ACCESS TO INFORMATION AND PROTECTION OF PRIVACY COMMISSIONER ANNUAL REPORT 1998/99

"The *Access to Information and Protection of Privacy Act* regards the government as the caretaker, not the owner, of the information it possesses. The information, rightfully, belongs to the public. The true owner of personal information is the person to which that information pertains. The Act aims to strike a balance between the public's right to know and the individual's right to privacy as these rights relate to information held by public bodies..."

Hank Moorlag
Information and Privacy Commissioner of the Yukon

Annual Report 1996

I. COMMISSIONER'S MESSAGE

At the end of two years of the existence of the Access to Information and Protection of Privacy (ATIPP) Act, I am happy to report that, in most cases, it appears to be working well. There has been a decrease this year in the actual number of Requests for Review but, unlike last year, none of the Requests were inter-related. In practical terms, the number of matters dealt with over the twelve months (April 1, 1998 to March 31, 1999) was only slightly less than in the previous year.

I am also pleased to note that, for the most part, the public bodies covered by the Act are being conscientious and true to the policy behind this legislation. The number of Reviews coming to my office is relatively small, which indicates that most applicants are receiving the information they are seeking at the first instance and that the Departments are doing a good job of applying the Act in response to initial requests for information.

The last year, however, has also revealed some of the weaknesses of the Act. In particular, it has become clear that in order for it to have any real effect, the government and the bureaucracy must co-operate. The Act works well when all parties involved are sensitive to and supportive of the policies behind this legislation. On the other hand, when a public body is hostile to the policies underlying the Act, that public body can effectively ignore the Act and its underlying spirit and intentions and prevent the disclosure of information. This problem has become glaringly apparent as a result of one particular Request for Review made in respect of information held by the Financial Management Board Secretariat. That public body's handling of

"Democratic governments have heralded the virtues of openness, transparency, participation and accountability as being major components of good government. The power of the public to effectively access government and participate in democratic processes is largely dependent on the public's ability to gain knowledge through access to information"

Barry Tuckett
Manitoba Provincial Ombudsman
1996 Annual Report

the initial request for information and the review process has revealed how easy it is to create delays and disregard the clear intention of the legislation. The request for information in question was originally made on October 9th, 1997 and the Applicant has yet to receive all of the information he requested. For the last 20 months, FMBS has found one reason or another to avoid providing the Applicant with the information requested, or even to identify those documents which might be responsive to his request. The minister in charge of FMBS then refused outright to comply with the Recommendation made by the ATIPP Commissioner for a timetable to provide the information requested, and refused to suggest any compromise or alternatives to the recommendation.

In cases such as these, the ATIPP Commissioner has little power to force compliance with her requests during the investigation process. In one case the ATIPP Commissioner requested that certain documents be provided to her in the course of an investigation five times over a period of five months before the documents were provided to her.

Furthermore, once the ATIPP Commissioner has done her job and made a recommendation, there have been significant delays in receiving the final decision from the head of the public body. The Act specifies that the head of a public body has 30 days to respond to the recommendations made by the ATIPP Commissioner at the conclusion of her investigation; however where that person neglects or refuses to deal with the recommendation, there is nothing that either the Applicant or the ATIPP Commissioner can do but wait. In one case, the reply was received 120 days after the recommendation was made, and in another, the Applicant has been waiting more than five months for a response. Where this happens, there is nothing that either the Applicant or the ATIPP Commissioner can do but wait. No appeal to the court can be taken before the decision to accept (or reject) a recommendation is made and there is no way to insist that a decision be made. The Applicant remains in limbo.

I recommend that the Act be reviewed and amended in order to strengthen the Commissioner's ability to enforce it. The Act should provide effective sanctions for failure to cooperate with an investigation being undertaken by the ATIPP Commissioner Some suggestions which might improve the Act include:

a. giving the ATTIP Commissioner subpoena powers

b. giving the ATIPP Commissioner the power to compel the appropriate employee of the public body to appear before her and provide an explanation as to why her directions and requests have been ignored.

c. a provision that in the event that the head of the public body has not provided his written position with respect to a recommendation made by the ATIPP Commissioner within the 30 days provided for in the Act, the Commissioner's recommendation is deemed to have been accepted.

