



OFFICE OF THE OMBUDSMAN AND
INFORMATION & PRIVACY COMMISSIONER

ANNUAL REPORT



YUKON LEGISLATIVE ASSEMBLY
Office of the Ombudsman

JANUARY 1 - DECEMBER 31, 2002



O M B U D S M A N A N D
I N F O R M A T I O N A N D P R I V A C Y
C O M M I S S I O N E R



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YUKON LEGISLATIVE ASSEMBLY
Office of the Ombudsman

May 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 1, 2002 to December 31, 2002.

Yours truly,

A handwritten signature in black ink, appearing to read "H. Moorlag". The signature is written in a cursive, flowing style.

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 an impartial and confidential investigation and, when warranted, recommending a fair and appropriate remedy.

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; and
- municipalities and Yukon First Nations governments if requested by a municipality or First Nation.

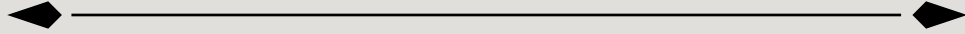
The Ombudsman does not have the authority to investigate the following:

- 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; and
- where there is a statutory right of appeal or review.

The Ombudsman 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.

O M B U D S M A N
Y E A R I N R E V I E W



The primary purpose of an ombudsman is to enable an independent review of disputes relating to public administration. A continuing challenge is to demonstrate the value of investigations conducted by an independent office and recommendations that will not only settle a dispute, but also lead to improved administrative practices. A common misconception by public authorities of an ombudsman investigation is that of an advocacy based process designed to find fault or second-guess government procedures. Defensiveness is often a natural response. However, the simple fact is that an ombudsman investigation is most effective when it is not regarded as an adversarial process. When public authorities welcome an independent review as a beneficial way to settle disputes the full potential of the institution of ombudsman is realized.

This was most evident in 2002 with a special investigation by the Office of the Ombudsman into a dispute following demolition of the Sewell House by the City of Whitehorse (see

summary on page 5. City Council called on the Ombudsman to investigate. The investigation put to rest the many questions raised publicly and it brought to an end acrimonious debate and tension within City Council on the matter.

In previous annual reports I identified miscommunication as a very common element in disputes. Again, in 2002 we saw the need for clarity through plain language in written materials about government programs. Equally important is how procedures and decisions are communicated. The public may not always agree with decisions that affect them, but they ought to clearly understand the reasons for them and be satisfied they were treated fairly.

The notion of fairness in decision making is, of course, subjective. What the decision maker considers fair may not be viewed in the same way by the individual affected by the decision. A number of investigations in 2002 revealed that the lack of information; or the failure to communicate clearly the operation of a program or policy; or the failure to give reasons for a decision, left complainants feeling they had been treated unfairly by government. These cases are included

with the case summaries under "Ombudsman Issues" beginning on page 6.

A scan across Ombudsman jurisdictions in Canada reveals it is probably an unrealistic expectation that the work of the Ombudsman will eventually eliminate complaints from the public. The volume of complaints fluctuates from year to year, but no clear trend is apparent in support of a theory that our work will lead to such an optimistic result. Two things, however, are achievable. The first is that administrative practices can be changed in ways that prevent a recurrence of an error. The second is that a process can be adopted for addressing public concerns and complaints so that criticism is received in a positive way and appropriate remedial action can be taken in a timely way. In time, perhaps government will be able to respond to these concerns without the need for the involvement of the Ombudsman. In the meantime our office will continue to investigate complaints and seek resolution.



I am very grateful for the untiring efforts and dedication of my staff to meet our workload demands. Also, for the very important proactive work they do in developing sound working relationships with departmental officials and identifying opportunities for preventing or reducing complaints by recommending improvements in public administration, I express my thanks.

A total of 57 complaints were received by the Ombudsman in 2002. When added to the 22 files brought forward from 2001, the office dealt with 79 files that were within the jurisdiction of the Ombudsman to investigate. During the year 50 cases were concluded and 29 were carried forward into 2003. The statistical summary beginning on page 12 shows how the complaints were resolved.

