Yukon Ombudsman
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BY HAND

April 16, 2008

The Honourable Ted Staffen
Speaker of the Assembly
Legislative Assembly Office
Government of Yukon A-9

Dear Mr. Staffen:

Re:Bill 50 - *Child and Family Services Act*

I write to advise you of a number of concerns I have regarding Bill 50, the *Child and Family Services Act,* and the implications for the protection of privacy and access to information contained in that proposed legislation. As Bill 50 is currently being considered and debated in the Legislative Assembly, I ask that you distribute this correspondence to all Members of the House, in order that they are made aware of my concerns as soon as possible.

At this late date, I am not providing a clause by clause review of the proposed legislation but rather have included here what I think are the most obvious examples of how the proposed Act will adversely affect the privacy and access provisions currently in place to protect the personal information of Yukoners.

The proposed *Child and Family Services Act* will govern work that involves the constant collection and use of personal information. The current privacy protections and access provisions set out in the *Access to Information and Protection and Privacy Act* (ATIPP Act) will be significantly affected and in some instances removed completely by the proposed legislation. In addition, the proposed legislation may impact on the ability to access information necessary for an independent investigation pursuant to the *Ombudsman Act*.

Authority to Comment

The ATIPP Act contemplates that, as Information and Privacy Commissioner, I review and comment on proposed legislative schemes that have implications for access to information or for protection of privacy. Section 42(c) authorizes me to "comment on

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the implications for access to information or for protection of privacy of existing or proposed legislative schemes or programs of public bodies." In my view this is a broad responsibility which requires consideration and monitoring of the privacy and access rights of Yukoners.

The purpose of the ATIPP Act, as described in section 1(1), is to "make public bodies more accountable to the public and to protect personal privacy" by limiting the circumstances in which a public body may disclose personal information, providing a public right of access to records and providing for an independent review of decisions made under the Act.

Given the serious implications of this proposed legislation for the protection of privacy and access to information as well as my responsibilities under the ATIPP Act, I had a reasonable expectation that I would have the opportunity to comment on the specific provisions of the draft legislation which impact the administration of the two Acts.

Although I was asked for comment by the Children's Act Project staff and Department of Health and Social Services (Department) officials in the fall of 2007, our discussions were limited to the concept of a child advocate and did not touch on protection of privacy and access to information issues in the proposed legislation.

Upon its introduction in the Legislative Assembly, a copy of the proposed legislation became available to me. As such, the following comments are being provided much later in the process than I would like and in a manner that in my view is not satisfactory.

Sections 179 and 180 Restrict Access to Information by the Information and Privacy Commissioner and the Ombudsman

The *Access to Information and Protection of Privacy Act* and the *Ombudsman Act* have been specifically designed and contain authority for independent review and investigation of complaints from the public about the administrative actions, policies and processes of public bodies and government departments. The spirit and important public policy objectives of the ATIPP Act and *Ombudsman Act* should be respected and only restricted in the rarest of circumstances.

Section 179(1) of the proposed *Child and Family Services Act* gives the Director authority to restrict and prohibit access to any "information or document that is kept by a director that deals with the personal history of a child or an adult and has come into existence through any proceedings under this Act or the former Act."

Section 180 of the proposed *Child and Family Services Act* states that "sections 177 to 179 apply despite any provision of the *Access to Information and Protection of Privacy Act."*

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The operation of these two sections appear to give the director the discretion to decide whether or not to disclose certain information or documents. This power could significantly impact the ability to access information or documents necessary for me to conduct independent investigations under the ATIPP Act and the *Ombudsman Act*.

Sections 179 and 180 Restrict Individual Rights to Personal Information

Currently an individual has the right to access personal information under the ATIPP Act. Sections 179 and 180 seem to erect significant barriers for individuals seeking access to their personal information. My understanding of these sections is that unless the Director consents to disclosure of information or documents, an individual may be forced to seek a court order for the disclosure. By way of example, could this mean that individuals seeking personal information to assist with an application or a claim for a residential school case could be barred from receiving that information without the consent of the director or a court order? Is this the intent of the proposed legislation?

The specific wording of Section 179 is curious and if it is intended to apply to only a specific type of record or information held by the Director it should clearly say so. I note that the terms 'document', 'information' and 'personal history' are not defined in the proposed legislation and as such will likely be given broad interpretation.

Permitted Disclosure of Personal Information with No Assurance of Continued Protection of Privacy

The ATIPP Act limits the unauthorized collection, use, disclosure, access or disposal of the personal information of Yukoners. Information sharing is a critical component of the work carried out by the Department. However, care must be taken to limit the circumstances where the Department would be disclosing personal information to individuals or agencies outside of government, because the ATIPP Act only applies to government and information passed to outside agencies or individuals will not be protected by the ATIPP Act.

The importance of protecting personal information is recognized and addressed in section 172 of the proposed legislation which designates a First Nation service authority as a "public body" subject to the ATIPP Act. However, one can imagine many situations in which the Department will be providing personal information to outside agencies or individuals who are not subject to the ATIPP Act. In their hands the collection, use, disclosure and control of that personal information will not be protected by the ATIPP Act. Examples of such individuals or agencies are: treatment professionals, parents, relatives, foster parents, prospective adoptive parents, doctors, caregivers, community groups or associations and persons participating in a family conference or other co-operative planning process.

Sections 28 and 42 of the proposed legislation, dealing with notification, illustrate this concern.

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Paramountcy of the *Child and Family Services Act* over the ATIPP Act

Sections 132 and 180 of the proposed legislation give the *Child and Family Services Act* specific paramountcy over the ATIPP Act. Legislation should only be given paramountcy over the ATIPP Act in limited circumstances.

Overriding the provisions of the ATIPP Act may undermine the public's confidence in the protection of privacy, the ability to access information, the ability to correct errors and seek independent review. I caution against creating separate regimes for particular types of records which can result in public confusion and an unnecessarily complicated patchwork of privacy and access legislation. Overriding the provisions of the ATIPP Act may also have the affect of eroding the commitment to open, transparent and accountable government.

When legislation states specifically that the ATIPP Act will not apply, legislators and Department officials must give consideration to the creation of a comprehensive scheme and process to address the issues of protection, privacy and access of the personal information of individuals.

In addition, Sections 177 and 178 give the Director unprecedented powers of collection, use, and disclosure of personal information from any government department. This is a fundamental shift in how personal information flows between government departments, as the Director has the right to obtain information without the consent or knowledge of the individual. By way of example, the Department could seek personal information about a proposed foster parent from the Motor Vehicles Branch or from Yukon Housing Authority.

In conclusion, the concerns expressed here are not intended to propose the restriction of collection, use and disclosure of relevant or personal information necessary for the work of the Department or the protection of children. Rather, I think it is important to convey my concerns about protection of privacy and access to information as it relates to this proposed legislation.
Thank you for providing these comments to the Members of the Legislative Assembly on my behalf. Should they have any questions arising from this correspondence I will make myself available to answer them.

Yours truly,

Tracy-Anne McPhee
Ombudsman and
Information and Privacy Commissioner

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