IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Branigan* v. *Commissioner of the Yukon Territory,*
2004 YKSC 79

Date: 20041202
Docket No.: S.C. No. 04-AP0006
Registry: Whitehorse

Between:

SHEILA BRANIGAN

Appellant

And

COMMISSIONER OF THE YUKON TERRITORY

Respondent

Before: Mr. Justice L.F. Gower

Appearances:

Peter Morawsky	For the Appellant
Penelope Gawn	For the Respondent
Joni MacKinnon	Appearing on her own behalf

REASONS FOR JUDGMENT

INTRODUCTION

[1] Sheila Branigan appeals a decision of the Yukon Department of Health and Social Services (the "Department") not to release to her part of a record in the Department's control despite a recommendation from the Information and Privacy Commissioner (the "IP Commissioner") to the contrary. The record is a four-page letter from Joni MacKinnon to the Manager of Youth Services with the Department, dated March 15, 2003.

Ms. Branigan was unsuccessful in her initial request for a copy of the letter from the Department. She then applied to the IP Commissioner for a review of the Department's

refusal. The IP Commissioner recommended that the Department provide an edited version of the letter to Ms. Branigan. However, the Department refused to follow the recommendation and the entire letter remains undisclosed. Ms. Branigan has appealed that refusal pursuant to the Yukon *Access to Information and Protection of Privacy Act*[1] (the "*Act*" or the "*ATIPP Act*"). Both Ms. MacKinnon and Ms. Branigan are considered to be employees of the Department under the *Act.*

ISSUES

[2] There are 5 issues in this appeal:

1. Does the letter contain "personal information" about Ms. MacKinnon?
2. If the answer to Issue #1 is yes, then would the disclosure of Ms. MacKinnon's personal information be an "unreasonable invasion" of her personal privacy?
3. Who bears the onus of proving that disclosure of Ms. MacKinnon's personal information would be an unreasonable invasion of her privacy?
4. If the answer to Issue #2 is yes, then can the personal information about Ms. MacKinnon reasonably be separated or obliterated from the letter in order to allow Ms. Branigan access to the remainder of the letter?
5. Does the letter contain "personal information" about Ms. Branigan and, if so, is she entitled to access that information?

ANALYSIS

Overview of the Act

[3] This appeal is governed by the *Act*. A copy of the relevant sections are attached to these reasons as Appendix A. Section 1 sets out the *Act'*s two competing purposes:

a) to make public bodies, such as the Department, more accountable to the public; and

[1] R.S.Y. 2002, c. 1

b) to protect personal privacy.

[4] The *Act* attempts to achieve these purposes, firstly, by giving the public a "right of access" to Yukon Government records, and more specifically, by giving individuals a right of access to personal information about themselves. Secondly however, there are identified limitations on this right of access. Thirdly, the Government's decisions about access are subject to review both by the IP Commissioner and by this Court.

[5] "Personal information" under the *Act* means any recorded information about an individual. Certain types of personal information are specified in s. 3 of the *Act* and those (for the purposes of this appeal) include:

> (a) the individual's name [or] address,
>
> …
>
> (c) the individual's … sex …,
>
> …
>
> (f) information about the individual's health care history, including a physical or mental disability,
>
> (g) information about the individual's educational, … or employment history,
>
> (h) anyone else's opinions about the individual, and
>
> (i) the individual's personal views or opinions, except if they are about someone else.

[6] Section 5 states that an individual has "a right of access" to any record in the control of a Government department. However, that right is subject to a number of exceptions under Part 2 of the *Act* which authorize the Government to refuse disclosure

of certain types of information. On the other hand, if that excepted information can reasonably be separated or obliterated from the document, the applicant has a right of access to the remainder of the record.

[7] Part 2 of the *Act* provides a number of instances in which a public body is authorized or required to refuse disclosure of information. Section 22 is one of those provisions and it says that if the information sought is personal information "about the applicant", a public body may refuse to disclose that information if doing so "could reasonably be expected to … threaten anyone else's health or safety … ".

