



Department of Justice
April 8, 2024

Applicant c/o
Access and Privacy Officer
Corporate Information Management, ATIPP Office

Final Response ATIPP Access Request 23-546

The Department of Justice has searched the Policy and Communications Unit and the Public Safety and Investigations Branch and has located records responsive to Access Request #23-546 noted below:

All emails, text messages, and briefing notes related to an on-call teacher being charged with possession of child pornography. Timeframe: December 15, 2023 - January 29, 2024.

Access Granted in Part

Certain types of information have been withheld pursuant to sections 70(3), 71, 72(1), 73, 74(1)(a), and 76 of the Access to Information and Protection of Privacy Act ("ATIPPA") which is explained below. Please note that some redactions in the provided records cite multiple sections because more than one section applies in whole or in part to that redaction. The attached Schedule A "Table of Records" outlines the provisions cited for each redaction made.

There are also duplicate email threads and attachments which have not been provided.

Reasons:

Per s. 64(2) of ATIPPA, the head's decision to withhold information in response to a request for access to records must identify the ATIPPA provision relied upon, and the factual and legal considerations that influenced the decision.

The decision(s) must be supported with reasons that are justified, intelligible, and transparent so that you, the applicant, can understand how the head arrived at their conclusion.

The following explains the rationale underlying the decision to apply each of the provisions cited for the various redactions made to the records being disclosed.

Redacted information citing section 70(3):

Section 70(3) states:

Each of the following types of disclosure of a third party's personal information is considered to be an unreasonable invasion of the third party's privacy:

a) the disclosure of information about

(iii) the education or employment history of the third party,

(d) the disclosure of information about a law enforcement matter of which the third party is or was the subject, or about a legal obligation owed to a public body by the third party, if the disclosure occurs during a period in which the information is necessary for use in

(i) an investigation into the matter,

(ii) a prosecution of an offence as it relates to the matter, or

(iii) enforcing the obligation;

Information was redacted under s. 70(3)(a)(iii) because it contained information regarding the individual's employment history.

Information was redacted under s. 70(3)(d) because the information contains details of the law enforcement matter of which an individual is the subject and the information is being used in an on-going investigation.

There are concerns regarding ongoing discussions of the third party's personal information and details of the law enforcement matter of which the individual is the subject.

The lack of anonymity an individual experiences within Whitehorse's relatively small population, as well as the speed of information dissemination via social mediums prompted realistic concerns that the release of the individual's name and other details had the reasonable potential of enabling identification and depriving them of their right to fair trial. Allegations of this nature must be handled with extreme care and caution as they have yet to be proven in court. Please refer to s. 72(1) for an expanded explanation on this point.

Redacted information citing section 71:

Section 71(2) states:

71(2) Subject to subsections (3) and (4), the head of a responsive public body must not grant an applicant access to information held by the responsive public body that is about a personnel assessment.

By s. 71(1):

“personnel assessment” means a process conducted by or on behalf of the head of a public body in respect of an employee’s conduct within the public body’s workplace or during the performance of their employment duties and responsibilities

(a) for the purpose of assessing whether the conduct is or has been disrespectful to other employees or the public, and

(b) that may, on the conclusion of the process, result in the discipline or termination, or recommendation for discipline or termination, of the employee.

Information was redacted under s. 71(2) because it discussed human resources details of the employee in question provided by the Public Service Commission.

Redacted information citing section 72(1):

Section 72(1) states:

72(1) Subject to subsection (2), the head of a responsive public body may deny an applicant access to information held by the responsive public body if the head determines that disclosure of the information

(b) could reasonably be expected to

(i) interfere with a law enforcement matter,

(ii) reduce the effectiveness of an investigative technique or procedure used or likely to be used in law enforcement,

(xi) deprive a person of their right to a fair trial or impartial adjudication.

By s. 1, “law enforcement” means:

(a) policing, including criminal or security intelligence operations,

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

(c) a proceeding that leads or could lead to a penalty or sanction being imposed.

Information was redacted under s. 72(1) because it could reasonably be expected to interfere with a law enforcement matter and deprive a person of their right to a fair trial.

