WHAT WE HEARD

Results
of the Public and Stakeholder Engagement on the

Comprehensive review of the *Access to Information and Protection of Privacy* Act

November 2016

Government of Northwest Territories
Gouvernement des Territoires du Nord-Ouest

"WHAT WE HEARD"
Results of the Public and Stakeholder Engagement on the Comprehensive Review of the *Access to Information and Protection of Privacy Act*

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A. Comprehensive Review of ATIPP Act

In 2012, the Department of Justice committed to undertake a Comprehensive Review of the *Access to Information and Protection of Privacy Act* to address issues identified by the public, the Legislative Assembly's Standing Committee on Government Operations (SCOGO), the Information and Privacy Commissioner (IPC) and Public Bodies[1].

The Comprehensive Review of the Act has been broken into three stages

1. **Research and Jurisdictional Review**
   A jurisdictional review of provincial, territorial and federal legislation was carried out, looking at issues that had previously been identified. Further to this, a more in-depth examination and analysis of a range of approaches to access and privacy matters was carried out on newer acts and regulations.

2. **Consultation and Analysis**
   As part of the Comprehensive Review the Department of Justice committed to engage with public bodies, the IPC and the public. The Department of Justice also committed to produce a "What We Heard" report based on the results of these engagements.

   Public Bodies and IPC - The first engagement from October 13, 2015 to January 8, 2016 was with Public Bodies and the IPC on issues that had been examined in the jurisdictional review and incorporated into a consultation document "Consultation with GNWT Departments, Public Bodies and the Information & Privacy Commissioner". This document addressed a range of issues including a number of specific technical and administrative issues that had been raised with the Act.

   Public - The second engagement from April 15, 2016 to July 15, 2016, with the public, included issues identified previously that were felt to be of concern or interest to the public. This did not include many of the more specific technical or administrative issues considered in the engagement with public bodies and the IPC. The public were also encouraged to provide any other comments or suggestions that they may have for amendments to the Act that may not have been addressed in the consultation paper. The document "Public Engagement on the Comprehensive Review – *Access to Information and Protection of Privacy Act"* was provided to a variety of community organizations and was posted on the Department of Justice website.

3. **Development of Legislation**
   In the final stage of the Comprehensive Review of the ATIPP Act, the Department of Justice will propose legislation that reflects the

[1] This includes GNWT Departments and other public bodies as set out in the ATIPP Regulations.

information collected through the earlier stages. The Department anticipates bringing forward legislative changes to the *Access to Information and Protection of Privacy Act* in 2017.

B. Background on the Act

In 1996, the Legislative Assembly of the Northwest Territories (NWT) passed the *Access to Information and Protection of Privacy Act* (*the Act*). The Act:

- Gives individuals the right to request access to information held by the Government of the NWT (GNWT) or other public bodies;
- Gives individuals the right to access and correct their personal information that is held by the GNWT or other public bodies.
- Specifies the limited exceptions to the right of access;
- Sets out when the GNWT or a public body may collect, use and disclose personal information; and
- Provides for an independent review of decisions made under this Act.

This legislation plays a critical role in maintaining government accountability and protecting the public's personal information and demonstrates the GNWT's commitment to protecting privacy and providing access to information.

Since the Act was introduced in the NWT in 1996, changes have been made to the Act in 2004 and again in 2005. These changes responded to issues that were raised by SCOGO, the IPC and other stakeholders.

C. This Report

This report is intended to give the reader a summary of the comments, suggestions and concerns received by the Department of Justice in the course of the two engagements. It does not include conclusions or recommendations for legislative amendments as this will be included in the next stage of the Comprehensive Review – Development of Legislation.

The following Results section includes information on who participated in the engagements, describes general issues that were raised and provides further results organized by common themes that emerged during the consultations. Under each of the themes is an explanation of the section being reviewed, what we asked and what we heard, organized by public body, IPC and the public, as well as a short summary of these results.

In some sections specific comments are quoted, although no names or organizations are provided. These quotations are provided to give a better sense of the feedback received and because they illustrate a common concern or perspective.

D. Results – What we heard

The Department received 27 responses including 15 from public bodies, 11 responses from private citizens, media organizations and civil and community organizations; and a detailed submission from the Information and Privacy Commissioner.

The fifteen responses received from public bodies answered the majority of issues identified. Of the eleven submissions received from the public only half responded to the majority of issues raised, while others focused their responses on a specific area of concern to them such as fees or time frames to respond.

A number of general issues were identified:

1. **Proactive Disclosure[2] of Records and/or Information**
   While the Act sets out a formal process for accessing records held by public bodies, it was not intended to replace existing practices for providing access to information of a public body. We heard that there is a need for greater disclosure of records/information held by public bodies. The formal access to information process should not be the means by which the public obtains the majority of their information or records.

2. **Clarity**
   We heard that the Act is complicated and difficult to understand. Steps should be taken to clarify the legislation.

3. **Technological changes and advancements**
   Since 1996, technological changes and advancements are extensive. There are major increases in the use of mobile devices, such as tablets and smart phones; digital technology to conduct business; social media to communicate and disseminate information and the use of analytics to analyse data in ways not considered when the Act first came into force.

   New technology has brought challenges in relation to both access to information and protection of privacy. We heard that the Act needs to be amended to address these challenges. More specifically, we heard that more access requests should be processed electronically, although preference of the applicant must still be considered.
   We also heard that in order to better protect privacy in this digital age that that the principles of Privacy by Design[3] must be considered in the design, of all new programs, service or legislation.

Other results on what we heard are organized by the following themes:

1. The purposes and application of the Act
2. The administration of the ATIPP Act.
3. Access to information provisions
4. Personal information protection
5. The Information and Privacy Commissioner
6. General and Other Matters
7. Other Comments or Considerations

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[2] Proactive Disclosure occurs when information or records are periodically released (without any request) pursuant to a specific strategy for release of information such as a communications plan or program.

[3] Privacy by Design is a framework that seeks to proactively embed privacy into the design of information technologies, networked infrastructure and business practices, thereby achieving the strongest privacy protection possible.

1. THE PURPOSE AND APPLICATION OF THE ACT

a. Purposes of the Act

The purposes of the Act, as outlined in the legislation, are to make public bodies more accountable to the public and to protect personal privacy. However, some have suggested the Act does not go far enough in terms of making government information open and accessible.

What We Asked

Public Bodies and IPC

Should the Act be changed to require public bodies to be more proactive in the disclosure of records or should proactive disclosure be facilitated through policies and programs? Should the Act be changed to indicate discretionary exceptions will not apply in instances where public interest in disclosure clearly outweighs the exceptions?

All

Should there be changes to the purposes of the Act, and if yes, why and what changes should be made?

What We Heard

Public Bodies

- All support being more proactive in the disclosure of records with the majority indicating this would best handled through policies and program rather than legislation.
- Some support expanding the Act's purpose statements to include a proactive disclosure statement.
- The majority have concerns about changing the Act to specify that the application of discretionary exceptions does not apply where there is a public interest in disclosure. It is not clear how and who determines this and whether it outweighs personal privacy interests.

IPC

- The Act should be amended to: require public bodies to:
  - Proactively disclose certain types of information;
  - Incorporate Access by Design[4] principles when creating new programs and services; and
  - Conduct access assessments on new programs and services.

[4] **Access by Design c**onsists of fundamental principles that encourage public institutions to take a proactive approach to releasing information, making the disclosure of government-held information an automatic process where possible – i.e. access as the default. Access by Design advances the view that government-held information should be made available to the public, and that any exceptions should be limited and specific.

- The Act should also be amended to indicate that if a discretionary exception applies to requested records, disclosure should take place unless there is a very good reason it should not be provided.

Public

- Suggest including statements in the purpose section relating to "duty to document"[5] requirements and proactive disclosure.

Summary

All support more proactive disclosures taking place but differ on what is required or the approach (policy or legislation).

b. Definitions

The Act provides key definitions used in the administration of the Act, however our current list of definitions has not been updated since the Act came into force. For instance under our Act an individual's business address or business telephone number is currently considered personal information. Many jurisdictions have removed this reference, and it may make sense to do that here.