As I have noted above, the spirit and intention of the Act is being accepted and applied by most government agencies I have worked with. It is clear, however, that when that commitment to the policies behind the Act evaporates, so does the effectiveness of the Act. I would certainly be willing to work with legislative drafters to create a more effective means of ensuring government compliance with the Act.

In July 1998, I attended the Summit of my fellow commissioners from across Canada. The focus of this meeting was two legislative initiatives proposed by the federal government. The first, a bill introduced in the House of Commons entitled the *Personal Information Protection and Electronics Documents Act,* is an initiative taken by the Federal Government to begin the process of regulating the protection of individual privacy in the private sector. The impetus for this legislation comes from the European Economic Community, which has strict controls on the protection of privacy in the private sector. These controls extend to commerce conducted outside of Europe and will affect international trading partners, including Canada, unless we too provide legislation to protect privacy.

"For electronic commerce to flourish, we need confidence in how our personal information is gathered, stored, and used and clear rules for industry. In a recent Ekos poll, eight in 10 Canadians indicated that they wanted government to work with business to come up with guidelines on privacy protection for the private sector. Legislation that establishes a set of common rules for the protection of personal information will help build consumer confidence and create a level playing field with clear and predictable rules for business"

John Manley
Minister of Industry
October 1, 1998

"Applications of telecommunications and information technology are critical to the seamless integration and co-ordination of the plethora of health care services characterizing today's health care sector. Such applications allow the electronic sharing of vital information, when required, among hospital services, laboratories, diverse health professionals, community health institutions and homecare providers who may be serving a particular patient...The national health infostructure will be an interconnected and interoperable network of networks, but one with stringent confidentiality and security safeguards to ensure that personal health information is fully protected in accordance with strong and effective privacy legislation and regulations"

Connecting for Better Health: Strategic Issues
Interim Report
September, 1998

The second major area of discussion was the progress of various health information systems being considered and implemented in several provinces, most particularly, Manitoba. Such "universal databases" appear to be the technology of the future. Although there are many laudable and important efficiencies that can be realized through the use of such databases, there are also significant threats to personal privacy which result. These programs must be carefully thought out and monitored to ensure that personal privacy issues remain at the forefront of these initiatives.

In January, I also attended a gathering of the Information and Privacy Commissioners from across the country to discuss the issues arising out of the Interim Report of the Advisory Council on Health Info-Structure entitled "Connecting for Better Health; Strategic Issues". This report is the precursor to the implementation of a national health database and the committee preparing the report sought to consult with privacy commissioner's at the provincial/territorial and national levels. The discussion pointed out many of the concerns of privacy commissioners across the country with such a program and the members of the committee took direction from the meeting.

All in all, I believe that it was a productive year for the ATIPP Commissioner's office. One area that does require more attention is given to publicizing the Act and the existence of the Office and I hope to be able to concentrate more effort on this area in the next year.

Elaine Keenan Bengts

II. INTRODUCTION

This is the Information and Privacy Commissioner's second Annual Report. It includes an outline of the mandate and role of the Commissioner and the principles of the Access to Information and Protection of Privacy Act. It also includes some examples of the Commissioner's Recommendations made over the last year and provides some commentary and recommendations for the future.

"Preserving the integrity of the individual from indiscretions and the encroachment of assorted authorities is the basic objective of personal information protection systems. This notion is not just a fad or a passing fancy on the eve of a new century. It lies at the core of an enriched rule of law based on the preeminence of the individual in the social fabric"

Paul-Andre Comeau
President
Commission d'access a l'information (Quebec)

Background

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. It came into effect on December 31st, 1996 and provides the public with a means of gaining access to information in the possession of the Government of the Northwest Territories and a number of other governmental agencies. This right of access to information is limited by a number of exceptions, aimed mainly at protecting individual privacy rights, and the ability of elected representatives to research and develop policy. It also gives individuals the right to see and make corrections to information about themselves in the possession of a government body. During 1998/99, the regulations under the ATIPP Act were amended to include Regional Health Board and Education Districts under the act, expanding the number of departments and agencies covered by the Act from 22 to 38.

