• • • ANNUAL REPORT • • •

OFFICE OF THE OMBUDSMAN AND INFORMATION & PRIVACY COMMISSIONER

• • •

January 1st to December 31st, 2003

YUKON LEGISLATIVE ASSEMBLY
Office of the Ombudsman

OFFICE OF

THE OMBUDSMAN AND

INFORMATION & PRIVACY

COMMISSIONER

MAILING ADDRESS

P.O. Box 31300, Whitehorse, Yukon Y1A 5P7 or

Government of Yukon, P.O. Box 2703, Whitehorse, Yukon Y1A 2C6

LOCATED AT

Suite 200, 211 Main Street, Whitehorse, Yukon

TELEPHONE

867-667-8468 • Toll free in the Yukon 1-800-611-0408 (extension 8468)

FACSIMILE

867-667-8469

E-MAIL • WEB SITE

email.ombudsman@ombudsman.yk.ca • www.ombudsman.yk.ca

Photos are from Herschell Island. Designated as a Yukon Territorial Park, Herschell Island is off the Yukon's north coast in the Beaufort Sea and was the overwintering grounds for American, British and Polynesian whalers from 1890 to about 1910. It continues to be the centuries-old home to the Inuvialuit and a site for traditional hunting, fishing and sealing.

OMBUDSMAN

• • •

• • • TABLE OF CONTENTS • • •

Letter to the Speaker 1

Mission Statement 2

The Function of the Ombudsman 3

Ombudsman's Message 4

Ombudsman Issues 6

- Adequacy of Internal Complaint Mechanism 7
- Balancing Institutional and Individual Rights 8
- Mistake in Calculating Remission 10
- Unreasonable Delay 10
- Evaluating Contract Bid Proposals. 12

Ombudsman Flow Chart of Complaints 13

Statistical Summaries – Ombudsman. 14

- Jurisdictional Files Handled in 2003 14
- Resolution of Jurisdictional Complaints Received in 2003 14
- Investigations Handled in 2003 14
- Outcome of Investigations Completed in 2003. 14
- Non-jurisdictional Complaints 14
- Complaints Received in 2003 (by Authority) 15
- Ombudsman Requests for Information 15

INFORMATION AND PRIVACY COMMISSIONER

• • •

• • • TABLE OF CONTENTS • • •

The Function of the Information and Privacy Commissioner 17

Commissioner's Message 18

Complaints about the Information and Privacy Commissioner 21

Review and Comment on Programs and Legislation 22

- *ATIPP Act* – Workplace Harassment Records 22
- *Adult Protection Act* and *Care Consent Act* 24
- Workers' Compensation Appeal Tribunal 25

Information and Privacy Issues 26

- The Use of Personal Information 26
- Disclosure Harmful to Personal Privacy 26
- Personal Information of Government Employees 27
- Extension of Time to Respond to an Access Request 28
- Disclosure of Ministerial Briefing Notes 29

Meeting the Purposes and Intent of the *ATIPP Act* 30

Request for Review Flow Chart 33

Statistical Summaries – ATIPP 34

- ATIPP Files by Legislation 34
- Section 48 Requests for Review 35
- Section 42(b) Complaints 35
- ATIPP Requests for Information 35

Website Links 36

YUKON LEGISLATIVE ASSEMBLY
Office of the Ombudsman

December 2004

The Honourable Ted Staffen
Speaker of the Legislative Assembly
P.O. Box 2703
Whitehorse, Yukon
Y1A 2C6

Mr. Speaker:

I have the pleasure of presenting to you, and through you to the Legislative Assembly, the Annual Report of the Yukon Ombudsman and Information & Privacy Commissioner.

This report is submitted pursuant to Section 31(1), *Ombudsman Act* and Section 47(1), *Access to Information and Protection of Privacy Act*. The report covers the activities of the Office of the Ombudsman and the Information & Privacy Commissioner for the period January 1st, 2003 to December 31st, 2003.

Yours truly,

H Moorlag.

Hank Moorlag
Ombudsman

• • • MISSION STATEMENT • • •

To provide an independent, impartial means by which public complaints concerning the Government of Yukon can be heard and investigated under the *Ombudsman Act*.

To provide an effective avenue for receiving and processing public complaints and requests for the review of decisions by public bodies related to the *Access to Information and Protection of Privacy Act*.

To promote fairness, openness and accountability in public administration.

• • • THE FUNCTION OF THE OMBUDSMAN • • •

The function of the Ombudsman is to ensure fairness and accountability in public administration in the Yukon.

The Ombudsman fulfills this function by receiving complaints, conducting impartial and confidential investigations and, when warranted, recommending fair and appropriate remedies.

The Ombudsman is not government but investigates government. The Ombudsman can recommend that an authority resolve administrative unfairness, but cannot make it change its actions or decisions. The Ombudsman receives complaints from individuals and groups but is not their advocate.

The *Ombudsman Act* provides the statutory framework under which the Ombudsman carries out his function.

The Yukon Ombudsman has jurisdiction to investigate complaints about the actions, decisions, recommendations or procedures of the following:

- Departments of the Yukon Territorial Government.
- Crown corporations and independent authorities or boards.
- Public schools and Yukon College.
- Hospitals, local and regional health bodies, and governing bodies of professional organizations.
- Municipalities and Yukon First Nations governments if requested by a municipality or First Nation.

The Ombudsman does not have the authority to investigate the following:

- Complaints about actions which occurred prior to July 1996 when the *Ombudsman Act* became law.
- Complaints about the courts, the Yukon Legislature, the Yukon Elections Office, or lawyers acting on behalf of the Yukon Territorial Government.
- Disputes between individuals.
- Complaints against the federal government.
- Complaints for which there is a statutory right of appeal or review.

The Ombudsman's office is an office of last resort. This means the Ombudsman encourages any complainant to raise his or her complaint with the authority first and then to come to the office if that route is unsuccessful.

• • • OMBUDSMAN'S MESSAGE • • •

The purpose of the annual report of the Ombudsman is to place before the Legislative Assembly an account of the work of the office for the year. As in the past, this includes a statistical summary of the complaints received, highlights of cases through a discussion of the issues they present, and some general comments about what impact the office is having on public administration.

A significant part of our work in 2003 related to complaints from the Whitehorse Correctional Centre. During the investigation of these complaints, a cooperative and collaborative working relationship between our office and the Superintendent and staff enabled a strengthening of the Centre's internal complaint handling procedures and some of the institution's administrative practices.

This illustrates the fact that Ombudsman investigations, contrary to common perceptions, are not adversarial in nature. Indeed, they have the greatest positive impact when public authorities recognize the value of an independent review of policies, practices and procedures. Acting Superintendent Sharon Hickey, in her letter of December 10, 2003 said:

Offender rights, our administrative responsibilities and correctional 'justice' do not occupy many agendas, but they occupy mine. Because of your mandate, and the skill and decorum with which each of you discharged that mandate, I felt we wound up working together so as to be able to make some of the changes necessary to improve inmate living conditions and ensure their basic rights were respected.

It is very gratifying to have the work of the office acknowledged in this way, and to validate the benefit of a collaborative approach to addressing the concerns of complainants. More details of these cases are discussed beginning on page 7.

In 2003, changes to practices in regard to government contract administration were achieved as a follow-up to an investigation that was settled in 2001. The case involved a contract for services in which there was, at the tendering stage, a requirement to demonstrate technical competence. I concluded that administrative errors occurred in the bid evaluation process and recommended that in future an experienced contracting services specialist be involved in bid evaluations where complex technical elements exist. This is discussed in more detail on page 12.

The office received 79 complaints in 2003. Of these, 10 required investigation and these were added to the 24 investigations brought forward from 2002. Sixteen investigations were completed in 2003 and 18 were carried over into the new year. I am pleased to report that all recommendations made to public authorities as a result of investigations were accepted and given effect.

Ombudsman investigations have the greatest positive impact when public authorities recognize the value of an independent review of policies, practices and procedures.

Many complaints were settled without having to complete a formal investigation and make recommendations. Section 15 of the *Ombudsman Act* contemplates informal resolution by making specific provisions for either the Ombudsman, or the head of the department or agency, to initiate direct discussions for the purpose of settling the complaint.

Much work has been done, since the Office of the Ombudsman was created in 1996, to develop working relationships with departments and agencies that will facilitate such informal settlements. In this respect, I am particularly grateful to deputy ministers who have all been very responsive to my requests for meetings, both for the purpose of settling specific issues, and also to create and foster a framework within which these discussions can take place.

Ombudsman to notify authority

15(2) The Ombudsman may at any time during or after an investigation consult with an authority to attempt to settle the complaint, or for any other purpose.

