NUNAVUT

INFORMATION AND PRIVACY COMMISSIONER

ANNUAL REPORT

OF THE

INFORMATION AND

PRIVACY COMMISSIONER

OF NUNAVUT

2000/2001

I. COMMISSIONER'S MESSAGE

Accountability is one of the primary tools for ensuring that government remains democratic and ethical. The Access to Information and Protection of Privacy Act may be one of the most important pieces of legislation in existence for ensuring that accountability and preserving long held democratic ideals. This legislation preserves and protects the openness and accountability of government agencies by regulating and directing access to government information by the public.

Government "recordkeeping" is the foundation of efficient, effective and accountable government. The information and knowledge captured and available in government records represents a major investment of intellectual property

Hon. John Reid, P.C.
Federal Information Commissioner
Annual Report, Information Commissioner 2000-2001

Just as important to a free and democratic society is the right to know what information government agencies hold about you and to be able to limit and control the use that such information is put to.

Access to information laws have been useful instruments for improving public understanding of the policy-making process and for protecting citizens against arbitrary decisions by public bodies. The advent of new and ever-expanding information technology makes the security and protection of private, personal information more and more important in a world where information is more valuable than gold.

My first full year as Information and Privacy Commissioner for Nunavut has been a relatively quiet one, with only three requests being made of my office to review a decision made by a government agency with

respect to the release of information held by a government agency. On the other hand, I am pleased to report that I have had ongoing and positive communications with government agencies who are not in any way reticent about contacting my office to seek advice and ask questions. This is a very positive development and one that, I hope, will continue to allow me to work with government agencies to ensure a fair and proper interpretation and application of the Act. All in all, it appears to me that the spirit and intention of the Act has been embraced by the Government of Nunavut.

Secrecy is inherently attractive to governments, and demands for accountability through use of the law butt up against the instincts of self protection

Ann Cavoukian, Ph.D
Information and Privacy Commissioner of Ontario

Annual Report 2000

It is, however, difficult to know exactly how government agencies are dealing with requests for information without any real understanding of how many requests for information are being received and what departments are receiving the majority of those requests. Because my office never receives the initial requests, and there is no requirement for any government agency to provide me with such statistics, I can only guess the number of access requests actually being received at the first instance. It would be helpful to have those statistics and I would urge the government to institute a process for tracking these requests if that is not already being done.

The requests that did hit my desk in 2000/2001 were mixed between requests to review access to information requests and requests to review a perceived breach of the privacy provisions of the Act.

In my opinion, privacy issues are going to become ever more pressing in the eyes of the public. With today's electronic recording and storing of information, the general public is becoming more and more concerned about how that information is being used. It might surprise most of us, for instance, to know how much of our personal health information is shared and with whom. The Access to Information and Protection of Privacy Act can only deal with breaches of patient confidentiality if that breach comes from a government run or operated institution. Private institutions, including dentists offices, chiropractors, pharmacists, optometrists and others within the health care system, are not covered by the Act. That is not to say that these groups are misusing patient information. What it is to say is that there is no "watchdog" to ensure that only proper use is made of personal information. Many southern jurisdictions, including Alberta and Manitoba, have passed separate legislation to deal with the protection of privacy in the health industry and other jurisdictions, such as Ontario, the Yukon, the Northwest Territories and British Columbia, are currently considering such legislation. This may be an area that deserves some consideration in Nunavut.