The Process

Each of the public bodies covered by the Act have appointed 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 forms have been created under the Act 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 might have in their possession and certain other specified kinds of information. Because there are a number of exceptions to the disclosure of information 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 Access to Information and Protection of Privacy Commissioner is to provide an independent review of discretionary decisions made by the public bodies in the exercise of their discretion. 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 usually appointed for a five (5) year term. The ATIPP Commissioner's position is presently being held by the writer on an "acting" basis, pending the election of a first new post-division Legislative Assembly.

"There may even be some nostalgia for a return to the days when all governance was done in secrecy , and information spooned out in self-serving, carefully-managed doses. For, in the federal bureaucracy, a wind of hostility blows against access rights, disfavour born of indignation against the perceived waste, in times of thrift, of valuable resources in responding to access requests. Special hostility is reserved for those requesters who make multiple requests and those who use the information so acquired to embarrass government or for commercial purposes"

John W. Grace
1996
Former Information Commissioner of Canada

"Freedom of information refers to public access to general records about what government does, ranging from administration and operations to legislation and policy. The underlying objective is open government and holding elected and appointed officials accountable to the people they serve"

Ann Cavoukian
Ontario Information and Privacy Commissioner

Annual Report 1997

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 Minister involved. In the event that one of the parties does not agree with the Minister's decision, that party has the right to appeal that decision to the Supreme Court of the Northwest Territories.

The Commissioner also has the obligation to promote the principles of the Act through public education. In addition, she is mandated to provide the government with comments and suggestions with respect to legislative and other government initiatives insofar as they effect either the ability to access information or the distribution of private personal information in the possession of a government agency.

"Brought together earlier this year by *Time magazine*, a panel of world leaders explored the impact of the new information technology upon the art and practice of government. One of the speakers, Thabo Mbeki, who is considered to be the heir apparent to Nelson Mandela in South Africa acknowledged that access to information will change the way leaders deal with their people: 'Before you had the politician as a professional, an expert who mediated understanding of events'. Now instant access, unfiltered through either government or press, "reduces the mystique that surrounds a politician". It is easier to govern, he continued, 'if the population is ignorant'.

John W. Grace
Former Information Commissioner for Canada

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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 ATIPP Commissioner for a review of the decision made by the public body. 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 of consideration of requests and objections 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 Review for Request. 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 for Information and a copy of all responsive documents from the appropriate public body. Except where the issue is an extension of time, 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 of reply, although this has not always proven to be necessary.

"It is not necessary for requesters to be 100 percent precise in describing records they seek from government. The access law does not place such a heavy burden on requesters. The onus on requesters is to provide adequate detail about the requested record to enable an experienced employee, with reasonable effort, to locate the record. Public officials (who are, after all, the experts) must act in good faith to give access requests a liberal and fair interpretation... Finding a bureaucratic, technical reason to say "no" is never an acceptable way of proceeding"

John W. Grace
Former Information Commissioner for Canada

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Several matters were reviewed by the Commissioner in the last year and Recommendations made. Other requests were resolved without the necessity of a complete review process as, for instance, in the case of one gentleman who was seeking personal information about himself and felt he had not received the entire record. In that case, several suggestions were made to the public body suggesting other means of searching for the information requested and further materials were identified and provided to the Applicant.

One complaint was received respecting the violation of personal privacy.

In a number of other instances, the Commissioner received inquiries with respect to certain access and privacy issues and was able to answer the questions immediately or to refer the individual to a specific public body or other agency. Several times, the Commissioner assisted individuals in making Requests for Information from the Federal Information Commissioner's Office.

During the 1998/99 fiscal year, the Commissioner completed eight reviews and issued recommendations to the head of the public bodies involved. The recommendations were accepted in six cases, rejected in one and in the last case is pending. One recommendation made by the ATIPP Commissioner, which was accepted by the head of the public body, has been appealed to the Supreme Court of the Northwest Territories. A decision is pending.

