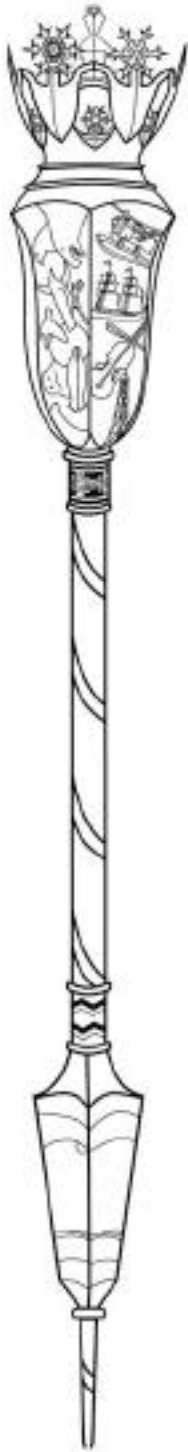


Northwest Territories Legislative Assembly

Standing Committee on Accountability and Oversight

Report on the Review of the Access to Information and
Protection of Privacy Commissioner's Report 1999-2000

Chair: Mr. Charles Dent, MLA



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THE HONOURABLE ANTHONY (TONY) WHITFORD, MLA
SPEAKER OF THE LEGISLATIVE ASSEMBLY

Mr. Speaker:

Your Standing Committee on Accountability and Oversight has the honor of presenting its Report on the Review of the Report of the Auditor General to the NWT Legislative Assembly for 1999, and commends it to the House.

Charles Dent, MLA
Chair

Standing Committee on Accountability and Oversight Review of the Access to Information and Protection of Privacy Commissioner's Report 1999-2000

Background

The Legislative Assembly of the Northwest Territories enacted its first *Access to Information and Protection of Privacy Act* (ATIPP) on December 31, 1996. As is noted in the Access to Information and Protection of Privacy Commissioner's Annual Report for 1999/2000:

"The Access to Information and Protection of Privacy Act was created to promote, uphold and protect access to the information that government creates and receives and to protect the privacy rights of individuals."¹

The Information and Privacy Commissioner is an independent officer of the Legislative Assembly, but is required under section 68 of the *Access to Information and Protection of Privacy Act* to prepare and submit an Annual Report on the Commissioner's activities to the Legislative Assembly. Ms. Elaine Keenan Bengts was re-appointed as the Northwest Territories' Information and Privacy Commissioner on July 1st, 2000 and will serve a 5-year term.

The *Access to Information and Protection of Privacy Act* provides the public with a means of gaining access to information in the possession of the Government of the Northwest Territories and governmental agencies. However, under the legislation, there are exceptions that function to protect individual privacy rights, and enhance the ability of elected representatives to research and develop policy and run the business of the government. The Act also gives individuals the right to see and make corrections to information about themselves in the possession of a government body.

Committee Review of the Report

The Standing Committee on Accountability and Oversight met to review the Information and Privacy Commissioner's report for the 1999-2000 year on April 4th and 5th, 2001 and again on May 9th, 2001. The list of witnesses included Ms. Elaine Keenan Bengts, the Information and Privacy Commissioner; Mr. Lew Voytilla, Secretary to the Financial Management Board; Mr. Robert Taggart, Manager of Corporate Services for the Financial Management Board Secretariat; and Mr. Gerry Sutton, Acting Deputy Minister, Department of Justice.

During the review, it became apparent to the Members that there was a difference between the Information and Privacy Commissioner and the Financial Management Board when it came to the interpretation of the Act. In her report, the Information and Privacy Commissioner stated "This public body (FMBS) in particular continues to be less than co-operative in meeting the objectives of the Act."² Through discussions with Financial Management Board Secretariat officials, it was determined that FMBS believed it had acted in accordance with the legislation. The Committee has noted the gap between these two bodies and encourages them to work more cooperatively in the future.

