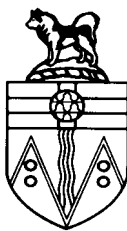


Office of the Ombudsman

FIRST ANNUAL REPORT

For the period July 1, 1996, to December 31, 1996



YUKON LEGISLATIVE ASSEMBLY

Office of the Ombudsman



YUKON LEGISLATIVE ASSEMBLY
Office of the Ombudsman

April 1997

Speaker of the Legislative Assembly
Government of Yukon
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 first Annual Report of the Yukon Ombudsman/Information and Privacy Commissioner.

This report is submitted in accord with 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/Information and Privacy Commissioner for the period July 1, 1996 to December 31, 1996.

Sincerely

Harley Johnson
Ombudsman

REMARKS OF THE OMBUDSMAN / INFORMATION AND PRIVACY COMMISSIONER

After numerous discussions over a number of years about the need for an Ombudsman, the vision of an independent investigator to review administrative actions of the Yukon Government (YTG) became a reality on July 1, 1996. A contract was signed between the Yukon and Alberta Legislative Assemblies which allowed me, as Alberta's Ombudsman, to be appointed as Yukon's first Ombudsman.

While a significant amount of time and effort was expended meeting with the public, private organizations and service clubs, members of YTG and the press, the role of the Ombudsman will require a continuing educative presence to let the public know what the Ombudsman is all about.

Primarily, the Ombudsman is an investigator of complaints people have about the administrative activities of the Yukon Government. As the Ombudsman reports to the Legislative Assembly as a whole and not through a government department, a Minister or the Cabinet, these investigations are conducted independent of the activities of government. This independence is one of the most important principles in how the Ombudsman performs this investigative role. Not only must this independence be actual, it must be perceived by all. As such, the Ombudsman is not an advocate for either but an impartial reviewer of evidence used by administrators in making decisions which affect people in their interactions with government departments, agencies, commissions and boards. If an error is found in these activities, the Ombudsman makes recommendations which in the Ombudsman's opinion, is a proper resolution to that error. If no error is found, people are assured that the actions of administrators were fully reviewed and that, while they may not like a decision made, that they were in fact treated fairly, properly and within the bounds of the law.

Some restrictions do apply to what the Ombudsman can investigate. For example, the courts, the Yukon Legislative Assembly itself, the Yukon Elections Office, lawyers acting for the govern-

ment (in their legal capacity), disputes between private individuals or other governments are all outside the jurisdiction of the Ombudsman. Also, those issues that have not been through available appeals cannot be looked at by the Ombudsman until those appeals have been completed.

In addition to departments, agencies, commissions and boards (YTG) being within jurisdiction, complaints about public schools, Yukon College, hospitals and professional/ occupational associations are within the jurisdiction of the Ombudsman.

Also, and in my opinion, a very positive and unique part of the *Ombudsman Act* is that First Nations and municipal governments may refer issues to the Ombudsman for an investigation on a cost recovery basis. Seldom does one see this concept of flexibility in legislation.

A second major role for the Ombudsman is to serve as the Information and Privacy Commissioner under the *Access to Information and Protection of Privacy Act*. The general role is to monitor how this Act is administered and to review, on request of the public, whether requests for information have been properly acted on or whether information contained within YTG records are properly collected, used or disclosed keeping in mind the protection of "personal" information.

In either case, whenever a person has a question, I encourage them to call or visit my office and discuss it.

During the start-up phase of the office, a very successful competition was held and Catherine Buckler was selected to be my assistant and my investigator. Ms. Buckler was formerly the Executive Director of Legal Aid. The office was indeed fortunate to have a number of very qualified candidates apply. Randi Mulder was contracted to provide receptionist/secretarial assistance on a part-time basis.