What We Asked

Public Bodies and IPC

Should the Act be changed to remove reference to business information and should the current definition list be updated further? If yes, are there definitions you would like to see included or removed?

What We Heard

Public Bodies

- The majority support removing business contact information from the definition of personal information, and updating the current list of definitions.

IPC

- Supports removing business contact information and updating and clarifying the listing of definitions listed.

Summary

There is support for removing business contact information and updating the listing.

c. Records that do not fall under the ATIPP Act

Under the ATIPP Act most records held by public bodies are subject to the Act. However there are a limited number of records that do not fall under the Act. If a public body

[5] Duty to Document establishes a positive duty for public servants and officials to create a full, accurate and complete record of important business activities. Records should be properly preserved so that they remain authentic, reliable, and easily retrievable when subject to access to information requests.

receives a formal access to information request for these types of records, the applicant must be informed the Act does not apply to the requested information. While these exceptions are limited, there have been requests related to this information which suggests the listing may not be appropriate.

What We Asked

All

Is the current list of records that do not fall under the Act still appropriate and are there other records that perhaps should be included?

What We Heard

Public Bodies

- The current list of excluded records from the ATIPP Act is still valid. Few additions to the list were recommended.

IPC

- The current listing is still valid but should be clarified. No other records should be added.
- Where there are questions whether an applicant's requested records are excluded, her office should have access to the records to confirm they are outside of the Act.

Public

- List should be reviewed and no new additions suggested.

Summary

The majority agree the current list of records continues to be valid. Public Bodies suggest the list could be expanded to include a few other records.

d. Conflict with another Act

The ATIPP Act defines the relationship between the Act and other NWT legislation. If a provision of the ATIPP Act conflicts with another piece of legislation, the ATIPP Act is considered to prevail unless the other legislation includes a "notwithstanding to the Access to Information and Protection of Privacy Act" clause.

As there is no requirement to identify the different NWT Acts that are notwithstanding to ATIPP, it means that it may be difficult to get a good understanding of the exceptions that exist in other NWT Acts. There is also no criteria on when a notwithstanding clause would be appropriate.

What We Asked

Public Bodies and IPC

Should criteria be created for public bodies developing legislation, in order to determine if a notwithstanding clause is appropriate and if yes, should it be in policy or legislation?

All

Should a listing of NWT Acts that include notwithstanding to ATIPP provisions be identified in the ATIPP Regulations?

What We Heard

Public Bodies

- All public bodies support developing criteria, through policies, to assist in determining if an act or a section of an act should be considered "notwithstanding" to the ATIPP Act.
- The majority support having listings in the ATIPP Regulations.

IPC

- Supports developing criteria, through policy however any new provisions should first be submitted to her office for comment and review.
- A listing of NWT Acts with notwithstanding to ATIPP provisions should be identified in the Access and Privacy Directory.

Public

- For greater clarity, a listing of NWT Act that include notwithstanding clauses relating to ATIPP provisions should be identified in the ATIPP Regulations.

"Why on earth isn't this done now? What's stopping you?"

Summary

Public Bodies and the IPC support developing criteria through policy.
The Public and Public Bodies support a listing of NWT Acts with notwithstanding clauses be listed in the ATIPP Regulations. The IPC suggests that this be included in the Access and Privacy Directory**.**

2. ADMINISTRATION OF THE ATIPP ACT

The ATIPP Act gives individuals the right to ask for information from public bodies and it protects personal information held by public bodies. This right is subject to limited exceptions. The Act also outlines a wide range of administrative functions relating to the processing of formal access to information requests, such as fees, processing costs, specific time limits, notice requirements and other administrative requirements.

a. Right of Access

The Act gives any person the right to request access to any record held by a public body. There are no restrictions on who may make a request or why they would want that information.

While it is standard practise to protect the identity of an applicant who has initiated an access to information request this is not specifically provided for in legislation. Recently one jurisdiction included a provision in their Act that requires public bodies to anonymize the identity internally during the processing of the request.

What We Asked

Public Bodies and IPC

Should the Act be changed to protect the identity of an access to information applicant from disclosure, during the ATIPP process? If yes, why?

What We Heard

Public Bodies

- The majority support protecting the identity of ATIPP applicants but through policy, not the legislation. Others indicate current practises of limiting this information on a need to know basis are adequate.

IPC

- Recommends amending the Act to include a provision that would limit the disclosure of the name of an ATIPP applicant.

Summary

There is support for protecting the identity of ATIPP applicants but differences on if that should be done through legislation or policy.

b. Fees

The ATIPP Act gives individuals the right to request access to general information held by public bodies as well as the right to request access to their own personal information. Under the ATIPP regulations there are two separate types of fees structures; fees for access to general information and fees for applicants requesting access to their own personal information.

General requests received by public bodies must include an initial $25.00 application fee and other fees may be charged. If the amount of the other fees is lower than $150.00 the applicant will not be charged any fees however if the estimated fees exceeds $150.00, public bodies must charge the total amount.

The fees outlined in the regulations were never intended to cover the actual cost of administering formal access to information requests and the fees charged are only intended to offset the costs of providing records to applicants and possibly to discourage frivolous requests. However, it is important that the fees charged do not become a barrier to access information.

What We Asked

All

Are the current fees in the NWT, still appropriate or do you believe they create a barrier to access to information?

What We Heard

Public Bodies

- The majority believe the current fee structure for general requests are appropriate however, providing applicants with a set number of free hours, a practise seen in other jurisdictions, would work better than the current fee estimate structure.
- Concerns were raised that eliminating fees could result in an increase in frivolous requests.
- Suggested that clarifying this section would be helpful.

"If the GNWT is serious about transparency they will lower the fees considerably."

IPC

- Eliminate the application fee and provide applicants with 15 free hours.
- Amend the Act to clarify only "actual time" spent processing may be charged.

Public

- Comments relating to the current fee structure indicate the fees should be minimized or removed as they act as a barrier to obtaining information held by public bodies.
- Concerns were raised on why the public has to pay fees for information that in many cases should be given outside of ATIPP.

Summary

All respondents support changes to the current fee structure. Public bodies are concerned that eliminating or lowering fees may result in an increase in frivolous requests.

c. How to Obtain Access

Currently, applicants can make a written request using an official request for information form, available from the Department of Justice website, or by written letter requesting records and referencing the Act. Applicants who are unable to put forward a written request may submit an oral request.

When the Act came into force in December 1996, the procedures developed for processing requests were based on a paper format, technological advances have changed the way government does business and the majority of records created today are in an electronic format. While public bodies in the NWT often provide documents to applicants in an electronic format, there is no requirement to do so.

What We Asked

All

Should the Act require public bodies to give a paper or electronic version of the requested information, depending on the preference of the applicant?

Public Bodies and IPC

Should we consider processing a full request through electronic means?

What We Heard

Public Bodies and IPC

- The majority support allowing an applicant to indicate in what form they prefer to access records and support a move toward proving in electronic form if requested. This should be limited to proving electronic data using the normal software/hardware used by the public body.
- The majority support electronic processing of requests but have concerns about how to confirm security, confirmation of receipt and capability of all public bodies to work in the specific digital context.

IPC

- Also recommends applicants be given their choice of medium where possible and that all public bodies have the necessary technology to disclose records electronically within 5 years.
- GNWT should develop a system which would allow online ATIPP requests as an option.
- Notes government should prepare for open government initiatives that include creating data and data sets in a way that will allow public bodies to respond to requests for machine readable records.

"the originating system will almost certainly now be digital, there is no justification for not providing the results of the information request in electronic form when requested"

Public

- All responses indicate the need to provide records in electronic format, if requested by the applicant to do so.
- Additional comments provided suggest that requests for general information should be published online, and in an accessible electronic format as appropriate.

Summary

The majority support giving applicants records in the format they prefer. Public bodies and the IPC further support electronic processing of requests; but issues relating to security, electronic confirmation in the digital context must be considered.

d. Time Limit for Responding to Initial Request

Public bodies are required to respond to a request for access to information within 30 calendar days after receiving it, unless the time limit is officially extended or the request is transferred to another public body. The time period begins on the date the request is received by the public body's access and privacy coordinator.

The current 30 calendar day timeframe is consistent with the majority of jurisdictions in Canada however some critics have indicated that the government should consider shortening the initial response time.

