OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER OF NUNAVUT

ANNUAL REPORT 2013/2014

NUNAVUT
INFORMATION
AND
PRIVACY
COMMISSIONER

August 12, 2014

Legislative Assembly of Nunavut
P.O. Bag 1200
Iqaluit, NU
X0A 0H0

Attention: George Qulaut
Speaker of the Legislative Assembly

Dear Sir:

I have the honour to submit my forth Annual Report as the Information and Privacy Commissioner of Nunavut to the Legislative Assembly for the period April 1, 2013 to March 31st, 2014.

Yours truly,

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner
/kb

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2013-2014 ANNUAL REPORT

COMMISSIONER'S MESSAGE

The 2013/2014 fiscal year was a year in which information and privacy issues became part of the day to day news cycle all over the world. Edward Snowden's revelations, for example, have provided a focus to these issues that has never existed before. Massive hacking operations have affected millions of shoppers, both on line and in stores and these stories have been all over the news. Canada has been no exception. This spring, Canada Revenue Agency had to shut down its servers to deal with the potential of a massive breach. While not in Nunavut, we've heard of instances in other parts of the country involving the deletion of government records and the use of private email by public servants to conduct government business for the purpose of avoiding an access to information request. There have been cases in which public bodies were found to be deliberately failing to document their work in order to avoid accountability. Access and privacy are no longer esoteric concepts. Canadians are beginning to discuss these issues around the water cooler every day. Many, including those in Nunavut, have demanded transparency in the spending of public funds at all levels of government. Citizens are increasingly concerned about the erosion of their individual privacy and are talking about privacy as a fundamental value. Whether we like it or not, however, more of what we do every day is "on line" and every time we go "on line" we leave a little bit of our identity behind. Often, there is no choice, especially for those in communities outside of Iqaluit where access to services is being pushed more and more to the internet. While an efficient and effective way to communicate and do business, there are many privacy pitfalls in the on-line world. Moreover on-line and electronic record keeping presents many challenges to ensuring that the public can still have access to those records that show the work government does.

Historically, Nunavut public bodies have been very responsive to access requests and willing to work with me on both access to information and privacy matters. Over the last couple of years, however, this responsiveness is waning somewhat. It may be that, as in my office, the work load is becoming too much to simply do "off the corner of a desk". ATIPP Coordinators in public bodies have many job

responsibilities over and above their responsibilities under the Access to Information and Protection of Privacy Act. While most public bodies do the best job they can in dealing with matters that arise under the Act, others seem overwhelmed or even annoyed by the responsibilities imposed on them. I can understand that sometimes this work seems to be a bit of a bother – it doesn't advance any project or move the public body forward in its work. It is, however, vital to the whole concept of democratic government and more should be done by senior management to emphasize how important this work is and to ensure that it has the priority that the legislation demands. Unfortunately, the submissions that I receive on most reviews are lacking in detail and background, notwithstanding the fact that, in most cases, the legislation puts the onus on the public body to establish that an exemption applies. In at least one instance this year, the public body essentially told me that they simply did not have the time to deal with responding to my letters and in another, the formal submission to my office included what amounted to a scolding of the Applicant for being a bother. These are not the normal responses I get from Nunavut public bodies, but they do raise concerns for me about the kind of services that the public is receiving in the first instance. It is important that senior management and staff show leadership in these matters and send consistent messages that emphasize the importance of the legislation.

> "Big Brother in the form of an increasingly powerful government and in an increasingly powerful private sector will pile the records high with reasons why privacy should give way to national security, to law and order [...] and the like."
> — William O. Douglas, *Points of Rebellion*

In October 2013, Information and Privacy Commissioners from across Canada met in Vancouver and proposed comprehensive reforms to modernize access to information and privacy laws, including mandatory breach notification, a legislated duty to document, and stronger enforcement powers including penalties for non-compliance. Nunavut is ahead of the game with its recent amendments to the Access to Information and Protection of Privacy Act which include breach notification requirements for "material" breaches of privacy discovered by a public body. In order for Nunavut to stay in

the game, however, I believe that more resources are going to have to be dedicated to getting the job done. Within government, that means ensuring that those who are tasked with the job of overseeing ATIPP matters within each department are afforded the necessary time to address these issues when they arise and that the ATIPP is not just an inconvenient "add on" to their other, seemingly more important, job responsibilities.

There will also have to be an understanding that the resources set aside for the work of the Information and Privacy Commissioner will, at some point, have to be increased. My office has seen a steadily increasing number of requests for review and privacy complaints over the years. As you may know, my work as the Information and Privacy Commissioner is currently done on an "as needed" basis. In addition to my role as the Information and Privacy Commissioner in Nunavut, I also continue to hold the same position for the Northwest Territories in addition to running a busy legal practice in Yellowknife. While this configuration has worked well for many years, it is becoming more and more difficult to stay on top of all of the files arriving in my office and to deal with everything on a timely basis. There is little time to be proactive or to keep on top of new initiatives and programs that might benefit from my input. In light of this, I have made the decision to discontinue my law practice so that I can concentrate more fully on the work of the Information and Privacy Commissioner and I anticipate that by the end of 2014, my work will be focused solely on my role as the Information and Privacy Commissioner in both Nunavut and the Northwest Territories. This will mean that I will have more time to deal with requests on a more timely basis and to address, more pro-actively, those issues that arise from time to time. While I do not believe that a full time Information and Privacy Commissioner for Nunavut is yet justifiable, I do believe that it is time to begin planning for the day in which it will not only be justifiable, but required. It may not happen in the next year, or even the next three years, but certainly within the next five or six years, there will have to be some serious thought about a permanent office in Nunavut with a full time Commissioner/staff.

