2016-2017 ANNUAL REPORT

August 9, 2017

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

P.O. Box 382
Yellowknife, NT
X1A 2N3

August 9, 2017

Legislative Assembly of Nunavut
P.O. Bag 1200
Iqaluit, NU
X0A 0H0

Attention: George Qulaut
Speaker of the Legislative Assembly

Dear Sir:

I have the honour to submit to the Legislative Assembly my Annual Report as the Information and Privacy Commissioner of Nunavut for the period April 1, 2016 to March 31st, 2017.

Yours truly,

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner
/kb

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COMMISSIONER'S MESSAGE

January 1st, 2017 marked the 20th anniversary of the coming into force of the *Access to Information and Protection of Privacy Act*. 2017 also marks my 20th anniversary as the Information and Privacy Commissioner of the Northwest Territories (as it then was) and of Nunavut. The world is a very different place today than it was in 1997. As noted by my Nova Scotia counterpart, Catherine Tully, in her most recent Annual Report:

> Twenty-four years ago, the world was a different place. In 1993 there were only 130 websites. Today there are one billion. Google wasn't founded until 1998 and Facebook wasn't created until 2004. Big data was the realm of scientists and dreamers.

For those just entering the workplace, most have never seen a typewriter and having to go to the post office to mail a letter is considered a thing of the past. Our forefathers did business with the shake of the hand. My generation did business with a signature. This generation does business digitally. Today, children are no longer even being taught cursive writing in school. By the time children start school today, they are already well acquainted with a keyboard and demand the instant gratification afforded by "on-line" connectivity. Even in Nunavut, where band width is limited and sometimes slower than in the rest of the country, we all rely heavily on technology to get things done and to communicate with each other and the world. These last twenty years have seen exponential changes not only in technology and how we use it, but in people's attitudes and interaction with information. In early years of the Act's existence, access to information issues made up the bulk of the portfolio of the Information and Privacy Commissioner's Office. As the value of information increased and technology advanced, the protection of privacy began to take on more prominence and it became the focus of the work done by Information and Privacy Commissioner's across the country. Access issues, in a way, became almost routine and secondary. In recent years, however, the pendulum is swinging back and access to Information issues are once again in the forefront. This seems to be the general trend throughout the country. While the public continues to be very concerned about the ability of governments to protect personal information collected in the course of government business, changing political realities, the growing value of information as an

> *Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.*
> Professor Donald C. Rowat , How Much Administrative Secrecy? (1965), 31 Can. J. of Econ. and Pol. Sci. 479, at p. 480.

asset and the growing demand of the general public that governments be transparent and accountable have all brought increasing focus back to the right of access to government information. One thing is for certain. Strong access and privacy legislation is increasingly vital to the maintenance of our democratic ideals as the world changes in ways no one would have imagined in 1997.

> *While process management is important, senior leadership must lay the groundwork for a culture that trusts and respects access to information as a cornerstone to good governance."*
>
> *Excerpt from comments by Jill Clayton, Information and Privacy Commissioner of Alberta on May 23, 2017*

This year my office, with the assistance of the former Information and Privacy Commissioner of Saskatchewan, Gary Dickson, completed the first ever privacy audit conducted under the Act. This audit was undertaken in response to the suggestion of the Standing Committee on Public Accounts, Independent Officers and Other Entities that my office undertake a formal privacy audit of a Government of Nunavut department, crown agency or territorial corporation in its Report on the Review of the Information and Privacy Commissioner's 2014/2015 Annual Report. I chose the Qikiqtani General Hospital for this audit, an organization which collects, uses and discloses massive amounts of personal information and personal health information, most of it extremely sensitive. The Qikiqtani General Hospital is the largest health facility in Nunavut, responsible for the health care of people throughout the Territory. It is also where the Meditech system – the electronic medical record system that the Department of Health has chosen to manage electronic health records throughout Nunavut - was first rolled out. This was, therefore, a logical place to do my first audit.

The report was submitted to the Committee in October, 2016 and tabled in the Legislative Assembly on November 8th, 2017. In early May of 2017 I appeared before the Committee, along with representatives from the Department of Health and spent a full day discussing the findings (discussed in more detail below). I believe that the exercise was well worth the considerable time, effort and resources that went into it and am hopeful that my report will serve to provide direction and guidance to the Department in its efforts to protect the privacy of Nunavummiut.

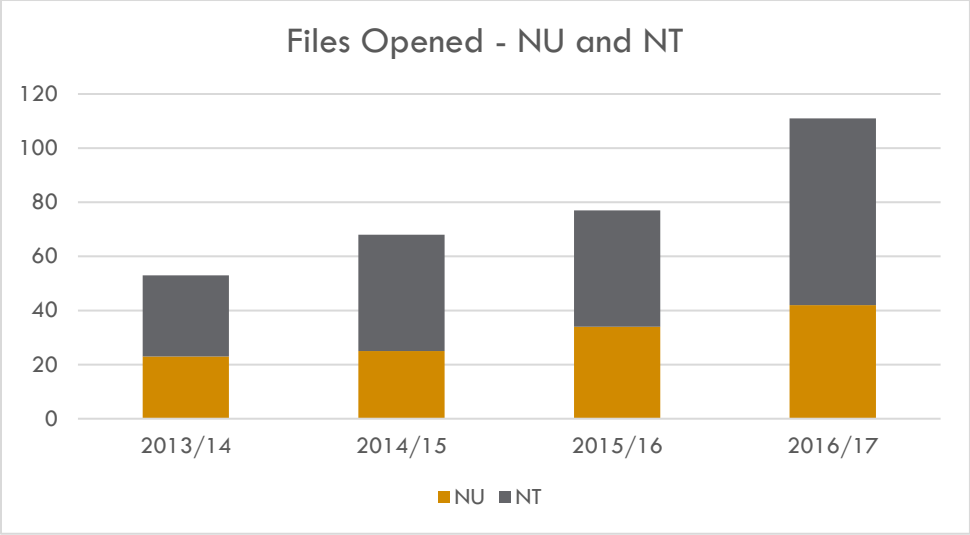
I also spent considerable time and effort in 2016-2017 on undertaking a comprehensive review of the *Access to Information and Protection of Privacy Act* again at the suggestion of the Standing Committee on Public Accounts, Independent Officers and Other Entities. I have been urging a review of the Act for some years and agreed that such a report might kick-start the process. This was, however, another extremely time-consuming exercise and was not completed, as hoped, within the fiscal year. The report has, however, since been completed and submitted to the Standing Committee for its consideration. I look forward to discussions with the GN as it moves toward the necessary amendments.