The *Access to Information and Protection of Privacy Act* is a new piece of legislation for the Northwest Territories. At the time of this report, the legislation had been in effect for four years. In the course of working with the legislation, the Commissioner found deficiencies and problems. The Commissioner made six recommendations that, in her opinion, would increase the effectiveness and efficiency of the Act. During the review, both the Commissioner and the Acting Deputy Minister of Justice addressed the recommendations. In addition, an interjurisdictional survey was performed to determine the practice in other Canadian jurisdictions. After the interjurisdictional survey was completed, the Committee met again on Wednesday, May 9th, 2001 in Fort Smith to complete the review.

Committee's Response to Recommendations of the Information and Privacy Commissioner

Commissioner's Recommendation #1

The acceptance of recommendations made: An amendment be made to the legislation which would create a presumption that the recommendation made by the ATIPP Commissioner is deemed to be accepted thirty days after the recommendation is made unless, prior to that, the head of the public body issues a different decision.

The Committee heard from the Information and Privacy Commissioner that heads of government bodies consistently failed to respond to the Commissioner's recommendations within the legislated timeframe. As the Commissioner does not have the power to force a response and there are no consequences within the NWT legislation to promote a timely response, the process can become stalled for unnecessary periods of time. By implementing an action for failing to respond to the Commissioner's recommendations within the legislated timeframe, the process would proceed in a more timely manner.

The Committee noted that there are no jurisdictions in Canada that treat the failure of a head of public body to respond to the Commissioner's recommendations as an acceptance of the recommendations. The Committee did find, however, that some jurisdictions have legislated the failure of the head of a public body to respond to the Commissioner's recommendations within the legislated time period to be a refusal. This concurs with what was presented by the Acting Deputy Minister of Justice. The Committee is not in support of the Commissioner's recommendation, however it would support an amendment to the legislation to reflect what is used in other jurisdictions.

The Standing Committee recommends the Access to Information and Protection of Privacy Act be amended to clarify that if the head of a public body fails to respond to the Commissioner's recommendations within the legislated time period, the head of the public body is deemed to have refused

to follow the recommendation of the Information and Privacy Commissioner.

Commissioner's Recommendation #2

Service of documents: The Act be amended to provide that all notices required under the Act be delivered personally to the recipient, or be served in some other fashion which allows for verification of the date of delivery, and that the thirty-day reply period begin only after service has been so effected.

The Commissioner informed the Committee that there were problems with the amount of time taken for the delivery of notices. It may take 14 to 20 days for a mailed notice to get to a remote community. If a reply is made in the same fashion, there is a good chance that the thirty-day time frame will be missed.

The Committee draws upon section 51 of the *NWT Access to Information and Protection of Privacy Act*, which states:

Where this Act requires notices to be given to a person, it is to be given

- (a) by sending it to that person by prepaid mail to the last known address of that person;
- (b) by personal service; or
- (c) by substitutional service where so authorized by the Information and Privacy Commissioner

The Committee is not convinced that changes to our legislation are necessary. Section 51(c) of the *NWT Access to Information and Protection of Privacy Act* provides for service of documents in a manner that allows for verification of the date of delivery. The interjurisdictional survey found that there was only one jurisdiction, Yukon, which says a notice that is required to be given to a third party "may" be given by certified mail. All other jurisdictions indicated that the time taken for the delivery of mail was not an issue for them. When it comes to the means for delivery of notices, the Committee is of the opinion that our present legislation is adequate. Consequently, there was no need for the Committee to pursue this recommendation.

Commissioner's Recommendation #3

Privacy complaints: The Act be amended to provide clear statutory authority for the Information and Privacy Commissioner to review complaints related to violations of personal privacy and to make recommendations.

In her opening comments to the Committee, the Commissioner stated that the *Access to Information and Protection of Privacy Act* sets out a number of rules about the government's collection and use of personal information, however the provisions of the Act are weak in terms of what happens if one of the rules are breached. Additionally, the Act does not specifically provide the authority for the Office of Information and Privacy Commissioner to review a complaint of invasion of privacy or improper use of personal information. The Commissioner would like the power to investigate and make recommendations in the event of a breach of privacy provisions of the Act. The Committee concurs that the Information and Privacy Commissioner should have this authority.

The Standing Committee recommends that the Access to Information and Protection of Privacy Act be amended to give the Commissioner the authority to investigate and make recommendations in the event of a breach of privacy provisions in the Act.