[8] Also within Part 2 is s. 25, which deals with personal information "about a third party". A public body "must" refuse disclosure of such information if doing so "would be an unreasonable invasion of a third party's personal privacy". Section 25(2) sets out a number of instances in which such disclosure is "**presumed** to be an unreasonable invasion of the third party's personal privacy" (emphasis added). Of those, the following may be relevant to this appeal:

> …
>
> (d) the personal information relates to the third party's employment or educational history;
>
> …
>
> (g) the personal information consists of personal recommendations or evaluations [or] character references;
>
> …

[9] Interestingly, s. 25(3) then sets out a number of instances where such disclosure "is **not** an unreasonable invasion of a third party's privacy" (emphasis added). The following might be pertinent to this appeal:

…

> (c) [if legislation, including the *ATIPP Act* itself] authorizes the disclosure;
>
> …
>
> (e) [if] … the information is about the third party's position [or] functions … as an … employee … of a public body
>
> …
>
> (i) [if] … the disclosure reveals details of a licence [or] permit … granted to the third party by a public body, not including personal information supplied in support of the application for the [licence or permit];

[10] Section 25(4) further requires a public body to consider "all the relevant circumstances" before refusing to disclose personal information about a third party, including a number of specific circumstances, which I will set out later in these reasons.

[11] Under Part 5 of the *Act*, an applicant or a third party may request the IP Commissioner to review a decision about access to a record. Within Part 5 is s. 54, which purports to set out who has the burden of proof on such a review.

[12] Section 54(1)(a) states that where a Government department has refused an applicant's request for a record, it is up to the public body to prove that the applicant has no right of access to the record, or the part of it in question.

[13] However, s. 54(2) is paramount to s. 54(1) and it provides that where a decision has been made to give an applicant access to all or part of a record containing "information that relates to a third party":

> (a) if the information is personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and

> (b) if the information is not personal information, it is up to the third party to prove that the applicant has no right of access to the record or the part.

[14] According to s. 57(2)(a), if the IP Commissioner decides that the public body is neither authorized nor required to refuse access, then the IP Commissioner "must" recommend that the public body give the applicant access to the record.

[15] Under s. 59(1)(a), if the public body decides not to follow the Commissioner's recommendation for access, then the applicant may appeal to this Court. The third party may appear as a party to such an appeal (s. 59(6)).

[16] Section 60(1) provides that on an appeal, this Court "may … conduct a new hearing and consider any matter that the [IP Commissioner] could have considered … ".

Issue #1
Does the letter contain "personal information" about Ms. MacKinnon?

[17] Yes, the letter contains the following personal information about Ms. MacKinnon:

- her name and address
- some information relating to her educational and employment history as an Open Custody Caregiver for the Department
- some statements of the opinions of others about Ms. MacKinnon, as expressed by Ms. MacKinnon
- Ms. MacKinnon's personal views or opinions

However, the letter also contains Ms. MacKinnon's views or opinions of Ms. Branigan which are, by definition in s. 3 of the *Act*, not considered to be personal information about Ms. MacKinnon. Rather, Ms. MacKinnon's opinions about Ms. Branigan are the personal information of Ms. Branigan.

Issue #2
If the answer to Issue #1 is yes, then would the disclosure of Ms. MacKinnon's personal information be an "unreasonable invasion" of her personal privacy?

[18] In order to answer this question, I must first consider the application of s. 25 of the *Act*, which requires the Department not to disclose the personal information about Ms. MacKinnon if doing so would constitute an unreasonable invasion of her privacy. The disclosure of some of Ms. MacKinnon's personal information may be "presumed" to be an unreasonable invasion of her privacy, namely:

- the information relating to her employment and educational history as a youth Caregiver for the Department
- the opinions of others about Ms. MacKinnon could be construed as "personal recommendations or evaluations"
- the letters of reference attached to the letter could be character references.

[19] Dealing with the last point first, the attachments to Ms. MacKinnon's letter were apparently not provided to the IP Commissioner; nor have they been filed in this appeal. However, since none of the parties made any comment or argument about the letters of reference, I assume they are not at issue.

[20] Next, whether the opinions of others about Ms. MacKinnon, as expressed by Ms. MacKinnon herself, can constitute "personal recommendations or evaluations", is a matter of interpretation. I have concluded that parts of the letter can be characterized as such and those parts are therefore presumptively excluded from disclosure.