Sewell House

Under Section 11(5) of the *Ombudsman Act*, a municipality or Yukon First Nation government may refer a matter to the Ombudsman for investigation and report.

At the request of the City of Whitehorse, an investigation was conducted into the destruction of the Sewell House, a Whitehorse waterfront building listed in the City of Whitehorse Heritage Building Register and the Yukon Historic Sites Inventory. The building was demolished by a City work crew on May 12, 2002.

The investigation had the following objectives:

1. To examine the events leading up to the destruction of the Sewell House;
2. To consider whether the events indicated the destruction was a deliberate or accidental event; and

3. To examine the extent to which a conspiracy or cover up was involved.

The Ombudsman concluded that the destruction of the Sewell House was an inadvertent act, based on a mistaken intent, but nevertheless preventable. The evidence uncovered during the investigation did not support a conclusion that there was a deliberate intent to destroy a building known to have heritage significance. The Ombudsman also concluded the investigation did not reveal a conspiracy or cover-up in relation to the Sewell House destruction.

The Ombudsman expressed the view that, from an administrative viewpoint, it is more productive to examine the causes contributing to a problem than to assign blame to an individual. On the basis of the investigation, he identified the following as contributing to the problem:

- Inadequate communication, primarily through a failure to verify the specific nature of a work assignment;

- The lack of an effective working protocol between City departments where responsibilities overlap;
- A failure to ensure provisions of the Heritage Bylaw and the demolition provisions under the Building and Plumbing Bylaw were strictly followed;
- A lack of awareness on the part of staff and employees about heritage sites;
- An inadequate system of recording work orders and related activities; and
- Increased demands on supervisors and their departments, without an increase in resources, may have decreased time available for thoroughness.

Powers and duties of Ombudsman in matters of administration

11. (5) A municipality or a Yukon First Nation government may at any time refer a matter to the Ombudsman for investigation and report and the Ombudsman shall:
 - (a) subject to being able to recover the costs of the investigation from the municipality or the Yukon First Nation government, investigate the matter referred; and
 - (b) report back as the Ombudsman thinks fit,
 but sections 23 to 26 do not apply in respect of an investigation or report made under this subsection.



Accordingly, the following recommendations were made:

1. *That the City Administration review its procedures for communicating work assignments between all levels of operations.*
2. *That the City Administration develop and implement an effective working protocol between departments where responsibilities overlap.*
3. *That the City Administration review existing procedures and modify them to ensure strict compliance with regulatory controls.*
4. *That the City Administration arrange Heritage Awareness Training for staff and employees, including the distinction between Heritage Registry and Designated Heritage Sites.*
5. *That the City Administration review existing procedures for recording work orders and related activities to maximize opportunities for operational oversight and regulatory compliance in advance of work assignments being carried out.*
6. *That the City Administration review the adequacy of Department of Public Works resources.*

The Ombudsman Act does not require the municipal government to decide how any recommendations will be given effect. Indeed, there is no specific authority for the Ombudsman to even make any recommendations with a section 11(5) investigation. Nevertheless, the City of Whitehorse accepted all the recommendations and advised that careful consideration would be given to their implementation.

O M B U D S M A N I S S U E S



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 is taken for

two reasons. The first is that it is more instructive to bring specific issues into focus rather than to simply describe the details of an individual 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 to the authority

Opportunity to make representation

17. If it appears to the Ombudsman that there may be sufficient grounds for making a report or recommendation under this Act that may adversely affect an authority or person, the Ombudsman shall inform the authority or person of the grounds and shall give the authority or person the opportunity to make representations, either orally or in writing at the discretion of the Ombudsman, before the Ombudsman decides the matter.



against whom the complaint was made. This 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 the work of the office in its annual report, and it would be difficult to do so without providing a summary of our case work. The following summaries are presented in the context of specific fairness standards or grounds set out in section 23 of the *Ombudsman Act* upon which the Ombudsman may base an opinion that an authority acted unfairly.

