



15th Legislative Assembly of the Northwest Territories

Standing Committee on Accountability and Oversight

Report on the Review of the
2004-2005 Annual Report of
the Information and Privacy
Commissioner

Chair: Mr. Kevin Menicoche

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June 1, 2006

SPEAKER OF THE LEGISLATIVE ASSEMBLY

Mr. Speaker:

Your Standing Committee on Accountability and Oversight is pleased to provide its Report on the Review of the 2004-2005 Annual Report of the Information and Privacy Commissioner and commends it to the House.

Kevin Menicoche, MLA
Chairperson

**STANDING COMMITTEE ON
ACCOUNTABILITY AND OVERSIGHT**

**REPORT ON THE REVIEW OF THE
2004-2005 ANNUAL REPORT OF THE
INFORMATION AND PRIVACY COMMISSIONER**

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REPORT ON THE REVIEW OF THE 2004-2005 ANNUAL REPORT OF THE INFORMATION AND PRIVACY COMMISSIONER

INTRODUCTION

The Standing Committee on Accountability and Oversight met on May 2, 2006 to review the 2004-2005 Annual Report of the Information and Privacy Commissioner. The Committee would like to thank the Commissioner, Ms. Elaine Keenan-Bengts, for her report and for her appearance before the Committee.

The NWT's *Access to Information and Protection of Privacy Act* (ATIPP) came into force on December 31, 1996. The purpose of the *Act* is to make public bodies more accountable and to protect personal privacy by giving the public a right of access, with limited exceptions, to records held by the GNWT and related public bodies, and by preventing the unauthorized collection, use or disclosure of personal information by the GNWT and related public bodies. The *Act* also gives individuals the right to see and make corrections to information about themselves.

The Information and Privacy Commissioner is an independent officer of the Legislative Assembly. Her primary role is to review and make recommendations on public bodies' decisions under the *Act*. Reviews can be requested by people who have been refused access to information, third parties who have an interest in information someone else is requesting, and people who have concerns about how their personal information has been handled. The Commissioner's mandate also includes: research into matters affecting the carrying out of the purposes of the *Act*; receiving representations about the operation of the *Act*; and offering comment on the implications for privacy protection of proposed legislative schemes or government programs.

2004-2005 ANNUAL REPORT

An underlying theme throughout the Commissioner's report and presentation to the Committee was the need to foster a corporate culture that is committed to open and transparent government and strives to follow the spirit as well as the letter of the *Act*. The Commissioner points to a trend of public bodies automatically refusing access to information wherever they have a discretionary exemption under the *Act*, without evaluating whether there are clear and compelling reasons to do so. She is concerned that public bodies, and in

particular the Financial Management Board Secretariat, are withholding information just because they can without considering whether they should.

In order to shift the corporate culture toward openness and transparency, the Commissioner believes a top-down approach is necessary. In her words, "if the top members of the bureaucracy and the politicians are afraid of openness, that fear will translate to the department or government and there will be a corporate culture of secrecy. If the corporate culture is one of openness, the rest of the bureaucracy will follow."

As an example of the leadership required, she cites the Premier, Management Board and Attorney General of Ontario, who recently issued memoranda emphasizing the importance of freedom of information in the democratic process and encouraging a proactive approach to providing information to the public. She recommends the Premier, Ministers and Financial Management Board follow the lead of Ontario by publicly and clearly endorsing the goals of the *Act* and taking positive steps to foster a corporate culture of openness and accountability.

The Committee shares the Commissioner's concerns and strongly supports her recommendation.

Recommendation

The Standing Committee on Accountability and Oversight recommends that the Premier, Ministers and Financial Management Board make public statements supporting the principles of the *Access to Information and Protection of Privacy Act*, and send clear messages to the public service about the importance of open and transparent government, and the need to grant access to information unless there is a clear and compelling reason not to do so.

The 2004-2005 Annual Report includes several other specific recommendations to enhance access to information and protection of personal privacy in the NWT, and to improve the administration of the *Act*.

Boards and Agencies

A longstanding concern for the Commissioner has been the need for members and staff of boards and agencies to be aware of their obligations under the *Act* and to implement appropriate records retention policies, particularly for documents in the hands of individual board members. The Commissioner recommends that, as a minimum, the chairs and executive directors of boards and agencies be required to take the training, although ideally training would be mandatory for all appointees.

