OFFICE OF THE OMBUDSMAN AND

INFORMATION & PRIVACY COMMISSIONER

ANNUAL REPORT

YUKON LEGISLATIVE ASSEMBLY

Office of the Ombudsman

JANUARY 1 - DECEMBER 31, 2002

OMBUDSMAN AND INFORMATION AND PRIVACY COMMISSIONER

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TABLE OF CONTENTS

INFORMATION AND

PRIVACY COMMISSIONER

TABLE OF CONTENTS

YUKON LEGISLATIVE ASSEMBLY
Office of the Ombudsman

May 2004

The Honourable Ted Staffen
Speaker of the Legislative Assembly
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 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, 2002 to December 31, 2002.

Yours truly,

H Moorlag.

Hank Moorlag
Ombudsman

MISSION STATEMENT

To provide an independent, impartial means by which public complaints concerning the Government of Yukon can be heard and investigated under the *Ombudsman Act*.

To provide an effective avenue for receiving and processing public complaints and requests for the review of decisions by public bodies related to the *Access to Information and Protection of Privacy Act*.

To promote fairness, openness and accountability in public administration.

THE FUNCTION OF THE OMBUDSMAN

The function of the Ombudsman is to ensure fairness and accountability in public administration in the Yukon.

The Ombudsman fulfills this function by receiving complaints, conducting an impartial and confidential investigation and, when warranted, recommending a fair and appropriate remedy.

The Ombudsman is not government but investigates government. The Ombudsman can recommend that an authority resolve administrative unfairness, but cannot make it change its actions or decisions. The Ombudsman receives complaints from individuals and groups but is not their advocate.

The *Ombudsman Act* provides the statutory framework under which the Ombudsman carries out his function.

The Yukon Ombudsman has jurisdiction to investigate complaints about the actions, decisions, recommendations or procedures of the following:

- departments of the Yukon Territorial Government;
- crown corporations and independent authorities or boards;
- public schools and Yukon College;
- hospitals, local and regional health bodies, and governing bodies of professional organizations; and
- municipalities and Yukon First Nations governments if requested by a municipality or First Nation.

The Ombudsman does not have the authority to investigate the following:

- complaints about actions which occurred prior to July 1996 when the *Ombudsman Act* became law;
- complaints about the courts, the Yukon Legislature, the Yukon Elections Office, or lawyers acting on behalf of the Yukon Territorial Government;
- disputes between individuals;
- complaints against the federal government; and
- where there is a statutory right of appeal or review.

The Ombudsman is an office of last resort. This means the Ombudsman encourages any complainant to raise his or her complaint with the authority first and then to come to the office if that route is unsuccessful.

OMBUDSMAN

YEAR IN REVIEW

The primary purpose of an ombudsman is to enable an independent review of disputes relating to public administration. A continuing challenge is to demonstrate the value of investigations conducted by an independent office and recommendations that will not only settle a dispute, but also lead to improved administrative practices. A common misconception by public authorities of an ombudsman investigation is that of an advocacy based process designed to find fault or second-guess government procedures. Defensiveness is often a natural response. However, the simple fact is that an ombudsman investigation is most effective when it is not regarded as an adversarial process. When public authorities welcome an independent review as a beneficial way to settle disputes the full potential of the institution of ombudsman is realized.

This was most evident in 2002 with a special investigation by the Office of the Ombudsman into a dispute following demolition of the Sewell House by the City of Whitehorse (see summary on page 5. City Council called on the Ombudsman to investigate. The investigation put to rest the many questions raised publicly and it brought to an end acrimonious debate and tension within City Council on the matter.

In previous annual reports I identified miscommunication as a very common element in disputes. Again, in 2002 we saw the need for clarity through plain language in written materials about government programs. Equally important is how procedures and decisions are communicated. The public may not always agree with decisions that affect them, but they ought to clearly understand the reasons for them and be satisfied they were treated fairly.

The notion of fairness in decision making is, of course, subjective. What the decision maker considers fair may not be viewed in the same way by the individual affected by the decision. A number of investigations in 2002 revealed that the lack of information; or the failure to communicate clearly the operation of a program or policy; or the failure to give reasons for a decision, left complainants feeling they had been treated unfairly by government. These cases are included with the case summaries under "Ombudsman Issues" beginning on page 6.

A scan across Ombudsman jurisdictions in Canada reveals it is probably an unrealistic expectation that the work of the Ombudsman will eventually eliminate complaints from the public. The volume of complaints fluctuates from year to year, but no clear trend is apparent in support of a theory that our work will lead to such an optimistic result. Two things, however, are achievable. The first is that administrative practices can be changed in ways that prevent a recurrence of an error. The second is that a process can be adopted for addressing public concerns and complaints so that criticism is received in a positive way and appropriate remedial action can be taken in a timely way. In time, perhaps government will be able to respond to these concerns without the need for the involvement of the Ombudsman. In the meantime our office will continue to investigate complaints and seek resolution.

I am very grateful for the untiring efforts and dedication of my staff to meet our workload demands. Also, for the very important proactive work they do in developing sound working relationships with departmental officials and identifying opportunities for preventing or reducing complaints by recommending improvements in public administration, I express my thanks.

A total of 57 complaints were received by the Ombudsman in 2002. When added to the 22 files brought forward from 2001, the office dealt with 79 files that were within the jurisdiction of the Ombudsman to investigate. During the year 50 cases were concluded and 29 were carried forward into 2003. The statistical summary beginning on page 12 shows how the complaints were resolved.

Sewell House

Under Section 11(5) of the *Ombudsman Act*, a municipality or Yukon First Nation government may refer a matter to the Ombudsman for investigation and report.

At the request of the City of Whitehorse, an investigation was conducted into the destruction of the Sewell House, a Whitehorse waterfront building listed in the City of Whitehorse Heritage Building Register and the Yukon Historic Sites Inventory. The building was demolished by a City work crew on May 12, 2002.

The investigation had the following objectives:

1. To examine the events leading up to the destruction of the Sewell House;
2. To consider whether the events indicated the destruction was a deliberate or accidental event; and
3. To examine the extent to which a conspiracy or cover up was involved.

The Ombudsman concluded that the destruction of the Sewell House was an inadvertent act, based on a mistaken intent, but nevertheless preventable. The evidence uncovered during the investigation did not support a conclusion that there was a deliberate intent to destroy a building known to have heritage significance. The Ombudsman also concluded the investigation did not reveal a conspiracy or cover-up in relation to the Sewell House destruction.

The Ombudsman expressed the view that, from an administrative viewpoint, it is more productive to examine the causes contributing to a problem than to assign blame to an individual. On the basis of the investigation, he identified the following as contributing to the problem:

- Inadequate communication, primarily through a failure to verify the specific nature of a work assignment;
- The lack of an effective working protocol between City departments where responsibilities overlap;
- A failure to ensure provisions of the Heritage Bylaw and the demolition provisions under the Building and Plumbing Bylaw were strictly followed;
- A lack of awareness on the part of staff and employees about heritage sites;
- An inadequate system of recording work orders and related activities; and
- Increased demands on supervisors and their departments, without an increase in resources, may have decreased time available for thoroughness.