Prematurely disclosing personal information details during an investigation's early stages has the potential of causing harm to victims and the accused. Victims may be reluctant to come forward and an individual who is inappropriately 'outed' may be negatively ostracised to the point of depression and self-harm. It also serves to prejudice the accused by way of public persecution without justification, which could also result in a *Canadian Charter of Rights and Freedoms* infringement that could negatively impact court process and potentially lead to a stay of proceedings or adverse court decision.

Taking this under advisement, the head determined that any record of this context that fell within this exemption, regardless of whether the exemption required or merely authorized the head to refuse access, should be redacted. The cautious approach is also reflective of Canadian common law.

Redacted information citing section 73:

Section 73 states:

The head of a responsive public body may deny an applicant access to information held by the responsive public body that

- (a) is subject to a legal privilege of a public body or any other person;*
- (b) has been prepared by or for the Attorney General or a public body in respect of*
 - (i) the provision of legal services to or by the Attorney General, or*
 - (ii) the prosecution of an offence by the Attorney General; or*
- (c) is contained in a communication about the provision of legal services or a prosecution referred to in paragraph (b) between*
 - (i) the Attorney General or a public body, and*
 - (ii) any other person.*

By s. 1:

"legal privilege" means: solicitor-client privilege, litigation privilege or any other type of legal privilege (including a privilege of the law of evidence).

Information was redacted under s. 73 because it is subject to legal privilege, it was prepared by or for the Attorney General and public bodies in the provision of legal services, and it is contained in a communication about the provision of legal services between public bodies and other persons.

In particular, the redacted emails include on-going communications between the departments of Justice, Education, Executive Council Office, and Public Service Commission for:

- the provision of legal services during the critical incident response for external communications to which this matter related; and,
- the formulation or giving of legal advice, advice sought, as well as the substance of the advice between persons, public bodies, and the Attorney General and Deputy Attorney General.

The Government of Yukon's standard process (see attached document "External Communications for Critical Incidents" and "Responding to Critical Incidents – internal communications" in the records provided) sets out that communication products related to litigation and criminal matters must be routed through the Department of Justice's Policy and Communications Unit for legal review prior to publication. In the same manner that a meeting may be held in-person or remotely, the email chain is viewed as a continuum of confidential legal communications between lawyers and the client (the Government of Yukon) and legal privilege applies as soon as the client seeks legal advice through this process.

For reference and by way of explanation, the purpose of legal privilege is to facilitate and enable clients the ability to have full, frank, and candid communication. This has been a long-standing integral aspect of the legal system as a whole. This aspect is so fundamental that the Supreme Court of Canada views legal privilege as a common law and constitutionally protected right under the *Canadian Charter of Rights and Freedoms*.

There is also legal precedent noting that while it is not necessary for the communication to specifically request or offer advice, if it can be placed within the continuum of communication in which the solicitor tenders advice; it is not confined to telling the client the law and includes advice as to what should be done in the relevant legal context.

Therefore, the entire record is redacted under s. 73 given the clear intent that one or more government lawyers were acting in a legal capacity, the gravity and nature of the context, subject matter of the advice, and circumstances in which it is sought and rendered.

Redacted information citing section 74(1)(a):

Section 74(1) states:

Subject to subsection (2), the head of a responsive public body may deny an applicant access to information held by the responsive public body if the head determines that disclosure of the information would reveal

(a) advice or recommendations prepared by or for a public body or a minister;

Information was redacted under s. 74(1) because it contains advice and recommendations raised by public servants throughout the process of drafting responses to the critical incident.

Generally speaking, “advice” refers to guidance or recommendations offered with regard to future action and “recommendations” and may include suggestions as to a course of action and the rationale for the suggestion. Legal precedent also notes the importance of allowing public servants the ability to have candid, confidential deliberations and opinions when providing options and alternatives for guidance and recommendations within the public service. If the advice and recommendations is permitted to be disclosed and subject to public scrutiny, public servants may be more likely to suffer self-censorship, especially in controversial matters, thereby risking participating in the process of being able to have full, frank, free disclosure and discussion with decision-makers.