Mistake of fact leads to unfairness

The Ombudsman investigated a complaint made by a parent related to the disciplinary action taken by the school against her child. When the parent contacted the Department of Education about the discipline the child had received at school, the Superintendent confirmed the action taken was permitted by the discipline policy formally adopted by the school in question. However, the particular policy referred to was developed by the Department for use with special needs students and was not intended for use with the general school population. The school in question did not have disciplinary guidelines in place for students who were not special needs students.

The Ombudsman substantiated the complaint on the ground that the action was based in whole or in part on a mistake of fact. An authority makes a mistake of fact when it is mistaken as to the existence of a certain fact or facts. In this case, the discipline guidelines were being relied on in the situation in question, in error.

The Ombudsman recommended that the Department of Education develop standard principles to support and guide local school administrations and School Councils in their development of policy for the enforcement of school rules. At the time the Ombudsman made the recommendations, the *Education Act* was being reviewed. The Department of Education indicated that in the course of this review the public was being consulted on school rules, student behaviour and discipline. The Department anticipated that amendments to the *Act* addressing this issue would be tabled in the legislature

in the spring. As the Ombudsman was satisfied that the concerns identified in his report were being addressed in the review of the *Education Act*, he considered this matter resolved.

Avoiding unreasonable delay; exercising care

The complainant had been travelling outside of the Yukon for some time and applied by mail to renew a driver's license. The complainant sent the required application form and fee to Motor Vehicles in June. Although the complainant wrote to Motor Vehicles on three occasions inquiring as to the status of the license, Motor Vehicles failed to respond or act on the request for a period of four months.

By the time the complainant was informed of the decision not to renew the license, the existing license had expired. The complainant was unaware of this fact.

Complainant to be informed

26. (1) If the Ombudsman makes a recommendation pursuant to section 23 or 24 and no action that the Ombudsman believes adequate or appropriate is taken within a reasonable time, the Ombudsman shall inform the complainant of the Ombudsman's recommendation and make any additional comments the Ombudsman considers appropriate.
- (2) The Ombudsman shall in every case inform the complainant within a reasonable time of the result of the investigation.



Motor Vehicles attributed its failure to respond to the complainant's correspondence and the delay in acting on the request for renewal to the fact the premises were being renovated and a number of staff, including the Registrar, were away during the period in question. The Registrar was also of the opinion that Motor Vehicles generally does not have any responsibility to inform a client that his or her license has expired.

The Ombudsman substantiated the complaint on the ground of unreasonable delay. The Ombudsman considers delay to be unreasonable when the particular service to the public is postponed improperly, unnecessarily or for some irrelevant reason. Motor Vehicles indicated that in most cases an applicant is advised to allow 30 days for a renewal application by mail. The only explanation for taking four months in this case was a combination of staff leave and renovations to the premises. While some delay may occur as a result of the renovations and staff leave, a delay of four months is unacceptable in the circumstances.

The Ombudsman also found that in the course of dealing with the application, Motor Vehicles was administratively negligent. The Ombudsman believes that it is reasonable to expect an authority to recognize a situation in which a person with whom it is dealing is dependent upon it and to exercise sufficient care in the circumstances to avoid damaging or prejudicing a person's position. Although not necessarily required to advise individuals in advance that their license is about to expire, Motor owes a duty to exercise sufficient care in the

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.

circumstances to avoid prejudicing the person's position as happened in this case.

Transparency and accountability in decision making

The Ombudsman received a complaint that the process followed by the Yukon Legal Services Society in hiring staff was

unfair. Although investigation revealed the procedure actually followed was fair, it was apparent the Society had been operating without any formal written procedures for making or communicating staffing decisions.

A fundamental principle of administrative fairness is that policies and guidelines established by authorities



should be clearly written and well publicized. The failure to clearly state in writing an authority's process for making a decision creates a perception that decisions are made arbitrarily and unfairly. The Society accepted the Ombudsman's recommendation to establish a written policy and procedure for making, and accounting for, future staffing decisions.

