

Office of the Ombudsman

**1997 ANNUAL REPORT**

**For the period January 1, 1997 to December 31, 1997**

## **Ombudsman and Information and Privacy Commissioner**

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April 1998

The Honourable Robert Bruce  
Speaker of the Legislative Assembly  
P.O. Box 2703  
Whitehorse, Yukon  
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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, 1997 to December 31, 1997.

Yours truly,

Hank Moorlag  
Ombudsman

## REMARKS OF THE OMBUDSMAN/INFORMATION AND PRIVACY

The Yukon Office of the Ombudsman was created July 1, 1996 following the enactment of the *Ombudsman Act* and the *Access to Information and Protection of Privacy Act*. An arrangement between the Legislative Assemblies of the Yukon and Alberta resulted in the appointment of Harley Johnson, the Ombudsman for Alberta, as the Yukon's first Ombudsman and Information & Privacy Commissioner. In addition to his busy schedule as Alberta's Ombudsman, Mr. Johnson traveled to Whitehorse on a monthly basis to oversee the establishment of the Yukon office and to carry out his duties. Mr. Johnson's appointment ended March 31, 1997.

On April 8, 1997 I had the honour to be appointed as the Yukon Ombudsman on the recommendation of an all-party selection committee and a subsequent vote of the Members of the Legislative Assembly. I was very grateful for the solid foundation that had been laid down by Harley Johnson and the Ombudsman's Assistant, Catherine Buckler. The office administration and clerical functions were

### Hank Moorlag, Yukon Ombudsman and Information & Privacy Commissioner

well developed with the very able assistance of Randi Mulder, our part-time receptionist/secretary. I was impressed with the extent to which Mr. Johnson had promoted the Office and established professional working relationships with government officials.

An introduction and orientation to the role of Ombudsman and Information & Privacy Commissioner was made easier because I was immediately welcomed by my colleagues in Canada. They were very generous with their time and depth of knowledge. That connection was strengthened by attendance at the following conferences and workshops: an Information and Privacy workshop in Edmonton in April; the conference and workshops of the United States Ombudsman Association in Portland in May, attended by myself and my Assistant; the Canadian Ombudsman conference in Regina; and the Information and Privacy Commissioners' conference in Edmonton during the fall of 1997.

The past year has provided a wide range of experiences and challenges that has helped to refine the process of receiving complaints, conducting investigations, preparing reports and dealing with government departments and agencies on the adoption and implementation of recommendations under the *Ombudsman Act*. As the Information and Privacy Commissioner I have dealt with a variety of requests for review under the *Access to Information and Protection of Privacy Act*. I was very pleased to co-sponsor and participate in an Access to Information and Privacy Symposium held at the Yukon Archives last October.

In the coming year I see several challenges for the Office. Efforts must continue to inform the public about the services of the Office of the Ombudsman. Through the Office's casework a positive impact must be made with the aim of improving openness and fairness in government administration.

***Ombudsman Act***

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***Chapter 17, SY 1995***

31.(1) The Ombudsman shall report annually on the affairs of his or her office to the Speaker of the Legislative Assembly, who shall cause the report to be laid before the Legislative Assembly as soon as possible.

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## History

For as long as government has existed the issue of guaranteeing citizens fair and equitable treatment under the law has been a concern. Although various protections have been utilized over the years, the most widespread means of enabling government-citizen fairness in modern times has been that of the Ombudsman. This concept of a grievance procedure, being neither political nor legal in nature, was initially developed in Sweden. The first public sector Ombudsman (meaning spokesperson) was appointed by the Parliament of Sweden in 1809.

New Zealand was the first country of the British Commonwealth to adopt the Ombudsman concept in 1962. Canada has the distinction of being the fourth Commonwealth country (after New Zealand, Guyana and the United Kingdom) and the first North American Legislature to establish an Ombudsman's Office. Alberta's act was the first to be adopted, in 1967, and is largely based on the New Zealand legislation. To date, only Prince Edward Island and the Northwest Territories have never had a provincial or territorial Ombudsman.