Powers and duties of Ombudsman in matters of administration

11. (5) A municipality or a Yukon First Nation government may at any time refer a matter to the Ombudsman for investigation and report and the Ombudsman shall:

(a) subject to being able to recover the costs of the investigation from the municipality or the Yukon First Nation government, investigate the matter referred; and

(b) report back as the Ombudsman thinks fit,

but sections 23 to 26 do not apply in respect of an investigation or report made under this subsection.

Accordingly, the following recommendations were made:

1. *That the City Administration review its procedures for communicating work assignments between all levels of operations.*
2. *That the City Administration develop and implement an effective working protocol between departments where responsibilities overlap.*
3. *That the City Administration review existing procedures and modify them to ensure strict compliance with regulatory controls.*
4. *That the City Administration arrange Heritage Awareness Training for staff and employees, including the distinction between Heritage Registry and Designated Heritage Sites.*
5. *That the City Administration review existing procedures for recording work orders and related activities to maximize opportunities for operational oversight and regulatory compliance in advance of work assignments being carried out.*
6. *That the City Administration review the adequacy of Department of Public Works resources.*

The *Ombudsman Act* does not require the municipal government to decide how any recommendations will be given effect. Indeed, there is no specific authority for the Ombudsman to even make any recommendations with a section 11(5) investigation. Nevertheless, the City of Whitehorse accepted all the recommendations and advised that careful consideration would be given to their implementation.

OMBUDSMAN ISSUES

In presenting a description of our case work over the year, we provide here a discussion of issues that arose and use the information from individual case files to indicate how those issues were addressed. This approach is taken for two reasons. The first is that it is more instructive to bring specific issues into focus rather than to simply describe the details of an individual case. The second reason is to respect the confidentiality requirements of the *Ombudsman Act*.

A core principle under which the Ombudsman operates is that investigations are confidential and conducted in private. The outcome of an investigation is only reported to the complainant and to the authority

Opportunity to make representation

17. If it appears to the Ombudsman that there may be sufficient grounds for making a report or recommendation under this Act that may adversely affect an authority or person, the Ombudsman shall inform the authority or person of the grounds and shall give the authority or person the opportunity to make representations, either orally or in writing at the discretion of the Ombudsman, before the Ombudsman decides the matter.

against whom the complaint was made. This facilitates the openness, the frankness, and the non-adversarial approach that characterizes an Ombudsman investigation.

Nevertheless, the *Ombudsman Act* requires the office to report on the work of the office in its annual report, and it would be difficult to do so without providing a summary of our case work. The following summaries are presented in the context of specific fairness standards or grounds set out in section 23 of the *Ombudsman Act* upon which the Ombudsman may base an opinion that an authority acted unfairly.

Mistake of fact leads to unfairness

The Ombudsman investigated a complaint made by a parent related to the disciplinary action taken by the school against her child. When the parent contacted the Department of Education about the discipline the child had received at school, the Superintendent confirmed the action taken was permitted by the discipline policy formally adopted by the school in question. However, the particular policy referred to was developed by the Department for use with special needs students and was not intended for use with the general school population. The school in question did not have disciplinary guidelines in place for students who were not special needs students.

The Ombudsman substantiated the complaint on the ground that the action was based in whole or in part on a mistake of fact. An authority makes a mistake of fact when it is mistaken as to the existence of a certain fact or facts. In this case, the discipline guidelines were being relied on in the situation in question, in error.

The Ombudsman recommended that the Department of Education develop standard principles to support and guide local school administrations and School Councils in their development of policy for the enforcement of school rules. At the time the Ombudsman made the recommendations, the *Education Act* was being reviewed. The Department of Education indicated that in the course of this review the public was being consulted on school rules, student behaviour and discipline. The Department anticipated that amendments to the *Act* addressing this issue would be tabled in the legislature in the spring. As the Ombudsman was satisfied that the concerns identified in his report were being addressed in the review of the *Education Act*, he considered this matter resolved.

Avoiding unreasonable delay; exercising care

The complainant had been travelling outside of the Yukon for some time and applied by mail to renew a driver's license. The complainant sent the required application form and fee to Motor Vehicles in June. Although the complainant wrote to Motor Vehicles on three occasions inquiring as to the status of the license, Motor Vehicles failed to respond or act on the request for a period of four months.

By the time the complainant was informed of the decision not to renew the license, the existing license had expired. The complainant was unaware of this fact.

Complainant to be informed

26. (1) If the Ombudsman makes a recommendation pursuant to section 23 or 24 and no action that the Ombudsman believes adequate or appropriate is taken within a reasonable time, the Ombudsman shall inform the complainant of the Ombudsman's recommendation and make any additional comments the Ombudsman considers appropriate.

(2) The Ombudsman shall in every case inform the complainant within a reasonable time of the result of the investigation.

Motor Vehicles attributed its failure to respond to the complainant's correspondence and the delay in acting on the request for renewal to the fact the premises were being renovated and a number of staff, including the Registrar, were away during the period in question. The Registrar was also of the opinion that Motor Vehicles generally does not have any responsibility to inform a client that his or her license has expired.

The Ombudsman substantiated the complaint on the ground of unreasonable delay. The Ombudsman considers delay to be unreasonable when the particular service to the public is postponed improperly, unnecessarily or for some irrelevant reason. Motor Vehicles indicated that in most cases an applicant is advised to allow 30 days for a renewal application by mail. The only explanation for taking four months in this case was a combination of staff leave and renovations to the premises. While some delay may occur as a result of the renovations and staff leave, a delay of four months is unacceptable in the circumstances.

The Ombudsman also found that in the course of dealing with the application, Motor Vehicles was administratively negligent. The Ombudsman believes that it is reasonable to expect an authority to recognize a situation in which a person with whom it is dealing is dependent upon it and to exercise sufficient care in the circumstances to avoid damaging or prejudicing a person's position. Although not necessarily required to advise individuals in advance that their license is about to expire, Motor owes a duty to exercise sufficient care in the circumstances to avoid prejudicing the person's position as happened in this case.

Procedure after investigation

23. (1) Where, after completing an investigation, the Ombudsman believes that

(a) a decision, recommendation, act or omission that was the subject matter of the investigation was

(i) contrary to law;

(ii) unjust, oppressive or improperly discriminatory;

(iii) made, done or omitted pursuant to a statutory provision or other rule of law or practice that is unjust, oppressive or improperly discriminatory;

(iv) based in whole or in part on a mistake of law or fact or in irrelevant grounds or consideration;

(v) related to the application of arbitrary, unreasonable or unfair procedures; or

(vi) otherwise wrong;

(b) in doing or omitting an act or in making or acting on a decision or recommendation, an authority

(i) did so for an improper purpose;

(ii) failed to give adequate and appropriate reasons in relation to the nature of the matter; or

(iii) was negligent or acted improperly; or

(c) there was unreasonable delay in dealing with the subject matter of the investigation,

the Ombudsman shall report his or her opinion and the reasons for it to the authority and may make the recommendation he or she considers appropriate.