The GNWT advised in its response to the 2003-2004 recommendations¹ that ATIPP training is routinely available to all board members and public servants, and that the Department of Public Works and Services would make available to board members its records management standards, policies and guidelines.

The Committee is concerned that the GNWT's approach to date has been far from proactive and supports the Commissioner's recommendation for mandatory training.

Recommendation

The Standing Committee on Accountability and Oversight recommends the GNWT make basic records management and ATIPP training mandatory for all chairs and executive directors of boards and agencies to which the Act applies.

Municipal Governments

For the sixth year in a row, the Commissioner's report speaks to the lack of information and privacy legislation for municipal governments.

The GNWT has identified concerns about the impact on day-to-day municipal operations and administration, costs, training and capacity as reasons why municipal information and privacy legislation cannot proceed at this time.

Municipal governments collect a substantial amount of personal information from residents and hold a great deal of information of interest to the public. The need for openness and transparency applies as much to them as to any other level of government. While the Committee acknowledges the challenges of developing and implementing information and privacy legislation, we are not satisfied that they excuse the GNWT's failure to take a proactive approach on this issue. Elections and human rights legislation, to name two examples, could also be said to be challenging to implement, expensive and at times inconvenient; however, we recognize their importance in a democratic society and do not question the need to allocate resources to them. Why should information and privacy legislation be any different? As the Commissioner said to us, quoting her Alberta counterpart, Mr. Frank Work, "the right to access to information is precious. No government should ever oppose or impede it on the basis that it is too expensive, too time consuming or that only the troublemakers use it."

¹ Tabled Document 94-15(4), February 22, 2006

The Committee would also point out that municipal staff are required to handle personal information and respond to information requests from the public in any case, and suggests that training and guidance in the form of legislation and policies would, if anything, make that aspect of their work less difficult.

The Committee has therefore taken it upon itself to write to the NWT Association of Communities in order to hear directly from them what is required in order for them to implement information and privacy legislation. Given the time needed to draft new legislation, we do not expect that a Bill could be introduced before the next election, however, we encourage the Government to begin work immediately to allow legislation to be brought in during the term of the 16th Assembly. In our view, this would provide ample time for the Government to resolve implementation concerns raised by municipal governments.

Recommendation

The Standing Committee on Accountability and Oversight recommends the GNWT bring forward a plan, including timelines, for developing and implementing municipal information and privacy legislation that addresses the implementation concerns raised by municipal governments and that will allow for consideration of legislative amendments by the 16th Assembly.

Private Sector Privacy Legislation

Another of the Commissioner's on-going recommendations from past years is that the NWT enact its own "made-in-the-north" privacy legislation to regulate how the private sector collects, uses and discloses personal information. As an example of a concern with how the private sector handles personal information, she cited the continued practice of some NWT businesses of printing credit card numbers in their entirety on transaction slips. In southern Canada, it is now standard to print partial numbers only, which helps to prevent theft.

Although the NWT private sector is already regulated by the federal *Personal Information Protection and Electronic Documents Act (PIPEDA)*, the Commissioner points out that a small and distant office in Ottawa is unlikely to have the time to address complaints and issues of a local nature. *PIPEDA* also does not protect employees from misuse of their personal information by employers. Some other Canadian jurisdictions, including Alberta and BC, have already enacted provincial legislation to address the gaps left by *PIPEDA*.

The GNWT has indicated it intends to review the effectiveness of *PIPEDA* in 2006 in order to determine whether territorial legislation is also necessary. The Committee looks forward to seeing the results of this review.

Recommendation

The Standing Committee on Accountability and Oversight recommends the GNWT review the effectiveness of the *PIPEDA* and the need for territorial legislation on private sector use of personal information, and provide a report on its findings to the Committee before the end of 2006.

Emerging Aboriginal Governments

As in previous reports, the Commissioner recommends the GNWT take the initiative to raise information and privacy issues in devolution discussions and with aboriginal governments in order to encourage them to include some form of regulation within their governance structures. She states that although there are likely to be cultural differences on many information and privacy issues, all peoples have the right to an open government, which requires access to records, and the right to expect a certain level of privacy.