Commissioner's Recommendation #4

ATIPP Commissioner's powers: The Act be amended to:

- i. Provide the ATIPP Commissioner with the power to subpoena documents and witnesses;
- ii. Impose penalties for failure to comply with the time limits outlined in the Act;
- iii. Provide for the withholding of performance bonuses from heads and deputy heads of public bodies that consistently fail to meet deadlines; and
- iv. Bring municipal governments under the Act.

Subpoena Powers

During the course of the Committee's review, Members were informed that there are basically two types of Access to Information and Protection of Privacy Commissioners in Canada. One is an ombudsman-like commissioner and the second exercises an adjudicator role. Presently the NWT legislation has the Commissioner acting in an ombudsman-like role. The Committee would like our Commissioner to remain in this capacity. It was also noted that in the majority of Canadian jurisdictions the Commissioner has subpoena power. The Committee is in favour of granting the power of subpoena to the Commissioner to deal with Access to Information issues but is not in favour of granting the power of subpoena to deal with privacy complaints. This follows the model that is used by the province of Ontario.

The Standing Committee recommends that the Access to Information and Protection of Privacy Act be amended to grant the Information and Privacy Commissioner subpoena powers when dealing with Access to Information issues.

Penalties For Lateness

The Committee does not in agree with the imposition of penalties for failure to comply with time limits outlined in the Act per se. However, they did note that the legislation does have a penalty under section 59(2) of the Act for willful obstruction of the Information and Privacy Commissioner or any other person in the exercise of the powers or performance of their duties under the Act. The Committee feels that it is time to review the penalties for willfully disobeying the Act with a mind to making the consequences greater.

The Standing Committee recommends that the Access to Information and Protection of Privacy Act be reviewed

respecting the penalties for willful obstruction, violation or disregard of the legislation.

Withholding Performance Bonuses for Failing to Meet Deadlines

The third part of this recommendation asks that there be a provision for withholding performance bonuses from heads and deputy heads of public bodies that consistently fail to meet deadlines. The Committee noted that this power is not granted in any other Canadian jurisdiction and does not support this action.

Municipalities to be Included Under the Act

The Commissioner also suggests that municipal governments should be brought under the *Access to Information and Protection of Privacy Act*.

The Committee undertook its own research and determined that there are two means by which municipalities could be made subject to this type of legislation. One way is to include municipalities under the existing *Access to Information and Protection of Privacy Act* and the second is through separate legislation specifically addressing communities. The Committee is of the opinion that more research and consultation on this matter is required.

The Standing Committee recommends that the Department of Justice and the Department of Municipal and Community Affairs along with the Northwest Territories Association of Municipalities, Bands and other forms of community governments, explore whether or not there should be Access to Information and Protection of Privacy legislation for municipalities;

And further, whether municipalities should be included in the current legislation or whether separate legislation should be developed.

Commissioner's Recommendation #5

Public Utilities Board: The Public Utilities Board be subject to the *Access to Information and Protection of Privacy Act*.

During the review process, the Department of Justice notified the Committee that the regulations for the Act had been changed to include the Public Utilities Board. This means that the Public Utilities Board is now subject to the *Access to Information and Protection of Privacy Act*. Consequently, there is no need to pursue this issue further.

Commissioner's Recommendation #6

Legislation with respect to Private Sector Privacy Standards: The Government of the Northwest Territories consider introducing legislation to respond to the recent passage of Bill C-6 (*Personal Information Protection and Electronic Documents Act*) by the Parliament of Canada.

The *Personal Information Protection and Electronic Documents Act (PIPEDA)* is federal legislation which gives Canadians new legal rights when their personal information is collected, used or disclosed in the course of a commercial transaction. Information supplied to the Committee by the Department of Justice indicates the Act will be implemented in three stages:

- As of January 1, 2001, the *Personal Information Protection and Electronic Documents Act* applied to businesses that collect personal information and are federally regulated.
- On January 1, 2002, organizations that collect personal health information, examples of which include drug stores, dental clinics and other health service providers, become subject to the *PIPEDA*.
- As of January 1, 2004, other private sector businesses that collect, use or disclose personal information in the course of a commercial activity will become subject to the legislation. The federal government may exempt organizations and/or activities in provinces that have their own privacy laws that are similar to the federal law.