Transparency and accountability in decision making

The Ombudsman received a complaint that the process followed by the Yukon Legal Services Society in hiring staff was unfair. Although investigation revealed the procedure actually followed was fair, it was apparent the Society had been operating without any formal written procedures for making or communicating staffing decisions.

A fundamental principle of administrative fairness is that policies and guidelines established by authorities

should be clearly written and well publicized. The failure to clearly state in writing an authority's process for making a decision creates a perception that decisions are made arbitrarily and unfairly. The Society accepted the Ombudsman's recommendation to establish a written policy and procedure for making, and accounting for, future staffing decisions.

Communicating information clearly

The Ombudsman investigated a complaint that the procedure followed by the Assessment and Taxation Branch in dealing with a group application under the Rural Electrification Program was unfair.

Under the program, rural property owners can apply for funding to extend electrical services to their area. If the required majority approve the project, the installation proceeds and the costs are distributed equally amongst all property owners in the project area. The complainant felt it was unfair to require those who voted against the project to contribute equally to the cost of installation. Further, the complainant felt that the way in which the authority carried out the approval process was unfair because it was not consistent with the written material or oral advice provided to them by the authority.

It is not the role of the Ombudsman to determine public policy in respect of extension of electrical service to rural areas, but the Ombudsman can review the operation of any policy from a fairness perspective.

Written materials about the Rural Electrification Program used words like "fair share" and "equitable and proportional distribution of costs" to describe the cost to a property owner and "cooperative open partnerships" to describe the relationship between the property owner and the government. The investigation revealed that the use of such vague and ambiguous words to describe a property owner's obligations and the role of the government led to a misunderstanding about the operation of the program in this case.

As a result of the Ombudsman's recommendation, the authority revised the program communications material for property owners, as well as its administration manual, to clarify the terms of the program and the role of the authority under the program. This should ensure that there is no misunderstanding in future about the terms of the program or the authority's role in facilitating an application under the program.

More than one authority

In 2002 the Ombudsman concluded an investigation into a complaint about the adequacy of an investigation into the death of a worker in the workplace. The first part of the investigation involving the Yukon Workers' Compensation Health & Safety Board (YWCH&SB), was completed in 2001. The second part relating to the Office of the Coroner - Department of Justice, was completed in 2002.

When a fatal accident occurs in a workplace several authorities have a statutory duty to investigate. In this case, the investigation involved the YWCH&SB and the Office of the Coroner. The RCMP also had a role but the Ombudsman does not have jurisdiction in relation to them.

Procedure after investigation

23. (2) Without restricting subsection (1), the Ombudsman may recommend that

(a) a matter be referred to the appropriate authority for further consideration;

(b) an act be remedied;

(c) an omission or delay be rectified;

(d) a decision or recommendation be cancelled or varied;

(e) reasons be given;

(f) a practice, procedure, or course of conduct be altered;

(g) an enactment or other rule of law be reconsidered; or

(h) any other steps be taken.

The Ombudsman substantiated the complaint and made recommendations directed at clarifying the authority of the coroner and improving the procedure for conducting investigations, making decisions and reporting the results of investigations into workplace fatalities. A significant outcome as a result of the Ombudsman investigation was the establishment of a written working protocol between the three agencies tasked with investigating fatal workplace accidents.

Conflict Resolution

In previous annual reports the Ombudsman has commented on the benefit of appropriate early intervention in disputes. When someone affected by a decision complains to the government office responsible for that decision, it is usually possible to resolve the matter, but the type of response given often prevents this from happening. An examination of investigations conducted by the Ombudsman reveals that the issues in dispute are seldom difficult to resolve.

The key is in how public authorities respond to people who question decisions, criticize procedures, or complain about the conduct of public servants. Complaints to the Ombudsman could be reduced significantly if government officials were better equipped to handle these situations and public policy reflected a proactive, rather than a defensive, approach.

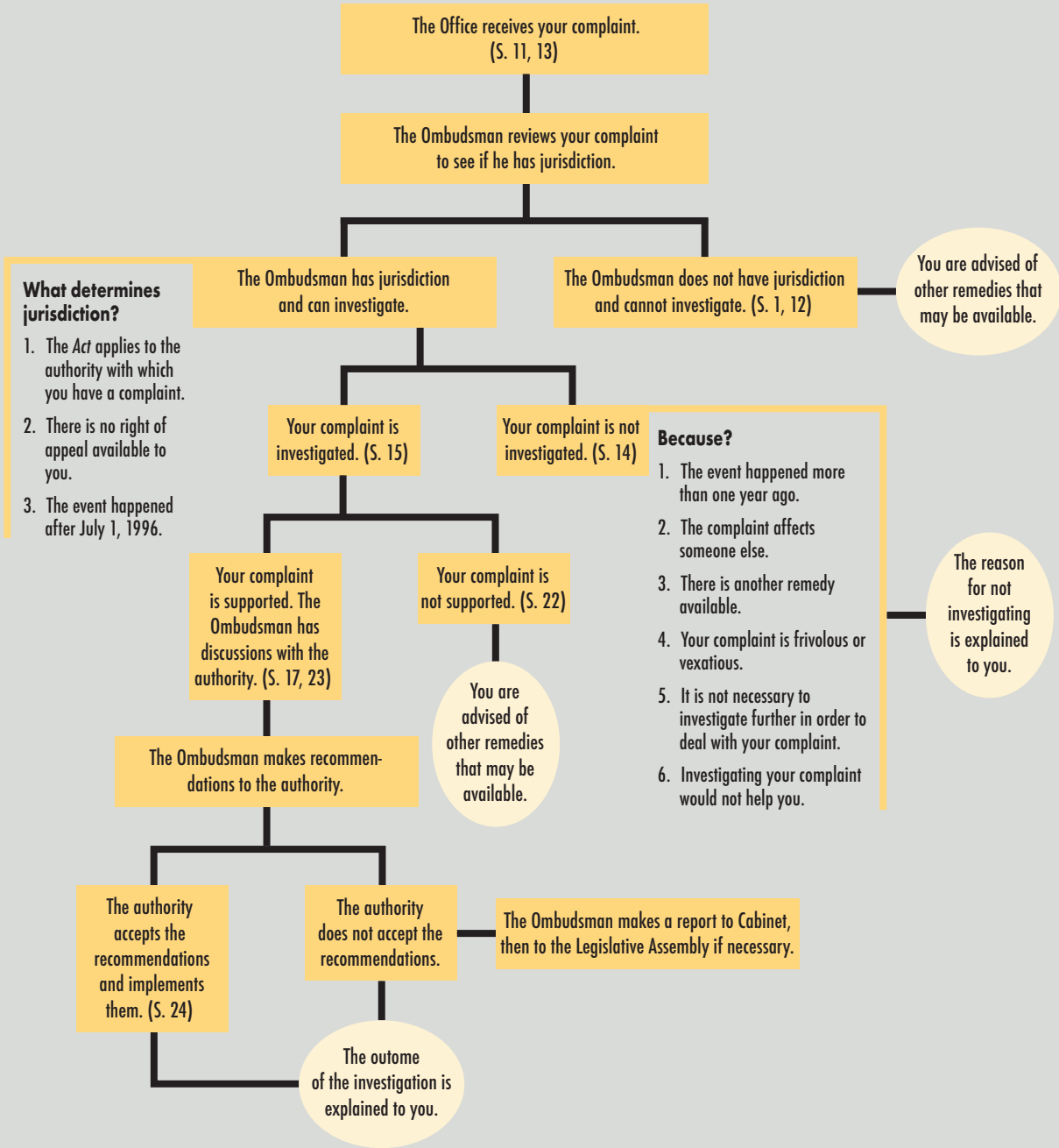
For the past three years, the Ombudsman has been involved in a course of study through the Justice Institute of British Columbia's Centre for Conflict Resolution. Many of the people attending the courses, offered through Yukon College, are employees of the Yukon government. Through this connection, the Ombudsman has made two observations:

