



OFFICE OF THE INFORMATION AND
PRIVACY COMMISSIONER OF NUNAVUT

ANNUAL REPORT

2020-2021

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Commissioner's message



Elaine Keenan
Bengts



Graham Steele

Retirement of former Commissioner

Elaine Keenan Bengts retired as Nunavut's Information and Privacy Commissioner in January 2021. She was, until then, the only IPC that Nunavut has known. She was the IPC for the Northwest Territories in 1999, and after division covered both the NWT and Nunavut.

The workload grew steadily because of amendments to the Act, such as privacy breach notifications. Elaine has left a legacy for Nunavut of 181 Review Reports, not to mention special reports, comments on legislation, and advice to anyone who needed it. She was committed to ensuring the access and privacy system would work to the benefit of all Nunavummiut.

With Elaine's impending retirement, the decision was made by the legislature's Management and Services Board to seek a full-time Commissioner who would be resident in Nunavut. Because of COVID and other hurdles, the process of finding a replacement took much longer than Elaine (or anyone else) anticipated. She called it "the longest

goodbye”. She held the fort until finally, on January 11, 2021, I assumed my role as Nunavut’s new IPC.

I congratulate Elaine, and thank her for the work she (and her assistant Lee Phypers) did over the past 21 years for the benefit of all Nunavummiut. Thank you for your service; you have done well; I promise to build on the solid foundation you have built.

Graham Steele
Information and Privacy Commissioner



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What We Do

The Information and Privacy Commissioner is an independent officer of the Legislative Assembly of Nunavut, appointed under section 61 of the *Access to Information and Protection of Privacy Act* (“the ATIPPA”).

The authority and activities of the Commissioner are derived from the ATIPPA.

The ATIPPA gives the public a right of access to records held by the Government of Nunavut, with limited exceptions. The ATIPPA also allows Nunavummiut to know what information the GN holds about them, and to correct it if it’s wrong. The ATIPPA also protects the privacy of Nunavummiut by preventing the unauthorized collection, use or disclosure of personal information.

The primary role of the Commissioner is to ensure the GN is following the ATIPPA correctly. Usually that is done at the request of a citizen who is dissatisfied with the GN’s response to a request for information, or who believes their privacy has been breached. If there is a complaint, the Commissioner looks at the law and the evidence, and then makes recommendations to the GN about how to improve their handling of information.

The Commissioner also does research and offers comments on access and privacy matters involving the GN.

Number and type of files in 2020-21

New files

In the 2020-21 fiscal year, the NUIPC opened 64 new files.

The number of files is not the same as the number of applications for review. One person's application may, if it raises multiple issues, lead to the opening of more than one file. In addition, a file does not necessarily lead to a Review Report. Some files are settled, withdrawn, or otherwise resolved.

Table 1 shows the main issue raised by the files opened in 2020-21:

Table 1. Nature of Case

Nature of Case	Files
Review of disclosure	12
Review of refusal to disclose	7
Review of time extension	3
Review of fees	1
Privacy breach notification	13
Privacy breach complaint	11
Self-initiated investigation	5
Request for comments	10
Administrative	2
Total	64

Table 2 shows the public body involved in the 64 files that were opened:

Table 2. Public bodies

Public Body	Files
Health	24
Education	10
Community & Government Services	6
Human Resources	4
Justice	4
None	3
Elections Nunavut	2
Family Services	2
Finance	2
Rep for Children & Youth	2
Executive & Intergovernmental Affairs	1
Languages Commissioner	1
Nunavut Arctic College	1
Nunavut Housing Corporation	1
Workplace Safety & Compensation Commission	1
Total	64

Requests for comment

The NUIPC provides comments to public bodies seeking advice on the interpretation of the ATIPPA. The NUIPC also provides comments to bodies of the Legislative Assembly on legislative proposals or policy issues.

During the year, comments were provided to the following public bodies:

- Chief Electoral Officer (criminal records check, provisional voters list)
- Languages Commissioner (disclosure and privacy)
- Representative for Children and Youth (disclosure and privacy)
- Workers' Safety and Compensation Commission (new disclosure policy)
- Department of Family Services (revisions to consent form)
- Department of Health (COVID response, proposed Medical Professions Act, proposed Mental Health Act)
- Department of Justice (using voter lists for juries)

Accomplishments and Challenges in 2020-21

Zero backlog

One of the former Commissioner's pre-retirement priorities was to reduce the backlog of Review Reports as much as possible. I am grateful for the work she did, especially in her last few months. With her work, and my own at the start of my term, I can report that Nunavut ended the 2021-22 fiscal year with a backlog of zero.

“IF THERE IS A BOTTLENECK IN THE ATIPP SYSTEM, IT WILL NOT BE IN THE COMMISSIONER’S OFFICE.”

Zero backlog is great news. Delays discourage applicants by making them feel like the system does not work. Some delays are built into the system. They are necessary, for example, to search for documents, to notify third parties, and to give both public bodies and

applicants time to make well-researched submissions. But excessive delays defeat the purpose of the ATIPPA. That is why the Act sets strict timelines for each step in the process. The timelines are not always respected, and there are no consequences for missing a deadline. But at least the deadlines are there.