I took advantage, this year, of the rare opportunity to attend an international conference entitled "Transparency for the 21st Century" hosted by the Information Commissioner of Canada in Ottawa in March. This conference covered topics such as International Perspectives on the Right to Know, the Role of the Fourth Estate and Transparency and Indigenous Rights. I also continued my participation in Canada Health Infoway's Pan Canadian Forum which has been ongoing for a number of years and which focuses on how Canadian provinces and Territories can work toward a pan-Canadian medical record system while at the same time respecting the privacy of patients. Finally, at the invitation of the Privacy Commissioner of Canada, I also

participated in a meeting organized by his office to discuss the concept of "consent" and privacy in today's connected world. All of these conferences and meetings were informative and interesting. The most important meeting of any year, for me, however, is the annual meeting of my federal, provincial and territorial counterparts which this year was held in Ontario. Our discussions ranged from a cross-country review of developments in access and privacy, discussions on the challenges raised by changes in government, public interest disclosures, open government and big data and surveillance. I am thrilled to be able to host my counterparts from across the country for our annual meeting in Iqaluit in October, 2017. Plans are well underway for this meeting and I look forward to showcasing Nunavut.

I was also pleased this year to sign my name to a joint submission to the public consultation on the modernization of Canada's national security framework. The preparation of this submission was spearheaded by the Office of the federal Privacy Commissioner and the document was signed by all of my provincial and territorial counterparts. The submission addressed a number of privacy issues, including domestic and international information sharing, the collection and retention of communications metadata, proposals to make it easier for law enforcement to access customers' subscriber information and encrypted communications, and the need for greater transparency and oversight of agencies involved in national security.

This year saw a 25% increase in the number of files opened by the Office of the Information and Privacy Commissioner. The number of files opened in Nunavut has, in fact, nearly doubled over the last four years. This is in addition to an increase of 130% over those same four years in the Northwest Territories. This trend is holding and even accelerating in the first quarter of 2017-2018. While I work diligently to stay on top of this rapidly increasingly workload, it is a losing cause. As a result, I have been unable to complete reviews within the mandated 6 months and the backlog is increasing month by month. It is very much time to add an Assistant Commissioner/Investigator to the budget so that my office can continue to meet its legislated mandate.



In closing, I would like to acknowledge and thank my assistant, Lisa Phypers, for her continued support and assistance. Her dedication, hard work and cheery disposition make my job so much easier.

ACCESS TO INFORMATION AND PROTECTION OF PRIVACY – A BRIEF OVERVIEW

The *Access to Information and Protection of Privacy Act* enshrines two principles:

1. public records must be accessible to the public; and
2. personal information must be protected by public bodies.

It outlines the rules by which the public can obtain access to public records and establishes rules about the collection, use and disclosure of personal information collected and maintained by Nunavut public bodies. It applies to 43 departments, crown corporations, local housing organizations and other agencies in Nunavut.

Access to Information

Part I of the legislation provides the public with the right to request and receive public records and a process for obtaining such records. This right of access is so important to the maintenance of open and accountable government that access to information laws have been deemed to be quasi-constitutional in nature. When the public can see how government is functioning and how they are doing their work, they are better able to participate in government and to hold government and governmental agencies to account. The right of access to government records is not, however, absolute. There must be some exceptions and these limited and specific exceptions are set out in the legislation. Most of the exceptions function to protect individual privacy rights and proprietary business information of the companies which do business with the Government of Nunavut. The exceptions also function so as to allow Ministers and their staff to have free and open discussions as they develop policies and deal with issues.

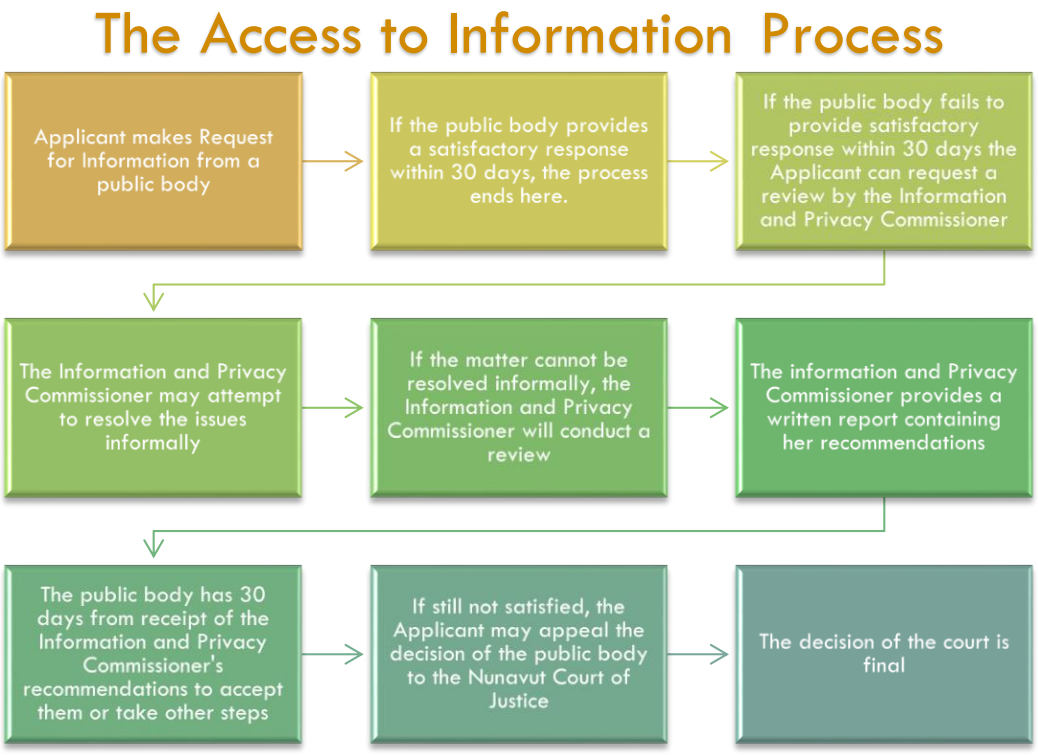
Requests for Information must be in writing and delivered to the public body from which the information is sought. When a Request for Information is received, the public body must first identify all of the records which respond to the request, then assess each record and determine what portion of that record should be disclosed and what might be subject to either a discretionary or a mandatory exception. This is a balancing act which is sometimes difficult to achieve. The response must be provided to the Applicant within 30 days. When an Applicant is not satisfied with the response provided by the public body, he/she can apply to the Information and Privacy Commissioner to review the response given. The full process is outlined in the chart on page 10.

Protection of Privacy

Part II of the Act provides rules for when and how public bodies can collect personal information, what they can use such information for once it has been collected and in what circumstances that information can be disclosed to another public body or the general public. It requires that all government agencies maintain adequate security for the personal information they hold and that that personal information be made available only to those who need it to do their jobs.

This part of the Act also gives individuals the right to ask for personal information held by a public body to be corrected.

In addition, if a public body knows or has reason to believe that there has been a material breach of privacy with respect to personal information under its control, the public body must report that breach of privacy to the individual whose information has been wrongfully disclosed and to the Information and Privacy Commissioner.