1. YTG staff attending these courses most often are there because of an interest they have personally expressed. Their attendance has been largely self-initiated rather than the result of a human resource based assessment of operational need.
2. Post-course discussion with some of these candidates indicates there is often not a supporting workplace culture to put the acquired skills into practice. Default responses to disputes are resumed and there is very little change.

The Ombudsman has shared his observation with the Staff Development Branch of the Public Service Commission and urges government to take a more proactive role in conflict resolution and the promotion of training in these skills.

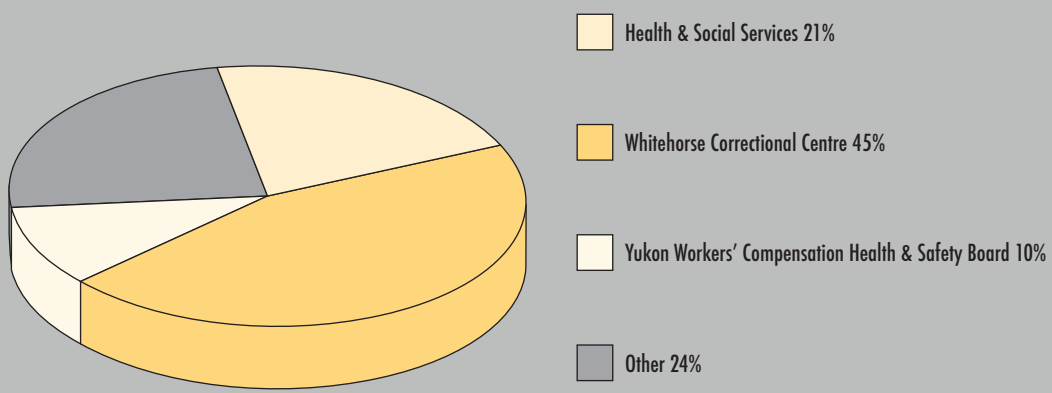
OMBUDSMAN

FLOW CHART OF COMPLAINTS



RESOLUTION OF COMPLAINTS (by Authority)

AUTHORITY	OPENED AS INVESTIGATION	NOT OPENED AS INVESTIGATION	TOTAL
Community Services	1	1	2
Driver Control Board	-	1	1
Education	-	1	1
Energy, Mines & Resources	-	1	1
Environment	-	1	1
Health and Social Services	2	10	12
Justice	-	1	1
Public Service Commission	-	2	2
Renewable Resources	-	1	1
Whitehorse Correctional Centre	7	19	26
Whitehorse General Hospital	-	1	1
Yukon Medical Council	-	1	1
Yukon College	-	1	1
Yukon Housing Corporation	-	1	1
Yukon Workers' Compensation Health & Safety Board	1	5	6
TOTAL	**11**	**47**	**58**
S.11(5) Investigation: A municipality or a Yukon First Nation government may at any time refer a matter to the Ombudsman for investigation.			
City of Whitehorse	1		1



OMBUDSMAN

STATISTICAL SUMMARY

RESOLUTION OF COMPLAINTS	
Declined on discretionary grounds	1
Further inquiry needed	2
Insufficient information provided	2
No benefit for complainant in investigating	1
Not yet analyzed, carried forward to 2003	6
Opened as investigation	12
Otherwise resolved	7
Referred to another remedy	22
Withdrawn	6
TOTAL	**59**

OUTCOME OF INVESTIGATIONS		
Brought forward from 2001		20
Opened in 2002		12
TOTAL		**32**
Completed in 2002		9
Complaint substantiated	5	
Complaint not substantiated	1	
Complaint discontinued	3	
Carried forward to 2003		23

OMBUDSMAN REQUESTS FOR INFORMATION	
TOTAL	**97**

NON-JURISDICTIONAL COMPLAINTS	
Businesses	18
Contracted Services	1
Courts	6
CPP, UIC & Revenue Canada	4
Federal	5
First Nations	3
Municipalities	3
Other	19
Other Provinces	4
RCMP	1
YTG – Non-Jurisdictional	6
TOTAL	**70**

THE FUNCTION OF THE INFORMATION AND PRIVACY COMMISSIONER

The primary purpose of the *Access to Information and Protection of Privacy Act* (the *Act*) is to make departments and agencies of government (public bodies) more accountable to the public and to protect personal privacy. The *Act* does so in a number of ways:

- By giving the public a right of access to records;
- By giving individuals a right of access to, and a right to request correction of, personal information about themselves;
- By specifying limited exceptions to the rights of access;
- By preventing the unauthorized collection, use and disclosure of personal information; and
- By providing for an independent review of decisions made under this *Act*.

It is the Office of the Information and Privacy Commissioner that carries out these independent reviews. However, the right to a formal review by the Commissioner is limited to the following decisions made under the *Act*:

- A refusal to grant access to a requested record;
- A decision to separate or obliterate information from a requested record;
- A decision about an extension of time for responding to a request for access to a record; and
- A decision to deny a request for a waiver of a fee imposed under the *Act*.

There is also a right of review if a person believes their personal information was collected, used or disclosed by a public body in a way that was contrary to the requirements of the *Act*.

A supplementary provision of the *Act* gives the Commissioner responsibility for monitoring how the Act is administered to ensure its purposes are achieved. The Commissioner may, among other things, receive complaints or comments from the public concerning the administration of the *Act*[1], conduct investigations into those complaints, and make reports. The Commissioner may also comment on the implications for access to information or for privacy protection of existing or proposed legislative schemes or programs of public bodies.

[1] "Administration of the *Act*" refers to anything done by the Records Manager, a public body, or the Information and Privacy Commissioner, to meet the requirements of the *Act*.

INFORMATION AND PRIVACY COMMISSIONER

YEAR IN REVIEW

In summarizing the office's work over the past year, I selected a number of issues and topics that merit discussion.

