

Report of the Information & Privacy
Commissioner

1999

OFFICE OBJECTIVES

- To provide an independent review of decisions made by public bodies respecting access to information and the protection of personal information held in government records.
- To provide comments, information, advice and recommendations on information access rights, protection of privacy, and obligations of public bodies with respect to information and privacy.
- To investigate and report on public concerns or complaints about the administration of the ATIPP Act.

The principles underlying the *Access to Information and Protection of Privacy Act* (ATIPP Act) are those of accountability and protection of privacy. These principles enable the actions of government to be held up to public scrutiny and secure every individual's fundamental right to privacy. The Office of the Information & Privacy Commissioner impartially reviews government decisions that pertain to the ATIPP Act and provides comments on the administration of the ATIPP Act. The services of the ATIPP Act are open to all citizens.

YEAR IN REVIEW

The number of cases presented to the Information & Privacy Commissioner during 1999 totaled 32. This compares to 36 for the previous year, a reduction of 11%. Of the 32 cases only 5 were requests for review under Section 48 of the ATIPP Act. This compares to 16 requests for review in 1998. Some cases combined a number of requests for review, as can be seen in table 3 of the statistical summaries. The total number of requests to review specific decisions of public bodies, as broken down by relevant sections of the ATIPP Act, was 20. While the numbers at first glance might indicate a significant reduction, in fact the number of issues dealt with at review this year compares to 23 in 1998, a reduction of only 13%.

When requests for review are received, the Commissioner authorizes a mediator to investigate and try to settle the matter under review. These mediation efforts can explore the interests of the parties and attempt to clarify specific requirements of the ATIPP Act. If the matter under review cannot be settled by mediation, the ATIPP Act requires the Commissioner to conduct an inquiry.

Inquiries in 1999 were conducted by way of written submissions from the parties to the Commissioner. Initial submissions of the parties, in accordance with standards of procedural fairness, were exchanged between the parties and final reply submissions were received by the Commissioner. On the basis of the parties' submissions, the

Commissioner settled the matters under review and issued reports with recommendations.¹

All cases handled through inquiries concluded with reports containing recommendations to public bodies. The Commissioner is pleased to report that all recommendations made in 1999 were accepted and implemented.

The Assistant to the Information & Privacy Commissioner was able to settle 2 cases through mediation. This compares to 6 cases successfully mediated in the previous year. This reduction does not necessarily represent a reduced dedication of time and effort to this means of settlement. Often many hours of work are expended, without the parties reaching agreement. Despite the relatively low success rate in mediated settlements, the Office of the Information & Privacy Commissioner continued over the year to vigorously promote and encourage the parties to resolve matters without going to inquiry. It is the Commissioner's view that there is an opportunity to mediate in almost every review that comes to his Office. He is also convinced that mediation is nearly always worthwhile as it may meet the interests of the parties more appropriately than the results of an inquiry based on strict statutory interpretation.

Section 42 of the ATIPP Act gives the Commissioner responsibility to monitor how the ATIPP Act is administered to ensure its purposes are achieved. As part of this responsibility, the Commissioner may receive comments or complaints from the public, conduct investigations and make reports. It is the practice of the Commissioner to receive such public complaints and comments and group them into common issues to determine if sufficient grounds exist on which to base an investigation.

During the year the workload of the office has not permitted the completion of any of these Section 42 investigations. All 10 of them have been carried forward to the new year.

GOVERNMENT ADOPTION OF ATIPP PRINCIPLES

The ATIPP Act seeks to make public bodies more accountable to the public through the public's right of access to records. It also gives the public a right to privacy by requiring public bodies to protect personal privacy through rules governing collection, use and disclosure of information.

Three full years have passed since the commencement of the ATIPP Act. Through the Commissioner's responsibility to monitor how the ATIPP Act is administered, a general assessment on the extent to which government has adopted and embraced its principles is provided in this report. Comments are based on completing 57 requests for review during

¹ For complete information on written inquiries visit our web site at www.ombudsman.yk.ca.

that time, including 22 formal inquiries, as well as the regular communication with public bodies, the Archivist and departmental ATIPP Coordinators.

