

# Speaking up for fairness

## 2016 Annual Report



Yukon Ombudsman Diane McLeod-McKay



The Honorable Nils Clarke  
Speaker, Yukon Legislative Assembly

Dear Mr. Speaker:

As required by section 31 of the *Ombudsman Act*, I am pleased to submit the Annual Report of the Ombudsman for the calendar year 2016.

In keeping with past practice, I am also pleased to share this with the Yukon public.

Kind regards,

Diane McLeod-McKay,  
Yukon Ombudsman

## Working toward fairness and awareness

I am very pleased to present my third Annual Report for the Office of the Ombudsman. It has been my pleasure to serve in this role over the past three years. I am looking forward to 2017, when I plan to do more outreach to the public and authorities.

2016 was an interesting year for our office. Although only 14 complaints came into the office, some of these files were remarkably complex and required a lot of attention, including extensive legal research. Stories that illustrate the kinds of complaints dealt with in 2016 can be found elsewhere in this report.

The low number of complaints in 2016 suggests that we need to do a better job of informing the public about our work. For that reason, I have included information below to help the public gain a clearer understanding about how we can assist them with problems encountered when engaging public services.

### What does the Ombudsman do?

Our office can investigate a complaint made by anyone who believes they were treated unfairly by an authority (defined below) in its implementation of programs and policy.

The Ombudsman's Office is considered an office of last resort. This means that before making a complaint to the Ombudsman, you must first try to resolve your complaint with the relevant authority, and exhaust any right of appeal or objection, or any right to apply for a review to a court or statutory tribunal.

It is important to know that the Ombudsman does not advocate for the complainant or authority when conducting an investigation. The Ombudsman's job is to determine if the authority acted unfairly and, if so, to recommend a remedy to prevent further unfairness. Sometimes the remedy will benefit the complainant and sometimes it will not. That depends

on the complaint and the ability of the authority to right the unfairness.

### Who can the Ombudsman investigate?

The Ombudsman can investigate 'authorities' in Yukon, which are:

- Yukon government departments
- a person, corporation, commission, board, bureau or authority whose board members (or a majority of them) were appointed by an Act, Minister, or Commissioner in Executive Council, and who are public officers or public servants in Yukon or are responsible to the Yukon government
- public schools
- Yukon College
- hospitals
- professional and occupational governing bodies
- municipalities (at their request only)
- Yukon First Nations (at their request only).

The Ombudsman has no authority to investigate:

- disputes between individuals
- the federal government
- the RCMP

- landlord/tenant matters
- home or auto insurance
- banks
- businesses
- the courts, Yukon Legislative Assembly, Yukon Elections Office, or lawyers acting on behalf of government.

### What happens when I make a complaint?

The Ombudsman is independent from government. This independence is very important as it ensures investigations conducted by the Ombudsman are objective and neutral. The Ombudsman's role is to act as a neutral arbiter in resolving complaints made against authorities about unfair treatment.

Upon receiving a complaint, the Office of the Ombudsman will try to work with the authority in question to address the complaint. If the complaint cannot be addressed informally, the Ombudsman may choose to conduct a full investigation. Once the investigation is complete, the Ombudsman will generally prepare a report containing the findings about unfairness and any recommendations made to remedy unfairness. The complainant does not receive the full report, but is provided with written information about the investigation, the findings, and any recommendations.

### When will an authority be found to have acted unfairly?

Under the *Ombudsman Act*, an authority will be found to have acted unfairly in the following circumstances:

- If the authority's decision, recommendation, act or omission related to the complaint was:
  - contrary to law
  - unjust, oppressive, or improperly discriminatory
  - made, done, or omitted pursuant to a statutory provision or other rule of law or practice that is unjust, oppressive or improperly discriminatory
  - based in whole or in part on a mistake of law or fact or on irrelevant grounds or consideration
  - related to the application of arbitrary, unreasonable, or unfair procedures
  - otherwise wrong.
- If in doing or omitting an act, or in making or acting on a decision or recommendation, the authority:
  - did so for an improper purpose
  - failed to give adequate and appropriate reasons in relation to the nature of the matter
  - was negligent or acted improperly
  - caused unreasonable delay.

These are legal standards, which means there is a bar that must be reached before a finding of unfairness will be made. During an investigation, an investigator may determine an authority acted improperly, but not unfairly according to the above standards. This is sometimes a source of confusion for complainants.