Review Decision 98-03

This decision was issued on April 28, 1998. The Request for Review arose as a result of a decision by the Department of Public Works and Services to release copies of certain leases for residential housing between the Government of the Northwest Territories and a number of corporate entities. A number of third parties (the landlords named in the relevant

"There is nothing in the Act to suggest that the Government must have some kind of proprietary right to the information it has in its possession in order for that information to fall under the Act. Any record in the custody or under the control of a Public Body is subject to the Act"

Elaine Keenan Bengts
Northwest Territories Information and Privacy Commissioner

Recommendation #98-04

May 19, 1998

leases) objected to the release of the information and the matter was referred to the ATIPP Commissioner for review. The issue was whether the information being requested was protected from disclosure by section 24 of the Act. This provision protects certain "commercial" information from disclosure. Eight separate "third parties" under the Act objected to the release of the information all arguing that the release of the information could reasonably be expected to result in undue financial loss or prejudice to their individual competitive positions. The Applicant argued, among other things, that the information in question could not be considered to have been provided in confidence and that the where there was no established market, the release of the requested information could not possibly affect the third parties' competitive position or result in undue financial loss to the third parties. The Commissioner reviewed the provisions of section 24 and recommended that the leases be disclosed to the applicant with the exception of the actual rent payable and certain proprietary information, such as operating and maintenance costs of the landlord. The recommendation was accepted by the head of the public body and edited versions of the leases were released.

The applicant in this case has appealed this matter to the Supreme Court of the Northwest Territories and the matter is currently pending.

Review Decision 98-04

This decision, released by the Commissioner on May 19, 1998, involved a request for information from the Department of Health and Social Services and the Keewatin Regional Health Board (KRHB) relating to the Applicant's employment record. The Request for Review in this case came from a third party, the Keewatin Regional Health Board (KRHB). There were two documents in question. The first was a memorandum from an employee of the KRHB to the Deputy Minister of Health and Social Services. The second was an e-mail message from an employee of the Department to a named individual who appears to have been an employee of the KRHB. There was a

"Access requests must be given a liberal interpretation. Where there is doubt about the scope of a request, the doubt should be resolved by communicating with the requester. Of course, the consultation with the requester must involve full disclosure of the types of records held of potential relevance to the request, so that the requester can make an informed, meaningful choice.

John M. Reid Information Commissioner for Canada

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interfere with its ability to do business. The dental care provider relied on Section 24, arguing that the release of the information would cause them undue financial hardship. The Commissioner found that, although the KRHB did not fall under the Act so as to compel it to comply with a request for information, the fact that the Department of Health and Social Services had a copy of the contract in question made that document subject to such a request. In the end, the Commissioner did recommend that the contract be provided to the third party, but edited so as to sever certain parts of the contract which contained "commercial" information.

Review Decision 98-06

In this Request for Review, an individual had requested personal information from the records of the Maintenance Enforcement Office. The Applicant received some information in response to his request but felt that the response was incomplete. He also wanted the Maintenance Enforcement Office's telephone records for a certain period of time. In the review process, one document was discovered which was apparently not given to the Applicant. It was determined that this was an honest mistake on the part of the department involved and the recommendation was made that it be released to him. It was also recommended that the Maintenance Enforcement Office review their telephone records again and provide the Applicant with specific information he requested about telephone calls to or from himself.

Review Decision 98-07

In this Request for Review, the Applicant sought information listing recipients of funds generated through the "Aurora Funds". The Financial Management Board Secretariat refused the request, stating that the Aurora Funds were not public bodies as defined in the Act. The ATIPP Commissioner reviewed the meaning of the term "public body" and determined that, looking at the nature of the body in question, the reason that it was created (to ensure government supervision and control of a capital investment fund), and the members of its Board of Directors (Ministers and senior government bureaucrats), it was in fact a "public body" as defined in the Act. The ATIPP Commissioner recommended disclosure of the information requested.

"Yet even when the access law is amended to perfection, the true promise of the right to know will be realized only with the unconditional support of members of the government, cabinet and the senior public service."