Another development which may have significant impact on Nunavut is the coming into effect of the *Personal Information Protection and Electronic Documents Act,* which is federal legislation intended to regulate the collection, storage and use of personal information in

The passage of the Personal Information Protection and Electronic Documents Act marks a significant step forward for Canada, putting it in the forefront of those nations embracing technological progress and electronic commerce while still protecting and enhancing long-cherished fundamental rights

George Radwanski
Federal Privacy Commissioner

Your Privacy Responsibilities - Canada's Personal Information Protection and Electronic Documents Act

the private sector. This legislation came into effect for "federal works" and for companies who transfer information over provincial/territorial boarders, on January 1st, 2001. The Act comes into effect for all other commercial activities on January 1st, 2004 unless, prior to that provincial legislation is passed which is similar or substantially similar to govern the use of information in the individual provincial/territorial jurisdictions. The intention was to give the provinces and territories time to formulate their own legislation to deal with this issue in each province or territory. The Federal Privacy Commissioner's Office, however, which has been given the task of overseeing the Act and dealing with complaints received under it, has taken the position that all of Nunavut (and the other two territories) are "federal works" and, therefore, subject to the Act immediately. This means that should there be a complaint about a Nunavut company failing to protect personal information, the complaint will be investigated and dealt with by the Federal Privacy Commissioner. I understand that there may be an ongoing dialogue between the federal and the territorial government with respect to this interpretation being given to the Act. However, it seems to me that the best way to avoid having a federal government agency dealing with privacy complaints arising in Nunavut is to establish our own legislation as soon as possible.

It is encouraging to see that efforts are being made to educate those in government who deal with information on a day to day basis are receiving some basic training in

We have to determine who will be the custodian or custodians of the citizens' health information. For our part, we feel the concentration of information within one organization implies serious risks for the confidentiality of personal information. There are indeed more risks in this approach than in the decentralization of information, which results in many custodians of the information.

Jennifer Stoddart
President, Commission d'acces a l'information

May 9, 2001

the application of the Act. I would encourage the Government to continue to offer these programs on an ongoing basis and to encourage all government employees to take the basic program. The eventual goal should be that every person employed by the Government of Nunavut and its agencies have received that basic training.

Work was commenced this year on developing a web page for the Information and Privacy Commissioner's Office. I hope to have the web site up and running by the the end of the year.

It continues to be my honour to be able to hold this position and to work with the government to ensure that the goals and objectives contemplated by the Access to Information and Protection of Privacy Act are met.

The new millennium heralds an era of unprecedented technological development that will undoubtedly pose fresh challenges to personal date privacy. The most immediate examples of the changes we are witnessing would be: the global reach of computer based networks; the consolidation of the "information economy"; the evolution and diffusion of E-commerce; the advent of the smart card society; electronic road pricing; sophisticated workplace surveillance systems and advances in biometrics.

Stephen Lau Ka-men
Hong Kong Privacy Commissioner for Personal Data

II. INTRODUCTION

A. ACCESS TO INFORMATION

Background

Access to Information and Protection of Privacy legislation was developed as a way to encourage and promote open and accountable government while recognizing that government agencies hold considerable amounts of personal, private information about individuals which need to be protected from improper use or disclosure. In Nunavut, the legislation came into effect on division.

The Act provides the public with a means of gaining access to information in the possession of the Government of Nunavut and a number of other governmental agencies, subject to certain exceptions which are spelled out in the Act. These exceptions function to protect individual privacy rights, and allow 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. It does not appear that the regulations under the Act have been amended or updated since division to reflect the departments and agencies of Nunavut which should be subject to the Act. This must be a priority for the Legislative Assembly to ensure that all government departments and agencies are properly accountable under the Act.

> In the cat-and-mouse game which persists between members of the public who want to see information and the officials who want them to see as little as possible, there are three hurdles which must be overcome by the information seekers: delay, excessive application of exemptions (blacking out/censoring) and inability to find the requested records. The last is now the most worrisome hurdle. Information management in the federal government is in such a sorry state that the term has almost become an oxymoron. There is a record keeping crisis and it threatens the viability of the right of access.
>
> Hon. John Reid, P.C.
> Information Commissioner for Canada

The Process

In the last twenty years, Canadian FOI laws have proved to be valuable tools for improving government accountability and protecting citizens against arbitrary government action. Citizens have come to expect that public institutions will maintain effective FOI systems and are unlikely to concede the legitimacy of institutions that fail to do so.

