Ombudsman &
Information and Privacy
Commissioner

Yukon Information and Privacy Commissioner

Submission on the Review of Proposed Amendments to the *Access to Information and Protection of Privacy Act*

December 15, 2008

Available at: http://www.ombudsman.yk.ca

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   b) That the ATIPP Act or regulations include a Schedule listing the entities deemed to be public bodies subject to the Act;
   c) That the ATIPP Act be amended to include criteria for determining whether a board, commission, council, foundation, corporation or other similar agency should be included or deleted as a public body to or from a Schedule of public bodies.

2. Stopping the Clock for Administration Delays (Section 11)
   a) That section 11 be amended to include subsections which have the effect of stopping the clock for administrative delays that are beyond the control of the public body and the records manager;
   b) That any amendments to section 11 should not permit the stopping of the clock for determining the scope of a request.

3. Right to Request Fee Waiver – in the Act, rather than Regulations
   a) That the ATIPP Act include a provision to allow a waiver of fees;
   b) That the section in the Act on fee waivers includes a provision for waiving a fee for a record that relates to a matter of public interest, including the environment or public health or safety.

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   a) That the word "must" in section 52(1) be replaced with the word "may".

5. Mediation as Part of the Review Process (Sections 48 and 51)
   a) That section 51 of the ATIPP Act not be amended.

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   a) That the ATIPP Act be amended to allow the commissioner to authorize a public body to disregard requests under section 6 that are frivolous or vexatious.

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   a) That section 12 of the ATIPP Act be amended to include a provision that the records manager be required to consider a request from a public body for the extension of time for multiple concurrent access requests on the same basis as she is required to do for voluminous records. This requires her to be satisfied that

meeting the time limit would unreasonably interfere with the operations of the public body;

b) The records manager's decision to extend time must also be subject to a review by the Commissioner under section 48.

8. Regular Comprehensive Review of the ATIPP Act:

a) That the ATIPP Act be amended to include a section that requires a regular comprehensive review of the ATIPP Act be done at least once every four years;

b) That a report, including any recommended amendments, be submitted to the Legislative Assembly within one year of commencing the review; and

c) That the first comprehensive review of the ATIPP Act be commenced no later than December 31, 2011.

9. Access Requests Deemed Abandoned (Section 6)

a) That a provision be added to the ATIPP Act to permit the records manager by notice in writing to the applicant, declare the request abandoned;

b) That the ATIPP Act be amended to include the provision that an applicant may ask for a review of the decision that the request has been abandoned, under section 48 of the Act;

c) That section 48 be amended to give the right of review where a request has been declared abandoned.

10. Workplace Harassment Records

a) That paragraph 19.1(2)(f) of the ATIPP Act be repealed;

b) That in Section 19.1(2) the words "a workplace harassment record and any information in it or about it" be changed to "information in a workplace harassment record".

11. Commissioner's Powers and Protections (Section 42)

a) That in order to clarify the procedures for investigations and reviews in the ATIPP Act, sections 53, 55, and 56 be amended to read "an investigation under section 42(b) or a review under section 48".

12. Authority for Commissioner to Appeal if Applicant Consents (Section 59)

a) That section 59 of the ATIPP Act be amended to add a subsection permitting the commissioner to appeal, a decision of a public body to refuse to follow his or her recommendations to give access to a record or part of a record, with the consent of the person who has the right of appeal, and if the commissioner is of the opinion that the decision raises a significant issue of statutory interpretation or that an appeal is otherwise clearly in the public interest.

13. Correction in Section 46(1)(a)

    a) That the wording be changed in section 46(1)(a) to read: the power to delegate under this section.

14. Correction in Section 50

    a) That the wording in section 50 be changed to read: On receiving a request for review …

15. Correction in Section 58(1)(a)

    a) That the wording in section 58(1)(a) be changed to read: ... decide whether the follow the recommendations of the commissioner ...

16. Update Wording in the Regulations

    a) That the word "Archivist" in the Regulations be replaced by the words "Records Manager".

Recommendations Related to Third Party Interests:

17. Notice Clarification in Section 26(1)

    a) That the ATIPP Act be amended to change the wording in section 26(1) from "Before giving access" to "If a public body intends to give access".

18. Correction in Sections 26(1)(a) and 26(2)(a)

    a) That sections 26(1)(a) and 26 (2)(a) of the ATIPP Act be amended to insert the word "business" immediately before the word "interests".

19. Right of Review and Appeal

    a) That section 48(4) of the ATIPP Act be amended to insert the words "or business" after the word "personal";
    b) That section 59(2) of the ATIPP Act be amended to insert the words "or business" after the word "personal".

B. INTRODUCTION

As Information and Privacy Commissioner, I have been invited to comment on proposed amendments to the *Access to Information and Protection of Privacy Act* (the ATIPP Act). I was provided with a Consultation Document listing eight issues under consideration for amendments to "update and improve the legislation".

While a comprehensive review of the ATIPP Act is badly needed, the government has structured a targeted review which will address just a few proposed amendments to the Act. This falls far short of the comprehensive review of the Act that government itself has acknowledged is required.

I am responsible for monitoring how the ATIPP Act is administered to ensure that its purposes are achieved and am therefore uniquely positioned to provide comment. The office has now had some 12 years of experience with the operation of the ATIPP Act and has developed expertise that is not available through any other source in the Yukon. The comments and recommendations in this submission are made through the lens of oversight and in the public interest – both the responsibility of the Information and Privacy Commissioner.

The current review of the ATIPP Act provides the first opportunity since the enactment of this legislation in 1996 to present the government with recommendations. My recommendations to address the issues identified by Government of Yukon as well as problems identified repeatedly by this office, by the public, by government departments and by the records manager. This submission includes rationales and, in some instances, suggested wording to facilitate implementation of the proposed recommendations.

Over the years, we have tracked issues related to the application of the Act and a number of recommendations for amendments have been made in our Annual Reports. In commenting on the Consultation Document, I feel very strongly that consideration for amendments to the Act should not be limited to the eight issues identified in the document.

