

17th Legislative Assembly of the Northwest Territories

Standing Committee on Government Operations

Report on the Review of the
2011-2012 Annual Report of the
Information and Privacy Commissioner
of the Northwest Territories

Chair: Mr. Michael M. Nadli

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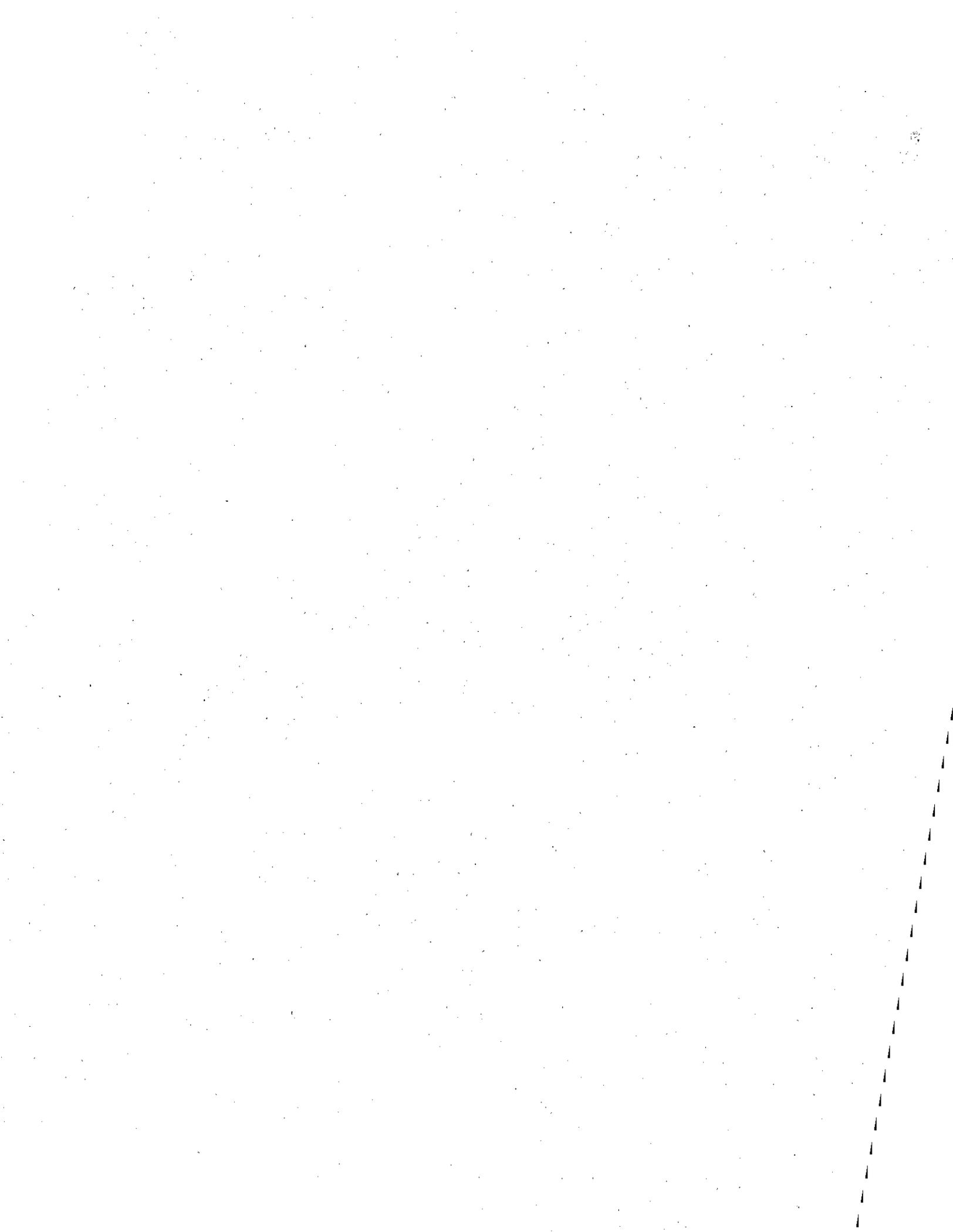
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Committee Analyst



**STANDING COMMITTEE ON
GOVERNMENT OPERATIONS**

**REPORT ON THE REVIEW OF THE
2011-2012 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 2011-2012 ANNUAL REPORT OF THE INFORMATION AND PRIVACY COMMISSIONER OF THE NORTHWEST TERRITORIES

INTRODUCTION

The Standing Committee on Government Operations has reviewed the 2011-2012 Annual Report of the Information and Privacy Commissioner of the Northwest Territories. Members would like to thank Ms. Elaine Keenan Bengts for her report and for her appearance before the committee at the public review on April 15, 2013.