What We Asked

All

Should the current 30 day deadline to respond be changed, and if yes, shorter or longer?

What We Heard

Public Bodies

- The majority believe the current time frame of 30 calendar days is appropriate, but would support 20 if calculated as business days.

"Government not properly resourcing the ATIPP positions is not a reasonable excuse for extended time limits."

IPC

- Supports the current time frame but recommends the act should indicate that responses should be given as soon as possible.

Public

- While 30 days is acceptable shorter time frames should be considered.

Summary

The majority support the current time frame of 30 days.

e. Duty to Assist Applicants

The Act requires public bodies to make every reasonable effort to assist applicants and to respond to each applicant in an open, accurate and complete manner, without delay. Under this section public bodies are obligated to create a new record from an existing electronic record if the new record can be created using the public body's normal computer hardware and software and technical expertise; and creating the record would not unreasonably interfere with the operations of the public body.

While public bodies routinely produce records from existing information systems in response to formal access to information requests in some instances producing the record can be complicated and time consuming.

What We Asked

Public Bodies and IPC

Should there be criteria developed to assist public bodies to assess what could be considered as "unreasonably interfering with the operations of a public body"? If yes, do you believe the criteria needs to be provided for legislation or in policy?

What We Heard

Public Bodies

- The majority support developing a criteria in policy but criteria must be applied on a case by case basis.

IPC

- Recognizes developing criteria in either policy or regulations would be beneficial but this would need to be on a case by case basis.

Summary

Support for developing a criteria in policy.

f. Extension of Time Limit for Responding

The ATIPP Act allows public bodies to extend the time limit for responding to an applicant's request by a reasonable period, if:

- There isn't enough detail for the public body to find the requested records;
- a large volume of records is requested or must be searched to find the records;
- the public body needs to consult with another public body or a "third party" (a person or business that may be affected by the request): or
- a third party requests the IPC to review the matter.

Across Canada, the approaches to initiating a time extension are varied. The majority of jurisdictions have specific time frames of 15-30 days for an initial extension but any longer requires the permission from the Commissioner.

What We Asked

All

Should a set period" for a time extension be outlined in the ATIPP Act and if yes, what is a reasonable time frame? Also should public bodies have to make an application to the IPC for a second time extension?

What We Heard

Public Bodies

- A number of respondents support a set number of days for an initial time extension although there are concerns that a set time period does not take into consideration how extensive an ATIPP request may be in terms of volume or locating records, and if capacity to meet the time frame is an issue.
- The majority do not believe a second time extension should go to the Commissioner.

IPC

- Supports an initial time extension of 20 days however any additional extension should be provided to her for approval.
- The IPC's decisions on time extensions should be orders and not recommendations.

Public

Respondents support a set number of days for an initial time extension but approval for any second time frame should be sought. Suggested time extension limits ranged between 15-20 days.

Summary

The majority support a set period for an initial time frame although suggested time periods differ. The IPC and Public support requiring the IPC to approve a second time extension.

g. Transferring Requests

The Act allows public bodies to transfer a request, and any records relating to it, to another public body if the record was produced by that body or the record is in the custody or under the control of the other public body.

The guidelines relating to transferring an access to information request to another public body indicates it should be done as quickly as possible, however the legislation does not give specific time frames for the transfer. This has resulted in inconsistent response times between public bodies, for transferred requests.

What We Asked

Public Bodies and IPC

Should the Act should be changed to indicate a set time frame for transferring a request to another public body, and if yes, how many days should it be?

What We Heard

Public Bodies

- The majority support a set time frame for a transferred request with times ranging from 5 to 20 days.

IPC

- Recommends 5 working days.

Summary

There is support for a set time frame for transferring a request but the suggested time periods differ.

h. Mail Service to Applicants and Third Parties

The Act contains several sections which require public bodies to give individuals notice of some action or decisions. The manner in which notice is provided has typically been through mail services, even though technological innovations have changed the way we communicate.

Other jurisdictions have addressed technological changes by allowing that notice may be provided by facsimile or in electronic form. Alberta's legislation allows notice to be provided to individuals through electronic form if the individual the documents pertain to consents to accept the notice or document in the form.

What We Asked

Public Bodies and IPC

Do you have concerns about providing individuals notice in a secure and confidential manner, through facsimile or electronic methods?

What We Heard

Public Bodies

The majority support providing individuals documents through electronic means but there must be a secured transfer through electronic delivery and confirmation of receipt must take place.

IPC

Recommends changing the Act to provide for notice by email, fax or mail, depending on the applicant's preferred method of delivery**.**

Summary

There is support for providing individuals notice through electronic means and fax but public bodies have concerns relating to security and confirmation of receipt.

i. Time Periods for Third Party Consultations and Privacy Reviews

An applicant may request information held by a public body that includes third party information. A third party is considered someone other than an applicant or a public body. Public bodies that are considering disclosing records that contain third party information are required to notify and consult with the third parties prior to any disclosure. The public body must notify the applicant and third party of the public body's decision regarding access.

The Act also allows applicants who have concerns relating to how a public body may have collected, used or disclosed their personal information to request a review of the matter to the IPC. The NWT time frames relating to a privacy complaint process are, along with Nunavut, the longest time periods in Canada.

What We Asked

All

Should the time frames relating to third party consultations and reviews related to privacy complaints be shortened, and if yes, what is a reasonable time periods?

What We Heard

Public Bodies

- The majority have concerns about reducing the time frames for third party consultations and do not support extending the time frames for privacy reviews.

IPC

- Third parties should have 21 days, public bodies 10 days to make a decision and then 21-30 days for an appeal.
- The IPC should continue to have 180 days to complete both access and privacy breach reviews however the time frame for public bodies to respond to the review should be reduced to 45 days.

Public

- Time frames are too long and must be shortened, 15-60 days.

Summary

The IPC and the Public support change to these time frames but Public Bodies have raised concerns.

j. Time Period for Applicant and/or Third Party Appeals

The Act requires public bodies to give written notice to an applicant and any affected third party of their decision on whether access will be given to the requested documents. This notice does not include a copy of the requested document but rather the decision on what the documents are and if they will be disclosed. Applicants and third parties then have 30 days to request an appeal of the public body's decision to the IPC.

Although the current time frame of 30 days for appealing a decision is in keeping with other jurisdictions, it has been suggested that this time period be extended , due in part to the time it may take for mail services to reach northern communities.

What We Asked

All

Should the time frame relating to the 30 day appeal period for applicants and third parties be extended and if yes, what is a reasonable time period?

What We Heard

Public Bodies

- The majority do not support extending the time limit.

IPC

- Does not support extending the 30 day appeal period however the IPC should have order making power due to the complexity of appealing Access to information requests to the court.

Public

- Time frames are too long and must be shortened.

Summary

The IPC and public bodies do not support shortening time frames but the Public supports a shorter appeal period.

3. APPLICATION OF EXCEPTIONS PROVISIONS

While the ATIPP Act gives the public the right of access to records held by public bodies, public bodies may withhold records only if they fall under one of the limited and specific "exceptions" set out in the Act.

a. Mandatory and Discretionary Exceptions

The Act has two types of exceptions, mandatory exceptions and discretionary exceptions. Records requested by an applicant, which are found to fall under a mandatory exception, must be denied. Records requested by an applicant which fall under a discretionary exception must be reviewed to determine whether harm is likely to result from the release of information. If no harm is apparent the information should be disclosed. Currently there are five mandatory exceptions and 10 discretionary exceptions. All access and privacy legislation across Canada provides for similar mandatory and discretionary exceptions to the right of access.

What We Asked

Public Bodies and IPC

Should the Act be changed to require greater clarity on the rational for the applying mandatory and/or discretionary exceptions or should this be addressed through policies or procedures?

Public

Are the mandatory and discretionary exceptions to disclosure still appropriate, If not, please explain why and provide suggestions for improvement.

What We Heard

Public Bodies

- The majority feel that any rational for application of mandatory or discretionary exceptions should be addressed in policy, not legislation.

IPC

- ATIPP's discretionary sections should be amended to clearly indicate that discretion is being applied and then outline the specific harm that is "reasonably" expected to occur if the records were to be disclosed.
- The starting point of all discretionary exceptions is disclosure.

