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NORTHWEST
TERRITORIES
INFORMATION
AND PRIVACY
COMMISSIONER

5018 - 47th Street
P.O. Box 262
Yellowknife, NT
X1A 2N2

ACCESS TO INFORMATION AND PROTECTION OF PRIVACY COMMISSIONER ANNUAL REPORT

1999/2000

NORTHWEST TERRITORIES INFORMATION AND PRIVACY COMMISSIONER

5018 - 47th Street
P.O. Box 262
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X1A 2N2

August 24, 2000

Legislative Assembly of the NWT
P.O. Box 1320
Yellowknife, NT
X1A 2L9

Attention: Speaker of the Legislative Assembly

Dear Speaker

I have the honour to submit my annual report to the Legislative Assembly of the Northwest Territories for the period April 1st, 1999 to March 31st, 2000

Yours sincerely,

Elaine Keenan Bengts
Information and Privacy Commissioner

In Yellowknife: 403-873-8631 ♦ Toll free: 888-521-7088 ♦ Fax: 403-920-2511 ♦ E-mail: privacy_comm@internorth.com

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I. COMMISSIONER'S MESSAGE

As suggested by the name of the Act, the *Access to Information and Protection of Privacy Act* of the Northwest Territories has a dual purpose. The first is to afford access to government information by the general public and the second is to ensure that personal information held by government agencies about individuals is protected from unauthorized use or distribution.

In the last thirty years, the idea that citizens should have a right of access to information held by public institutions has become firmly entrenched in most advanced democracies. This is evidenced by the rapid diffusion of freedom of information (FOI) laws that establish a right of access to information and explain how it may be exercised. In 1976, no Canadian government had an FOI law. By 1996, all but one of Canada's federal, provincial and territorial governments had adopted such laws.

Alasdair Roberts
"Retrenchment and Freedom of Information: Recent Experience Under Federal, Ontario and British Columbia Law"

The focus in the first two years of the Act was largely on access issues. This year, however, it appears that the focus has shifted somewhat and that privacy issues are becoming more prominent and inquiries about privacy issues are being received more frequently. This is not entirely surprising considering that new technologies are making it ever easier to collect, sort, use and share information and the public is becoming more aware of personal privacy issues. Several complaints have been received this year about unauthorized or inappropriate use of personal information.

On the national level, the *Personal Information Protection and Electronic Documents Act* has been passed and comes into effect within the next few months. This legislation will provide guidelines and impose regulations with respect to the collection and use of personal information by private sector organizations. It will, in time, apply to any organization which collects personal information, either in printed or electronic form. Although neither the Territorial Government nor the private sector have yet taken much interest in this legislation, it will have significant impact in the way businesses collect and use personal information.

The protection of personal information is bound to be one of the "hot" political issues of the next decade. Many of the provinces are now looking at legislation which will address the protection of personal information in the private sector and I would encourage the Government of the Northwest Territories to study the issue and consider similar legislation as well.

With respect to providing access to government records on request, almost all government agencies are attempting to comply with the Act and the spirit of the Act, and for the most part are working with me to resolve problems. Last year in my annual report, however, I expressed a concern about the lack of respect which certain government departments had given to their legislated obligations under the Act. FMB in particular has not addressed my stated concerns, nor has the attitude of that agency improved when dealing with their legislated obligations under the Act. This public body in particular continues to be less than co-operative in meeting the objectives of the Act. It is my respectful suggestion that this particular agency needs direction from its political bosses with respect to what is expected of them both under the letter and the spirit of the law so as to create a more open and accountable government. It did not go unnoticed by this Commissioner that virtually all of the currently sitting Members of the Legislative Assembly ran on a platform which included a commitment to more open and accountable government. It is my hope that this stated intention will translate into appropriate direction to all government employees in general and to the Financial Management Board in particular.

Public access to information is a powerful tool to ensure accountability of government and for this reason, appears to

The paternalistic belief by many public officials that they know best, what and when to disclose to citizens, remains strong. At the very highest levels of the bureaucracy, the official line on ethics for public servants stresses their "servant" role (i.e. being unseen, unheard, obedient, un-accountable) rather than their "public" role (being account-able, professional, obedient to the law and the public interest). The notion of ministerial ac-countability is, too often, taken to mean that the public should not know what public servants do or advise their ministers to do.

Hon. John Red. PC
Information Commissioner
Canada
1998/99 Annual Report

meet with resistance among some factions. It bears reminding that the Act is law, passed by the legislative assembly and requiring compliance by the Government of the Northwest Territories and its agencies.

Freedom of information laws have proved to be useful instruments for improving public understanding of the policy-making process and protecting citizens against arbitrary decisions by public bodies. However, governments have often been ambivalent about recognizing a right of access to information. They have been motivated by fears that openness will discourage frankness among ministers and officials, compromise the ability to collect information from other organizations , and undermine regulatory and security functions. There are also less worthy concerns about openness, rooted in a desire to minimize accountability for ill-advised policy decisions and poor management..

Alasdair Roberts
Retrenchment and Freedom of Information: Recent Experience under Federal, Ontario and British Columbia Law
Canadian Public Administration
Volume 42, No. 4

Section one of the Act sets out its purposes:

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

   a) giving the public a right of access to records held by public bodies;
   b) giving individuals a right of access to, and a right to request correction of, personal information about themselves held by public bodies;
   c) specifying limited exceptions to the rights of access;
   d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and
   e) providing for an independent review of decisions made under this Act.