The Yukon government and I have a mutual goal here of guaranteeing public access to information and protecting individual privacy through well-crafted and effective legislation. I urge the government to consider and adopt all of the recommendations made here as they address real problems in the day to day application of the Act. The changes proposed here are straightforward and their implementation would result in meaningful improvements to the ATIPP Act.

Whitehorse, Yukon
December 15, 2008

Tracy-Anne McPhee
Yukon Information and Privacy Commissioner

C. WHY IS THE ATIPP ACT IMPORTANT LEGISLATION?

Laws governing access and privacy are designed to make governments accountable to the public. Unless there is strong and clear legislation that provides a solid foundation for openness in public administration, the purpose of making public bodies more accountable to the public cannot be achieved.

The ATIPP Act has two purposes: to make Yukon public bodies more accountable to the public, and to protect personal privacy[1]. It does this by:

- giving the public a right of access to all government records;
- giving individuals a right of access to their own personal information in the hands of public bodies, and the right to ask for corrections to that information;
- specifying limited exceptions to the right of access;
- preventing the unauthorized collection, use, or disclosure of personal information by public bodies; and
- providing for an independent review of decisions made by public bodies under the Act.

Thus, the Act imposes on public bodies the obligation to create and maintain an environment of openness and accountability, and to protect the personal privacy of individuals in the course of public administration. A third fundamental component of the ATIPP Act is the oversight function of the Information and Privacy Commissioner. It is crucial to keep the goals and purposes of access and privacy legislation in mind working with the legislation.

Access to Information – Promoting Openness and Accountability

In any democratic society, government acts on behalf of and for its citizens. This responsibility is met by embracing the principle of openness – a fundamental principle that is at the centre of access to information legislation in democratic countries world-wide. Interestingly, some jurisdictions use the term "freedom of information" rather than "access to information"; the word freedom further emphasizes the principle.

Perhaps this concept is best described by former Supreme Court Justice Gerard La Forest when he made the following observation in a landmark decision involving the federal access to information regime:

> *The overarching purpose of access to information legislation … is to facilitate democracy. It does so in two related ways. It helps to ensure, first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.*[2]

Public expectations for governments to live up to this obligation are reflected in the efforts of Right to Know coalitions, a growing global movement promoting open

[1] Section 1(1) of the *Access to Information and Protection of Privacy Act*
[2] Dagg v. Canada (Minister of Finance) 1997 CanLII 358 (S.C.C.)

government. As part of these coalitions, the print and electronic media have expressed the view that "You can't have accountability without having transparency."[3]

Privacy Protection – The Need for a Strong Legislative Framework

The ATIPP Act also includes the universal privacy protection principles which form the basis of all privacy legislation:

- defining the purpose for which information is collected;
- collecting information directly from the individual, unless otherwise authorized;
- informing the individual of the purpose for collection, the authority for collection and who to contact if there are questions;
- limiting the collection to what is required for the purpose;
- using the information only for purposes consistent with the purpose for collection, unless there is consent;
- protecting the information by making reasonable security arrangements against risks of loss, alteration, unauthorized access, collection, use, disclosure or disposal; and
- restricting disclosure to those situations authorized by the Act.

Privacy legislation must be constantly evaluated for relevance in light of the ever changing technological world in which it operates. Advancements in technology have enabled organizations, including government institutions, to assemble and use personal information in electronic form to deliver many programs in a much more efficient way. Legislation needs to keep pace with these changes to ensure privacy protection principles are not compromised.

In addition, services to the public – particularly government services – are much more integrated than in the past. There are many services which government cannot provide in isolation, but which rely on external partnerships to operate properly. The public expects that in the development and the operation of such programs, personal privacy will be protected with an effective cross-jurisdictional privacy protection framework.

Canada's current privacy protection framework is a patchwork quilt of legislative schemes. Personal information held by federal government bodies is covered by the *Privacy Act*. Personal information used in the course of commercial activity, primarily by businesses, is covered by the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA). Some provinces have specific legislation to address personal health information, while others do not. There is currently no Yukon legislation that covers personal health information or personal information held by self-governing Yukon First Nations.

Failure to recognize and respond to the challenges of information management and technology results in legislation that does not keep pace and is ineffective.

[3] David Gollob of the Canadian Newspaper Association in an October 2007 Globe & Mail article responding to concerns about the federal government's performance on access to information requests.

Oversight – Complaints, Reviews, and Appeals

The primary purpose of the Access to Information and Protection of Privacy Act is to make departments and agencies of government, defined as public bodies, accountable to the public and protect personal privacy.

One of the ways this goal is achieved is by establishing the Office of the Information and Privacy Commissioner to provide independent oversight.

Oversight is primarily done through monitoring admistration of the act and providing the right to an independent review of decisions made under the Act.

Privacy and access principles include the ability for individuals to challenge compliance to policies and practices relating to the handling of their personal information or decisions regarding access to information. Oversight functions are provided for in the ATIPP Act by giving authority to the Commissioner under Parts 4 and 5. To be effective the process by which an individual can challenge decisions must be accessible, unambiguous and simple to use.

D. COMMENTS AND RECOMMENDATIONS

i) CONSULTATION DOCUMENT AMENDMENTS

1. Definition of a Public Body/Scope of the Act

Rationale:

The need for a legislative amendment to the definition of "public body" in the ATIPP Act has been a major concern raised by the Office of the Information & Privacy Commissioner for at least the past eight years. The problem with the current definition of a "public body" has been thoroughly discussed in an October 2000 Special Report to Minister Dale Eftoda, a December 18, 2002 letter to Minister Hart and numerous Annual Reports by this Office. In summary, an amendment to the definition of public body is required for two reasons. Firstly, the reach or scope of the definition is too narrow with the result that certain entities that should be subject to the operation of the Act, are not. Secondly, the uncertainty as to what entities are captured by the current definition has adversely affected the administration of the Act.

Scope of the Act

I agree that scope of the Act should be expanded to bring other sectors under the governance of the Act, specifically Yukon municipalities and local governance bodies, Whitehorse General Hospital and Yukon College and school boards and councils.

