

Standing Committee on
Government Operations



Report on the Review of the 2018-2019 Annual Report of the Information and Privacy Commissioner of the Northwest Territories

19th Northwest Territories Legislative Assembly

Chair: Mrs. Frieda Martselos

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October 27, 2020

SPEAKER OF THE LEGISLATIVE ASSEMBLY

Mr. Speaker:

Your Standing Committee on Government Operations is pleased to provide its *Report on the Review of the 2018-2019 Annual Report of the Information and Privacy Commissioner of the Northwest Territories* and commends it to the House.



Mrs. Frieda Martselos
Chairperson

**STANDING COMMITTEE ON
GOVERNMENT OPERATIONS**

**REPORT ON THE REVIEW OF THE 2018-2019 ANNUAL REPORT OF
THE INFORMATION AND PRIVACY COMMISSIONER OF THE
NORTHWEST TERRITORIES**

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STANDING COMMITTEE ON GOVERNMENT OPERATIONS

REPORT ON THE REVIEW OF THE 2018-2019 ANNUAL REPORT OF THE INFORMATION AND PRIVACY COMMISSIONER OF THE NORTHWEST TERRITORIES

INTRODUCTION

The Information and Privacy Commissioner (IPC) is an Officer of the Legislative Assembly. The IPC operates independently of the Government of the Northwest Territories (GNWT). The IPC reports to the Legislative Assembly. They provide oversight and enforcement of the government's duties under the *Access to Information and Protection of Privacy (ATIPP) Act*. The IPC plays a similar role under the *Health Information Act (HIA)*.

The *ATIPP Act* promotes government accountability. It balances the public's right to access information the government holds, while protecting people's privacy rights.

People can make a complaint to the IPC about access to, or disclosure of, information. The IPC will investigate, mediate or resolve these complaints. They also comment on privacy issues in proposed laws. The IPC also educates people about their rights. Under the *ATIPP Act*, the IPC files an annual report on her activities. This report can include recommendations.

The IPC has duties under the *Health Information Act (HIA)*. This legislation applies to collecting, using, protecting and disclosing personal health information. It applies to health information records. This includes both public and private health practitioners. The *Health Information Act* requires the IPC file an annual report. This report includes the IPC's activities under the *HIA*. They can also include recommendations made by the IPC that the Government did not follow. It can also include recommendations or comments about the Act.

The Speaker tabled the *2018-2019 Annual Report of the Information and Privacy Commissioner* on December 11, 2019. On May 27, 2020, the Standing Committee on Government Operations (Committee) met with the IPC to review her report. This is Committee's report of that review.

ACKNOWLEDGING THE LONG SERVICE OF THE IPC

In 1997, the Assembly appointed Elaine Keenan Bengts as the first IPC. After four re-appointments, Ms. Keenan Bengts will retire on October 30, 2020. This makes her the longest serving IPC in Canada. During her time, much has changed in how government collects and uses information. This is also true for the technology used to process and hold that information.

Ms. Keenan Bengts has served the people of the Northwest Territories well. She has been an advocate for both access to information and protection of privacy. The Committee recognizes Ms. Keenan Bengts' service and wishes her the best in her retirement.

ACCESS TO INFORMATION AND PROTECTION OF PRIVACY ACT

The *ATIPP Act* applies to GNWT departments. It also applies to most government boards and agencies. The Act states that public records must be accessible. It also requires the GNWT to protect personal information. The *Act* states how the public can access GNWT records. It also includes rules about how the GNWT collects, uses, and discloses information to protect people's privacy.

The Act states that the GNWT should only collect the information it needs to deliver a program. The ATIPP Act overrules over other laws, unless those laws say otherwise.

Providing access to information is the starting point of the Act. There are limited exceptions where the GNWT can refuse to provide access. These exceptions are to protect individuals' privacy, private business information, and advice to Cabinet.

In her opening remarks to Committee, the IPC noted that in 2018-2019, most files involved access to information. She told Committee that 30 of 55 files opened under ATIPP related to "access to information". In eight of these files, the public body had failed to respond to an access request within the required period. There were 14 files opened on privacy breaches. The IPC issued 18 review reports. She summarizes these in her report.

HEALTH INFORMATION ACT

The *Health Information Act (HIA)* covers the collection, use, disclosure and protection of personal health information. The legislation applies to health records under the control of health practitioners, such as doctors or pharmacists.

The Act says health practitioners should only have access to information they need to provide care. The Act assumes a person seeking health care has consented to the collection, use or disclosure of their health information. However, the practitioner's must believe that the patient understands how their information will be collected, used and disclosed.

The *HIA* gives patients the right to access their own health records. The GNWT can charge a fee to copy health records. If someone believes their records were wrongly collected, used or disclosed, they can ask the IPC for a review. This applies to complaints about both access and privacy issues.

The Act requires health practitioners to tell you and the IPC if the privacy of your health information has been breached.

In 2018-2019, the IPC opened 29 files under the *HIA*. Of these, 18 were breach-of-privacy notifications. While most were minor breaches, the media reported on two breaches. The first was a theft of a laptop containing health information of 40,000 NWT residents. The second was mental health and addictions records found at the Fort Simpson dump.

Noting the public concerns about these events, the IPC stated that awareness of privacy matters is on the increase and senior management is working toward improvement.

PUBLIC HEARING

During their review, Standing Committee had a good discussion with the IPC. They discussed both the *ATIPP Act* and the *HIA*. They also spoke about how the GNWT meets their duties under these Acts. Committee is making recommendations in the following areas:

When recent changes to the ATIPP Act will take effect

The IPC noted it had been a year since the Assembly had amended the *ATIPP Act*. However, the changes to the *ATIPP Act* have not taken effect. Committee has not received an update from the GNWT on when the changes will take effect.

As a result, Committee recommends:

Recommendation 1

The Standing Committee on Government Operations recommends that the GNWT provide an update on the work being done to bring into force the amended sections of the *ATIPP Act*, including a schedule indicating when the changes will take effect.

One major change to the *ATIPP Act* is it will apply to municipalities. The Committee in the 18th Assembly recommended that the Departments of Justice and Municipal and Community Affairs (MACA) develop a detailed plan to guide the implementation of *ATIPP* for municipalities.

In response, Justice and MACA said they would develop draft terms of reference for a working group. This group would include municipal leaders and administrators. The GNWT agreed to share the draft plan with Committee for input.

Committee notes the concern of some municipalities about the costs associated with *ATIPP*. Municipalities have asked if *ATIPP* will apply to older records, or on a go-forward basis. Committee asks that information about this be included in the response to this report and in the implementation plan.

Bringing together ATIPP skills

The IPC is concerned about the *“significantly increased lack of capacity within public bodies to address access and privacy matters.”* In her remarks to Committee, she said, *“the timeframes for responding to ATIPP requests are not being met and submissions to my office are significantly lacking in detail.”* She also noted, *“Exceptions are not well applied. I am seeing huge delays and a failure to respond to correspondence from my office...”* The IPC believes this reduced capacity to deal with *ATIPP* is the result of access and privacy knowledge not being highly valued in the job evaluation process. This results in pay levels being insufficient to attract employees with expertise.

The IPC suggested the GNWT needs a group of well-trained ATIPP coordinators. She mentioned there had been talk about centralizing the ATIPP function within government. This would create a pool of expertise and consistent application of the Act.

Committee was interested in this approach. There has been a trend towards centralizing some functions in the GNWT. This includes financial and information technology services. Committee also recognizes that the Department of Finance provides ATIPP administration for the Department of Executive and Indigenous Affairs.

Committee makes the following recommendation:

Recommendation 2

The Standing Committee on Government Operations recommends that the GNWT investigate and explore options for centralizing the management and administration of ATIPP on behalf of GNWT departments. The Standing Committee further recommends that Government share the results of this review for Committee input.

Proactive disclosure

Committee's discussion with the IPC turned to the subject of 'open government'. The purpose of open government is to make information the government holds easily available to the public. A person would not need to make a special request for information. This makes government more accessible and accountable. It could also reduce ATIPP requests.

The IPC noted the benefits of government building access and privacy into programs, policies and legislation as they are developed. This process is called 'access by design' or 'proactive disclosure'. It helps ensure that the ability to access information or protect people's privacy exists from the beginning.

Committee believes the GNWT needs to make a clear commitment to open government. As a result, Committee recommends:

Recommendation 3

The Standing Committee on Government Operations recommends that the GNWT update Committee on work to develop a standard approach to including 'access by design' principles into the design of communications, programs, policies and legislation. Committee requests details on how the GNWT will formalize and share the standard approach with GNWT staff.

Stopping the use of fax machines in the health sector

Committee and the IPC remain concerned about the use of faxes to share personal health information. Committee is aware this is an issue across Canada. In fact, our health care system links with Alberta may prevent changes in this area. However, Committee believes the health sector must begin to adopt practices that provide greater privacy protections. Committee recommends:

Recommendation 4

The Standing Committee on Government Operations recommends that the Government of the Northwest Territories develop and implement a plan for ending the use of fax machines in the health and social services sector.

The potential privacy impacts of COVID- 19

Committee questioned the IPC about the effect COVID-19 has had on the GNWT's response times to ATIPP requests. The IPC said she had not seen any deemed refusals because of COVID-19. The IPC did caution Committee about the pandemic's potential risks to privacy. She pointed to contact tracing apps used by governments. The IPC noted she had not received a Privacy Impact Assessment on any of the GNWT's COVID-19 responses.

Committee cautions the Government to be mindful of privacy concerns as it responds to the pandemic.

CONCLUSION

This concludes the Standing Committee on Government Operations' *Report on the Review of the 2018-2019 Annual Report of the Information and Privacy Commissioner of the Northwest Territories*. Committee again wishes Ms. Keenan Bengts well in her retirement and looks forward to working with the new IPC.

Recommendation 5

The Standing Committee on Government Operations recommends that the GNWT provide a response to the recommendations contained in this report within 120 days.

APPENDIX – IPC’s Opening Remarks to the Standing Committee

ADDRESS TO THE STANDING COMMITTEE ON GOVERNMENT OPERATIONS

May 27, 2020

Good morning. We’re living in interesting times and while I would rather be presenting this in person, I do appreciate being given the opportunity to meet with you virtually to share with you some of the highlights of my 2018/19 Annual Report.

As you all know, my role is to provide independent oversight with respect to issues around access to public records as well as with respect to how the GNWT and its agencies collect, use and disclose personal information under the *Access to Information and Protection of Privacy Act*. That Act came into force on December 31st, 1996. In October 2015, with the coming into force of the *Health Information Act*, my office was given the additional mandate of independent oversight of access to information and protection of privacy in the health sector, which includes both governmental and non-governmental health organizations.

Perhaps the highlight of the year in 2018-2019 for my office came in June last year, when Bill 29, *An Act to Amend the Access to Information and Protection of Privacy Act* received royal assent. This Bill represents the first major amendment to the legislation in more than 20 years. The changes that will result from this Bill are numerous, exciting and progressive. Some of the highlights include making the Northwest Territories the sixth jurisdiction in Canada (including the federal Access to

Information Commissioner) to give the Information and Privacy Commissioner “order” making power. It also lays the groundwork for including municipalities under the legislation, something that I have been advocating for since my first Annual Report in 1997/98 and makes several procedural changes intended to streamline the access to information process. On the privacy side, the Bill provides for mandatory breach notifications to affected individuals and to the Information and Privacy Commissioner and establishes the requirement for the preparation of privacy impact assessments - something already being done on an ad hoc basis but not mandated.

These amendments reflect the monumental change in the way the world does business and the ever increasing importance of “data” as a valuable commodity. To give some perspective, the world’s first website did not go live until 1990 and in 1993 there were only 130 websites. Yahoo was not created until 1994, which by the way was also the year the first massive commercial spam email message was sent. In 1995, only 3% of online users had ever signed on to the world wide web and only 65% of online users reported having sent or received an email at least once a week. Google wasn’t founded until 1998 and Facebook wasn’t created until 2004. Compare this to today. Virtually all business involves some kind of computing requirement, from beekeeping to healthcare, and the amount of information collected, used, manipulated and exchanged every day is unfathomable. Kids graduating from high school today have never known a time without computers and smart phones. While this explosion of technology allows us to do things that we could only have dreamed of 25 years ago, it also brings new responsibilities and new challenges. As Nunavut unfortunately learned in November, ransomware and other malicious apps can shut

down an entire government.

The passing of Bill 29 was, therefore, one of the year's highlights. Unfortunately as of today, almost a year later, it still does not have a "coming into force" date and this is disappointing and disheartening, particularly as there is no indication of an anticipated date for this.

It is also disappointing that I am noticing a significantly increased lack of capacity within public bodies to address access and privacy matters. The time frames for responding to ATIPP requests are not being met and submissions to my office are significantly lacking in detail. Exceptions are not well applied. I am seeing huge delays and a failure to respond to correspondence from my office, almost across the board. I understand that it is difficult to hire ATIPP personnel with the appropriate training and to keep those employees in those positions. In one major department, they went through three ATIPP Coordinators in the space of about 8 months and none of them were properly trained to do the work. I believe that this decreasing capacity to deal with access and privacy issues is partially because expertise in the area of access and privacy is not highly valued in the job evaluation process and the pay levels necessary to attract a high level of expertise is not, therefore being met. Whatever the reason, public bodies are going to have to step up in a big way once Bill 29 comes into effect and I would heartily encourage that the work needed to ensure that there are strong access and privacy staff in place and trained begin now.

Our office opened a total of 84 files in 2018/2019 down slightly from 86 the previous

year. That said, and for comparison purposes, 2019/2020, saw our busiest year yet with 154 files opened....close to double the number in 2018/2019. Much of this increase is as a result of breaches under the *Health Information Act* and the mandatory breach notification provisions in that Act. This suggests that once Bill 29 comes into effect which requires breach notification for all public bodies, the numbers will likely increase exponentially.

Under the ATIPP Act, the majority of the files continue to be issues surrounding access to information matters. Of the 55 files opened under ATIPP, 30 related in some way to the “access to information” side of the Act. Of these, 8 came to my office by way of review because public bodies had failed to respond to an access to information request on time and were in a “deemed refusal” situation. There were 14 privacy breach files opened. Eighteen Review Reports were issued during the year, all of which are summarized in my annual report.

Under the *Health Information Act*, in 2018/2019 we opened a total of 29 files. Of those, the majority (18) were breach notifications received from the Department of Health and Social Services or another health information custodian under the mandatory breach notification sections of the Act. We issued seven Review Reports under the *Health Information Act* in 2018-2019. Most of the reported breaches were relatively minor, but we had two that became very public - the first involved the theft of a lap top containing personal health information of virtually every NWT resident (40,000 individuals). The second came to light when an member of the public found dated mental health and addictions records in Fort Simpson and took them to CBC

North. These two files alone have demanded a significant allocation of time on the part of my office and caused a lot of negative public comment on the ability of the health sector to respect patient confidentiality. That said I am, overall, confident that the level of awareness among health care workers on the front line is up and senior management has, for the most part, been supportive and willing to work toward improvement.

The increasing workload and the ability of my very small staff to keep up to date continues to be a concern. The ATIPP Act currently gives me 6 months to complete a review. That goal is not being met. As of August of last year, I was a full year behind in completing review reports (i.e. it was taking me 18 months to get a Review Report completed). With the new Assistant Commissioner/Investigator who started working with my office in March of 2019, and by hiring some contractors to help with investigations and report writing, we have been able to whittle away at the backlog but with a doubling of new files coming in the door, for every report we complete, it seems we put two more on the list. The backlog is being reduced, but not by nearly as much as I would like it to be. I understand that money may have been allocated in the March budget to hire a new investigator and we are hoping to be able to get that position up and running as soon as possible so that we can erase the backlog before the new legislation kicks in and decreases the time for my office to complete a review from 6 months to 4 ½ months.

Before closing, I wanted to take just a few seconds to recognize Denise Anderson who has been the ATIPP Manager for the GNWT with the Department of Justice I

think for as long as I have been the Information and Privacy Commissioner. She called me a few weeks ago to tell me that she had decided to leave her position. The GNWT is losing an incredible resource and a wealth of knowledge and she will be missed. I wanted to publicly thank her for her work and her passion over the years.

I have been doing this work now for some 23 years, since 1997, which makes me the longest serving Information and Privacy Commissioner in Canada. My current appointment, however, comes to an end on October 31st of this year, and I will not be seeking to renew that appointment. This, therefore, will most likely be my last appearance before this committee. It has always been one of the highlights of my year, as I am very passionate about the work that I do and I love having a captive audience and appreciate the opportunity to talk about the work that my office does.

I thank you for your attention and would invite any questions or comments that the committee might have.