Without minimizing these very positive achievements, there is still work to do. Ineffective communication is a common thread running through most complaints. I have commented on this in previous annual reports, but it bears repeating. Often public authorities do not give adequate reasons for a decision, or an open and complete explanation for situations that give rise to complaints. Also, many complainants lack the skills to present their concerns clearly, or in some cases even respectfully. The combination is a recipe for conflict, and often results in an increase in the number of complaints to my office.

It's been said that one of the measures of a true democracy is the extent to which government not only tolerates, but actually welcomes criticism. Making a shift to this position is difficult because welcoming criticism usually runs counter to basic instincts. The personal defensiveness of public servants, if it carries over into the workplace, can easily be interpreted by the public as a reflection of corporate values. In my view, more work can be done by government on several fronts:

- Develop within departments a complaint handling process that is oriented to improving program delivery and public administration in response to public complaints.
- Train public servants to deal with conflict in productive ways. The Public Service Staff Development Branch continues to offer conflict resolution courses, but as I commented in the 2002 annual report, each department can take a more proactive approach by assessing operational requirements for this training and making its own plan for staff development based on need.
- Introduce Corporate Value Statements that can be modeled by public servants as an alternative to defensive and dismissive personal responses to criticism.

To assist government departments and agencies in developing an internal complaint handling mechanism, I offer for reference a guideline developed by my colleague, the Ombudsman for British Columbia. The guideline can be found on the BC Ombudsman web site: http://www.ombd.gov.bc.ca/reports/Public_Reports/PR40_ICM/index.html. I offer the expertise of my office as a resource to departments in the development of internal complaint mechanisms.

Ineffective communication is a common thread running through most complaints.

• • • OMBUDSMAN ISSUES • • •

In presenting a description of our case work over the year, we provide here a discussion of issues that arose and use the information from individual case files to indicate how those issues were addressed. This approach to reporting our case work is taken for two reasons. The first is that is it is more instructive to bring specific issues into focus rather than simply describe the details of a case. The second reason is to respect the confidentiality requirements of the *Ombudsman Act*.

A core principle under which the Ombudsman operates is that investigations are confidential and conducted in private. The outcome of an investigation is only reported to the complainant and the authority against whom the complaint was made. This confidentiality facilitates the openness, the frankness and the non-adversarial approach that characterizes an Ombudsman investigation.

This confidentiality facilitates the openness, the frankness and the non-adversarial approach that characterizes an Ombudsman investigation.

Nevertheless, the *Ombudsman Act* requires the office to report on its work in the annual report and it would be difficult to do so without providing a summary of cases investigated. The following summaries are presented in the context of specific fairness standards or grounds set out in section 23 of the Act. These are the grounds upon which the Ombudsman may base a decision that an authority acted unfairly.

Procedure after investigation

23(1) Where, after completing an investigation, the Ombudsman believes that

(a) a decision, recommendation, act or omission that was the subject matter of the investigation was
  (i) contrary to law;
  (ii) unjust, oppressive or improperly discriminatory;
  (iii) made, done or omitted pursuant to a statutory provision or other rule of law or practice that is unjust, oppressive or improperly discriminatory;
  (iv) based in whole or in part on a mistake of law or fact or in irrelevant grounds or consideration;
  (v) related to the application of arbitrary, unreasonable or unfair procedures; or
  (vi) otherwise wrong;

(b) in doing or omitting an act or in making or acting on a decision or recommendation, an authority
  (i) did so for an improper purpose;
  (ii) failed to give adequate and appropriate reasons in relation to the nature of the matter; or
  (iii) was negligent or acted improperly; or

(c) there was unreasonable delay in dealing with the subject matter of the investigation, the Ombudsman shall report his or her opinion and the reasons for it to the authority and may make the recommendation he or she considers appropriate.

Procedure after investigation

23(2) Without restricting subsection (1), the Ombudsman may recommend that

(a) a matter be referred to the appropriate authority for further consideration;

(b) an act be remedied;

(c) an omission or delay be rectified;

(d) a decision or recommendation be cancelled or varied;

(e) reasons be given;

(f) a practice, procedure or course of conduct be altered;

(g) an enactment or other rule of law be reconsidered; or

(h) any other steps be taken.

When a person has a complaint about an authority, that person is generally encouraged to use any existing internal complaint process before coming to the Ombudsman. If the existing complaint mechanism proves unsatisfactory, he or she can return to the Ombudsman with the complaint. Section 14(c) of the *Ombudsman Act* allows the Ombudsman to make a discretionary decision to refuse to investigate if an existing administrative procedure provides an adequate remedy for the complainant.

Refusal to investigate

14 The Ombudsman may refuse to investigate or cease investigating a complaint where in his or her opinion

(c) the law or existing administrative procedure provides a remedy adequate in the circumstances for the person aggrieved, and if the person aggrieved has not availed himself or herself of the remedy, there is no reasonable justification for his or her failure to do so;

Adequacy of Internal Complaint Mechanism

In one case completed in 2003, an inmate at Whitehorse Correctional Centre (WCC) came to the Ombudsman because he felt his complaint about the inappropriate conduct of a staff member had not been acted on by WCC authorities. He explained that he had made an internal complaint that the officer's negative behavior and attitude toward him were inappropriate.

The investigation confirmed that the inmate's report had been received by WCC staff, but no action had been taken in relation to the inmate's concerns. In the course of the investigation, it became apparent the existing complaint mechanism for receiving, investigating and acting on complaints from inmates about staff conduct or behavior did not meet the required fairness standard set by existing WCC policy.

The Ombudsman recommended that WCC review the procedure for receiving and investigating complaints to ensure that the process for dealing with the complaint was fair, impartial and timely. WCC committed to a review and modification of its policy and practices to put a fair and impartial complaint mechanism in place.

• • •

Balancing Institutional and Individual Rights

WCC officials recognize Ombudsman investigations as a means of obtaining or gathering information to help WCC, in the words of one Superintendent, "find the balance between institutional security and offender rights". That Superintendent sees the Ombudsman as "an important partner in ensuring that the work done and the human services provided are fair, accountable and lawful".

In 2003, the Ombudsman conducted investigations into several complaints and advised WCC of the findings. The Ombudsman and WCC then held discussions about what WCC would do in response to administrative problems identified as a result of the investigations. In most instances, the Ombudsman was satisfied with WCC's corrective actions, which settled the complaints without a formal report.

In one case, an individual with existing medical conditions was sentenced to incarceration. At sentencing, the Superintendent of WCC made submissions to the Court that all of the inmate's medical needs could be accommodated. However, at the time of admission, the medical dorm, normally used for inmates with medical needs, was occupied. Consequently, the inmate voluntarily agreed to be temporarily housed in a Segregation Unit. The only Unit available was Segregation #1, which is known by inmates as "the hole", as it is normally used for disciplinary segregation. The complainant felt he was being treated as though he were in that cell for disciplinary sanctions rather than for purposes of special medical attention.

This complaint was substantiated on the following grounds. The first is that the WCC segregation policy in effect at the time was used for an improper purpose. When a decision, recommendation, action or omission is based on otherwise proper policies and procedures but is used to achieve an improper purpose, it is unfair. This can occur when the intent of the policy or procedure is ignored or disregarded in order to affect a particular outcome. In this case, WCC was applying disciplinary segregation policies improperly to this inmate. The second ground was that the actions were oppressive. Actions are oppressive when they have an effect which is unduly punitive, harsh or harassing on an individual.

WCC introduced a "Special Instructions Form" for all inmates in segregation to itemize the unique conditions for the placement of each inmate. The Ombudsman was satisfied that this change effectively resolved this complaint.

In a related complaint, this same inmate, once he realized the conditions under which he was placed, used WCC's internal complaint mechanism, the Request Form, to bring forward his concern. The inmate subsequently complained to the Ombudsman that WCC did not respond to his Request Form in an acceptable manner, because both times he gave the request to corrections officers, it was returned to him unanswered.

This complaint was substantiated on the ground that WCC acted improperly because the corrections officers knew, or ought to have known, they did not act in accordance with the Inmate Requests policy. An authority acts improperly when it intentionally, or by neglect, breaches a duty which it owes towards a person and thereby creates adverse consequences.

WCC identified that the format of the Inmate Request Form in use at the time was not conducive to good administrative practices. With input from the Ombudsman, the form was revised to ensure that the policy regarding the internal complaint mechanism would be properly followed. The Ombudsman was satisfied that these changes effectively resolved this inmate's complaint.