### How can I learn more?

If you want to learn more about what the Ombudsman's Office does, visit [www.ombudsman.yk.ca](http://www.ombudsman.yk.ca). If you believe you were treated unfairly by an authority, contact the Ombudsman. See the end of this report for our contact information.

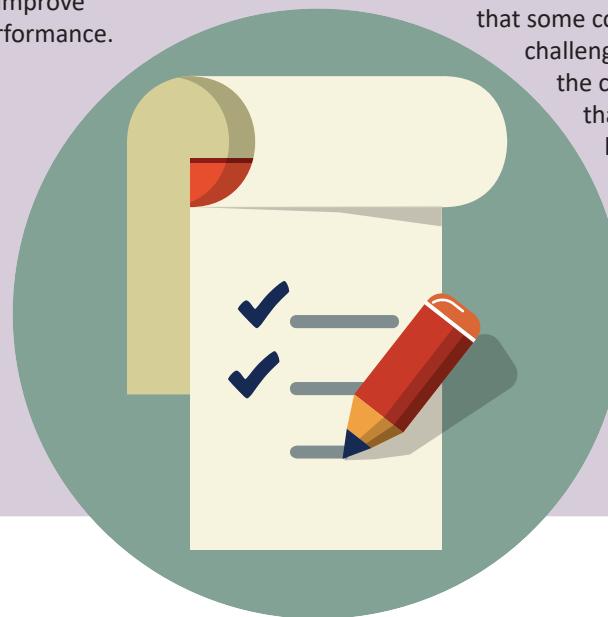


# Update on our goals

In my 2013 Annual Report, my first annual report after becoming Yukon's Ombudsman, I identified three goals that I intended to work on during my term. They are: improved performance, building relationships, and demonstrating our accountability. I am pleased to provide a progress report below on this work.

## Improving performance

My last two annual reports included updates on what we had done to improve performance.



One of the key changes we made during that period was the development of our early case resolution model. The purpose of creating this model was to improve timelines for resolving complaints that came into our office. In 2015, I reported that we had made significant improvements in meeting our performance measures. However, in 2016 we experienced some difficulty in meeting our targets.

Even though we are committed to resolving complaints quickly, we learned that some complaints are much more challenging to resolve due to the complexity of the issues that arise. In 2016, we had a few very complex complaints made to the Ombudsman that we were able to resolve informally, but that caused us to considerably exceed our performance target.

In recognition of these issues and the need to build some flexibility into our informal process, we changed the name of our 'early case resolution' process to 'informal case resolution'. For those cases that are complex, we plan to build a mechanism into our informal case resolution process to establish more realistic timelines for resolution of complex cases. This will help ensure we give ourselves enough time to properly consider the issues, and to communicate with the complainant and the public authority more clearly about whether we can settle a complex complaint.

## Building relationships

We continued to work with authorities to resolve complaints informally and achieved some success.

There was only one formal investigation launched this year. The decision to conduct this formal investigation was not because the informal resolution process failed, but because I was of the

view that the circumstances warranted a full investigation.

In 2017, I will expand this goal to include building relationships with the public. To date, it has proven very challenging to get the message out to the public about what my office does and so I have requested money in next year's budget to hire a resource to help me improve communications to the public.