COMMISSIONER'S 2011-12 ACTIVITIES

The Information and Privacy Commissioner is an independent officer of the Legislative Assembly. Her primary role is to review and make recommendations on public bodies' decisions related to the Northwest Territories *Access to Information and Protection of Privacy Act* (the *ATIPP Act*). The *ATIPP Act* requires that public bodies demonstrate their accountability by making information accessible to the public while at the same time protecting the privacy of individuals.

In 2011-12, the commissioner opened 27 files, up 35 per cent from the previous year. She completed ten review recommendations, up three from 2010-11. Six review recommendations were accepted, mainly or completely, by the public body concerned. Four recommendations were rejected, in whole or in part. The Department of Justice, the Beaufort Delta Health and Social Services Authority, and the Yellowknife Health and Social Services Authority all had three or more matters requiring the commissioner's consideration during the year.

RECOMMENDATIONS FOR LEGISLATIVE CHANGE

The Information and Privacy Commissioner is also authorized to make recommendations for legislative change. This year, the commissioner highlighted three legislative issues, all of which were raised in her past reports and forwarded to this House by the standing committee: new health privacy

legislation, access and privacy legislation for municipalities, and the need for a general review of the *ATIPP Act*. The committee concurs that these matters have become even more pressing with the passage of time.

Completion of the *Health Information Act*

In June of 2011, an employee of the Yellowknife Health and Social Services Authority (YHSSA) made a complaint to the Information and Privacy Commissioner about inadequate protection of medical information in Yellowknife's two primary care clinics. The investigation resulted in what the standing committee agrees is one of the most significant review reports completed during this commissioner's term of office.

The implementation of an electronic medical records system began in June 2010 at the Yellowknife Primary Care Centre. This is, for the most part, excellent news, as electronic records make it much easier and quicker for doctors and nurses to review patients' medical histories and provide swift and appropriate treatment. Members also recognize the key role electronic medical records will play in the integration of services and effective case management.

The complaint alleged that adequate privacy protections were not built into the new system. Numerous staff, ranging from senior managers to receptionists, had access to patient information in the system, including such sensitive matters as the reason for patient visits. There were no safeguards to prevent inappropriate access to patient information, no warning system which would identify when information had been inappropriately accessed, and no routine privacy auditing. All of these factors raised the risk of inappropriate use and disclosure of personal health information.

As the commissioner observed during the public review, the privacy of health records has a serious impact on patient comfort and safety, and ultimately on public health. Patients who are concerned about the privacy of their records may not give their doctors important but potentially embarrassing information. They may even decide not to go to the clinic for medical attention.

In the complaint under review, the Yellowknife Health and Social Services Authority responded to the commissioner's request for detailed information on its new electronic medical records system. The authority also had its legal counsel conduct a privacy impact assessment, shared the report with the Information and Privacy Commissioner, and committed to making improvements in line with the internal assessment.

The Information and Privacy Commissioner noted, however, that there is a “disconnect” between her view of what constitutes adequate protection of personal health information and the authority’s view. The differences turn on two issues, both of which have legislative implications: the extent to which information can be shared without the patient’s explicit consent, and the purposes for which it can legitimately be shared.

First, the YHSSA takes the position that all the information they collect is shared within a “circle of care.” That circle of care includes all employees who assist with client care, as necessary to perform job-related duties. What this means in practice is that sharing of some types of patient information is broadly permitted without explicit patient consent within the YKHSS system.