In another case, an inmate complained to the Ombudsman that excessive force was used by staff at WCC. During the ensuing investigation, the institution's policy on restraint and use of force was examined to determine if there was compliance with the policy. Although the use of force was not found to be excessive, it was found there was a complete failure to take certain actions after the use of force and to report in the prescribed form required by the policy. As a result, the complaint was substantiated as "otherwise wrong". An act, omission, decision or recommendation can be found to be "wrong" if it clearly departs from a policy, process, or procedure which sets out the proper course of action to be followed.

Discussions led to a settlement without the need for a formal report. WCC agreed to ensure that all staff is familiar with the policy requirements. As well, instruction on the policy requirements will be included as staff is recertified in restraint procedures, an initiative under way. The Ombudsman was satisfied these changes effectively resolved the inmate's complaint.

The Ombudsman received another complaint about a disciplinary hearing at WCC. The hearing was recorded, as required by the Inmate Rules and Discipline policy. The complaint concerned the fact that the hearing officer turned off the tape recorder, at which time there was an angry exchange between the hearing officer and the inmate. Investigation confirmed that the hearing officer acted improperly, thus undermining the integrity of the hearing process and compromising the fairness of this disciplinary hearing.

WCC agreed that officers who hear discipline matters needed to be appropriately trained and began to do so. WCC also agreed that there needs to be a more independent and objective process for hearing disciplinary infractions. This will be examined more closely during the review of the *Corrections Act*. WCC's commitment to ensuring procedural fairness in disciplinary hearings satisfied the Ombudsman and the complaint was settled without a formal report.

Mistake in Calculating Remission

In one case completed in 2003, an inmate at WCC contacted the Ombudsman when he was unable to convince the administration that an error had been made in the calculation of his sentence. He believed that the Sentence Administrator had failed to credit him with 12 days of earned remission time. Although he had provided information to the Sentence Administrator and senior management about the error, he had been unable to persuade them that a mistake had been made in the calculation. The failure to credit the earned remission time affected the date of his release from jail.

The investigation confirmed that the Sentence Administrator had failed to credit the inmate with the 12 days of remission time. WCC officials agreed to review the matter and subsequently recalculated the inmate's early release date to include the 12 days remission that had not been credited to him, thus resolving the inmate's concern.

In the course of the Ombudsman's investigation, it became apparent WCC's administration of remission time was not in keeping with the legislative requirements for awarding and forfeiting remission time. In response to the investigation of this matter, WCC agreed to develop a comprehensive policy related to the administration of inmate remission time which would include the following:

- A clear statement of the legal requirements for crediting and forfeiting remission.
- A description of the method for calculating remission and determining early release dates.
- A requirement that an ongoing summary of credits and forfeitures of remission time be placed on the inmate's file.
- A requirement to provide adequate documentation to the inmate of credits earned and lost on a regular basis.
- Guidelines for the forfeiture of remission as a disciplinary sanction.
- A process for an impartial good faith review of sentence calculations where a dispute arises about the correctness of the calculation.

WCC also committed to a review of current inmate files to ensure that the legal requirements for credit and loss of remission had been met in other cases regardless of whether a concern had been expressed.

This case demonstrates how complaints to the Ombudsman may provide a resolution for the person affected and can lead to policy development which assists the authority in carrying out its responsibilities fairly for everyone.

Unreasonable Delay

A failure to respond, or a delay in communicating a decision or in taking action, can have serious consequences for the person affected by the failure or delay. Whether delay is unreasonable depends on the individual circumstances. Delay generally is unreasonable whenever service to the public is postponed improperly, inconsistently, unnecessarily or for some irrelevant reason.

Often in those cases where the delay results from an inadvertent administrative error, contact from the Ombudsman's office is sufficient to resolve the matter without further investigation. If delay occurs routinely or appears to be the result of a systemic problem, the Ombudsman may undertake an investigation into the matter.

In 2003, an individual received a bill from Highways and Public Works for the costs associated with removal of his vehicle from the side of the highway. He contacted the Ombudsman, saying he had not received a reply to his letter to the authority. He was asking for an explanation as to why he had not been given an opportunity to remove the vehicle himself and he requested a breakdown of the costs billed to him. The authority had turned the bill over to Finance for collection but the complainant felt he should have an opportunity to review the bill before paying it.

The Ombudsman contacted the senior administrator, who agreed the complainant was entitled to a response to his request for information in a timely manner and that the failure to respond was an oversight on the authority's part. The authority agreed to immediately provide the complainant with the information he requested. Given the authority's commitment to take immediate steps to respond to the complainant, the Ombudsman determined that further investigation was not necessary.

In another case, an individual complained there had been unreasonable delay in receiving a decision regarding a matter involving Energy, Mines and Resources. The complainant believed a decision was to be made in 2000 about a request to have a small business loan forgiven. The individual did not hear further from the authority and assumed the request had been granted. In 2003, after reading in a newspaper article that the loan was outstanding, the applicant learned this might not be the case. In the interim, responsibility for these matters had transferred from Energy, Mines and Resources to Finance. The individual wrote Finance asking for a decision but did not receive a response.

At investigation, Finance acknowledged that it had not responded as it should have, and agreed to provide the individual with a letter of its decision and to apologize for the delay. This resolved matters for the individual and the Ombudsman considered the matter settled.

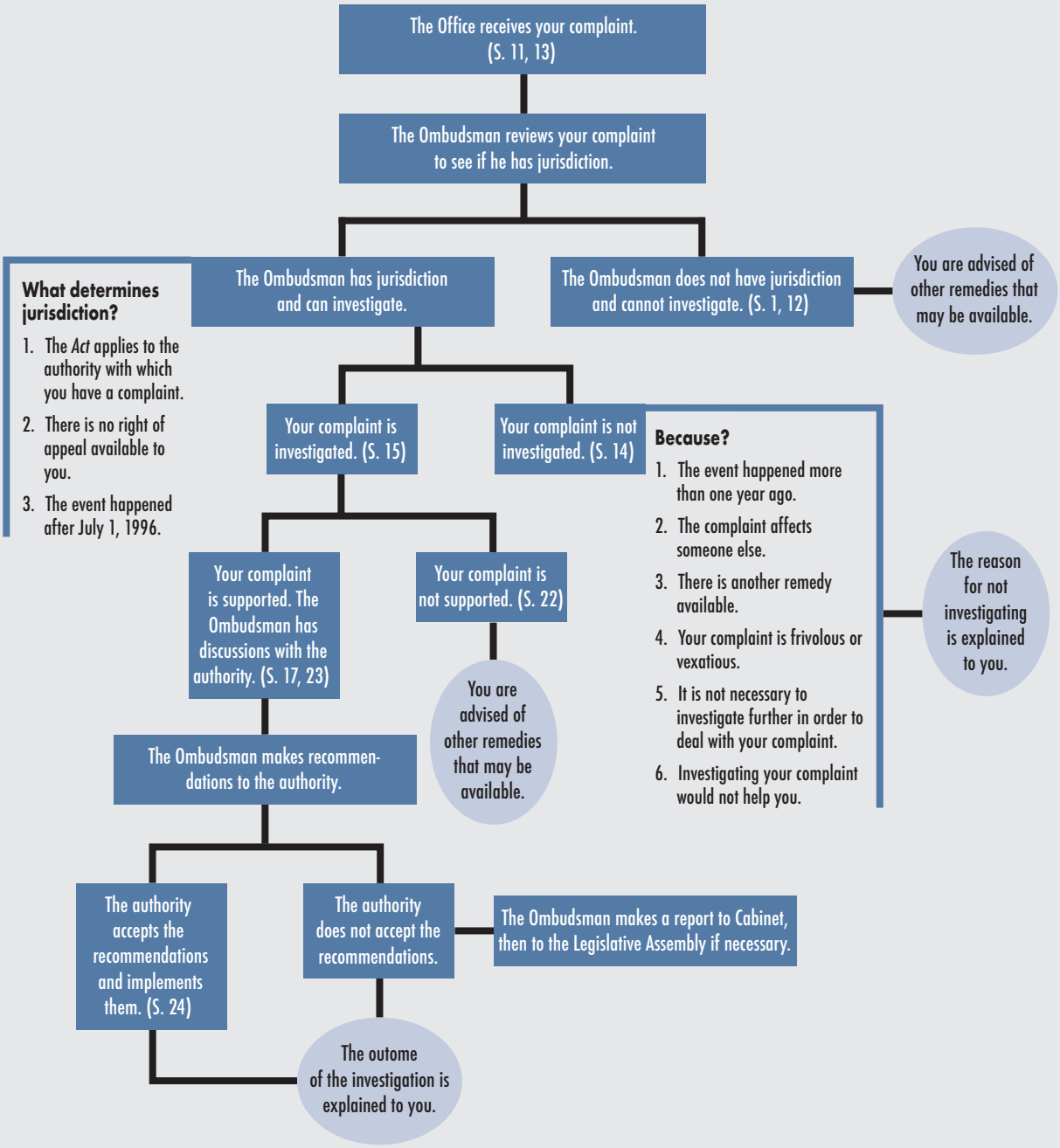
The Ombudsman met with the Deputy Minister of Energy, Mines and Resources about the lack of action in responding to the complainant's initial request to have the loan forgiven. A decision had, in fact, been made shortly after the request was received, but it had not been communicated to the complainant. The departmental official handling the file believed there was no obligation, in the circumstances, to notify the individual. The Deputy Minister agreed the notification should have been made promptly and that the failure to do so contradicted the department's service delivery standards. The Deputy Minister undertook to confirm and enforce these standards in program delivery. This settled the complaint.