All public bodies have now had the opportunity to work within the framework of this legislation and are making their best efforts to comply. Public bodies have made significant gains by determining the categories of records that can be made available to the public through routine disclosure pursuant to Section 64(1) of the ATIPP Act which states:

64(1) A public body may prescribe categories of records that are in its custody or control and are available to the public without a request for access under this Act.

Of those requests coming to this office for review, it appears decision making systems have been developed within public bodies that are able to provide applicants with a response within the 30 day time frame. Only occasionally is the Archivist deciding, pursuant to Section 12 of the ATIPP Act, to extend the period of time for a response when the public body requires additional time for reasons set out in Section 12.

The decision of public bodies to designate ATIPP Coordinators at a senior level within their organizational structures has been of great benefit. Of those public bodies that have been a party to a review, the public body representatives are conscientiously performing their responsibilities. However, the involvement of the ATIPP Coordinators is encouraged in all aspects of ATIPP from request through to inquiry so that a consistent approach to the principles of the ATIPP Act is maintained.

The Archivist and her staff have worked diligently, since the introduction of this legislation, to provide ATIPP orientation and training to a large number of people within the public service. The Archivist also facilitates workshops for ATIPP Coordinators, many of which the Commissioner has been invited to attend. At such sessions the Commissioner takes the opportunity to explain, in general terms, recommendations made after a review so public bodies can benefit from the review outcomes. At the same time, the Commissioner finds these more in-depth discussions of benefit in understanding the challenges faced by public bodies.

With this understanding, it is becoming increasingly clear that the efforts by those involved in administering the ATIPP Act have very often been at the cost of their primary responsibilities. When the legislation came into force, no additional resources were provided within the public service to meet the new demands required by the ATIPP Act. Duties imposed by the ATIPP Act are substantial and resource intensive. Public bodies are realizing there is a significant cost to the kind of accountability contemplated by this legislation.

The reason for bringing forward this discussion in the Annual Report is the Commissioner's serious concern that an adequate administration of the ATIPP Act cannot be sustained with the existing resources in the public service. Increasingly, there is evidence of frustration in the public bodies' efforts to meet the legislated time frames for

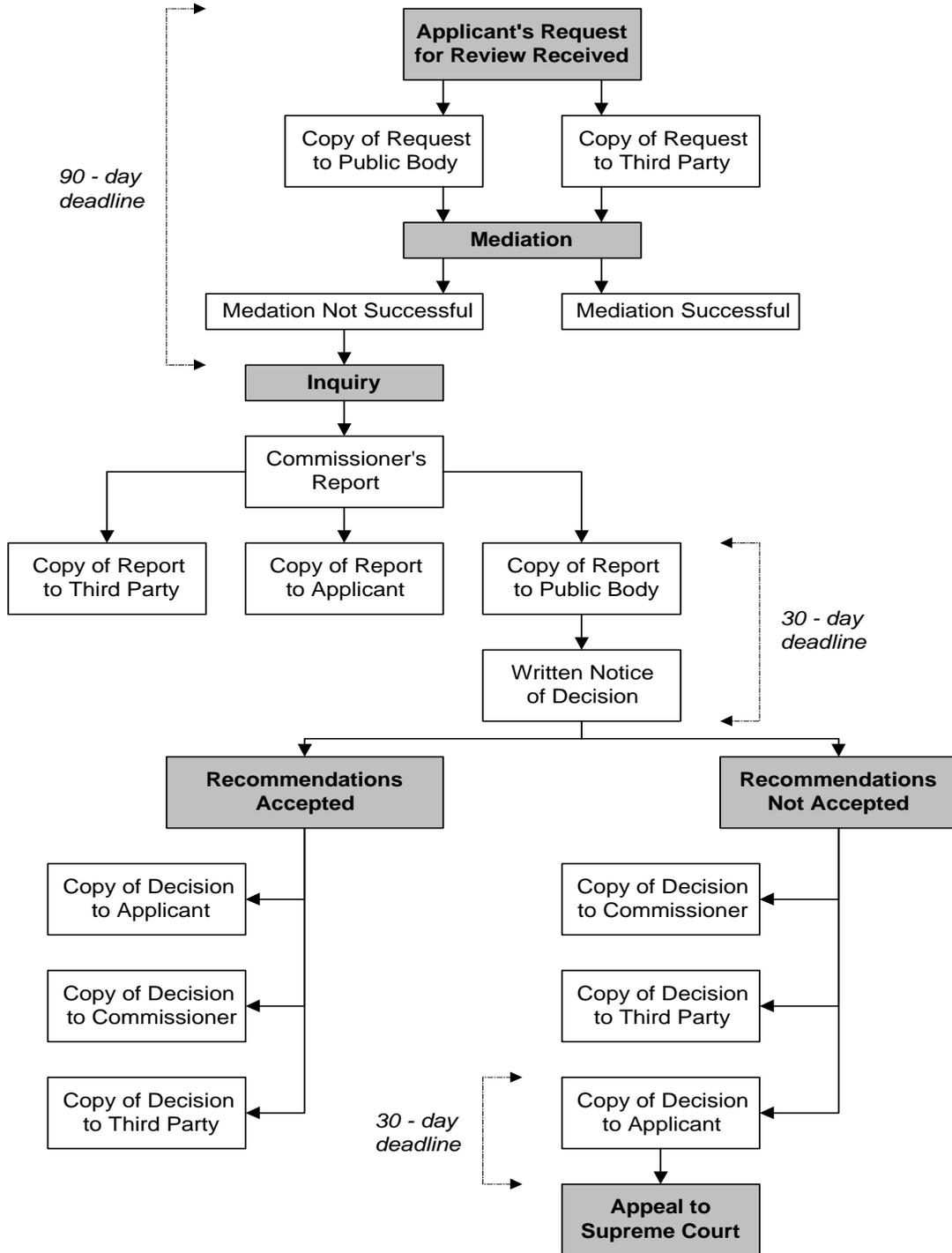
responding to access requests and the requirements for reviews by the Information & Privacy Commissioner. Their frustrations have, at times, manifested themselves in inappropriate responses to applicants and inadequate submissions to inquiries.

