

**ACCESS TO INFORMATION
AND PROTECTION OF PRIVACY COMMISSIONER
ANNUAL REPORT
1997/98**

I. COMMISSIONER'S MESSAGE

The Access to Information and Protection of Privacy (ATIPP) Act is now just over one year old. It has been a year of feeling out the Act and learning about the issues, particularly for me. As a result of my work as the ATIPP Commissioner and the research that I have done in that capacity, I have come to a greater appreciation of the importance not only of open and accountable government, but also of the right to privacy. Unfortunately, however, these two concepts are often tightly intertwined and difficult to balance.

In October, I attended the Summit of my counterparts from across Canada. The focus of this meeting was privacy issues. I was brought up to date on some of the current issues, particularly in the area of privacy, which legislators at the provincial/territorial and federal levels are dealing with across the country. Initiatives such as the Federal Gun Control Registry and the Universal Health Care Database are becoming possible as a result of new technologies. Alongside of the many positive uses of such databases, there are huge implications in terms of the loss of control over our own personal information. These are issues which go to the very root of a free society. There are, of course, two sides to the debate. On one side, there are those who feel that the benefits of such databases far outweigh the possible drawbacks. On the other side, there are those who feel that the potential for loss of privacy resulting from these initiatives will lead us that much closer to the Orwellian "big brother" way of life.

Perhaps even more alarming than these Government initiatives, which can at least be monitored and controlled, is the exchange of information which occurs in the private sector where there are no such limitations. The advent of the information highway and new communications technologies have created a whole new set of privacy issues that we could not have contemplated even 10 year ago. As yet in North America, only Quebec has attempted to legislate to protect individual privacy rights in the private sector. Many European countries have gone much further than Canada or the United States in this area and there is much for us to learn from these countries. The global economy means that privacy issues do not end at provincial, territorial or national borders. They are, and must remain, a concern of governments at all levels. An eye must be kept to the future and to the legislative changes that are taking place globally to protect personal information in all sectors of our lives.

On the "access to information" side of things, the issues are somewhat narrower, though no less important. In dealing with requests for review, I have attempted to take the role of a mediator, at least in the initial stages of the review process. In several instances, this has resolved the issues to the satisfaction of the parties involved and I have not had to make any further recommendations. Mediation has proven to be a far more efficient way to resolve issues than the hearing process. All hearings to date have been written hearings, with input invited from all parties involved. It is a somewhat cumbersome way of dealing with the issues but has been effective. With time and experience, I am confident that the process will become more streamlined and effective.

Through the generosity of the Alberta Freedom of Information Office, I was able to obtain, free of charge, a copy of their record management program which was designed specifically for their office to record and track requests. In the next year, I hope to receive authorization to contract the programmer who developed this system to revise it so that it is more specific to our legislation and therefore more useful to the Commissioner.

It has been an interesting year and I am pleased with the progress we have made in making Access to Information an effective and efficient system. There is, however, much room for improvement and I look forward to the next year, confident that the progress will continue.

Elaine Keenan Bengts

II. INTRODUCTION

This is the Information and Privacy Commissioner's first Annual Report. It explains the mandate and role of the Commissioner and the principles of the Access to Information and Protection of Privacy Act. This report includes some examples of the Commissioner's Recommendations made over the last year and provides some commentary and recommendations for the future.

Background

The Access to Information and Protection of Privacy Act was created to promote, uphold and protect access to the information that government creates and receives and to protect the privacy rights of individuals. It came into effect on December 31st, 1996 and provides the public with a means of gaining access to information in the possession of the Government of the Northwest Territories and a number of other governmental agencies. This right of access to information is limited by a number of exceptions, aimed mainly at protecting individual privacy rights and the ability of elected representatives to research and develop policy. It also gives individuals the right to see and make corrections to information about themselves in the possession of a government body. Currently the act covers 22 named government departments and agencies.

The Process

Each of the government bodies covered by the Act have appointed an ATIPP Co-ordinator to receive and process requests for information. Requests for information must be in writing, either on the forms which have been developed for use under the Act or simply by writing a letter. Requests must be submitted, along with the \$25.00 fee, to the appropriate government agency. There is no fee for a request to access an individual's own personal information.

The role of the public body is to apply the specific requirements of the Access to Information and Protection of Privacy Act to each request received while at the same time, protecting private information of and about individuals which they might have in their possession. Because there are a number of exceptions to the disclosure of information contained in the Act, the ATIPP Co-Ordinators are often called upon to use their discretion in determining whether or not to release the specific information requested. The ATIPP Co-Ordinators must exercise their discretion to ensure a correct balance is struck between the applicant's general right of access to information and the possible exceptions to its disclosure under the Act.