## The Role of the Yukon Ombudsman

An Ombudsman is:

- a neutral dispute solver
- an impartial investigator in situations where individuals believe they have been unfairly treated by the territorial government or agencies
- independent of government
- an Officer of the Legislative Assembly

An Ombudsman is not:

- an advocate for the complainant
- a defender of government actions
- a public servant

An Ombudsman can:

- advise you of what steps to take with the public body
- refer you to an available remedy
- can have access to information otherwise unavailable through the exceptional powers of the Ombudsman Act
- can recommend but not order government officials to remedy wrongs

The Ombudsman can only act if complaints fall within his jurisdiction. Jurisdictional authorities include:

- departments of the Yukon Territorial Government
- crown corporations and independent authorities or boards
- public schools and Yukon College
- hospitals, local and regional health bodies
- governing bodies of professional and occupational associations
- municipalities and Yukon First Nation governments by their request

The Ombudsman can not investigate:

- complaints about the courts, the Yukon Legislature, the Yukon Elections Office, or lawyers acting on behalf of the government
- disputes between individuals
- complaints against the federal government
- complaints about actions which occurred prior to the Ombudsman Act becoming law

## Who Can Complain?

Any person or group of persons who still feel they have been unfairly treated after they have exhausted all available appeal processes.

## OPENNESS IN GOVERNMENT

Government “openness” facilitates departments and agencies to act in an open, responsible and respectful manner with regard to the expectations and rights of citizens. The Office of the Ombudsman encourages public bodies to review their policy and procedures to ensure that they facilitate openness of office.

An "open" department or agency is one that:

- facilitates citizen access to public information and services
- takes every effort to provide timely, accurate information that is easy to understand
- clearly explains to citizens any decisions affecting them
- allows citizens to have decisions reviewed by higher authorities or other authorities if they are dissatisfied with them
- consults citizens about their expectations and level of satisfaction before setting standards
- works cooperatively with the public to implement changes
- does not invoke false pretenses to justify a refusal or inaction
- does not make promises it cannot keep
- says what it will do and does what it says
- freely accounts for its acts or omissions

## ADMINISTRATIVE FAIRNESS

The primary role of the Ombudsman’s office is to receive and investigate complaints of administrative unfairness made by individuals or groups against the government. Administrative fairness standards are used in evaluating the decisions, actions or omissions of government organizations. These standards are used as a reference guide in conducting investigations, drawing conclusions, and making recommendations.

The concept of administrative fairness is based on the recognition of “natural justice” or “procedural fairness” which has evolved through the courts to ensure that the decisions of administrative bodies are arrived at fairly.

The following principles are considered to be the minimum procedural protection on which persons affected by the decisions of governments are entitled to rely:

- the right to be heard
- the right to adequate notice
- the right to disclosure
- the right to rebut opposing evidence and to correct prejudicial statements
- the right to an unbiased decision-maker
- the right to reasons for decisions
- the right to have the decision based on evidence

Any administrative body can establish and promote an environment of fairness by adhering to the principles of natural justice. The Office of the Ombudsman encourages administrative bodies to apply these principles and develop a standard of service that is consistent and clear.

The Office of the Ombudsman received 226 complaints during 1997. Of these complaints, 104 were non-jurisdictional, meaning that they related to matters that were outside the authority of the Ombudsman to handle.

Examples of non-jurisdictional complaints would be those related to federal government departments or the private sector. The Office maintains a list of other bodies handling complaints, including the RCMP Public Complaints Commission, the national Information and Privacy Commissioners and Bank Ombudsman offices to whom people can be referred.

Of the remaining 122 complaints that were within the jurisdiction of the Ombudsman to investigate, 68 were referred to another remedy or appeal. This means that the government authority against whom the complaint was being made had either not been made aware of the complainant's concern, or there was an available remedy by way of a review or appeal process that was considered adequate in the circumstances to deal with the complaint. This is an important statistic because it reflects the expression of public concern that is returned to be dealt with through internal reviews and procedures.

Nineteen formal investigations were started in 1997. Twelve were concluded during the year. Eleven investigations were carried over from 1996. The average workload for investigation was 15 files under the *Ombudsman Act*.

During the year some delays were experienced in completing *Ombudsman Act* investigations as the Office adjusted to shifting priorities. The major factor affecting the length of time it takes to complete an *Ombudsman Act* investigation is the pressure of requests for review under the *Access to Information and Protection of Privacy (ATIPP) Act*. Under this *Act*, a review must be completed within a 90-day time frame. This includes an inquiry, if one takes place. The impact of the delays on current cases is being closely monitored.