If the approach taken to virtually every request for information is adversarial, it gives the impression that a government agency is afraid of accountability. When the agency resisting openness is the one which controls all of the money, the public has a right to be concerned. Although there are certainly cases in which the release of information might affect the government's ability to do business effectively and efficiently, not all information held by FMB is of this nature. Where that is the case, the provisions of the Act will protect those matters from disclosure. FMB would be well advised to pick its battles more judiciously and, rather than looking for ways to avoid releasing information, look for ways to increase

the amount of information given to the public while maintaining the confidentiality required to run the business of government. There is considerable room to expand the information available to the public.

Elaine Keenan Bengts

Acting Information and Privacy Commissioner

Both rights — the right to know and the right to privacy — shift power in a very real sense from the state to the individual citizen. Each right is enriched through respect for the other.

Hon. John Reid, P.C.
Information Commissioner, Canada
1998/99 Annual Report

Under *The Freedom of Information and Protection of Privacy Act*, disclosure is the rule, not the exception. In that the exceptions to access under the Act derogate from the thrust of the Act, they must be strictly and narrowly interpreted. Therefore, unless an access request falls squarely within one of the exceptions, the information must be disclosed. Where a discretionary exception applies, there should be a reason why the public body chooses to withhold,rather than release the record.

Barry E. Tuckett
Manitoba Provincial Ombudsman
Annual Report
1998

II. INTRODUCTION

A. ACCESS TO INFORMATION

Background

The *Access to Information and Protection of Privacy (ATIPP)* 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.

The Act 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. These exceptions function to protect individual privacy rights, and enhance the ability of elected representatives to research and develop policy and run the business of the government. The Act also gives individuals the right to see and make corrections to information about themselves in the possession of a government body. With the division of the two territories on March 31st, 1999, the number of departments and agencies now covered by the Act is 44.

The Process

Each of the public bodies governed by the Act has appointed an ATIPP Co-ordinator to receive and process requests for information. Requests for information must be in writing but do not require any particular form (although there are forms available to facilitate such requests). Requests are submitted,

A popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps, both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives.

James Madison
1822

along with the $25.00 fee, to the appropriate public body. 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 have in their possession as well as certain other specified kinds of information. Because of the exceptions to disclosure 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 public 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 Information and Privacy Commissioner is to provide an independent review of discretionary decisions made by the public bodies in the application of the Act. 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

As society has become more complex, governments have developed increasingly elaborate bureaucratic structures to deal with social problems. The more governmental power becomes diffused through administrative agencies, however, the less traditional forms of political accountability, such as elections and the principle of ministerial responsibility, are able to ensure that citizens retain effective control over those that govern them. ... The over-arching purpose of access to information legislation, then, is to facilitate democracy.

Dagg v. Canada (Minister of Finance) Supreme Court of Canada 1997

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. Under the Act, a Commissioner is appointed for a five (5) year term. Since the division of the Northwest Territories, the ATIPP Commissioner's position has been held on an "Acting" basis, until the election of the new Legislative Assembly of the Northwest Territories.

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 the person seeking information 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.

In addition to the duties outlined above, the Commissioner 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 which effect access to information or the distribution of private personal information in the possession of a government agency.

B. PROTECTION OF PRIVACY

The *Access to Information and Protection of Privacy Act* also provides rules with respect to the collection and use of

personal information by government agencies. Part II of the Act outlines what have become generally accepted rules for protection of privacy internationally. They include:

- No personal information is to be collected unless authorized by statute or consented to by the individual;

- Personal information should, where possible, be collected from the individual, and not from third party sources; and where it is collected from third parties, the individual should be informed of that fact and be given the opportunity to review it;

Control over our privacy in the information age is increasingly a pipe dream, because our information goes everywhere. We kind of shed it like skin wherever we move.

Dr. Roger Magnusson
1999

- Where personal information is collected, the agency collecting the information will advise the individual exactly the uses for which the information is being collected and will be utilized and, if it is to be used for other purposes, consent of the individual will be obtained;

- The personal information collected shall be secured and the government agency will ensure that it is available only to those who require the information to provide the service or conduct the business for which the information was collected.

- Personal information collected by a government agency will be used only for the purpose it is collected; and

- Each individual is entitled to personal information about themselves held by any government agency and has the right to request that it be corrected if they feel it is inaccurate.

Although the Privacy Commissioner does not have any specific authority under the Act to do so, this office has been receiving privacy complaints and making inquiries and recommendations with respect to breaches of the provisions of the Act dealing with personal privacy. The only option other than a review process with recommendations, is for the offending government employee to be prosecuted under the Act . Prosecution, however, is both unlikely to happen except in extreme cases, and not very instructive. It is the hope of this Privacy Commissioner that the legislature will review these sections of the Act and provide the ATIPP Commissioner with specific authorization to review privacy complaints and to make recommendations where there are problems.

Perhaps the hardest dilemma of privacy is not just how much is optimal, or the ways in which it must be balanced with communal needs, but its large fragility as a human situation — how quickly it can be harmed by other, more predatory human impulses.

Janna Malamud Smith
1997

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 Information and Privacy Commissioner for a review of the decision made by the public body. This includes decisions about the disclosure of records, corrections to personal information, time extensions and fees. The purpose of this process is to ensure an impartial avenue for review of discretionary and other decisions 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 request for review. A Request for Review may be made by a person who has made an application for information under the Act or 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

Even where the Act is applicable, a public body should consider whether use of the Act is necessary. It is good administrative practice for a public body to have determined what records can be routinely disclosed without the need of the access to information procedure. The determination of that initial question saves time and resources for both the public and the public body in the long run.