Communicating information clearly

The Ombudsman investigated a complaint that the procedure followed by the Assessment and Taxation Branch in dealing with a group application under the Rural Electrification Program was unfair.

Under the program, rural property owners can apply for funding to extend electrical services to their area. If the required majority approve the project, the installation proceeds and the costs are distributed equally amongst all property owners in the project area. The complainant felt it was unfair to require those who voted against the project to contribute equally to the cost of installation. Further, the complainant felt that the way in which the authority carried out the approval process was unfair because it was not consistent with the written material or oral advice provided to them by the authority.

It is not the role of the Ombudsman to determine public policy in respect of extension of electrical service to rural areas, but the Ombudsman can review the operation of any policy from a fairness perspective.

Written materials about the Rural Electrification Program used words like

"fair share" and "equitable and proportional distribution of costs" to describe the cost to a property owner and "cooperative open partnerships" to describe the relationship between the property owner and the government. The investigation revealed that the use of such vague and ambiguous words to describe a property owner's obligations and the role of the government led to a misunderstanding about the operation of the program in this case.

As a result of the Ombudsman's recommendation, the authority revised the program communications material for property owners, as well as its administration manual, to clarify the terms of the program and the role of the authority under the program. This should ensure that there is no misunderstanding in future about the terms of the program or the authority's role in facilitating an application under the program.

More than one authority

In 2002 the Ombudsman concluded an investigation into a complaint about the adequacy of an investigation into the death of a worker in the workplace. The first part of the investigation involving the Yukon Workers' Compensation Health & Safety Board (YWCH&SB), was completed in 2001. The second part relating to the Office of the Coroner - Department of Justice, was completed in 2002.

When a fatal accident occurs in a workplace several authorities have a statutory duty to investigate. In this case, the investigation involved the YWCH&SB and the Office of the Coroner. The RCMP also had a role but the Ombudsman does not have jurisdiction in relation to them.

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.



The Ombudsman substantiated the complaint and made recommendations directed at clarifying the authority of the coroner and improving the procedure for conducting investigations, making decisions and reporting the results of investigations into workplace fatalities. A significant outcome as a result of the Ombudsman investigation was the establishment of a written working protocol between the three agencies tasked with investigating fatal workplace accidents.

Conflict Resolution

In previous annual reports the Ombudsman has commented on the benefit of appropriate early intervention in disputes. When someone affected by a decision complains to the government office responsible for that decision, it is usually possible to resolve

the matter, but the type of response given often prevents this from happening. An examination of investigations conducted by the Ombudsman reveals that the issues in dispute are seldom difficult to resolve.

The key is in how public authorities respond to people who question decisions, criticize procedures, or complain about the conduct of public servants. Complaints to the Ombudsman could be reduced significantly if government officials were better equipped to handle these situations and public policy reflected a proactive, rather than a defensive, approach.

For the past three years, the Ombudsman has been involved in a course of study through the Justice Institute of British Columbia's Centre for Conflict Resolution. Many of the people attending the courses, offered through Yukon College, are employees of the Yukon government. Through this connection, the Ombudsman has made two observations:

1. YTG staff attending these courses most often are there because of an interest they have personally expressed. Their attendance has been largely self-initiated rather than the result of a human resource based assessment of operational need.
2. Post-course discussion with some of these candidates indicates there is often not a supporting workplace culture to put the acquired skills into practice. Default responses to disputes are resumed and there is very little change.