The “circle of care” concept is used in health-specific privacy legislation in some other Canadian jurisdictions to define the group within which personal health information can be shared for the purpose of providing medical help. Northwest Territories legislation does not refer to or define a “circle of care.”

Further, the commissioner warns that, even where jurisdictions have defined the concept, its scope is interpreted very differently by health care providers and the general public. The standing committee agrees that most people would expect their “circle of care” to be limited to the relatively small number of employees directly concerned with their treatment, rather than approximately 150 people employed in the system.

Secondly, the *ATIPP Act* provides that personal information can be used or disclosed only in narrowly defined circumstances, namely for the purpose for which the information was collected or for a use consistent with that purpose. The commissioner’s view is that the current legislation should be understood to require the patient’s express consent for the sharing of personal health information beyond the purpose for which it was originally provided. The YKHSS system, on the other hand, permits the sharing of patient information across practitioners for almost any health-related purpose unless there is an explicit request from a patient to limit the sharing.

The Information and Privacy Commissioner found, in short, that the YKHSS was not in compliance with current NWT privacy legislation. The issues identified go beyond the specific privacy complaint. The electronic medical records system at the Yellowknife clinics is being considered as the model for a territory-wide system. Health-specific privacy legislation is urgently required to provide clear rules for health and social services authorities and practitioners as these systems are implemented.

Work on Northwest Territories health privacy legislation has been underway for approximately five years. The new *Health Information Act* will establish a framework for the collection, use, disclosure of, and access to personal health information. The Information and Privacy Commissioner recommends that the Department of Health and Social Services do whatever is necessary to make completion of this legislation a priority.

The Standing Committee on Government Operations concurs. The committee recognizes that the *Health Information Act* is a large and complex piece of legislation, requiring significant public consultation. In view of the risks of electronic medical records systems to the privacy rights of individuals, and the speed with which these systems are being implemented, however, this legislation must be expedited.

In last year's response to the standing committee's recommendations, tabled October 17, 2012, the government said it anticipated the bill for the proposed *Health Information Act* would be introduced in 2013-14. However, the government also said the introduction of the bill would depend on ensuring adequate time for further consultations with key stakeholders in the winter of 2012-13. The committee trusts that this schedule is being maintained, and that members can expect the introduction of a bill before the end of this fiscal year.

Recommendation One

The Standing Committee on Government Operations recommends:

That the Government of the Northwest Territories expedite work on the new *Health Information Act* with a view to introducing a bill as soon as possible.

If the government is not able to introduce this bill in the fall sitting, the standing committee further recommends that the government table a detailed progress report in that sitting, identifying a timeline and any additional resources required so that a bill may be introduced within the 2013-14 fiscal year.

Information and Privacy Legislation for Municipalities

The three northern territories are the only Canadian jurisdictions which do not have information and privacy legislation for municipalities. Municipalities collect and retain significant amounts of personal information about citizens and employees. There is no recourse in the Northwest Territories for citizens when

this information is improperly used, not are there any rules governing citizens' access to municipal information.

The Information and Privacy Commissioner says she is receiving an increasing number of letters from people who are concerned about municipal access and privacy issues. In 2011-12, the commissioner received two formal complaints concerning a municipality's use and/or disclosure of employees' personal information. In the absence of legislation, the commissioner tried to engage the municipality in a discussion about policies, guidelines, and best practices, but received no reply.

Previous standing committees have supported the commissioner's recommendation to make municipalities subject to access and privacy legislation. The NWT Association of Communities has a Standing Policy on Access to Information and Protection of Privacy which supports the Information and Privacy Commissioner's recommendation, to the extent of urging the Department of Municipal and Community Affairs (MACA) to prepare a discussion paper and commence consultation with stakeholders.

Last year, the standing committee recommended the implementation of access and privacy legislation for municipalities, with a bill to be brought forward within the first two years of the 17th Assembly. The committee understands that small communities might not have the resources needed to implement access and privacy measures immediately. Members concurred with the commissioner's suggestion that legislation be developed, at the very least, for tax-based municipalities.