Alasdair Roberts "Retrenchment and freedom of Information: Recent Experience under Federal, Ontario and British Columbia Law" Canadian Public Administration, Volume 42, No 4, p445

Each of the public bodies governed by the Act is required to have an ATIPP Co-ordinator to receive and process requests for information. Requests for information must be in writing but do not require any particular form (although there are forms available to facilitate such requests). Requests are submitted, along with the $25.00 fee, to the appropriate public body. There is no fee for a request to access an individual's own personal information.

The role of the public body is to apply the specific requirements of the *Access to Information and Protection of Privacy Act* to each request received while at the same time protecting private information of and about individuals which they have in their possession as well as certain other specified kinds of information. Because of the exceptions to disclosure contained in the Act, the ATIPP Co-Ordinators are often called upon to use their discretion in determining whether or not to release the specific information requested. The ATIPP Co-Ordinators must exercise their discretion to ensure a correct balance is struck between the applicant's general right of access to information and the possible exceptions to its disclosure under the Act.

In the case of personal information, if an individual finds information on a government record which they feel is misleading or incorrect, a request in writing may be made to correct the error. Even if the public body does not agree to change the information, a notation must be

made on the file that a request has been made that it be changed.

The role of the Information and Privacy Commissioner is to provide an independent review of discretionary decisions made by the public bodies in the application of the Act. The Commissioner's office provides an avenue of appeal to those who feel that the public body has not properly applied the provisions of the Act. The Commissioner is appointed by the Legislative Assembly but is otherwise independent of the government. The independence of the office is essential for it to maintain its credibility and ability to provide an impartial review of the government's compliance with the Act. Under the Act, a Commissioner is appointed for a five (5) year term.

The ATIPP Commissioner is mandated to conduct reviews of decisions of public bodies and to make recommendations to the Minister involved. The Commissioner has no power to compel compliance with her recommendations. The final decision in these matters is made by the "head" of the public body involved. In the event that the person seeking information does not agree with the decision made by the head of the public body, that party has the right to appeal that decision to the Nunavut Court of Justice.
In addition to the duties outlined above, the Commissioner has the obligation to promote the principles of the Act through public education. She is also mandated to provide the government with

Identifying interests at an early stage may provide a foundation for resolving the matter well before it becomes a formal request under the Act.

It isn't easy to balance the needs of the individual with a rights based system and the statutory duty of the public body under the Act. While it takes extra effort, utilizing dispute resolution techniques can save time; often reduce frustration for both the applicant and the public body, and create a positive outcome.

Sharon Kelly
OIPC Voice
March 2001

comments and suggestions with respect to legislative and other government initiatives which effect access to information or the distribution of private personal information in the possession of a government agency.

Technological pressures, such as the increased capacity of our telecommunications infrastructure, the exponential growth of the Internet, and the promise of wireless technologies, have brought privacy issues to the fore. and growing awareness of privacy issues is fueling public demand for protection. At the same time, the vast technological capability we now have is fueling a parallel public demand for faster, more efficient, and more responsive access to government information and services. The challenge is to ensure that the open electronic window is as privacy protective as it is accessible.

Dr. Ann Cavoukian
Information and Privacy Commissioner for Ontario

B. PROTECTION OF PRIVACY

The *Access to Information and Protection of Privacy Act* also provides rules with respect to the collection and use of personal information by government agencies. Part II of the Act outlines what have become generally accepted rules for protection of privacy internationally. They include:

- No personal information is to be collected unless authorized by statute or consented to by the individual;

- Personal information should, where possible, be collected from the individual, and not from third party sources; and where it is collected from third parties, the individual should be informed of that fact and be given the opportunity to review it;

- Where personal information is collected, the agency collecting the information will advise the individual exactly the uses for which the information is being collected and will be utilized and, if it is to be used for other purposes, consent of the individual will be obtained;

- The personal information collected shall be secured and the government agency will ensure that it is available only to those who require the information to provide the service or conduct the business for which the information was collected.