> The fantastic advances in the field of electronic communication constitute a greater danger to the privacy of the individual.
> — Earl Warren


Access

THE OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

Established in 1999, with the creation of Nunavut, the Office of the Information and Privacy Commissioner (OIPC) provides independent oversight and enforcement of Nunavut's access and privacy law, the Access to Information and Protection of Privacy Act. This Act applies to 24 public bodies, including ministries, crown corporations, commissions and more.

The Information and Privacy Commissioner is appointed by the Commissioner of Nunavut on the recommendation of the Legislative Assembly and holds office for five year terms. As an independent officer, the IPC can be removed from office only "for cause or incapacity" which allows her to comment freely and directly.

The Information and Privacy Commissioner (IPC) has the power to:

- Investigate, mediate and resolve matters concerning access to information disputes, and to make public recommendations to public bodies with respect to these matters;
- Investigate and resolve privacy complaints;
- Initiate reviews if there is reason to believe that a public body has or may have collected, used or disclosed personal information in contravention of the Act;
- Where a public body has reported a breach of privacy, and the IPC has determined that the breach creates a real risk of significant harm to one or more individuals, the IPC may disclose the breach to the public if she is of the opinion that the disclosure is in the public interest;
- Comment on the access and privacy implications of proposed legislative schemes or government programs;
- Engage in or commission research into matters affecting the carrying out of the purposes of the Act;
- Educate the public about their access and privacy rights.

THE *ACCESS TO INFORMATON AND PROTECTION OF PRIVACY ACT*

The *Access to Information and Protection of Privacy* (ATIPP) Act enshrines two principles:

1. public records must be accessible to the public; and
2. "personal information" must be protected by public bodies.

It outlines the rules by which the public can obtain access to public records and it establishes rules about the collection, use and disclosure of information about individuals by Nunavut public bodies.

ATIPP applies to all "public bodies". This includes all Government of Nunavut departments, crown corporations, and some boards, commissions and agencies.

The Supreme Court of Canada has declared that laws like ATIPP are special kinds of laws that define fundamental democratic rights of citizens. They are "quasi-constitutional" laws that generally are paramount to other laws.

ACCESS TO INFORMATION

The Access to Information and Protection of Privacy Act gives the public the right to obtain access to most records in the custody or control of public bodies. While access is always the rule, there are a number of specific and limited exceptions to this right. Most of the exceptions function to protect individual privacy rights, to allow elected representatives to research and develop policy and the government to run the "business" of government. Courts throughout Canada, up to and including the Supreme Court of Canada, have interpreted access to information legislation to be “quasi-constitutional” in nature such that the exceptions to disclosure are to be narrowly defined and limited.

To obtain a record from a public body, a request must be made in writing and delivered to the public body from whom the information is sought. When an applicant is not certain who his or her request should be sent to, it can be sent to the Manager of Access to Information and Protection of Privacy in

the Department of the Executive and Intergovernmental Affairs, and she will make sure that it is delivered to the right person in the appropriate public body.

When a request for information is submitted to a public body, that public body has a duty to identify all of the records which are responsive to the request. Once the responsive documents are identified, they are reviewed to determine if there are any records or parts of records which are exempt from disclosure under the Act before they are given to the Applicant. In most cases, public bodies must respond to access requests within thirty (30) days.

If a response is not received within the time frame provided under the Act, or if the response received is not satisfactory, the applicant can ask the Information and Privacy Commissioner to review the decision made.

PROTECTION OF PRIVACY

Part II of the Access to Information and Protection of Privacy Act provides rules for when and how public bodies can collect personal information, what they can use such information for once it has been collected and in what circumstances that information can be disclosed to another public body or the general public. It also provides a mechanism which allows individuals the right to see and make corrections to information about themselves in the possession of a government body.

This part of the Act also requires public bodies to maintain adequate security measures to ensure that the personal information which they collect cannot be accessed by unauthorized individuals.

When an individual has privacy concerns, those concerns can be referred to the Information and Privacy Commissioner for review. In addition, if a public body knows or has reason to believe that a breach of privacy has occurred with respect to personal information under its control, the public body must report that breach of privacy to the IPC if the breach is "material" as defined in the Act. In either case, the IPC is authorized to investigate the complaint and to make recommendations to the public body. The IPC is also authorized to initiate an investigation of her own accord when information comes to her attention which suggests that a breach of privacy may have occurred.