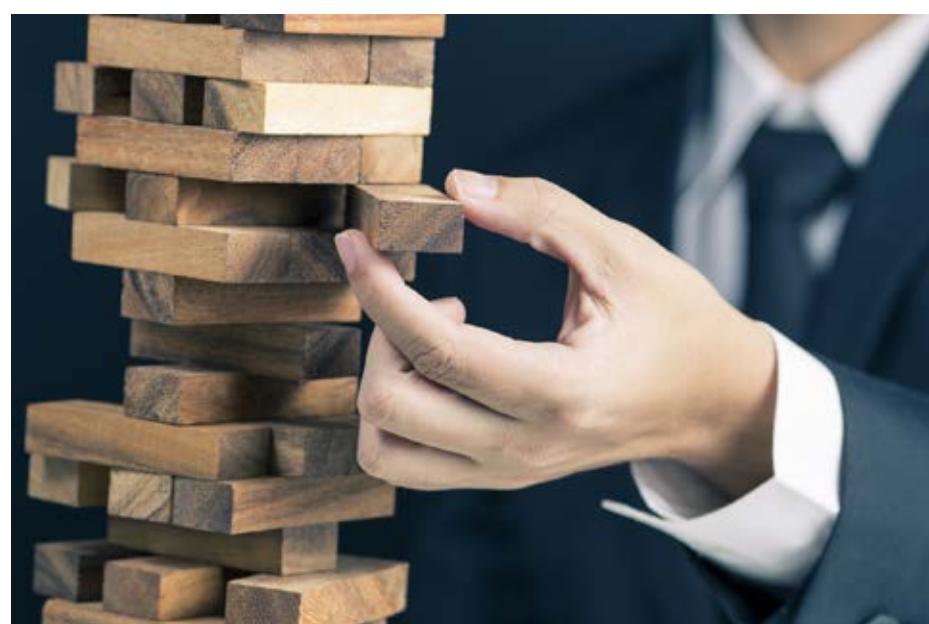
## Demonstrating our accountability

Our ability to meet our performance measures was tested this year for the reasons noted above. That said, our new case management system (implemented in late 2016) will assist us in producing better information about our procedures, so they can be more easily improved.

Diane McLeod-McKay  
Ombudsman

## Ensuring fairer investigations

BEING THE SUBJECT OF AN INVESTIGATION IS HARD ON ANY BUSINESS, BUT YOU SHOULD BE ABLE TO COUNT ON A FAIR, CLEAR, TIMELY PROCESS.



Roy was a Yukon entrepreneur running a business in Whitehorse. Like many Yukon employers, he had hired foreign workers through the Yukon Nominee Program (YNP). This joint territorial/federal government program is meant to help Yukon respond to labour market needs while also safeguarding job opportunities for Yukoners and Canadians.

In 2014, the Advanced Education Branch of the Department of Education told Roy that it was investigating a complaint registered against his business. During the investigation, Roy's business could not be part of the nominee program.

In the end, the YNP investigation found no problems with Roy's business, but he was still very unhappy with several aspects of the investigation and

believed it was unfair. He said that he was never informed of the nature of the complaint against him and was given no opportunity to respond to it. He added that there were no timelines or clear process for the investigation. Roy said that these issues were part of the reason he ended up closing his business.

When Roy approached the Ombudsman's Office, we used our early case resolution process to investigate his concerns. We worked with the Advanced Education Branch to identify and agree on some deficiencies in the procedural fairness of its YNP investigations. As a result, the branch agreed to develop new policies to correct these deficiencies. The new policies will cover procedural fairness in YNP investigations, appropriate and timely communication with the business using the YNP, and proper identification and maintenance of records of decisions and communications with the business.

**It's tough enough trying to keep a business going while being investigated, but at the very least you have the right to procedural fairness.**

## Time matters

DELAYING A DECISION BEYOND LEGAL TIMELINES IS UNFAIR, EVEN WHEN DONE WITH GOOD INTENTIONS.

Bill was interested in buying some land and made a residential spot land application to the Lands Management Branch of the Department of Energy, Mines and Resources. As part of the application process, Bill had to make a submission to the Yukon Environmental and Socio-economic Assessment Board (YESAB).

YESAB recommended against Bill's application, but he knew that the final say rested with the Yukon government, so he was eagerly awaiting its decision. But Bill had to wait much longer than expected. It took a full eight months for the government to issue its decision, seven months longer than the time frame allowed in YESAA. The government agreed with YESAB and denied Bill's application. He then brought his case to the Ombudsman's Office. Bill believed it was not fair that he had to wait so long for the government decision.

When our office looked into the complaint, the Lands Management Branch explained that the delay had been caused by two factors – its constitutional duty to consult with a First Nation and its attempts to find another piece of land acceptable to Bill before issuing its final decision.

Our investigation found that the delay was unreasonable. We found that the consultation with the First Nation about Bill's spot land application had actually ended months prior to the decision being issued. Instead, the ensuing discussions with the First Nation were really about other possible pieces of land that Bill could apply for. These discussions fell outside the process set out in the Yukon Environmental and Socio-economic Assessment Act (YESAA) and were not a legitimate reason to delay the decision. Because

the constitutional duty to consult with the First Nation ended when the government decided to accept YESAB's recommendation, the decision should have been issued at that point.