Ombudsman Act

Chapter 17, SY 1995

- 2 The Commissioner in Executive Council shall, on the recommendation of the Legislative Assembly made by at least two-thirds of the members of the Legislative Assembly, appoint as an officer of the Legislative Assembly an Ombudsman to exercise the powers and perform the duties set out in this Act.
- 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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This is the Office of the Ombudsman's first Annual Report. It covers the six month period from July 1, 1996 to December 31, 1996. The goal of the report is to explain the history and role of the Ombudsman, provide some information about the principles and practices of government openness and fairness, and to summarize some of the cases the Ombudsman has investigated and the recommendations he has made.

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 Yukon Ombudsman

An Ombudsman for the Yukon Territorial Government had been under consideration since the early 1970s. This goal came to fruition when the Yukon's own *Ombudsman Act* was proclaimed on July 1, 1996. Albertan Ombudsman, Harley Johnson, is overseeing investigations until March 31, 1997, after which a Yukon-based Ombudsman will be appointed. The Yukon Ombudsman is appointed by Cabinet, on recommendation of the Legislative Assembly, for a renewable five year term.

In addition to its investigative role, the initiative of the office in its first year is to also have an educative role. The following information is provided to clarify the role of the Ombudsman, and to put forward the principles of government openness and administrative fairness that the Office promotes.

What does the Ombudsman and his Office do?

An Ombudsman Office is more than just a place to air complaints against the government. It is a place to seek solutions, independent explanations, investigations and recommendations.

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.

What an Ombudsman can do and investigate

An Ombudsman can:

- advise you of what steps to take with the public body;
- refer you to an available remedy;
- have access to information otherwise unavailable through the exceptional powers of the *Ombudsman Act*;
- 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 THE 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:

1. facilitates citizen access to public information and services;
2. takes every effort to provide timely, accurate information that is easy to understand;
3. clearly explains to citizens any decisions affecting them;

4. allows citizens to have decisions reviewed by higher authorities or other authorities if they are dissatisfied with them;
5. consults citizens about their expectations and level of satisfaction before setting standards;
6. works cooperatively with the public to implement changes;
7. does not invoke false pretenses to justify a refusal or inaction;
8. does not make promises it cannot keep;
9. says what it will do and does what it says; and
10. 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 “absolute” 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.

Any administrative body interested in establishing and promoting an environment of fairness can be guided by the principles of natural justice. The Office of the Ombudsman encourages administrative bodies to consider their role in applying the principles of natural justice, and develop a standard in order to enable consistency and clarity of procedure.

Overview

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

1. an oral complaint;
2. a written letter of complaint; or
3. 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.

The following cases have been resolved in the first six months of operation. At the end of the calendar year there were eleven files open and working toward a resolution.

Authorities

Law Society of the Yukon

A person who had initiated a complaint with the Review Panel of the Discipline Committee of the Law Society of the Yukon complained that a decision had not been reached from a hearing which had occurred three months earlier.

An investigation was commenced on the issue of delay. The authority corrected its error of delay by providing their written decision to the complainant a month after the investigation was opened.

Department of Renewable Resources

An individual who had applied for a position with the Department of Renewable Resources complained of not receiving a response to a request for information from the Department's Personnel Officer as to why they had not been short listed.

An investigation was opened and subsequently closed when the authority corrected its error by responding to the request with specific reasons for their decision.

Yukon Workers' Compensation Health and Safety Board

A person wrote to an individual at the Yukon Workers' Compensation Health and Safety Board and had not received a reply.

An investigation was opened. The authority discovered that the individual had written a reply but that it had inadvertently not been sent. The error was corrected immediately and the investigation was closed.

STATISTICAL TABLES

TABLE 1 – COMPLAINTS

July 1, 1996 - December 31, 1996

Authority	Total Complaints	Complaints Investigated	Complaints not Investigated *
Department			
Community and Transport Services	10	1	9
Education	4	-	4
Finance	1	-	1
Government Services	2	-	2
Health and Social Services	17	5	12
Justice	7	1	6
Whitehorse Correctional Centre	10	4	6
Public Service Commission	5	1	4
Renewable Resources	6	2	4
Tourism	3	-	3
TOTAL: Departments	65	14	51
Boards and Commissions etc.			
Yukon Housing Corporation	2	-	2
Yukon Human Rights Commission	2	-	2
Yukon Legal Services Society	1	-	1
Yukon Worker's Compensation	19	6	13
TOTAL: Boards and Commissions etc.	24	6	18
Professional and Occupational Assoc. and College			
Law Society of Yukon	1	1	-
Yukon Medical Council	1	-	1
Yukon College	1	-	1
TOTAL: Associations and College	3	1	2
COMBINED TOTAL	92	21	71