The first matter concerns the impact of the August 2002 decision of the Yukon Court of Appeal in Yukon (Medical Council) v. Yukon (Information and Privacy Commissioner) 2002 YKCA 14. The Yukon Medical Council argued that it was not a public body subject to the *Act*.

For a body other than a department of government to fall within the definition of a "public body" it must be an agent of the Government of the Yukon Territory. The decision focused on the proper method for determining whether an entity is an "agent of government". The Court concluded that the Yukon Medical Council was not an agent of government and therefore not a "public body" subject to the *Act*.

The implication of the decision for the Office of the Information and Privacy Commissioner and my work is far reaching. The decision limits my jurisdiction in relation to access requests for records that are in the custody and control of government departments and those few other bodies that come within the Court of Appeal's narrow interpretation of "agent of the government".

The effect of this narrow interpretation is to exclude a significant number of bodies and therefore information from the scope of the *Access to Information and Protection of Privacy Act*. In the result, access and privacy rights of Yukoners in relation to information held by these bodies are not protected. For example, prior to this decision, I was of the opinion that the Yukon Workers' Compensation Health and Safety Board was a "public body" as defined in the *Act*. Applying the approach articulated by the Court of Appeal for determining whether a body is an agent of government, it is clear that the YWCH&SB is not a public body subject to the *Act*.

The lack of a clear definition also results in needless confusion and inefficiencies. The analysis necessary to determine if a body other than a government department is subject to the *Act* is complex. The public should not have to undertake this sort of legal analysis to determine whether the *Act* applies to a particular body. The bodies themselves will have to undertake the same analysis to be certain of their obligations if any under the *Act*. This uncertainty also increases the potential for litigation.

The solution is simple. In other jurisdictions in Canada, privacy legislation includes a schedule that lists the agencies which are subject to the *Act*. The agency is either on the list or not. This ensures the public is aware of who is subject to the *Act* and this also facilitates the exercise of an individual's right to an independent review of the body's decision.

In the past I have recommended to the Minister responsible for the *Act* that amendments to the legislation should include a list of public bodies subject to the *Act*. The need to do so is even more pressing with the decision from the Court of Appeal.

Another matter I wish to highlight in this annual report is how public bodies respond to requests for information when an exception relied on is not a mandatory one and the public body has the discretion to disclose information.

One review in the past year demonstrated again what is becoming an all too common response by public bodies, which is to refuse access when the *Act* authorizes it, without considering whether disclosure can and should be made in the interests of openness and accountability. The Government of British Columbia has developed guidelines for public bodies when dealing with the application of discretionary exemptions, which I have

adopted as appropriate guidelines for public bodies to follow in exercising their discretion under our *Act*.

For the first time in the six-year history of the office, I found it necessary to make a section 42 report to a Minister of an instance of what I found to be maladministration of the management or safekeeping of a record. The Minister did not agree and expressed the view that the public body was in compliance with the *Act*. A more detailed discussion of this matter appears on page 20.

During the year, four Requests for Review were mediated in whole or in part. Success in mediating the matters under review always merits praise, because the parties have come to a settlement on what are often difficult issues through the work of the mediator. Typically, by the time a Request for Review is made, the parties have assumed positions that are quite fixed. I am therefore pleased to report that 22% of reviews completed in 2002 were successfully mediated.

In 2002, nineteen Requests for Review were made to me. Sixteen reviews were carried forward from the previous year and three were received during the current year. Eighteen reviews were completed in 2002, with one carried over to 2003. Four complaints about the administration of the *Access to Information and Protection of Privacy Act* were settled. In addition, I commented on the implications for access and privacy in the review of existing or proposed statutory schemes or programs of public bodies on seven occasions.

Review and Comment on Programs and Legislation

One of the roles of the Commissioner is to comment on government programs or proposed legislation that have an impact on the access or privacy rights of Yukoners. During 2002, the Commissioner commented on the following matters.

Amendments to the Education Act

Amendments to the *Education Act* in the form of Bill 63 were tabled in the Legislative Assembly. The Information and Privacy Commissioner discovered that the proposed *Act* did not resolve conflicts with the *Access to Information and Protection of Privacy Act*. The Commissioner undertook a review of Bill 63 and wrote to the Deputy Minister of Education informing him of the results of that review.

The Commissioner commented that the existing *Education Act* pre-dates the *ATIPP Act* and therefore contains its own provisions for protecting personal information. Since the *ATIPP Act* came into effect, however, its provisions prevail. The review revealed that the standards, and the mechanisms, for privacy protection in the two statutes were different. The Commissioner expressed the view that the privacy protection provisions in the *Education Act* should be repealed in favour of giving effect to the purpose of the *ATIPP Act* as overarching legislation for privacy protection.

The Commissioner's review also raised the question of whether the provisions of the *ATIPP Act* are intended to apply to records created by, or in the custody or control of, Local Education Councils and School Boards. Bill 63 offers no certainty about whether a Local Education Council is a "public body" as defined in the *ATIPP Act*. On the other hand, a School Board is clearly exempted from the *ATIPP Act* because Bill 63 states, "a school board is not an agent of the Government of the Yukon".

Both Local Education Councils and School Boards handle the personal information of students and staff members. It is also apparent that personal information would be shared between officials of the Department of Education and either a Local Education Council or a School Board. The Commissioner expressed the view that the same standard for privacy protection ought to apply across the entire public education system. For this reason he recommended the proposed legislation be reconsidered with a view to having Local Education Councils and School Boards included within the scope of the *ATIPP Act*.

Amendments to the Liquor Act

Draft amendments to the *Yukon Liquor Act* were received by the Commissioner for review and comment.

The Commissioner noted that legislative schemes sometimes involve the collection of certain information from sources other than from the person the information is about. The information is then used for the purpose of making a decision that will affect an individual. Such is the case with the *Liquor Act* where, in deciding whether to grant a liquor license, the licensing authority can consider "... objections or other information provided by the public."

The public, in supplying such information, often has an expectation that the information is supplied in confidence. Officials, in turn, might give assurances that confidentiality will be maintained.

A difficulty may arise when an access request is made for the information supplied. Public bodies, in the past, have argued that such information should be exempted from disclosure on the basis of departmental policy, or the commitment of confidentiality. In fact, only the provisions of the *ATIPP Act* apply in determining a right of access, not departmental policy or practice. For this reason public bodies should avoid assurances of confidentiality unless there is certainty that an exception under the *ATIPP Act* affords the desired protection.

The Commissioner pointed out that the proposed *Act* requires notice to an applicant for a liquor license of "the information to be relied upon in making the decision". However, it is possible that all "the information to be relied upon" could conceivably be different from all the information gathered. The department was urged to develop in advance the standard for how transparent the licensing process is intended to be. The Commissioner suggested there may be an opportunity to avoid difficulties with clarity in the language of the legislation.

With respect to the protection of privacy, the Commissioner urged the department to complete a Privacy Impact Assessment.