Concern has often been expressed by the public about **Yukon municipalities and local governance bodies** not being covered by the Act, leaving a serious gap that has been closed in other jurisdictions by including local government bodies in their legislation.

Some government health care programs have been launched without a comprehensive privacy protection framework within which they can operate. Programs that rely on the sharing of information (personal health information in the case of health care) with partner agencies are currently not covered by the Act. Public trust that personal health information of all individuals is properly protected is essential as health care delivery systems move rapidly toward the creation and use of electronic health records.

The provinces of Ontario, Manitoba, Saskatchewan and Alberta have all enacted stand-alone legislation for personal health information privacy protection because these jurisdictions believe privacy protection in the delivery of health care can best be accomplished in this way. Other jurisdictions have made specific provision for personal health information within the already existing access and privacy legislative regime.

This issues related to personal health can only be properly dealt with in a more comprehensive review. In the interim, however, there is an opportunity here to close a serious gap in our legislative framework, by including the **Whitehorse General Hospital** as a public body. This would follow the model in British Columbia, where hospitals and regional health boards are included as public bodies under the *Freedom of Information and Protection of Privacy Act* which is the equivalent of our ATIPP Act.

Yukon College is part of Yukon government's education program delivery and should therefore fall within the scope and reach of the Act. There should be a comprehensive and consistent set of rules for access to information and protection of privacy across the entire educational system.

Definition of a Public Body

The current definition of public body in the Act is problematic. It is difficult to apply, often requiring a legal analysis to determine whether an entity is a public body. Also, the effect of the Yukon Supreme Court decision in *Reddoch* v. *The Yukon Medical Council*[4], was to eliminate bodies such as the Yukon Medical Council and the Yukon Workers' Compensation Health and Safety Board from the operation of the Act. This lack of certainty as to which public bodies are covered by the Act contributes to confusion on the part of the public and some entities as to who is subject to the Act. Dealing with the issue can be costly and time consuming for everyone.

I agree that the requisite certainty can be achieved by including as a regulation, a Schedule, listing the public bodies subject to the Act as has been done in other Canadian jurisdictions, specifically British Columbia, Alberta and Ontario. This simplifies the identification of public bodies.

Criteria for Identifying, Adding to and Removing Public Bodies from the Schedule of Public Bodies

I also recommend that the Act include criteria for determining whether a board, commission, council, foundation, corporations or other similar agency should be included as a public body and therefore listed in the Schedule. The criteria should also specify the criteria for removing a public body from the Schedule. Established criteria should be included in the Act rather than regulation or government policy. The intention of including the criteria for both adding and removing public bodies in the Act rather than regulation or government policy is to promote transparency and accountability.

In summary, the definition of public body needs to be expanded and made more certain. I am recommending the following the following suggested wording as adapted from the Alberta legislation as the definition for public body.

Suggested wording:[5]

"public body" means

(a) Subsection (a) needs to appropriately capture the entities already described in the current legislation, including government departments, secretariats and executive agencies.

[4] Reddoch v. The Yukon Medical Council 2001 YKCA 13 (CanLII)

[5] In offering suggested language, the Office of the Information & Privacy Commissioner does not presume to have expertise in legislative drafting. The language offered is taken from similar provisions in other jurisdictions, or simply framed in the context of the Recommendation.

(b) each local government body, including a municipality, rural government body, local advisory council, and other similar body formed or established under the Municipal Act

(c) the Whitehorse General Hospital, including any boards and committees established under the Hospital Act

(d) Yukon College, school boards, and school councils

(e) each board, commission, foundation, corporation or other similar agency designated as a public body in Schedule 1 of the regulations.

The following criteria applies to designating and deleting public bodies to Schedule 1

(1) The Commissioner in Executive Council may designate an agency, board, commission, corporation, office or other body as a public body and add the name of that body to the list in Schedule 1

(a) where the Government of the Yukon

(i) appoints a majority of the members of that body or of the governing board of that body,

(ii) provides the majority of that body's continuing funding, or

(iii) holds a controlling interest in the share capital of that body,

or

(b) where that body performs an activity or duty that is required by an enactment and the Minister responsible for the enactment recommends that the Commissioner in Executive Council make the designation.

(2) The Commissioner in Executive Council or the Minister may delete a body designated under subsection (1), but only if the Commissioner appointed under this Act is satisfied that it is not contrary to the public interest to delete the body and that

(a) the body

(i) has been discontinued or no longer exists,

(ii) has been amalgamated with another body, and use of the name under which it was designated has been discontinued, or

(iii) would more appropriately be subject to another Act of the Yukon or Canada that provides for access to information or protection of privacy or both,

or

(b) all of the following apply:

(i) the Government of the Yukon does not appoint a majority of members to the body or to the governing board of the body;

(ii) the Government of the Yukon does not provide the majority of the body's continuing funding;

(iii) the Government of the Yukon does not hold a controlling interest in the share capital of the body.

Recommendation #1:

a) That the ATIPP Act be amended to add Yukon College, school boards, and councils, municipalities and local governance bodies formed or established under the Municipal Act, and Whitehorse General Hospital as public bodies;

b) That the ATIPP Act or regulations include a Schedule listing the entities deemed to be public bodies subject to the Act;

c) That the ATIPP Act be amended to include criteria for determining whether a board, commission, council, foundation, corporation or other similar agency should be included or deleted as a public body to or from a Schedule of public bodies.

2. Stopping the Clock for Administrative Delays (Section 11)

Rationale:

The Consultation Document suggests the clock should be stopped in a number of situations including "when the applicant is asked to decide on issues such as the scope of the request". I agree that it is appropriate to stop the clock in situations where delays may be beyond the control of the records manager or the public body. I do not agree that the clock should be stopped when there is a delay because an applicant is asked to decide the "scope of the request". This is not an administrative delay which is beyond the control of the records manager or the public body. In fact, the notion of waiting on an applicant to decide the scope of a request seems contrary to the intent of the Act.