Other demands by way of changes to information management processes and systems add to the frustration. The overall result has, at times, been an annoyance with the legislation at best and outright hostility toward it at worst. The Commissioner fears a culture is developing within the public service that finds itself in direct conflict with the kind of openness and accountability the legislation is intended to produce. This is not in the best interest of either the government or the public it serves.

There is currently an adequate level of compliance with the ATIPP Act, and even in some areas a strong commitment to its principles. But it is not likely that this can be sustained with the existing resource levels in the public service.

The Commissioner urges government to conduct a department by department program review, audit and evaluation related to the requirements of the *Access to Information and Protection of Privacy Act* for the purpose of ensuring public bodies, including the office of the Archivist, are adequately resourced to meet the demands of the ATIPP Act.

REQUEST FOR REVIEW FLOW CHART



ACCESS TO INFORMATION AND PROTECTION OF PRIVACY ISSUES

In 1999 the Office of the Information & Privacy Commissioner received 32 new requests for review. Of these requests, 5 were discontinued, 2 were settled in mediation, and 5 proceeded to the inquiry level. A further 15 cases are still under investigation.

A selection of issues, which are representative of the cases handled by the Office, are presented on the following pages.

“Information” vs. “Records”

During 1999, on at least two occasions an important question was raised about the distinction between “information” and “records”, particularly in relation to access requests. This issue deserves some discussion because it is often found to be at the centre of confusion and, at times, frustration. Many people making access requests seek information related to an event, decision or perhaps their personal records, without knowing if a specific record will be responsive to their request.

Although the ATIPP Act includes in its title the words “Access to Information”, all references to “information” in the ATIPP Act are expressed in terms of “records”. Here are some examples:

- The ATIPP Act gives the public “ a right of access to records”.
- Personal Information is defined as “recorded information about an individual”.
- In setting out the Scope of the ATIPP Act, it states, “the Act applies to all records in the custody, or under the control of a public body...”
- In making an access request, the applicant must provide enough detail to identify a record.
- In a response to the applicant, the archivist must tell the applicant whether access will be given to a record, or part of it.
- Requests for a review by the Information & Privacy Commissioner of decisions by the Archivist and the Public Body must relate to a record.