Although the Lands Management Branch may have thought it was in Bill's interest to delay the decision, it failed to respect Bill's entitlement to a decision within the time frame set out in the act and to communicate the decision to him.

The Lands Management Branch accepted our conclusions, apologized to Bill and explained the reasons for the delay. It also clarified its policy to ensure that future decisions are issued as set out in YESAA, noting that other assistance to the applicant to find suitable land is a separate process and should not delay the decision. Finally, the branch circulated the clarified policy to staff.



**Although this settlement did not change the outcome of Bill's land application, which is what he had hoped, it resulted in another lasting benefit. It will improve the timeliness and clarity for service delivery for all Yukoners.**

## ► Be aware, be fair

TWO RULES FOR FAIRNESS: KNOW THE RULES. FOLLOW THEM.

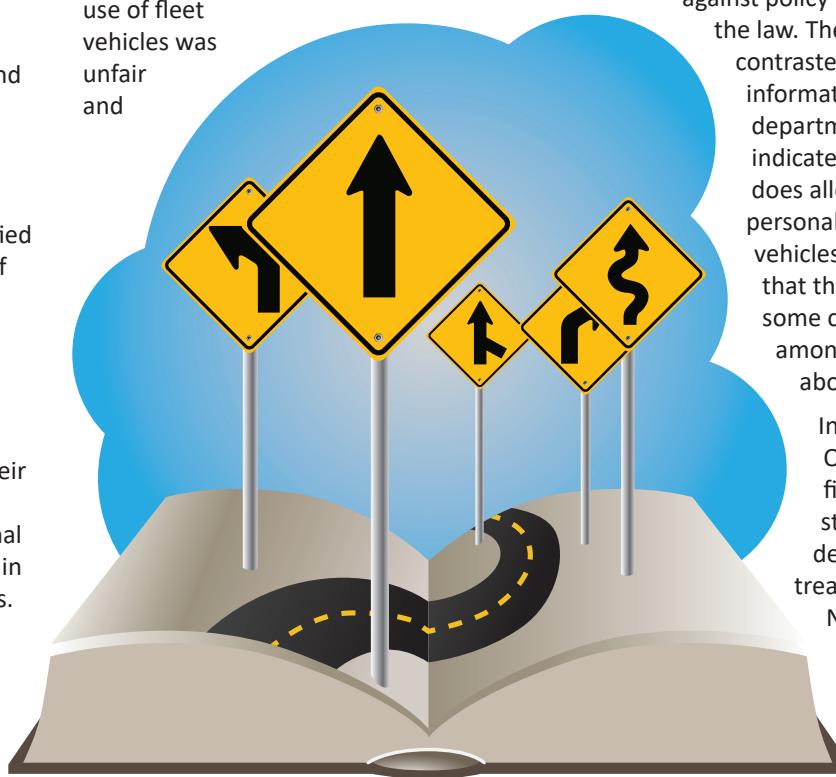
In 2010, two nurses, Naomi and Greta, accepted jobs at two different health centres in remote Yukon communities. Before agreeing to accept the positions, both nurses negotiated agreements with the Department of Health and Social Services (HSS) to use Yukon government fleet vehicles to get to and from work, because neither owned a vehicle. At the time, the department was having trouble staffing remote locations such as these, and the agreement on vehicle use was identified as a creative way to permanently staff the positions. Both Naomi and Greta said these agreements were indeed a major factor in their decisions to take the positions.

From 2010 to 2014, the nurses used fleet vehicles to travel to and from their health centres to start and end work. They also used them for other personal uses, such as grocery shopping when in Whitehorse on health centre business. Then, things changed. In 2015, both Naomi and Greta complained to the Ombudsman's Office of unfair treatment because HSS had

disallowed personal use of the vehicles, saying it was contrary to policy.

Because the two complaints were so similar, our office investigated them together.

In a preliminary report to the department, based on the evidence presented, the Ombudsman concluded that the decision to disallow personal use of fleet vehicles was unfair and



"otherwise wrong" as set out in the *Ombudsman Act*. The Ombudsman found that the agreements were clear and that the department officials involved had the authority to offer these terms. She recommended that the original agreements be restored.

Then, HSS presented new information, saying the agreements were not only against policy but also against the law. The new evidence contrasted with earlier information from the department, which indicated it can and does allow some personal use of fleet vehicles. This told us that there remains some confusion amongst HSS officials about the rules.