The matter of the Ombudsman's jurisdiction became an issue during the year. Section 12 of the *Ombudsman Act* states that the Ombudsman may not investigate conduct occurring prior to the commencement of the *Act*, July 1, 1996. This provision of the *Act* was interpreted initially as having some discretion to review the history of a case if the complaint was based on a post-commencement event.

The Office of the Ombudsman was required to review that interpretation after interim recommendations made to an authority were challenged under Section 12. The recommendations all related to events occurring prior to the commencement of the *Act*. On review, the Ombudsman withdrew the recommendations and implemented Office policy. Under the policy, the Ombudsman will review the relevant history of a complaint if that history precedes July 1, 1996, but on completion of an investigation will prepare a report with opinions and recommendations that are limited to matters occurring after the commencement of the *Ombudsman Act*.

Efforts continued during the year to make the public more aware of the role of the Ombudsman. Community visits were scheduled where the Ombudsman held public meetings and met with government departments and agencies. Discussions at these meetings included the function of the Office, procedural fairness and openness in government administration.

An interesting fact is that per capita, Yukoners are greater users of the Internet than their southern neighbours. For this reason and because this information transfer medium is projected to be the leading means to information and communication in the future, the Office introduced an Ombudsman website during 1997. The website can be visited at [www.ombudsman.yk.ca](http://www.ombudsman.yk.ca) for information about the role of the Ombudsman and the Information & Privacy Commissioner.

## Overview

Investigations occur as a result of three different sets of circumstances:

- an oral complaint
- a written letter of complaint
- a referral from the Legislative Assembly or any committee of the Legislative Assembly

In many other jurisdictions an Ombudsman can investigate, on his own initiative, on an Ombudsman's "Own Motion." The Ombudsman is not able to do that under the Yukon Ombudsman Act.

Investigations referred by a municipality or a Yukon First Nation government, can also be undertaken by the Ombudsman subject to being able to recover the cost.

## Authorities

### *Public Service Commission*

Two managers of a government corporation complained to the Ombudsman that a finding of harassment was made at a third level grievance hearing without allowing a full defence or input into the grievance hearing process, and that the Public Service Commissioner, who heard the grievance, was in a conflict of interest position as she had made a public statement on the issue being grieved prior to the hearing.

The Ombudsman's investigation into the complaint that the Public Service Commissioner was in a conflict of interest position concluded that this aspect of the complaint was not substantiated. It was the opinion of the Ombudsman that the Public Service Commissioner's comments in response to a question from the media did not compromise her ability to hear the grievance impartially and independently.

The Ombudsman concluded that aspects of the grievance hearing process were unjust and that certain principles of natural justice were not observed to the extent required for conformity to fairness standards. However, having reached that opinion, the Ombudsman was not prepared to assert unequivocally that the outcome of the hearing would have been different had the unfairness not occurred.

Nevertheless, the Ombudsman made two recommendations: that the Public Service Commissioner, in handling harassment grievances, provide an opportunity for the person who is alleged to have harassed the grievor to present his/her point of view by inviting that person to make a written submission for presentation as an exhibit at the hearing; and that grievance hearings include, as standard practice, the procedure of providing disclosure to affected parties of records to be introduced at such hearings.

The adoption and implementation of the recommendations have been the subject of continued discussion with the authority because they impact on the collective bargaining agreement. Efforts continue to ensure the spirit and intent of the recommendations are adopted by the Public Service Commission and that implementation can take place within the parameters of collective bargaining. The Ombudsman has urged the Public Service Commissioner to seek the highest level of fairness possible within the confines of what the parties to the collective agreement have decided they want as their governing process.

### *Department Of Justice - Whitehorse Correctional Centre*

An inmate of Whitehorse Correctional Centre made the following complaints to the Ombudsman: that attendance at programs was mandatory, enforced by increasing the inmate's security rating for non-attendance; and that a corrections officer used confidential information for purposes other than those intended.

An investigation was conducted which resulted in recommendations that inmates be provided with adequate and appropriate reasons for discretionary decisions, and the Inmate Handbook be updated to reflect new policy. In addition, although the Ombudsman chose to handle the latter complaint as one of administrative fairness, recommendations were made in conjunction with this investigation under the general provisions, Section 42, of the *Access to Information and Protection of Privacy Act*, to include training on the *Act* for Whitehorse Correctional Centre staff.

### ***Yukon Workers' Compensation Health And Safety Board***

An injured worker complained to the Ombudsman that the Yukon Workers' Compensation Health and Safety Board unfairly denied responsibility for a 1992 injury that the worker believed was related to a 1989 compensable injury.