In the case of personal information, if an individual finds information on a government record which they feel is misleading or incorrect, a request in writing may be made to correct the error. Even if the government body does not agree to change the information, a notation must be made on the file that a request has been made that it be changed.

The role of the Access to Information and Protection of Privacy Commissioner is to provide an independent review of discretionary decisions made by the public bodies in the exercise of their discretion. The Commissioner's office provides an avenue of appeal to those who feel that the public body has not properly applied the provisions of the Act. The Commissioner is appointed by the Legislative Assembly but is otherwise independent of the government. The independence of the office is essential for it to maintain its credibility and ability to provide an impartial review of the government's compliance with the Act. With the exception of the present Commissioner's appointment, which will expire on March 31st, 1999 (Division Day), the appointment of the ATIPP Commissioner is for a term of five years.

The ATIPP Commissioner is mandated to conduct reviews of decisions of public bodies and to make recommendations to the Minister involved. The Commissioner has no power to compel compliance with her recommendations. The final decision in these

matters is made by the Minister involved. In the event that one of the parties does not agree with the Minister's decision, that party has the right to appeal that decision to the Supreme Court of the Northwest Territories.

The Commissioner also has the obligation to promote the principles of the Act through public education. She is also mandated to provide the government with comments and suggestions with respect to legislative and other government initiatives insofar as they effect either the ability to access information or the distribution of private personal information in the possession of a government agency.

III. REQUESTS FOR REVIEW

Under section 28 of the Access to Information and Protection of Privacy Act, a person who has requested information from a public body or a third party who may be affected by the release of information by a public body, may apply to the ATIPP Commissioner for a review of the decision made by the public body arising out of a request for information. This includes decisions about the disclosure of records, corrections to personal information, time extensions and fees. The purpose of this section is to ensure an impartial avenue of consideration of requests and objections made under the Act.

A Request for Review is made by a request in writing to the Commissioner's Office. This request must be made within 30 days of a decision by a public body in respect to a request for information. There is no fee for a Review Request. A Request for Review may be made by a person who has made an application for information under the Act. It may also be made by a third party who might be mentioned in or otherwise affected by the release of the information requested.

Requests for Review are reviewed by the Commissioner. In most cases, the Commissioner will first request a copy of the original Request for Information and a copy of all responsive documents from the appropriate public body. Except where the issue is an extension of time, the Commissioner will review the records in dispute. Generally, an attempt will first be made by the Commissioner's Office to mediate a solution satisfactory to all of the parties. In several cases, this has been sufficient to satisfy the parties. If, however, a mediated resolution does not appear to be possible, the matter moves into an inquiry process. All of the relevant parties, including the public body, are given the opportunity to make written submissions on the issues. In most cases, each party is also given the right of reply, although this has not always proven to be necessary.

A number of cases have been resolved by the Commissioner's mediation efforts. In one instance, for example, a person had requested information from the Workers' Compensation Board. The Workers' Compensation Board reviewed its records and did not find anything responsive to the request. They did, however, refer the request to the Department of Justice, to whom a number of files had been transferred when the Mining Inspection Office became part of the Workers' Compensation Board. The Department of Justice reviewed its records and provided the Applicant with a small number of documents. The Applicant was not satisfied that he had received all of the documents in the hands of the government that were responsive to his request. In order to attempt to resolve the matter, the Commissioner personally reviewed the government's files and identified several additional documents which, although not strictly within the wording of the Request for Information, clearly were the kinds of records which the Applicant had contemplated when making his request. Without a hearing, the Commissioner suggested that these documents be provided to the Applicant, which was done.

In another case, an Applicant made the same Request for Information from a number of different public bodies, all of whom had a large number of documents responsive to the request. Many of the records in each of the various public bodies were duplicates of records held by other public bodies who had received the same request. With the assistance of the Commissioner, and the input of each of the public bodies and the Applicant, the specific information which the Applicant wanted was clarified and narrowed. It was also agreed that each public body would provide a full list of the records in their possession and for any record which was duplicated, only the public body from which the record originated would provide that record rather than each of the public bodies providing the same record. This compromise had the effect of drastically reducing the number of records to be provided to the Applicant and streamlined the process significantly. In this case, the Applicant eventually received some records and withdrew his request for any further records.