Public

- There were concerns with the application of exceptions and some suggest that some mandatory exceptions should be discretionary exceptions.
- Suggest removing discretionary exceptions or providing a general public interest override provision.

"Consideration should be given to narrowing the list of subject matters that are subject to discretionary disclosures with an overriding principle of public interest."

Summary

Public Bodies and the IPC support clarify the application of exceptions sections, but do not agree on how. The IPC supports changes to the legislation specifically in relation to discretionary exceptions.

The Public indicate some mandatory exceptions should be changed to discretionary and some discretionary exceptions should be removed.

b. Cabinet Confidences

The Act requires public bodies to refuse to disclose information that would reveal a confidence of the Executive Council. This section is intended to preserve the unique role of cabinet institutions and conventions within the framework of parliamentary government. Cabinet's decision-making process has traditionally been protected by the rule of confidentiality. This enables ministers to engage in full and frank discussions necessary for the effective functioning of a cabinet system of government.

While all jurisdictions include exceptions to the right of access in order to protect information that falls within the category of cabinet confidences, the type of information which falls within this protection varies. Jurisdictions, such as Newfoundland have tried to clarify what is considered a cabinet confidence by including a provision that identifies the types of cabinet information that would fall under the mandatory protection of this section.

What We Asked

Public Bodies and IPC

Is the current list of information that would disclose a confidence of Executive Council still appropriate and should we consider revising the provision to describe what records are considered information revealing a cabinet confidence?

What We Heard

Public Bodies

- Majority believe the current list is still appropriate however clarifying the section and including materials relating to standing committees would be helpful.

IPC

- This section should be reviewed and consider adopting NFLD's definition of cabinet records for greater clarity.

Summary

There is support to review and clarify this section and to consider the NFLD's model.

c. Advice to Officials

This discretionary exception is intended to protect deliberations between senior officials and ministers, and their staff, as well as among officials themselves. This section also contains a provision clarifying the types of information that would not fall

under this exception. All Canadian jurisdictions include an exemption within their legislation relating to "advice and recommendations".

What We Asked

Public Bodies and IPC

Should the current list of information that is considered to reveal advice remain under this discretionary protection? Are there examples of information that should be included in this section?

Public

Is the list of discretionary exceptions appropriate and if not, what changes would you make?

What We Heard

Public Bodies

- Majority support maintaining the current listing but believes that this section could be clarified.

IPC

- Is concerned with how broad this section is and has recommended removing specific items, such as deliberations involving officers of a public body.

Public

- Responses indicate concern with this exception to disclosure.

Summary

All responses received have some questions or concerns with this section.

One respondent raised concerns regarding cabinet confidences and advice to officials, indicating when these sections are applied broadly they "impose secrecy on much of the government decision making process and reduce the ability of people to understand the reasons the government has made a decision."

d. Intergovernmental Relations

The Act gives public bodies the discretion to refuse to disclose records that could harm the normal process of intergovernmental relations or the supply of intergovernmental information. Public bodies may refuse to disclose records that could impair relations between the GNWT or its agencies and federal, provincial, territorial governments, aboriginal organizations, municipalities, international governments and/or states.

All Canadian jurisdictions include a similar section in their legislation, however some also indicate that decision making relating to law enforcement information should be

determined by the Attorney General and all other information referred to the Executive Council.

What We Asked

Public Bodies and IPC

Should decisions regarding access relating to law enforcement be referred to the Attorney General? If not, why?

What We Heard

Public Bodies

- Most think that although this seems reasonable it is not clear that it is necessary.

IPC

- Does not believe this is necessary.

Summary

Respondents said that this is not necessary.

e. Disclosure Harmful to Historical Resources, Rare, Endangered or Vulnerable Life

The Act allows a public body to refuse to disclose information if the disclosure could reasonably be expected to result in damage or interfere with conservation measures. While all Canadian jurisdictions provide a similar exemption within their access and privacy legislation the majority of jurisdictions have expanded the provision "rare, endangered, threatened or vulnerable form of life" to provide clarification on the different types of species and what should be considered when reviewing the possible use of this section.

What We Asked

Public Bodies and IPC

Does the current provision need to be expanded to include detailed examples as seen in other jurisdictions?

What We Heard

Public Bodies

- There is support for expanding this provision. The Department of Environment and Natural Resources agrees expanding this section would be useful and other public bodies defer to ENR on this issue.

IPC

- This has not come up as an issue for the IPC so she has no opinion on this.

Summary

There is support for expanding this section.

f. Disclosure Prejudicial to Law Enforcement

This exception to access is intended to protect both law enforcement activities and information in certain law enforcement records. The Act defines law enforcement in Section 2 of the Act to include:

- policing, including criminal intelligence operations;
- investigations that lead or could lead to a penalty or sanction being imposed; and
- proceedings that lead or could lead to a penalty or sanction being imposed.

All jurisdictions include a similar provision that allows public bodies to refuse to disclose information that may harm law enforcement matters, however a listing of additional law enforcement information that could be considered for inclusion under this provision was provided for review.

What We Asked

Public Bodies and IPC

Is the current listing of law enforcement activities still appropriate and should any of the additional law enforcement activities identified, be included? Are there other law enforcement activities that should be considered?

Public

Should the NWT consider expanding the exemptions in this section or making any other changes?

What We Heard

Public Bodies

- Some support the additional law enforcement activities noted, however many responses indicated no real need to expand this section.

IPC

- Recommends removing section 20 (2) a. – "disclosure exposing person to civil liability".
- Does not support expanding to include additional law enforcement activities as it is not necessary.

Public

- Generally no specific concerns with expanding the provision, however one respondent indicated they did not support further additions and noted in their view, the existing provisions are currently too broad.

"The ability for members of the public to access information about policing practices and policies provides an appropriate safeguard on the fair and effective use of police powers."

Summary
While there was some general support for the examples provided, the majority feel expansion is not necessary.

g. Disclosure Harmful to an Applicant or Another Individual's Safety

This discretionary exception allows public bodies to refuse to disclose information, including an individual's own information, where the disclosure could reasonably be expected to endanger another person's safety, mental or physical health.

The majority of Canadian jurisdictions have expanded this provision to give public bodies the discretion to refuse to disclose information that may interfere with public safety. This has been generally defined to mean information where the disclosure could reasonably be expected to hamper or block the functioning of organizations and structures that ensure the safety and well-being of the public at large.

What We Asked

All

Should this provision be expanded to address the broader public safety aspects described and if not why?

What We Heard

Public Bodies

- The majority support expanding this section to address broader public safety aspects however, defining "public interest is necessary.

IPC

- Does not support expanding this section, as this has not been an issue in the years since the Act came into force.

Public

- Some supported this while others felt it was either unnecessary or already covered under the law enforcement section.

Summary
While there is some support for expanding this section to address broader public safety others feel it is not required.

h. Confidential Evaluations

This section allows that public bodies may refuse to disclose to an applicant, personal information that is evaluative or opinion compiled solely for the purposes of determining the applicant's suitability, eligibility or qualifications for employment or for the awarding of government contracts or other benefits. The provision applies when the information is given to the public body, explicitly or implicitly, in confidence.

Public
The majority of Canadian jurisdictions include a section in their access and privacy legislation that allows a public body to refuse to disclose this type of information. The intent of this exception is to protect the receipt of confidential evaluations received by public bodies, particularly in relation to the hiring of personnel or awarding of contracts.

Public Bodies and IPC
A few jurisdictions have included a provision that permits public bodies to refuse disclosure of personal information of participants in a formal employee evaluation process. This process is typically known as a "360 degree" evaluation where a peer, subordinate or client of the applicant gives evaluative comments.

What We Asked

Public Bodies and IPC
Should this section be expanded to include a provision that would permit public bodies to withhold the names and positions of subordinates/colleagues, or clients, who have given evaluation information?

Public
Do you think this type of discretionary exception should be maintained and if not, why?

What We Heard

Public

- There is support for maintaining the discretionary exception however one respondent noted this should not include confidential evaluations pertaining to performance measures of a public body.

Public Bodies

- The majority support changing the Act to permit protections to the identity of individuals who provide evaluation as part of a 360 degree program but concerns were raised that employees should know who and what comments were made about them.