ICEMS

The department of Education referred a proposed program involving the certification of apprentices to the Commissioner for review and comment. Under the program the Advanced Education Branch of the department would contribute to the Interprovincial Computerized Examination Management System (ICEMS) certain personal information elements from individuals in apprenticeship training programs. This would assist all jurisdictions in Canada in determining whether a candidate is eligible or suitable to practice a trade in each other's jurisdiction. Additionally, a subset of the information would be used for statistical research with respect to the labour market.

The department of Education had already completed a privacy impact assessment questionnaire which addressed most of the issues for the collection, use and disclosure of the personal information for purposes of the program.

The Commissioner pointed out, however, that ICEMS itself does not provide authority for the initial collection of the personal information. Rather, it relies on each contributing jurisdiction to have that authority in place. On the basis of the material reviewed, the Commissioner expressed the view that neither the Apprenticeship Act nor any other statutory scheme in the Yukon gives such authority.

Disclosure harmful to personal privacy

25. (1) A public body must refuse to disclose personal information about a third party to an applicant if the disclosure would be an unreasonable invasion of the third party's personal privacy.

Two options were proposed. The first is to put in place the necessary legislative authority for the collection of the personal information without requiring the individual to give consent, in which case there should be justification for doing so, and the individual must be informed that the information will be collected from other sources, as well as the purpose for collecting it.

The second option is for the individual to provide informed consent for the collection, use and disclosure. To obtain such consent, the individual should clearly understand what the intended use and disclosure is to be, and to have the opportunity to either agree, or not agree. The Commissioner is of the view that an apprenticeship application form containing a notation that certain personal information will be collected for purposes of this program is not consent, even if the applicant signs the form. Proper consent needs to ask the applicant whether he or she consents to the collection, use and disclosure, with an ability to opt in or opt out.

Draft Statistics Act

The Yukon Bureau of Statistics asked the Commissioner to review and comment on the draft *Statistics Act*.

The Commissioner noted that section 9 of the draft *Act* contains specific provisions for it to operate despite the *ATIPP Act*. The Commissioner's lack of jurisdiction notwithstanding, he offered comments in the interests of broadening the discussion of privacy considerations contemplated by the proposed *Act*.

The Commissioner expressed the view that if the *Statistics Act* will operate outside the privacy protection afforded by the *ATIPP Act*, it should contain its own assurances that accepted principles of privacy protection will be met. The proposed *Act* contained very strong provisions for confidentiality and security of personal information collected, but the Commissioner suggested there are other equally important principles not specifically reflected in the *Act*. These are:

1. Personal information should be collected directly from the person the information is about.
2. The authority and justification for collecting personal information should be explained to those from whom it is collected, and the purpose for which it will be used.
3. Personal information collected for one purpose should not be used for any other purpose without the informed consent of the individual the information is about.
4. Public bodies collecting personal information should make every reasonable effort to ensure it is accurate and complete when it is collected, with lawful authority, from sources other than from the individual it is about.

The Commissioner also noted that the Minister responsible for the *Act* can prescribe rules and instructions for how survey/research projects are to be carried out. The Commissioner offered some considerations for establishing generally accepted minimum criteria for projects involving the collection of personal information for research purposes.

Legal Advice

18. A public body may refuse to disclose to an applicant a record

    (a) that is subject to solicitor client privilege; or

    (b) that was prepared by or for a public body in contemplation of and for the purpose of existing or reasonably expected proceedings in court or before an adjudicative body, regardless of whether it has been communicated to or from a lawyer.

INFORMATION AND PRIVACY ISSUES

Maladministration in the Management of a Record

The Commissioner made a report to the Minister of Health and Social Services under Section 42(e) of the *Act* after finding that there was an instance of maladministration in the management or safekeeping of a record. The matter arose out of the following fact situation.

A number of employees within a work unit of the Department of Health and Social Services made a request for access to a report following an investigation conducted by the Public Service Commission into suspected workplace harassment in their work unit. A copy of the report that resulted was in the custody of both Health and Social Services and the Public Service Commission. The applicants made separate requests for access to both of the public bodies, who responded by refusing to grant access. The employees then asked the Commissioner to review the decision made by each public body to refuse access.

Both public bodies made submissions to the Commissioner at inquiry. In addition to presenting arguments in support of the decision to refuse access, Health and Social Services notified the Commissioner that its copy of the record was now with the Public Service Commission because the government's workplace harassment policy requires all records created in the course of a workplace harassment investigation to be centrally stored in that office.

At the conclusion of the inquiries, the Commissioner recommended to each of the public bodies that certain information be severed from the record in question, and that the remainder of the record be given to the applicants. Health and Social Services responded that it could not follow the recommendation because it no longer had the record; that it was with the Public Service Commission. The Commissioner took the view that the Public Service Commission only had the record for archival purposes, that the record was still a record of the Department of Health and Social Services and that it should be retrieved from Public Service Commission for purposes of complying with the Commissioner's recommendation. The Deputy Minister of Health and Social Services refused to do so.

The Commissioner wrote to the Deputy Minister expressing the view that once a public body responds to an applicant's request for access to a record by deciding to refuse access, it must retain the record in question pending the outcome of the review of that decision. A public body cannot attempt to absolve itself from its responsibility under the *Act* by disposing of or transferring a record which is the subject of a review.

The Commissioner considered the public body's failure to retain the record, and its refusal to retrieve it from the Public Service Commission, as an instance of maladministration of the management or safekeeping of a record. He made a report to the Minister, recommending that the public body acknowledge the requirement under the *Act* to maintain custody, or control, of a record it has identified as a responsive record to an access to information request, pending the final outcome of a review by the Information and Privacy Commissioner.

The Minister of Health and Social Services was of the opinion that the department had, in fact, complied with the *Act* in this instance. The Minister stated: "Health and Social Services merely deferred to the Public Service Commission in the reasonable belief that the [*ATIPP Act*] imposed on the PSC the responsibility and the authority to decide about disclosure of this record in response to the request."

The Commissioner is not persuaded by the Minister's response that the *Act* permits another public body to assume responsibility for its decision to refuse an applicant access to a record that was in its custody at the time of the application for access. However, the Commissioner has no further authority under the *Act* to deal with this issue.

Yukon Supreme Court Decision

Section 59 of the *Access to Information and Protection of Privacy Act* gives an applicant the right to appeal a public body's decision not to follow the Commissioner's recommendation to give the applicant access to a record or part of a record.

In this case[2], the Commissioner recommended the Public Body release to the Applicant a final investigation report of workplace harassment involving the Applicant's workplace record with the deletion of third party information. The Public Body refused to follow the Commissioner's recommendation, saying it required the Applicant to sign a confidentiality agreement prohibiting the sharing of the report's contents with anyone. The Applicant appealed the Public Body's decision to the Yukon Supreme Court.

The Public Body argued that a final workplace harassment investigation report should generally be protected from public release, firstly because of the personal and sensitive nature of such a report, and secondly because it is necessary to ensure employees will bring forward complaints. The Public Body pointed to the confidentiality provisions in the Workplace Harassment Policy in support of its position.

The Court rejected this argument, saying that none of the specified exceptions to the right of access in the *Act* can be interpreted to justify blanket non-disclosure for an entire record premised on a policy of confidentiality.