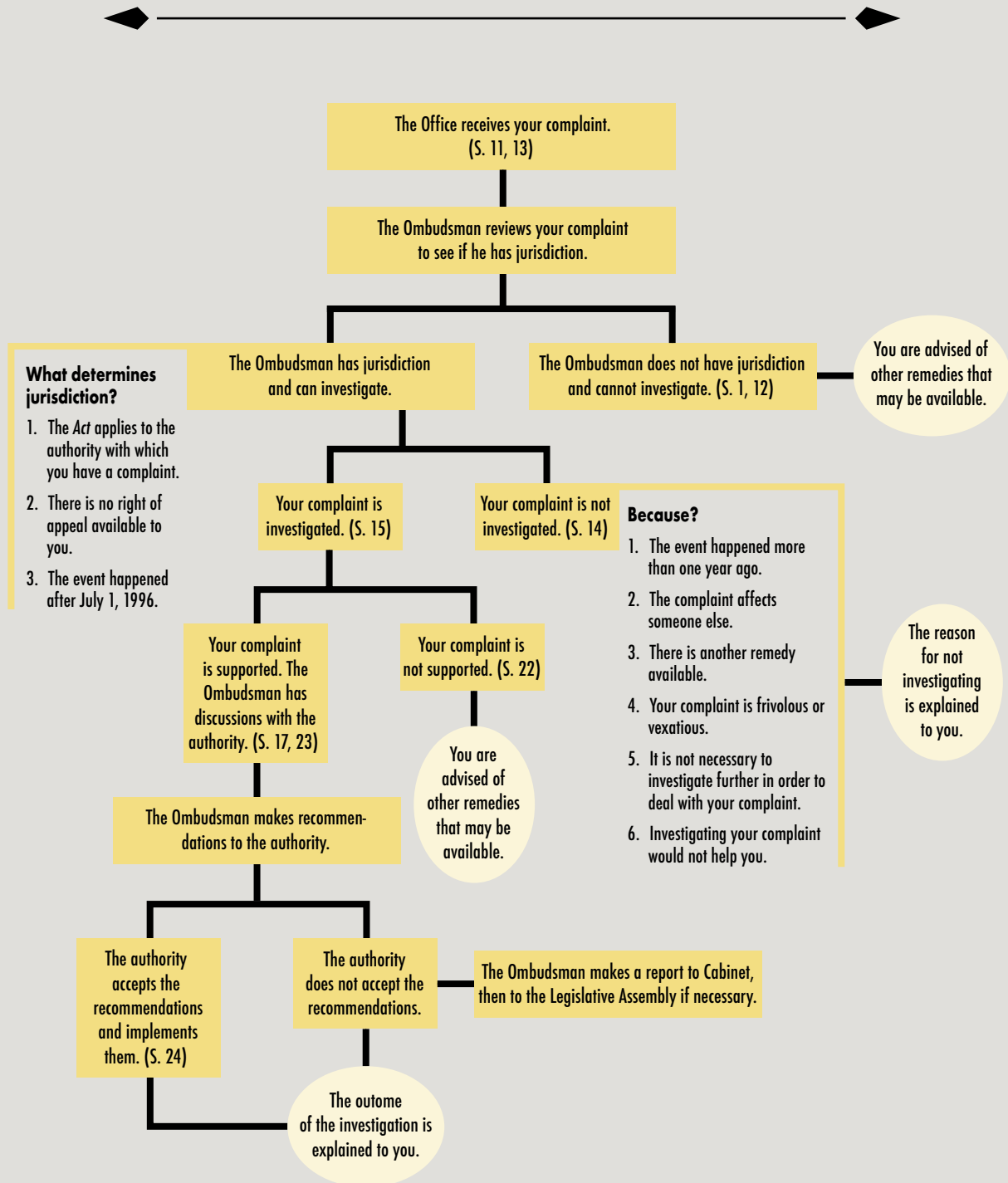
The Ombudsman has shared his observation with the Staff Development Branch of the Public Service Commission and urges government to take a more proactive role in conflict resolution and the promotion of training in these skills.