There are already three provisions in the Act that allow for the refinement of the scope of the applicant' request. The first is section 6(2), requiring an applicant to "… provide enough detail [in the access request] to identify the record." The second is section 7, which places an obligation on the records manager to assist applicants with their requests. The third provision, found in section 12(1)(a), authorizes the records manager to extend the time for responding if the applicant does not give enough detail to enable the public body to identify a requested record.

It is true that some requests are very broad in scope, making it challenging for the records manager and public bodies to determine the specific records being sought. But given the three above-mentioned sections of the Act, there is insufficient rationale to justify a clock-stopping measure to assist an applicant in defining the scope of an access request.

There are times, however, in administering an access request, when there may be delays beyond the control of the records manager or the public body. I agree that in these situations stopping the clock is appropriate. Specifically, this relates to the time for:

- dealing with a request to the commissioner by a public body under section 43 to disregard an access request;
- an applicant to respond to an estimate of costs;

- an applicant to make a payment when the Records Manager has requested some or all of the estimated fee, as authorized by section 8 of the Regulations, before processing the request;
- dealing with a request by an applicant to waive all or part of the fees; or
- a review by the commissioner of a decision by the Records Manager to not waive a part or all of the fee.

In my opinion section 11 should retain the requirement for the records manager to respond within the 30 days. However, subsections could be added which would "stop the clock" in any of the above-noted situations. This would address the concern about delays beyond the control of the records manager.

I support the manner in which British Columbia has addressed this issue in its legislation.

Suggested wording:

11(1) The records manager must make every reasonable effort to respond without delay and must respond not later than 30 days after a request is received unless the time limit is extended under section 12.

(2) If a public body asks the commissioner under section 43 for authorization to disregard a request, the 30 days referred to in subsection (1) do not include the period from the start of the day the application is made under section 43 to the end of the day a decision is made by the commissioner with respect to that application.

(3) If the records manager determines an applicant is required to pay fees for services related to a request, the 30 days referred to in subsection (1) do not include the period from the start of the day the records manager gives the applicant a written estimate of the total fees to the end of the day one of the following occurs:

(a) the records manager waives the payment of all of the fees under section 9 of the Regulations;

(b) the records manager waives the payment of part of the fees under section 9 of the Regulations, and the applicant agrees to pay the remainder and, if required by the records manager, pays the advance on fees required;

(c) the applicant agrees to pay the fees set out in the written estimate and, if required by the records manager, pays the advance on fees required.

(4) If an applicant asks the commissioner under section 48(1)(d) to review a decision to not waive a part or all of a fee, the 30 days referred to in subsection (1) do not include the period from the start of the day the applicant asks for the review to the end of the day the commissioner makes a decision.

Recommendation #2:

a) That section 11 be amended to include subsections which have the effect of stopping the clock for administrative delays that are beyond the control of the public body and the records manager;

b) That any amendments to section 11 should not permit the stopping of the clock for determining the scope of a request.

3. Right to Request Fee Waiver – in the Act, rather than Regulations

Rationale:

The Consultation Document proposes to make the fee waiver provision more obvious by putting it in the ATIPP Act itself rather than in the Regulations. I agree.

In addition, I am also suggesting that fees could be waived when the information being sought is in the public interest. Such is the case in many other Canadian jurisdictions. Examples would include requests for information in support of research for studies that would benefit the public at large, or information related to a community's interests and not just that of the applicant.

The British Columbia legislation has the following provision:

> *(5) If the head of a public body receives an applicant's written request to be excused from paying all or part of the fees for services, the head may excuse the applicant if, in the head's opinion,*
>
> *(a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment, or*
>
> *(b)* ***the record relates to a matter of public interest, including the environment or public health or safety****.* [emphasis added]

I am suggesting that the ATIPP Act contain a similar provision.

Recommendation #3:

a) That the ATIPP Act include a provision to allow a waiver of fees;

b) That the section in the Act on fee waivers includes a provision for waiving a fee for a record that relates to a matter of public interest, including the environment or public health or safety.

4. Reviews and Inquiries (Section 52)

Rationale:

Section 52 reads as follows:

If a matter is not settled under section 51, the commissioner must conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry. [Emphasis added]

The word "must" in the section suggests the Commissioner is required to conduct an inquiry whenever a matter is not settled under section 51. The proposal in the Consultation Document is to amend the section so that the Commissioner "would be able to decide whether or not a full inquiry is needed."

I agree that the Commissioner should have the ability to determine whether or not a full inquiry is needed in every case. This can be achieved by simply replacing the word "must" in section 52 with the word "may". This would give the Commissioner the discretion to decide whether or not to hold an inquiry on an individual's request for review.

This discretion can be found in other access and privacy legislation. In British Columbia's FOIP legislation, section 56(1) gives the BC Commissioner the discretion to decide whether or not to hold an inquiry on an individual's request for review. The wording of section 56(1) is identical to what I am proposing for section 52 in Yukon ATIPP Act. Principles for exercising discretion have been discussed in a number of the BC Commissioner's orders where he has considered the public body's request that the matter not proceed to inquiry.[6] I find these principles to be a reasonable guide for exercising such discretion:

- The public body must show why an inquiry should not be held.
- The applicant for the records does not have a burden of showing why the inquiry should proceed; however, where it appears obvious from previous orders and decisions that the outcome of an inquiry will be to confirm that the public body properly applied FIPPA, the applicant must provide "some cogent basis for arguing the contrary".
- The reasons for exercising discretion under section 56 in favour of not holding an inquiry are open ended and include mootness, situations where it is plain and obvious that records fall under a particular exception or outside the scope of FIPPA and the principles of abuse of process, *res judicata* and issue estoppel.
- It must in each case be clear that there is no arguable case that merits an inquiry.

Suggested wording:

[6] Decision F08-11, http://www.oipcbc.org/orders/2008/OrderF08-11.pdf

(1) If the matter is not referred to a mediator or is not settled under section 51, the commissioner may conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry.

Recommendation #4:

That the word "must" in section 52(1) be replaced with the word "may".