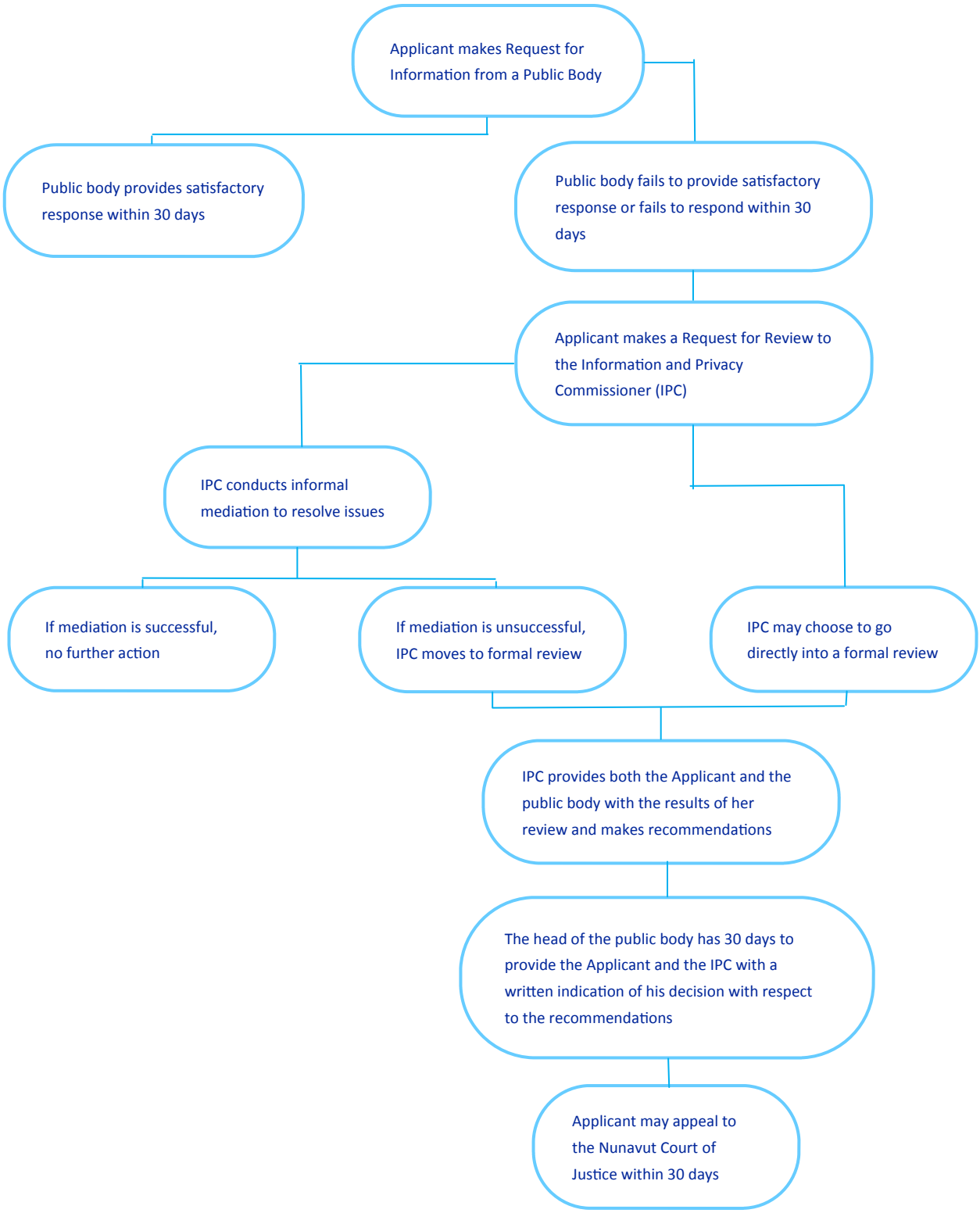
THE PROCESS

When the Information and Privacy Commissioner receives a Request for Review with respect to an access to information matter, she corresponds with both the Applicant and the public body involved to determine what records are involved and obtain an explanation from the public body as to the reasons for their decisions. The Applicant is also given the opportunity to provide input, as well as any third parties whose information is the subject of the request. The IPC has the benefit of being able to review, in almost every case, copies of all of the responsive records in their original format and with any edits which have been applied by the public body in responding to the request. The IPC considers the input of all interested parties, the records themselves and the provisions of the ATIPP Act and produces a report containing recommendations. The IPC does not have any power to compel public bodies to either disclose or protect information from disclosure but she is required to make recommendations. Public bodies must, however, respond to the recommendations made within 30 days and the Applicant has the right to appeal to the Nunavut Court of Justice if they remain dissatisfied with the outcome.

The process is very similar for a complaint about the alleged improper collection, use or disclosure of personal information. The IPC will communicate with both the public body and the complainant, and with any other person who might have some information about the alleged breach to determine whether or not a breach of privacy occurred. Whether or not there has actually been an improper collection, use or disclosure of personal information, the IPC will prepare a report which will almost always contain comments and recommendations to improve policies and procedures so as to reduce the possibility of future breaches. The recommendations made by the IPC with respect to privacy issues are provided to the head of the public body and, once again, the public body will then have to decide whether or not to accept the IPC's recommendations. There is, however, no right to appeal the public body's decision respecting a privacy breach complaint.

> Secrecy is not healthy as the default position and should be used only where it is strictly necessary. If information is withheld, people often think there must be something to hide about what is being done in their name with their money.
>
> — Richard Thomas, former UK Information Commissioner

THE REQUEST PROCESS



THE YEAR IN REVIEW

In the 2013/2014 fiscal year, my office opened a total of 23 files, which is fairly consistent with the last two fiscal years. These files can be divided into a number of categories:

Requests for Review - Privacy Issues	9
Requests for Review - Access to Information	8
Requests for Comment	3
Breach Notification	1
Requests for Review - no jurisdiction	1
Administrative	1

What is interesting in these statistics is the huge increase in the number of privacy complaints from the previous fiscal year, when there was only one such complaint. It may be that this is a function of the new provisions of the Act with respect to privacy coming into force but my sense is that it has more to do with the fact that people, generally, are becoming more aware of privacy issues in their day to day lives. On the up side, there were no complaints about extensions of time, a significant improvement from the previous year in which there had been five such complaints.

The public bodies involved with respect to these matters included:

> Government ought to be all outside and no inside.
>
> — Pres. Woodrow Wilson

Department of Economic Development and Transportation	3
Nunavut Housing Corporation	3
Department of Health	6
Department of Community and Government Services	2
Department of Justice	1
Department of Finance	1
Department of Education Culture and Employment	1

One matter was withdrawn before the review and recommendations were completed and one request was premature and the Information and Privacy Commissioner simply informed the Applicant and closed the file. The three requests for comment came from Nunavut Arctic College, the Nunavut Housing Corporation and the Department of Health.