Evaluating Contract Bid Proposals

Following an investigation into a complaint about an improper bid evaluation process, the Ombudsman concluded in 2003 that administrative errors occurred. The tender document on which the bid proposals were made, required an assessment of technical competence through training and experience. The Ombudsman determined that the evaluation committee compromised the objective of the tender document by awarding points on the basis of assurances and sincere intent rather than on existing capabilities. Although the contracting authority rationalized the point allocation by interpreting the criteria in a way that accommodated a promise or intent on the part of the proponent, the Ombudsman concluded this was not the purpose of the contract specifications.

The Ombudsman expressed the view that both proponents ought to have been held to the same standard in meeting the specifications. The investigation came to no conclusion about which of the two proponents should have been awarded the contract; that was not its aim. Rather, it only examined the fairness of the evaluation process. The Ombudsman recommended that in future an experienced contracting services specialist be involved in bid evaluations where the assessment of complex technical competence is an issue. The recommendation was accepted.

• • • OMBUDSMAN FLOW CHART OF COMPLAINTS • • •



• • • STATISTICAL SUMMARIES – OMBUDSMAN • • •

JURISDICTIONAL FILES HANDLED IN 2003

Brought forward from 2002	29
investigations	23
not yet analyzed	6
Received in 2003	79
TOTAL	**108**
Completed in 2003	89
Carried over to 2004	20
investigations	18
not yet analyzed	2

RESOLUTION OF JURISDICTIONAL COMPLAINTS RECEIVED IN 2003

Opened as investigation	10
Referred to another remedy	33
Further investigation not necessary	1
Insufficient information provided	11
No benefit for complainant in investigating	1
Complaint withdrawn	3
Otherwise resolved	1
Not yet analyzed	2
Legislated appeal exists	7
Not an authority (non-jurisdictional)	10
TOTAL	**79**

INVESTIGATIONS HANDLED IN 2003

Brought forward from 2002	23
Opened in 2003*	11
TOTAL	**34**
Completed in 2003	16
Carried over to 2004	18

* Includes one complaint received in 2002, but opened as investigation in 2003.

OUTCOME OF INVESTIGATIONS COMPLETED IN 2003

Complaint substantiated after investigation	–
Complaint not substantiated after investigation	1
Complaint discontinued	5
Complaint settled	10
TOTAL	**16**

NON-JURISDICTIONAL COMPLAINTS

Businesses	8
Courts	2
CPP, UIC & Revenue Canada	1
Federal	6
Municipalities	1
Other	4
Other provinces	1
RCMP	1
TOTAL	**24**

These requests often require time to research before being referred to other agencies for assistance.

• • • STATISTICAL SUMMARIES – OMBUDSMAN • • •

COMPLAINTS RECEIVED IN 2003 – BY AUTHORITY

AUTHORITY	OPENED AS INVESTIGATION	NOT OPENED AS INVESTIGATION	NOT ANALYZED	TOTAL
Community Services	1	2	–	3
Education	–	1	–	1
Energy, Mines and Resources	1	1	–	2
Environment	–	–	2	2
Finance	2	–	–	2
Health and Social Services	–	13	–	13
Highways and Public Works	2	4	–	6
Infrastructure	–	2	–	2
Justice	–	7	–	7
Public Service Commission	2	2	–	4
Registered Nurses' Association	–	1	–	1
Tourism	–	2	–	2
Whitehorse Correctional Centre	2	13	–	15
Yukon Hospital Corporation	–	1	–	1
Yukon Housing Corporation	–	2	–	2
Yukon Workers' Compensation Health & Safety Board	–	6	–	6
Not an authority	–	10	–	10
TOTAL	**10**	**67**	**2**	**79**

OMBUDSMAN REQUESTS FOR INFORMATION

TOTAL	**85**

Requests for information often require time to research.

THE FUNCTION OF THE INFORMATION AND PRIVACY COMMISSIONER

The primary purpose of the *Access to Information and Protection of Privacy Act* (the *Act*) is to make departments and agencies of government (public bodies) more accountable to the public and to protect personal privacy. The *Act* does so in a number of ways:

- By giving the public a right of access to records.
- By giving individuals a right of access to, and a right to request correction of, personal information about themselves.
- By specifying limited exceptions to the rights of access.
- By preventing the unauthorized collection, use and disclosure of personal information.
- By providing for an independent review of decisions made under the *Act*.

The office of the Information and Privacy Commissioner carries out these independent reviews. However, the right to a formal review by the Commissioner is limited to the following decisions made under the *Act*:

- A refusal to grant access to a requested record.
- A decision to separate or obliterate information from a requested record.
- A decision about an extension of time for responding to a request for access to a record.
- A decision to deny a request for a waiver of a fee imposed under the *Act*.

There is also a right of review if a person believes his or her personal information was collected, used or disclosed by a public body in a way that was contrary to the requirements of the *Act*.

A supplementary provision of the *Act* gives the Commissioner responsibility for monitoring how the *Act* is administered to ensure its purposes are achieved. The Commissioner may, among other things, receive complaints or comments from the public concerning the administration of the *Act*[1], conduct investigations into those complaints, and make reports. The Commissioner may also comment on the implications for access to information or for privacy protection of existing or proposed legislative schemes or programs of public bodies.

[1] "Administration of the *Act*" refers to anything done by the Records Manager, a public body, or the Information and Privacy Commissioner, to meet the requirements of the *Act*.

• • • COMMISSIONER'S MESSAGE • • •

In addition to statistical information and a discussion of the various issues dealt with during the year, I have always considered it important to make a general assessment, year by year, of the extent to which the purposes of the *Act* are being achieved. Indeed, section 42 gives the Information and Privacy Commissioner specific responsibility for "monitoring how this *Act* is administered to ensure its purposes are achieved".

General Powers of Commissioner

42 In addition to the commissioner's powers and duties under Part 5 with respect to reviews, the commissioner is responsible for monitoring how this *Act* is administered to ensure that its purposes are achieved ...

In past annual reports I made some general comments in this respect, but I am of the view it is now time to make a more direct assessment. I will describe some developments that are clear indicators of a trend toward secrecy rather than the kind of openness and public accountability the *Act* is intended to produce.

The first is a legislative amendment to the *Act* brought forward by the Public Service Commission to create a specific exception to the right of access to records that are part of a workplace harassment investigation. In doing so, the fundamental scheme of the legislation has been altered. The amendment contains a provision for a public body to refuse access to an entire record, rather than justify withholding specific information in a record on the basis that its disclosure would do some specific harm. This issue is discussed in more detail on page 22.

The second situation relates to a decision by the Department of Energy, Mines and Resources to refuse public access to ministerial briefing notes. The Department relied on section 16 of the *Act*, which authorizes a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a Minister. The Department was steadfast in its argument that not only should the entire records be exempted from disclosure under the *Act*, but so should the disclosure of even their existence. I determined, on review, that such a position is simply not supported by the *Act* and recommended disclosure of almost all the records.

The third situation relates to three cases where public bodies relied on section 13(2) of the *Act* to deny applicants access to their own personal information. Section 13(2) gives public bodies the discretionary authority to neither confirm nor deny the existence of the records being sought in those rare circumstances where the disclosure of whether or not the records exist would adversely affect personal privacy or law enforcement. In all three cases, on review, I determined the use of section 13(2) was not justified.

Contents of response

13(1) In a response under section 11, the records manager must tell the applicant

(c) if access to the record or to part of the record is refused,
  (i) the reasons for the refusal and the provision of this Act on which the refusal is based,

(2) Despite clause (1)(c)(i), a public body may refuse to confirm or deny the existence of

(a) a record referred to in section 19.1,

(b) a record containing information described in section 19 or section 19.1, or

(c) a record containing personal information about the applicant or a third party.