[21] Then there is the personal information about Ms. MacKinnon's employment. While s. 25(2)(d) would **presume** that disclosure of information which "relates to" her

employment history would be an unreasonable invasion of her privacy, s. 25(3)(e) suggests that disclosure of the information about Ms. MacKinnon's "position or functions" as a youth Caregiver for the Department would **not** be an unreasonable invasion of her privacy. Nor would details about her licence or permit to act as a youth Caregiver for the Department (s. 25(3)(i)), to the extent that parts of the letter could be construed as such.

[22] Therefore, I must decide whether Ms. MacKinnon's personal information about her employment falls within the category under s. 25(2), such that its disclosure would be presumed to be an unreasonable invasion of her privacy; or alternatively, whether it falls within the category under s. 25(3), where its disclosure would not be an unreasonable invasion of her privacy. Further, in making that determination, I am directed by s. 25(4) to consider "all the relevant circumstances", including whether:

> (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 was supplied in confidence;
>
> (d) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant; [and]
>
> (e) the personal information is relevant to a fair determination of the applicant's rights.
>
> …

[23] None of the parties argued the applicability of paragraphs 25(4)(a) or (b), however I have considered them in reviewing the content of the letter. I am satisfied neither paragraph applies to my determination of which parts of the letter relating to Ms. MacKinnon's employment should not be disclosed.

[24] As for paragraph 25(4)(c), counsel for the Department and Ms. MacKinnon, on her own behalf, focused much of their argument on the fact that the letter was provided by Ms. MacKinnon to the Department in confidence. However, I agree with the IP Commissioner that there is no objective or corroborative evidence that confidentiality was even a factor when the letter was submitted.

[25] Specifically, I agree with the IP Commissioner's assessment that the letter itself makes no reference whatsoever to Ms. MacKinnon's expectation of confidentiality. Nor is there any evidence that the Department received the letter on a confidential basis or treated it as though it were confidential. Further, the fact that the letter was copied to the Minister of the Department, Mr. Jenkins, indicates that Ms. MacKinnon intended it to be acted upon at the Departmental level, that is, by any number of unnamed or unknown individuals within the Department. This inference is supported by the fact that both the former Deputy Minister, Rob McWilliam, and his successor in office, John Greschner, became involved with Ms. Branigan's application for access to the letter (Ms. Branigan's affidavit #1, exhibit C; J. Greschner's affidavit #1). It is therefore reasonable to presume that other individuals within the Department have had access to, or involvement with, the letter as well. It appears as though Ms. MacKinnon only took the position that she intended the letter to be confidential when she received notice, pursuant to the *Act*, of Ms. Branigan's request for access to the letter.

[26] In summary, I agree with the IP Commissioner that there is no evidence that Ms. MacKinnon had an expectation of confidence at the time the letter was written and sent to the Department. Therefore, I do not find that the letter was "supplied in

confidence" by Ms. MacKinnon and that argument does not justify the Department's refusal to disclose it.

[27] With reference to paragraph 25(4)(d), I have concluded that parts of Ms. MacKinnon's information relating to her employment includes the names of identifiable individuals, whose reputations may be unfairly damaged by disclosure. Therefore, I have determined those names should not be disclosed. Also, some of the names are of youths, whose identity is not to be disclosed pursuant to s. 33 of the *Young Persons Offences Act*, R.S.Y. 2002, c. 232 and s. 110 of the *Youth Criminal Justice Act*, S.C. 2002, c. 1.

[28] That leaves the remaining circumstance under paragraph 25(4)(e), of whether the personal information about Ms. MacKinnon's employment is relevant to a fair determination of the applicant's rights. Ms. Branigan has alleged that her relationship with the Department, her employer, has been negatively affected by Ms. MacKinnon's letter and that because of this she is pursuing a grievance through the collective agreement process. She feels that the application for disclosure of the letter is directly related to that process, and that she is essentially hamstrung without having a copy to justify her grievance (Ms. Branigan's affidavit #2, para. 6). Ms. Branigan also makes no secret of the fact that, upon disclosure of the letter, she intends to seek legal advice about whether she has grounds to sue Ms. MacKinnon for defamation of character.

[29] Therefore, it may well be that parts of Ms. MacKinnon's personal information about her employment is relevant to a fair determination of Ms. Branigan's rights, both under the collective agreement and at common law.