My office issued ten Review Recommendations during the fiscal year.

> Access to public records gives citizens the opportunity to participate in public life, help set priorities, and hold their governments accountable. A free flow of information can be an important tool for building trust between a government and its citizens. It also improves communication within government to make the public administration more efficient and more effective in delivering services to its constituency. But, perhaps most importantly, access to information is a fundamental human right and can be used to help people exercise other critical human rights, such as clean water, healthcare, and education.
>
> — The Carter Center, Americas program, http://cartercenter.org/peace/americas/nav_question4.html, 2009

REVIEW RECOMMENDATIONS

REVIEW RECOMMENDATION 13-063

Category of Review: Access to Information

Department Involved: Department of Human Resources (now Finance)

Sections of the Act Applied: Section 23(2)(a), 23(2)(d), 23(2)(h)(i), 14.1(b)(1)

Outcome: Recommendations Accepted

The Applicant in this case sought access to information about himself surrounding certain work-place issues involving him. Many of the records that the Applicant received from the public body in response to his request were heavily redacted with the department relying on the exemptions provided for in sections 23 (unreasonable invasion of third party privacy) and 14 (consultations or deliberations involving officers or employees of a public body) of the Act.

The IPC did a line by line review of the records. In many cases, the public body had edited items that were opinions expressed about the Applicant by his co-workers. The IPC pointed out that opinions expressed about an individual are the personal information of that individual, not the personal information of the person holding the opinion. As a result, she recommended the disclosure of many of those edits involving opinions about the Applicant. Where the information removed was the Applicant's opinion about others in the workplace, the IPC recommended the removal of the third parties' names, but the retention of the opinion itself.

> Privacy is the right to be alone–
> the most comprehensive of
> rights, and the right most
> valued by civilized man.
>
> — Louis D. Brandeis

REVIEW RECOMMENDATION 13-064

Category of Review: Third Party Request for Review - Access to Information

Department Involved: Department of the Environment

Sections of the Act Applied: Section 24(1)(a), 24(1)(b) and 24(1)(c)

Outcome: Recommendations accepted

The public body in this case had received a Request for Information from an individual in respect of records between two given dates about a particular environmental spill and its cleanup. Some of the information responsive to the request included invoices and related records about two third party companies who were contracted by the department to provide some of the cleanup services. These two companies objected to the disclosure of much of the information, claiming that the disclosure would prejudice their competitive position.

Section 24 of the Act is intended to protect sensitive commercial, financial and technical information belonging to third parties who work with the GN under contract or otherwise where that disclosure would be reasonably expected to harm the business interests of the third parties. The party asserting such a claim must provide objective evidence that:

a) there is a clear cause and effect relationship between the disclosure and the harm;

b) the disclosure will cause harm and not simply interfere or create an inconvenience;

c) the likelihood of harm must be genuine and conceivable.

The IPC found that the third parties had not established that there was any reasonable likelihood of harm to the companies by the disclosure of the information in question. Nor was there any technical or proprietary information in the records that might possibly harm the business interests of the third parties if disclosed. The IPC recommended the disclosure of most of the records, with some limited exceptions.

REVIEW RECOMMENDATION 13-065

Category of Review: Access to Information

Department Involved: Department of Community and Government Affairs

Sections of the Act Applied: Sections 23, 24(1)(b), 24(1)(c), 21, 22, 14(1)(a) and (c) and 15

Outcome: Recommendations Accepted

The Applicant requested information pertaining to the events leading up to the awarding of Kitikmeot Region RFP 2011-21, including communications between certain specific individuals involved in the RFP process. The public body refused to disclose any of the requested information. In making this determination, the public body relied on several exemptions under the Act:

- Section 24(1)(b) and (c) which prohibit the disclosure of records where the disclosure would reveal financial, commercial, scientific, technical or labour relations information obtained in confidence from a third party, or the disclosure could reasonably be expected to prejudice the competitive position of a third party;
- Section 21 which allows a public body to refuse to disclose information where the disclosure could reasonably be expected to endanger the mental or physical health or safety of an individual other than the applicant;
- Section 22 which allows public bodies to refuse to disclose personal information that is evaluative or opinion material compiled solely for the purpose of determining the applicant's suitability, eligibility or qualifications for employment when the information has been provided in confidence;
- Section 23 which prohibits the disclosure of the personal information of a third party where that disclosure would amount to an unreasonable invasion of the third party's privacy;
- Section 15 which allows a public body to refuse to disclose information that is subject to any type of privilege available at law, including solicitor/client privilege.

The IPC did a line by line review of the records. She found that sections 15, 21 and 22 did not apply to any of the records. The IPC reviewed the three part test necessary before section 24 would apply and found that the test was met for some of the records withheld. She also found that some of the records might qualify for a discretionary exemption pursuant to Section 14 of the Act, which was not referred to or relied on by the public body, but which gives public bodies the discretion to refuse to disclose information where the disclosure could reasonably be expected to reveal advice, proposals, or recommendations developed for a public body or consultations involving officers or employees of a public body. She directed the public body to review these records and to exercise its discretion with respect to these records.

REVIEW RECOMMENDATION 13-066

Category of Review: Access to Information

Department Involved: Department of Health

Sections of the Act Applied: Sections 23(2)(a), (d) and (h)(i) , 14(1)(b) and 20(1)(a)

Outcome: Recommendations Accepted

The Applicant in this case sought access to information about himself surrounding certain work-place issues involving him. Many of the records that the Applicant received from the public body in response to his request were heavily redacted with the department relying on the exemptions provided for in sections 23 (unreasonable invasion of third party privacy) and 14 (consultations or deliberations involving officers or employees of a public body) of the Act.

