SUPREME COURT OF YUKON

Citation: *Yukon (Government of) v Information and Privacy Commissioner,* 2026 YKSC 50

Date: 20260707
S.C. No.: 25-A0122
Registry: Whitehorse

Between

GOVERNMENT OF YUKON (DEPARTMENT OF JUSTICE),
IAN DAVIS, and MICHEAL LAFFIN

Petitioners

and

INFORMATION AND PRIVACY COMMISSIONER

Respondent

S.C. No.: 25-AP015

Between

GOVERNMENT OF YUKON (DEPARTMENT OF JUSTICE),
KERRI KEMP, DREW MACNEIL and AMANDA RUSSELL

Petitioners

and

INFORMATION AND PRIVACY COMMISSIONER

Respondent

Before Chief Justice S.M. Duncan

Counsel for the Petitioners — I.H. Fraser and Simone Dumbleton

Counsel for the Respondent — Kate R. Phipps, Shaunagh Stikeman and Amy Steele

REASONS FOR DECISION

Overview

[1] These petitions raise the question of the lawful authority of the Information and Privacy Commission (IPC), a body created under the *Access to Information and Protection of Privacy Act,* SY 2018, c.9 (the *Act*), in the context of the issuance of summonses to employees of the Yukon government during an IPC investigation on their own motion. The investigation was into the processing by the Yukon Department of Justice (the public body) of an individual's request for access to their video surveillance information while they were in custody at the Whitehorse Correctional Centre (WCC). The public body said they could not process the request because they did not have custody and control of the video recordings; they were in the custody and control of the RCMP, a federal entity not subject to the Yukon *Act*.

[2] The Yukon government seeks an order setting aside the summonses on the basis of Rules 20(26) and 42(44) of the Supreme Court of Yukon *Rules of Court*, (the *Rules*). They argue that the summonses are explicitly tied to the power of the IPC to investigate a decision or matter, and not to the IPC's general powers or duties under the *Act*. The statutorily required notice of formal investigation from the IPC sets out the scope of the investigation. Here the decision or matter set out in the notice was insufficient to authorize the summonses. The Yukon government further says the summonses are an abuse of process because they have been issued for a collateral purpose, including seeking information about legal not factual matters. They further argue that all likely relevant information was voluntarily provided by the summonsed individuals in their affidavits filed in this proceeding or statutory declarations included in

the initial response to the IPC, and that any further information requested by the IPC through the summonses is not relevant or necessary. To require these individuals to appear, testify and produce documents is an unnecessary hardship.

[3] The IPC says that the summonses are lawful, and are necessary to fulfill their statutory mandate which includes monitoring compliance with the *Act* and ensuring government decision making and administration are done in accordance with the purposes of the *Act*. Lawfulness of the summons is maintained as long as the information sought through a summons is relevant to a lawful inquiry, and no broader than necessary to fulfill the purpose of the inquiry. In this case the IPC says the summonses meet this test and should not be set aside.

[4] The issues are:

i) What is the appropriate test for challenging a summons issued by the IPC, a statutory body with the same powers as are vested in the Court to summon a person to appear before the Commissioner and provide sworn testimony; and to compel a respondent to produce information or a record held by the public body and relevant to the investigation?

ii) Has the test to set aside the summonses been met?

iii) Can the summonses to the individual employees lawfully include the records that are the property of Yukon government?

[5] The statutory body has lawfully issued the summonses for the purpose of investigation in this administrative law context that requires court deference. The investigation is authorized by the statute, and is not challenged by the Yukon government; the summonses arise clearly from the notice of investigation setting out the

decision or matter to be investigated; the information requested is reasonably relevant to the decision or matter; the summonses are clear and specific; the summonses are no broader than necessary for the purpose of the investigation. Requiring the individual employees to attend and provide testimony even though they say they have provided all the information they have in relation to the issues is not an abuse of process. The IPC has the authority to determine whether their fact-finding is complete. The additional information sought is factual and not a legal inquiry. The IPC can amend their summonses to require the respondent public body to produce the requested records, rather than the individual employees.

[6] There are two petitions being heard together, to address the summonses of five individual employees of the Yukon government who were summonsed at two different times. The issues raised in both petitions are the same.

[7] In the following I will use the words summons and subpoena interchangeably.

Background and Procedural History

[8] This matter began with an access to information request to the public body by an unknown requester. Specifically, the request was for access to video recordings taken between April and December 2024 at the Arrest Processing Unit (APU) of WCC where the requester had been held in custody. The public body responded to the requester that no records were found. They explained that the video recordings in the APU are captured by one feed and stored separately on two servers: one server is maintained by and within the control and custody of the WCC, and the other "is deemed in the custody and control of the Royal Canadian Mounted Police (RCMP)." Each of WCC and the RCMP retains the records according to their own policies, procedures and applicable

laws. The public body further explained that their retention period for the requested video recordings had expired, but the requester could make an access request to the RCMP, the link to which was provided. The public body also suggested that a modified request to them for documentation such as incident and observation reports and medical documentation may satisfy the request.