[30] In summary, I conclude that there are circumstances in s. 25(4) which justify non-disclosure of parts of Ms. MacKinnon's personal employment information. On the other hand, there is also a reason to support disclosure of other parts of that information, specifically the employment information which is not presumptively excluded from disclosure **and** which may be relevant to a fair determination of the appellant's legal rights. In particular, I order disclosure of the portions outlined in blue ink and labelled "In", in the copy of the letter I have attached to the Department's copy of these reasons. Those portions outlined in red ink and labelled "Out" are not to be disclosed. In each case, I have noted on this copy of the letter which section of the *Act* is applicable.

[31] Finally, some of Ms. MacKinnon's personal information is neither presumptively excluded from disclosure, nor subject to categorization under s. 25(3) or analysis under s. 25(4). Here I am simply referring to the information about Ms. MacKinnon's name and, address and sex.

Issue #3
Who bears the onus of proving that disclosure of Ms. MacKinnon's personal information would be an unreasonable invasion of her privacy?

[32] Section 54(2) of the *Act* would initially seem to govern here, as I am dealing with "information that relates to" Ms. MacKinnon, who is a third party, and this is an appeal of "a decision [by the IP Commissioner] to give an applicant access" to parts of that information. If that information is "personal information" of Ms. MacKinnon, then s. 54(2)(a) states that it is up to **the applicant** to prove that disclosure would not be an unreasonable invasion of Ms. MacKinnon's personal privacy. I have already determined that the letter contains personal information about Ms. MacKinnon. Therefore, it is up to

Ms. Branigan to prove that disclosure of that information would not be an unreasonable invasion of Ms. MacKinnon's privacy.

[33] But how can she do so? She has not seen the letter and her knowledge of its contents is limited to what has been disclosed or insinuated, in a limited and cryptic way, in the materials filed on this appeal. Counsel for the Department argues that the applicant must discharge her onus here, but was unable to suggest how she might do that when Ms. Branigan has no knowledge of the precise nature of Ms. MacKinnon's personal information. It seems to me that s. 54(2)(a) puts applicants in an impossible position in these particular circumstances.

[34] Granted, there may be situations where an applicant may attempt to discharge the onus by arguing the applicability of one of the exceptions in s. 25(3), where disclosure is deemed not to unreasonably invade the third party's privacy. For example, an applicant might submit that disclosure:

- is specifically authorized by legislation;
- is for research purposes; or
- is about travel expenses of the third party.

However, in instances such as the present appeal, applicants will simply be unable to discharge this burden of proof.

[35] Firstly, in appearing upon a review before the IP Commissioner, applicants will not be able to make their own assessment of whether they are dealing with "personal information" relating to the third party. That is because they will not have seen the record they are requesting. And, not having seen the record, I am unable to imagine how an

applicant could prove that disclosure of the record would not constitute an unreasonable invasion of the third party's personal privacy, unless they can argue the applicability of one of the exceptions in s. 25(3) discussed above. Thus, s. 54(2)(a) appears to be in need of legislative amendment.

[36] Secondly, the situation is no different on an appeal to this Court. Section 60 says that this Court "may … conduct a new hearing and consider any matter that the commissioner could have considered …". Although that section is worded in a permissive way, I conclude that its effect is essentially mandatory and directive. What alternative does this Court have when the legislation permits it to proceed with a fresh hearing on the merits? Should this Court ignore that permission and treat an appeal in an alternative fashion, such as an appeal on the record or an application for judicial review? There was certainly no suggestion by any party that I should proceed in that direction. Incidentally, I am not saying there could never be an application by a party for judicial review based on jurisdictional grounds, but that is not how this appeal was commenced. Rather, it is specifically an appeal under s. 59(1)(a) of the *Act*. And, I conclude that the intention of the Legislature was that this Court should conduct a new hearing upon such an appeal.

[37] Furthermore, if I am to proceed with a fresh hearing, the *Act* suggests that I consider any matter that the IP Commissioner could have considered. While "matter" usually means substance and not form, it can also include the logical content of a proposition: *The Concise Oxford Dictionary* (8th Ed.), 1990. Therefore, I conclude that in conducting a new hearing, I should also follow the principles and procedures (that is, the logic) of the *Act* in doing so. To do otherwise might result in appellate decisions based

upon entirely different reasons from those of the IP Commissioner. That in turn would only lead to greater confusion and less certainty in the interpretation and application of the *Act*. I find support for this conclusion in *Avoledo* v. *Yukon (Commissioner)*, 2003 YKSC 10, where Veale J. analyzed and applied certain provisions of the *Act* in conducting a fresh hearing on an appeal under the *Act*.

