



Yukon
Ombudsman

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August 6, 2024

The Honourable Jeremy Harper
Speaker of the Yukon Legislative Assembly

Dear Mr. Speaker:

Re: Certification Report of the Ombudsman
Our File: OMB-REP-2023-11-263

I submit the attached certification report to the Legislative Assembly required pursuant to section 18 of the *Ombudsman Act*, relating to our investigation of the Yukon Human Rights Commission.

Yours sincerely,

Jason Pedlar, BA, MA
Ombudsman





Yukon
Ombudsman

CERTIFICATION REPORT

**Pursuant to section 18 of the
*Ombudsman Act***

File: OMB-REP-2023-11-263

Certificate of the Minister of Justice

Jason Pedlar, Ombudsman

August 6, 2024

Background

[1] This Ombudsman report (Certification Report) arises from three *Ombudsman Act* complaints concerning the Human Rights Commission's (HRC) investigative and settlement processes.¹

OMB-INV-2023-047

[2] On May 27, 2021, my office received a fairness complaint about the HRC alleging unreasonable delays in resolving the matter before it (*i.e.*, +two years), evidence mismanagement (*i.e.*, lost and found evidence) and questionable employee conduct in treating the complaint as being guilty from the outset. I assigned it to my Informal Case Resolution team.

[3] On February 10, 2023, I escalated it to Formal Investigation.

OMB-INV-2023-02-048

[4] On March 22, 2022, my office received a fairness complaint about the HRC alleging unreasonable delays in resolving the matter before it (*i.e.*, +16 months since HRC complaint submitted and no investigator assigned). I assigned it to my Informal Case Resolution team.

[5] On February 10, 2023, I escalated it to Formal Investigation.

OMB-INV-2023-04-084

[6] On March 10, 2023, my office received a fairness complaint about the HRC alleging that the settlement process used by the HRC between 2019-2022 concerning the complainant's matter was unfair. I assigned it to my Informal Case Resolution team.

[7] On April 12, 2023, I escalated it to a Formal Investigation as a matter to be investigated in tandem with files 047 and 048.

[8] A formal investigation report on these three complaints will be released publicly and tabled in the Yukon Legislative Assembly, independent of this Certification Report.

Investigations

[9] As part of my investigations into these three complaints, it became necessary to determine if the common cause of the complaint issues pertaining to the HRC investigative and settlement

¹ These three investigation reports into the HRC, once completed, will be published on the Ombudsman's website.

processes was due to a growing disconnect over time between the fiscal resources that the HRC requires to carry out its mandate and those resources annually allocated to it.

[10] Although the HRC reports directly to the Yukon Legislative Assembly (YLA), the YLA does not independently fund it. The HRC instead receives appropriated funding directly from the Department of Justice (Justice) because the HRC, for budget purposes, is a program function of Justice.²

[11] As such, I issued an NTPR to Justice to produce these records, including any discussions concerning the annual HRC budget.

[12] Justice responded by providing some records but ‘certified’ others in accordance with section 18 of the *Ombudsman Act*, thus refusing to provide these latter records.

Authority to compel Documents

[13] Section 16 gives me broad powers to access information, and it is at my discretion to determine what information, documentation, or evidence I seek.

[14] Section 18 allows for the exclusion of information from my review by giving the Minister of Justice the ability to make a ‘certificate’ (Certificate). It is not a defined term, but Black’s Law Dictionary characterizes ‘certification’ as the process of giving someone or something an official document stating that a specified standard has been satisfied.³

Executive Council Proceedings

18 If the Minister of Justice certifies that the entry on premises, the giving of information, the answering of a question, or the production of a document or thing might

- (a) interfere with or impede the investigation or detection of an offence;*
- (b) result in or involve the disclosure of deliberations of the Executive Council; or*
- (c) result in or involve the disclosure of proceedings of the Executive Council or a committee of it, relating to matters of a secret or confidential nature and that the disclosure would be contrary or prejudicial to the public interest,*

² Yukon Government ‘O&M and Capital Estimates 2023-24 Vote 08 Department of Justice’ at 15-4. See <https://yukon.ca/sites/yukon.ca/files/fin/fin-2023-24-budget-main-estimates-justice.pdf>.

³ Black’s Law Dictionary, 11th ed, s.v. ‘certification’ at 284.

the Ombudsman shall not enter the premises and shall not require the information or answer to be given or the document or thing to be produced, but shall report the making of the certificate to the Legislative Assembly not later than in the Ombudsman's next annual report. [Emphasis mine]

[15] Ombudsman legislation elsewhere in Canada and in other commonwealth countries confer similar certification powers on ministers of Justice or attorneys general.

Facts

2023

[16] On July 24, 2023, my office received a response from Ian Davis, Acting Deputy Minister of Justice, attached as 'Appendix, Document 1'. He requested clarification about the scope of the above mentioned NTPR, as well as a production deadline extension.

[17] On July 25, my office replied by providing further clarification, as well as an extension. The letter is attached as 'Appendix, Document 2'.

