Yukon Ombudsman and Information & Privacy Commissioner

Submission on the *Child and Youth Advocate Act* Discussion Paper

December 23, 2008

INTRODUCTION

This submission is in response to the Discussion Paper from the Department of Health and Social Services regarding the proposed Child and Youth Advocate Act. The discussion paper seeks feedback on the "made in Yukon model" proposed for a Child and Youth Advocate.

I am not commenting on the principles, scope or functions of the proposed Youth and Child Advocate, as that is a political decision within the mandate of the government in my view. Instead, my comments are limited to the role of the Ombudsman, as well as the application of the *Access to Information and Privacy of Privacy Act*, in relation to the proposed Child and Youth Advocate.

Once legislation has been drafted, I would like the opportunity to make additional comments as appropriate.

Whitehorse, Yukon
December 23, 2008

Tracy-Anne McPhee
Ombudsman
Information and Privacy Commissioner

THE ROLE OF THE OMBUDSMAN

The proposed legislation which creates a Child and Youth Advocate is a positive additional step towards ensuring an effective system of oversight for children and youth receiving services directly from Yukon government. The proposal contemplates the Advocate will primarily focus on individual advocacy and would assist children/youth and their families in understanding and resolving concerns with Yukon government services. In my experience, children, youth and their families do from time to time need help in navigating various government systems, and the proposed Child and Youth Advocate will clearly serve that function.

The Advocate will be able to represent the interests of children seeking or receiving government services, but will not have the power to investigate substantive complaints about those services.

It is my understanding that the role of the Advocate will be to articulate a point of view on behalf of a child or young person. In contrast, the Ombudsman's mandate is to review issues of administrative fairness, not to help individuals to have their voices heard. The Ombudsman has strong investigative and reporting tools, as well the ability to make recommendations for improvement in government systems.

While the creation of a Child and Youth Advocate is a positive step forward, it should not effect the important function of the Ombudsman. The Ombudsman continues to have an important role to play in relation to complaints from individuals about government. As a result, it is my recommendation that the creation of a Child and Youth Advocate not change the mandate, role and responsibility of the Ombudsman in relation to children, youth and their families seeking or receiving government services.

If a concern raised by a child, youth or family cannot be resolved with the assistance of the Advocate, or where the Advocate has determined that a independent investigation of a complaint is necessary, the matter could be referred to the Ombudsman. While there is no doubt that children and youth in the Yukon deserve a strong advocate, this must go hand in hand with strong oversight to safeguard the interests of children and families generally. The Ombudsman provides the oversight and quality assurance for children, youth and families receiving or seeking services from government.

Recommendation #1:

The creation of a Child and Youth Advocate not change the mandate, role and responsibility of the Ombudsman in relation to children, youth and their families seeking or receiving government services.

ACCESS TO INFORMATION AND PROTECTION OF PRIVACY ACT

Collection of Information and Protection of Privacy by a Child and Youth Advocate

One of the questions Child and Youth Advocate Act Discussion Paper poses is: "How should government balance the right to privacy with the need for the advocate to obtain information?"

The Paper suggests that the Advocate's access to personal information in the possession of the government will be subject to the *Access to Information and Protection of Privacy Act* (ATIPP Act) "unless different rules are set out in the Child and Youth Advocate Act". I agree the ATIPP Act should apply to the Advocate. The provisions in the ATIPP Act strike the balance between an individual's right to privacy with the need for the Advocate to access information. There are however, certain limited situations, as noted below, that will require special provisions in the proposed Child and Youth Advocate Act to ensure that the Advocate can obtain the information necessary to carry out his or her duties.

It is my recommendation that the ATIPP Act should apply to the Advocate rather than designing a separate regime for access and privacy within the Child and Youth Advocacy Act. It is problematic when different rules of access and privacy apply to accessing and protecting personal information. Introduction of a patchwork of rules should be avoided.