[9] Before the public body's response to the requester dated June 11, 2025, it had accepted the request and collected 105 hours of video from the APU recordings over the dates requested. They had not realized that the WCC 30-day retention period had elapsed and they had accessed the recordings through the RCMP server. The RCMP retention period is two years.

[10] The IPC became aware of the public body's stated inability to produce the requested video recordings on July 3, 2025. The IPC decided on its own motion to investigate what occurred. Section 94 of the *Act* sets out the process and requirements of an IPC investigation in the absence of a complaint as follows:

> (1) Subject to subsection (2), the commissioner may conduct an investigation into a decision or matter that the commissioner reasonably believes could be the subject of a complaint only if the commissioner
>
> > (a) is satisfied that an investigation into the decision or matter in the absence of a complaint is practicable and warranted; and
> >
> > (b) provides the notice described in subsection (2) not later than one year after the day on which the decision was made or the matter arose.
>
> (2) Before the commissioner conducts an investigation under subsection (1), the commissioner must provide to the respondent, and to any other person to whom the commissioner considers it would be appropriate to provide a notice, a notice that

(a) states

(i) the commissioner’s intention to conduct an investigation in respect of a decision or matter for which a complaint has not been filed, and

(ii) the grounds on which the commissioner believes the decision or matter could be the subject of a complaint.

(b) specifies

(i) details of the decision or matter to be investigated, and

(ii) the grounds on which the commissioner believes the decision or matter could be the subject of a complaint.

(3) For greater certainty

(a) the provisions of this Division apply, with any necessary modifications, to an investigation conducted under this section;

(b) the commissioner is not to be considered the complainant in respect of an investigation conducted under this section.

[11] The ICP issued a notice of formal investigation under s. 94(1)(a) of the *Act*, setting out the following rationale for the investigation in the background facts section:

> “given that video surveillance is a highly intrusive form of technology and the fact that it is persons in custody that are the subject of the surveillance, the IPC decided to exercise their own motion authority under the ATIPPA to conduct a formal investigation about the ability of the Public Body to process access requests involving video records collected at the APU and/or the WCC.”

[12] The IPC also wrote in the notice that this issue “substantially mirrors a recent complaint” to the IPC. The IPC found in that earlier investigation report that the public body “held” or had custody of video records at the APU and WCC, and control over the

recordings created by the system. The public body accepted the IPC's finding in that matter, and the records were disclosed to the requester with some redactions. The IPC stated that the refusal in this current matter was contrary to its findings in the earlier complaint and thus gave rise to this investigation.

[13] The notice of formal investigation described the decision or matter for investigation and submissions (the Issue) as follows: "Did the Public Body process and respond to Access Request No. 25-042 in accordance with its obligations under, and in compliance with, the ATIPPA?" The notice also asked five specific questions about what the public body did in processing the request, why they determined the records were not in their custody and control, and whether they complied with s. 64 of the *Act*, the section prescribing how a public body should respond to an access request.

[14] The public body responded in writing to the five questions on August 1, 2025. They stated, among other things, that the RCMP, not the public body, had control and custody of the records at issue. As a federal institution under contract for policing services with the Yukon government, they said the RCMP are not service providers under the *Act,* and the federal access to information statute applies to them.

[15] The public body included with its written submission to the IPC two statutory declarations- one from Micheal Laffin, Acting Deputy Superintendent of Corporate Services of WCC and one from Amanda Russell, Acting Director of Community Corrections of WCC. Micheal Laffin disclosed information about the technicalities of the different servers, storage, and access. Amanda Russell explained the process of accessing the recordings in this matter.

[16] On August 15, 2025, the IPC issued summonses to Micheal Laffin and Ian Davis, Assistant Deputy Minister, Community Justice and Public Safety, at the public body. Ian Davis provided an affidavit saying other than the information in the two statutory declarations and the submission by the public body he had no personal involvement in the response to the access request and no information in relation to it.

[17] On August 21, 2025, the public body initiated a court petition to strike the summonses issued to Micheal Laffin and Ian Davis. In turn, the IPC applied to strike the public body's petition. The IPC's application to strike was dismissed on November 21, 2025. That decision also held that the appropriate procedure to challenge the summonses was a petition not a judicial review.

[18] In the meantime, between the hearing of the application to strike the petition on September 10, 2025, and the decision of November 21, 2025, the IPC issued three more summonses – to Kerri Kemp, Director of Facility Based Corrections, Drew MacNeil, Director of Policy and Communication at the public body, and Amanda Russell – to appear before the IPC to provide oral testimony and to bring with them specified documents and records in their possession, power and control. There was no stay of the IPC investigation pending the outcome of the application to strike the petition.

[19] On September 19, 2025, the public body brought a second petition to set aside the three new summonses on the same basis as the first two. This petition is being heard together with the first one brought on August 21, 2025. Each of the three additional summonsed employees provided an affidavit affirming they had no information in relation to the events and questions in the notice of investigation other than the contents of their respective affidavits and attached exhibits.

i) What is the appropriate legal test for the challenge to the summons?