[38] Therefore, I find that in conducting a new hearing I should apply the burden of proof provisions in s. 54 of the *Act*. I take some comfort from the fact that both counsel before me also agreed that I should follow s. 54 on this appeal. Nevertheless, I felt it necessary to analyse the point, since jurisdiction cannot generally be conveyed by consent.

[39] Thus, I am faced with the dilemma that s. 54(2)(a) seems unworkable in this particular appeal, in that it creates an impossible burden for the applicant to discharge. Further, if s. 54(2)(a), at least for the purposes of this appeal, is essentially of no force and effect, I must revert to s. 54(1), which places the onus upon the public body/Department to prove that the applicant has no right of access to the record.

[40] Here, counsel for the Department, as I understood her submissions, essentially argued two points:

1. that Ms. MacKinnon's personal information includes details of her employment history with the Department, as well as personal evaluations of that employment.

2. that Ms. MacKinnon supplied the letter to a Department in confidence.

[41] I can dispose of the second point summarily, since I have already concluded that there is no merit to this submission.

[42] As for the first point, I agree that disclosure of this particular type of information, on its face, would be presumed to result in an unreasonable invasion of Ms. MacKinnon's privacy pursuant to s. 25(2)(g) of the *Act*. However, the Department did not go on to consider the provisions in s. 25(3), where the disclosure of information about Ms. MacKinnon's position or functions as an employee of the Department is deemed **not** to be an unreasonable invasion of Ms. MacKinnon's privacy. Nor did the Department fully consider the potential application of s. 25(4) and, in particular, whether disclosure of any of Ms. MacKinnon's employment information is relevant to a fair determination of the applicant's rights. Granted, counsel for the Department did argue that the collective agreement process is a separate proceeding from this appeal and not within the jurisdiction of this Court at this time. I agree. However, the subject of this appeal is relevant to that process. Indeed, Ms. MacKinnon's letter, or at least parts of it, may well form the entire basis for Ms. Branigan's grievance.

[43] Therefore, I conclude that the Department has not considered "all the relevant circumstances" before refusing disclosure, and consequently has not discharged its onus under s. 54(1) of the *Act*. Specifically, the Department has not proven that Ms. Branigan has no right of access to the entire letter, which is the Department's position on this appeal.

Issue #4
If the answer to Issue #2 is yes, then can the personal information about Ms. MacKinnon reasonably be separated or obliterated from the letter in order to allow Ms. Branigan access to the remainder of the letter?

[44] Here, counsel for the Department argued that Ms. MacKinnon's personal information is inextricably intermingled throughout the letter, such that it cannot be

separated or obliterated, and thereby “excepted from disclosure” to Ms. Branigan. I disagree. I have reviewed the copy of Ms. MacKinnon’s letter which was before the IP Commissioner and have noted his highlighting indicating those portions he recommends for disclosure and those portions which should not be disclosed. I have concluded that more of Ms. MacKinnon’s personal employment-related information should be disclosed than that recommended by the IP Commissioner. I also conclude that the portions of the letter which are excepted from disclosure can be separated or obliterated, leaving the remainder of the letter intelligible.

Issue #5
Does the letter contain “personal information” about Ms. Branigan and, if so, is she entitled to access that information?

[45] I agree with the IP Commissioner that Ms. MacKinnon’s views and opinions about Ms. Branigan are the “personal information” of Ms. Branigan, and not of Ms. MacKinnon. That is the only information in the letter which remains to be dealt with. Further, s. 5 of the *Act* says that Ms. Branigan has a right of access to personal information about herself, subject to the limits within Part 2 of the *Act*.

[46] For the purposes of this appeal, the only limit within Part 2 which pertains to personal information of the applicant is found in s. 22(1). It provides that the public body may refuse disclosure if doing so “could reasonably be expected to … threaten anyone else’s health or safety”. Counsel for the Department argued in the alternative that this was the case here. She said that the expectation of harm must be reasonable, but not necessarily probable. I agree the expectation need not be of probable harm, in the

sense of it being more likely than not to occur. However, the expectation must be reasonable.