The IPC did a line by line review of the records. As in Review Recommendation 13-062, many of the items edited from the responsive records were opinions expressed about the Applicant by his co-workers and opinions expressed by others about the Applicant. The IPC pointed out that opinions expressed about an individual are the personal information of that individual, not the personal information of the person holding the opinion. As a result, she again recommended the disclosure of

many of those edits involving opinions about the Applicant. Where the information removed was the Applicant's opinion about others in the workplace, the IPC recommended the removal of the third parties' named, but the retention of the opinion itself.

She also found that an investigation by a professional oversight body did not constitute a "law enforcement" matter such that section 21 would be applicable to grant an exemption from disclosure.

REVIEW RECOMMENDATION 13-067

Category of Review: Breach of Privacy

Department Involved: Nunavut Housing Corporation

Sections of the Act Applied: Sections 40, 42, 43, and 48

Outcome: Recommendations Accepted

An employee of the public body complained that his supervisor, or another co-worker in his office, had improperly collected and used his personal information. On a regular review of the long distance charges for the division, the Complainant noticed that a number of calls had been made from one of the extensions in the workplace to a phone number that had previously been assigned to his business in another jurisdiction. The dates of the phone calls coincided with the time during which he was involved in a formal complaint process involving himself and other individuals in his workplace. He was convinced that the telephone number had been obtained from his personnel file and was being use in an attempt to "dig up dirt" on him in the context of the workplace dispute. The public body confirmed that the telephone number had been dialed a number of times during regular work hours from a specific extension in the workplace assigned to a particular co-worker. They further conceded that the co-worker was at work on the dates the telephone calls were made. They could not, however, confirm that the co-worker was the one who made the calls and the co-worker denied that he had. They could provide no explanation as to why the phone calls might have been made or how the number had come to be in the possession of any person in the office.

The IPC concluded that the phone number did not come from the Complainant's personnel file, which was held in another community. She also determined that, although the public body may not be able to determine exactly who collected the information, or who used it, there was sufficient evidence to suggest that someone in the workplace had collected the information during working hours, and used the information to place the phone calls. While there was no way to determine with certainty who in the office collected and used the information, it is clear that someone did. The public body in this case did not comply with the rules set out in Sections 40, 42 and 43 of the Act with respect to the collection and use of personal information.

The IPC recommended that the public body provide all management and supervisors with basic training with respect to its obligations under the ATIPP Act to protect the privacy of individuals, including the rules about the collection, use and disclosure of such information. She further recommended that the public body create and send consistent and repeated messaging to its employees to remind them of their responsibilities under the Act.

REVIEW RECOMMENDATION 13-068

Category of Review: Access to Information

Department Involved: Human Resources

Sections of the Act Applied: Sections 23(1)(i), 23(4)(e)

Outcome: Recommendations Accepted subject to Third Party Consultation

The Applicant sought access to certain records in connection with a complaint which he had filed with respect to harassment within his workplace, including a copy of a report prepared by an employee of the Department of Justice as a result of an investigation conducted because of his complaint. Much of what was provided to the Applicant was heavily edited and there were 42 pages to which he was denied access altogether.

The public body relied entirely on section 23(2)(i) of the Act which prohibits the disclosure of personal information about a third party where that disclosure would constitute an unreasonable invasion of that person's privacy. Section 23(2)(i) states that there is a presumed breach of privacy where the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation.

The comments redacted were, for the most part, comments made by co-workers of the Applicant, about the Applicant, which were made to the investigator. The IPC held that section 23(2)(i) was intended to allow public bodies to interview references when considering an individual for employment or promotion within the GN, not to protect the opinions of individuals in the workplace in the context of a workplace dispute. Such opinions did not, in her view, constitute an "evaluation" or "character reference". She also pointed out that section 23(4)(e) of the Act specifically states that there is no unreasonable invasion of a third party's privacy where the information relates to the third party's employment responsibilities as an employee of the GN.

The IPC did a line by line review of the records in question and recommended the disclosure of many of the redacted portions.

REVIEW RECOMMENDATION 13-069

Category of Review: Access to Information

Department Involved: Department of Health

Sections of the Act Applied: Sections 23(1), 23(2)(a), 49

Outcome: No recommendations made

The Applicant sought access to "all records pertaining to the Discharge Abstract Database and the National Ambulatory Care Reporting System for acute care hospitals in Nunavut which had been submitted to the health ministry..... for the most recent reporting year"

There were no records responsive to that part of the request relating to the National Ambulatory Care Reporting System. The department of health refused to disclose any information in the Discharge Abstract Database (DAD) on the basis that they were unable to render a de-identified data set in a way that they could ensure that re-identification or data matching could not occur and that the disclosure of identifiable information would constitute an unreasonable invasion of the privacy of the patients involved. This decision was taken after consulting with both the Canadian Institute of Health Information (CIHI) and Nunavut's Chief Epidemiologist. The department provided evidence that the nature of the database was such that de-identification of data, with the small population base, would be difficult, if not impossible. Furthermore, they argued that the kind of line level data being requested would only typically be used for statistical research and access to information for such purposes requires the approval of a research ethics committee and licensing by the Nunavut Research Institute.

The IPC agreed with the decision of the public body to refuse disclosure to any part of the database requested. No further recommendations were made.