The procedures for handling access requests must, therefore, include a transition from the “information” an applicant seeks to a “record” that will be responsive to the request. The ATIPP Act imposes a duty on the applicant, the archivist and the public body to make this transition. The applicant, pursuant to Section 6 must provide enough information to identify a record. The archivist, pursuant to Section 7 must “make every reasonable effort to assist applicants and to respond to each openly, accurately and completely”. The public body, pursuant to Section 10 must “make every reasonable effort to assist the archivist and enable the archivist to respond to each applicant openly, accurately and completely”.

Despite these requirements, cases are coming forward for review where it is clear the transition has not been made successfully. Some factors identified by the Office of the Information & Privacy Commissioner contributing to this are:

- Extremely broad, and often vague details given by the applicant in relation to the information being sought.
- A lack of understanding by the applicant of the kind of information that would be helpful to the archivist and the public body in identifying the record.
- The request being processed by the archivist and the public body without the identification of a specific record.
- The absence of an information directory to assist in identifying and locating records, as required by Section 63 of the ATIPP Act.

The Office of the Information & Privacy Commissioner, through its reviews and general communication with public bodies and the archivist, makes every effort to reinforce the need for an effective transition process from an applicant's information request to the identification of a record.

It is the view of the Information & Privacy Commissioner that government can assist in this process. The ATIPP Act makes no provision for the Commissioner to make formal recommendations to government through the Annual Report. However, the Commissioner urges government to consider the following informal recommendations:

1. Complete the publication of the information directory.
2. Provide specific training to the staff of the Archivist and to departmental ATIPP Coordinators on making a successful transition from an information request to the identification of responsive records.
3. Conduct a review of information management systems to ensure the storage and retrieval of the records of all public bodies allows efficient record identification in response to access requests.

Information Supplied in Confidence

Two cases reviewed by the Information & Privacy Commissioner involved a fundamental principle of fair information practices: the right of an individual to be aware of the collection of their personal information. Also, once collected, the public body is required, under the ATIPP Act, to protect the information from unauthorized disclosure and to retain it for a certain period of time if the information was used to make a decision affecting an individual.

Both cases involved public bodies collecting personal information in support of internal investigations into alleged misconduct by employees of the public body.

In the first case, an individual provided specific information in written form and by way of recorded material to the public body in support of a complaint against an employee of the public body. At the end of the investigation, the complainant requested the return of the material. The public body refused, however, stating that it was obligated to retain the information for possible future litigation, and that the ATIPP Act requires public bodies to retain information used in making a decision affecting an individual.

It was evident that the matter of the information's return to the complainant had not been properly considered and communicated at the time it was collected. In this case, the matter was mediated successfully when the parties agreed to a special arrangement. The public body undertook to secure the records in a way that was satisfactory to the complainant.

In the second situation the supplier of the information, referred to as the third party in the review, believed the information was being given to the public body in confidence. The public body acted on the information and was later faced with an access request from the employee affected by the public body's action. At that point the public body was prepared to provide the access, but faced the objection of the third party who felt the public body was betraying confidentiality.

In his Report After Review, the Information & Privacy Commissioner accepted that the person who supplied the information had the sincere belief that it had been given to the public body in confidence. However, the principles of openness and accountability in public administration have very few exceptions. The Commissioner expressed the view that the public body was not entitled to offer the kind of protection, by way of confidentiality, that the third party thought was available. Collecting personal information in these circumstances, without the knowledge and consent of the person the information is about, violates the principles of the ATIPP Act. Although the ATIPP Act does make some exceptions, such as collecting information for law enforcement purposes, the exceptions did not apply in this case.

The Commissioner's review of the matter determined that disclosure of the information would not be harmful to the third party, and recommended the public body give the applicant access to the information.

Impact of Disclosure on Business Interests

Two cases reviewed in 1999 involved the question of whether the disclosure of the requested information could be harmful to a third party's business interests. Section 24 of the ATIPP Act requires a public body to refuse access if the disclosure of requested information satisfies a three-part test as being harmful to a third party's business interests.