- Personal information collected by a government agency will be used only for the purpose it is collected; and

- Each individual is entitled to personal information about themselves held by any government agency and has the right to request that it be corrected if they feel it is inaccurate.

Although the Privacy Commissioner does not have any specific authority under the Act to do so, this office will receive privacy complaints and make inquiries and recommendations with respect to breaches of the provisions of the Act dealing with personal privacy. The only option other than a review process with recommendations, is for the offending government employee to be prosecuted under the Act . Prosecution, however, is both unlikely except in extreme cases, and not very instructive. A recommendation was made in last year's annual report that consideration be given to amending the Access to Information and Protection of Privacy Act to give the Information and Privacy Commissioner specific authority to investigate and make

In the medical arena it is easy to rationalize data gathering as an activity undertaken for the sake of the individual and society. But information may be used for many purposes that are not benevolent, and the collection of medical data can easily turn into medical surveillance. Such surveillance, in turn, can lead to unprecedented forms of supervision of personal life.

Beverly Woodward

recommendations with respect to breaches of the privacy provisions of the Act. This would give more weight to the recommendations made by the Information and Privacy Commissioner on privacy issues and is in keeping with the ever growing concern being expressed by the public about the protection of their personal, private information.

Patients privacy is steadily eroding in the name of health research, ready access to personal information and administrative efficiency — and Canadians are the last to know. A recent survey conducted for the Canadian Medical Association (CMA) revealed that three out of four Canadians believe that information they give their doctor is kept confidential. The reality is far different; the lineup behind our doctors — all claiming to "need to know" — is long and growing.

Personal health information stored in electronic systems is becoming fair game for bureaucrats, researchers, as well as insurance and pharmaceutical companies, among others.

Bruce Phillips
Privacy Commissioner for Canada

There is enormous power for the individual to have the right to access information on how their government does business, and this power is feared by many. But it is this power that makes democracy vibrant and is an underpinning of an informed society.

Lorraine Dixon
Executive Director
Office of the Information and Privacy Commissioner of British Columbia

March 2001

III. REQUESTS FOR REVIEW

Under section 28 of the *Access to Information and Protection of Privacy Act*, a person who has requested information from a public body, or a third party who may be affected by the release of information by a public body, may apply to the Information and Privacy Commissioner for a review of that decision. This includes decisions about the disclosure of records, corrections to personal information, time extensions and fees. The purpose of this process is to ensure an impartial avenue for review of discretionary and other decisions made under the Act.

A Request for Review is made by a request in writing to the Commissioner's Office. This request must be made within 30 days of a decision by a public body in respect to a request for information. There is no fee for a request for review. A Request for Review may be made by a person who has made an application for information under the Act or by a third party who might be mentioned in or otherwise affected by the release of the information requested.

Requests for Review are reviewed by the Commissioner. In most cases, the Commissioner will first request a copy of the original request made and a copy of all responsive documents from the public body involved. In most cases, the Commissioner will review the records in dispute. Generally, an attempt will first be made by the

Commissioner's Office to mediate a solution satisfactory to all of the parties. In several cases, this has been sufficient to satisfy the parties. If, however, a mediated resolution does not appear to be possible, the matter moves into an inquiry process. All of the relevant parties, including the public body, are given the opportunity to make written submissions on the issues. In most cases, each party is also given the right to reply, although this has not always proven to be necessary.

Two Review Recommendations were made in the last year. Other requests were resolved without the necessity of a complete review process.

Given the underlying purposes of the Act, "an account of consultations and deliberations" should be interpreted narrowly. The anonymous responses extracted from a survey of attitude do not constitute an account of consultations or deliberations. The head of a government institution therefore has no discretion to refuse to release the information under paragraph 21(1)(b). Even if the information does qualify for exemption under this provision, institutional discomfort with, or embarrassment over, disclosure is not a proper basis for exercising discretion in favour of secrecy.