REVIEW RECOMMENDATION 13-070

Category of Review: Access to Information

Department Involved: Department of Health

Sections of the Act Applied: Sections 14(1)(a), 23

Outcome: Recommendations Accepted

The Applicant asked for information surrounding the medevac flight of his spouse, who died within days of her evacuation from a small community. The Applicant referred in his Request for Information to the ATIPP Act, but worded his request in a series of questions:

a) why did it take so long for the medevac flight to arrive?

b) why was it necessary to change crews part way through the trip?

c) why did it take so long for the flight to reach its final destination?

The public body responded by providing one record - a newspaper report of the incident - and short written answers to the three questions posed.

During the review process, the department identified a number of additional responsive records. None of the records were released to the Applicant. The department provided no explanation for this effective refusal to disclose except with respect to two pages, which they indicated were exempt from disclosure pursuant to section 14(1)(a).

The IPC noted that the Access to Information and Protection of Privacy Act contemplates the disclosure of information in the form of records. While it was, in this case, helpful for the public body to answer the questions posed, this is not what the Act directs them to do. If the request is made with reference to the Act, the obligation of the public body is to respond with all responsive records unless the Applicant specifically and clearly agrees that all he really wants is for the questions to be answered.

The IPC also noted that most of the records responsive to this request involved significant amounts of personal medical information about the Applicant's spouse, a third party as defined in the Act. In most circumstances, there would be a presumption raised that the disclosure of these records would be an unreasonable invasion of the third party's privacy, even if that third party were deceased. This, however, is a rebuttable presumption. After reviewing the case law in other jurisdictions in similar situations, the IPC held that in the particular circumstances of this case, the presumption was rebutted *vis a vis* the Applicant and she recommended that the records be disclosed.

Where the public body relied on section 14(1)(a) for refusing to disclose, the IPC reviewed the three tests for determining whether this section applied:

a) was the "advice" sought or expected or part of the responsibility of a person by virtue of that person's position?

b) was the "advice" directed toward taking an action?

c) was the "advice" made to someone who could take or implement an action?

In this case, the IPC found that the information in the record in question did not meet the second part of this test. The only thing contained in the record was background information about what had happened. The record was in the nature of a report, rather than an action brief. While the information may well have been necessary for the recipients to have before making decisions as to how to proceed, there were only very limited parts of the record which were directed toward taking action. Section 14 did not apply.

The IPC recommended the disclosure of all of the records with several small exceptions.

REVIEW RECOMMENDATION 14-071

Category of Review: Access to Information

Department Involved: Department of Justice

Sections of the Act Applied: Sections 14(1)(a), 15(a), 20(1)(h) and 20(1)(k)

Outcome: Recommendations Accepted

The Applicant sought access to a document entitled "Memorandum of Understanding" between the Government of Nunavut and the Office of the Correctional Investigator (OCI) as well as the final report prepared by the OCI concerning the state of the Baffin Correctional Centre. The department had provided the MOU but refused to disclose most of the report, basing their refusal on section 14 (advice to a public body), section 15 (solicitor/client privilege), 20(1)(h) (disclosure could facilitate escape from custody) and 20(1)(k) (prejudice the security of any property or system).

The public body provided no background or other evidence as to how the disclosure of any of the records might facilitate an escape or prejudice the security of the facility and the IPC could find nothing in the records themselves upon which she could reach that conclusion. She found that section 20 was not applicable.

The IPC further determined that the report in question was not intended or drafted with the purpose of providing advice or recommendations to the public body. The terms of reference in the MOU provided that the OCI was to conduct a review of BCC's infrastructure and functionality through a human resources lens that would complement existing assessments and evaluations. The IPC was not convinced that the report was directed toward taking any particular action. There was no nexus between the contents of the report and the taking of some action. Section 14 did not, therefore, apply to provide an exemption from disclosure.

Finally the IPC held that there was no solicitor/client relationship between the public body and the OCI and that section 15 did not, therefore apply.

The IPC recommended that the report be disclosed.

REVIEW RECOMMENDATION 14-072

Category of Review: Failure to Respond to Request for Information

Department Involved: Taloyoak Housing Authority/Nunavut Housing Corporation

Sections of the Act Applied: Section 3, Definition of "public body"

Outcome: Recommendations Accepted in Part

This review arose when the Taloyoak Housing Authority failed to respond to a request for information within 30 days as required by section 8 of the Access to Information and Protection of Privacy Act. Shortly after the review was commenced, the Applicant received the records he had requested but he asked me to continue with my review to determine whether, in fact, housing authorities and housing associations created under the Nunavut Housing Corporation Act, were subject to the ATIPP Act.

The regulations to the ATIPP Act provide a list of public bodies that are subject to the Act. The Nunavut Housing Corporation is included in that list. Housing Authorities and Housing Associations

(Local Housing Organizations or LHOs) created under the Nunavut Housing Corporation are not listed as public bodies. The Information and Privacy Commissioner observed, however, that all LHOs are closely connected with the Nunavut Housing Corporation, dependent entirely on the NHC for funding and subject to the direction of the Minister. In all of the circumstances, she found that LHOs are responsible, through the Nunavut Housing Corporation, to comply not only with the access provisions of the act but also the privacy provisions. She recommended:

a) that steps be taken to add all LCOs as public bodies in the Regulations;

b) that in the interim, LCOs be reminded about their obligations under ATIPP, including their responsibility to name a designated ATIPP Co-ordinator;

c) that training with respect to ATIPP be provided to the ATIPP Co-Ordinators and to management so as to ensure that these organizations fully understand their roles and responsibilities under the Act; and

d) that the Department of Executive and Intergovernmental Affairs take steps to review the list of public bodies under the regulations and to update it to include all organizations which receive the bulk of their funding through the Government of Nunavut or another public body;