The Court clarified the scheme set out in the *Act*, stating that sections 1 and 5 of the *Act* set out a person's right of access to information in the custody of a public body. This right of access is only limited by the specific exceptions set out in Part 2 of the *Act*. In addition, the Court concluded that Section 5 is quite explicit in stating that where information subject to an exception can reasonably be separated or obliterated from the record, the applicant has a right of access to the remainder of the information.

The Court reviewed the record and ordered that the record be released to the appellant with the deletion of third party information as required by Part 2 section without the requirement of a confidentiality agreement.

Yukon Court of Appeal Decision

The Applicant in this case[3] requested records held by the Yukon Medical Council (YMC). The YMC challenged the jurisdiction of the Information and Privacy Commissioner on the basis that it was not a public body as defined in the *Act*. The Yukon Supreme Court held that the YMC was a public body for the purposes of the *Act* and confirmed the Commissioner's jurisdiction to continue the inquiry. On appeal to the Yukon Court of Appeal, however, the Court concluded the YMC is not a public body subject to the *Act*.

The definition of public body in the *Act* includes an entity that is an agent of the Government of Yukon. The issue in this case was whether or not the YMC was an agent of the Government of the Yukon subject to the *Act*.

The Court concluded the question could be decided on the basis of the common law tests for agency. According to the Court:

> *... it is the extent or absence of control over the body's function that determines whether it acts in the capacity of a government agent.*

[2] *Avoledo v. The Commissioner of the Yukon 2003 YKSC 10*

[3] *Yukon (Medical Council) v. Yukon (Information and Privacy Commissioner)* 2002 YKSC 14

The Court concluded that the *Medical Professions Act* gave the YMC sole jurisdiction in relation to the licensing and discipline of the medical profession in the Yukon. While the Court noted that the legislation gives the government control over the administrative framework within which the YMC operates, including such things as appointing the Council members, setting and paying their remuneration, approving the hiring of staff, providing a member of the public service to act as registrar and making regulations under the *Act*, it concluded that these administrative controls did not limit, impair, or restrict the exercise of the statutory powers conferred on the Council in relation to licensing and disciplining of physicians in the Yukon.

The Court held that since the YMC was free of any interference or control in the exercise of its primary powers or function by the Yukon government, it was not an agent of the government and therefore not a public body within the meaning of the *Act*.

Information and Records

The connection between "information" and "records" was explained in the 2001 Annual Report. Attention must be given to which word is used in the *Act*, as this will affect its application. It is necessary that a response to a request be given by record. However, it is necessary to apply the exceptions to information, except where the word record is specifically used. Approaching a request for access to records in an organized way will help.

A schedule of all records responsive to a request can be constructed. Although mediation of one review in 2002 was not completely successful, a schedule of records was assembled by the public body. Included was a description of each record, whether the record was released, and if it was withheld, identification of the exception used under the *Act* for refusing access. As a result, the public body itself identified further records that could be disclosed to the applicant.

In a different review, which was successfully mediated, the applicant withdrew the request when the public body clarified its response by providing a schedule of the large number of records responsive to the request for access for records, indicating what records were released and what records were refused, including the exception used for each.

In yet another review in 2002, in relation to Section 16, the Commissioner addressed whether the *Act* supported the proposition that if one part of a

Right to request correction of personal information

32. (1) A person who believes there is an error or omission in his or her personal information may request the archivist to request the public body that has the information in its custody or under its control to correct the information.

(2) If no correction is made in response to a request under subsection (1), the public body must annotate the record with the correction that was requested but not made.

(3) If personal information is corrected or annotated under this section, the public body must give notice of the correction or annotation to any public body or any third party to whom that inform-ation has been disclosed during the year before the correction was requested.

(4) On being notified under subsection (3) of a correction or annotation of personal information, a public body must make the correction or annotation on any record of that information in its custody or under its control.

record contained information to which an exception applied, the entire record could be withheld. It was his opinion that this was not supported by the language of section 5 nor section 16 of the *Act*. He stated:

> Clearly a public body has the responsibility to determine whether information contained in a record ought to be withheld and whether that information can reasonably be separated or obliterated. If so, an applicant has a right of access to the remainder of the record. The only way to meet this requirement is for a public body to conduct a line-by-line review of its responsive records.

If information in a record is separated or obliterated and if the refusal is based on different provisions of the *Act*, it will necessitate an even more detailed response by record.

Ability to Review and Comment

The Commissioner's review of Bill 63 (*Education Act* amendments), when it had already been tabled in the Legislative Assembly, prompted the Commissioner to examine how reviews of proposed legislative schemes or programs of public bodies could be done in a more timely and consistent way. As a start the Commissioner met with the Policy Review Committee, a body that reviews submissions to cabinet.

The Policy Review Committee agreed to include in its review process a standard provision for making a referral to the Information and Privacy Commissioner whenever submissions involve the handling of personal information. The Committee also undertook to work with the office of the Information and Privacy Commissioner to introduce a process for the completion of a Privacy Impact Assessment by sponsoring public bodies whenever proposed legislative schemes or programs involve the handling of personal information.

Checklist for Data-Sharing Agreements

The Commissioner has jointly prepared a checklist with his provincial, territorial and federal colleagues. It is intended to provide guidance to public bodies when entering into any data-sharing or data-matching agreement with public or non-public bodies, to ensure all privacy considerations are examined. It is hoped that, through the use of this checklist, public bodies will ensure that the privacy rights of the individuals whose personal information is subject to the agreement will be protected. This checklist can be obtained by contacting the Office of the Information and Privacy Commissioner.

Powers to authorize a public body to disregard requests

43. (1) If a public body asks, the commissioner may authorize the public body to disregard requests under section 6 that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body.

(2) If the commissioner authorizes the public body to disregard the request and the public body does disregard the request, the applicant may appeal the public body's decision to the Supreme Court under sections 59 to 61 without first requesting a review by the commissioner under section 48.