In my reports to the public bodies, I pointed to the requirement in the *Act* for public bodies to exercise discretion in ways that weigh an applicant's right of access to his or her own personal information against any other considerations. It was apparent to me the decisions of the public bodies were based more on public policy interests in preventing disclosure than considering the purposes of the *Act*. Despite these comments in my reports to the public bodies, I am noticing a continuing trend toward more positional arguments that discretionary exemptions like section 13(2) "authorize and empower" public bodies to apply them and that the *Act* does not require public bodies to justify the exercise of discretion on review. This is, in my view, contrary to the purpose and intent of the *Act* and is completely inconsistent with the practice in every other Canadian jurisdiction with substantially similar legislation.

The final situation I want to highlight involves a case in which I found it necessary to formally summon a representative of the Department of Community Services to answer questions under oath in order for me to understand how the public body could refuse an applicant access to records that, on review, it claimed not to have in its custody or under its control. Neither the pre-inquiry stage of the review, nor my written communication to the public body, could resolve the discrepancy. The explanation that finally emerged was that the public body followed the response of another public body for similar records from the same applicant, rather than developing its own response based on its own search for, and a proper examination of, any responsive records. The public body refused access to the applicant in the mistaken belief that it had the records being sought. However, a subsequent search revealed it did not have the records.

In my report after review I commented that the *Act* requires public bodies to take all necessary steps so that a response to an applicant's access request is open, accurate and complete. The response in this case was inaccurate and the review process was unnecessarily impeded and frustrated by the public body's unwillingness or inability to openly explain its error.

Public body to assist Records Manager

10 The public body that has the record in its custody or control must make every reasonable effort to assist the records manager and enable the records manager to respond to each applicant openly, accurately and completely.

Not all reviews conducted in 2003 presented similar concerns. Nevertheless, the above cases led me to an assessment that the purposes of the *Act* are not being met. That is to say, on balance, the *Act* is not making public bodies more accountable to the public. The concept of public accountability through access to information legislation is best described by the Saskatchewan Court of Appeal, as follows:

The [legislation's] basic purpose reflects a general philosophy of full disclosure unless information is exempted under clearly delineated language. There are specific exemptions from disclosure set forth in the Act, but these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act. That is not to say that the statutory exemptions are of little or no significance. We recognize that they are intended to have a meaningful reach and application. The Act provides for specific exemptions to take care of potential abuses. There are legitimate privacy interests that could be harmed by release of certain types of information. Accordingly, specific exemptions have been delineated to achieve a workable balance between the competing interests. The Act's broad provisions for disclosure, coupled with specific exemptions, prescribe the "balance" struck between an individual's right to privacy and the basic policy of opening agency records and action to public scrutiny.[2]

The challenge is to foster and maintain a culture of openness within government that reflects these principles of the legislation. On page 32 of this report I offer suggestions that I believe would lead to noticeable change. Some can be put into action quickly; others represent the kind of 'investment' that requires planning and persistent effort.

In this process I offer the services of my office as a resource in the hopes that the goal of achieving higher levels of openness and accountability can be realized in a cooperative and collaborative way. My intent is to monitor progress and to continue to include in my annual reports an assessment of how the *Act* is being administered to ensure its purposes are achieved.

In 2003, I received 26 requests for review. One review was carried over from the previous year. As indicated in the statistical summary, 12 reviews were completed and 15 were carried forward to 2004.

Under the general powers of the Commissioner to monitor the administration of the *Act* to ensure its purposes are achieved, I may receive complaints or comments from the public about the administration of the *Act* and conduct investigations. In 2003 I received five such complaints and brought two forward from the previous year. Complaints related to the administration of the *Act* do not necessarily always result in investigation. I may decide to defer acting on the complaint to determine whether the concern relates to an exceptional situation, or whether a pattern is developing that requires intervention, because they are received in the context of my responsibility to monitor the administration of the *Act*. None of the complaints received in 2003 required investigation.

[2] General Motors Acceptance Corp. of Canada v. Saskatchewan Government Insurance (Sask. C.A.) [1993] S.J. No. 601.

COMPLAINTS ABOUT THE • • • THE INFORMATION AND PRIVACY • • • COMMISSIONER

Section 47(1)(b) of the *Act* requires the Commissioner to include in his annual report any complaints and reviews of complaints about the Commissioner's decisions, acts, or failures to act.

The purpose of this requirement is to provide a means for the Commissioner to be accountable. No other mechanism exists to deal with complaints about the performance of the Commissioner, because he is an independent officer of the Legislative Assembly.

Annual Report of the Commissioner

47(1) The commissioner must report annually to the Speaker of the Legislative Assembly on

(b) any complaints and reviews of complaints to the commissioner about the commissioner's decisions, acts, or failures to act.

In 2003, an individual asked the Commissioner to review a public body's decision to refuse him access to information he requested. Subsequently, he expressed dissatisfaction about the length of time it took to complete the review. The review was one of a number of files that were related in some way to appeals that were before the courts on the question of whether the Yukon Medical Council was a 'public body' under the *Act*.

During the pre-inquiry stage of the review, the file was inadvertently placed with other files pending the decision of the Yukon Court of Appeal. The error occurred through a mistaken impression that the public body in this review was the Yukon Medical Council when, in fact, it was the Department of Justice. The result of this error was that this review remained dormant until after the decision of the Yukon Court of Appeal. This was an inordinate and unjustified delay. The Commissioner wrote a letter to the individual apologizing for the error.

The *Act* requires a review to be completed within 90 days. In this situation the Commissioner determined that the language of the statute is directory and failure to comply with the procedural directive would not be fatal to proceeding with the inquiry. The inquiry was therefore completed.

REVIEW AND COMMENT ON PROGRAMS AND LEGISLATION

One of the roles of the Commissioner is to comment on government programs or proposed legislation that have an impact on the access or privacy rights of Yukoners. During 2003, the Commissioner commented on the following matters.

General Powers of Commissioner

42 In addition to the commissioner's powers and duties under Part 5 with respect to reviews, the commissioner is responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may

(c) comment on the implications for access to information or for protection of privacy of existing or proposed legislative schemes or programs of public bodies;

The *ATIPP Act* — Workplace Harassment Records

On October 16, 2003 the Public Service Commission (PSC) contacted the Commissioner with an invitation to meet and discuss a proposed amendment to the *Act*. The purpose of the amendment was to address a concern that the *Act* was not designed to contemplate highly sensitive matters such as workplace harassment investigations. This issue was previously raised in reviews by the Commissioner and in a particular case dealt with by the Yukon Supreme Court on an appeal from the Commissioner's review. To bring this discussion into context, some background information is helpful.

The Public Service Commission has responsibility for conducting investigations into allegations of workplace harassment under the Yukon Government's Workplace Harassment Policy. The policy requires confidentiality as set out in Article 2.7:

All complaints under this policy both formal and informal and any information and materials related to the complaints will be treated as confidential and will not be disclosed to any unauthorized persons.

Similarly, all records created in the course of such investigations must, under the policy, be retained by the PSC in a special secure file.

From time to time, the PSC has been faced with access requests under the *Act* for these records, typically from individuals involved in the investigations who seek access to their own personal information contained in the records. The PSC has responded by claiming confidentiality of the records by policy and various exceptions to the general right of access under the Act, as justification for withholding the records being sought.

The Commissioner has consistently pointed out to the PSC that the *Act* does not permit public bodies to refuse access to entire records in these circumstances. Public bodies must carefully examine records to determine if there may be information in the records in need of protection, and then, where possible, separate or obliterate excepted information from the record, and give the applicant access to the remainder of the record.

ATIPP Act stands for the *Access to Information and Protection of Privacy Act*.

In one specific case the Commissioner, after review, recommended the PSC give the applicant access to the record in dispute, with certain parts of the record to be severed. The PSC failed to follow the recommendation of the Commissioner and the applicant appealed to the Yukon Supreme Court.

In *Avoledo v. The Commissioner of the Yukon Territory and the Government of Yukon as represented by the Public Service Commission*, 2003 YKSC 10, Justice Veale said:

I am of the view that the ATIPP Act makes no provision for non-disclosure on a blanket basis for a particular type of record or information. Section 5(1), in fact, creates a right of access to any record unless it can be excepted from disclosure under section 5(2). Section 5(2) is quite explicit in stating that if such excepted information can be reasonably separated or obliterated from the record, the applicant has a right of access to the remainder of the record. In my view, section 5 sets out the procedure to be followed in any of the sections of Part 2 of the ATIPP Act ...

...

This is also supported in the purposes of the Act, where section 1(a) gives the public a right of access subject to section 1(c) specifying limited exceptions. I reiterate that none of the specified exceptions to the right of access can be interpreted to justify a blanket non-disclosure for an entire record premised on a zone of confidentiality policy ground.