Brief Conclusion

[20] In matters such as this where the statutory body issues the summons, the legal test for setting aside a summons must be consistent with the character of the summonsing entity as a statutory body performing a fact-finding role; the language and purpose of the governing statute; the purpose of the summons; and the administrative law context. Where the challenge to a summons is based on relevance, the appropriate test is that the material sought must be reasonably relevant to a lawful inquiry in progress and must be related to the nature and purpose of the power accorded to the statutory body. Where production of records is compelled, the summons must be clear and specific, and it must be no broader than necessary to fulfill the purpose of the inquiry.

Introduction

[21] The November ruling in this case permitted the public body's use of the petition to challenge the summonses, grounding their objection in the common law test, reflected in the *Rules*. The reasons for preferring this procedure over a judicial review are set out in that decision and will not be repeated here. I note the circumstances of and arguments in this particular case influenced those reasons and my conclusion. The procedure in any future cases such as this should be determined from their context, circumstances, and applicable legislation. The parties agreed not to contest the November finding for the purpose of arguing the merits of this case.

[22] After the hearing on the merits of the petition, with the benefit of additional caselaw and argument, I find that the common law test to be applied by a court in

deciding whether to set aside a subpoena issued in a non-administrative law setting needs modification where a statutory body is issuing the summons.

[23] In this section I will review the differences in the issuance of summons under the common law and by statute. I will also review the jurisprudence related to the test for issuing lawful summons by statutory bodies. The focus of my assessment of the test will be on the aspect of relevance, as that is the primary basis of the Yukon government's opposition to the summonses.

Discussion

[24] The common law test, reflected in the *Rules*, first requires the person issuing the subpoena to establish it is **likely** the person subpoenaed will have relevant evidence of an issue in the proceeding (my emphasis). This threshold is to prevent fishing expeditions. Once likely relevance is shown, the burden shifts to the person seeking to quash the subpoena to show good reason to do so, such as oppressiveness, abuse of power, privilege, lack of necessity, irrelevance, or hardship. When challenged on necessity, irrelevance or abuse of power, the issuer of the subpoena must demonstrate there is a probability, not merely a possibility, that relevant evidence will be obtained (*Xiao-Phillips v Thomson*, 2024 SKCA 67 at para. 46).

[25] In this case, the statutory power given to the commissioner to issue a summons in conducting an investigation is set out in s. 95 of the *Act*. It provides that the commissioner has the same power as is vested in the court:

- to summon a person to appear before the commissioner (s. 95(1)(a));
- to compel a person summonsed to give oral or written testimony on oath (s. 95(1)(b));

- to compel a respondent to produce to the commissioner information or a record of certain types if it is held by the public body to which the investigation relates and is relevant to the investigation (s. 95(1)(c)); and
- to examine information or a record that is produced to the commissioner (s. 95(1)) (d)).

[26] A person's knowing failure to comply with a summons to appear before the commissioner is an offence for which a person is liable to a fine of up to $25,000 and/or imprisonment for six months or less (ss. 121, 122).

[27] Despite the wording "the same power as is vested in the court" the caselaw is clear that a statutory body exercising that power is not acting as a superior court. The Federal Court of Appeal in *Canadian Judicial Council v Girouard*, 2019 FCA 148, held that the Judicial Council, which had the same power as is vested in the court to summons witnesses and compel attendance, and was "deemed to be a superior court" for the purpose of inquiries and investigations, was not in fact acting as a superior court. The legislated power did not transform the tribunal's status into a court. The power was only for the purpose of inquiry or investigation under that legislation.

[28] There are differences between a court-issued subpoena in a civil or criminal proceeding, and a subpoena issued by a statutory body pursuant to its legislated authority. These differences affect the legal test for setting aside a subpoena issued by a statutory body.

[29] First, the general concern about abuse of process in a court context is diminished where a statutory body issues the subpoena itself. The court issuance of a subpoena is generally initiated by one of the litigants and the court does not pre-screen or assess

the request for subpoena. The litigant has the right to use the court's power to compel witnesses for its own purposes in advancing the case. Its subpoena request may be inappropriate as a consequence of the adversarial nature of the proceeding or for other reasons. The court has the ability to quash the subpoena as part of its ability to control its own processes and prevent their abuse.

[30] Unlike a court-issued subpoena, a statutory body such as the IPC issues a summons in accordance with its statutory authority – in this case, its authority to investigate. As noted in *Re Diamond and the Ontario Municipal Board*, [1962] OR 328 (CA) at 4, "… it is, of course, a creature of statute and possesses only those powers and can discharge only those functions authorized by the statute which created it". In an own motion investigation such as this one, the commissioner is not to be considered a complainant in respect of an investigation (s. 94(3)(b) of the *Act*), distinguishing it from a court subpoena originating from an active litigant. The commissioner's powers to issue a summons are subject to legislative constraints, unlike a court-issued subpoena where the court has no advance knowledge of the purpose or appropriateness of the subpoena. Where a statutory body issues a summons, there is a built-in systemic safeguard from abuse of process through the applicable legislative parameters and mandate of the statutory body.