[47] The evidence in support of Ms. MacKinnon's fear for her safety resulting from the potential disclosure of the letter is in her first affidavit. There she stated that she firmly believes Ms. Branigan "holds unwarranted and unfounded personal animosity towards" her and that she will suffer "undue continued emotional stress and trauma" if she is called upon to defend herself following the release of the letter.

[48] With all due respect, my response to Ms. MacKinnon's unilateral and uncorroborated statement of fear and concern is that 'if you are going to jump into the pool, you should expect to get wet'. Ms. MacKinnon wrote her letter to the Department on a completely unsolicited basis. She believed that Ms. Branigan had been spreading false rumours about her within the Department and she felt called upon to defend herself. However, in doing so she clearly made suggestions, insinuations and allegations reflecting adversely upon Ms. Branigan's character. And, while hindsight is always 20/20, Ms. MacKinnon did not have to take that extra step in her own defence. It is one thing for Ms. MacKinnon to have defended her own good character and employment history with the Department; it is another for her to have attacked Ms. Branigan as part of that defence.

[49] There was also an attempt by Ms. MacKinnon to provide objective support for her fear by attaching letters of reference from Pastor Ron Ritchie of the Yukon Bible Fellowship Four Square Church, and also from Reverend Richard Turner, both written in early October 2004 (J. MacKinnon's affidavit #1, exhibits A and B).

[50] Pastor Ritchie stated in his letter:

> Joni without question has suffered from Sheila Branigan's unacceptable, hurtful behaviour. It has been for her a continuous, unnerving drain both emotionally and financially.

[51] Reverend Turner stated in his letter:

> I have been aware of Sheila Branigan's harassments over these past few years … For whatever reason, Mrs. Branigan does not want to see Joni succeed and appears to be opposing her on all fronts. I believe that this is malicious and vindictive. It also appears to be personal. She seems determinie [as written] to continue this at all cost [as written].

[52] Frankly, I am surprised at the readiness of these two clergymen to side with Ms. MacKinnon against Ms. Branigan, apparently without having the benefit of Ms. Branigan's side of the story. And, if they are aware of Ms. Branigan's position, they certainly made no reference to it in their letters. Thus, their statements cause me to be reasonably apprehensive that they are biased in Ms. MacKinnon's favour and, to the extent that Ms. MacKinnon attempts to rely on them as objective evidence supporting her fear for her safety, I discount them entirely.

[53] Finally, it is the Department which bears the onus of proving that the applicant has no right of access to personal information about herself (s. 54(1) of the *Act*). I again find that the Department has not discharged its onus and has failed to prove that Ms. MacKinnon's safety "could reasonably be expected" to be endangered by disclosure of this information (s. 22(1)). Accordingly, I order the Department to disclose to Ms. Branigan those parts of the letter containing Ms. MacKinnon's views and opinions about Ms. Branigan.

CONCLUSION

[54] Notwithstanding my earlier remarks about the power of this Court upon an appeal under the *Act*, as compared with those of the Commissioner upon a review, there is one significant difference. Section 61 authorizes this Court to order the Department to disclose all or part of the record, rather than simply recommending disclosure. Conversely, s. 66 does not empower this Court to produce the record, or part of it, directly to the applicant. I can only order the Department to do so. Accordingly, I have refrained from making any specific references to the content of the letter in these reasons, as that may unfairly compromise the privacy interests of the parties, should they choose to keep the matter private.

[55] In the result, I order that the Department disclose to Ms. Branigan, forthwith, the parts of Ms. MacKinnon's letter identified by me as such on the copy attached to the copy of these reasons intended for the Department.

[56] Ms. Branigan shall have her costs for this appeal.

_____

GOWER J.