Barry Tuckett
Manitoba Ombudsman
1998 Annual Report

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 to reply, although this has not always proven to be necessary.

Several matters were reviewed by the Commissioner in the last year and Recommendations made. Other requests were resolved without the necessity of a complete review process.

During the 1999/2000 fiscal year, the five reviews were completed and recommendations made. The ATIPP Commissioner's recommendations were accepted in 3 cases and a decision is still pending on one. The fifth report dealt with a matter in which the Special Information and Privacy Commissioner appointed to review the matter determined that the facts of the matter did not allow him jurisdiction to make recommendations.

Canadian jurisprudence is consistent in holding that the general philosophy behind this type of legislation is full disclosure insofar as it relates to government documents. The provisions of the Act must be given a liberal and purposive construction. The legislation recognizes that there are legitimate privacy interests that must be respected but any exceptions to the rule of disclosure must be clearly delineated in the legislation.

Justice John Z. Vertes
Supreme Court, NWT
October 25, 1999
CBC and Selleck v.
Commissioner of the NWT
et al

One recommendation made by the ATIPP Commissioner in 1998, was reviewed by the Supreme Court at the instance of the Appellant. In that case, the decision of Justice Vertes of the Supreme Court of the Northwest Territories varied the recommendations of the ATIPP Commissioner.

The case involved a request for the release of certain residential and commercial leases. The ATIPP Commissioner's recommendation was that the leases should be released, with the sections which related specifically to rents payable and those sections dealing with calculation of operating an maintenance costs severed. The head of the public body accepted the recommendations and indicated that

the leases would be released. The third party landlords, however, objected to the release of the information and appealed to the Supreme Court.

Justice Vertes made several findings as to the effect of the Act:

1. The appeal from the decision of the head of the public body should be heard on the basis of a *de novo* hearing.

2. The public body, in this case, bore the onus of showing that the information was not subject to release.

3. The onus to be met was the burden of persuasion — the burden of establishing that the statutory criteria were met on the basis of "detailed and convincing" evidence.

4. The circumstances of this case gave rise to an implication that information provided to the public body as to maintenance and operating costs (including insurance or mortgage costs) were not readily available to outsiders and were provided with an expectation of confidentiality.

5. The base rent figure in each lease was a "negotiated term" of the contract, not information either obtained by or supplied to the government in confidence.

6. The base rent, therefore, was not exempt from disclosure, but operating and maintenance costs, whether set out separately or as part of an additional rent component, was exempt.

I agree that the circumstances can implicitly give rise to a situation of confidentiality. The evidence on this appeal shows that, even though the department has no written rules as to confidentiality, its personnel operate under the assumption that information received from proposers is to be treated confidentially. Similarly, the proposers operate under the assumption that information conveyed to government in a proposal would be treated confidentially. There is a mutual understanding as to the usual practice.

Justice John Z. Vertes
Supreme Court , NWT
October 25, 1999
CBC and Selleck v.
Commissioner of the NWT
et al

IV. REVIEW RECOMMENDATIONS MADE

Review Recommendation 99-11

This Request for Review arose out of an ongoing, more wide ranging request that was commenced last year. The initial request for information was for information regarding the "pay equity" issue being dealt with by the Government of the Northwest Territories. This specific review addressed the question of whether or not certain reports which had been identified as being responsive to the request for information were exempt from disclosure because of solicitor/client privilege as contemplated by section 15 of the Act. Alternatively, the argument was that the information was protected as its release would interfere with the contractual negotiations of the Government.

As I have stated in previous decisions, where the discretion exists, it must be seen to be exercised and it must be exercised in a reasonable way. What is the nature of the document in question? Would there be prejudice to the department or any other person should the information be released? What circumstances, if any, exist in which this information might be released? Questions such as these must be addressed and must be seen to be addressed before the discretion can be said to have been properly exercised.

Elaine Keenan Bengts
Review Recommendation
99-11

The review of the ATIPP Commissioner found that there was no "solicitor/client" privilege as the document did not constitute a communication between a lawyer and his/her client. The Privacy Commissioner did, however, discuss the concept of "litigation privilege" and found that it fell under the exemption provided for in section 15 of the Act and that the information was, therefore, properly withheld, at least so long as the litigation was pending.

Review Recommendation 99-12

This Request for Review arose out of the same original request for information referred to in Review Recommendation 99-11. In this review, the document identified as being responsive to the request for information

was entitled "Joint Equal Pay Study, Final Report". It was a report jointly commissioned by the Government of the Northwest Territories and the Union of Northern Workers on the pay equity issue. It is to be noted that these are the two parties involved in pending litigation before the Canadian Human Rights Tribunal, on opposite sides of the issue. Because a third party's rights might have been affected by the release of the information, notice was given to the Union of Northern Workers who gave their consent to the release of the information. The Government claimed that this report was subject to litigation privilege and that it was, therefore, not able to release it to the Applicant. It was further argued that the study was protected from disclosure under section 14(1)(c) of the Act because "its disclosure could reasonably be expected to reveal positions, plans, procedures and other criteria developed for the purpose of collective bargaining negotiations."