O M B U D S M A N

F L O W C H A R T O F

C O M P L A I N T S



O M B U D S M A N

S T A T I S T I C A L S U M M A R I E S

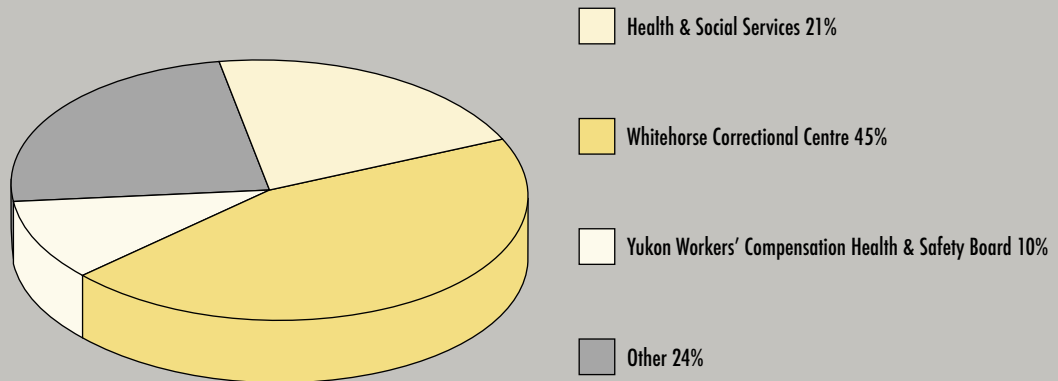


RESOLUTION OF COMPLAINTS (by Authority)

| AUTHORITY | OPENED AS INVESTIGATION | NOT OPENED AS INVESTIGATION | TOTAL |
|---|-------------------------|-----------------------------|-----------|
| Community Services | 1 | 1 | 2 |
| Driver Control Board | - | 1 | 1 |
| Education | - | 1 | 1 |
| Energy, Mines & Resources | - | 1 | 1 |
| Environment | - | 1 | 1 |
| Health and Social Services | 2 | 10 | 12 |
| Justice | - | 1 | 1 |
| Public Service Commission | - | 2 | 2 |
| Renewable Resources | - | 1 | 1 |
| Whitehorse Correctional Centre | 7 | 19 | 26 |
| Whitehorse General Hospital | - | 1 | 1 |
| Yukon Medical Council | - | 1 | 1 |
| Yukon College | - | 1 | 1 |
| Yukon Housing Corporation | - | 1 | 1 |
| Yukon Workers' Compensation Health & Safety Board | 1 | 5 | 6 |
| TOTAL | 11 | 47 | 58 |

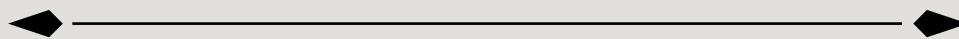
S.11(5) Investigation: A municipality or a Yukon First Nation government may at any time refer a matter to the Ombudsman for investigation.

| | | | |
|--------------------|---|--|---|
| City of Whitehorse | 1 | | 1 |
|--------------------|---|--|---|



OMBUDSMAN

STATISTICAL SUMMARY



| RESOLUTION OF COMPLAINTS | |
|---|-----------|
| Declined on discretionary grounds | 1 |
| Further inquiry needed | 2 |
| Insufficient information provided | 2 |
| No benefit for complainant in investigating | 1 |
| Not yet analyzed, carried forward to 2003 | 6 |
| Opened as investigation | 12 |
| Otherwise resolved | 7 |
| Referred to another remedy | 22 |
| Withdrawn | 6 |
| TOTAL | 59 |

| OUTCOME OF INVESTIGATIONS | |
|----------------------------------|-----------|
| Brought forward from 2001 | 20 |
| Opened in 2002 | 12 |
| TOTAL | 32 |
| Completed in 2002 | 9 |
| Complaint substantiated | 5 |
| Complaint not substantiated | 1 |
| Complaint discontinued | 3 |
| Carried forward to 2003 | 23 |

| OMBUDSMAN REQUESTS FOR INFORMATION | |
|---|-----------|
| TOTAL | 97 |

| NON-JURISDICTIONAL COMPLAINTS | |
|--------------------------------------|-----------|
| Businesses | 18 |
| Contracted Services | 1 |
| Courts | 6 |
| CPP, UIC & Revenue Canada | 4 |
| Federal | 5 |
| First Nations | 3 |
| Municipalities | 3 |
| Other | 19 |
| Other Provinces | 4 |
| RCMP | 1 |
| YTG – Non-Jurisdictional | 6 |
| TOTAL | 70 |



W E B S I T E L I N K S

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

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/oi/

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