In the end, the Ombudsman's finding was still that the department's treatment of Naomi and Greta was unfair and wrong,

but for a different reason. It was because the new evidence presented by the department indicated that the agreements entered into by department officials regarding the vehicle use were prohibited under the *Financial Administration Act*. Therefore, the agreements should never have been entered into by department officials in the first place. Both nurses relied on these agreements when they decided to take their jobs, and both were placed in the impossible position of being denied the benefit of their agreements without any recourse.

The department agreed to apologize to the nurses. It also agreed to review and potentially revise its human resources policies and procedures to ensure the rules regarding fleet vehicles are clear, and to provide training on the rules to employees responsible for hiring.

**Government officials have a responsibility to ensure they know, understand and follow the rules that apply to their work. Failure to understand the rules can have lasting negative consequences for other staff or the public.**

## ► System error

GOVERNMENT MUST TAKE CARE NOT TO MAKE ERRORS BUT MUST ALSO BE OPEN TO CHECKING OUT POSSIBLE MISTAKES.

Bonnie received her federal child benefit cheque in the mail and deposited part of it, \$599.00, into her bank account, taking the rest in cash. When she received her next social assistance cheque from the Yukon government, Bonnie was surprised to see that it was lower than usual.

It turned out that when the Department of Health and Social Services (HSS) noticed the deposit of \$599.00 on her bank statement, staff assumed it was money she had earned. Any earned income is deducted from social assistance for that month. However, some things are not considered earned income, such as the federal child benefit. Bonnie was certain her social assistance payment should not have been cut.

Bonnie tried to tell HSS staff that the \$599.00 deposit was part of her child benefit but they were not convinced, so she came to the Ombudsman's Office for help. When we approached the department, we were able to work with staff to determine that an error had indeed been made and that the \$599.00 had been wrongly classified as earned income. The department agreed to reimburse Bonnie for the incorrect reduction in her social assistance cheque.

Bonnie took the initiative to have the federal child benefit direct deposited into her account, which clearly shows where the money is coming from, to prevent such a misunderstanding from occurring again.

**Government staff can accidentally make wrong assumptions. It is very important for the public to raise their concerns, and for government to be willing to look into possible mistakes and correct any errors they find.**

## ► Troubled trial travels

THERE ARE MANY KINDS OF MEDICAL TRAVEL, BUT ONLY THOSE SET OUT IN YUKON LAW QUALIFY FOR PAYMENT BY GOVERNMENT.

Brent was seriously ill and heard about a drug trial taking place in a southern Canadian city for a drug that could treat his illness. His doctor thought Brent would be a good candidate for the trial. Brent approached Insured Health and Hearing Services, in the Department of Health and Social Services, to ask if the government would pay for his travel to get to the trial. The department turned Brent down, which he felt was unfair, and Brent brought his complaint to the Ombudsman.

Our office considered the complaint and found the department did act fairly.

Decisions of this kind are made based on what is set out in two acts, the *Travel for Medical Treatment Act* (TMTA) and the *Health Care Insurance Plan Act* (HCIPA). TMTA authorizes government payment for travel to obtain necessary insured services not available in Yukon. HCIPA identifies the insured services which the Yukon government will pay for. In Brent's case, clinical drug trials are not an insured service under HCIPA.

**Even though taking part in a drug trial may address an illness, Insured Health and Hearing Services is not able to pay**

for travel expenses to get to a trial, because it is not an insured service under law.

## ► Doing the job right takes resources

AN AD HOC APPROACH TO PROVIDING SUPPORT TO AN ADVISORY COMMITTEE TOOK ITS TOLL ON A YUKON HEALTH PROFESSIONAL.

Judy is a Licensed Practical Nurse (LPN) who was the subject of a complaint under the *Licensed Practical Nurses Act*. The complaint went to the Licensed Practical Nurses Advisory Committee, which is supported by the Department of Community Services.

The advisory committee has the responsibility to review the complaint, decide if it should be referred to a board of inquiry and, if so, appoint three members of its discipline committee to a board of inquiry to deal with the complaint. Once that decision is made, the advisory committee has 15 days to let the LPN know and forward a copy of the complaint.

In Judy's case, the advisory committee did not follow the rules. It did not send the notice and the copy of the complaint until almost eight months after making the decision. This delay had a significant effect on Judy because until this notice was given, the complaint could not be heard, and in the meantime, she could not work as an LPN in Yukon, or anywhere else.