The adversarial system is based on the assumption that if each side presents its case in the strongest light the court will be best able to determine its truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel....Indeed, if counsel knows he must turn over to the other side the fruits of his work, he may be tempted to forego conscientiously investigating his own case in the hope he will obtain disclosure of the research, investigations and thought processes compiled in the trial brief of opposing counsel.

The Law of Evidence in Canada (Sopinka J., J. Lederman and A. Bryant, Toronto: Butterworths, 1992):

The review recommendation pointed out that the report was jointly commissioned and jointly paid for by the Government and the Union. Each of these parties received a copy of it. Each side knew the other would receive a copy. The contents of the report were commonly known by both sides. The document was not prepared by or for counsel. Furthermore, it was clear that there was no expectation of confidentiality in this report as both sides to the litigation were privy to it. The rationale for litigation privilege no longer existed and the report was not, therefore, exempted from disclosure under section 15 of the Act.

Similarly, the ATIPP Commissioner found that, because both sides of the collective bargaining equation had access to the

The information requested is, to some degree, information about a third party. It is not, however, all financial information, nor is it information which appears to have been received from the third party in confidence. It is, for the most part, information which appears to have been gathered from the files of the financial institution which lent the money. Little, if any of it, appears to be information which could only have been obtained from the third party itself. Much of the information is already the matter of public record. For instance, the names of the companies involved are already public by virtue of the bill that was presented to the legislative assembly. The names of the directors and officers of the companies at the time that the loans were made is information which is also publicly available through the Companies' Registry of the Northwest Territories. The fact that loans were made to the companies and the amount of the loans are also already in the public domain.

Elaine Keenan Bengts
Review Recommendation
99-13

report and knew its contents, the release of the document would not "reveal" positions, plans, procedures or other criteria developed for the purpose of collective bargaining negotiations. Consequently, the report was not protected from disclosure by section 14 (1)(c) of the Act.

The Commissioner recommended that the report be provided to the Applicant.

Review Recommendation 99-13

This Request for Review arose as a result of an application directed to the Northwest Territories Development Corporation for information with respect to debts which had been written off by the Development Corporation in the spring of 1998. The applicant was denied access to that information on the grounds that it was governed by section 13(1) of the Act and could not be released except with the approval of the Executive Council Secretariat or the Financial Management Board Secretariat. The Applicant requested a review of that decision.

Section 13(1) of the Act provides that the government "shall refuse to disclose to an applicant information that would reveal a confidence of the Executive Council, including.....advice proposals, requests for directions, recommendations, analyses or policy options prepared for presentation to the Executive Council or the Financial Management Board" .

The debts were written off by an Act of the Legislative Assembly. The Applicant requested "background papers

regarding the write off of the ...debts owed to the Northwest Territories Development Corporation" by each of five companies which had debts written off. The request sought a detailed history of the corporation's collection efforts in each case and detailed reasons for non-compliance provided by the defaulting companies. The request also sought copies of the original loan applications or the proposals which resulted in the loans made to each company and the names of the officers of each company at the time the loan was made. The ATIPP Commissioner found that there was nothing presented to her by the public body to suggest that the documents were prepared only for Cabinet or the Financial Management Board. Nor was there any suggestion that the files from which the summaries were compiled were prepared for and available only to the Cabinet. The Commissioner found that section 13 of the Act did not, therefore, apply.

In the end, most of the records at issue do not contain "personal information" as it is defined in the Act. To the extent that it is, it is generally accepted that, barring something very unusual, every individual is entitled to have access to any personal information about him or herself which the public body has in its possession. It is most important to recognize that opinions made about a person are the personal information of the person about whom the comments are made.

Elaine Keenan Bengts
Review Recommendation
99-14

The public body also claimed that the information was information obtained from a third party explicitly or implicitly, intended to be confidential. The ATIPP Commissioner, however, found that much of the information in question was already in the public domain, and therefore open to the Applicant. She recommended that a further search be done to find the source documents from which the basic information was derived and that the public body review those documents with a view to providing the Applicant with further information in response to his request. The decision of the Head of the public body is still pending on this recommendation.

Review Recommendation 99-14

The records at issue in this case were a large number of

records relating to the Applicant and his employment with the Government of the Northwest Territories. The request was made in the context of an arbitration with respect to the dismissal of the Applicant by the Government of the Northwest Territories. Several grounds were claimed for exemptions for a number of documents. The ATIPP Commissioner reviewed each document in the context of each of the claimed exemptions and made recommendations with respect to the release of parts of the documentation with certain information severed from the documents where exemptions applied. The ATIPP Commissioner found that, for the majority of the documents in question, the information constituted personal information of the Applicant to which he was entitled. Each document was reviewed individually, with recommendations made as to severing third party information and other protected information.

Third party information is information that directly identifies a person. Personal information includes such things as names, addresses, identifying numbers and the like. Clearly, the names of the witnesses and any other third parties referred to in the statements are third party personal information and that information, at least, should be edited out of the statements. The contents of the statements themselves, however, do not constitute personal information except to the extent that they contain opinions about the Applicant. To that extent, they constitute the personal information of the Applicant only.

Elaine Keenan Bengts
Review Recommendation
99-14

The recommendations of the ATIPP Commissioner were accepted and the Applicant was given the information he had requested.

Recommendation 99-14A

In this case, a father who had joint custodial rights to his child, requested from the Department of Social Services, information about complaints made to the department about the care his child was receiving at the home of the child's mother. The Department refused to release the information, citing the provisions of the Child and Family Services Act, which contains a "notwithstanding" clause. The father was not interested in knowing who had filed the complaint, just the nature of the complaint and the nature of the concern raised.