To meet this test, the record at issue must contain information:

1. that contains trade secrets or commercial, financial, labour relations, scientific or technical information of the third party;
2. that was supplied in confidence, and
3. that, if disclosed, could reasonably be expected to be harmful in a number of ways listed in Section 24.

If a public body decides the disclosure would not be harmful as set out in Section 24, it must notify the third party who then has a right to ask the Information & Privacy Commissioner to review the public body's decision.

In one case reviewed by the Commissioner, the third party argued that the information being considered for disclosure was common to a large number of Yukon businesses. The disclosure of the requested information to this applicant, in the third party's view, would be unfairly discriminatory. The third party was also concerned about the purpose for which the applicant would use the requested information.

In his Report After Review, the Commissioner found there was no evidence that the disclosure could reasonably be expected to be harmful to the business interests of the third party. Also, the Commissioner commented that the public body must respond to a specific access request despite the fact that it is not being asked to disclose similar information about other businesses.

Relating to the third party's concerns about how the applicant would use the requested information, the Commissioner pointed out that the ATIPP Act does not require an applicant to set out reasons for an access request. The only consideration is whether or not an applicant is entitled to access under the provisions of the ATIPP Act. The Commissioner recommended the public body give the applicant access to the information.

In the other case, the submissions of the third party presented at inquiry failed, in the Commissioner's view, to meet the three-part test that disclosure would be harmful to the third party's business interests. As a result, the Commissioner recommended the public body in that case give the applicant access to the requested information.

MONITORING THE ADMINISTRATION OF THE ATIPP ACT

The Commissioner is responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may comment on the implications for access to information or for protection of privacy of existing or proposed legislative schemes or programs of public bodies.

SECTION 42 ATIPP ACT

One of the roles of the Information & Privacy Commissioner is to comment on government programs or proposed legislation that can impact the privacy or access rights of Yukoners. On four occasions the Commissioner was involved in this respect during 1999.

Statistics Canada/Yukon Agreement on Statistical Data Collection

The Department of Community and Transportation Services asked the Commissioner to review and comment on a proposed agreement with the Federal Government to collect personal information related to the Canadian Vehicle Survey.

The Commissioner commented that although disclosure of personal information must comply with very strict privacy rules, Section 38 of the ATIPP Act permits the disclosure of personal information for research or statistical purposes, within certain limitations. The limitations and legal authorities referred to in the proposed agreement appear to conform with the statutory requirements as prescribed by the ATIPP Act.

Draft Yukon Government Contribution Agreements

The Department of Economic Development asked the Commissioner to review a draft of its contribution agreement and comment on the implications for the protection of personal privacy. Of specific interest was a term of the Agreement permitting the Yukon Government to make public announcements about the assistance provided to recipients pursuant to the agreement.

The Commissioner reviewed the Agreement and found that he did not have sufficient information on how it might effect an individual's privacy rights. He commented that since the public body holds the program details and deals with individual recipients, the public body ought to complete its own privacy impact assessment. The Commissioner provided the public body with a template containing a comprehensive list of factors that should be explored to determine how a program affects an individual's personal privacy. Included in the template is a discussion about informed consent if government wishes to make public certain personal information about a recipient.

Conflict of Interest Bill

The Executive Council Office asked the Commissioner to review and comment on a draft of Bill 92, being an Act to Amend the *Conflict of Interest (Members and Ministers) Act*, the *Public Service Act*, and the *Cabinet and Caucus Employees Act*.

The Commissioner commented on one part of the bill regarding disclosure of the Conflict Commission's report after investigation. The bill sought to prohibit disclosure of the report on the basis that its disclosure would be an unreasonable invasion of personal privacy.

It was the Commissioner's view that none of the Acts the bill would amend has paramountcy over the ATIPP Act. Therefore, an unreasonable invasion of privacy cannot be deemed that is different from the ATIPP Act's description of an unreasonable invasion of personal privacy.

The Commissioner urged the Office of the Executive Council to research this point further.

FAS Reporting Regulations

The Department of Health and Social Services asked the Commissioner to review a draft of the *Reporting of Fetal Alcohol Syndrome Regulation*.

