my recommendations. The Department must give written notice of its decision to me and the parties who receive a copy of this report, noted on the distribution list below.

[174] If the Department does not give notice of its decision within 30 days of receiving this report, then it is deemed to have refused to follow my recommendations.

[175] If the Department does not follow my recommendations, then it must inform the Applicant, in writing, of their right to appeal that decision to the Yukon Supreme Court.

## Applicant's Right of Appeal

[176] Paragraph 59(1)(a) gives the Applicant the right to appeal to the Yukon Supreme Court if the Department Head rejects a recommendation or is considered to have done so.

### ORIGINAL SIGNED

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Jason Pedlar, B.A., M.A.  
Information and Privacy Commissioner  
Office of the Information and Privacy Commissioner

### Distribution List:

- Department Head
- Applicant