There is a conflict: section 5 of the ATIPP Act says there is a right of access subject to the exceptions in the ATIPP Act. Section 71(2) of the *Child and Family Services Act* says notwithstanding the ATIPP Act, none of the information referred to in section 71(1) can be disclosed except in the circumstances set out in section 71(2) of the *Child and Family Services Act*. ....the conflict gets resolved in favour of section 71(2) of the *Child and Family Services Act*.

Robert C. Clark
Special Information and Privacy Commissioner
Report, March 16, 2000

This matter was reviewed by a Special ATIPP Commissioner appointed to deal with this matter as a result of a conflict on the part of the ATIPP Commissioner.

This case raised the issue of a "notwithstanding clause" in the *Child and Family Services Act*. Section 4(2) of the ATIPP Act states that "if a provision of this Act is inconsistent with or in conflict with a provision of another Act, the provisions of this Act prevails unless the other Act expressly provides that it, or a provision of it, prevails notwithstanding this Act. The *Child and Family Services Act* contains a clause which states that, notwithstanding the ATIPP Act, "any information relating to a child or his or her parent is confidential " when received under that Act and that no person shall disclose any information or record of information to any person except....." in certain circumstances delineated in the Act.

The Special Information and Privacy Commissioner found that the provisions of the *Child and Family Services Act* were, in fact, in conflict with the provisions of the *Access to Information and Protection of Privacy Act* and the result was that the ATIPP Commissioner had no jurisdiction to deal with the issue.

V. OTHER MATTERS OF INTEREST

In two additional instances, the ATIPP Commissioner was asked to review refusals to provide information. In once case, the ATIPP Commissioner worked with the Department of Health and Social Services to help the applicant find fairly dated records about the individual's time in the care of the Department of Social Services many years ago. The Application for Information was difficult because the individual resided in what is now Nunavut at the time he was in care and there were several different possible spellings of his last name. In addition, the Applicant had changed his last name at some point. He was certain that there had to be more documentation than he had actually received, as there was no mention in the documentation of several of his case workers. The Department worked with the Commissioner to co-ordinate efforts between the Northwest Territories and Nunavut to locate further materials and significantly more documents were eventually found and provided to the Applicant.

In another instance, the matter was worked out very quickly after the ATIPP Commissioner became involved as it became clear that the problem was one of miscommunication and misunderstanding rather than a refusal to provide information.

The ATIPP Commissioner has also been asked this year to provide comments on privacy issues arising under several different pieces of legislation, including the Motor Vehicles Act and proposed new health information legislation, as well as proposed amendments to various pieces of legislation dealing with family issues. All of these projects are under way and reports and recommendations will be forthcoming.

Opinion polls have repeatedly shown that, for a variety of reasons, public cynicism is rampant and faith in various levels of government is low. Yet those of us who have the opportunity to work closely with government organizations often see a different picture -one of hard-working people who do their best to live up to the meaning of "public service."
By releasing the information on which tough choices are based, government organizations can open a window on the decision-making process. Some people may well disagree with what government has done, but at least they will have a better understanding of why government has done it.

Dr. Ann Cavoukian
Information and Privacy Commissioner for Ontario
May, 1999

The ATIPP Commissioner also spoke to a number of groups and organizations about privacy issues over the year, including the Yellowknife Rotary Club and one Yellowknife school. Contact has been made with the two Yellowknife High Schools to offer the services of the ATIPP Commissioner to give presentations to high school students on privacy issues and it is hoped that a program can be developed for more widespread use in the school system.

..... some children are spending hours online in "chat rooms," unaware of who they are talking to and the potential dangers to their safety and privacy. Some of these chat rooms ask children to provide personal information about themselves, such as their age, sex, telephone number, address, grade level, personal preferences, and a picture or physical description of themselves.

KIDSONLINE
Ontario Information and Privacy Commissioner's Office

VI. COMPLAINT TO THE FEDERAL PRIVACY COMMISSIONER

This winter, we received a final report of the Federal Privacy Commissioner with respect to a complaint made by this office on behalf of a resident of the Northwest Territories who did not want to make the complaint herself. The result of the investigation and complaint is contained in the Annual Report of the Federal Privacy Commissioner as follows:

> The Information and Privacy Commissioner for the Northwest Territories complained that Human Resources Development Canada (HRDC) was making improper disclosures of SINs by printing them on cheques for employment insurance benefits. Her contention was that recipients therefore cannot cash their cheques without revealing personal information to a financial institution or other cheque-cashing establishment.
>
> HRDC still prints the SIN on several kinds of cheques it issues. Of these, employment insurance cheques are the case for which the department offers perhaps its best argument. In this instance, as often in the past, HRDC explained its position as follows:
>
> - Given that the SIN was designed for employment insurance purposes in the first place, its use on employment insurance cheques is entirely appropriate and legitimate. Furthermore, the SIN is the official file number for the employment insurance program, and as such is an important element in establishing the identity of cheque recipients. Since many persons may have the same name, an employment insurance payment is actually issued not to a name, but rather to a SIN.
>
> - In cases where a cheque was lost or stolen, tracing it would be expensive and laborious without the SIN
>
> - As far as confidentiality is concerned, financial institutions already have responsibility for recording the confidential SIN for certain other transactions. Establishments other than financial institutions may not have similar SIN responsibilities, but on the

Even if it doesn't show through its envelope window, a Social Insurance Number (SIN) printed on a government-issued cheque does not stay hidden forever. Sooner or later the envelope gets opened, and the SIN becomes visible to people who really have no right to see it — notably, the people who cash the cheque.