In a number of other instances, the Commissioner received inquiries with respect to certain access and privacy issues and was able to answer the questions immediately so as to avoid the necessity for a Request for Review, or to refer the individual to a specific public body or other agency. Several times, the Commissioner assisted individuals in making Requests for Information from the Federal Information Commissioner's Office.

During the 1997/98 fiscal year, the Commissioner completed two reviews and issued recommendations to the Minister of the public body involved. In each case, the Minister agreed with the recommendations made. In neither of these cases did the parties involved appeal the decision to the Supreme Court.

Review Decision 97-01

This decision was issued on May 22nd, 1998. The Request for Review arose as a result of a decision by the Workers' Compensation Board to refuse to respond to a request for information. The request was for information outlining the total cost of the expenditures incurred by the NWT Workers' Compensation Board (WCB) in a civil claim on behalf of certain injured workers which was then before the courts. The Workers' Compensation Board declined to provide the information requested, relying on Section 15 of the ATIPP Act which provides that a public body may refuse to disclose information which is subject to solicitor/client privilege. After reviewing the scope of solicitor/client privilege, the Commissioner found that so long as the litigation was ongoing, the information requested was protected by solicitor/client privilege and recommended that the position of the Workers' Compensation Board be upheld.

Review Decision 97 - 02

This decision, released by the Commissioner on October 23rd, 1997, also dealt with solicitor/client privilege. In this case, the Applicant applied under the *Access to Information and Protection of Privacy Act* (the "Act") to the Department of Justice for

information with respect to an investigation which had been undertaken as a result of inmate complaints at the Yellowknife Correctional Centre. The information requested included a memorandum addressed to the Director of the Corrections Division of the Department of Justice from the department's in-house legal counsel. The main issue was whether a legal opinion written by an employee of the department was entitled to the same protection as that afforded to private counsel. The Commissioner found that the memorandum did, in fact, constitute a legal opinion. A review of some case law indicated that legal privilege existed in such instances and the Commissioner found that section 15 did apply. She also found, however, that there was no indication that Department of Justice, when reviewing its records and responding to the Request for Information, had inquired of its client (Corrections Division), whether it was prepared to waive its privilege. She noted that Section 15 makes the solicitor-client exemption a discretionary one on the part of the public body as it provides that the head of the department "may" refuse to disclose information which is subject to solicitor-client privilege. This implies that the head of the department must put his or her mind to the matter and cannot refuse to release the information simply because it is protected by privilege. She recommended that, at the very least, the head of the department must inquire of the division who requested the legal opinion whether or not it is prepared to waive any privilege attached to the document and, although the Minister had the ultimate discretion as to whether or not privilege could or should be waived, discretion must be exercised and be seen to be exercised in some real way.

IV. STATISTICS

The Office of the Information and Privacy Commissioner receives many inquiries on a wide variety of information and privacy issues, most of which are dealt with fairly quickly and readily by telephone or by mail. The office has not logged or tracked these kinds of inquiries because of the administrative burden involved.

From the proclamation of the ATIPP Act, to March 31st, 1998, the Commissioner's Office opened 28 Review Files. Of these, two have been resolved by Review Recommendations, and seven have been resolved by mediation or negotiation and the Requests for Review have been withdrawn. Another ten are in the final stages of the review process and a recommendation is likely to be issued within the next few weeks. The remaining files are in various stages of the process.

Of these 28 files, 2 have been complaints that the information provided in response to a Request for Information was incomplete, 3 have been as a result of the public body's refusal to provide access to all or some of the records identified as responsive, 7 resulted from the Applicant's perception that the public body had not been prompt or thorough enough in their response to the Request for Information, and 16 were Third Party Objections to the release of information.

The Department of Public Works and Services, the Department of Health and Social Services and the Department of Justice, in that order, were the public bodies most often involved in the Review process.

V. OTHER ACTIVITIES OF THE COMMISSIONER'S OFFICE

In addition to the 28 files review files, two files have been opened to assist individuals in obtaining information. In one case, it was not clear which government agency would have the information and in the other case there were issues as to the jurisdiction of the ATIPP Act over the information in question. In each case, as no initial Request for Information was made, they were not "Review" files. They were, however, opened because the issues involved some research or could not be resolved quickly.

One of the Commissioner's responsibilities under the Act is to offer comment on the implication of proposed legislative schemes or government programs with respect to privacy protection issues. To this end, during the year the ATIPP Commissioner made written submissions to the Standing Committee on Social Issues with respect to four pieces of legislation dealing with family law issues, specifically the Adoption Act, the Children's Law Act, the Child and Family Services Act, and the Family Law Act. Several concerns were raised about the implications of certain of the proposed legislative programs in terms of their effect on personal privacy rights. A number of other proposed bills were also reviewed by the Commissioner to consider whether there were any privacy issues which should be addressed arising from the proposed legislation. In addition, the Commissioner has been consulted by the Department of Education, Culture and Employment which is in the process of reviewing and proposing legislative changes to the Archives Act and Regulations.