> With the passage of the FOIA, the burden of proof shifted from the individual to the government. Those seeking information are no longer required to show a need for information. Instead, the `need to know' standard has been replaced by a `right to know' doctrine. The government now has to justify the need for secrecy."
>
> — Introduction to the Citizens Guide on Using the Freedom of Information Act, published by the House Committee on Government Reform, September 2005

LOOKING AHEAD

Every year I make recommendations in this section of my Annual Report to address issues that have come up from time to time with a view to improving how the Act meets its goals. An issue that came up not once, not twice, but three times this year was whether or not Local Housing Associations and Local Housing Authorities established under the Nunavut Housing Corporation Act are public bodies subject to the Access to Information and Protection of Privacy Act. In one instance, it was because a client of one of the Housing Authorities needed to access information about his rental arrangement with the Housing Authority and got push back from the Authority about his request. In another instance, an employee of a Local Housing organization, while drunk, posted information on his Facebook page about the arrears owing by another member of the community. In the third instance, a public body was looking for guidance on what the roles and responsibilities of Local Housing Organizations (LHOs) were under the Act. While the Nunavut Housing Corporation is named as a public body in the Regulations, LHOs are not. This run of issues surrounding LHOs, however, suggests to me that it is time to make it absolutely clear that these organizations do, indeed, fall under the Act and have obligations and responsibilities under the Act. There is, in my opinion, nothing that would weight against such specific inclusion - these are public organizations, whose leadership is most often appointed by the Minister, which are funded exclusively or almost exclusively with public funds and which are given policy direction by a public body (the Nunavut Housing Corporation). I have provided the opinion that this puts their records in the "custody and control" of the Nunavut Housing Corporation and subject to both the access and privacy provisions of the Act. This, however, should be made clear by adding all such organizations into the list of "public bodies" identified by the Regulations.

Another issue that has come up on numerous occasions again this year, after a bit of a hiatus, is how the Government of Nunavut awards contracts, especially the large, multi-million dollar, multiple year contracts. While Nunavut has done some work with respect to pro-active disclosure of these contracts, this government is far behind many provincial/territorial governments in disclosing information relating to contracts, particularly large contracts. While information is available on line,

the amount of information is sparse and, when it comes to the very large contracts, really not very helpful. For example, a $71.5 million dollar contract for sealift services has only the following information:

Project Name:	Sealift Services
Contract Type:	Service Contract
Contract Method:	Public Request for Proposals
Community:	Iqaluit
Originating Department:	Community and Government Services
Awarded To:	Nunavut Sealink and Supply Inc.
Award Date:	03 April 2012
Award Value:	$71,500,000.00

Nunavut is a small jurisdiction and everyone has a connection in one way or another. A very high percentage of individuals and companies rely, on a very large degree, on government contracts for their livelihood. For this reason interest in the contracting process is very high and much higher than it is in other jurisdictions. The general public in Nunavut is generally far more aware about who is getting government contracts than in other parts of the country where the pool is larger. There are lots of questions about why certain individuals and businesses are successful in obtaining government contracts and others are not. The public is, at times, going to question the hows and the whys of certain awards. The more of this information that can be made pro-actively available, the less room there is for any suggestion of favoritism, nepotism, fraud or other allegations of improper considerations. The larger the contract and the longer its duration, the more important it is to ensure that the process and the outcome are open. The Government of Nunavut, generally, can and should do a much better job of this.

I continue to be concerned about the state of affairs in the health sector as well. This is a recurring theme in my Annual Reports, I know, but I believe that it is important to address the unique nature of health information and the health system, particularly in Nunavut where so many people need to travel for health services. If I'm not mistaken, Nunavut is now the only Canadian jurisdiction without health specific privacy legislation. The Yukon, the Northwest Territories and Prince Edward Island have all passed health specific privacy legislation over the last year and are in the process of implementation.

No Annual Report of mine would be complete without a reference to the inclusion of municipalities under some form of access and/or privacy legislation. I am aware that the ATIPP office in the Department of the Executive and Intergovernmental Affairs is working, in particular, with the City of Iqaluit on these issues. Some progress is being made but it is very slow and is focused only on the larger communities at this point. I have heard tell of municipalities using their web sites as a kind of community newsletter, posting information about new babies, illnesses, deaths and the like on their web sites. While I understand that this is considered a "public service", communities also have to be respectful of the privacy of individuals whose lives are or may be affected. Once again, I would encourage the Government of Nunavut to engage municipal and community governments to establish and implement privacy policies as a starting point.

My third term as the Information and Privacy Commissioner of Nunavut is coming to a close in the spring of 2015. As noted in my opening comments, I would strongly recommend that the planning begin now to create both the infrastructure and the budget necessary to expand the office and the role of the Information and Privacy Commissioner. Within the next five or six years, I expect that a full time commissioner with staff will be necessary. I note, as well, that with the increasing number of requests for information being received by public bodies, more will have to be done to ensure that ATIPP Co-Ordinators have the time that they need to complete their work.

As always, I would like to express my thanks to those within the Government of Nunavut that I work with, especially Jessica Bell, the Manager of ATIPP. Good debates and good discussions about issues that arise give us both a better understanding of how the Act works or should work, even when we do not always agree on direction or policy. I look forward to my next year serving the people of Nunavut in my capacity as the Information and Privacy Commissioner.