The Role of the Information and Privacy Commissioner

The Office of the Information and Privacy Commissioner (OIPC) was established under the *Access to Information and Protection of Privacy Act* of the Northwest Territories in 1997, prior to division. This legislation was continued in Nunavut on Division Day in 1999. The Information and Privacy Commissioner (IPC) is appointed by the Commissioner of Nunavut on the recommendation of the Legislative Assembly and holds that appointment for a five-year renewable term. This role is currently held by Elaine Keenan Bengts, whose term expires in October, 2020.

The role of the Information and Privacy Commissioner (IPC) is to provide independent oversight over public bodies as they apply the *Access to Information and Protection of Privacy Act*. The independence of the role is vital to the work of the IPC as it allows her to openly criticize government, when necessary, without fear of being removed from office.

When someone has asked for information from a public body and is not satisfied with the response received, they may request a review by the Information and Privacy Commissioner. The IPC is able to review all responsive records and, based on the input of both the Applicant and the public body, will prepare a report and make recommendations. The Information and Privacy Commissioner does not have any power to compel public bodies to either disclose or protect information from disclosure but she is required to provide the Minister of a department or the CEO of a public corporation with recommendations. The Minister or CEO must decide to either accept the recommendations made or to take such other steps as they deem appropriate, within 30 days. The Applicant has the right to appeal the Minister's or CEO's decision to the Nunavut Court of Justice if there continues to be a dispute as to the proper application of the Act to the records in question.

The Information and Privacy Commissioner is also authorized to investigate privacy complaints, including complaints about the failure or refusal of a public body to make a correction to an individual's personal information. Any person may file a complaint about a privacy issue with the Information and Privacy Commissioner. The IPC will investigate and prepare a report and make recommendations for the Minister or CEO.

The Information and Privacy Commissioner is authorized to initiate an investigation of a privacy issue of her own accord when information comes to her attention which suggests that a breach of privacy may have occurred.

As in the case of an Access to Information review, the Minister or CEO of the public agency involved must respond to the recommendations made by the Information and Privacy Commissioner in privacy breach matters. In these cases, however, the Minister or CEO has 90 days to respond, and there is no right of appeal from the decision made.

THE YEAR IN REVIEW

General

The Office of the Information and Privacy Commissioner opened a total of 42 files in 2016/2017, a 25% increase from 2015/2016. This is in addition to 69 new files in the Northwest Territories, which represents a 40% increase in files for that jurisdiction as well. In the first month and a half of the 2017/2018 fiscal year, 15 new files have been opened in Nunavut and 24 in the Northwest Territories. It is important to consider the Northwest Territories numbers along with the Nunavut numbers because the two jurisdictions share the services and the costs of the office. Needless to say, the resources of this one-person office are being stretched beyond capacity. As a result, applicants and complainants are being subjected to significant delays in dealing with their matters and an increasing number of files are not being completed within the mandated 180 days provided for in section 31(3). This increase in numbers is not unexpected or unusual. Some of the increase in numbers can be attributed to a number of individuals making multiple requests for information. This is, however, not the only reason for the spike. The north is following the trend of all Canadian jurisdictions, as access and privacy issues become ever more important and populous participation in government is expanding.

The files opened by the OIPC in 2016/2017 can be divided into a number of categories:

Access to Information Matters

General Requests for Review	17
Deemed Refusal Complaints	1
Fees	1
Request to Disregard Request for Information	1

Breach of Privacy	
General Privacy Breach Complaints	1
Public Body Breach Notifications	9
Other Breach Notifications	2
Correction to Personal Information	1
Comments/Consultations	5
Miscellaneous inquiries/requests	3
Administrative	1

It is to be noted that eight of the nine breach notifications from public bodies came from the Department of Health or involved the inadvertent disclosure of personal health information. It may be that this Department is simply more adept at recognizing and dealing with breaches, which is a good thing. The numbers also suggest, however, that other public bodies are not recognizing breaches or are not reporting them in accordance with section 49.9. That section requires public bodies to report all material breaches of privacy to the Office of the Information and Privacy Commissioner. More education may need to be done to ensure that all employees understand the obligation to report breaches to the Information and Privacy Commissioner.

It is important that public bodies are vigilant in recognizing and reporting breaches not only so as to raise awareness and avoid risk of damage to individuals, but also to focus on correction. The more breaches we deal with the more chance there is to learn and improve policies, procedures and awareness so as to avoid future breaches.

Eighteen Review Recommendations were issued, up from seven in 2015/2016.

On the access to information side of matters, the Department of Culture and Heritage was involved in seven of the Requests for Review. All of these files involve a single applicant. Finance, in its role as the human resources manager for the Government of Nunavut, was involved in five access to information reviews. This is not terribly surprising in light of the fact that employees and former employees of the GN are among the most frequent requesters – looking for information to find out more about a workplace harassment matter or why they were unsuccessful in a job application or why they were overlooked for promotion. Community and Government Services and Health were each named in two requests for review with Justice and the Nunavut Housing Corporation each involved in one.

REVIEW RECOMMENDATIONS MADE

REVIEW RECOMMENDATION 16-098

Category of Review: **Access to Information**
Public Body Involved: **Department of Economic Development and Transportation**
Sections of the Act Applied: **Section 23**
Outcome: **Recommendations Accepted**

The Applicant was involved in a workplace dispute. He sought copies of any correspondence about the matter which was to or from a particular email. Two responsive records were found but both were withheld in full pursuant to section 23 of the Act. The public body felt that the disclosure of the records would constitute an unreasonable invasion of the privacy of third parties. They took the position that the records included employment, occupational or educational history about third parties. They also argued that the records related to a complaint of workplace harassment and could be viewed as very personal and sensitive history of both the alleged victim and the alleged perpetrator, neither of whom was the Applicant. They suggested the information was supplied in confidence and that disclosure might unfairly damage the reputation of third parties referred to in the documents.

The IPC's review determined that some information from the emails could be disclosed without resulting in an unreasonable invasion of the privacy of third parties if properly redacted and recommended the disclosure of parts of the two records.

REVIEW RECOMMENDATION 16-099

Category of Review: **Access to Information**
Public Body Involved: **Department of Finance**
Sections of the Act Applied: **Section 23(2)(h), Section 13(1)(d)**
Outcome: **Recommendations Accepted**

A request was made for records in relation to a workplace issue involving the Applicant. The pubic body identified 164 pages of responsive records and disclosed them to the Applicant with the exception of 18 pages which were withheld in full pursuant to section 23(2)(h) of the Act in order to protect the privacy of third parties. The IPC reviewed all of the records and recommended that parts of most of the withheld records be disclosed with appropriate redactions to remove the names and other identifying information about third parties. She further found that the one instance in which the public body claimed an exemption under section 23 (unreasonable invasion of the privacy of a third party) was appropriate.