The Ombudsman began an investigation after the complainant had exhausted the various levels of appeal in 1996. During the investigation the Ombudsman recommended to the Yukon Workers' Compensation Health and Safety Board that the 1992 injury be accepted and adjudicated. This was done through an independent adjudicator in March, 1997.

In April, 1997 the Ombudsman investigation was concluded and an interim report was presented to the Yukon Workers' Compensation Health and Safety Board with a number of recommendations. At this point the Yukon Workers' Compensation Health and Safety Board challenged the jurisdiction of the Ombudsman to conduct the investigation and make a report because Section 12 of the *Ombudsman Act* states that the Ombudsman "...may not investigate conduct occurring prior to the commencement of the *Act*". The *Ombudsman Act* came into effect July 1, 1996.

After a thorough review of the matter, the Ombudsman acknowledged that he lacked jurisdiction and discontinued his involvement.

As a result of this case, policy was established in the Office of the Ombudsman in the handling of complaints where the case history precedes the commencement of the *Ombudsman Act*. Under the policy the Ombudsman will review the history of the complaint, but at the conclusion of the investigation any opinions the Ombudsman reaches or recommendations he makes will be limited to issues that arise from events occurring after July 1, 1996.

### ***Department Of Justice - Whitehorse Correctional Centre***

An inmate of Whitehorse Correctional Centre made the following complaints to the Ombudsman: not being given access to a program that the inmate believed to be required although a different program was offered; that proper security measures for accommodation of the inmate, as a special management inmate, were not being taken; that copies of signed Whitehorse Correctional Centre documents were not being provided; and, a representative of the inmate was not permitted to attend a meeting with administration.

An investigation resulted in several recommendations. Whitehorse Correctional Centre was asked to review the particular program in question, especially with respect to the establishment of eligibility criteria and whether there were other factors that might hamper an inmate's access to the program. The Ombudsman recommended that attention be given to compliance with policy as it relates to special management inmates and specifically commented on the accommodation considerations of those inmates. The Ombudsman identified the need for Whitehorse Correctional Centre to improve the management of records signed by an inmate. However, a recommendation from a different complaint, which had previously been accepted and implemented by that authority, had already addressed this issue. It was also recommended that the principles of administrative fairness be used as much as possible in all aspects of inmate interaction with administration.

### ***Department Of Justice - Whitehorse Correctional Centre***

An inmate made the following complaints: that policy was not clear concerning the complainant as a federal inmate housed at Whitehorse Correctional Centre; that a confidential letter had been received open; and that no opportunity was given to refute accusations that were made affecting the complainant.

The complaints were partially substantiated by the Ombudsman and the following recommendations were made and accepted by Whitehorse Correctional Centre: that exceptions to policy, as they relate to federal inmates, would be clearly set out; that Whitehorse Correctional Centre would ensure its staff had the necessary knowledge to adhere to the policy and procedure concerning the parole process for federal inmates; that a Case Plan would be developed immediately for the complainant; and that action on "Inmate Requests" would be reviewed for accountability. Staff also met with the complainant concerning their suspicions about previous behaviour.

# STATISTICAL TABLES

## TABLE 1 – COMPLAINTS

January 1, 1997 – December 31, 1997

<b>AUTHORITY</b>	<b>Total Complaints</b>	<b>Complaints Investigated</b>	<b>Complaints Not Investigated*</b>
Community & Transportation Services	8	2	6
Education	4	–	4
Executive Council Office	1	–	1
Government Services	4	1	3
Health and Social Services	17	2	15
Justice	9	1	8
Whitehorse Correctional Centre	20	2	18
Teslin Correctional Centre	1	–	1
Public Service Commission	7	1	6
Renewable Resources	6	1	5
Tourism	2	–	2
<b>Total</b>	<b>79</b>	<b>10</b>	<b>69</b>
<b>Boards, Commissions, Corporations and Societies</b>			
Yukon Housing Corporation	10	2	8
Yukon Hospital Corporation	2	–	2
Yukon Human Rights Commission	2	–	2
Yukon Legal Services Society	2	–	2
Yukon Workers' Compensation Health and Safety Board	20	3	17
<b>Total</b>	<b>36</b>	<b>5</b>	<b>31</b>
<b>Professional and Occupational Associations and College</b>			
Yukon Medical Council	3	1	2
Yukon College	4	–	4
<b>Total</b>	<b>7</b>	<b>1</b>	<b>6</b>
<b>Non-Jurisdictional Entities</b>	<b>104</b>	<b>–</b>	<b>104</b>
<b>COMBINED TOTAL</b>	<b>226</b>	<b>16</b>	<b>210</b>

\*The reasons for not investigating complaints are set out in table 3.