* The reasons for not investigating complaints are set out in Table 3

TABLE 2 – INVESTIGATIONS

July 1, 1996 - December 31, 1996

Authority	Total Investigated	Investigation Discontinued	Corrected when Notified	Carried Forward
Department				
Community and Transport Services	1	-	-	1
Education	-	-	-	-
Finance	-	-	-	-
Government Services	-	-	-	-
Health and Social Services	5	2	-	3
Justice	1	1	-	-
Whitehorse Correctional Centre	4	1	-	3
Public Service Commission	1	1	-	-
Renewable Resources	2	-	1	1
Tourism	-	-	-	-
TOTAL: Departments	14	5	1	8
Boards and Commissions etc.				
Yukon Housing Corporation	-	-	-	-
Yukon Human Rights Commission	-	-	-	-
Yukon Legal Services Society	-	-	-	-
Yukon Worker's Compensation	6	2	1	3
TOTAL: Boards and Commissions etc.	6	2	1	3
Professional and Occupational Assoc. and College				
Law Society of Yukon	1	-	1	-
Yukon Medical Council	-	-	-	-
Yukon College	-	-	-	-
TOTAL: Associations and College	1	0	1	0
COMBINED TOTAL	21	7	3	11

TABLE 3 – COMPLAINTS NOT INVESTIGATED

July 1, 1996 - December 31, 1996

Authority	Total not Investigated	* Reasons						
		A	B	C	D	E	F	G
Department								
Community and Transport Services	9	-	7	-	-	-	1	1
Education	4	-	2	-	-	-	2	-
Finance	1	-	-	-	1	-	-	-
Government Services	2	-	2	-	-	-	-	-
Health and Social Services	12	-	11	-	-	-	1	-
Justice	6	-	5	1	-	-	-	-
Whitehorse Correctional Centre	6	-	3	1	-	2	-	-
Public Service Commission	4	-	1	1	-	-	-	2
Renewable Resources	4	-	4	-	-	-	-	-
Tourism	3	-	2	-	-	-	1	-
TOTAL: Departments	51	0	37	3	1	2	5	3
Boards and Commissions etc.								
Yukon Housing Corporation	2	-	2	-	-	-	-	-
Yukon Human Rights Commission	2	-	1	-	1	-	-	-
Yukon Legal Services Society	1	-	1	-	-	-	-	-
Yukon Worker's Compensation	13	-	6	1	3	-	2	1
TOTAL: Boards and Commissions etc.	18	0	10	1	4	0	2	1
Professional and Occupational Assoc. and College								
Law Society of Yukon	-	-	-	-	-	-	-	-
Yukon Medical Council	1	-	1	-	-	-	-	-
Yukon College	1	-	1	-	-	-	-	-
TOTAL: Associations and College	2	0	2	0	0	0	0	0
COMBINED TOTAL	71	0	49	4	5	2	7	4

*** Reasons**

- | | | | |
|---|--------------------------------------|---|--|
| A | Further inquiries required | E | Declined on discretionary grounds |
| B | Referred to another remedy or appeal | F | Did not provide sufficient information |
| C | Otherwise resolved | G | Not yet assigned a recommendation |
| D | No authority to investigate | | |

*Access to Information and
Protection of Privacy Act*

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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This is the Information and Privacy Commissioner's first Annual Report. It explains the history and role of the Commissioner and the office, provides some information about the principles and practices of the *Access to Information and Protection of Privacy Act* (the Act), and gives some examples of the cases the Information and Privacy Commissioner has investigated and the recommendations he has made.

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.

Information access and protection of privacy rights in the Yukon

The *Access to Information and Protection of Privacy Act* was proclaimed 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.