Our investigation found that the delay was unreasonable and unfair, and that responsibility for the delay rested primarily with the advisory committee, but also with Community Services. The committee had no office, dedicated space, budget, staff or any secure means of managing correspondence or files. Although the department had provided administrative support in the past, it had reduced that support due to its numerous responsibilities, programs and services, each with competing needs. This contributed to Judy's case falling through the cracks.

We also found that the delay was partly due to a lack of training for committee members in administrative law and

about their roles and responsibilities. While the chair of the advisory committee is responsible for identifying training needs, the department is responsible for providing resources for that training.

The department agreed to provide an administrative assistant to serve the advisory committee and boards in general, to develop a manual to guide the committee, and to explore options to provide administrative law training.

**When government delegates another body, such as the advisory committee, to carry out a statutory mandate, it also has the responsibility to ensure that body has the proper tools to do its job well.**

# HOW WE MEASURED UP IN 2016

## ► Ombudsman accountability metrics

### File management goals

- See diagrams at right.

### Proactive compliance work

- Began exploring ways to support authorities' conduct of investigations

### Skills development

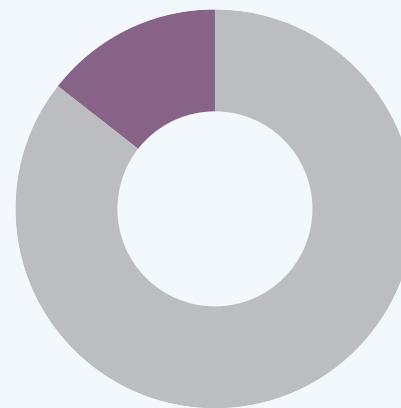
- Ombudsman attended one national meeting
- Ombudsman and staff attended a presentation by the Correctional Investigator on the use of segregation, and a webinar called 'Safeguarding the Independence of the Canadian Watchdog Institutions'

### Complaints against the Office of the Ombudsman

- None

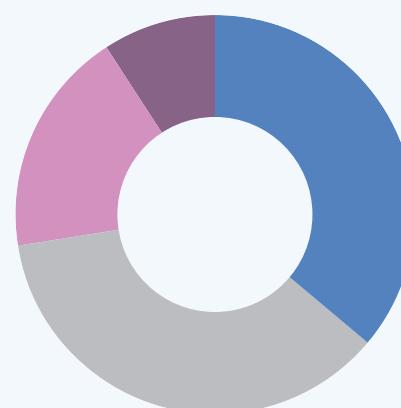
### Ombudsman investigation - 1 year target

Closed (within 1 year)	0
Closed (over 1 year)	6
Still open (within 1 year)	0
Still open (over 1 year)	1



### Ombudsman settlement - 90 day target

Closed (within 90 days)	8
Closed (over 90 days)	8
Still open (under 90 days)	4
Still open (over 90 days)	2



### Ombudsman Act - 2016 activity

Resolved at intake - no file opened	
Non-jurisdiction	49*
Referred-back	22
Requests for information	41
Informal complaint resolution	12
<b>Total</b>	<b>124</b>
File opened by type	
Informal Case Resolution files opened	14
Investigation files opened	0
Mediation files opened	0
<b>Total</b>	<b>14</b>
All files opened in 2016	14
Files carried over from previous years	15
Files closed in 2016	22
Files to be carried forward	7

\*This number is the same for all tables showing intake non-jurisdiction.



## ► Budget summary

The Office of the Ombudsman's budget covers the period from April 1, 2016 to March 31, 2017.

Operations and maintenance (O&M) are expenditures for carrying out day-to-day activities. A capital expenditure is for items that last longer than a year and are relatively expensive, such as office furniture and computers.

Personnel costs comprise the largest part of our annual O&M budget and include salaries, wages and employee benefits. Expenses described as 'Other' include such things as rent, contract services, supplies, travel and advertising.

For accounting purposes, capital expenses are reported jointly for the Offices of the Ombudsman, the

Information and Privacy Commissioner (IPC), and the Public Interest Disclosure Commissioner (PIDC) because all staff use these assets in their work. This is also the case for the personnel category.