## TABLE 2 - INVESTIGATIONS

January 1, 1997 - December 31, 1997

AUTHORITY	From 1996	Started 1997	Ended 1997	Outcome of Investigations Ended in 1997		Into 1998
				Discontinue	Report to Authority	
Community and Transportation Services	1	2	1	–	1	2
Government Services	–	1	–	–	–	1
Health and Social Services	3	2	2	2	–	3
Justice	–	1	–	–	–	1
Whitehorse Correctional Centre	3	2	3	–	3	2
Public Service Commission	–	3	2	–	2	1
Renewable Resources	1	1	1	1	–	1
<b>Total</b>	<b>8</b>	<b>12</b>	<b>9</b>	<b>3</b>	<b>5</b>	<b>11</b>
<b>Boards, Commissions and Corporations etc.</b>						
Yukon Housing Corporation	–	2	1	1	–	1
Yukon Workers' Compensation Health and Safety Board	3	4	2	2	–	5
<b>Total</b>	<b>3</b>	<b>6</b>	<b>3</b>	<b>3</b>	<b>–</b>	<b>6</b>
<b>Professional and Occupational Associations and College</b>						
Yukon Medical Council	–	1	–	–	–	1
<b>Total</b>	<b>–</b>	<b>1</b>	<b>–</b>	<b>–</b>	<b>–</b>	<b>1</b>
<b>COMBINED TOTAL</b>	<b>11</b>	<b>19</b>	<b>12</b>	<b>6</b>	<b>5</b>	<b>18</b>



***Access to Information and  
Protection of Privacy Act***

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***Chapter 1, SY 1995***

- 40.(1) The Ombudsman appointed under the Ombudsman Act is also the Information and Privacy Commissioner.
- 47.(1) The Commissioner must report annually to the Speaker of the Legislative Assembly on
- (a) the work of the Commissioner's office, and
  - (b) any complaints and reviews of complaints to the Commissioner about the Commissioner's decisions, acts, or failures to act.

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## AMENDMENTS TO THE ACT

The amendments to the *Access to Information and Protection of Privacy Act*, proclaimed December 11, 1997, repeal sections of statutes that are no longer relevant because they have been replaced by provisions of the *Act*.

They also allow the Information and Privacy Commissioner to review the fees to be paid by applicants under the *Act*; to extend the time for completing a review under the *Act* up to an additional 60 days if the time is needed to mediate a review; and to report to a Minister information, comments and recommendations about instances of maladministration in the management or safekeeping of records. The Commissioner is also required to report

evidence of an offence under Yukon or Canadian law to the RCMP.

The amendments also set out the procedure for appointing an acting Commissioner to carry out a review of a request under the *Act* when the Commissioner believes he or she would be in a conflict of interest or might reasonably be thought to be biased in undertaking or continuing a review.

They also make it an offence to tamper with a record for the purpose of misleading any individuals, and authorize the Yukon Archives to disclose personal information where an individual has been dead for 25 years or more.

## ACCESS TO INFORMATION AND PROTECTION OF PRIVACY

### History

Information rights are a relatively new body of citizen rights in many countries. They commonly deal with legislated rights of access to information and rights for protection of personal information. Sweden is generally credited as the country with the oldest access rights to government records. Information access and protection of privacy legislation began to emerge in North America in the 1960s and 1970s. The first Freedom of Information Act was proclaimed in the United States in 1966 and the first Privacy Act followed in 1974.

Canada's history of legislating information rights is more recent, and in many cases, still evolving. At the federal level, information rights were first addressed in legislation during the mid 1970s. Although the 1974 Protection of Privacy Act is significant as the first federal statutory recognition of the right to privacy, it was not until 1983 that the much weightier and comprehensive Access to Information Act and Privacy Act were both proclaimed in force. Currently, all provinces and territories have

their own information access and privacy protection provisions. The *Access to Information and Protection of Privacy Act* was proclaimed in Yukon on July 1, 1996 and applies to all territorial departments, agencies, boards, commissions, and corporations. The Ombudsman appointed under the *Ombudsman Act* is also the Information and Privacy Commissioner. The Information and Privacy Commissioner, like the Ombudsman, is an independent authority responsible to the Legislative Assembly.