With respect to the exemption claimed pursuant to section 13(1)(d) which prohibits the disclosure of information that would reveal a confidence of the Executive Council, she found that while the correspondence in question was between members of the Executive Council, there was no substantive information in the communication that would reveal the nature of any discussion in cabinet and recommended that the information be disclosed.

REVIEW RECOMMENDATION 16-100

Category of Review: **Access to Information**
Public Body Involved: **Department of Finance**
Sections of the Act Applied: **Section 23, Section 11**
Outcome: **Recommendation Accepted**

The Applicant sought access to records created by his supervisor in which he was referred to, as well as copies of any complaints made about him by several named co-workers. The Applicant was unhappy with the response received because he felt that there were missing records and the records provided had been "edited". He noted, as well, that there were no voicemail recordings and large gaps in time in which no records were disclosed. He objected to the redaction of names and other personal information of third parties on the basis that in most cases, the information redacted was in email correspondence in which he was either the sender or a recipient and therefore providing him with the records would not constitute a "disclosure" under the Act.

The IPC agreed with the Applicant that, in light of the work relationship between the Applicant and his supervisor, there should have been many more pieces of email correspondence from the supervisor in which he was mentioned (if only as a sender or recipient of email exchanges). The IPC recommended that the public body conduct additional searches. The IPC further commented on the inability of the GN to ensure that communication outside of the GN system (i.e. text messages, BBM messages etc.) were properly recorded and retained. Finally, the IPC found that the third party information in the records was properly redacted because once the information left the confines of the workplace, there were no longer any restrictions on how the information could be further used or disclosed. Any disclosure of personal information outside of the work environment, therefore, must be treated in accordance with section 23, whether or not the Applicant himself can identify the names redacted.

REVIEW RECOMMENDATION 16-101

Category of Review: **Access to Information**
Public Body Involved: **Department of Finance**
Sections of the Act Applied: **Section 23**
Outcome: **No Recommendations Made**

The Applicant sought copies of all records in which he was mentioned in any way from by three named GN employees. The Department identified and disclosed 202 pages of responsive records. Three pages were edited to some extent so as to redact third party personal information the disclosure of which, the Department determined, would have constituted an unreasonable invasion of the privacy of those individuals. The Applicant felt that there should have been additional records, including records predating the date on the earliest record produced. There were significant gaps during which there were no responsive records and there were no records of voicemail, text messages, blackberry messages or phone calls. He also objected to the redactions made on three of those records produced.

The IPC could find no evidence that there were records responsive to the Applicant's request predating the earliest dated record produced. An incident which occurred on a specific date resulted in significant email traffic between the parties named in the Applicant's request, but there was nothing to suggest that there was any need for these parties to discuss the Applicant prior to that date. She found that the redacted information had been properly edited from the records disclosed so as to protect the personal information of third parties whose privacy would have been breached had this not been done. The IPC did comment on the inability of the GN to retain text messages and BBM messages, as well as voicemail and suggested that this needs to be addressed.

REVIEW RECOMMENDATION 16-102

Category of Review:	**Access to Information**
Public Body Involved:	**Department of the Environment**
Sections of the Act Applied:	**Section 23**
Outcome:	**Recommendation with respect to Exceptions Accepted** **Recommendations with respect to Process Taken Under Advisement**

The Applicant requested information about concerns that had been raised about harassment in the workplace. He was not satisfied that the response was complete so he made a second, slightly different, request. He was able to demonstrate that records were still missing after the second request (he had also made similar requests of other departments who had disclosed records that should have been included with the response from the Department of the Environment).

In order to search for responsive records, public bodies rely on each individual employee to search his or her own email and digital records. One of those individuals indicated that he had deleted some email records in which he had been accused of inappropriate behaviour in the workplace. During the course of the investigation, the IPC suggested that this would be an appropriate case to do a deeper search with the assistance of technical specialists. That was done and the deleted emails were recovered - 13 pages in total. The IPC addressed a number of issues in this review, including the potential conflict of interest when employees are requested to search their own records. She noted that if the emails had been deleted during the course of searching for responsive records, she would have considered this a very serious offence. Some disciplinary steps were taken as a result of the deletion of these records but no details were provided. The IPC made recommendations with respect to the process of searching for responsive records.

> *When an employee is asked to search his/her electronic records to identify and provide copies of records in which he or she may not be reflected in the best light, there is an inherent conflict of interest and a very human urge to expunge or attempt to hide embarrassing records.*
>
> *Review Recommendation 16-102*

REVIEW RECOMMENDATION 16-103

Category of Review:	**Access to Information**
Public Body Involved:	**Department of Justice - Coroner's Office**
Sections of the Act Applied:	**Section 14(1)(a), Section 15(a), Section 15(c), Section 16(1)(a), Section 16(1)(c), Section 23(1) and Section 23(2)(d), Section 49.10**
Outcome:	**Recommendations with Respect to Breach Notification Not Accepted** **Recommendation with Respect to Disclosure of Names of Government Employees (From Other Jurisdictions) Not Accepted** **Recommendation with Respect to RCMP Consultation Not Accepted** **Recommendation with Respect to Exercise of Discretion Accepted** **Recommendation with Respect to Briefing Notes Accepted** **Recommendations with Respect to Correspondence with Coroners in Other Jurisdictions Not Accepted** **Recommendations with Respect to Solicitor/Client Privilege Accepted**

An Applicant made a request for records about the way in which the Coroner's Office had handled a particular inquiry. The Department identified a total of 671 pages of responsive records which were disclosed to the Applicant with significant redactions. The Applicant felt that the public body had been overly cautious

in refusing to disclose some portions of the responsive records and that the exceptions relied on by the public body were not properly applied.

The IPC did a page by page, line by line review of the responsive records and made specific recommendations. In some instances, she noted that information that should have been edited to protect the personal information of third parties was not properly redacted, resulting in a breach of the privacy of those third parties. In these instances, she recommended that the breaches be reported in accordance with section 49.10 of the Act

REVIEW RECOMMENDATION 16-104

Category of Review:	**Access to Information - Extension of Time and Deemed Refusal**
Public Body Involved:	**Department of Community and Government Services**
Sections of the Act Applied:	**Section 16(1)(a)(iii), Section 24(1)(b)(ii), Section 25(1), Section 7**
Outcome:	**Recommendation to disclose as records become available accepted** **Recommendation to disclose records pro-actively not accepted**

The Applicant sought copies of financial reports and financial statements for a particular community for each of four fiscal years. In a second and separate request, he asked for the same information for all Nunavut communities for the last fiscal year. With respect to the first request, the Department advised the Applicant that they would be taking an extension of time to respond to the request to consult with the community. With respect to the second request, the Department essentially told the Applicant that there were no responsive records because some of the communities had not yet submitted their financial reports for the year. In its submissions to the OIPC during the review of the matter, the public body further argued that because the financial statements requested are available for public viewing at the community offices throughout the territory, Section 25, which gives public bodies the discretion to refuse to disclose a record where that record

is otherwise available to the public, refusal to disclose altogether was justified, though they chose not to follow that path. They cited, as well, Section 24 which protects valuable third party business information from disclosure. Finally, they argued that the intergovernmental relationship between the GN and the communities might be harmed by disclosure, and that Section 16(1) applied so as to provide an exception to disclosure.