Our personnel budget increased slightly in 2016 to provide staff with a small increase in wages and to create a new position to support the extra work load generated by the *Health Information Privacy and Management Act*, which was brought into force in August of 2016. The new position was filled in May of 2016. There was also a small increase in the O&M budget for the Ombudsman's Office to fund the Canadian Council of Parliamentary Ombudsman meeting, hosted in the territory by the Yukon Ombudsman in June of 2016.

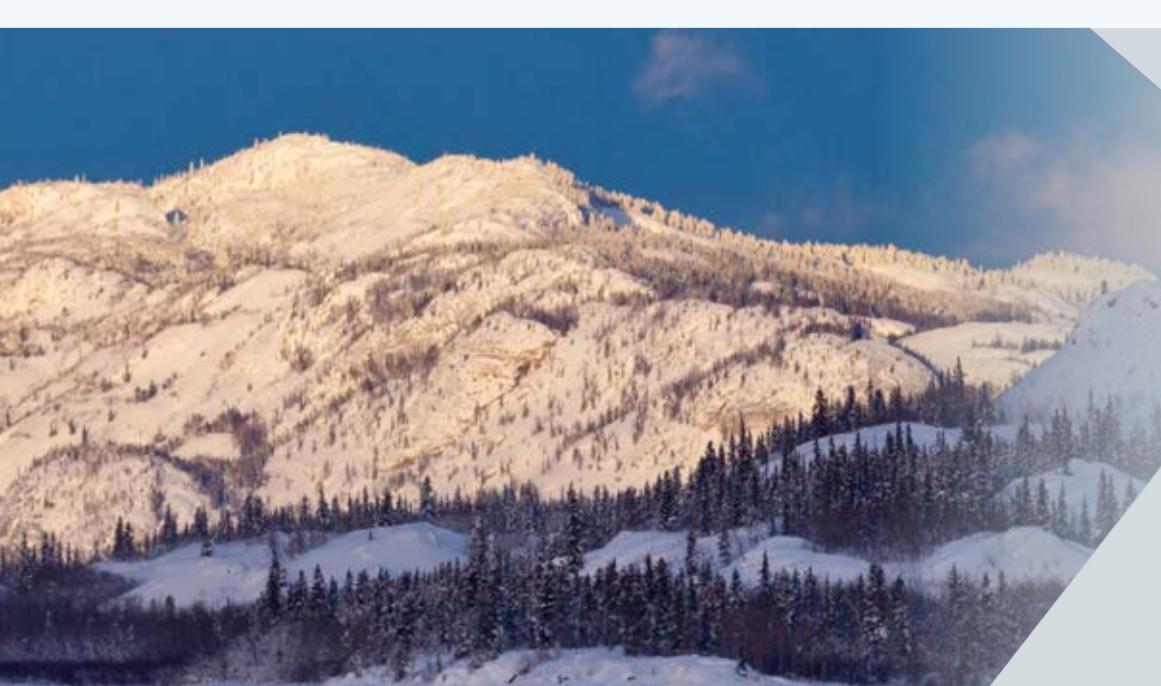
2015/16 Budget	
Personnel (combined)	\$ 765,000
Capital (combined)	\$ 34,000
Other (Ombudsman's office)	\$ 104,200
Other (IPC's office)	\$ 131,000
Other (PIDC's office)	\$ 17,800
<b>Total</b>	<b>\$ 1,052,000</b>

2016/17 Budget	
Personnel (combined)	\$ 841,000
Capital (combined)	\$ 5,000
Other (Ombudsman's office)	\$ 109,000
Other (IPC's office)	\$ 131,000
Other (PIDC's office)	\$ 18,000
<b>Total</b>	<b>\$ 1,104,000</b>

### Files opened in 2016 by authority

Authority	Number of files			Recommendations		
	Informal case resolution	Investigation	Total	Formal*	Accepted	Not yet implemented (includes prior years)
Health & Social Services	3	0	3	2	2	1
Justice	5	0	5	2	2	2
Yukon Workers' Compensation Health and Safety Board	4	0	4			
Yukon Housing Corporation	2	0	2			
<b>Total</b>	<b>14</b>	<b>0</b>	<b>14</b>	<b>4</b>	<b>4</b>	<b>3</b>

\*Formal recommendations are those made by the Ombudsman in a formal Investigation Report issued in 2016.



## ► Contact us

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All services of the Ombudsman's office are free and confidential.

We welcome your feedback on our annual report including the method of delivery.