The *Access to Information and Protection of Privacy Act* regards the government as the caretaker, not the owner, of the information it possesses. The information, rightfully, belongs to the public. The true owner of personal information is the person to which that information pertains. The *Act* aims to strike a balance between the public's right to know and the individual's right to privacy as these rights relate to information held by public bodies within the Yukon Territory.

## Administering the Act

Section 42 of the *Access to Information and Protection of Privacy Act* gives the Information and Privacy Commissioner responsibility for monitoring how the *Act* is administered. Some of these responsibilities include:

- educating the public about the *Act*
- receiving comments or complaints from the public concerning the administration of the *Act*
- conducting investigations and reporting on complaints against the administration of the *Act*
- commenting on the implications for access to information or for protection of privacy of existing or proposed legislative schemes or public bodies
- authorizing the collection of personal information from sources other than the individual the information is about

## Access Rights

The legislation guarantees access to Yukon government records with certain exceptions. Records available to the public include files, letters, agreements, microforms and computer records dealing with all aspects of government operations.

The *Act* also guarantees access to personal information about one's self and gives the requester the right to ask for corrections to that information.

Certain types of records are protected and cannot be released. Exceptions to access provisions include: personal information about other people, information that could cause a person or a government body to make or lose money, information that could be a threat to public safety, information that could interfere with law enforcement, and Cabinet records for up to fifteen years.

## Privacy Rights

The section of the *Act* dealing with protection of privacy specifies how a public body may collect, use, and disclose personal information. The legislation prevents other people from seeing personal information without consent, and

prevents unauthorized personal information from being collected, used or made public.

## Information Retrieval

Any person wishing to obtain information from a government department or agency should first contact the relevant office and see if the information is available there. If not, the Yukon Archives have the necessary forms to complete. They also have a directory to search for information about Yukon government departments and the kind of records they keep.

There is a thirty day deadline to provide the information unless the time limit is extended by the archivist.

## Commissioner's Role

Individuals can request the Information and Privacy Commissioner to review decisions made by a public body or resolve a complaint made under the *Act*.

### **Complaints**

A person may request the Commissioner to review a complaint that a public body has not collected, used or disclosed information in compliance with the *Act*.

### **Reviews**

The goal of the *Act* is to make information more accessible to Yukoners, so most requests for information are granted. There may be times, however, when a department will have to turn down a request, or part of a request, for information. Any person who requests access to a record may ask the Information and Privacy Commissioner to review:

- a refusal to grant access to a record
- a decision to separate or obliterate information from a records
- a decision about a time extension

The Commissioner may also review:

- third party requests to review a decision by the public body to disclose information about that third party

- requests to have personal information corrected or annotated, that are not granted by the public body

Requests for review must be submitted to the Commissioner, in writing, within thirty days of being notified of the decision to be reviewed. If the matter cannot be settled through mediation, the Commissioner must conduct an inquiry. After completing a review, the Commissioner must prepare a report which sets out his findings, recommendations and reasons for those findings and recommendations. The public body must decide whether to follow the

recommendations of the Commissioner and give written notice of its decision to the parties involved.

### **Appeals**

Appeals may be made to the Supreme Court by:

- applicants when a public body does not follow the Commissioner's recommendations
- applicants unhappy with the determinations of the Commissioner
- third parties when decisions are made to release information about them

## **THE YEAR IN REVIEW**

The 1997 calendar year was a remarkably active one for the Information and Privacy Commissioner. During 1996, it was projected that this function would represent about 20% of the work of the Office. Our 1997 experience was that it was closer to 40% in relation to actual time spent on Access to Information and Protection of Privacy (ATIPP) matters.

Sixteen ATIPP cases were handled in 1997 by way of reviews under the *Access to Information and Protection of Privacy Act*. When a request for review is received, the Commissioner delegates authority to his Assistant who attempts to resolve the matter through mediation. Six cases were successfully mediated in this way during the year.

If mediation is not successful or not considered appropriate, the Commissioner must hold an inquiry. Three inquiries were held during 1997. These resulted in reports to the parties with recommendations to the public body. In all cases the recommendations were accepted and implemented.