Justice Veale ordered the PSC to give the applicant access to the severed record.

The PSC proposed the following amendment to the *Act*:

19.1(1) A public body may refuse to disclose a record created in the course of, or in contemplation of, an investigation about whether there has been, or what to do about, a violation of

(a) a workplace harassment policy approved by the Executive Council or the Commissioner in Executive Council to govern the conduct of a public body's employees in the course of their employment for a public body; or

(b) a provision of a collective agreement under which the Government of Yukon is the employer defining, and providing a process for dealing with, workplace harassment of a public body's employees by a public body's employees.

On October 22, 2003 the Commissioner wrote to the Public Service Commissioner in advance of the meeting, expressing the following concerns:

- This amendment fundamentally changes the nature and operation of the legislation. It introduces an exception to the general right of access based solely on the subject matter of a record. This is different from all similar exceptions under the *Act*, which are based on a harms test.
- Section 19, to which this proposed amendment is attached, requires such a harms test. It does not provide blanket protection to any and all records created in the course of law enforcement. Rather, it gives a public body discretionary authority to refuse to disclose information, if the disclosure could reasonably be expected to do any of the things listed in paragraphs (a) to (n). I don't believe records created during the course of an investigation under the Workplace Harassment Policy ought to be afforded any greater protection than records created in the course of law enforcement.

At the meeting the PSC agreed to redraft the amendment, to identify the specific harms that could result from disclosure of information and thereby make the amendment more consistent with the law enforcement exception in section 19.

On October 28, 2003, the PSC provided the Commissioner with a revised draft of the amendment that would "meet the concerns of the IPC." The Commissioner was also advised the amendment would be tabled on October 30, 2003 in the Legislative Assembly. Although the amendment contained a list of harms that could result from disclosure, it unexpectedly introduced paragraph (f) – a provision that was not discussed at the meeting:

19.1(2) A public body may refuse to disclose a workplace harassment record and any information in it or about it if the disclosure of the record or any information in it or about it could reasonably be expected to

...

(f) reveal a record that has been supplied in confidence in the investigation of a complaint under a policy or provision referred to in subsection (1);

Because of the time constraint, the Commissioner sent an email message to the PSC objecting to the inclusion of paragraph (f) on the basis that it would serve to except entire records from disclosure, not on the basis of any harm that would result from the disclosure of certain information in a record, but rather on the basis that the record itself was received under some unspecified "confidence". The PSC did not respond to the Commissioner's objection. The Amendment was tabled in the Legislature on October 30, 2003 and passed.

The addition of paragraph (f) alters, in a fundamental way, the operation of the *Act*, a change the Commissioner thought the PSC agreed should be avoided. In addition to the paragraph (f) insertion, the lead-in to subsection (2) authorizes a public body to refuse access to " ... a workplace harassment record and any information in it or about it." This change excludes entire records from disclosure rather than specific information in records, the disclosure of which could be harmful.

Workplace harassment investigation records are now afforded a level of protection that far exceeds the exemptions for information in law enforcement records. However well-motivated the PSC may have been to protect its legitimate interests in safeguarding the workplace from any harmful effects of disclosing information related to investigations under the Policy, in the Commissioner's view the result has been that access rights have been reduced and public bodies are less accountable to the public.

Adult Protection Act and *Care Consent Act*

Two pieces of draft legislation were forwarded to the Commissioner for review and comment. The first was a draft of the *Adult Protection and Decision Making Act*. This legislation proposed three levels of support for adults in need of assistance in making decisions related to their personal affairs. The other piece of draft legislation was the *Care Consent Act* that would enable decisions to be made in respect of individuals who need care.

The Commissioner commented that parts of the proposed legislation relied heavily on the presumption of informed consent on the part of adults for the sharing of personal information. Suggestions were made to strengthen the informed consent provisions. The Commissioner also commented that those designated under the legislation to act as a representative for an adult in need of assistance or care

were given the authority to deal with that person's most personal information. This authority brings with it a responsibility to protect personal privacy. For that reason, the Commissioner urged the following privacy protection rules to be included in the legislation:

- Collect only what personal information is required to exercise authority under the legislation.
- Use the personal information only for a purpose that is consistent with the purpose for which it was collected.
- Make reasonable arrangements for the security of the information so it is protected from unauthorized access, use or disclosure.
- Dispose of the personal information in a way that respects the privacy of the individual the information is about, once the purpose for which it was collected is satisfied.

These changes were reflected in revisions to the draft legislation. The Commissioner suggested that 'Designated Agencies', charged with responding to reports of adult abuse and neglect, be deemed to be 'public bodies' under the Act. Also, that the 'Capability and Consent Board' created under the *Care Consent Act* be deemed a 'public body'. A change was made to make 'Designated Agencies' public bodies under the *Act*, but not the 'Capability and Consent Board' because, on the basis of legal advice, it was considered to be at arm's length from government.

Workers' Compensation Appeal Tribunal

The Chair of the Workers' Compensation Appeal Tribunal asked for the Commissioner's opinion about the application of the *Act* to the Tribunal. The Commissioner had decided in December 2002 that the Yukon Workers' Compensation Health and Safety Board was not a public body under the *Act* as part of dealing with active files. Although the Tribunal exists under the authority of the *Workers' Compensation Act* to hear appeals, it is a body that is independent of the Yukon Workers' Compensation Health and Safety Board.

The Commissioner said it would be inappropriate to give an opinion in relation to the Tribunal in advance of a matter coming before him either in a review or a complaint under the *Act*. The determination of whether or not the Tribunal is a public body requires a careful examination of the Tribunal's enabling statute and regulations and an analysis of the degree of control exercised by the government in relation to the Tribunal's primary function. The Commissioner expressed the view that such a determination could only be made in the context of a review where affected parties have an opportunity to present argument on the question of the application of the *Act*. The Commissioner suggested the Tribunal seek its own legal opinion.

The Commissioner agreed that the process for identifying those entities subject to the *Act* should not be so difficult. To that end he has encouraged the Minister responsible for the *Act* to seek an amendment that would clarify the definition of a 'public body'.

The Commissioner agreed that the process for identifying those entities subject to the Act should not be so difficult.

The Use of Personal Information

A person may ask the Commissioner to review their complaint that a public body has not handled personal information in compliance with the *Act*. In conducting such a review, the Commissioner examines the conduct of the public body against rules prescribed in Part 3 of the *Act* on the collection, use and disclosure of personal information.

A complaint was received in 2003 that personal information from a student's school records had been used for the purpose of auditing the sick leave records of a teacher in another school. The teacher was the parent of the student whose records were accessed. During the investigation and mediation stage of the review, the public body agreed that this collection, use and disclosure of the student's information was in contravention of the *Act*, because the use was not consistent with the purposes for which that personal information was collected. The matter was settled through mediation between the parties.

Disclosure Harmful to Personal Privacy

In the Yukon, as elsewhere in Canada, the media often uses the *Act* to obtain information from government. In 2003, a reporter made several requests for access to records. In one case, the request was for records containing personal information about children in care.

Health and Social Services refused access to all the records requested, on the basis that the disclosure would be an unreasonable invasion of third party personal privacy. The applicant argued that the disclosure of these records was desirable for the purpose of subjecting the activities of the Government of Yukon to public scrutiny and that the disclosure was likely to promote public health and safety. Section 25(4) of the *Act* gives examples of the relevant circumstances, such as these, that must be considered before a public body refuses to disclose third party personal information. This is in keeping with one of the purposes of the *Act*, which is to make public bodies more accountable to the public.

The matter ultimately went to inquiry and the Commissioner decided, in the circumstances of this case, that the particular records requested "were not the appropriate vehicle through which the activities of the Government of Yukon or this Public Body should be subjected to public scrutiny", since the records contained highly sensitive and stigmatizing personal information. The Commissioner confirmed the public body's decision to refuse the applicant access.

Disclosure harmful to personal privacy

25(4) Before refusing to disclose personal information under this section, a public body must consider all the relevant circumstances, including whether

(f) the disclosure is desirable for the purpose of subjecting the activities of the Government of the Yukon or a public body to public scrutiny;

• • •

Personal Information of Government Employees

The *Act* requires a public body to refuse an applicant's request for access to a third party's personal information, if the disclosure of that information would be an unreasonable invasion of the third party's personal privacy.

The *Act* then sets out examples of the information that, if disclosed, would be deemed to be an unreasonable invasion of privacy. One of these examples is information related to an individual's employment.