Hon. John Reid, P.C.
Information Commissioner for Canada

Even when an organization itself falls outside the jurisdiction of the *Access to Information Act*, its records may sometimes be accessible under the Act through a related institution that is covered by the Act. Contracts or other aspects of the relationship between the organization and a government institution will be assessed to determine whether there is a degree of shared control sufficient to raise an obligation to process records under the Act.

Hon. John Reid
Information Commissioner of Canada

Annual Report 2000/2001

IV. REVIEW RECOMMENDATIONS MADE

Review Recommendation 00-010

This Request for Review arose out of a request by a member of the press for copies documentation related to an alleged incident which happened at a camp run by the Department of Sustainable Development. The incident alleged involved a specific individual and, if it in fact occurred, would have been personal to the individual involved. The Department took the position that, in this case, it would be improper to confirm or deny the existence of the documentation in question pursuant to section 9(2) of the Act, which states as follows:

> The head of a public body may refuse to confirm or deny the existence of a record.....
>
> (b) containing personal information respecting a third party, where disclosure of the information would be an unreasonable invasion of the third party's personal privacy.

After reviewing the facts of the case, the Information and Privacy Commissioner agreed in this case with the Department that it would be improper to admit or deny the existence of any documentation with respect to the alleged incident as to do so would be an unreasonable invasion of the third party's privacy. She indicated,

however, that this section of the Act is one that should be used sparingly and only in circumstances where, if the existence of documents were confirmed, that in itself would be sufficient to result in an unreasonable invasion of the third party's privacy.

Review Recommendation 01-002

This Request for Review came from a business which had been unsuccessful in a tendering process to provide dental services to in the Kitikmeot Region. The Applicant was requesting a copy of the proposals submitted by his competitors as well as the evaluation sheets prepared by the government when reviewing the different proposals.

The awarding of a contract after a Call for Proposals is clearly the exercise of a discretionary power and, for that reason, the evaluations constitute the "reasons" for that award. The evaluations cannot be protected from disclosure under section 14.

Elaine Keenan Bengts
Review Recommendation 001-002

The Department of Health and Social Services took the position that the proposals were protected under section 24(1)(b) as third party commercial and/or financial information which had been obtained in confidence. Unfortunately, no notice had been given to the third party and there was no indication whether or not they would be willing to consent to the release of the information in question. In those circumstances, the Information and Privacy Commissioner reviewed the documents in question herself and decided that they did, in fact, constitute commercial information and that they were most likely provided to the Government with the expectation that they would remain confidential. In those circumstances, the Information and Privacy

Commissioner upheld the decision of the Department to refuse to release those documents.

With respect to the evaluation sheets, however, there was no such confidence attached. The Information and Privacy Commissioner pointed out that section 24(1)(b) could not be used to refuse disclosure of the evaluation sheets as those documents contained information generated by the department, not information provided to the government by a third party. The Information and Privacy Commissioner recommended that the evaluation documents be released to the Applicant.

The *Access to Information Act*, ... "is intended to complement and not replace" other means of providing access. Given the significant costs associated with processing a formal access to information request, every effort should be made to disclose records informally, outside of the Act.

Hon John Reid, P.C.
Information Commissioner for Canada

Annual Report
2000/2001

V. STATISTICS

In 2000/2001, three Requests for Review were received, two of which were resolved by means of recommendations made. In both cases, the recommendations made by the Information and Privacy Commissioner were accepted by the Government agency involved. The third Request for Review remains under investigation by the Commissioner.

In addition to requests for review, the Information and Privacy Commissioner entertained approximately two calls each month from government agencies within the Government of Nunavut and from other governmental and non-governmental agencies seeing information and advice on issues which had arisen on access to information or privacy issues. In most cases, these inquiries dealt with privacy issues.