5. Mediation as Part of the Review Process (Sections 48 and 51)

Rationale:

Discussion on this issue in the Consultation Document begins with a concern about the length of time mediation sometimes takes, thereby restricting the amount of time left for Inquiry. Section 52(6) provides for an additional period of up to 60 days if more time is needed for mediation. In my view, the issue here may be one of perception rather than one of reality. The practice of the Office of the Information and Privacy Commissioner has been to schedule settlement efforts, including authorizing a mediator, in a manner that does not limit the Inquiry stage of a review. Although this scheduling may not have worked perfectly all the time, there is no justification to change the current provisions of the Act to address an infrequent problem for which there are already solutions. I should also note that the common law permits the Commissioner to extend the time for conducting an Inquiry in certain situations.

A secondary concern expressed in the Consultation Document is that "there may be perceptions of conflict of interest in having the Information and Privacy Commissioner's office conducting mediation". Similar provisions for settling a matter under review exist in every other Canadian jurisdiction. Changing the settlement process in our Act would be a major departure from the model utilized across the country.

In reality, the mediator authorized to settle any matter under review conducts settlement efforts independent of the Commissioner. The mediator must have significant expertise in the ATIPP Act and the issues that arise pursuant to its operation in order to assist parties in facilitating a resolution between them that is not contrary to the Act's requirements or intent. Like other offices, we have designed a process at the Office of the Information and Privacy Commissioner to alleviate the perceived conflict of interest. In recent years many matters have been successfully settled under section 51, alleviating the need for a complicated and lengthy Inquiry.

Reviews under the ATIPP Act sometimes involve minor matters, such as a misunderstanding about the records requested by the applicant or the amount of information a public body has severed. These reviews are typically easy to resolve and section 51 offers the avenue by which the Commissioner can authorize a member of her

staff to assist a public body and an applicant resolve and settle a Request for Review without proceeding to Inquiry as required by section 52(1).

The proposal of using mediators not skilled in the ATIPP Act and its application to conduct mediation and navigate settlement efforts, as proposed in the Consultation Document, would create many more problems than it might solve: additional costs, lack of expertise, unnecessary duplication and the introduction of confidentiality and privacy protection issues that would be difficult if not impossible to manage, to name but a few.

A 1997 amendment to section 48 of the ATIPP Act includes a provision allowing for the legislature to appoint a person to act as commissioner to deal with a review where the Commissioner has a conflict or there is reasonable apprehension that the Commissioner is biased. This provision provides a sufficient alternative to deal with any real conflicts that may arise and has been utilized when necessary.

Therefore, I do not agree with the proposed amendment.

Recommendation #5:

That section 51 of the ATIPP Act not be amended.

6. Authorizing a Public Body to Disregard Certain Access Requests (Section 43)

Rationale:

Section 43 of the Act allows the Commissioner, on the request of a public body, to authorize the public body to disregard access requests that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body.

The Consultation Document proposes to add a provision to authorize a public body to disregard requests that are frivolous or vexatious.

I support a recommendation on the basis of the stated rationale included in the 1999 decision of the BC Information and Privacy Commissioner:

> *Access to information legislation confers on individuals … a significant statutory right, i.e., the right of access to information (including one's own personal information). All rights come with responsibilities. The right of access should only be used in good faith. It must not be abused. By overburdening a public body, misuse by one person of the right of access can threaten or diminish a legitimate exercise of that same right by others, including as regards their own personal information. Such abuse also harms the public interest, since it unnecessarily adds to*

public bodies' costs of complying with the Act. Section 43 exists, of course, to guard against abuse of the right of access.[7]

Suggested wording:

43(1) If a public body asks, the commissioner may authorize the public body to disregard requests under section 6 that,

(a) because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body, or

(b) are frivolous or vexatious.

Recommendation #6:

That the ATIPP Act be amended to allow the commissioner to authorize a public body to disregard requests under section 6 that are frivolous or vexatious.

7. Multiple Concurrent Access to Information Requests

Rationale:

The Consultation Document suggests the Act be revised to allow for "an automatic extension of the response timeline" when one applicant makes multiple concurrent access requests. I do not agree with any amendment that authorizes an automatic extension of the response timeline. This would be an unnecessary departure from the administrative process for allowing extensions of time already included in section 12 of the ATIPP Act.

Section 12 already authorizes the records manager to extend the time for responding to a request when the volume of records to be searched and examined, within the time limit, would unreasonably interfere with the operations of the public body. No automatic extension of time is permitted. A public body must provide an explanation and justification for an extension of time. The record manager's decision to extend the time is subject to a review by the Commissioner under section 48.

There is no need to depart from this process for the purpose of dealing with multiple concurrent requests. I propose that the records manager be required to consider a request from a public body for the extension of time for multiple concurrent access requests on the same basis as she is required to do for voluminous records. This requires her to be satisfied that meeting the time limit would unreasonably interfere with the operations of the public body. The record manager's decision to extend time must also be subject to a review by the Commissioner under section 48.

[7] URL: http//www.oipc.bc.ca/orders/section43/02-01.pdf

Suggested wording:

12(1) The records manager may extend for a reasonable period the time for responding to a request if

... or
(e) multiple concurrent requests have been made by the same applicant and meeting the time limit would unreasonably interfere with the operations of the public body.

Recommendation #7:

a) That section 12 of the ATIPP Act be amended to include a provision that the records manager be required to consider a request from a public body for the extension of time for multiple concurrent access requests on the same basis as she is required to do for voluminous records. This requires her to be satisfied that meeting the time limit would unreasonably interfere with the operations of the public body;

b) That the records manager's decision to extend time must also be subject to a review by the Commissioner under section 48.

8. Regular Comprehensive Review of the ATIPP Act

Rationale:

I agree with the proposed amendment that there be a regular review provision in the ATIPP Act, with more clarification. In my view the Act should specifically require a "regular *comprehensive* review". After twelve years in operation the ATIPP Act has still not undergone a comprehensive review. In a similar span of time, both Alberta and British Columbia legislation have each had two comprehensive reviews of their public sector access and privacy legislation. In both those jurisdictions the provision for review includes the word "comprehensive" which makes clear the nature of the review to be undertaken.