APPENDIX A

PART 1
INTRODUCTORY PROVISIONS

Purposes of this Act

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

(a) giving the public a right of access to records;

(b) giving individuals a right of access to, and a right to request correction of, personal information about themselves;

(c) specifying limited exceptions to the rights of access;

(d) preventing the unauthorized collection, use, or disclosure of personal information by public bodies; and

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

(2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public independently of this Act. *S.Y. 1995, c.1, s.1.*

Definitions

3 In this Act,

"adjudicative body" means any person or group of persons before whom a proceeding may be taken for a determination of rights according to established law and procedures; *« organe juridictionnel »*

"commissioner" means the Information and Privacy Commissioner appointed under section 40; *« commissaire »*

"employee", in relation to a public body, includes a person retained under a contract to perform services for the public body; *« employé »*

"judge" means a judge of any court that has jurisdiction in the Yukon or of any court on appeal from a court that has jurisdiction in the Yukon; *« juge »*

"judicial administration record" means a record containing information relating to a judge, including

(a) scheduling of judges and trials,

(b) content of judicial training programs, and

(c) statistics of judicial activity prepared by or for a judge; *« document concernant l'administration judiciaire »*

"law enforcement" means

(a) policing, including criminal intelligence operations,

(b) investigations that lead or could lead to a penalty or punishment being imposed or an order being made under an Act of Parliament or of the Legislature,

(c) proceedings that lead or could lead to a penalty or punishment being imposed or

an order being made under an Act of Parliament or of the Legislature, and
(d) investigations and proceedings taken or powers exercised for the purpose of requiring or enforcing compliance with the law; *« exécution de la loi »*

“personal information” means recorded information about an identifiable individual, including

(a) the individual’s name, address, or telephone number,
(b) the individual’s race, national or ethnic origin, colour, or religious or political beliefs or associations,
(c) the individual’s age, sex, sexual orientation, marital status, or family status,
(d) an identifying number, symbol, or other particular assigned to the individual,
(e) the individual’s fingerprints, blood type, or inheritable characteristics,
(f) information about the individual’s health care history, including a physical or mental disability,
(g) information about the individual’s educational, financial, criminal, or employment history,
(h) anyone else’s opinions about the individual, and
(i) the individual’s personal views or opinions, except if they are about someone else; *« renseignements personnels »*

“public body” means
(a) each department, secretariat, or other similar executive agency of the Government of the Yukon, and
(b) each board, commission, foundation, corporation, or other similar agency established or incorporated as an agent of the Government of the Yukon,
but does not include
(c) a corporation of which the controlling share capital is owned by a person other than the Government of the Yukon or an agency of the Government of the Yukon, or
(d) the Legislative Assembly Office or offices of the members of the Legislative Assembly, or
(e) the chief electoral officer and election officers acting under the *Elections Act,* or
(f) a court established by an enactment; *« organisme public »*

“record” includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other process or mechanism that produces records; *« document »*

“records manager” means the Manager of Records Management in the Records Management Branch, Department of Infrastructure, or such other officer as is designated by the Minister. *« gérant des documents »*

“third party”, in relation to a request for access to a record or for correction of personal information, means any person, group of persons or organization other than

(a) the person who made the request, or
(b) a public body; *« tiers »*

“trade secret” means information, including a formula, pattern, compilation, program,

device, product, method, technique or process, that

(a) is used, or may be used, in business or for any commercial advantage,
(b) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use,
(c) is the subject of reasonable efforts to prevent it from becoming generally known, and
(d) the disclosure of which would result in harm or improper benefit. *« secret commercial »*. *S.Y. 2002, c.1, s.2; S.Y. 1995, c.1, s.3.*

PART 2
ACCESS TO INFORMATION

Right to information

5(1) A person who makes a request under section 6 has a right of access to any record in the custody of or under the control of a public body, including a record containing personal information about the applicant.
(2) The right of access to a record does not extend to information that is excepted from disclosure under this Part, but if that information can reasonably be separated or obliterated from a record an applicant has the right of access to the remainder of the record.
(3) The right of access to a record is subject to the payment of any fee required by a regulation made under section 68. *S.Y. 1995, c.1, s.5.*

Disclosure harmful to individual or public safety

22(1) A public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to
(a) threaten anyone else's health or safety, or
(b) interfere with public safety.
(2) A public body may refuse to disclose to an applicant personal information about the applicant if, in the opinion of an expert, the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's safety or mental or physical health. *S.Y. 1995, c.1, s.22.*

Disclosure harmful to personal privacy

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.

(2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

(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.

(3) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(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).

(4) Before refusing to disclose personal information under this section, a public body must consider all the relevant circumstances, including whether

(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. *S.Y. 1995, c.1, s.25.*

Burden of proof

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 or the part of it in question, or

(b) that the extension of time is justifiable.