[18] On August 15, Justice provided my office with a package of responsive records, including a covering letter attached as 'Appendix, Document 3'. In this covering letter, Deputy Minister Mark Radke stated as follows:

The following records are being withheld as they fall within subsections 18(b) and (c) of the *Ombudsman Act*:

- Financial Management Board Submission; and
- Department of Management Board Submission Tracking.

[19] On August 17, my office sent a letter to the Minister of Justice asking for clarification on the extent of the documents being certified, as well as confirmation of certification by the Minister. The letter is attached as 'Appendix, Document 4'.

[20] On August 28, the Minister of Justice replied by letter and attached as 'Appendix, Document 5'. The letter confirmed that she had issued a Certificate in respect of my HRC investigations. The Certificate identified the withholding of two documents pursuant to subsection 18(c): 'Financial Management Board Submissions' (six pages), and 'Department of Justice Management Board Submission Tracking' (one page).

Conclusion

[21] The Minister of Justice, under subsection 18(c), certified that the production of two records, if provided to the Ombudsman, might cause one of two possible outcomes. The first is one that results in or involves the disclosure of Executive Council proceedings, including those of an Executive Council committee, concerning secret or confidential matters. The second is one that amounts to a disclosure contrary or prejudicial to the public interest. As such, Justice did not have to provide these records to the Ombudsman.

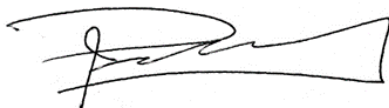
[22] In exercising her certification power, the Minister did not clarify why the two records were classified as secret or confidential, or how disclosure to the Ombudsman would be prejudicial to the public interest.

[23] Despite the issuance of this Certificate and its possible effect on my investigations into the HRC, I was able to complete them to my satisfaction.

Certification Report

[24] In accordance with section 18, I am providing this Certification Report to the Speaker of the Yukon Legislative Assembly.

Respectfully,

A handwritten signature in black ink, appearing to read 'Jason Pedlar', written over a horizontal line.

Jason Pedlar, BA, MA,
Ombudsman

Appendix

[25] The following documents are attached as follows.

- 1) Letter from Ian Davis to Kelly Hjorth (Investigator) dated July 24, 2023;
- 2) Letter from Investigator to Ian Davis dated July 25, 2023;
- 3) Letter from Mark Radke to Investigator dated August 15, 2023;
- 4) Letter from Investigator to The Honourable Tracy-Anne McPhee dated August 17, 2023;
and
- 5) Letter from The Honourable Tracy-Anne McPhee to Investigator dated August 28, 2023.



Justice
PO Box 2703, Whitehorse, Yukon Y1A 2C6

July 24, 2023

Office of the Yukon Ombudsman
3162 Third Avenue, Main Floor
Whitehorse, Yukon Y1A 1G3

Dear Kelly Hjorth, Investigator – Ombudsman’s Office,

Re: Notice to Produce Records (“NTPR”) under the Ombudsman Act (the “Act”)
Your File No.: OMB-INV-2023-02-047, OMB-INV-2023-048, and OMB-INV-2023-04-084

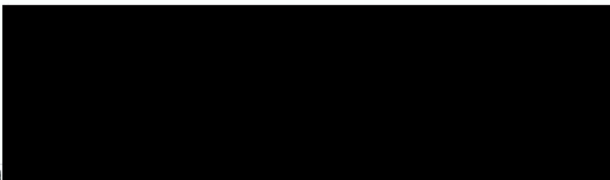
Your letter of July 12, 2023, directed to Minister Tracy-Anne McPhee, has been forwarded to me for a response from the Department of Justice.

The department is in the process of compiling records in response to your request. Given the broad nature of the records being requested and the date range for the request, it would be helpful for us to receive further information about what you are looking for regarding the following:

- distribution of funds;
- deliberation of funding; and
- any further matter relating to funding, budget or general finances.

In addition, we would appreciate an extension to end of day August 15, 2023 to thoroughly search our records to meet this request. Responding to the requested timeline has required us to request retrieval of some hard copy records.

Yours truly,



la
Acting Deputy Minister



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July 25, 2023

DELIVERED BY SFT

Ian Davis
Department of Justice
P.O. Box 2703
Whitehorse, Yukon Y1A 2C6

Dear Mr. Davis,

**Re: Notice to Produce Records (“NTPR”) under the *Ombudsman Act* (the “Act”)
Our File No: OMB-INV-2023-02-047, OMB-INV-2023-048, and OMB-INV-2023-04-084**

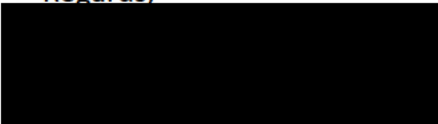
Thank you for your letter dated July 24, 2023. I am happy to elaborate on the three categories under which I have requested documents.

I am of the understanding that the Yukon Human Rights Commission (the “HRC”) is funded under the umbrella of the Department of Justice (“Justice”) to whom the HRC makes annual budgetary submissions and periodic supplemental budgetary submissions.