IPC

- The Act currently provides protections by allowing the opinion to go but redacting the individual's identity, so this may not be necessary.

Summary
The Public supports maintaining this exception.
On the question of 360 degree evaluations, Public Bodies support including this but the IPC indicates this can be done under the current Act.

i. Personal Privacy of Third Parties

The Act indicates that public bodies that receive a formal access to information request must not disclose personal information of "third parties", if the disclosure could be considered an unreasonable invasion of their privacy. Some jurisdictions have expanded the examples of personal information, which if disclosed would be considered an unreasonable invasion of privacy, to include ethnic origin, sexual orientation and political beliefs or associations.

A current example of personal information which if disclosed is considered not to be an unreasonable invasion of third parties privacy is the salary ranges of employees of public bodies. However there are jurisdictions that give the actual salary of employees and not just the salary range. This information is disclosed as a transparency and accountability measure for public funds. Questions were also asked in relation to how privacy protections apply to deceased individuals.

What We Asked

All

Should the Act be changed to indicate disclosures of personal information relating to ethnic origin, sexual orientation and political beliefs would be considered an unreasonable invasion of privacy? Are there other examples that should be considered?

Should the examples of personal information, which if disclosed are not considered to be an unreasonable invasion of privacy, include the actual salary range of public servants?

Do the privacy interests of a deceased individual decrease over time or are there other factors that should be considered?

What We Heard

Public Bodies

- The majority support expanding this provision to include the examples noted and had additional suggestions such as age, affirmative action status, place of origin.
- The majority do not support including the remuneration of public servants. Concerns that the population size makes a "sunshine" list more problematic here.
- Most believe that the length of time an individual has been deceased does affect the privacy protections and suggested time frames for decreased protection for deceased individuals between 20-50 years.

IPC

- Supports expanding section, and specifically sexual orientation.
- Recommends disclosing remuneration including salary, bonuses and discretionary benefits. Further recommends disclosing dollar amount of severance agreements.

- Recommends amending the Act to allow for disclosures of personal information of deceased individuals be provided to the estate's executor, or spouse or next of kin in order to settle the deceased person's affairs.

Public

- Support to expand to include other examples of personal information.
- General support to disclose actual salaries of public servants.
- Support decreasing the privacy interests of deceased individuals over time however, the time periods identified are between 20-100 years.

Summary

All support expanding this section to include the examples noted, and other examples for consideration were provided.

The IPC and Public support disclosing the remuneration of public servants but public bodies have concerns with this type of disclosure.

There is general support that the privacy interests of deceased individuals may decrease over time however the approaches and time frames on this issue differ.

j. Business Interest of Third Parties

Public bodies that receive an access to information request relating to third party business information must consider if there is harm to the business if the information is disclosed. They must balance the public's expectation that they can access information relating to the business of government, against the protections the Act provides for third party business interests. All jurisdictions include protections relating to third party businesses.

What We Asked

Public Bodies and IPC

Is the current list of business information protected under this mandatory exception still appropriate?

All

Should the Act be changed to include a section to protect information supplied to arbitrators, mediator, labour relations officers, or others relating to a labour dispute? Do you have concerns with the section that protects the business interests of third parties and if yes, what are they?

What We Heard

Public Bodies

- Many suggest this provision is still appropriate but would benefit from a more detailed jurisdictional analysis
- Majority recommend expanding this provision to include the identified additions noted.

IPC

- Recommends changing this section to be similar to either Alberta, Ontario, Newfoundland or others that provide for more openness in contracting and procurement matters.
- Section 24(1) c should be clarified and it should not apply to pricing information in contracts.
- Supports expanding to include identified examples.
- Recommends removing provision 24(1)(f) – "a statement of financial assistance provided to a third party by a prescribed corporation or board;"

Public

- A number of concerns were raised regarding the application of this exception. Some did not believe this should be a mandatory exception.

"businesses that partner with government should expect the same transparency requirements as government."

Summary

All responses support changes to this section but suggest a range of different options.

k. Information Otherwise Available to the Public

The Act gives public bodies discretion to refuse to disclose information which is currently available to the public or that will be published or released within 6 months of the applicant's request.

All jurisdictions have a similar provision however only the NWT and Nunavut have time frames of 6 months. All other time frames range between 30-90 days.

What We Asked

Public Bodies and IPC

Do you have concerns with shortening the time frame and if yes, why and what would you consider reasonable?

What We Heard

Public Bodies

- The majority support shortening the time frame to 90 days.

IPC

- Recommends either removing this section or lowering time frame to 30 day.

Summary

Both the IPC and Public Bodies support changing the time frame, but IPC indicates this exception could be removed.

l. Other Exceptions to Consider: Workplace Investigations

The exception relating to workplace investigations allows a public body, on receipt of an access to information request for a workplace investigation, to refuse to disclose all relevant information created or gathered for the purpose of a workplace investigation. However if the request for information is from a complainant or a respondent that is party to the workplace investigation, they must be given all relevant information gathered for the investigation. This provision further indicates any witnesses who request information pertaining to the investigation may only have access to the witness statement provided by the witness in the course of the investigation.

What We Asked

Public Bodies and IPC

Do you believe including this type of provision in the ATIPP Act would be beneficial to applicants and if not, why?

What We Heard

Public Bodies

- The majority support including this type of provision.

IPC

- Supports allowing disclosures to complainants and respondents in workplace investigations or witnesses but recommends anyone else may request this through the normal ATIPP process.

Summary

Both Public Bodies and IPC generally support this type of exception but differ on what should be included.

m. Public Interest Override in Access Legislation

A number of jurisdictions have included a public interest "override" in their access and privacy legislation. This type of override is intended to recognize that while the information requested may fall into a specific discretionary category, there may be an overriding public interest to disclose the information. This would require public bodies to consider the public's interest when exercising discretion on exceptions to disclosure.

Both Ontario and Newfoundland have a public interest override within their Acts that applies to specific exceptions. Ontario qualifies the application of the override by stating there must be a "compelling" public interest in the disclosure that "clearly outweighs" the reason for the exception. Newfoundland, does not qualify the override with terms as used above. Instead, public bodies in Newfoundland must balance the possibility of harm associated with the disclosure of information against fundamental democratic and political values such as transparency and accountability.

Currently, exceptions to access identified under our legislation do not provide for any public interest overrides in relation to discretionary exceptions.

What We Asked

Public Bodies and IPC

Should the Act be revised to provide a public interest override in relation to specific discretionary exceptions and if yes, which ones? If a public interest override is considered which model (Ontario or NFLD) would work best in the NWT?

What We Heard

Public Bodies

- The majority support public interest disclosures in principle however many feel the Act currently provides this.
- Concerns on how this would be defined and applied.
- Both models suggested have some support.

IPC

- Disclosure is the starting point and with this approach there is no need for a public interest override with respect to discretionary exceptions.
- There is merit in considering a public interest override to attach to other discretionary exemptions as well.
- IPC recommends an amendment that states that for all discretionary exceptions, disclosure is the rule and any reason for refusal to disclose must include a full explanation of the criteria used in the exercise of that discretion.

Summary

There is some support for a public interest override but concerns on how it is applied.

4. PERSONAL INFORMATION PROTECTION

a. Collection of Personal Information for Evaluation

This provision deals with those situations where public bodies collect personal information about individuals, either through an application form, interviews, questionnaires or surveys. This section restricts public bodies in the personal information they may collect. Personal information may only be collected if it is authorized by law, collected for law enforcement purposes or is personal information which related directly to an existing or proposed program.

What We Asked

All

Should the Act be changed to allow for the collection of personal information for program evaluation or planning? If not, why?

What We Heard

Public Bodies

- Majority support the collection of personal information for evaluation purposes although this would need to be clearly defined.

IPC

- IPC does NOT support including a provision for the purpose of program evaluation.

Public

- Public support for collection for program evaluations is limited.

Summary

Support for collection of personal information for program evaluation is limited.

b. Collection of Information from Individual Concerned

Public bodies must collect personal information directly from the individual the information is about unless it falls under one of the eleven exceptions to this rule as outlined in the Act. Currently the Act does not allow for the indirect collection or disclosure of personal information for the delivery of common or integrated programs. This can result in delays in the delivery of integrated services to clients.