The IPC found that there was no justification for the extension of time in the first case because, by law, all Nunavut communities are required to submit audited financial statements to the Department annually and that they are , by law, public records. There was, therefore, nothing for the Department to consult about. Furthermore, Section 24, which protects financial and other commercially valuable information of third parties does not apply here for the same reason - the records requested were, by law, public records. Further, the circumstances were such that there is no chance that relations between the two governments might be impaired. Finally, she found that the Department's handling of these two requests constituted a breach of section 7 of the Act which requires public bodies to assist Applicants.

She recommended that the public body disclose those responsive records it had possession of and that for those communities which had not yet submitted their 2015-2016 reports, that these be provided to the Applicant as they became available. Further, she recommended these types of records be disclosed pro-actively by posting them in an appropriate place on the public body's web site.

REVIEW RECOMMENDATION 16-105

Category of Review:	**Request for Correction to Personal Information**
Public Body Involved:	**Department of Economic Development and Transportation**
Sections of the Act Applied:	**Section 45(1), Section 45(2), Section 45(3), Section 46(2)**
Outcome:	**No Recommendations Made**

The Applicant disagreed with his employer about the amount of overtime pay he was entitled to. This disagreement eventually led to warnings being placed on the Applicant's personnel file and then to disciplinary proceedings and a letter of reprimand. The Applicant sought a correction of his time records and the removal of the letter of reprimand and other disciplinary information from his personnel file. The public body refused to make the requested corrections on the basis that the documents in question were all factually accurate. They had, however, placed a note on his file that he had requested the corrections and the specific corrections he had requested.

The IPC found that while the Act clearly allows for an individual to request a correction to information held by public bodies, these provisions are not intended as a mechanism to resolve issues of interpretation. This was not about the number of hours the Applicant had worked, but about how his pay and/or lieu time was calculated in accordance with government policies. There were no "facts" in dispute which were subject to correction. No recommendations were made.

REVIEW RECOMMENDATION 16-106

Category of Review: **Breach Notification**
Public Body Involved: **Department of Health**
Sections of the Act Applied: **Section 49.9, Section 49.10**
Outcome: **Recommendations Accepted**

The Department of Health notified the IPC that they had been alerted to the existence of a blog authored by a casual employee of a health centre in a small community. The employee had disclosed personal information and personal health information of employees and patients of the health centre. While names were not revealed in the blog, it contained sufficient information to identify specific members of the community. Immediately upon becoming aware of the blog, the Department ordered the employee to remove it and the employee was terminated. Steps were taken by the Department to improve the privacy training provided to short-term employees and to provide privacy breach identification and prevention training throughout Nunavut. The Department acknowledged that given the sensitivity of the information and the number of affected individuals, the breach was "material" as defined in section 49.9(1) of the *Access to Information and Protection of Privacy Act*. They were, however, reluctant to give notice of the breach to those affected as required by section 49.10 because of concern that the notification itself would result in significant emotional harm to some clients who were already emotionally fragile. They were further concerned that disclosing the breach to those affected would significantly and negatively affect the credibility and trust in health workers in the community and may deter the individual clients from seeking and receiving treatment at the health centre.

While the IPC understood the concerns expressed by the Department, she noted that section 49.10 was mandatory and required that the affected individuals be advised of the breach. She recommended that those individuals whose identity could be easily ascertained from the content of the blog be informed. She suggested that this be done face to face with each individual so that the Department could immediately address any concerns/questions those individuals had. She also recommended that the employee who breached patient confidentiality be reported to his professional body for discipline.

REVIEW RECOMMENDATION 16-107

Category of Review: **Access to Information**
Public Body Involved: **Department of Economic Development and Transportation**
Sections of the Act Applied: **Section 13(1)(a) and (b), Section 14(1)(b)(i), Section 15(c), Section 23(1)**
Outcome: **Recommendation with Respect to Section 13 Not Accepted**
Some Recommendations with Respect to Section 23 Not Accepted
Remaining Recommendations Accepted

The Applicant sought records in connection with a proposed direct appointment to a particular position within the GN. The pubic body identified 163 pages of responsive records but many of them were heavily redacted before being disclosed to the Applicant. The redactions were made to protect

a) advice, proposals requests for directions, recommendations, analyses or policy options prepared for presentation to the Executive Council;

b) the contents of agendas, minutes or records of decisions of the Executive Council;

c) consultations or deliberations involving officers or employees of a public body;

d) information contained in correspondence between a lawyer and his client public body in a matter relating to any matter involving the provision of advice

e) personal information of a third party, the disclosure of which would result in an unreasonable invasion of the third party's privacy

The IPC did a page by page, line by line review of the records and recommended the disclosure of additional portions of the responsive records.

REVIEW RECOMMENDATION 16-108

Category of Review: **Access to Information - Fee Assessment**
Public Body Involved: **Department of Justice**
Sections of the Act Applied: **Regulation 10(3)**
Outcome: **No Recommendations Made**

The Applicant made a request for personal information in relation to a workplace dispute in which he was involved. A portion of the request included a copy of the tape recording of the interviews done by the investigator. The public body identified 619 pages of responsive records and assessed a fee of $154.75 for copying the records pursuant to Section 10(3) of the Regulations. The Applicant was advised that no further steps would be taken to complete the response until he paid a deposit of 50% of the cost and undertook to pay the balance prior to disclosure. The public body also advised the Applicant that part of the response was an audio tape and that they were unable to disclose the tape because it contained third party personal information. They were, however, prepared to provide him with a transcript, appropriately redacted.

The Applicant sought a review. He complained that he was being denied access to copies of the audio tapes. He also argued that he should not be asked to pay a fee to obtain the files if the public body knew that he would not be receiving 100% of the records requested.

The IPC found that the Applicant's request for review was largely premature because the "access" process was not yet complete. The right to access is subject to the payment of fees as set out in the Act. The fee was reasonable and in accordance with the regulations. The fees do not depend on whether or not the public body applies exemptions to the records disclosed. If the Applicant wanted to proceed, therefore, he was required to accept the fee estimate and pay the deposit. When he received the records, if he was not satisfied with the response received, he could ask the IPC to review the response.

No recommendations were made.