[31] A second difference between a court issued subpoena and a subpoena issued by a statutory body relates to the respective roles of courts and administrative tribunals. Court oversight of the actions and decisions of statutory bodies is guided by an interpretation of the language, purpose and legislative intent of their governing statute.

As stated by the Supreme Court of Canada in *Chrysler Canada Ltd. v Canada (Competition Tribunal),* [1992] 2 SCR 394 at 395:

> "…if a statute, read in context and given its ordinary meaning, clearly confers upon an inferior tribunal a jurisdiction that is enjoyed by the superior court at common law, while not depriving the superior court of its jurisdiction, it should be given effect."

[32] This does not immunize the administrative body from court review of its powers such as the issuance of summonses (*Canada (Attorney General) v TeleZone Inc.*, 2010 SCC 62 (*TeleZone Inc.*) at paras. 24, 26; *Dunsmuir v New Brunswick*, 2008 SCC 9 (*Dunsmuir*) at paras. 27-29; and *Re Hawkins and Halifax County Residential Tenancies Board* (1974), 47 DLR (3d) 117 (NS SC (TD)) (*Re Hawkins*) at 129). However, such review must respect legislative supremacy. The long accepted administrative law principle of court deference to reasonable decisions by a statutory body acting within the parameters of their governing statute, prevents courts from unduly interfering with a statutory body's discharge of its functions (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*) at para. 30). Premature intervention by a court in a statutory body's process is discouraged by courts because it does not allow the statutory body's process to run its course (*Hemminger v Law Society of British Columbia*, 2022 BCSC 30, aff'd 2023 BCCA 36 (*Hemminger*) at paras. 34-38). This deferential approach in the context of a fact-finding investigatory process supports a standard of reasonableness and a test of relevance that derives from the scope and purpose of the investigation.

[33] A third difference relates more directly to the fact-finding and investigatory purpose of a statutory body summons. The ability of an investigative statutory body to

determine relevance in advance of issuing the summons may be less certain, with less clear parameters than in a civil or criminal court proceeding where the issues are framed by the pleadings or the indictment, and the discovery or the disclosure. In applying the common law test developed in the court-issued subpoena context, the determination of likely relevance for the purpose of quashing a subpoena is based on these more defined parameters. The courts in *Thomson Newspapers Ltd. v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission*), [1990] 1 SCR 425 (*Thomson Newspapers*) and the *Ontario Securities Act* (*Binance Holdings Limited v Ontario Securities Commission*, 2025 ONCA 751 (*Binance Holdings*)) noted the difficulty for a regulatory investigator to know whether potential offending conduct being investigated had occurred, whether a person had relevant information, or whether a document was relevant in advance of receiving it.

The Supreme Court of Canada in *Thomson Newspapers* adopted the principle from an American case, *United States v Morton Salt Co*., 338 US 632 (1950) in determining the test for compelling production of documents: "… it is sufficient if the inquiry is within the authority of the agency, the demand [for documents] is not too indefinite, and the information sought is reasonably relevant" (*Thomson Newspapers* at 531). In elaborating on the test for compelling production of documents, the Supreme Court of Canada followed the American case of *Oklahoma Press Publishing Co. v Walling,* 327 US 186 (1946)*,* in concluding "… the subpoena must be sufficiently clear and specific to inform the subpoenaed party of precisely what documents are being demanded…and must only be as broad as is necessary for the purposes of the inquiry in progress" (*Thomson Newspapers* at 532*).* The Court of Appeal of Ontario in *Binance Holdings* adopted the principles in *Thomson Newspapers,* referencing the conclusion in that case that the "material sought must be relevant to the inquiry in progress…, and the question of relevancy… must be related to the nature and purpose of the power accorded" (*Binance Holdings* at para. 89).

[34] The Yukon government argues that the statutory wording and purpose in *Thomson Newspapers* and *Binance Holdings* are different from that in this case and consequently the articulated test has no application. However, while the facts and statutory wording in *Thomson Newspapers* and the facts in *Binance Holdings* differ from the instant case, the principles emerging out of both cases are applicable here. This is because they are derived from the purpose of the statutory body as an investigator or factfinder, and from the statutory origin of the powers. In *Thomson Newspapers* the statutory investigative power was a more open-ended exploratory tool than that in the *Act,* in that there was an absence of the statutory constraints on the power to summons. In *Binance Holdings,* the Ontario Securities Commission was provided with the same power to subpoena that is vested in the Superior Court of Justice for the trial of civil actions. In both decisions, the Courts held that relevance is an essential component of the summons power to compel documents. That relevance is determined by the scope of the authorized investigation and cannot be broader than that scope. It is enough if the relevance of the information sought is within the scope of the authorized investigation and compliant with statutory requirements such as an Investigation Order or notice of investigation; it does not have to be strictly relevant (as in the test for criminal proceedings) or likely relevant (as in the test for civil proceedings).