What We Asked

All

Should the Act be changed to allow public bodies to indirectly collect personal information for an integrated program services or evaluating an integrated program or activity. If not, why?

What We Heard

Public Bodies

- Majority support indirect collection for integrated programs however criteria must be developed that clearly identifies what are integrated programs and information sharing agreement must be used.

IPC

- IPC does not support including the collection of personal information for integrated program services or their evaluation.

Public

- Public support for collecting personal information for integrated programs or evaluation was limited and there were questions about why consent would not be obtained.

"without establishing clear principles, and effective oversight, these provisions would lead a significant loss of personal privacy, and should not be enabled."

Summary

Public bodies support the indirect collection of personal information for integrated programs or program evaluation, however the IPC does not, and Public support is limited.

c. Notice of Collection of Personal Information

The Act requires public bodies that collect information directly from individuals to provide notice regarding the purpose of the collection, the legal authority that authorizes the collection, and the contact information of the public body representative who can answer questions regarding the personal information collected.

This section also allows public bodies to not provide notice, if compliance may result in the collection of inaccurate information or defeat the purpose or prejudice the use for which the information is collected. This scenario is typically used for the collection of personal information for law enforcement purposes. In some jurisdictions this is specifically set out in their legislation.

What We Asked

Public Bodies and IPC

Should the Act be changed to indicate that the notification requirements do not apply when the personal information is being collected for the purpose of law enforcement?

What We Heard

Public Bodies

- Majority support including this provision.

IPC

- Does not support this provision.
- Indicates that in the matter of the collection of law enforcement information the individual has a right to know why the information is being collected.

Summary
The majority of public bodies support this provision, however the IPC does not.

d. Privacy Impact Assessments (PIA)

The Act requires public bodies to protect personal information by making reasonable security arrangements against such risks as unauthorised access, collection, use, disclosure or disposal. This provision indicates the head of the public body is directly responsible for taking the necessary steps to implement privacy protections relating to the protection of personal information in their custody and control.

Privacy Impact Assessments
A PIA is the principal tool used in Canada to ensure that programs and information technology systems and applications are compliant with the jurisdictions' privacy laws. While all jurisdictions in Canada use PIAs to some degree, the majority of jurisdictions provide for the use of PIAs in government policy or directives, however in some jurisdictions the requirement for a PIA required is set out in their legislation.

What We Asked

All

Should PIAs be required in the NWT and if yes, would the use of government policies and/or directives be acceptable?

What We Heard

Public Bodies

- Majority support including PIA requirements in policy however there are concerns around the capacity to undertake PIAs, both in policy and legislation.

IPC

- Recommends that PIAs be required in the legislation and that PIAs be conducted anytime third party contractors have access to personal information collected by a public body.
- PIAs should be completed for any new technology purchase that includes personal information, in order to confirm privacy and security of information.

Public

- Public responses support including the requirement for PIAs in the Act.

Summary
There is general support for requiring PIAs, with the IPC and Public indicating it should be included in the legislation. But Public Bodies raise concerns regarding the capacity to accomplish this.

e. Information Incident Reporting

In the GNWT, breaches of personal information are often referred to as an information incidents or privacy breach. A privacy breach may involve the unauthorized collection, use, disclosure, access, disposal, or storage of personal information, whether accidental

or deliberate. Similar to PIA requirements, the majority of jurisdictions provide for it through policies or directives. In the GNWT this currently falls under a government directive.

What We Asked

All

Should privacy breach reporting continue to be addressed through government policies and/or directives or should it be defined in legislation?

What We Heard

Public Bodies

- The majority want information incident reporting addressed through policies.

IPC

- Recommends breach reporting be addressed in the legislation.

Public

- Support information incident reporting, with the majority saying that this should be addressed in the legislation.
- One response supported this being handled through policy, they explained.

> ***"this provides flexibility, and the capacity to define decision making and disclosure requirements that are appropriate for the relevant domain."***

Summary

All support incident reporting of privacy breaches however there are differences on whether this should be in policy or legislation.

f. Use of Personal Information

The Act allows public bodies to use the personal information they collect for the purpose for which it was originally collected or for a use consistent with that purpose; if the individual the information is about consents to its use for a secondary purpose; or for other purposes outlined in the disclosure sections of the Act.

Some jurisdictions permit their post-secondary colleges to use personal information from their alumni records for the purpose of fund raising activities specific to the education body.

What We Asked

Should the Act be changed to allow NWT post-secondary educational bodies to use the personal information from their alumni records for fundraising?

What We Heard

Public Bodies

- Majority support a provision that permits secondary education bodies to use personal information from their alumni records for fundraising.

IPC

- IPC does not support this provision and suggests post-secondary institutions obtain consent for this.

Summary

While Public Bodies support including this section the IPC does not.

g. Disclosures of Personal Information

The Act identifies 22 specific circumstances where public bodies have discretion to disclose personal information to other parties outside of the formal access to information request process. Public bodies must take into account both the individual harm that could result from the disclosure and the consequences for the public body in withholding the personal information. Examples include, but are not limited to considering if the:

- disclosure is in keeping with why the information was originally collected or compiled;
- individual the information is about consents to the disclosure ;
- information is disclosed for law enforcement purposes;
- information is about employees and will be used for the purposes of hiring, managing or administering personnel of a public body;
- information is for the Maintenance Enforcement Administrator and involve personal information about individuals in default of their spousal maintenance payments; and
- information is provided to a Member of the Legislative Assembly who has been requested by the individual the information is about to assist in resolving a problem.

A number of proposed new and expanded provisions were identified for stakeholders. These examples are intended to provide greater clarity relating to permitted disclosures and to identify new area where disclosure may be warranted. These examples include:

- officer or employee of a public body, if the disclosure is necessary for the delivery of a common or integrated program or service;
- representative of a bargaining agent, who has been authorized in writing by the employee the information is about, to make an inquiry;
- surviving spouse or relative of a deceased individual where, the disclosure is not an unreasonable invasion of the deceased's personal privacy;
- for the purpose of i)licensing or registration of motor vehicles or drives, or ii) verification of motor vehicle insurance, motor vehicle registration or drivers licenses.

- for the purposes of licensing, registration, insurance, investigation or discipline of persons regulated inside or outside of Canada by government bodies of professions and occupations; and of information;
    i. disclosed on a social media site by the individual the information is about;
    ii. was obtained by the public body for the purpose of engaging individuals in public discussion or promotion respecting proposed or existing initiatives, policies, or activities of the public body; and
    iii. is disclosed for a use that is consistent with the purposes described above in (ii).

What We Asked

All

Should the current provisions we identified be expanded for greater clarity or understanding? And is there a need for any of the new provisions that will permit public bodies to disclose personal information for the situations we noted?

What We Heard

Public Bodies

- General support for expanding some of the current provisions to provide for greater clarity/understanding however each provision must be carefully considered. Additionally we will need to clarify these provisions further through definitions (social media/relative/etc.).

IPC

- IPC supports some of the suggested provisions but has concerns with a number of the suggested revisions or additions.

Public

- Respondents expressed concern with some of the suggested expansions, particularly in regards to social media.

> *"It is difficult to imagine that an individual posting on a social media site would reasonably anticipate that government bodies would have a legitimate interest in their personal posts. It is therefore not reasonable to assume implied consent for additional uses of this information on social media that an informed individual cannot reasonably anticipate and will not be able to detect or influence."*

Summary
There is general support for reviewing current sections to provide for greater clarity but stakeholders have differing concerns about expanding the section to include other examples

h. Disclosure for Research Purposes

The Act deals with requests for access to personal information for research purposes. Public bodies have discretion to disclose identifiable personal information to accomplish general and statistical research if it is determined that:

- The research purpose cannot be accomplished unless the information is provided in identifiable form;
- Any record linkage resulting from disclosure is not harmful to the individuals the information is about and the benefits to be derived from the record linkage are clearly in the public interest;
- The head of the public body has approved conditions relating to the security and confidentiality of the information; and
- If the researcher signs an agreement to comply with the approved conditions.