John W. Grace
Former Information Commissioner for Canada

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Review Decision 98-08

This Request for Review arose out of a request for a series of information from the Financial Management Board Secretariat (FMBS) dealing with the "pay equity" issue. The original request was made by the Applicant on October 9th, 1997. The Applicant had received no information by February 25th, 1998 and asked the ATIPP Commissioner to review the matter. Under section 8 of the Act, a request for information is to be responded to within 30 days of the request. The explanation provided by FMBS was:

a) some of the information requested was "sensitive" and could have "negative economic impact on the GNWT in the collective bargaining and pay equity processes";

b) a detailed review of the information would be required to ensure appropriate severing of exempted information and the staff was not available to do such a review;

c) many of the documents requested would be available in a public forum within six months and the Act provided for a delay in such circumstances

Neither the ATIPP Commissioner nor the Applicant were satisfied with this explanation. An attempt was made to mediate the matter and at least get the Applicant certain uncontroversial documents. Nothing had been received by the Applicant by the end of April. The ATIPP Commissioner than asked FMBS to provide a list of the documents responsive to the request by May 15th and copies of all documents by the end of May for the purposes of her review. On May 15th, 1998, a letter was received from FMBS indicating that there were "thousands" of records related to the general issue of pay equity and that those records were not catalogued or indexed in any way and that it would take 18 months to do so. By a letter of June 15th, 1998, FMBS provided the Applicant with a package of information which they identified as being in "partial" reply to the Applicant's October, 1997 request for information. Privilege was claimed for the vast majority of the documents identified as being

responsive to the Applicant's request. FMBS advised at this time that the cataloguing of the documents in response to the remainder of the Applicant's request was still in progress. Nothing further was received by the Applicant in the ensuing months and on October 29th, 1998, FMBS wrote to the ATIPP Commissioner to advise that on October 19th a request for proposals had been published seeking proposals to catalogue the documents. No further documents had been identified or provided to the Applicant.

The sole issue on this review was whether or not FMBS had made reasonable efforts to provide the Applicant with the information requested as required by the ATIPP Act. The ATIPP Commissioner found on her review of the matter that the delay in responding to the Applicant was unacceptable. The public body could give no good explanation as to the reason for the state of disarray of the documents in question and why there was no reasonable "records system" in place with respect to these "thousands" of documents which appeared to be completely uncatalogued and unindexed. Further, no real steps had been taken in the year since the Applicant had made his request to correct the situation, save for a last minute request for proposals.

The ATIPP Commissioner found that the filing and recording system with respect to these records was completely inadequate and recommended that the resources and manpower be made immediately available to sort through, organize and record the nature of the documents in question and identify those which were responsive to the Applicant's request for information. The Commissioner further recommended that the public body complete that process within one month of the Minister's acceptance of the Recommendation. It was also recommended that the Applicant be provided with the information requested by January 31st, 1999. Finally, the ATIPP Commissioner recommended that there be a full and thorough review of this public body's record keeping system and that expertise be employed to ensure that this kind of problem did not occur again.

"Tactics of delay and doing away with records are most likely to be the last desperate weapons used in an inevitable losing battle against the rigors of openness and transparency. In the end, the right to know will prevail, though the battle to protect the victory will always go on."

John W. Grace
Former Access Commissioner for Canada

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This Recommendation was made to the Minister on November 15th, 1998. By letter of March 2nd, 1999 (received on March 19th), the Minister responsible for FMBS, John Todd, rejected the recommendations out of hand. Contrary to the Act, this response was received nearly four months after the recommendation was made.

It is to be noted that the Applicant has yet to receive the information he requested almost two years ago.

Review Recommendation 99-09

This review arose out of a request for "telephone call records" for a particular member of the cabinet for a given period of time. The only such records which could be located were contained in a computer printout generated by a call accounting system. These records were provided, although all specific telephone numbers were edited out. The Applicant felt that he should be entitled to receive the telephone numbers. He suggested that the telephone numbers themselves did not identify any one person or the names of the persons who actually took part in the telephone calls. He was prepared to accept a list of the telephone numbers that were not "unlisted". The argument was that the release of widely published telephone numbers could not be considered an invasion of individual privacy because the numbers would be available elsewhere in published form. The ATIPP Commissioner found that telephone numbers, insofar as they related to individuals, constituted personal information and should not be released. Because there was no record to show which numbers belonged to individuals and which belonged to corporations, the public body was correct in refusing to release any of the numbers. The Applicant did not provide any reasonable case for this kind of invasion of personal privacy and, without that, the personal privacy provisions of the Act superseded the right to access provisions. The ATIPP Commissioner recommended that none of the telephone numbers be provided to the applicant.