The Information and Privacy Commissioner also participated in a consultation undertaken by the Canadian Institute of Health Information with respect to the protection of privacy within the health sector.

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable t the citizenry.
>
> Justice G.V. LaForest
> Supreme Court of Canada
> *Dagg v. Canada (Minister of Finance)* [1997] 2 S.C.R. 432-3

VI. RECOMMENDATIONS

All of the recommendations made in the Information and Privacy Commissioner's annual report last year have been accepted in whole or in part by the Standing Committee on Government Operations and Services. Unfortunately, it does not appear that any of the recommendations have yet been implemented..

As a priority, I again recommend that the regulation under the Act which lists the government agencies which will be subject to the Act must be updated and amended so as to reflect the reality of Nunavut today. If I were to receive a request for a review of an access to information request from, for example, the Nunavut Housing Corporation or the Nunavut Power Corporation, it is doubtful that I could deal with it as the regulations now stand. These regulations must be updated immediately.

The basic tenet underlying the exchange of personal information, and one which is at the core of the Act respecting access, is the separation of the many components of the public administration. Exchanges occurring without the consent of the individuals concerned should be the exception rather than the rule and obey very strict conditions.

Privacy and Openness in the Administration at the End of the 20th Century

Commission d'access a l'information, June, 1997

I have been working with the Access to Information Co-ordinator throughout the year and I understand that there are significant training sessions for Government of Nunavut employees planned for the next few months. This should be encouraged and continued with the long term goal being to have every Government of Nunavut employee and every employee of every "public body" under the act required to participate in a basic training session every few years.

As suggested in the introduction to this report, privacy

issues are likely to be prominent over the next number of years. With the Federal Privacy Commissioner taking the position that the *Personal Information and Electronic Documents Act*, applies in Nunavut effective January 1st, 2001, it is important for Nunavut, the Northwest Territories and the Yukon to take the lead in creating legislation to govern privacy issues in the private sector and to establish that legislation as soon as possible. Failing the implementation of a "made in the North" solution, the Federal Privacy Commissioner will continue to have the power to make decisions about privacy issues in local business and commercial activities.

Having an identified genetic disability or predisposition to a disease could create a social stigma that adversely affects an individual's life. The concern is that an entire class of genetic "undesirables" might be created, with the resultant discrimination in the context of employment, housing and insurance.

Dr. Ann Cavoukian
Information and Privacy Commissioner for Ontario

Annual Report, 2000

It is all the more important to create a Nunavut solution in light of the rapid advance of new communications technologies and the ever increasing ability of the computerized world to use and misuse information.

Another area that requires some attention is legislation to deal with the protection of personal health information. As noted in the introduction to this report, several jurisdictions have already passed such legislation and others are contemplating it. The federal government, together with the provinces and territories, is exploring ways in which the use of communications technologies can enhance the provision of health care services. With the use of such technologies, however, comes the increased risk that the information will end up in the hands of unauthorized people and will be used for purposes never intended. It is important to have good legislation in place that will provide strict guidelines for the whole of the health industry when

dealing with personal health information.

I continue to feel that municipalities should either be added as public bodies under the Access to Information and Protection of Privacy Act or that new legislation be prepared to deal specifically with those organizations. I understand that this may not be a priority issue, but it should not be lost in the mix. These issues are as relevant at the municipal level as they are at the territorial or federal level and should, eventually, be governed by similar access and privacy legislation with oversight provisions.

The IPC believes that while genetic research offers untold benefits in terms of medical research, if not properly regulated, it could create gross invasions of both bodily and informational privacy. The development of a proper balance and effective controls is not a simple task, requiring participation from all sides of this discussion — patients and doctors; researchers and ethicists; government and private sector companies; employers and employees.

Dr. Ann Cavoukian
Information and Privacy Commissioner of Ontario

INDEX