In his response, the Commissioner discussed the principles of privacy protection as set out in the ATIPP Act and suggested that the regulation clarify how personal “identities” would be removed for the purpose of creating a “record” pursuant to the regulation. The Commissioner expressed the view that the process requires the elimination of not only primary or obvious identifiers, such as the patient’s name, address, and treating physician, but also of secondary identifiers through which a user could deduce the patient’s identity.

The Commissioner pointed out one of the underlying principles of fair information practices: the right of self-determination over one’s personal information. The review of the draft regulation did not make it obvious how this principle would be applied to the required collection of personal information about the mothers of those diagnosed with FAS.

The Commissioner also expressed concern about the significant demand there may be to use the information for purposes other than those for which it was collected. In order for the public body having custody or control of such personal information to know the implications for privacy, the Commissioner recommended the completion of a Privacy Impact Assessment.

Table 1 - Complaints And Requests For Review

Public Body	Number of Cases	
	1999	1998
Community and Transportation Services	2	4
Economic Development	2	–
Education	11	6
Executive Council Office	2	1
Government Services	1	1
Health and Social Services	5	1
Justice	2	4
Public Service Commission	1	4
Renewable Resources	–	2
Tourism	–	2
Whitehorse Correctional Centre	–	1
Yukon Housing Corporation	–	1
Yukon Workers' Compensation Health and Safety Board	6	9
TOTAL	32	36

Table 2 - Means Of Settlement

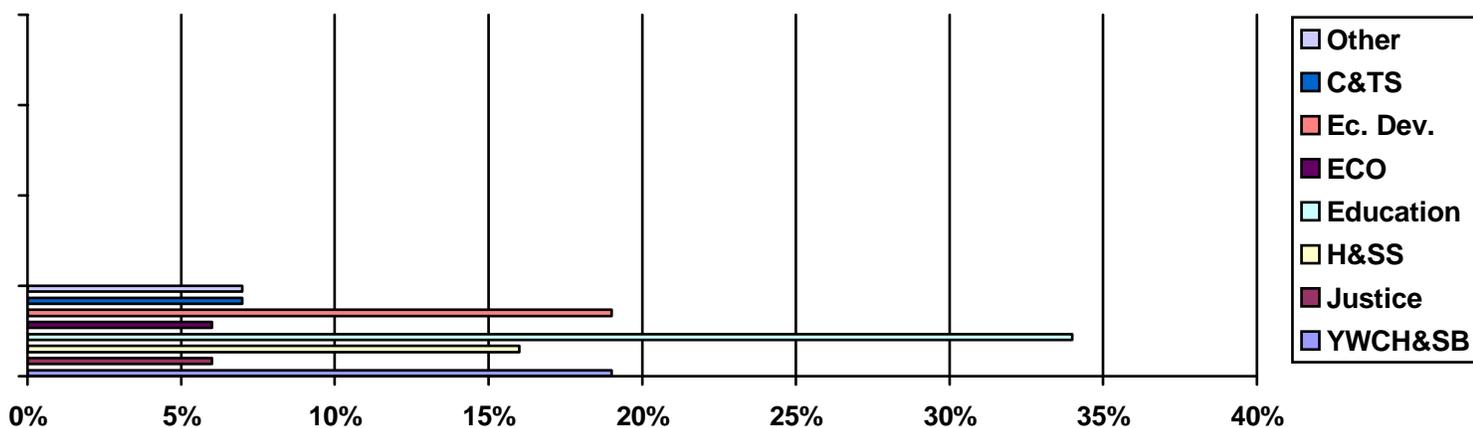
Settlement Type	Number of Cases	
	1999	1998
Inquiry	5	16
Investigation	10	9
Mediation	2	6
Discontinued	5	3
Section 42 Comment	5	2
Not yet completed	5	–
TOTAL	32	36
Carried forward	26	9