> Democracy must be built through open societies that share information. When there is information, there is enlightenment. When there is debate, there are solutions. When there is no sharing of power, no rule of law, no accountability, there is abuse, corruption, subjugation and indignation.
>
> — Atifete Jahjaga, 4th President of Kosovo

APPENDIX

Modernizing Access and Privacy Laws for the 21st Century

Resolution of Canada's Information and Privacy Commissioners and Ombudspersons

October 9, 2013

CONTEXT

Canadians have come to expect greater accountability and transparency on the part of both governments and private-sector organizations with respect to how they gather, create, share, disclose and manage information, including personal information.

There have been many changes in technology, changes to government practices (such as public-private partnerships, out-sourcing or shared services models), and Canadians' expectations over the years. Recent revelations about government surveillance programs have heightened Canadians' concerns about the erosion of their privacy rights and have prompted calls for increased transparency and greater oversight of national security initiatives.

Most Canadian access and privacy laws have not been fundamentally changed to keep up with these changes and to improve protections and rights since their passage, some more than 20 years ago. Only a few Canadian laws have recently been passed or updated to address modern challenges and to ensure continued protection of individuals' rights to access and privacy.

At the same time, other laws have been amended or passed that have had the result of undermining or eroding access and privacy rights – the very rights access and privacy laws were intended to protect and guarantee.

Elsewhere in the world, privacy and access laws are being strengthened to meet the realities of the 21st Century – more powerful information and communication technologies, the challenge of managing electronic information and the social and political demands of engaged citizens. Canada's laws need to do the same.

WHEREAS

Information is one of Canada's most important national resources.

Robust protection of privacy and access to information are defining values for Canadians and underpin our democratic rights and freedoms.

Canadians need to be able to hold public institutions and private organizations to account for their privacy practices, their access decisions and their information management.

Canada must re-establish its position as a leader in both the access and privacy fields.

THEREFORE

1) Canada's Information and Privacy Commissioners and Ombudspersons call on our respective governments to recommit to the fundamental democratic values underpinning access and personal privacy legislation by:

- Consulting with the public, civil society and Information and Privacy Commissioners and Ombudspersons on how best to modernize access and privacy legislation in light of modern information technologies, evolving government practices and citizens' expectations.
- Modernizing and strengthening these laws in keeping with more current and progressive legislation in parts of Canada and around the world, including some or all of the following:

In terms of access to information:

a) Providing strong monitoring and enforcement powers such as the ability to issue binding orders for disclosure, and penalties for non-compliance;

b) Broadening and clarifying which public entities are covered by access laws;

c) Creating a legislated duty requiring all public entities to document matters related to deliberations, actions and decisions;

d) Legislating strict and enforceable timelines for public entities to respond to access requests in a timely fashion;

e) For exemptions where the expectation of harm is in issue, limiting which records are exempt from the general right of access by requiring public entities to prove there is a real and significant harm in their disclosure;

f) Requiring all records, including exempt records, be disclosed if it is clearly in the public interest to do so;

g) Establishing minimum standards for proactive disclosure, including identifying classes or categories of records that public entities must proactively make available to the public and, in keeping with the goals of Open Data, make them available in a usable format;

h) Requiring that any exemptions and exclusions to access that are to be included in laws other than access to information laws be demonstrably necessary and that government consult with Information and Privacy Commissioners and Ombudspersons; and

i) Establishing a requirement that for any new systems that are created, public entities create them with access in mind, thus making exporting data possible and easier.

In terms of privacy:

a) Providing strong monitoring and enforcement powers and penalties for non-compliance;

b) Broadening and clarifying which public entities are covered by privacy laws;

c) Establishing legislative requirements for notifying affected individuals when their personal information has been lost, stolen, destroyed, or improperly accessed, used or disclosed (mandatory breach notification);

d) Requiring public and private entities to improve the information they provide about their personal information policies and practices;

e) Legislating a "necessity test" requiring public and private entities to demonstrate the need for the personal information they collect;

f) Providing individuals with effective means to assert their privacy rights and to challenge entities' compliance with their legislated obligations;

g) Strengthening reporting requirements to the public with respect to the disclosure of personal information between private and public entities;

h) Legislating a requirement that public and private entities implement privacy management programs to ensure the protection of personal information; and

i) Establishing a requirement that for any new legislation, service, program or policy, public entities consider and plan for privacy implications at the outset (for example, privacy impact assessments, privacy by design).

2) Canada's Information and Privacy Commissioners and Ombudspersons commit to

- Engaging and following up with government, Legislature and Parliament on the issues set out above;
- Continuing to study and make public how access and privacy laws impact all Canadians; and
- Making recommendations to government, Legislature and Parliament based on our areas of expertise.

List of signatories

Jennifer Stoddart,
Privacy Commissioner of Canada

Suzanne Legault,
Information Commissioner of Canada

Elizabeth Denham,
Information and Privacy Commissioner for British Columbia

Jill Clayton,
Information and Privacy Commissioner of Alberta

Mel Holley,
Acting Ombudsman for Manitoba

Anne E. Bertrand,
Access to Information and Privacy Commissioner of New Brunswick

Ed Ring,
Information and Privacy Commissioner for Newfoundland and Labrador

Elaine Keenan Bengts,
Information and Privacy Commissioner for the Northwest Territories and
Information and Privacy Commissioner for Nunavut

Dulcie McCallum,
Freedom of Information and Protection of Privacy Review Officer (Commissioner) for the Province of Nova Scotia

Ann Cavoukian,
Information and Privacy Commissioner of Ontario

Maria C. MacDonald,
Information and Privacy Commissioner of Prince Edward Island

Me Jean Chartier,
President, Commission d'accès à l'information du Québec

R. Gary Dickson,
Information and Privacy Commissioner of Saskatchewan

Diane McLeod-McKay,
Ombudsman and Information and Privacy Commissioner of Yukon