[35] This test was also described in the case of *College of Physicians and Surgeons of Ontario v. Sazant,* 2012 ONCA 727 (*Sazant*). In that decision, the Court of Appeal for Ontario held that the statutory provision authorizing a College investigator to issue a summons to any person, requiring that person to give or produce relevant evidence to the investigator, meant that the evidence sought had to be relevant to the subject matter of the inquiry. The inquiry had to be a duly authorized investigation into specified professional misconduct. The Court of Appeal for Ontario also described the statutory summons power as a reasonable power (para 154).

[36] The jurisprudence shows the test for relevance of information and documents sought through a summons issued by a statutory body takes into account the statutory wording and purpose, the administrative law context, and the purpose of the summons and its relationship to the investigation. The underlying factors to be considered in the assessment of relevance of information requested by a summons issued by a statutory body in carrying out an investigation are applicable here: the information sought is within the knowledge of the entity being investigated, and the purpose of the statutory body's request is fact-finding in support of an authorized investigation to ensure there is compliance with the *Act*. As long as the information sought is reasonably relevant, within the scope of the investigation, and compliant with any statutory constraints on the power to summons, the test will be met. For the production of documents, the summons must be clear and specific so that the person knows what documents are requested, and the request no broader than necessary to fulfill the purpose of the investigation. In all cases, deference must be shown to the statutory requirements and the intent of the legislature.

ii) Has the test to set aside the summonses been met?

Brief Conclusion

[37] The test to set aside the summonses has not been met. The information sought by the summonses meets the reasonably relevant threshold. The persons summonsed have information relevant to the purpose of the investigation; the statutorily required notice of investigation into a decision or matter is to be considered in its totality and not restricted to the Issue set out in the notice. The notice of investigation is sufficient to authorize the summonses. The IPC has the authority to decide whether the information provided by the persons summonsed satisfies the purpose of their investigation and this is not an abuse of process. In a statutory body investigatory context, it is not necessary to advise the summonsed individuals in advance of issuing the summons of what additional relevant information they expect to receive.

Introduction

[38] I will set out and address the three primary arguments of the Yukon government. I will also set out in the alternative the analysis of the application of the common law test to this case, in the event I am wrong about the applicable test.

Discussion

Position of Yukon government

[39] The Yukon government's position is that the IPC has an overbroad and expansive interpretation of their statutory authority to investigate. It raises the following arguments in support of its petitions to set the petitions aside.

a) The power to summons in s. 95 of the *Act* is circumscribed by the commissioner's conduct of an investigation into a decision or matter that the commissioner reasonably believes could be the subject of a complaint. Before conducting an investigation, the commissioner must provide a notice to the respondent and any other person that sets out the intention to conduct an investigation on its own motion, gives reasons why it is practicable and warranted in the absence of a complaint, and specifies the details of the decision or matter to be investigated and the grounds on which the commissioner believes the decision or matter could be the subject of a complaint (s. 94).

In this case, the Yukon government argues that the summonses are not authorized by the scope of the investigation as described in the notice. The summonses are not permitted to be issued for a broad-based or wide-ranging investigation to fulfill the purposes of the *Act* or to advance the additional duties of the commissioner in s. 112. Those include: providing recommendations to the head of the public body in respect of its exercise of powers or performance of its duties under the *Act (*s. 112(e)); taking actions that the commissioner considers necessary to identify and promote changes to public bodies' practices and procedures for improving the protection of personal information and access to information under the *Act (*s. 112(g)); or notifying the head if the commissioner becomes aware of persistent failures of the public body in its processing of access requests (s. 112(h)). These constitute collateral purposes according to the Yukon government because a broad or wide-ranging inquiry into the capability or ability of the public body to provide access to video recordings at the APU of WCC is not part of the decision or matter to be investigated required by s. 94. That decision or matter in this case is limited to the statement under the heading of Issue in the notice: "Did the Public Body process and respond to Access Request No. 25-042 in accordance with its obligations under, and in compliance with, the ATIPPA?" The background facts in the notice, including the failure of the public body to follow the previously accepted recommendation from a similar investigation, are not part of the decision or matter to be investigated, according to the Yukon government. Anything other than information in support of the stated Issue does not meet the test of relevance and is not lawful. Counsel for the Yukon government stated that if sections of the background facts in the notice related to the previous recent similar complaint and the ability of the public body to process similar access requests appeared under Issue for investigation and submission, they may not have challenged the summonses.

b) The summonsed Yukon government employees provided all of the information they have about this matter in their sworn documents and exhibits. Unlike the cases of *Thomson Newspapers* and *Binance Holdings*, where the investigators did not know the internal processes of and actions taken by the corporations being investigated, here the IPC has knowledge of what occurred and there are no facts related to the investigation that have not already been provided. Compelling the employees to appear, testify and produce documents is a hardship and an abuse of process.

c) The IPC is required to advise the respondent or the persons being summonsed in advance of issuing the summons what additional relevant evidence they expect to receive and they have not done so.

a) *Notice of investigation insufficient to authorize summons*

[40] The IPC is a statutory body that provides independent oversight and enforcement of access to information and privacy laws in the Yukon, including the *Act*. The *Act* provides the public with a right to access information held by public bodies and to personal information, to ensure government transparency and to facilitate the public's ability to participate meaningfully in the democratic process (s. 6(e)). Sections 64 and 65 require public bodies to respond to an access request in a prescribed manner, and to provide access to all information held by the public body relevant to the access request, with certain exceptions. The *Act* also sets out powers and duties of the commissioner in s. 112 as noted above, enabling them among other things, to ensure that public bodies are complying with the *Act* and its purposes in their responses to requests for access to information.