"Although there are good public policy reasons for ensuring open and accountable government, there are equally good reasons for protecting the right of an individual constituent to contact his or her Member of the Legislative Assembly without fear of being 'discovered'. After all, open and accountable government depends, to a large degree, on free and open communications between elected officials and the constituents they serve"

Elaine Keenan Bengts
Northwest Territories Information and Privacy Commissioner

Recommendation #99-09

January 25, 1999

"Perhaps the most important lesson ... is the degree to which the right of access depends on good records management practices. If departments don't know what records they hold or where they are filed, they cannot respond completely and efficiently to access requests"

John M. Reid Information Commissioner for Canada

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Review Decision 99-10

In this case, the Applicant sought access to a document known as "the Wallace Report", a report prepared by lawyer, Brian Wallace, for the Government of the Northwest Territories in connection with the granting of contracts for fuel supply and delivery in the eastern Arctic. The public body claimed that the report was subject to solicitor/client privilege or, alternatively, litigation privilege and did not, therefore, have to be disclosed. After reviewing the report and background information, the ATIPP Commissioner found that there was no evidence to suggest that the document was intended to be confidential between the lawyer and the government and that it was not, therefore, protected by solicitor/client privilege. She indicated that, if she were wrong in this, and the document was protected, that there was nothing before her to show that the government had properly exercised its discretion in refusing to release the document.

The public body also argued that the document constituted a cabinet confidence and was therefore protected from disclosure by section 13 of the Act. The ATIPP Commissioner rejected this argument as there was nothing before her to suggest that it was prepared for "cabinet".

Finally, the public body argued that the report constituted "advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive council". The ATIPP Commissioner found that the document did, in fact, constitute advice and recommendations and that the public body must exercise its discretion as to whether or not to disclose the information. The ATIPP Commissioner found that this had not yet been done and recommended that the discretion be exercised and reasons provided to the Applicant.

The Minister's decision as to whether or not to accept this recommendation has not yet been received.

IV. STATISTICS

"Another serious weakness in the Act lies in information-sharing agreements and arrangements between the federal government and other levels of government (including governments of other nations), and the private sector. Many of these agreements are essential for the conduct of government operations, and are authorized by many statutes, including the *Privacy Act*. However, the scope of sharing permitted by the Act's broad language is an open barn door even for the slowest horse. There are hundreds of agreements in existence, of which this office has only fragmentary knowledge. But what we do know is not comforting. Much of the sharing is virtually invisible to taxpayers, and often to the departments themselves."

Bruce Phillips
Privacy Commissioner
for Canada

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In the second full year of the Act, six new Requests for Review were received. This is down from the 28 received in the first year. It is to be noted, however, that of the 28 review files opened in 1997/98, 10 were from third parties intervening to object to one application for information, another 6 were with respect to one request for information which had been made by the same individual to six different departments. In actual numbers, therefore, the numbers are down, but not significantly so.

Of the 19 requests outstanding from 1997/98, 15 have now been completed and recommendations made, one was resolved by negotiation, one is to be transferred to Nunavut, and two are still pending.

Of the six Requests for Review received in 1998/99, one has been completed by way of recommendation, two have been resolved by way of negotiation and three are pending.

Of the six Requests for Review received in 1997/98, four resulted from the failure of the public body to provide access to some or all of the records requested, one was a third party objection to the release of information and in one the party requesting the information felt that the information received was incomplete. In the latter case, the information in question was the personal information of the applicant. In this case, the ATIPP Commissioner's intervention resulted in the release of further information. The Applicant then sought to have her personal information amended.

In addition to the Requests for Review, two privacy complaints were received over the last year. One of these was investigated and the department involved agreed to make changes to its forms and procedures. The second one involved a matter covered by the Federal Privacy Act and the matter was referred to the Federal Privacy Commissioner's office.

Requests for Review involved the Departments of Justice, Health and Social Services, Public Works and Services, the Executive and Resources, Wildlife and Economic Development.

V. OTHER ACTIVITIES OF THE COMMISSIONER'S OFFICE

"Attention now turns to a practice which poses a deadly threat to privacy and to its corollary — autonomy and personal freedom...