MANDATE

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:

1. educating the public about the Act;
2. receiving comments or complaints from the public concerning the administration of the Act;
3. conducting investigations and reporting

on complaints against the administering of the Act;

4. commenting on the implications for access to information or for protection of privacy of existing or proposed legislative schemes or public bodies; and
5. authorizing the collection of personal information from sources other than the individual the information is about.

Access rights

The *Access to Information and Protection of Privacy Act* 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 following a request for information unless the time limit is extended by the archivist.

Where the Information and Privacy Commissioner fits in

Individuals can request the Information and Privacy Commissioner review decisions made

by a public body or resolve a complaint made under the Act.

Complaints

A person may request the Commissioner to investigate 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; or
- 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 part; or
- 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; or
- third parties when decisions are made to release information about them.

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.

The following identify issues that have been resolved in the first six months of operation. During this period the fact that only one case proceeded to inquiry level reflects the skill of the Assistant to the Commissioner in investigating and mediating disputes.

Public bodies

Department of Justice and Yukon Workers' Compensation Health and Safety Board

A person who was a personal representative of an individual requested a review for access to information which had been partially granted and partially denied by two public bodies under Sections 15(1), 20(1)(b) and 25(2) of the *Access to Information and Protection of Privacy Act*.

The Commissioner authorized mediation which was successful. It was determined that the applicant was trying to access two very specific records in both public bodies' files. Upon review it was found that these records did not exist. Both public bodies agreed that the non-existence of those specific records could be confirmed. In addition, a reproduction of a record that had been provided earlier but was not clear was reproduced in better quality and given to the applicant by the public body.

Yukon Workers' Compensation Health And Safety Board

A person requested a review for access to information which was refused by the Yukon Workers' Compensation Health and Safety Board.

One of the refused records included components of an investigation as well as a legal opinion. It was refused under Section 18(a) of the *Access to Information and Protection of Privacy Act*. The other records were from a quasi-judicial body and were refused under Section 2(1)(b) of the *Access to Information and Protection of Privacy Act*.

The Commissioner authorized mediation which was successful. The public body agreed that not all of the correspondence could be refused under Section 18(a) and released the parts of that record that were not exempt. The public body also agreed to release all internal and external correspondence by the quasi-judicial body.

Department of Education

A person who was considered for employment, but not hired, complained that the Department of Education collected, used, or disclosed personal information in a manner contrary to the *Access to Information and Protection of Privacy Act*.

Although all the conduct in question was made prior to the proclamation of the Act, the parties agreed to the Information and Privacy Commissioner conducting a hearing. The inquiry found evidence to support the complaint. The Department of Education's decision not to hire the person was based on unsubstantiated evidence. This administrative action disadvantaged the complainant who never had the opportunity to refute the allegation.

As the legislation is not retroactive, the Commissioner was limited to making suggestions rather than recommendations. As a result of the suggestions the public body agreed that policy would be developed to address areas of the hiring process dealing with unsubstantiated or confidential information, and those which would ensure necessary sign-offs are specified and carried out.

STATISTICAL TABLES

TABLE 1 – CASES OPENED

July 1, 1996 - December 31, 1996

Type of Case	Relevant Section of Statute	Number of Cases
Review of complaint that a public body has not collected, used or disclosed information in compliance with this Act.	48(3)	2
Request for a review on a refusal by the public body or the archivist to grant access to the record.	48(1)(a)	3
TOTAL		5

TABLE 2 – NUMBER OF COMPLAINTS AGAINST A PUBLIC BODY

July 1, 1996 - December 31, 1996

Public Body	Number of Complaints
Department of Education	2
Department of Justice	1
Workers' Compensation Board	2

TABLE 3 – MEANS OF SETTLEMENT

July 1, 1996 - December 31, 1996

Settlement Type	Number
Mediation	3
Inquiry	1
Not settled / carried over	1

Ombudsman and Information and Privacy Commissioner

Government of Yukon
Box 2703
Whitehorse, Yukon
Y1A 2C6

or

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Y1A 5P7

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