[41] In this case, the Yukon government's restrictive interpretation of the decision or matter to be investigated to the question stated in the notice under Issue is unwarranted for two reasons. First, the application of the modern principle of statutory interpretation means the decision or matter described in the notice cannot be confined to the one statement set out in the Issue, especially when the statute itself mandates specific details of the decision or matter be provided in the notice. Second, the wording of the Issue is broad enough to include the question of the general ability of the public body to process access requests for APU video recordings.

[42] The notice describes the Issue as whether the public body processed and responded to the access request in accordance with its obligations under and in compliance with the *Act*. Part of those obligations may include complying with an accepted recommendation of the commissioner from an investigation report. In this case, the public body accepted the IPC finding in a previous investigation report that appears on its face to contradict the position it took with respect to the access request in this case. In the previous case, the IPC found that the public body has custody and control over video recordings from the APU. No judicial review of that determination was sought, and the public body processed the earlier access request with some redactions. Their response here that they were unable to process the request raises the question of their ability to meet their obligations under the *Act*. The IPC has some questions eliciting factual differences between the two matters.

[43] The modern approach to statutory interpretation requires that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Bell ExpressVu Limited Partnership v Rex,* 2002 SCC 42 at para. 26, quoting E. Driedger, *Construction of Statutes*, 2nd ed (1983) at 87).

[44] This principle demands that the sections in the statute about the investigation and the notice be considered within the context and purpose of the statute. For an investigation under the *Act* to be valid it must be consistent with the purpose of the *Act* and the commissioner's role. The *Act* requires that the notice specify details of the decision or matter to be investigated, the grounds on which it could be a subject of a complaint, and why an investigation is practicable and warranted in the absence of a

complaint. All this information can be considered in assessing the appropriateness of the summonses.

[45] Here, the notice complies with the *Act* in the following ways:

- The covering letter accompanying the notice from the commissioner to the Minister of Justice states that in accordance with his authority under para. 94(1)(a) he has “decided to investigate the capacity of the Department of Justice (Public Body) to process access to information requests involving video records” and that he has learned that access requests are being denied as a result of the inability of the public body to process such requests.
- The background facts section reviews the circumstances and states again that the IPC decided to conduct a formal investigation on its own motion “about the ability of the public body to process access requests involving video records collected at the APU and/or the WCC.”
- The background facts also provide that this issue “substantially mirrors a recent complaint” in which the investigation report found that video records are held at the APU and WCC by the public body, who is required to process access requests for any such video records. The public body’s apparent refusal or stated inability to do so contrary to these earlier findings is part of the notice.
- The commissioner asked the public body to provide written submissions in answer to five specific questions, including the basis on which the public body determined that the records were not in its custody and control, if it

referred the applicant to the RCMP for access to the records. This relates to the earlier matter and the IPC's finding that the public body had custody and control of those records.

[46] The statutory provisions about the investigation into a decision or matter by the commissioner on its own motion, and the notice to be provided of that investigation must be read in a context that includes the scheme and object of the *Act*. The Yukon government's urged interpretation is too restrictive. Among other things, the purpose of the *Act* includes at s. 6(f) "to provide the commissioner with powers and duties that enable the commissioner to monitor public bodies' compliance with this Act and ensure that public bodies' decision-making is conducted in accordance with the purposes of this Act and that their administration is in accordance with the purposes of this Act." This is similar to the wording in the Issue section of the notice. Other purposes include providing the public with a "right to access information held by public bodies subject to specific exceptions, in order to ensure government transparency and to facilitate the public's ability to meaningfully participate in the democratic process" (s. 6(e)), and "to ensure that individuals have access to their personal information held by public bodies and have a right to request correction of it" (s. 6(c)). The summons is one of the powers of the commissioner that allows him to ensure the public body's decision is conducted in accordance with its obligations under and in compliance with the *Act*. The summonses in this case are tied to the investigation. That investigation is being conducted to ensure that an access request for a video recording at the APU is being processed or not in compliance with the *Act*. There is no collateral purpose. The interpretation of the notice of investigation is not to be restricted only to the statement of the Issue, but it is to be

considered in its totality, because the statute requires details of the decision or matter to be provided. In this case, those details cannot be ignored or dismissed.