That issue is data matching, an innocent-sounding activity with the capacity to demolish any real right to privacy and certainly to destroy the basis of trust which must exist between citizens who provide, and governments which collect, personal information."

Bruce Phillips
Privacy Commissioner
of Canada

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In addition to the review files, the Access to Information and Protection of Privacy Commissioner has been asked to comment on various pieces of legislation and policy. In particular, submissions have been made to committee with respect to proposed legislation to amend various existing Acts to provide for provisions which will apply to information under those Acts notwithstanding the ATIPP Act. In most cases, the provisions strengthened privacy protections already found in the ATIPP Act. In at least one case, however, concerns were expressed by the ATIPP Commissioner that the new provisions would have allowed information collected for specific purposes to be used for totally unrelated matters. The first rule of privacy legislation is that information collected is used only for the specific purpose it was collected. Many of the amendments proposed allowed the use of personal information collected for one purpose, such as acquiring a driver's license, for a number of other, unrelated purposes. Although it may be convenient and easy to use this information for other purposes, this must not be allowed to happen except in vary narrow circumstances.

The ATIPP Commissioner has also been asked by the Department of Motor Vehicles to provide some guidance on the use that can be made of information collected from individuals in the licensing process for other purposes and how much information should be provided in various circumstances. The Commissioner is presently researching this project and will be providing the Department of Motor Vehicles with her comments.

These two examples raise one of the most pressing concerns presented as a result of new technologies, that of data matching. Data matching is the electronic comparison of two or more databases containing personal information and it is technology that business and governments everywhere are anxious to make use of. As noted by Ann Cavoukian, Access to Information and Privacy Commissioner of Ontario and Don Tapscott in their book "Who Knows: Safeguarding your Privacy in a Networked World",

> Computer matching is used for a variety of purposes, primarily detecting fraud, recouping debts, and verifying continuing eligibility for government programs.

Dr. Cavoukian and Mr. Tapscott go on to point out, however, that there has been no firm evidence that data matching is cost effective. Furthermore, it often takes place without proper verification of information and is a denial of due process and "often just plain wrong".

> A "raw hit", or unverified information (about a suspected individual) yielded from a match can lead to the end of benefits or entitlement to a program without the person being given the opportunity to challenge the decision or offer evidence to the contrary. Principles of due process require that you be given the opportunity to challenge your accuser before a decision against you is made."

They point out as well that another major problem with computer matching is the accuracy of the information which results. There is concern that the technology has not been perfected to ensure accurate and reliable results. Errors result from everything from inaccurately entered data to time lags or hardware and software problems. The problem is duplicated when bad data from one computer match is used in a subsequent data match. Dr. Cavoukian and Mr. Tapscott caution that it is a matter of balance. The more we allow our privacy to be invaded, the further we move from a free and democratic society. Data matching and the use of personal information for purposes other than the purpose it was collected must be allowed only in very narrow circumstances and then only when there has been careful and thorough study of the necessity of doing so.

Another role that the ATIPP Commissioner plays is as an educator on access and privacy issues. She has been asked to speak to several groups over the past year with respect to the provisions of the ATIPP Act and the limitation on the uses that can be made of information collected. She has participated in a number of such discussions and seminars during the course of the year and invites any agency subject to the Act to contact her to answer quest ions about the Act or to speak to groups concerning any aspect of the Act.

"in early June 1997, some 40 US computer companies were announcing the launching of new tools to ensure the anonymity of Internet surfers. These are intended to thwart one of the most serious threats to the protection of personal information, which is the presence of 'cookies' enabling the owners of Web sites to take prints of visitors and then, through a simple program, draw their profiles, including names and addresses. One could not imagine a better example of the perverse effects of some computer tools. "

Paul-Andre Comeau
President
Commission d'access a l'information (Quebec)

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

June, 1997

VI. LOOKING AHEAD

Despite the problems outlined in this report, it would be wrong to suggest that the Act is not working at all. In fact, for the most part it is appears to be working very well and this office has a good relationship with most of the public bodies with which it has worked. In several instances, this office was asked for an opinion on a matter before the matter was able to get as far as a request for review. In most of those instances, the advice and direction given by this office has avoided the necessity of a review. In other instances, simple discussions with the public body in question has been sufficient to focus the issue and resolve the problem.