Definition of consistent purposes

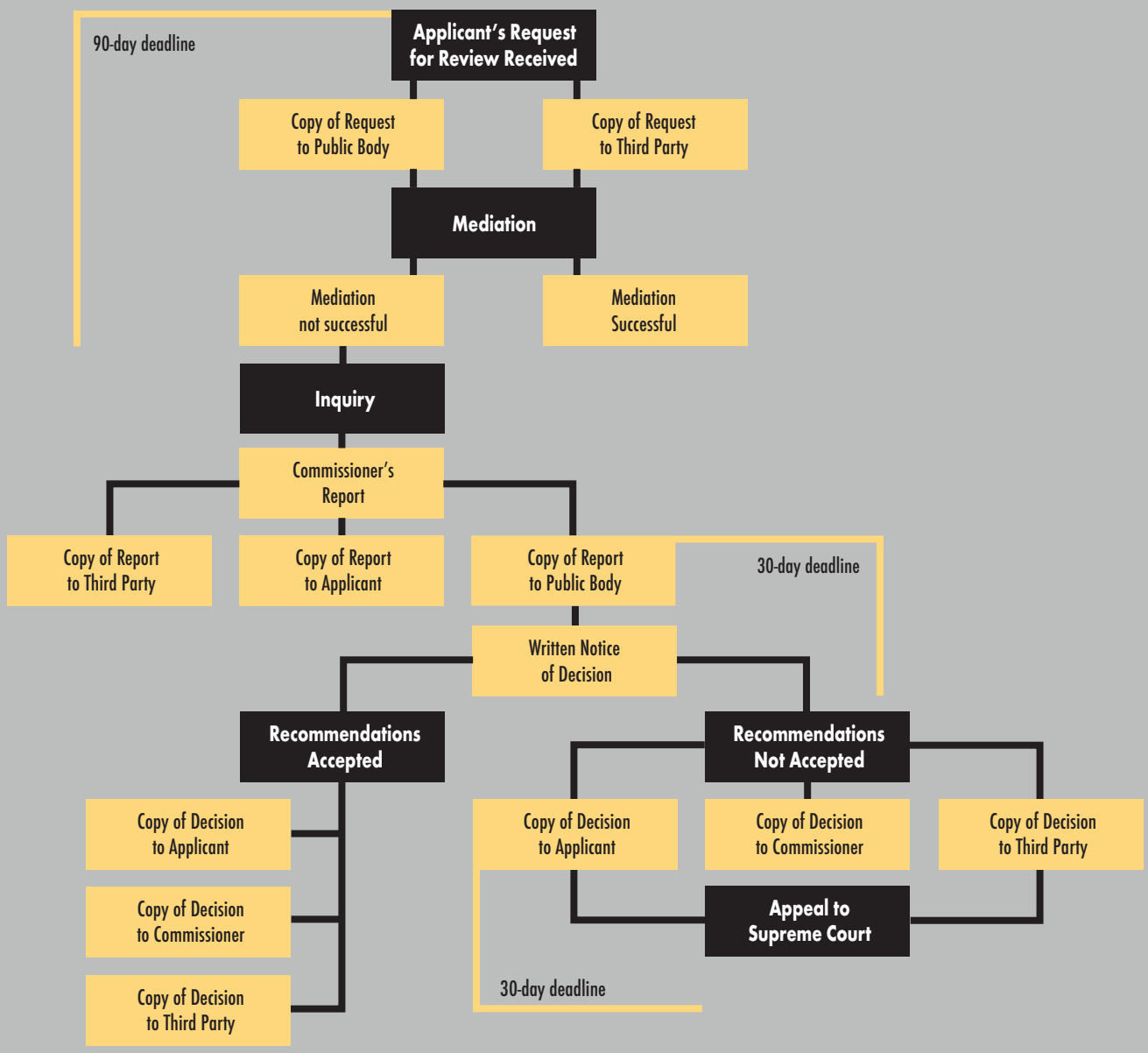
37. A use of personal information is consistent under 35 and 36 with the purposes for which the information was obtained or compiled if the use

(a) has a reasonable and direct connection to that purpose; and

(b) is necessary for performing the statutory duties of, or for operating a legally authorized program of, the public body that uses the information or to which the information is disclosed.

INFORMATION AND PRIVACY COMMISSIONER

REQUEST FOR REVIEW FLOW CHART



INFORMATION AND PRIVACY COMMISSIONER

STATISTICAL SUMMARY

ATIPP FILES BY LEGISLATION

Section of the *Act*	Description	Opened in 2002
28(2)(b)	Requirement of a public body to disclose information to the public if there are reasonable grounds to believe that the information would reveal the existence of a serious environmental, health or safety hazard to the public. Before disclosing, the public body must notify the Commissioner.	1
42(b)	General powers to receive complaints or comments from the public concerning the administration of the *Act*, conduct investigations into those complaints, and report on those investigations.	2
42(c)	General powers to comment on the implications for access to information or for protection of privacy of existing or proposed legislative schemes or programs of public bodies.	6
42(e)	General powers to report to a Minister information and the commissioner's comments and recommendations about any instance of maladministration of the management or safekeeping of a record or information in the custody of or under the control of a public body.	1
48(1)(a)	Request for a review of a refusal by the public body or the archivist to grant access to the record.	2
48(1)(c)	Request for a review of a decision about an extension of time under section 12 for responding to a request for access to a record.	1

The statistical summary presented here does not compare numbers with the year 2001. A comparison cannot be meaningful because of Renewal, which came into effect on April 1, 2002 creating new departments, as well as changing or deleting departments which previously existed.

SECTION 48 REQUESTS FOR REVIEW

Brought forward from 2001		19
Received in 2002		3
Infrastructure	2	
YWCH&SB	1	
TOTAL		**19**
Completed in 2002		18
To inquiry	13	
Successfully mediated	4	
Discontinued	1	
Carried forward to 2003		**1**

SECTION 42(b) COMPLAINTS

Brought forward from 2001		4
Received in 2002		2
TOTAL		**19**
Completed in 2002		3
Investigated	1	
Discontinued	3	
Carried forward to 2003		**2**

ATIPP REQUESTS FOR INFORMATION

TOTAL	**44**

WEB SITE LINKS

Yukon Office of the Ombudsman
Information about the Yukon Ombudsman and Information & Privacy Commissioner.
www.ombudsman.yk.ca

Government of Yukon
Links to Yukon facts, travel information, government, government leaders, and news.
www.gov.yk.ca

Alberta Information and Privacy Commissioner
A variety of information pertaining to the Alberta Freedom of Information and Protection of Privacy Act, as well as information about the Commissioner's Office.
www.oipc.ab.ca/

British Columbia Information and Privacy Commissioner
Includes legislation, orders, information on decisions, investigations as well as other reports, information about the office, policies, news releases, publications and useful links.
www.oipcbc.org/

Ontario Information and Privacy Commissioner
Includes Access and Privacy Acts, annual reports, a selection of investigations, policy papers, orders that have been issued by the office and links to other relevant sites.
www.ipc.on.ca/

Information Commissioner of Canada
Information about the Federal Information Commissioner and links to Access to Information Acts, reports, publications, and speeches.
www.infocom.gc.ca

Privacy Commissioner of Canada
Information about the Federal Privacy Commissioner and links to Privacy Acts, reports, presentations and numerous e-commerce sites
www.privcom.gc.ca

International Ombudsman Institute
Worldwide organization of Ombudsman offices.
www.law.ualberta.ca/centres/ioi/

Open Government Canada
A freedom of information coalition seeking a national voice for freedom of information users.
www.opengovernmentcanada.org

Information Access and Protection of Privacy Certificate Program
An online distance course provided by the University of Alberta, Faculty of Extension. This course was developed as a response to the need for accredited access and privacy specialists to meet the demands of increasing growth in access an protection of privacy legislation.
www.govsource.net/programs/iapp/index.nclk

Personal Information Protection and Electronic Documents (PIPED) Act
General information and tips for individuals, businesses and the health sector relating to this new legislation.
www.privcom.gc.ca/information/02_05_d_08_e.asp