[47] Further, even if the scope of the summons were restricted to the Issue, it is broadly worded enough to authorize the summonses. Although it refers only to the one access request, its references to the public body's obligations under and compliance with the *Act* are sufficient to authorize fact-based questions about consistency with previous IPC findings arising from a similar issue.

b) *Seeking further information from persons summonsed is an abuse of process*

[48] The Yukon government's second argument about abuse of process relates to how relevance is determined and by whom. Relevance is determined by the statutory body (subject to court oversight). Even if some information has already been provided, the statutory body can request further information as long as it meets the test of relevance and complies with the statute.

[49] Section 95(1)(a) and (b) of the *Act* set out the powers of the commissioner to summons individuals to appear and to give sworn testimony and incorporates the language of having "the same power as is vested in the Court". The word relevance does not appear in these subsections. However, the appropriate test clearly imports reasonable relevance to the investigation as circumscribed by the statute as a necessary component of determining the reasonableness of the summons.

[50] In other s. 95 subsections that provide the commissioner with powers that do not reference the "same power as is vested in the Court" language, the word 'relevant' is used, and notably not 'likely relevant' as in the common law test. For example, in s. 95(1)(g) the commissioner may conduct interviews with an employee of the public

body that they reasonably believe may know or hold information relevant to an investigation. In s. 95(1)(h) the commissioner may receive and consider evidence of any other type that is relevant to the investigation. This further supports the reasonableness test of relevance, not likely relevance, as articulated by the courts in *Thomson Newspapers*, *Binance Holdings* and *Sazant*.

[51] The IPC was provided with information from employees of the public body about how and why they responded to the access request in question the way they did. However, it is not the role of the responding public body to conclude that the summonsed employees have nothing more of relevance to provide to the investigator. As noted in the decision of *Re: The Yukon Ombudsman,* 2023 YKSC 26 (*Ombudsman*) at para. 214, it is the statutory body whose role it is to determine whether it has reason to believe a person has information relevant to an investigation.

[52] There is no dispute that all of the persons summonsed had information relevant to the investigation. Their statutory declarations and affidavits confirm their knowledge and involvement. The issue is whether they have additional information to provide that is relevant to the investigation. The Yukon government says they do not.

[53] Counsel for the IPC noted that three of the five people summonsed provided no evidence: Ian Davis, Kerri Kemp, and Drew MacNeil. The information provided by the other two individuals, Micheal Laffin and Amanda Russell, gave rise to additional relevant questions.

[54] The IPC raised during the hearing the following additional questions:

- if the records were under the custody and control of the RCMP, how did the public body access the records (105 hours of video recording from 2024);
- are there factual differences between this case and the previous similar one where the IPC's accepted recommendation was that the public body has custody and control of those records in the same location;
- what mechanisms were discussed among Amanda Russell, Drew MacNeil and Micheal Laffin to mitigate the access of the records on the RCMP server by the public body;
- do the emails between Amanda Russell and Ian Davis about the issue raise further questions;
- does Kerri Kemp have information about how the public body intends to respond to these access requests in future as she was part of the plan discussed and was to be included along with Amanda Russell on correspondence from the public body's access and privacy office for all video requests;
- Amanda Russell has knowledge of how the videos were accessed although no detail was provided in her statutory declaration, as well as what the public body knew about it and when;
- Micheal Laffin has significant detailed knowledge about the technical and functional storage of the video recordings that may raise additional questions for clarification.

[55] All these unanswered questions invite factual answers. In the information provided the declarants and affiants did not answer any factual questions about the apparent contradiction of the position taken in this case to their acceptance of the recommendation in the previous case, nor did they explain the process they intended to follow for future similar requests.

[56] These questions are relevant to why and how the public body responded the way they did to this access request, and they help the IPC to determine whether the public body was in compliance with the *Act*. They fit within the scope of the investigation as set out in the notice and they are questions that elicit answers beyond the information provided in the affidavits and statutory declarations.

[57] The Yukon government argued that the compulsion of these individuals to attend at a particular time and place is an onerous burden on their time, especially when their information is, in the Yukon government's view, negligible. No evidence was proffered in support of this argument. The summonsed witnesses all have relevant information. To require them to comply with the summons is not an abuse of process.

[58] Having made this determination, given the significant operational responsibilities of these individual employees and the fact that they have already provided substantial information to the IPC, I recommend that the IPC provide a time estimate to each employee for their required attendance and testimony. Further, the IPC may consider whether they require all five employees to provide testimony once they have received information from some of them.

c) *The IPC failed to advise the public body in advance of the additional relevant evidence they expected to receive*

[59] The Yukon government's third argument is the IPC failed to advise the public body in advance of issuing the summons what additional relevant evidence they expected to receive from these individuals. This requires an analysis of the investigation context in which the summonses are issued and the role of the statutory body as described in the *Ombudsman* decision. As noted above, in an investigation, unlike a civil or criminal proceeding, there is often a lack of knowledge by the investigatory body about the internal processes and communications affecting the matters being investigated (*Thomson Newspapers* at 526). It is often not possible for the investigatory body to know in advance of issuing the subpoena whether an individual will have relevant information and in what areas. This is part of the reason for the less strict relevance standard for information requested by statutory bodies conducting an investigation.