However, the *Act* goes on to set out some specific and limited examples of information that, if disclosed, would be deemed not to be an unreasonable invasion of a third party's personal privacy. One of these is information about a government employee's position, function or salary range.

One review handled by the Commissioner in 2003 related to a request for access to information about an investigation into an employee's conduct. In his report after the review, the Commissioner pointed out the distinction between information about a government employee that is available for public disclosure, and employment information that must be regarded as personal information. The *Act* recognizes that even though information may pertain to an individual in that person's professional capacity such that it cannot be considered to be their personal information, where that information relates to an investigation into, or assessment of, whether there was improper conduct, the characterization of the information changes and it becomes personal information, the disclosure of which would be an unreasonable invasion of the individual's personal privacy.

Disclosure harmful to personal privacy

25(1) A public body must refuse to disclose personal information about a third party to an applicant if the disclosure would be an unreasonable invasion of the third party's personal privacy.

(2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

(d) the personal information relates to the third party's employment or educational history;

(3) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(e) the information is about the third party's position, functions or salary range as an officer, employee or member of a public body or as a member of a Minister's staff;

Such was the case with the information in dispute in this review. The Commissioner's examination of the record revealed an assessment of the employee's performance and a discussion of whether discipline was warranted. The information is, therefore, employment information that must be withheld. It did not fall into the limited description of information about a government employee's position, function and salary range, that should be available to the public. The Commissioner confirmed the public body's decision to refuse the applicant access.

Extension of Time to Respond to an Access Request

Under the *Act*, a public body may request an extension of time to respond to a request for access to records. The Records Manager is authorized to grant an extension that is reasonable in the circumstances, and that is based on certain conditions. One of them is that a large number of records is being requested and meeting the time limit would unreasonably interfere with the operations of the public body.

The Commissioner was asked to review a decision of the Records Manager to extend the time for the department of Health and Social Services to respond to an access request. At mediation, a schedule of responsive records was produced by the public body and this enabled the applicant to narrow the request to specific records being sought. A reasonable timeline for the production of the records was then agreed upon, and this settled the matter under review.

Extending the time limit for responding

12(1) The records manager may extend for a reasonable period the time for responding to a request if

(b) a large number of records is requested or must be searched and meeting the time limit would unreasonably interfere with the operations of the public body;

Disclosure of Ministerial Briefing Notes

Section 16 of the *Act* authorizes a public body to refuse an applicant access to information that would reveal advice or recommendations to a Minister. This exception to the right of access was relied on by the Department of Energy, Mines and Resources to refuse a request from a media reporter for ministerial briefing notes. The response from the public body was that such briefing notes to the Minister contained advice or recommendations and would therefore not be disclosed.

Policy advice, recommendations, or draft regulations

16(1) A public body may refuse to disclose to an applicant information that would reveal advice, recommendations, or draft Acts or regulations developed by or for a public body or a Minister.

(2) A public body must not refuse to disclose under subsection (1)

(a) any factual material;

At inquiry, the public body's representations to the Commissioner maintained that the records in their entirety were protected by section 16 from disclosure. The public body also argued that disclosure of even the existence of the briefing notes is a violation of the confidentiality under which they are prepared.

The Commissioner concluded there is no basis in the *Act* for the public body's decision to refuse access on these grounds. The *Act* only authorizes the public body to refuse access to information within the records that would reveal advice or recommendations, not the entire records. The *Act* places an obligation on public bodies to determine if specific information in a record that is excepted from disclosure can reasonably be separated or obliterated. If so, it should be done and the applicant should be given access to the remainder of the record.

Subsection (2) of section 16 specifically states that a public body must not refuse to disclose, under subsection (1), any factual material. The Commissioner's examination of the briefing notes revealed much of the information consisted of factual information, and therefore recommended the disclosure of almost all of the records. A recommendation was made to withhold several of the records, or information within records, on the basis of third party personal privacy.

The public body followed the Commissioner's recommendation.

MEETING THE • • • PURPOSES AND INTENT • • • OF THE *ATIPP ACT*

Information and privacy legislation around the world has been enacted to embrace two simple democratic principles: to make the administration of government more open, transparent and accountable to the public, and to impose a responsibility on government to protect personal information in the custody or under the control of its departments and agencies.

Yukon's *Access to Information and Protection of Privacy Act* seeks to realize the goal of openness, transparency and accountability by giving the public a right of access to general information held by public bodies, and by giving individuals a right of access to their own personal information. These rights of access are subject only to limited and specific exceptions. The goal of openness and transparency cannot be realized if information must be pried out of the reluctant hands of public bodies that apply the narrowest possible interpretation to access rights under the *Act*. The default position of government should be disclosure, not secrecy.

Exceptions to the right of access must be applied only when they can be fully justified. In the case of discretionary exceptions, public bodies are under an obligation to take all factors into consideration and determine whether they might weigh in favour of disclosure, even when there is authority under the *Act* to withhold the information.

Section 42 vests the Commissioner with the responsibility of monitoring the administration of the *Act* to ensure its purposes are achieved. It is through the conduct of reviews, the receipt of complaints or comments from the public about the administration of the *Act*, and the day-to-day interaction with public bodies, that the following observations are made. They bring into serious question whether the principles and intent of the *Act* have been adequately embraced by Yukon public bodies.

The default position of government should be disclosure, not secrecy.

In responding to requests for access to information, public bodies have:

- Applied blanket protection for classes of records, when such exemptions do not exist under the *Act*.
- Applied discretionary exemptions under the *Act*, without considering relevant factors that might weigh in favour of disclosure. When a public body is authorized, but not required, to refuse access, it must take the purposes of the *Act* into account before deciding whether or not to withhold the information.
- Failed to conduct a record-by-record and line-by-line examination of records, as required by the *Act*, to determine the right of access to information.
- Failed to properly identify the specific records that are responsive to an access request, thereby not responding 'openly, accurately and completely' as required by the *Act*.

There are other indicators that the *Act* is not receiving the consideration it deserves:

- The ATIPP Manual, developed by government in 1999 as a starting point to guide public bodies in the administration of the *Act*, remains an inadequate reference tool.
- No practical progress has been made on the development of a legislative amendment to clarify the definition of a 'public body', since the need was identified in 2000.
- The roles and responsibilities of ATIPP Coordinators vary widely across departments with no standard that establishes and acknowledges their expertise.
- The training of departmental ATIPP Coordinators has not been sustained.
- A program of coordinated training in support of the *Act's* administration has fallen into a state of disarray since the transfer of responsibility for the *Act* from the Department of Education to the Department of Highways and Public Works. This is largely due to staffing turnovers and the reduction in profile of the position of Records Manager from the Director level held by the Archivist before the change.
- There is no public reporting on the administration of the *Act*. In most other jurisdictions the ministry responsible for the legislation reports annually on all aspects of the *Act's* administration and the extent to which the requirements of the *Act* are being met.
- Proposed legislative schemes or programs of public bodies are not routinely referred to the Commissioner for review and comment as allowed for under section 42(c) of the *Act*.

The goal of openness and transparency cannot be realized if information must be pried out of the reluctant hands of public bodies that apply the narrowest possible interpretation to access rights under the Act.