Bruce Phillips
Privacy Commissioner for Canada
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other hand, people who have their cheques cashed at such alternative establishments do so by their own choice.

- Another good option available to recipients is having their cheques deposited directly to their bank accounts. Direct deposit obviates the need for any others to cast eyes upon the confidential SIN.

The Office sees some merit in the HRDC argument, particularly as it relates to the options generally available to cheque recipients. Financial institutions do indeed already have routine access to SIN, notably for transactions such as reporting income to Revenue Canada. Presumably, they also have safeguards in place for the protection of this personal information. Likewise, it is true that direct deposit may bring a greater measure of privacy.

However, when the Northwest Territories comes into the picture, the HRDC position weakens. In the many sparsely populated areas of Canada's North, financial institutions may be few and far between. Direct deposit or no direct deposit, its hard enough just to get to the bank. Many northerners have to rely on whatever alternative cheque cashing facilities may be available – the local general store, for example.

Such establishments may have attractions of their own, of course, but they are not known for the kind of anonymity that one often seeks in a financial institution. Afar all, it is one thing to have your SIN scanned by an unknown and indifferent bank teller, but quite another to be obliged to disclose personal information to a friend, relative, neighbor or local acquaintance.

The Office is please to announce that, as a result of discussion arising directly from this northern complaint, HRDC has softened its line. It has agreed to examine its use of social insurance numbers on the cheques it issues — not just for employment insurance, but for *all* of its programs. More concretely, the department has already proposed to change its procedures so as to print not the whole SIN but rather only the last six digits on each cheque it issues.

Once again, the SIN was on the mind of many inquirers. This year's SIN-related inquiries exceeded even last year's total, which had burgeoned as a result of commentary by the Auditor General. In fact, more than 40 per cent of telephone inquiries in 1999/2000 related to the use of the SIN

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Would six digits be enough for HRDC? Yes. The Department has conceded that six digits are all it really needs for most purposes of identification.

But would merely eliminating three digits of the SIN be enough to address the privacy issue? In good part, it would. For one thing, the six remaining digits would not be identified as part of a SIN, nor would they be recognizable as such. For another, no one, not even HRDC, could guess or recreate the complete SIN from the last six digits.

In short, both the federal commissioner and the territorial commissioner regard this proposal as a reasonable compromise. While acknowledging that the change may not be accomplished overnight, the Privacy Commissioner has assured his northern counterpart that he will monitor the progress of HRDC's undertaking.

Information privacy is important for a number of reasons. First, it is related to a series of other rights and values such as liberty, freedom of expression and freedom of association. Without some control over our personal information, our ability to enjoy these rights may be hindered

Second, as more information about us becomes available, it is used in a wider variety of situations to make decisions about issues such as the kinds of services we are entitled to, the jobs we are qualified for and the benefits we may be eligible for. It is extremely important to have mechanisms in place to give us control over our own personal information and enable us to ensure that it is both accurate and relevant.

The Protection of Personal Information — Building Canada's Information Economy and Society
Industry Canada
Justice Canada
January, 1998

VII. STATISTICS

In the third full year of the Act, seven new Requests for Review were received. This is one more than received last year. Of these, two were resolved by the issuance of recommendations and three were resolved by means of negotiation and mediation between this office and the parties. Two more are currently under review and recommendations are expected within a short period of time.

Two complaints remained outstanding from 1997/98. One of those remains ongoing, several separate recommendations having been made arising out of the initial request for review with further documents yet to be dealt with, as they are identified by the public body. All three of the review requests which were outstanding from 1998/99 have all been completed by the issuance of recommendations.

In the 1999/2000 fiscal year, Financial Management Board was the department most often involved in Requests for Review. Second in line would be the Department of Health and Social Services, followed by the Department of the Executive.

This year an attempt was made to record and keep track of telephone inquiries dealt with by the office. Our records show that we had about 60 general inquiries over the year with respect to the Act and how to make requests for information. In each case, the caller was provided with the information requested, directed to another forum, or provided with forms to make a request.

> Grounded in a man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.
>
> Justice La Forest, 1988
> R. v. Dyment

VIII. LOOKING AHEAD

Two matters, originating at the federal level, will demand the attention of this Government in the near future.

The first of these is the advent of the *Personal Information and Electronic Documents Act*, passed by the federal government this spring. This legislation was spurred by directives made by the European Economic Community with respect to the restriction of trade with jurisdictions which did not have safeguards in place with respect to the protection of personal privacy.

The *Personal Information Protection and Electronic Documents Act* gives Canadians new legal rights when their personal information is collected, used or disclosed in the course of a commercial transaction. Beginning in one year, the Act will apply to federally regulated companies such as banks, communications companies and transportation companies as well as crown corporations. It will also apply to some interprovincial and international data transactions, particularly the buying, selling and leasing of customer lists and other personal data. In approximately five years, unless the Territorial Government has by that time passed its own legislation to deal with privacy protection in the private sector, it will apply to all organizations regulated by Territorial law. The law will apply to all personal information about an identifiable individual, regardless of the form in which that information exists with a few, very narrow exemptions. The Act will require all businesses and organizations which collect such personal information to comply with the CSA Code, which has nine points.