The addition of Regional Health Board and Social Services Boards and Education Boards to the public bodies subject to the Act appears to have resolved some of the problems which became the subject of Requests for Review last year. The next step should be to bring municipal governments under the scrutiny of the Act .

It is important, from the Commissioner's perspective, that the legislature keep abreast of developments and initiatives in other jurisdictions aimed at legislating the development of personal information databases. The federal/provincial government initiatives to create national health databases is one that requires careful scrutiny to ensure that personal privacy in this most private of matters is maintained at all costs. Similarly, it will be important for this government to keep a close eye on developments in efforts to legislate privacy controls in the private sector. At the moment this is a federal initiative but it will require the cooperation and participation of the provincial/territorial governments to implement. With the advent of the Internet and advanced technology, the threats to personal privacy are being eroded faster than most of us realize. As noted by Canada's Privacy Commissioner in his 1997/98 annual report,

> Certainly, the information landscape has been transformed during this term but it is a transformation well underway seven years ago. Computer technology led the revolution in information management, bringing with it all the promise and peril of massive new collection and use of personal information. All the prophecies made at the time, both for good and for ill, have been borne out. The personal information of millions of people is being collected, manipulated, massaged, bought and sold, used and abused at a rate now many times faster than was possible seven years ago. Privacy is such a fundamental part of a free and open society, and more must be done by government

"The protection of personal information has but one goal: guard individuals against the almighty state. Not only should government guarantee that personal information will be kept confidential, but it should be sparing in its use. And citizens should disclose to the state only such information as is absolutely necessary"

Paul-Andre Comeau
President

Commission d'acces a l'information (Quebec)

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"We have seen the maturation of perhaps history's greatest and potentially most liberating communications system, the Internet. Millions more users join the Net each year, and surely it will soon become as much a commonplace as - and may well supplant - the telephone for much of the world's transactions and personal communications.

But Internet has also brought new problems: threats to privacy, decency and truth (and possibly to individual safety). With the abuses comes a corresponding effort by society generally, and governments particularly, to gain some control."

Bruce Phillips
Privacy Commissioner of Canada

Annual Report 1997/98

Most importantly for the success of the Northwest Territories' Act is the need, as outlined above, to provide stronger incentives for government bodies who are reluctant to comply with the terms of the Act. These problems are not unique to the Northwest Territories. Almost every jurisdiction deals with reluctant public bodies from time to time. The problems could be reduced, however, by amending the Act to :

a) allow the ATIPP Commissioner the power to subpoena documents and witnesses;

b) impose penalties for failure to comply with the time limits outlined in the act,

c) including removal of the right to levy fees for late responses;

d) removing the right to invoke discretionary exemptions on late responses;

e) withholding of performance bonuses from heads and deputy heads of departments which consistently fail to meet the deadlines

These are some suggestions that have been made in other jurisdictions. Deemed acceptance of a review recommendation unless the head of the public body has formally dealt with a recommendation within the 30 day statutory period allowed for doing so would be another way to induce compliance with section 36 of the Act which requires the head of the public body to respond to the Commissioner's recommendations within 30 days. What is clear, however, is that some measures must be taken to deal with recalcitrant public bodies.

Finally, I would be remiss in not suggesting, as I did in my recommendation to the Minister in Charge of the Financial Management Board Secretariat, that there be a full and thorough review of the government's record management systems as a whole. The fact that there were "thousands" of documents which appeared to be unindexed and uncatalogued in this case is problematic and troubling. There can be no other conclusion but that, at least in this instance, there was a complete breakdown of the records management system and this is unacceptable. Unfortunately, the Minister in charge of FMBS at the time rejected that recommendation. The effectiveness of the Access to Information and Protection of Privacy Act relies on some basic organization and records system. In fact, the effectiveness of government itself relies on an effective records system. Where there is a breakdown in the system, it should be corrected as quickly as possible.

We live in an era of communication. New technologies can make life much easier. We cannot lose sight of the fact, however, that with these benefits come costs. It is important that we don't lose sight of those costs and weigh them very carefully when planning the future.

"Privacy is like freedom: we do not recognize its importance until it is taken away"

David Flaherty
Information and Privacy Commissioner of British Columbia