Table 3 – Types of Cases

Description	Relevant Section of the Act	Number of Cases	
		1999	1998
Request for a review on a refusal by the public body to grant access to the record.	a) 48(1)(8	14
Request for a review of a complaint that a public body has not collected, used or disclosed information in compliance with the Act.	48(3)	6	7
Request for a review on a decision about an extension of time for responding to a request for access to a record	c) 48(1)(2	1
Request for a review of a decision by a public body to disclose personal information about a third party	48(4)	2	1
General powers to investigate complaints on the administration of the Act.	42(b)	10	11
General powers to comment on implications for access to information or for protection of privacy of existing or proposed legislative schemes or programs of public bodies	42(c)	5	2
A decision by the public body or the archivist to separate or obliterate information from the record	b) 48(1)(2	–

*Note: Several files are relevant to more than one section of the ATIPP Act; hence the discrepancy in total number of 1999 ATIPP cases from Table 2

ATIPP CASES BY PUBLIC BODY



Web Site Links

Yukon Office of the Ombudsman. Information about the Yukon Ombudsman and Information & Privacy Commissioner.

<http://www.ombudsman.yk.ca>

Government of Yukon. Home page of our local government. Links to Yukon facts, travel, government, government leaders, and news.

<http://www.gov.yk.ca/>

Privacy Commissioner of Canada. Home Page of the Federal Privacy Commissioner. Links to Privacy Acts, reports, presentations and numerous sites dealing with e-commerce privacy.

<http://www.privcom.gc.ca>

Alberta Freedom of Information and Protection of Privacy Publications. Several on-line publications on privacy. Of particular interest is the "Contractors' Guide to the *Freedom of Information and Protection of Privacy Act*"—a pamphlet that explains to contractors to the Government of Alberta how the *Freedom of Information and Protection of Privacy Act* affects them.

http://www.gov.ab.ca/foip/other_resources/index.cfm

National Conference on Health Info-Structure. The Health Info-Structure is a Health Canada initiative that uses information and communication technologies to modernize the health system.

<http://www.hc-sc.gc.ca/ohih-bis/>

Bill C-54. Protection of Personal Information and Electronic Documents Act and related links.

http://www.privcom.gc.ca/english/02_06_e.htm

Canadian Standards Association (CSA). The CSA is a not-for-profit, non-statutory, voluntary membership association engaged in standards development and certification activities. In 1996 the CSA developed its Model Code for the Protection of Personal Privacy (Q830-96), which provides 10 basic principles based on the OECD Guidelines.

<http://www.media-awareness.ca/eng/issues/priv/laws/csacode.htm>

Organization for Economic Co-operation and Development (OECD). A group of 29 member countries that provide governments with a setting in which to discuss, develop and perfect economic and social policy.

<http://www.oecd.org/>

**Ombudsman and
Information and Privacy Commissioner**

Box 31300
Whitehorse, Yukon
Y1A 5P7

or

Government of Yukon
Box 2703
Whitehorse, Yukon
Y1A 2C6

Located at:

211 Main Street
Suite 200
Whitehorse, Yukon

Telephone: 867-667-8468
Toll free in Yukon: 1-800-661-0408
(ext. 8468)
Facsimile: 867-667-8469

Website: www.ombudsman.yk.ca
E-mail: ombudsman@yukon.net

QUOTES

“Next in importance to freedom and justice is popular education, without which neither freedom nor justice can be permanently maintained.” James A. Garfield

“Justice cannot be for one side alone, but must be for both.” Eleanor Roosevelt

“Organization and can never be a substitute for initiative and for judgement.” Louis Dembitz Brandeis

EXCERPTS

“The ATIPP Act seeks to make public bodies more accountable to the public through the public’s right of access to information.”

“The Archivist and her staff, particularly, have worked diligently at providing an efficient response system.”

“The Information & Privacy Commissioner impartially reviews government decisions that pertain to the Act and also provides comments on the administration of the Act.”

“Third Party: any person other than the person who made the request” Section 3 ATIPP Act

“Public Body: each department, board, commission, foundation, secretariat, or corporation of the Government of the Yukon” Section 3 ATIPP Act

“Record: any thing on which information is stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other process or mechanism that produces records” Section 3 ATIPP Act

“Authorities have, generally, become more receptive to responding to public complaints openly and making commitments to resolve them fairly”

“The Ombudsman commends the Cabinet’s leadership in putting initiatives forward”

“The Office of the Ombudsman continuously strives to maximize the opportunities to resolve complaints within the investigative framework”