[60] The extent of the commissioner's duty to disclose the basis of their investigation and summons is the notice of investigation requirement in the *Act*. As long as the information sought from the summonsed individuals fits within the scope of the decision or matter being investigated set out in the notice of investigation, there is no further obligation on the IPC to disclose the information they seek to obtain in advance of the summons. Here I have found that the scope of the investigation as set out in the notice authorizes the summons, and that the individuals summonsed have additional relevant information justifying the summonses. The requirement to provide that information in advance does not exist. Ensuring the test of relevance is met is done through court oversight.

Conclusion on application of the test

[61] A core function of the IPC is to determine whether the public body processes and responds to an access to information request in accordance with its obligations under and in compliance with the *Act* (s. 6(f)). In this case the notice of investigation into the decision or matter was consistent with this purpose section of the *Act*. The summonses issued were to assist the IPC in its fact-finding into the denial by the public body to process the access request. The information requested was reasonably relevant. The five individual employees who received the summonses were involved in responding to the access request, or involved in discussions of why they were unable to respond to the request, and discussions of how to manage similar requests in future. The IPC was entitled to determine whether they have additional relevant information to provide, in the context of the investigation and the statutory parameters. The IPC is not required to advise the individuals in advance of the additional relevant information they seek.

Alternative determination applying the common law test

[62] If I am wrong about the applicable legal test, and instead the common law test, reflected in the *Rules,* applies in this context, I find that the summonses were issued lawfully. It is clear and undisputed from the material provided by the public body through the statutory declarations and the affidavits that the individuals likely have relevant information to provide to the IPC. As an example, Ian Davis, who attested to an awareness of the issue but a lack of involvement, was part of email discussions and plans of how to manage such requests in future. The burden to establish on a *prima facie* basis likely relevance of information sought through the summons is met by the IPC.

[63] The Yukon government's argument in response that the summonses' compulsion was a burden was not supported by evidence. The Yukon government's further argument that the summonses were unnecessary and irrelevant because the individuals have no further information to provide is not well-founded. The IPC has raised a number of questions in responding to the petitions to show a probability that additional relevant information will be obtained.

iii) Can the summonses to the individual employees lawfully include the records that are the property of Yukon government?

Brief conclusion

[64] The summonses to Kerri Kemp, Drew MacNeil and Amanda Russell include a requirement to bring with them, when appearing to testify before the IPC, documents in their possession or control relating to the matters in question: specifically, "any handwritten or digital (typed) communications in relation to this access to information request, including texts, e-mails, Microsoft Teams messages, personal notes on meetings you attended, issue alerts and briefing notes". I find that this request is authorized by the *Act*, with the exception of naming the individual employees rather than the public body to respond. I will permit the IPC to amend its summons for the records to name the public body rather than the individual employees.

Positions of the parties

[65] The Yukon government says the IPC does not have the power through a summons to compel employees of the Yukon government to produce records of the Yukon government. These employees come into possession of documents during their employment that belong to the Government of Yukon and are "public records". The employees have access to the documents solely for the purpose of performing their

duties (General Administration Manual (GAM) Policy 2.15 – Security of Public Records, s. 3.3).

[66] The IPC says that there are two ways in which the IPC can obtain production of these records. First, the IPC power under s. 95(1)(c) to compel a respondent, in this case the head of the public body (s. 89, “respondent”, (b) and (c)) to produce records, includes records that either the respondent or an employee or delegate of the respondent holds (s. 97(2)(a)). Second, the IPC power to order production of records from public body employees is incidental to its power to summons witnesses generally. Sections 95(1)(a) and (b) of the *Act* provide the IPC with the same power as is vested in the Court to appear and give oral or written testimony. Like subpoenas issued under the *Rules*, they include compelling the person to attend and to bring relevant specified documents (Form 25, Rules 42(41), 40(3), (28(5)). Here the employees are not being summonsed in their personal capacity, but in their capacity as employees of the public body, involved in processing an access request.

Discussion

[67] The IPC is entitled to production of the records requested. The *Act* is clear that the respondent is obligated to produce them, through the head of the public body (the respondent) whether or not they are held by them or by individual employees. The head of the public body has not been summonsed to appear by the IPC in this case presumably because they have no relevant *viva voce* testimony to provide. The request to produce specific records added to the summonses of the individual employees of the respondent is practical and consistent with the intent of the legislature to give access to the IPC to relevant documents held by the employees or the head of the public body. In

order to obviate any uncertainty of the summonsed employees, due to the specific wording of the *Act* and the policy in the GAM, and to be consistent with the *Act*, I will allow the IPC to amend the summonses to remove the production of records requests from the individual employees' summons and add them to a summonses to the head of the public body. The request for records is to be limited to the same production of the records requested of the employees in the existing summonses.

Conclusion

[68] For the above-noted reasons, the petitions are dismissed.

DUNCAN C.J.