



**RESPONSE TO COMMITTEE REPORT 6-14(6)
AOC REPORT ON THE REVIEW OF THE
ACCESS TO INFORMATION AND PROTECTION OF PRIVACY COMMISSIONER'S
ANNUAL REPORT 2001-2002**

Background on Access and Privacy Legislation in Canada & the NWT

NWT residents are currently protected by federal and territorial access and privacy laws. The purpose of these laws is to set out procedures for collecting personal information, an individual's rights to access and request corrections to the information, limits on the use and disclosure of personal information held by an organization, and how to request access or corrections.

- The federal *Access to Information Act* took effect in 1983. This act applies to accessing information held by federal government departments and agencies.
- The federal *Privacy Act* took effect in 1983. This act applies to personal information held by federal government departments and agencies.
- The *Personal Information Protection and Electronic Documents Act* (PIPEDA) came into force on January 1, 2001. At this time, this federal legislation applies to personal information held by federal works, undertakings and businesses as well as organizations which collect, use or disclose personal information across jurisdictional boundaries.
- The *Access to Information and Protection of Privacy Act* (ATIPP) is territorial legislation that took effect in 1996. It applies to personal information held by the Government of the NWT, its boards and agencies.

All provinces and territories have some form of access and privacy legislation respecting information held by provincial/territorial governments and agencies. Several jurisdictions have access and privacy legislation that applies to municipal governments¹.

In January 2004, PIPEDA will apply to all organizations in Canada which collect, use or disclose personal information in the course of commercial activities. A review of the Act, conducted by a Committee of the House of Commons, is required in 2006 under the legislation.

The federal Privacy Commissioner has interpreted the phrase "federal works, undertakings and businesses" to include all private sector organizations in the three territories. The territories disagree with this interpretation. For the purposes of this response, the Department of Justice is of the opinion that PIPEDA will come into effect for the private sector in the NWT on January 1, 2004.

¹ B.C., Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nova Scotia (under *Municipal Gov. Act*).

GNWT Response to 2001-2002 Recommendations

Under the *Access to Information and Protection of Privacy Act*, the Access and Privacy Commissioner is an independent officer appointed for a five-year term. The Act requires the Commissioner to file an annual report on their activities. The Commissioner may also include in their report recommendations for amending the legislation they believe would improve the Act's efficiency and effectiveness.

The Standing Committee on Accountability and Oversight conducted a review of the Commissioner's report. Their report of the Review was tabled in the Legislative Assembly on February 20, 2003. It included seven recommendations.

The following is the Government of the NWT (GNWT) response to the recommendations contained in the AOC's "Report on the Review of the Access to Information and Protection of Privacy Commissioner's Annual Report 2001-2002":

1. The Government tables the agreed-upon draft amendments to the ATIPP Act as soon as possible, preferably in the February/March Session.

Response

The Department of Justice introduced legislation to amend the *Access to Information and Protection of Privacy Act* during the June sitting of the 6th session of the 14th Legislative Assembly. Bill 27, *An Act to Amend the Access to Information and Protection of Privacy Act*, makes amendments that:

- provide for "deemed refusal" where the head of a public body fails to respond to a recommendation of the Commissioner.
- provide the Commissioner with the authority to investigate and make recommendations in the event of a breach of privacy provision of the Act.
- grant the Commissioner authority to subpoena documents and witnesses deemed necessary to conduct a review of an access complaint. (As recommended by the AOC, this authority will not extend to privacy complaints.)

2. Municipalities be included under the Territorial ATIPP law or new legislation be drafted to deal with municipalities' use of public information.

Response

The Department of Justice initiated two consultations with municipalities on the issue of including Municipalities under the Territorial ATIPP legislation or some form of Access and Privacy legislation. Representatives of municipalities told the Department that they do receive public requests for information that is created or collected by those governments. Although some municipal representatives could see the benefits that coming under the legislation might bring, all of them recommended against bringing them under the Act at this time. The following specific problems were identified by the representatives:

1. Administration of the Act

Municipalities were concerned with how the Act would affect day-to-day operations of municipal employees as well as the general administration of the municipality. They were concerned about increased workload, a reduction in their current discretion, and increased difficulty in determining when material can and cannot be shared.

Municipal representatives were also concerned about the need for, or value of, different policies and procedures involved with the implementation of the Act, including the need for consistent records management practices.

2. Costs

All representatives were concerned about the costs associated with administering the Act. They asked if additional money would be added to their base funding to cover the cost of implementation and the ongoing administrative costs associated with this legislation.

3. Training

All participants requested additional training on the Act, particularly training addressing the unique needs of municipalities.

In November 2000, the City of Yellowknife intended to enact an Access to Information bylaw. Upon review, the City was concerned about the significant operational and financial costs this would entail. The City chose to create access and privacy guidelines to help them respond to these requests in a consistent manner. In other communities, requests for information are dealt with in the manner that local government representatives determine is appropriate in each case.

Based on consultations with representatives of municipalities, the Department of Justice recommends against bringing municipalities under ATIPP at this time. The Department of Justice will continue to provide advice and training to municipalities that wish to develop access and privacy guidelines.

3. The government establish privacy legislation dealing with private sector business in order to exercise territorial jurisdiction in this area of law.

4. The government review the effect of the federal Personal Information and Protection of Electronic Documents Act ("PIPEDA") as soon as possible, rather than in 2006.

Response

The *Personal Information Protection and Electronic Documents Act* will come into effect for all private sector organizations on January 1, 2004, unless the NWT has similar legislation in place and the Governor in Council exempts its application in the NWT.