In her opening comments to the Committee, the ATIPP Commissioner stated

“The *Personal Information Protection and Electronic Documents Act* came into effect on January 1st of this year. This Act governs the protection of personal, private information in the private sector, as opposed to the public sector. In other parts of the country, there is a phase-in period to allow provincial governments to introduce their own legislation dealing with privacy issues in the private sector.

However, because of the constitutional nature of the Northwest Territories, the Act is fully effective in this jurisdiction since January 1st. The effect of this is that complaints of invasion of privacy or improper use of personal information by the private sector will now be dealt with by the Federal Privacy Commissioner’s office.”³

This information was different from that which was presented in the Commissioner’s report and different from the information provided by the Department of Justice. The Committee sent a letter to the Minister of Justice requesting clarification.

The Department responded that they understood that the application of *Personal Information Protection and Electronic Documents Act* in the Northwest Territories would be the same for both the provinces and the territories. The Department only recently became aware that there was a different interpretation resulting in the Act being applied differently in the territories as compared to the provinces.

In the Minister’s response, it was also brought to the attention of the Committee that the federal Privacy Commissioner’s Office had released a brochure titled “*The Personal Information Protection and Electronic Document Act: A Guide for Canadians*”. This brochure states that the *PIPEDA* “covers all businesses and organizations engaged in commercial activity in the Yukon, the Northwest Territories and Nunavut” as of January 1, 2001. This is cause for concern. The federal *Interpretation Act* interprets the word “province” to include all three territories and it is not known why, in this situation, the territories would be treated differently from the provinces. Industry Canada, the federal department responsible for the administration of *PIPEDA*, has been contacted by the Department of Justice and is reviewing the situation. The Department of Justice has requested that Industry Canada make its position known to the GNWT. Further, the Department of Justice has undertaken its own review of the *PIPEDA* in order to examine the Act’s application in the NWT.

The Standing Committee requests the Minister of Justice to keep the Standing Committee informed of any new developments in this issue. The Committee would also like to be supplied the positions arrived at by the NWT Department of Justice and Industry Canada. Until the issue is resolved, the Committee will not act upon this recommendation.

Cabinet Documents

During the review, a number of other issues relating to the ATIPP legislation were raised, researched and discussed by the Committee. One of these issues was public access to Cabinet documents. The Standing Committee is of the opinion that, in pursuit of a more open and accountable government, it is desirable to open up the public's access to Cabinet documents. Legislation from the different jurisdictions was reviewed and the Committee agreed that Alberta's legislation was what would be the preferred option for the Northwest Territories.

21(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees or of the Treasury Board or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees or to the Treasury Board or any of its committees.

(2) Subsection (1) does not apply to

- (a) information in a record that has been in existence for 15 years or more,
- (b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or
- (c) information in a record the purpose of which is to present background facts to the Executive Council or any of its committees or to the Treasury Board or any of its committees for consideration in making a decision if
 - (i) the decision has been made public,
 - (ii) the decision has been implemented, or
 - (iii) 5 years or more have passed since the decision was made or considered.

The Standing Committee recommends that Access to Information and Protection of Privacy Act be amended to make our legislation read the same as section 21 of Alberta's Freedom of Information and Protection of Privacy Act.

Conclusion

The Standing Committee was pleased to have the opportunity to meet with the Information and Privacy Commissioner, the Secretary to the Financial Management Board, the Manager of Corporate Services for the Financial Management Board Secretariat, and the Acting Deputy Minister of Justice to discuss this report. The Standing Committee on Accountability and Oversight requests that the Executive Council table a comprehensive response to this report within 120 days in accordance with Rule 93(5) of the Rules of the Legislative Assembly.

End Notes:

¹ Elaine Keenan Bengts, Access to Information and Protection of Privacy Commissioner Annual Report 1999/2000, page 6.

² Elaine Keenan Bengts, Access to Information and Protection of Privacy Commissioner Annual Report 1999/2000, page 3.

³ Elaine Keenan Bengts, Standing Committee on Accountability and Oversight Transcripts, Wednesday, April 4, 2001, page 7