The majority of jurisdictions include provisions for disclosures of personal information for research purposes and that includes conditions relating to the security and confidentiality of the information. However some jurisdictions also permit their government Archives to disclose personal information for archival or historical purposes, if the disclosure is for historical research and would not be considered an unreasonable invasion of a third party's privacy. If the requested research involves deceased individuals, the research may only be considered for individuals who have been deceased for 20 years or more or the information itself has existed for over fifty years.

What We Asked

Public Bodies and IPC

Should this section be expanded to include disclosures for historical research through the NWT Archives? If yes, should there be similar conditions relating to deceased individuals or the existence of information over 50 years old? Are there other research considerations that should be included?

What We Heard

Public Bodies

- There is support from Public Bodies to include disclosures of personal information for historical research through the Archives. There was further

support to include some type of conditions for information pertaining to deceased individuals.

IPC

- Does not support expanding this provision to include the NWT Archives, specifically.

Summary

There are conflicting opinions on this – both for and against the proposals.

5. THE INFORMATION AND PRIVACY COMMISSIONER

The Act establishes the position of the Information and Privacy Commissioner, who is an officer of the Legislature, independent of government. The IPC provides an independent review of the decisions made under the Act and may review the decisions of public bodies regarding access to records, or correction of personal information. The Commissioner may also review how public bodies collect, use or disclose personal information.

a. Appointment

The Commissioner in Council, on the recommendation of the Legislative Assembly, appoints the IPC to carry out the duties and functions set out in the Act. Currently, an IPC may serve for five years or until they are reappointed or a successor appointed. In the NWT, there is no limit on the number of terms that an IPC can serve.

What We Asked

All

Should the number of terms in office that one IPC can hold be restricted and if yes, what should be the length and number of terms the IPC is allowed to serve?

What We Heard

Public Bodies

- The majority of public bodies support limiting the term in office of the IPC.
- Most suggested 2 terms of around 5 years, although one respondent preferred 1 term of 7 years.

IPC

- IPC does not support limiting the term in office of this position.

Public

- Majority of responses support limiting the term.
- Most thought 2 terms of 5 years would be appropriate.

Summary

Public Bodies and the Public support limiting the terms in office of the IPC. The IPC does not support limiting the term of this office.

b. Recommendation Power

Under the Act the IPC has powers similar to an ombudsperson. The IPC has the authority to review decisions of the Government or other public bodies and may issues recommendations. The IPC's recommendations are not binding on the Government or a public body. If an applicant or third party does not agree with a decision of a public body, the applicant would need to appeal the decision on an access to information matter to the Supreme Court.

In Canada, IPCs either follow the ombudsperson model (make recommendations), or the IPC is granted order making power. IPCs who have order making powers, may issue decisions to public bodies that are legally binding.

What We Asked

All

Should the Act be revised to provide the NWT IPC with order making powers?

What We Heard

Public Bodies

- The majority do not support providing the IPC with order making powers or a hybrid model. This could be costly and time consuming.

IPC

- If order making power were to be considered, IPC suggests there may be some merit in applying it only to access to information matters (not privacy reviews).
- Suggests reviewing the Newfoundland "hybrid model" where the IPC still makes recommendations however if the public body disagrees they must apply to the court for a declaration that, by law, the public body is not required to comply with the recommendation.
- Another option would be to provide IPC with order making powers on administrative matters, such as fees and extensions or provide IPC with the ability to appeal matters to the court on behalf of applicants.

Public

- Raised concerns about the cost of taking something to court. There is general support for providing IPC with order making power.

Summary

Public Bodies do not support providing the IPC with order making power but there is general support from the Public to do this. The IPC provided a number of options regarding order making powers.

c. Powers of Information and Privacy Commissioner on Review Matters

In the NWT the IPC has specific powers in relation to a review. During the review process the IPC's investigative powers include the ability to obtain and review all records, issue production orders, and administer oaths. The IPC may also enforce attendance of witnesses or compel any person to give evidence. In relation to a privacy complaint the IPC has the authority to require public bodies to provide her any document or allow her to examine any document held by the public body, which pertains to the complaint.

However the IPC's review powers currently does not provide for mediation between public bodies and applicants. The IPC has also raised concerns that the current privacy complaint process allows her to undertake a review only when she has received a formal complaint on the matter.

What We Asked

All

Should the Act be changed to allow the IPC to attempt to mediate access to information requests or privacy complaints? And should the Act be changed to allow the IPC to initiate a privacy review even though a formal complaint has not been made?

What We Heard

Public Bodies

- The majority support giving the IPC the power to mediate access requests or privacy complaints, although there were some concerns about the impact on time frames.
- The majority do not support providing the IPC with the power to initiate a privacy review, without receipt of a formal complaint.

IPC

- Currently undertakes informal mediation however supports changing the Act to provide her office with the ability to conduct formal mediations. She notes this will require additional resources for her office.
- Recommends changing the Act to allow her office to initiate privacy reviews without a formal complaint. She believes applicants may not be bringing forward concerns due to fear of reprisal.

Public

- Majority support giving the IPC the ability to mediate access requests or privacy complaints.
- Majority support giving the IPC the ability to initiate a privacy review without a formal complaint.

Summary

There is general support amongst all respondents for providing the IPC with mediation powers. The IPC and the public would support giving the IPC the power to initiate a privacy review without a formal complaint, but public bodies do not support this.

d. General Powers

The act outlines the general powers of the IPC. Currently, the Act provides that the IPC may engage in or commission research into matters relating to the administration of the purposes of the Act. The IPC may also receive representations regarding the operations of this Act or examine and comment on legislation and program activities that may have implications for protection of privacy.

The following examples of other expanded "general powers" given for comment included;

- providing educational programs to inform the public about the Act and their rights;

- giving the authority to consult with any person with experience or expertise in any matter related to the purpose of this Act;
- providing comments on the privacy implications relating to the use of information technology in the collection, storage, use or transfer of personal information;
- taking action to identify and promote adjustments to practices and procedures that will improve public access to information and protection of personal information;
- bringing to the attention of the head of a public body a failure to fulfil the duty to assist applicants; and
- informing the public from time to time of apparent deficiencies in the system, including the office of the IPC.

What We Asked

Public Bodies and IPC

Should the IPC's general powers be expanded to include any of the additional powers noted and if yes, why?

What We Heard

Public Bodies

- The majority support outlining these general powers in the legislation.

IPC

- Indicates she already undertakes many of these activities however supports including these in the legislation.

Summary

Both the IPC and Public Bodies support including the additional general powers provided above in the Act.

6. GENERAL AND OTHER MATTERS

a. Exercise of Rights by Other Persons

The Act sets out the specific conditions where other persons may be authorized to act for an individual. The Act allows others to exercise a right or power if:

- an individual is deceased,
- a guardian or trustee has been appointed for the individual .
- someone is acting on behalf of a minor in their lawful custody,
- someone provides a written authorization .

It has been suggested that the Act include someone who is acting as an agent as designated under the *Personal Directives Act* or someone acting under the authority of a power of attorney.

What We Asked

All

Should the Act be changed to include the exercise of rights by other persons as set out in a personal directive or a power of attorney and are there other situations where someone else may need to act for an applicant that should be considered?

What We Heard

Public Bodies

- The majority support changing the Act to include these provision but some do not believe it is necessary.

IPC

- IPC supports including reference to both personal directives and powers of attorney, if it provides greater clarification, but has no further suggestions for expanding this section.

Public

- There is general support for these provisions.

Summary

There is general support for including these provisions in the Act.

b. Protection from Liability

This section in the Act gives public bodies and their employees involved in the administration of the Act, protection from liability for damages. In Newfoundland a similar protection is provided for their MLAs when they disclose personal information they obtained while acting on behalf of constituents they are assisting with a problem. (Section 48v)

What We Asked

Public Bodies and IPC

Should protection from liability be expanded to include protection for MLAs when acting in accordance with the section above?

What We Heard

Public Bodies

- Majority do not believe MLAs require additional protection from liability.

IPC

- Recommends MLAs become subject to the Act and therefore liable for disclosing personal information except in accordance with the Act.

Summary

Public Bodies do not support this provision while the IPC indicates MLAs should become subject to the legislation and therefore liable.

c. <u>Offences and Penalties</u>

The Act requires public bodies and other persons to cooperate both with the IPC and with any other person in the conduct of their duties under this Act. Under this section a misuse of personal information is considered an offence.