REVIEW RECOMMENDATION 16-109

Category of Review:	**Privacy Complaint**
Public Body Involved:	**Department of Finance**
Sections of the Act Applied:	**Section 41(g)(I), Section 1(d), Section 40,**
Outcome:	**Recommendation to Remove Improperly Collected Information Accepted** **Recommendation to Discontinue Use of FAF for Sick Leave Taken Under Advisement** **Recommendation to Amend FAF Taken Under Advisement** **Recommendation to Avoid Coercion in the Collection of Personal Information Taken Under Advisement** **Recommendation to Limit the Amount of Personal Health Information Exchanged between Departments Accepted**

The Complainant asked the IPC to review the way in which the GN had collected his personal information in the context of his application for sick leave benefits. The Complainant had provided the employer with a medical note from a medical practitioner indicating that he had to be off work for one month for medical reasons. Within days the employer requested that the Complainant have a very detailed "functional abilities form" completed because the medical note did not include the specific restrictions which prevented the Complainant from carrying out his job duties. The Complainant had difficulties finding a medical practitioner in his community who could complete the form within the time frame required by the public body but he was told that unless and until he had the form completed and returned, his sick leave benefits would be denied and he would be considered absent without leave.

The public body argued that they had the right to assess the claim for medical leave benefits and that section 41(g)(i) of the Act gave them the right to collect personal information about the Complainant for the purpose of determining the eligibility of an employee to receive a benefit.

The IPC reviewed the relevant GN policies and procedures, case law and the collective bargaining agreement. She noted that the GN's right to collect personal information is restricted by section 40 and that no information could be collected unless it relates directly to and is necessary for the purpose of administering the employee's sick leave benefits. She found that, while the public body had the right to collect sufficient information about the employee's circumstances to administer the sick leave program and to accommodate his eventual return to work, the collection must be "necessary" under the policies and procedures and the law. On the facts of this case, there was nothing in the Collective Bargaining Agreement or in any of the GN's policies or procedures or in the law which justified the department's collection of additional personal and personal health information other than what it already had at the time of the request for the completion of the FAF. Even where an accommodation is requested for an employee's return to work, public bodies should only be collecting the information necessary to address the specific requested accommodation. It is, for example, inappropriate to ask questions about an employee's mental health if the accommodation requested/needed is that the employee not be required to lift more than 50 pounds at a time. And where such information is required to assess accommodation, the scope of the information requested should be limited to the specific information needed to accommodate the specific needs of the individual involved. General forms which

attempt to "cover the gamut" will inevitably result in the collection of more information than is necessary for the public body to assess a specific request for accommodations.

The Information and Privacy Commissioner made a number of recommendations related to the use of the Functional Abilities Form and changes that should be made to the form to make it less invasive. She also recommended changes to procedures in relation to the collection of personal information in the context of administering sick leave benefits.

REVIEW RECOMMENDATION 16-110

Category of Review: **Offence Under the Act**
Public Body Involved: **Department of Finance**
Sections of the Act Applied: **Section 59**
Outcome: **No Recommendations Made**

The Applicant made Requests for Information from several public bodies. He was not satisfied with the response received from the Department of Finance and asked for a review of that matter. The Request for Review was completed and Review Recommendation 15-089 was issued. One of the issues in that review was whether or not certain information which had been withheld from the Applicant constituted advice, proposals, requests for directions, analyses or policy options prepared for presentation to the Executive Council. The public body had advised the IPC that the records in question had been prepared in anticipation of making a request for a direct appointment but that the request had never been made. The IPC had determined that whether or not the records were actually presented to cabinet for a decision, the records had clearly been prepared for that purpose and section 13(1)(a) applied to except the records from disclosure. It later was determined that, contrary to what the IPC had been advised during the review of the above matter, the records had in fact been presented to the Executive Council. The Applicant sought to have the IPC take steps pursuant to Section 59 of the Act to prosecute the Department for misleading the IPC during the review process.

The IPC found that the public body had misstated the facts in their submissions to the office in the previous review but that the misstatements were inadvertent and did not change the conclusions reached in the recommendations made. No recommendations were made.

REVIEW RECOMMENDATION 16-111

Category of Review: **Breach Notification**
Public Body Involved: **Department of Health**
Sections of the Act Applied: **Section 49.9**
Outcome: **Recommendations Accepted**

This matter arose as a result of a notification from the Department of Health that there had been a breach involving the personal health information of a patient in a small community. A psychiatric Nurse working at a

community health center was preparing to copy a patient file for Family Services and noticed that the mental health progress notes were missing from the file. The missing information was on one page, double sided and contained hand written notes which had been made by the nurse. The record had not been found as of the date of the report to the IPC despite thorough searches. The health centre had, however, been able to reconstituted the patient's records by obtaining a copy of the record from another agency who had previously been provided with a copy. The patient was contacted and informed about the incident and a report was completed by the nurse who discovered that the page was missing.

The IPC provided comment about the use of paper records systems and recommended that a procedure be established in all health centres that ensures that whenever a health record is disclosed to a third party, whether or not with the consent of the patient, a notation be made on the file so that, at the very least, there is a record of where the records have been sent. She further recommended that steps be taken to convert all medical health records in Nunavut to electronic records at the very earliest opportunity. Finally, she recommended that the practice of sharing personal health information with the Department of Family Services without the consent of the patient be discontinued immediately and that policies with respect to confidentiality and information sharing be reviewed to ensure that they reflect the law.

REVIEW RECOMMENDATION 16-112

Category of Review:	**Access to Information**
Public Body Involved:	**Department of Health**
Sections of the Act Applied:	**Section 22, Section 23**
Outcome:	**Recommendations Accepted**

The Applicant requested information with respect to his employment with the Department of Health. The public body identified 496 pages of responsive records and disclosed those to the Applicant with some information redacted pursuant to sections 22 and 23 of the Act. The Applicant sought a review of the response indicating that he wanted access to the redacted portions of the records.

The IPC reviewed the records, page by page and line by line. She found that in every instance in which the public body had redacted information pursuant to section 23 of the Act, the information withheld was information about a third party and that disclosure of that information would have constituted an unreasonable invasion of the privacy of those third parties.

She further found that the information which had been redacted pursuant to section 22 was, indeed, evaluative in nature. Section 22, however, requires provides for an exception for information which is evaluative in nature **and** provided to the public body in confidence. In this case, the evaluative material was created by the public body, not provided to it. Section 22 did not, therefore, apply and she recommended the disclosure of those portions of the records to which this section was applied.

REVIEW RECOMMENDATION 17-113

Category of Review: **Access to Information**
Public Body Involved: **Department of Health**
Sections of the Act Applied: **Section 23(1)**
Outcome: **Recommendations Accepted**

The Applicant was contracted to the Department of Health for the provision of certain services in Nunavut. At some point, one or more complaints were made to the Department about his work and he lost his contract as a result. He made an Access to Information Request for any employment or other records in which he was

mentioned for a specified period of time during which the complaints had been made. The public body identified and disclosed 148 pages of records, of which 118 contained some redactions. The Applicant sought a review of two redacted items, both of which were withheld pursuant to section 23 (unreasonable invasion of a third party's privacy).