Bill C-6 is very much about protecting the right to be let alone. It is about ensuring a fair balance between the legitimate information needs of the private sector and the essential rights of individuals in a democracy. It is not the objective of the bill to impede business. The objective is to help create a state of mind in which business routinely considers client, customer and employee privacy rights in developing products and administrative practices. This will not happen overnight. But business depends on satisfied clients and customers. Its reputation is any company's most important asset, and no one will want to risk being singled out for willfully flouting the rights of individuals.

Bruce Phillips
Address to the Canadian Bar Association, Ontario
January 28, 2000

1. Accountability - organizations will be responsible for personal information in their possession and will have to designate one or more individuals to oversee individual privacy rights and compliance with the Act.

2. Identifying Purposes - the purpose for which information is being collected must be determined before it is collected and that purpose must be disclosed to the individual from whom it is being collected. Before such information can be used for any other purpose, consent of the individual will be required.

The challenge facing Canadians is to find a balance between the needs of business for access to the information necessary for functioning in a knowledge-based economy and the rights of individuals to privacy and security of personal information. Collectively, we must ensure that technological innovations do not become intrusions on these economic needs and fundamental rights.

The Protection of Personal Information — Building Canada's Information Economy and Society
Industry Canada
Justice Canada
January, 1998

3. Consent - Consent will be required for the collection, use or disclosure of any personal information and the purposes must be clearly stated and there must be a reasonable effort made by the organization to ensure that those purposes are understood. The nature and form of the consent will have to match the sensitivity of the information and the individual's reasonable expectations.

4. Limiting collection - The amount and type of information collected must be limited to what is necessary for the identified purposes.

5. Limiting Use, Disclosure and Retention - Personal information can only be used for the purposes it was originally collected, except with the consent of the individual involved. Personal information is to be retained only as long as necessary to fulfill the purpose identified.

6. Accuracy - There will be an onus on organizations to ensure that personal information is as complete, accurate and up to date as necessary for the required purpose, particularly where the information will be used to make decisions about an individual.

7. Safeguards - All personal information must be protected against loss, theft, unauthorized use or disclosure, copying or modification.

8. Openness - Organizations will be required to provide the public with general information about their data protection policies and practices.

9. Individual Access - Individuals must have access to personal information about themselves held by an organization and be given the opportunity to correct errors. Organizations will also be required to advise individuals how their information has been used.

This is far reaching and important legislation made more necessary by the advent of new communications technologies and the ever increasing ability in a computerized world to share, link and use information in ways not even contemplated even fifteen years ago. It is an important first step and I would urge the Government of the Northwest Territories to consider its own legislation to parallel the federal law.

The second federal initiative that will undoubtedly affect not only the Government of the Northwest Territories, but also every individual living in Canada, is the proposal for the "Canada Health Infoway". Over the last few years, the Government of the Northwest Territories has participated in discussions between the federal, provincial and territorial governments with a view to developing what is, in essence, a national database for health information. There is much to be said for such a database in terms of reaching new heights of administrative efficiency, the sharing of knowledge and the effectiveness of the Health Care System. The biggest drawback to such a project is the

Public interest in privacy protection has grown steadily over the past two decades, prompted by social, economic and technological change. The development of a global economy, proliferating computer networks, exponential growth in Internet transactions, satellite-based telecommunications, and sophisticated surveillance technologies all contributed to a general public uneasiness about eroding personal privacy

Bruce Phillips
Privacy Commissioner
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unprecedented threat to the protection of the most personal and intimate of personal information. Those heading the discussions have recognized the concerns and have therefore met with all of the Information and Privacy Commissioners on two occasions to discuss the issues and are working quite closely with the ATIPP Commissioners from some of the larger jurisdictions, some who have already dealt with the privacy implications of large health database systems (some successfully, others not so successfully). It is encouraging to note the importance that appears to be being put on the protection of personal privacy. The ATIPP Commissioner will continue to monitor this project and would be pleased to provide her comments to the Government of the Northwest Territories at the appropriate time.

Each federal, provincial and territorial jurisdiction now takes a different approach to privacy, with the result that the level of protection varies greatly across the country. At the same time, the level of security in hospital record offices and in physician's offices can leave much to be desired. Most people do not know how to obtain access to their records, while the rules governing how much of a person's file a health care professional or provider needs to see are often vague. A key foundation of the Canada Health Infoway will be the harmonization upward of provincial, territorial and federal privacy legislation for privacy protection in the health sector. Another will be the implementation of fair information practices and privacy-enhancing technologies throughout the health sector. "

Canada Health Infoway
Paths to Better Health
Final Report
February 1999

IX. RECOMMENDATIONS FOR LEGISLATIVE IMPROVEMENTS

In the course of working with a new piece of legislation, such as the Access to Information and Protection of Privacy Act, certain deficiencies and problems come to light. Some of these are becoming apparent and there are areas in which the effectiveness and efficiency of the Act would be greatly improved.

....when it comes to response deadlines, the law needs teeth. There is a need for legal consequences when the right of access is undermined by means of delay. Delay is as grave a threat to the right of access as is document tampering or record destruction.

Hon. John M. Reid
Information Commissioner
Canada
Annual Report 1998/99

<u>The acceptance of recommendations made.</u> As pointed out in my last annual report, one problem which has arisen time and again is that recommendations, once made by this office, are languishing on the desks of the heads of the public bodies which are supposed to be dealing with them. The Act provides that the head of the public body is to deal with the recommendation made within thirty days of it being made. That deadline is rarely met and, in one case, it was nearly a year from the date that the recommendation was made before the Applicant received a decision. This delay was the subject of a feature news report on the local CBC news show "North Beat" earlier this year. I would strongly recommend that an amendment be made to the legislation which would create a presumption that the recommendation made by the ATIPP Commissioner is deemed to be accepted thirty days after the recommendation is made, unless, prior to that, the head of the public body issues a different decision. This puts the onus on the head of the public body to meet the legislated deadline.