When it comes into force, this act will provide guidelines and procedures for the collection, use and disclosure of personal information, as well as remedies for correcting personal information or ensuring compliance with the legislation. It will also require organizations to create policies and procedures for the retention and destruction of personal information.

The Department of Justice proposes that it would be premature to consider developing legislation similar to the PIPEDA, and that the need for such legislation and the implications (such as the administrative cost to the Government) should be considered following the mandatory review of the PIPEDA, which is scheduled for 2006.

- 5. That the Government either expand the current Act or establish new legislation to protect citizens from disclosure of personal information by private health care companies.**

Response

Personal health information collected, used or disclosed by a board or agency of the GNWT is currently covered by ATIPP.

Personal health information collected used or disclosed by a federal works, undertaking or business or by private health care companies that trade personal information across jurisdictional boundaries became subject to the PIPEDA on January 1, 2002.

Personal health information collected, used or disclosed by a private health care organization in the NWT will be subject to the PIPEDA on January 1, 2004.

The Department of Justice proposes that it would be premature to consider developing legislation similar to the PIPEDA, and that the need for such legislation should be considered following the mandatory review of the PIPEDA, which is scheduled for 2006.

- 6. The Government adopt a “deemed refusal” amendment to the *Access to Information and Protection of Privacy Act*. The Committee further recommends the wording be such that should the head of a public body not respond within the required 30 days to the *Access to Information and Protection of Privacy Act* Commissioner’s recommendation(s) the head is deemed to have refused access to the records in question.**

Response

During the June 2003 sitting of the 6th session of the 14th Legislative Assembly, the Department of Justice introduced amendments to the ATIPP Act. These amendments included provisions dealing with “deemed refusal”.

The Department of Justice looked at the approach suggested by the Standing Committee in their report – if the head does not respond within 30 days to the Access to Information and Protection of Privacy Commissioner’s recommendation the “head is deemed to have refused access to the records in question”. The Department’s review concluded that this approach was not workable due to the kind of decisions that can be reviewed under the NWT’s *Access to Information and Protection of Privacy Act*.

Under subsection 28 (1) of the Act, when a person has asked the head of a public body for access to a record, that person can then ask the Information and Privacy Commissioner to review any “decision, act or failure to act” of the head that relates to the request. The Commissioner’s review is broader than the question of “access or no access to records”. The Commissioner’s review could deal with other matters such as the fee charged or the time the Government has indicated that they need to produce the records. Clearly a “deemed refusal” scheme that deals only with release of records would not work.

In addition, the Committee’s suggested wording could create unintended consequences. For instance where the head of a public body and the Commissioner agree that the documents should be released. If there is no response by the head to the Commissioner’s recommendations the “deemed decision” would be to refuse access to the records. This is the opposite of the head and the Commissioner’s recommendations. If the head agrees to release some of the records but not others, a “deemed decision to refuse access to the records in question” could end up with the release of none of the records.

In the legislative amendments to ATIPP the Government has tried to respond to the Commissioner and the Standing Committee’s desire to provide a “deemed decision” that an applicant or third party might appeal if there is no response from the head. The proposed amendments require the Commissioner to include recommendations in her report only if she does not fully concur with the decision of the head. The head would only need to respond to the Commissioner if there is disagreement/recommendations concerning any “decision, act or failure to act”. Failure by the head to respond “is deemed to be a decision to refuse to follow the recommendations of the Information and Privacy Commissioner”.

This approach reflects the scope of matters that can be reviewed under the Act and does not create the unintended consequences mentioned above. This approach also provides a decision that an applicant or third party can appeal in those very limited cases where the head does not respond within 30 days.

7. That the Government amend the *Access to Information and Protection of Privacy Act* to give the Commissioner authority to investigate and make recommendations in the event of a breach of privacy provision of the Act.

Response

The Department of Justice introduced amendments to the *Access to Information and Protection of Privacy Act* in June 2003 during the 6th session of the 14th Legislative Assembly. Bill 27 makes amendments that provide the Commissioner with the authority to investigate and make recommendations in the event of a breach of privacy provision of the Act.

Other Issues

The Standing Committee on Accountability and Oversight also mentioned other issues that the Commissioner had raised in her 2001-2002 Annual Report:

- the use of public registries, such as property registry information, online;
- the need for the collection and annual reporting by the GNWT of data about ATIPP requests; and
- production of an updated directory with departmental ATIPP Coordinators contact numbers.

Use of public registries

Response

The Department of Justice is aware of the concerns expressed relating to personal information available through registry offices, especially information that may become available to the public in electronic format.

The GNWT does not currently have electronic access to personal information available to the general public via the internet. If and when this service becomes available, appropriate measures will be taken to protect either the access or use of this information.

Collection and annual reporting by GNWT of data about ATIPP

Response

The Department of Justice has maintained general statistics on the *Access to Information and Protection of Privacy Act*, since 1997. The statistics cover the following:

- Total number of requests received by Public Bodies.
- Time period of response to requests.
- Amount of Fees collected to process requests.
- Source of ATIPP requests.

The Department has forwarded a copy of the statistics from 1997-2000 to the Information and Privacy Commissioner. The Department is updating the 2001 and 2002 statistics to forward to the Privacy Commissioner for September 2003.

Directory with departmental ATIPP Coordinators

Response

The updated Access and Privacy Directory was ready for distribution in March, 2003. In view of the proposed amendments, the directory will be further updated and distributed to NWT residents through NWT Library Services for distribution throughout NWT Libraries. The updated directory should be distributed by September 2003.