I am looking for any/all records Justice possess which document those requests, internal records which contemplate such requests, and records which document actual funds being disbursed to the HRC from Justice. For greater context I am seeking to establish timelines and histories about the finances of the HRC. In addition, we are looking to see what factors Justice considers when deciding to accept, reject, or modify HRC budget requests.

With regard to your request for an extension of time, the Ombudsman is prepared, on a one-time basis, to accept the above described records no later than August 15, 2023.

Regards,


Kelly Hjorth – B.A., J.D.
Investigator and Compliance Review Officer



Justice
PO Box 2703, Whitehorse, Yukon Y1A 2C6

August 15, 2023

Kelly Hjorth, Investigator
Office of the Yukon Ombudsman
kelly.hjorth@yukonombudsman.ca

Dear Kelly Hjorth,

Re: Notice to Produce Records under the Ombudsman Act – Your File No.: OMB-INV-2023-02-047, OMB-INV-2023-048, and OMB-INV-2023-084

I am writing in response to your notice dated July 12, 2023 to produce all records for the period January 1, 2016 to July 1, 2023 containing information pertaining to:

- a) the distribution of funds to the Yukon Human Rights Commission;
- b) the deliberation of funding for the Yukon Human Rights Commission; and
- c) any further matter related to the funding, budget, or general finances, of the Yukon Human Rights Commission.

As clarified in subsequent correspondence received on July 25, 2023, your office is:

- d) of the understanding that the Yukon Human Rights Commission is funded under the umbrella of and makes annual and periodic supplemental budgetary submissions to the department; and
- e) providing the Department of Justice a one-time extension to provide the records no later than August 15, 2023.

Please find enclosed the requested records. Information not relevant to the request has been redacted.

The following records are being withheld, as they fall within s. 18 (b) and (c) of the Ombudsman Act:

- Financial Management Board Submission
- Department of Justice Management Board Submission Tracking

Should you require any other information, please do not hesitate to contact my office.

Yours truly,



Mark Radke
Deputy Minister and Deputy Attorney General



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July 12, 2023

DELIVERED BY SFT

Hon. Tracy-Anne McPhee
Minister of Justice

Box 2703
Whitehorse, Yukon Y1A 2C6

Dear Minister McPhee,

Re: Notice To Produce Records (“NTPR”) under the Ombudsman Act (the “Act”)
Our File No.: OMB-INV-2023-02-047, OMB-INV-2023-048, and OMB-INV-2023-04-084

Further to the letter of Deputy Minister Radke, dated August 15, 2023 I write you regarding your election to certify certain documents pursuant to paragraphs 18(b) and 18(c) of the Act. These documents would otherwise be responsive to our July 12, 2023 NTPR.

In Deputy Minister Radke’s letter he cites that two records are being withheld under sections 18(b) and 18(c).

- *Financial Management Board Submission*, and
- *Department of Justice Management Board Submission Tracking*.

A certification of this type may only be made by the Minister of Justice. Accordingly, the Ombudsman requires written certification directly from your office to proceed on this basis.

As the Ombudsman is obligated to report this certification to the Legislative Assembly, it is important that we can provide clear details of the specific provision(s) you are citing for each record and the number of pages in that record.

Until such written certification is received, the NTPR stands in effect. Please either provide a certification detailing the records being certified, or the records themselves, to our office no later than Friday, August 25, 2023.

Should you have any questions in respect of the above, please do not hesitate to contact me at 867-667-8629 or by email at Kelly.Hjorth@yukonombudsman.ca.

Thank you,



Kelly Hjorth – B.A., J.D.
Investigator - Ombudsman's Office

Copy: DM Mark Radke





Minister's Office
PO Box 2703, Whitehorse, Yukon Y1A 2C6

August 28, 2023

Kelly Hjorth
Kelly.Hjorth@yukonombudsman.ca

Dear Kelly Hjorth,

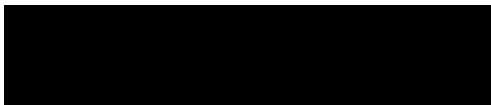
Re: Notice To Produce Records (“NTPR”) under the Ombudsman Act (the “Act”) File No.: OMB-INV-2023-02-047, OMB-INV-2023-048, and OMB-INV-2023-04-084

Thank you for your correspondence of August 17, 2023, regarding two records withheld under section 18 of the *Ombudsman Act*:

- *Financial Management Board Submission* (six (6) pages), and
- *Department of Justice Management Board Submission Tracking* (one (1) page).

While I would maintain that words directing or empowering the Minister of Justice may be delegated under both s. 2.4 of the *Government Organisation Act* and section 17 of the *Interpretation Act* (thus providing the Deputy Minister of Justice the necessary delegated authority to certify records pursuant to section 18 of the *Ombudsman Act*), please consider this letter as certification that the two above-noted documents are being withheld pursuant to subsection 18(c).

Yours truly,



Tracy-Anne McPhee
Minister of Justice and Attorney General