The Commission took this opportunity to remind government that it cannot treat the citizen's personal information as if it were its own. "This information characterizes and differentiates each of us: it is the property of individuals in the strictest sense of the word. Citizens entrust their personal information in good faith. They expect, and have right to expect, that it will be dealt with respectfully and only for the purpose for which it was collected.

Paul Andre Comeau
Commission d'access a l'information
Annual Report
1998/99

The "service" of documents. Many of the provisions in the Act provide for a thirty day notice period. Unfortunately, thirty days will not always give a party sufficient time to respond. For instance, in one recent incident , a document was sent to my office from Iqaluit by mail and date stamped the 2nd day of the month. It was received in my office in Yellowknife on the 28th of the month. To ensure fairness, I would recommend that the legislation be changed to provide that all notices required under the act be sent by registered mail, be delivered personally to the person, or "served" in some other fashion which allows verification of the date of delivery, and that the thirty day reply periods begin only after "service" has been so effected. I believe that this is essential to fair process under the Act and would respectfully suggest that, whether or not the legislation is changed, that all government agencies covered by the Act would take steps to ensure that documents are actually received by the addressee before they begin to calculate the 30 days.

Privacy Complaints. More and more of the complaints and inquiries received in this office are about privacy issues rather than access to information. Although the Act provides that it is an offence for anyone to make use of personal information in a manner not consistent with the Act, it also provides protection from prosecution for government employees who release information "in good faith". There is no complaint mechanism which allows the ATIPP Commissioner to review a complaint of invasion of privacy or to make recommendations as a result. This ATIPP Commissioner has chosen to accept complaints of

this nature and make recommendations, but there is no legislated authority for me to do so under the Act, nor would any public body be required to co-operate in such an investigation if they chose not to. As noted earlier, the protection of personal privacy is becoming a larger and larger issue and there really should be a mechanism in place to deal with such complaints other than prosecution, particularly where there has to be "bad will" involved in order to justify a prosecution.

Parliamentarians and Canadians instinctively know the truth of the position recently articulated by the Supreme Court of Canada: the access law is an indispensable tool for ensuring an accountable government and a healthy democracy. Parliamentarians and Canadians instinctively know that governments distrust openness and the tools which force openness upon them. Parliamentarians and Canadians instinctively know that they, not governments, bear the burden of keeping the right of access strong and up-to-date.

John Reid
Information Commissioner
Canada
1998/99 Annual Report

ATIPP Commissioner's Powers. As noted in last year's annual report, in some instances this office has met with considerable resistance in receiving responses to inquiries from this office. Although this year did not see the same monumental struggles as last year, they will, inevitably, happen again. I recommend that the Act should be amended:

- to provide the ATIPP Commissioner with the power to subpeona documents and witnesses;
- to impose penalties for failure to comply with the time limits outlined in the Act or imposed by the Commissioner including the right to disallow fees otherwise payable by an applicant, and removing the right to invoke discretionary exemptions in the event of late responses;
- to withhold performance bonuses from heads and deputy heads of departments which consistently fail to meet deadlines.

Certain comments made by Justice J.Z. Vertes in CBC and Selleck v. Commissioner of the Northwest Territories et al referred to above bear some consideration as well. In that

problems which have arisen with respect to these issues in the municipal sector in recent years, it seems that the citizens of the Northwest Territories would be well served by bringing municipal governments under the Act.

Public Utilities Board. For some reason that does not appear evident, the Public Utilities Board is not listed as a public body which is subject to the Act. A recent request for review sought information about a tender process (not the tenders themselves, but the process) and was denied that information because the Board is not listed as a public body in the regulations. The function and purpose of this Board is not significantly different than the function and purpose of other Boards and there does not appear to be any good reason to protect it from public scrutiny. The inclusion of the Board under the Access to Information and Protection of Privacy Act should be considered and implemented.

Legislation with respect to Private Sector Privacy Standards. With the passage of the *Personal Information Protection and Electronic Documents Act* at the federal level, the Government of the Northwest Territories will have to put its mind to the question of legislation at the Territorial level to ensure protection of privacy in the private sector. This is a golden opportunity to take the time necessary to create a "made in the North" solution to the privacy issues that will inevitably be front and centre as a political issue over the next decade. I would strongly encourage the Government of the Northwest Territories to look at passing its own legislation to deal with this issue.

In Genesis, the Bible records that Adam and Eve were expelled from Eden because they had disobeyed God's instruction not to eat the fruit of the tree of knowledge of good and evil. They were made mortal and forced to provide for themselves, prevented by a flaming sword from ever returning to Eden

Whether we interpret Genesis literally or not, it describes the reality of our existence: that innocence, once lost, cannot be regained; that knowledge, once acquired, is never unlearned. Despite our efforts over the centuries, we cannot renounce that taste of the fruit of the tree of knowledge and return to Eden. We must make our own way in the larger world.

How we do so remains very much in our own hands

Hon. Perrin Beatty
President and CEO
Canadian Broadcasting Corp.
Lecture to the University of Western Ontario
March 20, 1998