The IPC agreed with one of the redactions but recommended the disclosure of the second.

REVIEW RECOMMENDATION 17-114

Category of Review: **Access to Information**
Public Body: **Department of Culture and Heritage**
Sections of the Act Applied: **Section19(b), Section 23(1), Section 23(2)(2)(d)**
Outcome: **Recommendations Accepted**

A request was made for records in relation to permits issued during a four-year period under the Nunavut Archeological and Paleontological Site Regulations, as well as for the applications submitted for such permits. Two hundred and sixty-three responsive records were identified. All but five of these pages were disclosed in full. Five pages were withheld. The public body cited sections 19(b) and 23(1) and 23(2)(d) as justification for the refusal to disclose these five pages. The Applicant sought a review of the decision to withhold these five pages.

During the course of the review process the public body indicated they had reconsidered their position with respect to the two pages withheld pursuant to section 19(b) and would be disclosing those records to the Applicant. The remaining three pages were a resume or curriculum vitae for a named individual.

The IPC referred to Section 23(2)(d) which raises a presumption that a disclosure will constitute an unreasonable invasion of the privacy of a third party where the information relates to employment, occupational or educational history. The resume in question clearly fit within that definition and disclosure was, therefore, prohibited.

The IPC agreed with the redactions pursuant to section 23 but recommended the disclosure of the records which had been withheld pursuant to section 19(b).

REVIEW RECOMMENDATION 17-115

Category of Review: **Breach Notification**
Public Body: **Department of Health**
Sections of the Act Applied: **Section 42, Section 49.9, Section 49.8**
Outcome: **Recommendations Accepted**

The Department of Health reported that they had shipped 18 boxes of confidential medical records from Iqaluit to Rankin Inlet through Canadian North Cargo. Only 17 boxes were received in Rankin Inlet. The

Department could only provide a very broad description of the missing records as being outpatient and inpatient service reports containing patient demographics and clinical information of patients seen at the Qikiqtani General Hospital. There would have been between 2000 and 2500 documents in the missing box. There was no record kept of the exact records which might have been in the box and no way to identify which box went missing or to narrow down the possibilities of what specific records were in the box.

The records were transferred from Iqaluit to Rankin Inlet so that the information in the records could be entered into a centralized health information system that is not accessible in Iqaluit. The Rankin Inlet centralized system is called "Medigent" and is a multi-functional system used by Nunavut Health Insurance programs to electronically manage the business processes of the office. The system is not in any way connected with diagnosis, treatment or care but is used for financial and system management.

The IPC found that the loss of this box of records created a real risk of significant harm to the individuals whose records were included in the missing box. Because the public body had no way to identify the individuals who were affected, the IPC recommended that the Department issue a general press release giving notice to Nunavummiut about the lost records, including as much information as possible about the kind of information included in the records and a time frame during which the records were created. She further recommended that the Department designate one or two people who could respond to any inquiries received as a result of the notification and ensure they were aware of the circumstances and could adequately answer questions.

The IPC noted that going forward, if documents containing personal health information are to continue to be shipped from all Nunavut communities to Rankin Inlet, steps should be taken to reduce the risk of a recurrence. She recommended that clear written policies be developed for the shipping of records which would include limiting the number of boxes that can be shipped at one time, marking each box to identify how many boxes there are (i.e. - Box 1 of 5) and clear communication between offices when boxes are being shipped. She further recommended steps be taken to identify records being shipped by recording, in some fashion, every record placed in each box.

SPECIAL REPORT ON THE QIKIQTANI HOSPITAL

My office completed a Privacy Audit of Qikiqtani General Hospital in Iqaluit in 2016. The process included a review of privacy related documents, an on-site tour of the hospital and interviews with senior officials in QGH as well as the Department of Health. The report resulting from the audit contains 31 recommendations for QGH and the Government of Nunavut.

The Privacy Audit revealed a number of different privacy tools and resources, a significant familiarity with basic privacy principles among some healthcare professionals and leaders and an electronic medical record, known as Meditech, that is the means by which some, but not all, personal health information of patients is being collected, used and disclosed.

The Audit further revealed, however, that there is no privacy management program which is up-to-date, comprehensive or widely understood and supported. Without such a privacy management program, the efforts to promote privacy awareness and compliance tended to be fragmented, inconsistent, and not well understood by all staff at QGH.

Some of the most serious problems are outside of the ability of the QGH to change. The *Access to Information and Protection of Privacy Act* (ATIPPA), which is currently the only legislation in Nunavut governing privacy protection in Nunavut, is neither suitable nor adequate to establish the privacy rules within which QGH performs its critically important healthcare services. The ATIPPA is an access and privacy law that reflects a first- generation model for governing all kinds of personal information in the custody or control of all public bodies. Most other Canadian provinces and territories have determined that the move to electronic health records for all Canadians requires a stand-alone health information law. Unlike ATIPPA, such a health information law can be designed to facilitate the kind of sharing of personal health information associated with electronic health records at the same time that Personal Health Information is appropriately protected from those who have no legitimate need to know that information.

In the short term, the report recommended that QGH be designated as a "public body" for purposes of ATIPPA. This would more appropriately reinforce the need for QGH to be held accountable to the citizens of Nunavut who require the services of QGH.

It was further recommended that Nunavut immediately start developing an electronic health record that meets the recommendations of Canada Health Infoway which needs to be accompanied by a stand-alone health information law similar to that developed in other Canadian jurisdictions.

In terms of a suitable privacy management program, the main recommendation made was that QGH proceed as quickly as possible to appoint a Privacy Officer with responsibilities which would include the following:

- familiarity with ATTIPA, and contemporary privacy and access best practices including the Canadian Association of Health Informatics (COACH) Guidelines;
- seniority in the QGH organization with ready access to the CEO and the management team of QGH;

- responsibility for dealing with patient privacy complaints and requests for access to Personal Health Information and public education to ensure that patients understand how their personal health information will be used and disclosed and what their rights are;
- responsibility to provide advice to the CEO and management team with respect to new programs, policies and procedures;
- responsibility to develop and to oversee comprehensive privacy training for new hires and in-service training;
- responsibility to interact with the Information and Privacy Commissioner (IPC) on a regular basis and to consult with the IPC on new programs, policies and procedures that will impact the privacy of patients;
- responsibility to provide advice on privacy compliance to the regional health centers in Nunavut and to the Department of Health.

The Audit revealed a need for much closer coordination and harmonization of privacy efforts between the Health Records Department, the IT department and the QGH Privacy Officer.

The report recommended a renewed focus on moving all PHI records to electronic format and terminating the current hybrid record system of both paper and digital records by a near date certain.