The government's response, tabled October 17, 2012, recognized that this recommendation was still outstanding and, once again, acknowledged the importance of the issue. The response noted that officials from the Departments of Justice and Municipal and Community Affairs (MACA) met with representatives of community governments and their administrators last fall. A working group was established to review how all NWT municipalities may be brought under existing access and privacy legislation and develop a discussion paper for stakeholders. The government does not wish to distinguish between tax-based communities and others for access and privacy purposes, as smaller communities that are incorporated as charter communities or hamlets now have the option to become tax-based.

The Standing Committee on Government Operations is pleased that the government has finally started working towards the inclusion of municipalities in access and privacy legislation. The government promised to provide findings to the standing committee when the review is concluded. Members appreciate the

offer. It is not clear, however, when this report may be expected, and the committee remains concerned about the slow pace of this initiative.

Recommendation Two

The Standing Committee on Government Operations recommends:

That the Government of the Northwest Territories expedite work on bringing municipalities under access to information and protection of privacy legislation, and

That a phased approach to implementation be considered in order to take into account the needs and resources of smaller communities, while improving access to information and protection of privacy in larger population centres, and

That the government table its review report and discussion paper in the fall sitting. If these are not available, the government should table a detailed progress report on the municipal access and privacy initiative, identifying a timeline for completion and any additional resources required to complete the review report within the life of the 17th Assembly.

Review of the *Access to Information and Protection of Privacy Act*

In her 2011-12 Annual Report, as in her three previous reports, the Information and Privacy Commissioner recommends a general review of the *ATIPP Act*. The Northwest Territories *ATTIPP Act* has now been in force for more than 15 years. Access and privacy laws in other jurisdictions provide for regular reviews at 5- or 10-year intervals. The Standing Committee on Government Operations forwarded this recommendation, among others, to the Assembly last May.

The government indicated in its response to last year's standing committee report that it supports the committee's recommendation to undertake a comprehensive review of the *Act*, including an examination of the role and powers of the Information and Privacy Commissioner. The review was identified in the Department of Justice 2013-14 Business Plan, but completion is dependent on resources and timing.

The standing committee is pleased that a review is on the government's agenda. The committee appreciates the efforts and commitment of the Minister of Justice

and the Government of the Northwest Territories Access and Privacy Office to advance the work during the 17th Assembly.

Recommendation Three

The Standing Committee on Government Operations recommends:

That the Government of the Northwest Territories provide a detailed progress report to this Assembly on work done towards a comprehensive review of the *Access to Information and Protection of Privacy Act*, identifying a timeline and any additional resources required to complete the review within the life of the 17th Assembly.

Progress Report for Recommendations

Last year, the Standing Committee on Government Operations expressed concern with the government's lack of action on many of the Information and Privacy Commissioner's longstanding recommendations for legislative and administrative improvement, most of which have been supported in standing committee reports and motions in the House. The committee recommended that the government provide a progress report.

In response, on October 19, 2012, the government tabled a detailed progress report on the work it has done on the committee's access and privacy recommendations since 2008. Although progress has been painfully slow in some areas, the committee found this report to be a useful tool in clarifying government intentions and following up on key recommendations. Members commend the GNWT Access and Privacy Office for their work on the progress report, and would like to see an updated version on an annual basis.

Recommendation Four

The Standing Committee on Government Operations recommends:

That the Government of the Northwest Territories table an updated progress report and implementation plan for the committee's recommendations concerning *Access to Information and Protection of Privacy* presented in the House since 2008, during or before the fall 2013 sitting of the Legislative Assembly.

CONCLUSION

Northwest Territories residents are fortunate to have had Elaine Keenan Bengts, a lawyer in private practice, as the Information and Privacy Commissioner since 1997. This length of service provides the territory with remarkable continuity and expertise in the complex and evolving field of access to information and protection of privacy. The Standing Committee on Government Operations is grateful for Ms. Keenan Bengts' passion for information and privacy rights in northern Canada, and respects her work in reviewing complaints and making thoughtful, well-considered recommendations for legislative change. Members are committed to giving the commissioner's recommendations due consideration, forwarding them as appropriate to this House, and following up with the government on their implementation.

Recommendation Five

The Standing Committee on Government Operations recommends:

That the Government of the Northwest Territories provide a comprehensive response to this report within 120 days.