The GNWT indicated in its response to the 2003-2004 recommendations that information and privacy matters are being addressed in devolution and Aboriginal land, resource and self-government negotiations, in the Tlicho Agreement and in the Deline, Gwich'in and Inuvialuit self-government agreements-in-principle. It is unclear to the Committee whether the provisions are limited only to information the governments handle as delivery agents for GNWT programs and services, or whether they extend to all the governments' operations. The Committee would like more information from the GNWT on the scope of the access and privacy issues being discussed in the negotiation process and how proactive the GNWT has been in encouraging emerging governments to incorporate freedom of information and protection of privacy into their structures.

Recommendation

The Standing Committee on Accountability and Oversight recommends the GNWT ensure access and privacy issues are considered in devolution and self-government negotiations, encourage and offer assistance to Aboriginal governments to develop their own regulations where other legislation does not apply, and provide further detail to the Committee on its efforts in its formal response to this report.

Contractors

As in past reports, the Commissioner raises the importance of ensuring contractors who handle government information are aware of and comply with

the requirements of ATIPP. Her concerns appear to be addressed in part by terms and conditions incorporated into GNWT contracts and the October 2005 amendments to the *Act*, which made contractors directly responsible for protecting personal information. However, the need for on-going enforcement and monitoring of compliance continues to be an issue. Specific measures she recommends include requiring contractors to notify the public body of any requests or demands made by foreign authorities for personal information, and of any unauthorized disclosure of information that has taken place.

Recommendation

The Standing Committee on Accountability and Oversight recommends the GNWT ensure adequate measures are in place to monitor and enforce contractors' compliance and to detect and defend against disclosure of personal information to foreign authorities.

Development of Online Registries

The Commissioner's report also emphasizes the need to consider privacy issues before moving public registries online. While information from registries such as the Land Titles Registry has always been open to public inspection, the ability for someone to misuse personal information or collect it in mass for commercial purposes has been limited until recently by the practical limitations of a paper registry in a fixed location. The Commissioner suggests a number of questions the GNWT should be asking itself before moving public registries online; for example, what is the purpose of the registry, and whether individuals should be asked whether they consent to their personal information being disclosed or used for other purposes such as direct marketing.

Recommendation

The Standing Committee on Accountability and Oversight recommends the GNWT consider privacy issues and consult with the Information and Privacy Commissioner in order to take advantage of her expertise before moving any more public registries online.

Amendments to Clarify the Act

The Commissioner recommends two amendments to the *Act* to address problems that came to light in the course of a review of a decision to refuse access to information by the former Department of Resources, Wildlife and Economic Development.

The first issue was with a specific provision of the *Act*, paragraph 24(1)(f), which states that a public body must not disclose information that is a statement of financial assistance provided to a third party by a prescribed corporation or board. The Commissioner interpreted the words “prescribed corporation or board” to refer to any corporation or board subject to the *Act*. The Department interpreted them to require a specific designation as a “prescribed corporation or board”. The Commissioner recommends the *Act* be amended to clarify the meaning of paragraph 24(1)(f).

The second issue was with the Department’s response to the Commissioner’s recommendations, which in her opinion seriously undermined the credibility of the review process. The Commissioner’s recommendations were based on the Department’s argument that the information requested was subject to a specific exemption in the *Act*. On receiving the Commissioner’s recommendations, the Department declined to follow them on the basis that they had changed their mind about which exemption they wanted to rely on and that they had determined the exemption they had initially cited, and on which the Commissioner based her recommendations, did not apply to them.

One of the Commissioner’s concerns with this kind of response on the part of a public body is that it leaves no recourse for the applicant other than to make an application to court and effectively sidelines the role of the Commissioner. The *Act* does not allow for the Commissioner to reconsider a request for review if a department changes its mind about its arguments after she has made her recommendations. In her report, she therefore recommends an amendment to the *Act* requiring public bodies to refer to all relevant sections of the *Act* when responding to the Information and Privacy Commissioner, and to be bound by those submissions. During her meeting with the Committee, she suggested an alternative would be an amendment requiring that no final decision be made by the head of a public body until the Commissioner is given an opportunity to make recommendations based on all the arguments the public body wishes to rely on.

In our discussions with the Commissioner it became apparent to the Committee that the underlying problem is likely not so much a gap in the legislation as the overall corporate culture and approach to requests for review of access to information decisions. The Commissioner advised us that public bodies often take what she referred to as a “lazy” approach in making their submissions and fail to provide complete lists of their arguments and the specific exemptions or sections of the *Act* they wish to rely on. As the Commissioner pointed out, the onus is on the public body to demonstrate that an exemption applies. However, because of the poor quality of submissions, the Commissioner sometimes finds herself in the position of having to research and make the public bodies’ arguments for them because of the possible consequences of not considering all the angles.