The Advocate will primarily be collecting personal information from and disclosing personal information to departments of Yukon government. All Yukon government departments are public bodies and therefore subject to the ATIPP Act. The Act provides a universal scheme of access to information and protection of privacy principles for the Yukon government and therefore any office created to achieve a public purpose should be subject to the ATIPP Act's governance. Even if the proposed Child and Youth Advocate office is created as an independent office reporting directly to the Legislative Assembly, it should be identified as a public body under the ATIPP Act. As an example, British Columbia's *Freedom of Information and Protection of Privacy Act* includes Officers of the Legislative Assembly within its scope.

Collection, Use and Disclosure of a Child or Youth's Personal Information

The Discussion Paper suggests that as a general rule the Advocate should obtain consent from the child/youth to collect their personal information from the government. This is addressed in section 30(1)(a)(i) of the ATIPP Act, which authorizes the collection of personal information where the individual gives consent for access to information in records in the custody or under the control of a public body.

Section 30 does not authorize the collection of personal information of anyone other than the person who has given their consent. Given that the Advocate is intended to assist

children, youth and their families, it is likely that information about other persons may be required in order for the Advocate properly carry out his or her duties. Section 30(1)(a)(iii) does contemplate that personal information of other individuals could be collected where authorized by legislation. Therefore the Child and Youth Advocate Act must be drafted to include a specific authorization for the Advocate to collect such information.

Disclosure of Information

The Discussion Paper suggests that the Advocate will likely be involved with Yukon First Nations and their children. Advocating for some children or youth will result in the Advocate having to disclose personal information to parties that are not public bodies under the ATIPP Act, such as some First Nations. Section 36 of the ATIPP Act regulates disclosure of personal information. Section 36(d) authorizes disclosure for the purpose of complying with an arrangement or agreement made under an enactment of Canada or the Yukon. This section contemplates the development of explicit agreements that would authorize the disclosure of personal information in certain specified circumstances. In other jurisdictions Information Sharing Protocols have been developed to address access and privacy concerns and to authorize sharing of personal information between two or more entities.

Recommendation #2:

a) That the Advocate's access to information be governed generally by the ATIPP Act.

b) That there be a departure from those rules only where it is absolutely necessary for carrying out the Advocate's mandate.

c) That any departure from the operation of the ATIPP Act be expressly set out in the Child and Youth Advocate Act.

Recommendation #3:

That explicit agreements, authorizing the sharing of information, be used where necessary to enable the Child and Youth Advocate to disclose personal information to parties that are not public bodies under the ATIPP Act.

Records held by the Director of Family and Children's Services - *Child and Family Services Act:* Sections 179 and 180

Question #3 of the Discussion Paper suggests that the Child and Youth Advocate will be accessing information in relation to "matters arising from … services under the *Child and Family Services Act*". In my view, sections 179 and 180 in *Child and Family Services Act* removes a class of records, namely those in the Director's custody or under her control, outside of the operation of the ATIPP Act.

By virtue of the paramountcy provision in section 4 of the ATIPP Act, the express statement in section 180, that sections 177 to 179 of the *Child and Family Services Act* apply despite any provision in the ATIPP Act, means that the ATIPP Act does not apply "to any information or document that is kept by the Director that deals with the personal history of a child or an adult that has come into existence through any proceedings under this Act or the former Act." This section gives the discretion to the Director to decide whether or not to disclose information.

In my view, the operation of section 180 of the *Children and Family Services Act* means that the Advocate will need the consent of the Director to access information kept by the Director. Given the Advocate's role, it is easy to imagine that situations will occur where there will be a conflict between the Advocate and the department. It is therefore unreasonable for the Advocate to have to have the Director's consent to access information. This will hamper the ability of the Advocate to carry out his or her work.

Recommendation #4:

Ensure that the Child and Youth Advocate is not prevented in his or her ability from accessing information and documents referred to section 179 of the Child and Family Services Act.