The Office of the Information and Privacy Commissioner was pleased to participate with Yukon Archives and Yukon Justice in hosting an ATIPP Symposium in Whitehorse during October, 1997. Guest speakers included David Flaherty, B.C.'s Information and Privacy Commissioner; Gerald Neary of the Federal

Privacy Commissioner's Office, and Judith Whitemarsh from Edmonton, who is an information and privacy specialist. The symposium drew senior Yukon Government officials and staff working with records management, as well as department ATIPP coordinators. We were pleased to have introductory remarks made by the Honourable Lois Moorcroft, Minister responsible for the *Access to Information and Protection of Privacy Act*, who brought greetings from the Yukon Government and reiterated the government's commitment to the purposes of the *Act*: openness and accountability. The symposium agenda included an overview of the *Act* and its practical application to public administration. The symposium was very well received and has prompted planning for a follow-up event in 1998 on the topic of electronic records.

As Yukon's Information and Privacy Commissioner I attended a conference in Edmonton with my counterparts from across Canada. Topics of discussion included privacy issues around the "mining" of databanks, personal identifier systems, and a central firearms registry. All are current initiatives and activities within various levels of government. The 1998 national conference is being held in Whitehorse during the last week of June.

# REVIEWS AND INVESTIGATIVE SUMMARIES

## Overview

Reviews occur as a result of a written request. The Commissioner can also receive complaints about the *Access to Information and Protection of Privacy Act* concerning the administration of the *Act* and can conduct investigations into these complaints.

## Public bodies

### ***Department Of Education***

The Commissioner conducted an inquiry to review how personal information was collected or used. A school official complained to the Information and Privacy Commissioner that personal information about the school official had been collected by an employee who then used the information in an attempt to discredit the school official within the department. The school official was able to correct the situation by providing proof that the prejudicial information collected by the employee was in error.

The Commissioner found that there was an improper and unauthorized collection of personal information and that the department has responsibility for the conduct of its employees. The Commissioner also found that the records generated by the department as a result of the department's response to this matter did not become part of the record keeping system. Finally, the Commissioner found that there was a lack of understanding related to access and privacy issues by some department employees.

The Commissioner made four recommendations. A normal remedy for the collection of information in contravention of the *Access to Information and Protection of Privacy Act* would be for the public body to destroy the offending material. In this case, however, the matter was set straight and it was more appropriate to have a record of the events. The Commissioner therefore recommended that the relevant material become part of the official record. The second recommendation was for the department to seek closure on the matter by making a written apology. The third recommendation was for the department to include its file on the matter within its records system. The final recommendation required the department to undertake a training program for personnel handling sensitive, personal information. All the recommendations were accepted and implemented.

### ***Department Of Health And Social Services***

A request for review was made of a decision by the Department of Health and Social Services to deny access to information related to the number of occurrences and associated costs of a medical procedure.

The public body argued at an inquiry before the Information and Privacy Commissioner that the release of the requested information could disclose personal and stigmatizing information, because the number of occurrences of the procedure was so low.

The applicant argued that statistical information for research purposes should be disclosed as authorized by the *Access to Information and the Protection of Privacy Act*.

The Information and Privacy Commissioner concluded that the release of the requested information could result in an unreasonable invasion of privacy. The Commissioner recommended and affirmed that the public body should continue to refuse access.

## ***Department Of Education and Public Service Commission***

An individual who was partially granted and partially denied a request for access to records from two different public bodies, requested the Commissioner to review the matter.

Upon mediation it was determined that the Department of Education had none of the records requested. The individual had received copies of records from the Public Service Commission as a response to their request for access to records. However, a review of these records indicated that one entire file, containing the records requested, had inadvertently not been copied. This was promptly corrected by the public body and the request for review was settled without inquiry.

## ***Yukon Housing***

A request was made to review a decision by the Yukon Housing Corporation to deny access to all or part of a record consisting of a supervisor's day timers for a three year period.

The public body had denied access to the requested original records under Section 5(2) of the *Access to Information and Protection of Privacy Act* for the reason that extensive references to third parties could not be reasonably separated to allow the applicant to view the originals. Alternately, the public body proposed copying the records with all third party references removed, with an estimate of costs attached.

The parties entered into mediation, but were unable to resolve the issues prior to the 90-day time restriction set by the *Act*. An inquiry was held by the commissioner.