The Committee is not convinced that the solution to this problem lies in amendments to the *Act*. We see the problem as relating back to the overall corporate culture and attitude discussed earlier in this report, and therefore suggests that the appropriate response is leadership and direction from the top down to ensure public bodies are more diligent and thorough in preparing submissions to the Commissioner.

Recommendation

The Standing Committee on Accountability and Oversight recommends the GNWT set standards for submissions to the Information and Privacy Commissioner and provide appropriate leadership and direction to ensure they are understood and followed.

The Committee further recommends that the GNWT review the need for amendments to the *Act* to allow the Information and Privacy Commissioner to reconsider a request for review where a public body changes its arguments after the Commissioner has made her recommendations.

The Committee further recommends that the GNWT either bring forward an amendment to clarify the meaning of paragraph 24(1)(f) or provide direction to public bodies on how it is to be interpreted.

Updating Regulations

For the second time, the Commissioner's report includes a recommendation that Schedule A of the regulations be kept up-to-date in order to ensure new or renamed public bodies are subject to the *Act*. As of the date of our meeting with the Commissioner, the regulations still did not list the Business Development and Investment Corporation, although it was established over a year ago. The Committee fails to understand the reason for the delay in making such a simple amendment. We therefore support the Commissioner's recommendation that the regulations be updated at least annually. Ideally, they should be updated immediately each time a new public body is created or renamed to ensure the continued application of the *Act*.

Recommendation

The Standing Committee on Accountability and Oversight recommends that Schedule A to the Access to Information and Protection of Privacy Regulations be updated at least annually.

Updated Directory of ATIPP Coordinators

The Commissioner recommends that a link be provided from the Legislative Assembly website to the directory of ATIPP coordinators as it is currently difficult to find on the Justice and GNWT websites. She further recommends that a paper directory be made available throughout the NWT.

While the Committee is not convinced that keeping an up-to-date paper directory in circulation is feasible, Members do support linking the directory to the Legislative Assembly's website in order to make it more accessible to users.

Recommendation

The Standing Committee on Accountability and Oversight recommends the GNWT continue to keep its online directory of ATIPP Coordinators current, and that a link to the directory be included on the Legislative Assembly website.

OTHER ISSUES

At the time of our public review of the 2004-2005 report, the Commissioner raised two additional issues which the Committee wishes to comment on.

The first was a concern that the Department of Health and Social Services and health authorities have not sought her advice in the course of the move to electronic health records. As with the shift to online public registries, the change in the management of health records raises a number of privacy issues. The Committee believes it would be sensible for public bodies to seek the Commissioner's expert advice on privacy matters when they undertake such initiatives.

Recommendation

The Standing Committee on Accountability and Oversight recommends that GNWT public bodies consult with the Commissioner to identify potential privacy issues in the early stages of projects resulting in the transfer of personal information to electronic records systems.

The second issue the Commissioner raised was a concern with the capacity of existing staff to respond to access to information requests. As an example, she cited the Department of Education, Culture and Employment, which is currently dealing with a high volume of requests due to inquiries related to residential schools. Public bodies typically assign responsibility for coordinating ATIPP

matters in addition to an employee's other duties rather than to a dedicated staff person. The Commissioner suggested the GNWT consider either hiring dedicated ATIPP staff for high-volume departments or establishing a central unit of dedicated ATIPP staff that public bodies could access.

Recommendation

The Standing Committee on Accountability and Oversight recommends the GNWT evaluate its capacity to respond to access to information requests.

CONCLUSION

As the Commissioner stated to the Committee,

“Secrecy and closed doors lead to corruption and bad government no matter how well intentioned governments may be. It is far easier as a member of the public to accept the bona fides of government when they seem to be open and willing to accept responsibility, even for bad news, than if they appear to be secretive.”

The Committee encourages the Government to heed this advice, and to strive for full compliance with both the spirit and letter of the *Access to Information and Protection of Privacy Act*.

Recommendation

The Standing Committee on Accountability and Oversight recommends that pursuant to Rule 93(5), the GNWT table a comprehensive response to this report within 120 calendar days.