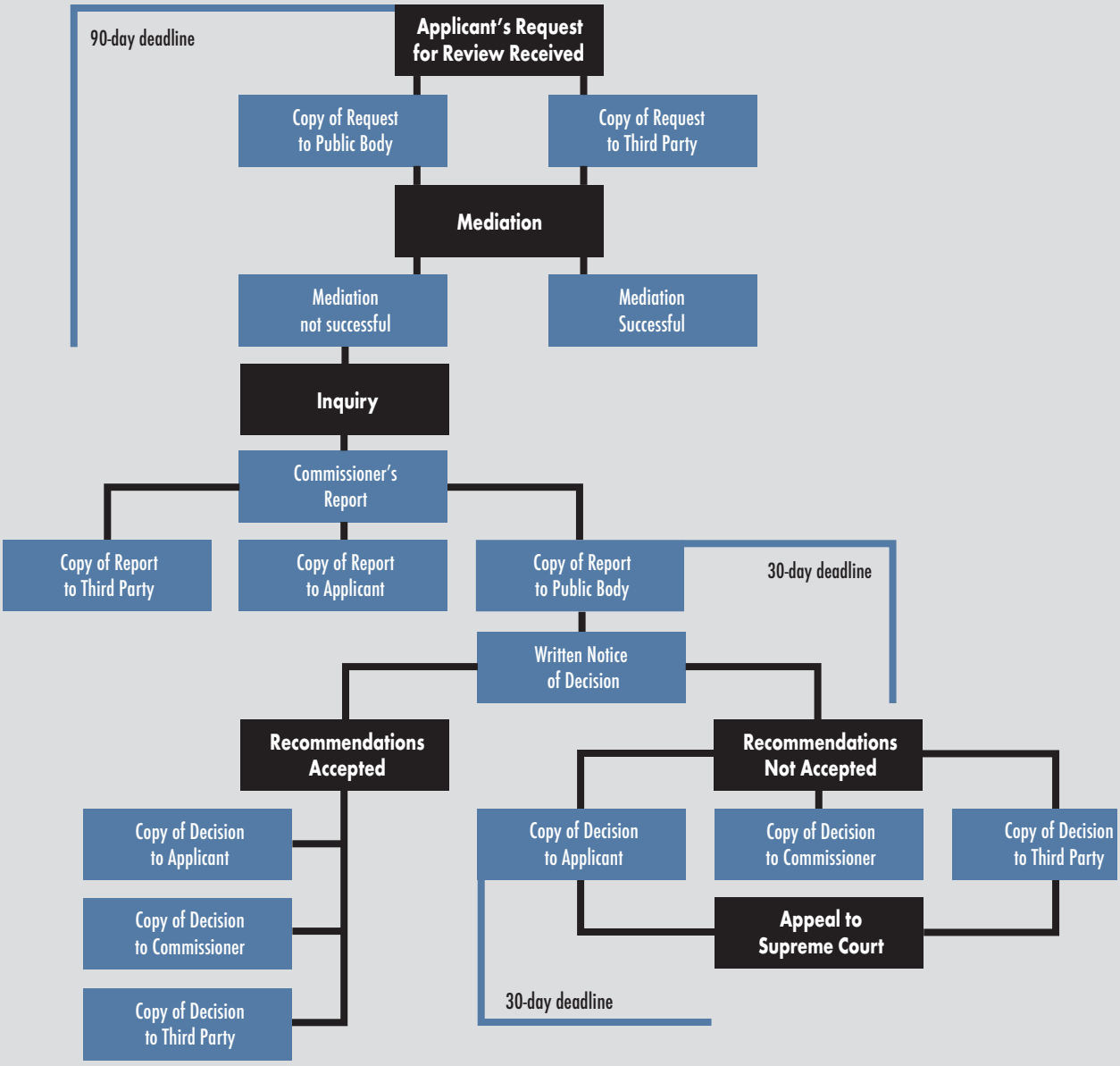
The following changes are offered as suggestions that would lead to a real and noticeable difference in meeting the government's objective of openness and transparency as expressed in the purposes of this legislation:

- Develop, update and maintain the ATIPP Manual to make it a primary source of information for the administration of the *Act*.
- Raise the profile of the Records Manager and provide sustained support to bring the position to a level at which it can be recognized as the centre of expertise on the administration of the *Act*, particularly regarding requests for access to information. Continuity in staffing is essential.
- Institute an annual reporting process, by the ministry responsible, on the administration of the *Act*. Other jurisdictions have a mandate to do so in their legislation; however, it would be a positive, proactive, step to do so in Yukon even in the absence of a prescriptive requirement in the *Act*.
- Include in the performance measurement for all Deputy Ministers the extent to which the principles of the *Act* are understood and put into practice.
- Invest in the competence and expertise of departmental ATIPP Coordinators by making funding available for training, including the University of Alberta on-line course of study for access and privacy specialists.
- Develop a minimum job description standard to reflect the role and responsibilities of ATIPP Coordinators.
- Designate ATIPP Coordinators at a level in departments that permit them to have meaningful input into decisions made under the *Act*.
- Encourage departments to identify and publish categories of records available to the public by way of routine disclosure, as contemplated by section 64 of the *Act*.

Records available without request

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*.

• • • REQUEST FOR REVIEW FLOW CHART • • •



• • • STATISTICAL SUMMARIES – ATIPP • • •

ATIPP FILES BY LEGISLATION

SECTION OF THE *ACT*	DESCRIPTION	OPENED IN 2003
42(b)	General powers to receive complaints or comments from the public concerning the administration of the *Act*, conduct investigations into those complaints, and report on those investigations.	5
42(c)	General powers to comment on the implications for access to information or for protection of privacy of existing or proposed legislative schemes or programs of public bodies.	5
42(e)	General powers to report to a Minister information and the commissioner's comments and recommendations about any instance of maladministration of the management or safe-keeping of a record or information in the custody of or under the control of a public body.	1
43(1)	Powers to authorize a public body to disregard requests.	1
48(1)(a)	Request for a review of a refusal by the public body or the records manager to grant access to the record.	17
48(1)(b)	Request for a review of a decision by the public body or the records manager to separate or obliterate information from the record.	1
48(1)(c)	Request for a review of a decision about an extension of time under section 12 for responding to a request for access to a record.	1
48(2)	Request for a review of the public body's refusal or failure to correct information or to annotate the record or to give notice of the annotation.	1
48(3)	Request for a review of a complaint that a public body has not collected, used or disclosed information in compliance with the *Act*.	4
48(4)	Request by a third party for a review of a decision by a public body to disclose personal information about a third party.	2

• • • STATISTICAL SUMMARIES – ATIPP • • •

S.48 REQUEST FOR REVIEW	
Brought forward from 2002	1
Received in 2003	26
Cabinet Office	1
Community Services	2
Education	2
Energy, Mines and Resources	1
Environment	4
Health and Social Services	7
Highways and Public Works	2
Justice	2
Public Service Commission	5
TOTAL	**27**
Completed in 2003	12
To inquiry	4
Successfully mediated	3
Discontinued	5
Carried forward to 2004	15

S.42(b) COMPLAINTS	
Brought forward from 2002	2
Received in 2003	5
Environment	1
Highways and Public Works	2
Public Service Commission	2
TOTAL	**7**
Completed in 2003	4
Investigated	–
Discontinued	4
Carried forward to 2004	3

ATIPP REQUESTS FOR INFORMATION	
TOTAL	**45**

• • • WEBSITE LINKS • • •

Yukon Office of the Ombudsman
Information about the Yukon Ombudsman and Information & Privacy Commissioner.
www.ombudsman.yk.ca

Government of Yukon
Links to Yukon facts, travel information, government, government leaders, and news.
www.gov.yk.ca

Yukon Records Manager
The Records Manager has responsibility under the *Act* to receive all requests for access to information and coordinates the handling of the requests with the public body having custody or control of the responsive record.
www.hpw.gov.yk.ca/ict/atipp/

Alberta Office of the Ombudsman
Information about the Alberta Ombudsman.
www.ombudsman.ab.ca

British Columbia Office of the Ombudsman
Information about the British Columbia Ombudsman.
www.ombudsman.bc.ca

Manitoba Office of the Ombudsman
Information about the Manitoba Ombudsman and Information & Privacy Commissioner.
www.ombudsman.mb.ca

Nova Scotia Office of the Ombudsman
Information about the Nova Scotia Ombudsman.
www.gov.ns.ca/ombu/

Ontario Office of the Ombudsman
Information about the Ontario Ombudsman.
www.ombudsman.on.ca

Alberta Information and Privacy Commissioner
A variety of information pertaining to the Alberta *Freedom of Information and Protection of Privacy Act*, as well as information about the Commissioner's Office.
www.oipc.ab.ca/

British Columbia Information and Privacy Commissioner
Includes legislation, orders, information on decisions, investigations as well as other reports, information about the office, policies, news releases, publications, and useful links.
www.oipcbc.org/

Ontario Information and Privacy Commissioner
Includes Access and Privacy Acts, annual reports, a selection of investigations, policy papers, orders that have been issued by the office and links to other relevant sites.
www.ipc.on.ca/

Information Commissioner of Canada
Information about the Federal Information Commissioner and links to Access to Information Acts, reports, publications, and speeches.
www.infocom.gc.ca

Privacy Commissioner of Canada
Information about the Federal Privacy Commissioner and links to Privacy Acts, reports, presentations and numerous e-commerce sites.
www.privcom.gc.ca

International Ombudsman Institute
Worldwide organization of Ombudsman offices.
www.law.ualberta.ca/centres/ioi/

Open Government Canada
A freedom of information coalition seeking a national voice for freedom of information users.
www.opengovernmentcanada.org

Information Access and Protection of Privacy Certificate Program
An online distance course provided by the University of Alberta, Faculty of Extension. This course was developed as a response to the need for accredited access and privacy specialists to meet the demands of increasing growth in access and protection of privacy legislation.
www.govsource.net/programs/iapp/index.nclk

Personal Information Protection and Electronic Documents (PIPED) Act
General information and tips for individuals, businesses and the health sector relating to this new legislation.
www.privcom.gc.ca/information/02_05_d_08_e.asp