As articulated many times by the Office of the Information and Privacy Commissioner, a comprehensive review of the ATIPP Act is long overdue. The current consultation on specific proposed amendments does not replace the need for a comprehensive review. I agree with the rationale in the Consultation Document that the Act requires review at regular intervals: the need to have the Act keep pace with a changing environment, including technological advances and practices with respect to information management.

In addition, services to the public – particularly government services – are much more integrated than in the past. There are many services government cannot provide in isolation, and reliance on external partnerships to operate efficiently is growing. New legislative schemes and programs must comprehensively protect personal privacy and create an environment of openness and accountability through access to information.

Equally important is the need to ensure the Act works together with other access and privacy legislation in Canada. This is best illustrated by the delivery of health care to Yukoners, which is particularly dependent on the provision of health care services in Alberta and British Columbia. It is necessary that a legislative framework for the protection of personal health information be developed to keep pace with legislation in those provinces with which health information is currently shared, as well as addressing inter-jurisdictional electronic health record information technologies, and anticipated pan-Canadian electronic health record infrastructure.

As a result, I recommend that the ATIPP Act be amended to include a section that requires that a regular comprehensive review of the ATIPP Act to be done at least once every four years and that a report, including any recommended amendments, must be submitted the Legislative Assembly within one year of commencing the review.

As the amendments from this process will not go forward to the Legislative Assembly until the fall of 2009, the first regular comprehensive review should begin on December 31, 2011 and at regular intervals after that of no more four years.

Recommendation #8:

a) That the ATIPP Act be amended to include a section that requires a regular comprehensive review of the ATIPP Act be done at least once every four years;

b) That a report, including any recommended amendments, be submitted to the Legislative Assembly within one year of commencing the review; and

c) That the first comprehensive review of the ATIPP Act be commenced no later than December 31, 2011.

ii) ADDITIONAL PROPOSED AMENDMENTS

Over the past twelve years, the Office of the Information and Privacy Commissioner has identified several problems with the practical application of the ATIPP Act. Each of these problems have been previously brought to the attention of the government and have been included on numerous occasions in Reports after Review, Investigation Reports and Annual Reports. There are no surprises here.

I am recommending the following amendments to address the problems previously identified as they can in my view be easily dealt within the scope of this review. The amendments do not affect the fundamental purpose or intent of the current legislation and will enhance the interests the ATIPP Act is seeking to balance.

9. Access Requests Deemed Abandoned (Section 6)

Rationale:

In the course of administering access to information requests, public bodies and the records manager are often required to correspond with an applicant for the purpose of providing further information or to provide an estimate of fees. The responsibility should lie with the applicant to respond in a timely manner.

A provision such as the one found in the Alberta legislation that allows the access request to be deemed abandoned if the applicant does not respond within 30 days should be included in the Act.

Suggested wording:

6.1(1) Where a public body or the records manager contacts an applicant in writing respecting the applicant's request, including

(a) seeking further information from the applicant that is necessary to process the request, or

(b) requesting the applicant to pay a fee or to agree to pay a fee, and the applicant fails to respond to the public body or the records manager, as requested, within 30 days after being contacted, the records manager may, by notice in writing to the applicant, declare the request abandoned.

(2) A notice under subsection (1) must state that the applicant may ask for a review under Section 48.

Recommendation #9:

a) That a provision be added to the ATIPP Act to permit the records manager by notice in writing to the applicant, to declare the access request abandoned;

b) That section 48 be amended to give the right of review where a request has been declared abandoned.

10. Workplace Harassment Records (Section 19.1)

Rationale:

In 2003 an amendment was made to the ATIPP Act to include section 19.1 that creates an exception to the right of access concerning investigations into allegations of workplace harassment. One subsection, 19.1(2)(f), of this amendment fundamentally changes the general right of access.

Prior to 2003 the Public Service Commission had been responding to requests for access to this type of record by claiming confidentiality, as set out in its policy as justification for withholding the records being sought. This was a classic case of departmental policy clashing with the provisions of the Act. The Act did not provide the kind of blanket exemption for information in records like these, as contemplated by the policy. The Commissioner's interpretation of the Act was confirmed by the Yukon Supreme Court in its finding that:

> *... none of the specified exceptions to the right of access can be interpreted to justify a blanket non-disclosure for an entire record premised on a zone of confidentiality policy ground.*[8]

The Yukon Government responded to the Supreme Court decision by amending section 19 to add section 19.1 which authorized the PSC to withhold any record created in relation to an investigation into a violation under the Workplace Harassment Policy, or a similar provision in the collective agreement.

Section 19 of the Act allows a public body to refuse to disclose information if the disclosure could be harmful to law enforcement. Section 19 requires a harms test; it does not offer blanket protection for any and all records created in the course of law enforcement. Section 19.1 forms part of section 19 and specifically deals with records created in the course of a workplace harassment investigation. All subsections of 19.1(2) except (f) include a harms test. The adoption of section 19.1 (2)(f) resulted in a blanket protection for workplace harassment investigation records. This creates a class-based exception keeping entire records from disclosure that is dramatically different from the other exceptions which require a harms test. By departing from a harms test, subsection 19.1(2)(f) fundamentally changes the general right of access.

In addition, this unusual exception permits the collection and use of personal information about an individual in the course of investigation into allegations of workplace harassment that could be completely withheld from the individual. This practice violates a specific right of access to one's own personal information and the right to request a correction of that information.

I propose the removal of section 19.1(2)(f) for two reasons. It affords an excessive level of protection to records in a way that is contrary to the intent of the Act and the harms tests set out in the other subsections of the section. The other subsections in 19(2)

[8] Justice Veale in Avoledo v Government of Yukon (PSC), 2003 YKSC 10

provide adequate protections for any concerns a public body might have about disclosing sensitive information on records created in the course of a workplace harassment investigation.

Additionally, I propose changing the words of section 19.1(2) "a workplace harassment record and any information in it or about it", to "information in a workplace harassment record". This would to make that section consistent with the section 19 exemption for law enforcement records to which it is attached.

Suggested wording:

19.1(2) A public body may refuse to disclose information in a workplace harassment record if the disclosure could reasonably be expected to …

Recommendation #10:

a) That paragraph 19.1(2)(f) of the ATIPP Act be repealed;

b) That in Section 19.1(2) the words "a workplace harassment record and any information in it or about it" be changed to "information in a workplace harassment record".

11. Commissioner's Powers and Protections (Section 42)

Rationale:

The Information and Privacy Commissioner has two major oversight functions found in different sections of the ATIPP Act. The first oversight function flows from Section 48 which gives the Commissioner authority to review: access to information decisions made by a public body or the records manager, complaints brought by an individual about a public body's collection, use and disclosure their personal information, or a decision of a public body not to correct or annotate their personal information.

The Commissioner's authority to review under section 48 is accompanied by powers of compulsion in section 53. In addition, sections 55 and 56 include protections to the Commissioner and those acting for or under the direction of the Commissioner from disclosing or being compelled to testify in relation to all information obtained in the performance of duties, powers, and functions including that obtained through investigation under the Act.

Section 42 places a responsibility with the Information and Privacy Commissioner to "monitor how this *Act* is administered to ensure that its purposes are achieved." One of the ways the Commissioner may do this is to receive complaints or comments from the public concerning the administration of the Act, conduct investigations into those complaints and report on those investigations. However it is not clear that the powers

and protections in sections 53, 55 and 56 apply when dealing with section 42 investigations.

I am recommending that the ATIPP Act be amended to specifically extend the powers and protections found in sections 53, 55 and 56 in relation to reviews to investigations under section 42. This amendment is necessary to allow the Commissioner the full ability to perform her statutory functions and to assure public bodies, applicants and third parties that the information provided to the Commissioner in relation to an investigation about the administration of the Act is protected in the same manner as information provided to the Commissioner in a review.

To achieve this, the word "review" in sections 53, 55, and 56 of the ATIPP Act should be changed to read "an investigation under section 42(b) or a review under section 48". This wording change would give clarity to the Act providing clear direction regarding investigations and reviews. Legislation in Alberta and British Columbia grants the Commissioner powers of compulsion and gives protections to both investigation and review functions.

Recommendation #11:

That sections 53, 55, and 56 of the ATIPP Act be amended to include "an investigation under section 42(b) or a review under section 48".

12. Authority for Commissioner to Appeal if Applicant Consents (Section 59)

Rationale:

The current appeal provisions in the Act only permit an applicant to appeal when a public body decides not to follow the Commissioner's recommendation to give the applicant access to a record or to part of a record.

This provision presents a significant and unfair power imbalance because many applicants may not have the ability or the financial means to undertake an appeal before the Yukon Supreme Court. The appeal process can be intimidating, time consuming and very costly. In addition, the possibility exists that if a public body is reluctant to make the disclosure recommended by the Commissioner, it may decide to not follow the recommendation because the applicant's likelihood of making an appeal is remote.

It may also be the case that if a public body is resolute in its decision to withhold information despite the Commissioner's recommendation and the applicant does not appeal, a significant legal issue that ought to be resolved by the Court and in the public interest, may be unresolved.

Manitoba legislation contains a provision that permits the Commissioner to:

- bring an appeal to the Supreme Court, with the consent of the person who has the right of appeal;
- intervene in an appeal if the Commissioner is of the opinion that there is a significant issue of statutory interpretation;
- intervene in an appeal if the Commissioner is of the opinion that an appeal is clearly in the public interest.

I propose that the appeal provisions of the ATIPP Act be amended to adopt a provision similar to that in the Manitoba legislation. I refer to Manitoba legislation because, as in our ATIPP Act, the Manitoba Commissioner is only authorized to make recommendations. In other jurisdictions the Commissioners have order making power so this is not an issue in those jurisdictions.

Suggested wording:

59(8) The commissioner may appeal a decision described in paragraph 59(1)(a) within the time limit set by subsection 59(3), if the commissioner has obtained the consent of the person who has the right of appeal, and if the commissioner is of the opinion that the decision raises a significant issue of statutory interpretation or that an appeal is otherwise clearly in the public interest.

Recommendation #12:

That section 59 of the ATIPP Act be amended to add a subsection permitting the commissioner to appeal a decision of a public body to refuse to follow his or her recommendations to give access to a record or part of a record, with the consent of the person who has the right of appeal, and if the commissioner is of the opinion that the decision raises a significant issue of statutory interpretation or that an appeal is otherwise clearly in the public interest.

iii) HOUSEKEEPING AMENDMENTS

Proposed amendments in this part of our submission include minor insertions and changes in wording where the existing language in the Act is in error or requires simple clarification.

13. Correction in Section 46(1)(a)

Rationale:

This section deals with the Commissioner's authority to delegate the duties, powers or functions of the Commissioner. Section 46(1)(a) is the first of three exceptions to this authority, and is written as "the power to delegate under this **action**" [emphasis added]. We believe this word is in error, and should be replaced with the word "section".

Recommendation #13:

That the wording be changed in section 46(1)(a) to read:
(a) the power to delegate under this section.

14. Correction in Section 50

Rationale:

Section 50 requires the Commissioner to give copies of a request for review to the public body and any third party involved, on receiving the request for review. The current section reads: "On **reviewing** a request for review, the commissioner must give a copy to ..." [emphasis added] We believe this word is in error, and should be replaced with the word "receiving".

Recommendation #14:

That the wording in section 50 be changed to read:
On receiving a request for review …

15. Correction in Section 58(1)(a)

Rationale:

Section 58 deals with the public body's requirement to respond to the Commissioner's recommendation(s), after receiving the Commissioner's report. At paragraph 58(1)(a) the Act currently reads that the public body must (a) decide whether to follow the

recommendations of the **commission** [emphasis added]. We believe the word "commission" should be replaced with the word "commissioner".

Recommendation #15:

That the wording in section 58(1)(a) be changed to read:
... decide whether the follow the recommendations of the commissioner ... .

16. Update Wording in the Regulations

Rationale:

Copies of the Regulations which are available to the public, especially those available on-line, refer to the "archivist", rather than the "records manager".

Recommendation #16:

That the word "Archivist" in the Regulations be replaced by the words "Records Manager".

Amendments Related to Third Party Interests

I have several comments and recommendations in relation to third party interests in the ATIPP Act.

17. Notice Clarification in Section 26(1)

Rationale:

I am concerned that public bodies are not following the intent of the Act when notifying third parties under section 26 (1).

Section 26(1) of the Act currently reads as follows:

> *26.(1)* ***Before giving access*** *to a record that a public body believes contains information to which section 24 or 25 applies, the records manager must, where practicable, give the third party a notice*
>
> *(a) stating that a request has been made by an applicant for access to a record containing information the disclosure of which might affect the interests or invade the personal privacy of the third party;*
>
> *(b) describing the contents of the record; and*

> *(c) stating that, within 20 days after the notice is given, the third party can make written representations to the records manager explaining why the information should not be disclosed.* [emphasis added]

Section 26 requires notice to be given to a third party where either section 24 (disclosure harmful to business interests of a third party) or section 25(disclosure would be an unreasonable invasion of third party personal information) is the subject of the access request. Sections 24 and 25 are mandatory exceptions to the right of access, meaning a public body **must** refuse to give access to business information or personal information **if** (section 24) the disclosure would be harmful to third party business interests, or (section 25) disclosure would be an unreasonable invasion of third party personal privacy.

The Act requires the public body to make a decision about whether giving access would be harmful to business interests or an unreasonable invasion of personal information by applying the criteria and relevant circumstances specified in the Act. Having done that, a public body may decide to disclose the information because it believes the business information does not meet the criteria for withholding business information, or a consideration of all the relevant circumstances favors disclosure of a third party's personal information.

If, after having considered the information in the records and applying the criteria and relevant circumstances, the public body decides to disclose the information, it must notify the third party of its intent to give access to the applicant.

In the past, some public bodies have interpreted section 26 to mean that a third party must be given notice before the examination and consideration described above have been completed, and that the third party should participate in this initial decision-making process. This, in my opinion, is not what the Act requires.

The proper sequence is for the public body to decide the right of access. If the public body decides the applicant does not have a right of access, the request is denied and there **is no requirement to notify the third party**. If, on the other hand, the public body decides to grant access to the applicant, then **before giving the access,** it must notify the third party of its intent to do so under section 26.

An amendment is required to clarify for both third parties and the public body the point at which notice must be given. This can be accomplished by simply changing the words at the beginning of the section "Before giving access" to "If the public body intends to give access".

Suggested wording:

26 (1) <u>If a public body intends to give</u> access to a record that the public body believes contains information to which section 24 or 25 applies, the records manager must, where practicable, give the third party a notice ...

Recommendation #17:

That the ATIPP Act be amended to change the wording in section 26(1) from "Before giving access" to "If a public body intends to give access".

18. Correction in Sections 26(1)(a) and 26(2)(a)

Rationale:

Both sections 26(1)(a) and 26 (2)(a) require notice to be given to the third party and the applicant that " a request has been made by an applicant for access to a record containing information the disclosure of which might affect the **interests** or invade the personal privacy of a third party". Emphasis added] The ATIPP Act is unclear regarding the nature of the "interests" referred to in those sections. I recommend that those sections be amended to insert the word "business" before the word "interests" to clarify that interests refers to business interests of a third party, rather than interests generally.

Recommendation #18:

That sections 26(1)(a) and 26 (2)(a) of the ATIPP Act be amended to insert the word "business" immediately before the word "interests".

19. Right of Review and Appeal Corrections in Sections 48(4) and 59(2)

Rationale:

The omission in the Act of a right of review to the Commissioner or appeal to the Supreme Court for a third party when a public body decides to give an applicant access to third party business information should be corrected. The failure to include a right of review or appeal can only be attributed to an inadvertent error in drafting.

Section 24 requires a public body to refuse an applicant access to third party **business information** if disclosure would reveal certain information as described in sections 24(1)(a) to (c) and in section 24(2).

A public body must decide whether disclosure would, in fact, reveal the described information and, if the public body determines disclosure would not be harmful and intends to give the applicant access, it must first give notice to the third party of its intent to disclose. The third party then has the right to make representation before the public body makes it final decision.

If that final decision is to disclose business information, despite the third party's objections, section 27 sets out the public body's time limit and the requirement for notice of its decision, whether it is a third party's business information or personal information.

Under subsection 27(3), if the public body decides to give access, the notice "… must state that the applicant will be given access unless the third party **asks for a review under section 48 within 20 days"**. [emphasis added]

Section 48(4) gives a right of review to a third party notified under section 26 but limits the review to a decision where the public body intends to disclose personal information about the third party. It reads as follows:

> *A third party notified under section 26 of a request for access may ask for a review of a decision by the public body* ***to disclose personal information about the third party.*** [emphasis added]

So, while section 27(3) says the third party can ask for a review, section 48(4) limits the right of review to the decision is to disclose personal information about a third party. It reads:

> *A third party notified under section 26 of a request for access may ask for a review of a decision by the public body to disclose* ***personal information*** *about the third party.* [emphasis added]

A third party should have the same right of review for business information as when his or her personal information is being disclosed.

Similarly, the appeal provision in section 59(2) currently limits third party appeal rights as follows:

> *A third party may appeal to the Supreme Court a decision by a public body under section 27 to disclose* ***personal information*** *about the third party.* [emphasis added]

The implications for a business of releasing third party business information to an applicant can be as serious as for the release of personal information. There must be the same rights of review and appeal in relation to that information.

Recommendation #19:

a) That section 48(4) of the ATIPP Act be amended to insert the words "or business" after the word "personal";

b) That section 59(2) of the ATIPP Act be amended to insert the words "or business" after the word "personal".