During mediation, the applicant made a request to the Territorial Archivist to waive the fees. The Archivist denied the request, stating that the policy was to interpret "undue hardship" as a demonstrated inability to pay the fees. The Archivist proposed to begin three hours of free preparation the applicant was entitled to under the *Act's* regulations. The public body agreed to prepare as many records for release as possible within the 3-hour time frame, which occurred prior to the inquiry.

At the inquiry the applicant argued that the protracted process for reviewing third party information was unreasonable; that the associated costs were excessive; that the level of fees effectively served to deny access to the records being sought, and that the Archivist's decision on the waiver of fees was an improper interpretation of the *Act*.

As of the date of this inquiry the request for review process under Part 5 of the *Act* did not authorize the commissioner to examine the reasonableness of the estimate of fees, or to review the Archivist's decision regarding a waiver of fees. However, since this was integral to the release of the requested records, the commissioner exercised the general powers provisions of Section 42 to examine this aspect of the administration of the *Act*.

The commissioner recommended that the public body prepare a revised cost estimate based on the actual time spent on work already completed, resulting in a significantly reduced estimate. The commissioner also recommended that the Archivist implement as standard practice an active offer of the three free hours of work at the outset of an access request, when applicable, to assist in developing a more accurate estimate of costs for the remaining work.

The commissioner did not have authority, prior to the December 1997 amendments to the *Act*, to review a decision by the Archivist to deny a request for a waiver of fees. However, a recommendation was made for the Archivist to communicate to the applicant how the policy on eligibility for a waiver of fees was developed and why it contains the current criteria.

## ***Yukon Workers' Compensation Health And Safety Board***

A request for review was received on a Request for Access to Records, which was denied, to Yukon Workers' Compensation Health and Safety Board for statistics on permanent impairment awards on a specific injury over a specific period of time. The denial was based on the amount of time it would take to review the large number of files manually to obtain the information requested

This Request for Review was successfully mediated when Yukon Workers' Compensation Health and Safety Board utilized electronic records, also agreeing to research a limited number of files to ensure the veracity of the electronically produced data.

### ***Department Of Justice and Yukon Workers' Compensation Health And Safety Board***

A person requested two separate reviews on a decision for access to records made simultaneously to two different public bodies. The first request for review was to both public bodies for specific records. Although a response had been given to the applicant, there was still action being taken on one component of the initial request by the Department of Justice. Once it was apparent that this action would not change the outcome, that the record sought could not be located, the applicant requested the second review on only this component of the initial request, within the necessary time limitation.

Although all components of the requests under review were "granted", the applicant was concerned that Yukon Workers' Compensation Health and Safety Board had not provided all the records, and that the Department of Justice had not conducted a thorough search for the record. Upon mediation it was determined that Yukon Workers' Compensation Health and Safety Board could provide a number of additional records, which they subsequently did.

On the second component of the initial request for information, the Department of Justice pursued all possible leads in searching for the information and satisfied the applicant that the records in question did not exist. Although the applicant did not obtain the result sought, the applicant was satisfied that the public body had provided what relevant information it possessed. An inquiry was not requested by the applicant.

## STATISTICAL TABLES

### TABLE 1 - COMPLAINTS AND REQUESTS FOR REVIEW

January 1, 1997 - December 31, 1997

Public Body	Number of Cases
Community and Transportation Services	1
Education	1
Health and Social Services	2
Justice	1
Whitehorse Correctional Centre	1
Public Service Commission	2
Renewable Resources	1
Yukon Housing Corporation	3
Yukon Workers' Compensation Health and Safety Board	5
<b>TOTAL</b>	<b>17*</b>

### TABLE 2 - CASES OPENED

January 1, 1997 - December 31, 1997

Type of Case	Relevant Section of Statute	Number of Cases
General powers provision to investigate complaints on the administration of this Act.	42	3
Review of complaint that a public body has not collected, used or disclosed information in compliance with this Act.	48(3)	3
Request for a review on a refusal by the public body to grant access to the record.	48(1)(a)	12
<b>TOTAL</b>		<b>18</b>

### TABLE 3 - MEANS OF SETTLEMENT

January 1, 1997 - December 31, 1997

Settlement Type	Number of Cases
Investigation	1
Mediation	7
Inquiry	4
Discontinued	4
In Progress	2
<b>TOTAL</b>	<b>18</b>

\*Note: One file was opened in 1996 and included in the 1996 Annual Report, but was dealt with in 1997. It was included in Tables 2 and 3 as the case was reviewed and the inquiry held in 1997.