(2) Despite subsection (1), in a review of a decision to give an applicant access to all or part of a record containing information that relates to a third party,

(a) if the information is personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy; and

(b)if the information is not personal information, it is up to the third party to prove that the applicant has no right of access to the record or part. *S.Y. 1995, c.1, s.54.*

Commissioner's report after conducting a review

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

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

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

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

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

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

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

(3) If the review is of a decision to not waive a part or all of a fee imposed under this Act, the commissioner may recommend that the public body and the records manager waive part or all of the fee.

(4) If the review is of an extension of time, the commissioner may recommend that an extension of time under section 12 be granted, refused or changed.

(5) If the review is of a public body's refusal or failure to annotate a record or to give notice of the annotation as required by section 32, the commissioner may recommend how the record should be corrected or annotated and what notice of the annotation should be given.

(6) If the review is of a complaint about how a public body has collected, used or disclosed information, the commissioner may recommend

(a) that the public body destroy information collected in contravention of this Act; and

(b) what change the public body should make in its conduct so as to avoid using or disclosing the information in contravention of this Act.

(7) The commissioner must give a copy of the report to

(a) the person who asked for the review;

(b) the public body involved; and

(c) any person to whom notice of the review was given under section 50.

S.Y. 2002, c.1, s.3; S.Y. 1997, c.4, s.1; S.Y. 1995, c.1, s.57.

Appeal to Supreme Court

59(1) An applicant may appeal to the Supreme Court

(a) a decision by a public body under section 58 to not follow the commissioner's recommendation that the public body give the applicant access to a record or to part of a record; or

(b) a determination by the commissioner under section 57 that the public body is authorized or required to refuse access to all or part of the record.

(2) A third party may appeal to the Supreme Court a decision by a public body under section 27 to disclose personal information about the third party.

(3) An appeal under subsection (1) or (2) must be made by giving written notice of the appeal to the public body within 30 days of the appellant receiving the body's decision.

(4) The public body that has refused a request for access to a record or part of a record must immediately on receipt of notice of an appeal by an applicant, give written notice of the appeal to any third party that the public body

(a) has notified or should have notified under section 26; or

(b) would have been required to notify under section 27 if the public body had intended to give access to the record or part of the record.

(5) The public body that has granted a request for access to a record or part of a record must immediately on receipt of notice of an appeal by a third party, give written

notice of the appeal to the applicant.

(6) A third party who has been given notice of an appeal and an applicant who has been given notice of an appeal may appear as a party to the appeal.

(7) The commissioner may not be a party to an appeal under subsection (1) or (2), unless the appeal is under paragraph 59(1)(b) against a determination by the commissioner. *S.Y. 1995, c.1, s.59.*

Appeal hearing

60(1) On an appeal, the Supreme Court may

(a) conduct a new hearing and consider any matter that the commissioner could have considered; and

(b) examine any record privately in order to determine the issue involved.

(2) Despite any other Act or any privilege that is available at law, the Supreme Court may, on an appeal, examine any record in the custody or under the control of a public body, and no information shall be withheld from the Supreme Court on any grounds.

(3) The Supreme Court must take every reasonable precaution, including, if appropriate, receiving representations from one party in the absence of others and conducting hearings privately, to avoid disclosure by the Supreme Court or any person of

(a) any information or other material if the nature of the information or material could justify a refusal by the public body to give access to a record or part of a record; or

(b) any information as to whether a record exists if the public body, in refusing to give access, does not indicate whether the record exists. *S.Y. 1997, c.4, s. 1; S.Y. 1995, c.1, s.60.*

Disposition of an appeal

61 On an appeal to it, the Supreme Court must decide whether the public body is required or authorized to refuse access and may

(a) order that the public body give the applicant access to all or part of the record, if the court determines that the public body is not authorized or required to refuse the access; or

(b) confirm the public body's refusal to give access to all or part of the record, if the court determines that the public body is required or authorized to refuse the access. *S.Y. 1995, c.1, s.61.*

Protection of public body from legal suit

66 No action or other proceeding lies against the Government of the Yukon or a public body or any person acting on behalf of or under the direction of a public body for

damages resulting from

(a) the disclosure in good faith and without negligence of all or part of a record under this Act or any consequences of that disclosure; or

(b) the failure to give any notice required under this Act if reasonable care is taken to give the required notice. *S.Y. 1995, c.1, s.66.*