The Commissioner has also been invited to participate in meetings of the ATIPP Co-Ordinators for all of the various public bodies covered under the Act. Although she was unable to attend the first of these meetings, she did attend a second one approximately half way through the year and found the discussion very helpful and informative. A number of practical issues were discussed concerning the process and suggestions were made for improving the efficiency of the system. It is hoped that there will be more of these meetings in the future so that the lines of communication remain open.

Another activity that the Commissioner has undertaken during this initial year of the Act is public education. She has spoken to several classes at Arctic College about the Act and its purpose and is in the process of arranging for speaking engagements in several communities outside of Yellowknife as a part of a general training program for Boards and other organizations. The Commissioner has also been asked to participate as a panel member in the National Ombudsman Conference being hosted by the Northwest Territories Languages Commissioner in June of this year. Although the Commissioner did not do as much public education as she would have liked in the first year of the legislation, it is anticipated that public education about the Act will become an important function of the Commissioner's Office in the future.

VI. LOOKING AHEAD

For the most part, the initial year of the ATIPP Commissioner's Office was a productive and successful one. It was, quite frankly, somewhat busier than had been anticipated. Because the matters that reach the Commissioner's attention are a small minority of the applications made for information under the Act, it is clear that the public is aware of the availability of the Act. It is encouraging to see that this is the case, despite relatively little publicity of the existence and availability of the legislation. It is the Commissioner's hope that more public education will make the legislation even more visible and, therefore, available, to the general public.

As with any program, the first year of operation of the ATIPP Act has revealed some areas in which the legislation could be improved to better meet the objectives of the Act. Specifically, as a number of inquiries received by the Commissioner's Office related to the Regional Health Boards, it is clear that there is a need for the scope of the legislation to be expanded to include these public bodies. These boards are clearly government agencies, spending government money and it is important for the public to be able to have access to information which is created or received by these boards. Care, of course, must be taken to prevent the improper use of personal health information. The kinds of requests that have been received this year, however, have been for business records and minutes of board meetings which should be available to the public. Similarly, it has become clear that the legislation should also be expanded to include municipal and community counsels. The recent Supreme Court case involving the City of Yellowknife and a local ratepayers group with respect to "secret meetings" of council members may have been resolved without the need for the court's intervention had there been legislation in place to govern access to information at the municipal level.

It is important, from the Commissioner's perspective, that the legislature to keep abreast of developments and initiatives in other jurisdictions aimed at legislating the

development of personal information databases. This will most likely become an issue first in the area of health records and the proposed universal health information database. Some provinces are already considering legislation to create and govern such a database. It will be important for the Governments of the Northwest Territories and Nunavut to keep up with these developments. As well, it is important that we not lose sight of developments with respect to the protection of individual privacy rights in the private sector. These issues will become more and more prominent over the next few years.

Another area in which the Commissioner sees an immediate need for change to the legislation is in providing her Office with some means of compelling compliance with her process. The Commissioner has noted that there is very little power in the Act which allows her to compel compliance with her requests. Although most of the public bodies have been extremely helpful and have willingly complied with time limits and other requests made by the Commissioner, this has not been universally the case. In one case, the Commissioner has had to write several rather pointed letters in an attempt to get the public body in question to recognize the Commissioner and comply with her requests. As the Act does not presently provide the Commissioner with any power to subpoena the production of documents or apply any sanctions in the event of non-compliance with a request made by the Commissioner, her hands are tied when the public body decides to be less than co-operative. There must be some means by which the Commissioner can ensure the co-operation of the various public bodies short of an application to the Court. It is strongly recommended that the legislation be reviewed and amended so as to provide the Commissioner with specific powers to ensure the compliance of public bodies with the processes of the ATIPP Act.

Finally, it is the hope of the Privacy Commissioner that a web page be developed over the next year and added to the Legislative Assembly's web site to provide a means of public access to information about the process and access to review decisions.

VII. CONCLUSION

This first year of the ATIPP Act and the Commissioner's Office has been one of learning, planning and organizing. It has been a full year, with many problems having been encountered. There is much to learn, and much to improve. We have, however, made a good start and I look forward to the continuing challenges of ensuring that the concepts contemplated by the Act are respected and encouraged.