The information contained in the records offered suggestions, alternative options, and rationales prepared by public bodies for decision makers for consideration in terms of courses of action as it related to the context of this law enforcement matter and external communications.

In light of this context, the head determined that information of this nature should be redacted under s. 74(1)(a).

Redacted information citing section 76:

Section 76(1) states:

Subject to subsection (2), the head of a responsive public body may deny an applicant access to information held by the responsive public body that a public body has not accepted in confidence in the prescribed manner from a government or organization referred to in subsection 68(1) if the head determines that disclosure of the information could reasonably be expected to harm relations between the Government of Yukon or a public body and the other government or organization.

Information was redacted under s. 76(1) because it contains details and information exchanges between the RCMP and Department of Justice related to the ongoing investigation and individual in question.

The relationship between the Government of Yukon and the RCMP is a critical one to inform and assist with investigations and enforcement activities, especially regarding serious allegations related to the safety of children (please refer to the Safer Schools Action Plan that may be found online here: [Safer Schools Action Plan | Government of Yukon](#)). Meetings are regularly held between the Assistant Deputy Minister of Community Justice and Public Safety, the Director of Public Safety and Investigations, and the RCMP Superintendent responsible for Criminal Operations to facilitate this relationship.

Disclosing information set out in the records risks compromising and potentially eroding the trust and positive relations that have been built between the Government of Yukon and the RCMP. It is important that each body has a say in how the information relayed explicitly or implicitly in confidence is managed so as not to undermine the foundation of trust, cooperation, and communication established.

In this context, the RCMP supplied information in confidence and good faith given the early stages of the investigation. It is highly probable that significant issues would impact this investigation if the information contained in the records was not redacted. It is also reasonable to assume that disclosing confidential information would harm relations because the relationship of trust would be undermined.

In light of this, the head decide to redact the information within the records.

Public Interest Override considerations:

Section 82 states (in part):

(1) Despite any provision of Division 8 or 9 other than section 67, the head of a responsive public body must not deny an applicant access to information in relation to which the head, after consideration of the factors listed in paragraphs (2)(a) and (b), determines that the public interest in disclosing the information clearly outweighs the public interest in withholding the information from disclosure.

(2) In determining whether the public interest in disclosing the information clearly outweighs the public interest in withholding it under subsection (1)

(a) the head must consider the following factors:

- (i) the level of public interest in the information,
- (ii) whether the information is likely to be accurate and reliable,
- (iii) whether similar information is in the public domain,
- (iv) whether suspicion is likely to exist in respect of a public body's conduct in relation to the matter to which the information relates,
- (v) if harm to a person, public body or government is likely to result from disclosure of the information, the significance and type of the harm,
- (vi) whether the disclosure of the information is likely to result in similar information no longer being supplied to a public body;

In each case, the head considered whether the public interest in disclosing the redacted information clearly outweighed the public interest in withholding the information from disclosure considering the factors enumerated in s. 82(2(a)).

The head did not consider the factors set out in s. 82(2)(c).

In each case, the head concluded that the public interest in disclosure did not outweigh the public interest in withholding the information.

Final Costs

There is no charge to the applicant.

Right to Complain

Pursuant to section 66 of the Access to Information and Protection of Privacy Act you may contact Yukon's Information and Privacy Commissioner with a complaint in respect to this response. Section 66 states:

An applicant may, in respect of the head of a responsive public body's response to their access request under section 64, make a complaint to the commissioner by filing the complaint in accordance with section 90.

Should you wish to do so, please refer your written complaint within 30 business days to the Information and Privacy Commissioner at:

Yukon Information and Privacy Commissioner
3162 Third Avenue, Main Floor, Whitehorse, Yukon Y1A 1G3
E-mail: intake@yukonombudsman.ca
Phone: (867) 667-8468; (toll free: 1-800-661-0408 ext. 8468)

Contact Person in Department

If the applicant has any questions, please contact the Designated Access Officer for Department of Justice at jus.atipp@yukon.ca.

Notes:

Non-responsive records may include records outside of the time frame of the request and/or records unrelated to the subject matter of the request.

Pages withheld in full are documents that have the information withheld in entirety, with no part of the page being eligible for release.