Any failure to comply with the legislation that is not an offence under this section is dealt with by the IPC under the normal review process set out in the Act. Any person who commits an offence under the Act is liable, upon conviction, to a fine of up to $5,000. However we noted other jurisdictions have expanded the list of other offences and increased the fines.

What We Asked

All

Should the Act be revised to include the identified activities and are there other offences or penalties that should be considered? Should the current fine be increased?

What We Heard

Public Bodies

- Majority support expanding the listing of offences but noted there must be clarification that someone "knowingly" committed the offence.
- Responses differed on increases with the majority indicating they were not sure it was necessary.

IPC

- Supports expanding the list of offences and further suggests changing the Act to include "duty to document" sections and include penalties for those who fail to properly document significant decisions in their work as government employees
- Supports increasing the fines from $5,000 to $10000 to act as a deterrent.

Public

- There is general support for increases in fines and expanding offences.

Summary

There is support for expanding the list of offences. While the Public and IPC support increasing the fines, public bodies generally feel that it is not necessary.

d. Delegation

The head of a public body has the power to delegate any of the head's duties, powers and functions under the legislation. This does not include the power to delegate. Typically, delegation is to the Deputy Minister, Chief Executive Officer, or program head and is also provided to the public body's Access and Privacy Coordinator. The delegation must be made in writing and include with any conditions or restrictions. While the Act defines both who the head of a public body is as well as the Minister who is responsible for the administration of the Act, it is silent on the position of the Access and Privacy Coordinator.

What We Asked

Public Bodies and IPC

Should the ATIPP Act be revised to identify the position and responsibilities of a public body's Access and Privacy Coordinator?

What We Heard

Public Bodies

- The majority support identifying the position but appointing the position remains at the discretion of the head of the public body.

IPC

- Supports identifying the role of the coordinator as well as indicating they have must have a specialized knowledge in the field of access and privacy.

Summary

There is support for identifying the position of Access and Privacy Coordinator in the legislation.

e. Directory of Public Bodies

The Act requires the Minister of Justice to publish a directory to assist applicants in making access to information requests, requests for corrections, or requesting a privacy review to the IPC. The directory is a reference tool to assist the public in understanding the structure of government and who to contact in a public body if they have a request. It provides an official listing of the office(s) within each public body where an applicant may direct a formal request under the Act.
The Directory is posted on the Department of Justice, GNWT Access and Privacy webpages:
https://www.justice.gov.nt.ca/en/access-to-information-held-by-public-bodies/page/4/

While the Directory provides information regarding the Act and Regulations it does not provide a general listing of records held by public bodies, a practise undertaken by a number of jurisdictions.

What We Asked

Public Bodies and IPC

Should the Act be changed to require including a general listing of records held by each public body in the Access and Privacy Directory? Should Public Bodies be required to publish personal information banks relating to the personal information they hold?

What We Heard

Public Bodies

- While there is general support for listings of records in the Directory, there are concerns regarding the workload associated with this and how this would be done.
- Respondents said they don't believe this would be entirely helpful and again difficult to implement.

IPC

- Is not sure a listing of records would be entirely helpful.
- Again indicates she is unclear that personal information banks would be entirely helpful.

Summary

Support for this is limited and both public bodies and the IPC are not sure this would be helpful.

f. Records made available without request

The Act allows public bodies to specify categories of records they have in their control that will be made available to the public without a request for access under the Act. This does not apply to records that contain personal information. This permits public bodies to specify categories of record that are available without an access to information request, however it does not require this to be done.

What We Asked

All

Should the ATIPP Act be changed to require public bodies to establish categories of information that the public can access without a formal request?

What We Heard

Public Bodies

- There is some support for this but also concern about the capacity to undertake this work.

IPC

- Supports this suggestion and believes it is a positive step in proactive disclosures.

Public

- All support this suggestion.

Summary

The IPC and Public support changing this section but Public Bodies have concerns.

g. Review of the Act

Currently there are no provisions within the ATIPP Act that provide a requirement to undertake a comprehensive review of the Act, on a regular basis. The majority of jurisdictions require a review be undertaken, generally every 5- 7 years.

What We Asked

All

Should the Act be changed to require a regularly scheduled review of the Act and if yes, how often?

What We Heard

Public Bodies

- All support including a specific review period, between 3/5-10 years.

IPC

- Strongly recommends that a review happens every 5 years.

Public

- All support including a specific review period, with the majority indicating every 5 years.

Summary

All support including a regularly scheduled review of the Act, in the legislation. Time frames vary from 3 to 10 years.

7. OTHER COMMENTS OR CONSIDERATIONS PROVIDED BY STAKEHOLDERS

As part of our engagement with stakeholders, Public Bodies, the Information and Privacy Commissioner and the public were encouraged to provide any other comments or suggestions that they may have for amendments to the Act that were not identified in the engagement document.

The following are comments received that address other issues not specifically included in the consultation papers.

a. Powers of the Information and Privacy Commissioner

IPC

- **Enforcement of Accepted Recommendations**
  - Once the public body has accepted recommendations made by the IPC, there is nothing in the Act which provides for or allows any follow up or enforcement. Normally there is no follow up and no obligation on the part of public bodies to report when they have completed the steps recommended or how they have done so.
  - Change Section 34(1) to clearly indicate that any records which includes a claim of solicitor/client privilege, must be provided to the IPC to substantiate that claim.
- **Power to subpoena records** Amend the Act to allow the IPC to subpoena records from a third party not subject to the Act.

b. Disclosures of Personal Information

Public Bodies

- Include a provision that would allow schools to disclose the names of graduates or students receiving an honour or award (similar to the Alberta Act) and attendance or participation in a public event.
- Include a provision in the Act that to allow the disclosure of information about the status of a license or permit (e.g. daycare license).

c. Municipalities and other organizations should be added as "public bodies"

IPC

- Municipalities must be either added as "public bodies" under the Act or separate legislation should be passed to deal with municipalities.
- NWT municipalities must become subject to rules and procedures with respect to both access to information and protection of privacy.
- Housing Authorities established under the Housing Corporation Act receive much of their funding from government and are required to follow government policy objectives. It is time that they became subject to the access and privacy provisions of the Act.

Public

- It was pointed out that the IPC has argued that the territory's communities should be brought under the Act or under their own similar legislation.

  "In her 2012-2013 report, the commissioner notes the potential monetary cost associated with such a change, but also notes that it is "...a necessary cost of transparency, accountability and, ultimately, democracy." Taking this step would potentially close a significant gap in the legislation and help citizens better understand their local government."

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- The NWTAC advised that their resolution RA-16-15-06: "ATIPP Legislation for Communities." identifies issues of capacity, existing legislation, accountability requirements, and funding at the community level.

e. <u>Private Sector – Privacy Legislation</u>

Public

- The NWT Access to Information and Protection of Privacy Act does not apply to the private sector. Privacy protection in the private sector falls under the federal *Personal Information Protection and Electronic Documents Act*. The exclusion of information which could affect public and environmental health and safety is of concern. Various territorial statutes govern matters such as public health and workplace safety, and environmental protection. The right to disclosure of information should apply in these instances. Because a number of these instances fall within the realm of federal legislation excluded from the jurisdiction of this Act, an administrative recommendation should be made indicating this deficiency and the possibility of political resolution of the jurisdictional issue.

f. <u>General ATIPP Administration</u>

Public

- Consideration should be given to the accountability of the ATIPP process and ATIPP Coordinators. Some jurisdictions have considered centralizing processing to remove potential Department-level bias; others have considered making ATIPP coordinators appointed and accountable directly to their Minister. Ensuring a more transparent approach to responding to ATIPP requests.

- Review resourcing of ATIPP functions across government. The review mentions that ATIPP coordinators are often part time, or on a job shared basis with other duties when referencing improved timelines/responsiveness. Access to information is a fundamental right of citizens and should be funded as such. It is understandable that a large request may face days or multiple requests at the same time, but on a regular basis resources should not be a barrier for access to information.

If you have any questions about the report or the comprehensive review, please contact, GNWT Access and Privacy Office, Department of Justice.

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