The Audit identified a number of specific concerns related to the Meditech system. This includes the accreditation process for registered users, the inadequacy of the training program to address privacy issues and likely risks, the lack of any process to immediately terminate the access of users once they no longer require access to the system to do their QGH job and the lack of a random audit function to detect misuse of the system.

The Report further recommended training of all QGH staff, both professional and clerical or support staff to provide each staff member with the basic information they need to understand for the purpose they serve in QGH and the kinds of collection, use and disclosure practices that would be common their respective workplaces, to be reinforced and supported by accessible check-lists and simple case studies.

The Audit includes specific recommendations for email and texting, social media policy and outsourcing arrangements that involve PHI being shared outside of QGH.

> ***No one would argue with the need to protect personal health information. It is the most sensitive type of personal information because it is information about our body, our state of mind and our behaviour. As Information and Privacy Commissioner, I am concerned about how this sensitive personal health information is protected in privacy law and policy. I am convinced that new health information privacy law is needed in BC.***
>
> *Excerpt from "Prescription for Legislative Reform", a report by the BC Information and Privacy Commissioner, April 2014*

TRENDS AND ISSUES – MOVING FORWARD

Nunavut is the now the only jurisdiction that is not undertaking a comprehensive review of its first-generation access and privacy legislation with a view to making changes to meet the needs of the modern technological world we live in. There are advantages to being the last to do something. It allows us to learn from others and to gather the best from around the country. There is much work being done in this arena and it is important that the Nunavut keep pace. My office has now completed and submitted a review of the Act from our perspective. I anticipate that this report will be tabled at the next sitting of the Legislative Assembly. The report provides comments and recommendations for changes that need to be made to modernize the Act.

I was hopeful that a comprehensive review of the Act was something that would have been at least started during the current legislative mandate but it does not appear that this will happen. Instead, Bill 48 was presented to the Legislative Assembly in early June, 2017. There was no consultation with my office in the planning stages for this legislation and while some of my longstanding recommendations have been addressed, such as steps to ensure municipal governments have legislated obligations for both access to information and protection of privacy, other amendments in the Bill are retrogressive and concerning for the future of access to information. I have provided my comments in relation to the Bill directly to the Standing Committee on Legislation and hope that there is room for amendments before the Bill passes third reading.

This said, not everything is about the legislation. Good access and privacy also require strong leadership, good policies, and good information management.

Good Information Management Practices and Policies

When the ATIPP Act came into force, most record keeping was still paper based and there were strong information management professionals working within most, if not all, government agencies to ensure that those records were properly classified, stored and archived so as to preserve the historical record of decision making by government. Over the last twenty years, however, this kind of information management is extinct. Every employee is now expected to manage their own records, most with little or no training in appropriate records management policies and procedures. Rules and policies still exist, but there is no focus on ensuring that employees are acquainted with appropriate information management practices and no oversight within public bodies to ensure that employees are all complying with those policies. Every employee with a computer has control over his or her record keeping system. Record keeping, therefore, is becoming more and more haphazard and unwieldly. Quite apart from the need to maintain good records for current and future use, there is a direct relationship between good records and information management and the ability of a public body to meet its responsibilities under the *Access to Information and Protection of Privacy Act*. Good records and information management practices can prevent records from being lost or misfiled, or from being improperly deleted. At the same time, strong records and information management practices will reduce the time and effort required to identify and gather records in response to an access request. More resources and focus need to be committed to this basic function of government - good, consistent and monitored record keeping.

The Use of Instant Messaging and Personal Devices for Business

Many public servants and elected officials use texts, instant messaging and web-based personal email accounts to assist them in the work that they do. While this may be a current day reality, it also bad practice which not only threatens the ability of the public to gain access to government records but also is a considerable threat to privacy. Requests for information in the last year, in particular, have brought this issue to light with some clarity. While it may be difficult, perhaps impossible, in today's world, to prohibit the use of personal devices and accounts by GN employees, there need to be clear and well publicized restrictions on the use of any mode of digital communication done outside of the GN system. There needs to be more effort on behalf of senior managers to ensure that these protocols are followed and there need to be clear and significant consequences for failing to do so. Nunauvt is clearly not alone in dealing with this reality. Precedents, guidelines and support can be found in a number of places. For example, the Information and Privacy Commissioner of Ontario published a guidance document in June of 2016 that addresses this issue which provides direction and advice. This document can be found at https://www.ipc.on.ca/wp-content/uploads/2016/08/Instant-Messaging.pdf . Other governments and Information and Privacy Commissioners offices have also created detailed guidance documents. I encourage the Government of Nunavut to follow suit as a priority so that there are clear rules around this issue and all employees are aware of those rules.

Communicating Personal Health Information

The reality of our health system is that information has to flow to provide effective services. When it comes time to move health information from one place to another, however, it seems that the sector appears reluctant to embrace the technology designed to protect information. The continuing use of fax technology to transmit sensitive personal health information is one example. Fax technology is now old technology and should be used only in exceptional circumstances. While all means of transferring information from one place to another have inherent risks, it is much easier to mitigate those risks in the digital arena. Emails can be encrypted to protect the content so that, in the fairly likely event that an email goes astray from time to time, the content is not disclosed. Unfortunately, it also appears that the use of encryption technology in the Nunavut health sector is not prevalent. As a result, the probability of a breach of privacy as a result of a misdirected email remains high. More energy and attention needs to be focused on how information is communicated from place to place within the system so as to avoid potential breaches. Encrypted email is likely the easiest and most effective way to do this. The Department of Health needs to make this the mandatory method of communications except in situations which makes this impossible or the urgency of the situation makes it infeasible.

Adequate Resources

Even perfect legislation will fail if there are inadequate resources to meet the demand. This year has demonstrated, even more than in previous years, the need for more resources to be dedicated to access and privacy, both within public bodies and in my office. There are a number of public bodies which routinely deal with significant numbers of access to information requests. This year, the Department of Culture and Heritage,

which had rarely seen an access to information request before 2016, now finds itself as the department dealing with more requests than most other departments. Access to Information is a client driven function of government. There is a very real ebb and flow to the volume of work as a result. That said, when the tide is high, public bodies need to have the resources and the flexibility to deal with whatever comes in the door.

As noted earlier in this report, my office is also struggling to keep up. The work load of the office increases every year. Nunavut file numbers have increased 83% in the last four years with no real increase in resources. The numbers alone do not tell the whole story. Major projects, such as the privacy audit of the Qiqiktani Hospital and the comprehensive review of the Act, take significant dedication of hours and resources. It is not realistic to expect that this increase in work load can continue to be met without additional manpower. While I recognize that increased budget for my office is contingent on a commitment from both Nunavut and the Northwest Territories, I am seeking a commitment from Nunavut for funding to support a half-time Assistant Commissioner and will be seeking the same commitment from the Northwest Territories. Without the additional manpower, I simply will not be able to continue meet my legislated mandate and will continue to fall further and further behind.

Respectfully submitted:

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner.