



April 3, 2014

Honourable Wade Istchenko
Minister
Highways and Public Works
Minister's Office
Yukon Government Administration Building
CM-7

Dear Minister Istchenko:

Re: *Access to Information and Protection of Privacy Act – Public Interest Override*

I listened with interest to the discussion in the Legislative Assembly on April 2, 2014, with respect to the challenges faced by the Truth and Reconciliation Commission in gaining access to records. I wish to draw to your attention a measure that may be of assistance to bodies, such as the Truth and Reconciliation Commission, in the future to facilitate access to information held by public bodies subject to the *Access to Information and Protection of Privacy Act* (ATIPP Act).

Many access to information laws across Canada include a public interest override provision. These provisions operate to facilitate access to information where it is found to be in the public interest to disclose the information despite the application of a valid exemption to or prohibition of disclosure. As an example, section 23 of Ontario's *Freedom of Information and Protection of Privacy Act* (FIPPA) indicates that the exemptions that operate under that Act to authorize or require a public body to refuse access "*do not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.*"

Section 23 of the Ontario's FIPPA has been applied to facilitate the disclosure of information to an applicant where it was found to be in the public interest despite a valid exemption applying to the information. Information disclosed under section 23 of FIPPA includes evaluations of Ontario Hydro's nuclear power plants¹ and Ontario budget impacts of Quebec independence.²

¹ Ontario Information and Privacy Commissioner Orders, P-1190 and PO-1805 upheld on judicial review, leave to appeal denied.

² Order P-1398 decision reversed on judicial review and upheld by the Court of Appeal.

British Columbia and Alberta also have public interest override provisions in their *Freedom of Information and Protection of Privacy Acts* that require a public body to disclose information that is determined to be “clearly in the public interest” without the requirement for an access request.³

If a public interest override provision were included in the ATIPP Act, a public body would be in a position to disclose information to an applicant, such as the Truth and Reconciliation Commission, after determining the public interest in disclosure outweighs the purpose of an exemption that applies under the ATIPP Act.

To ensure Yukoners have access to information that is in their interests to access, I urge Yukon government to consider amending the ATIPP Act to include a public interest override provision that will operate to facilitate this access where it is established, on balance, that the public interest in accessing the information outweighs the purpose of a valid exemption to disclosure under the ATIPP Act.

I recognize that including such a provision in the ATIPP Act would not be a complete answer to the challenges experienced by the Truth and Reconciliation Commission given that some laws, such as the *Vital Statistics Act*, are paramount over the ATIPP Act. Laws that are paramount to access to information laws may unnecessarily restrict access to information that should be made accessible in accordance with the requirements of these laws, which are designed to balance the competing interests of the public in accessing information held by public bodies against the ability or requirement of a public body to refuse access.

I would be pleased to discuss further with you the value of including a public interest override provision in the ATIPP Act.

Sincerely,

ORIGINAL SIGNED BY

Diane McLeod-McKay, B.A., J.D.
Information and Privacy Commissioner

DMM

Copy to: Mike Johnson, Deputy Minister, Highways and Public Works

³ Paragraph 25 (1)(b) of British Columbia’s *Freedom of Information and Protection of Privacy Act* and paragraph 32 (1)(b) of Alberta’s *Freedom of Information and Protection of Privacy Act*.