Zero backlog means no delays at the review stage, except for the time the Commissioner needs to write a Review Report. Zero backlog means that Review Reports can be turned around in a few weeks or less. If there is a bottleneck in the ATIPP system, it will not be in the Commissioner's office.

Ransomware

In her annual report for 2019-20, the former Commissioner had a good deal to say about the ransomware attack that hit the GN on November 1-2, 2019.

At the end of the 2020-21 fiscal year, almost a year and a half after the attack, there had still been no public accounting by the GN of what happened.¹

The former Commissioner commenced an investigation, but for a variety of reasons was unable to make much headway. When I started in January 2021, I believed that the ransomware investigation needed to be concluded. Long after the former Commissioner was assured that all data had been restored, “ransomware” was being cited as the reason why an ATIPP request could not be fulfilled. As I wrote in Review Report 21-191:

...the time for accepting the response “ransomware” as a reason for not fulfilling an ATIPP request is over. The law requires better. Nunavummiut deserve better.

At the time of writing this annual report, I am still working on my investigation. I hope to have it finished before the end of 2021, but that will require ongoing cooperation from all public bodies subject to the ATIPPA.

¹ As this annual report was being prepared, the government tabled a document in the Legislative Assembly titled “Government of Nunavut Ransomware Report” on June 3, 2021. The report is dated July 14, 2020.

Under-reporting of privacy breaches

The former Commissioner believed that privacy breaches are significantly underreported.² I share that belief.

The ATIPPA says that a public body “that knows or has reason to believe” that a privacy breach has occurred is required to file a report to the NUIPC, if certain minimum conditions are met.³

Despite this provision, which has been in the Act since 2012, the NUIPC receives very few privacy breach notifications. It is possible that there are very few privacy breaches. I think it more likely, however, that there are many privacy breaches that should be reported under the ATIPPA, but are not.

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Astonishingly, the ransomware attack in November 2019 - an attack that carried with it the possibility that every piece of data on every GN server had been compromised - did not trigger a notification to the NUIPC under s 49.9 of the ATIPPA. Neither did the ransomware attack in February 2021 on one of the Department of Education’s private-sector service providers.

When such large and significant attacks on the personal information of Nunavummiut do not trigger a notification to the NUIPC, there is something wrong with the legislation, or with public bodies’ understanding of it.

² See, for example, last year’s Annual Report at page 10.

³ ATIPPA, Part 2, Division E. To be reported, the breach must be “material”, a word that is further explained in s 49.9(2).

The purpose of the privacy-breach notification system is to ensure that individuals are notified quickly and completely so they can take appropriate steps to protect themselves. A secondary purpose is to ensure that there is an independent set of eyes on every material privacy breach. The NUIPC is also able to keep records of all material privacy breaches in a way that a single public body cannot.

The Department of Health takes privacy breaches seriously, perhaps because of the volume and sensitivity of personal information it handles daily. Almost all privacy breach notifications to the NUIPC come from that department.

The almost complete absence of reports from other departments and public bodies does not, unfortunately, demonstrate that Nunavummiut privacy is well-protected. It likely means that other units of government are not aware of their reporting obligations under the ATIPPA, or do not recognize privacy breaches as such when they occur, or do not have a well-established procedure for reporting privacy breaches to the NUIPC.

Case example: Nunavut Arctic College

In February 2021, the Territorial ATIPP Manager (TAM) advised all ATIPP Coordinators that a certain public drive on GN servers might contain personal information. The TAM advised the ATIPP Coordinators that they should review the drive for information belonging to their public body, and if any such information was found, to move and/or protect the information.

Alone among all public bodies in the GN, Nunavut Arctic College reported to the NUIPC that they had found personal information exposed on the drive. The information included, for example, an individual's name, address, and social insurance number. The NAC immediately moved the information to a secure drive and notified the affected individuals. The NAC did everything right. After the NAC's final report was received, the NUIPC closed its file. We were satisfied that appropriate steps had been

taken. A mistake had been made when the personal information was exposed on a public drive, but the NAC caught the error, and corrected it. That's the way the system is supposed to work.

Failure to exercise discretion

There is another aspect of the ATIPPA on which the GN is doing poorly: the failure to exercise its discretion.

If the GN is going to withhold information, it has to fit within one of the exemptions in the ATIPPA. There are two kinds of exemptions: mandatory and discretionary.

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A mandatory exemption says the GN “shall” withhold the information, if the conditions for the exemption are met. They have no choice.

A discretionary exemption says the GN “may” withhold the information, if the conditions for the exemption are met. But they still have a choice - they can release the

information anyway. This requires them to “exercise their discretion”, which means they at least have to think about it, and make a decision.

The problem is that, in the cases we see, the GN almost never exercises its discretion. If the conditions for the exemption are met, the GN treats it as “case closed”. That is legally wrong, but the GN keeps doing it.

The former Commissioner wrote a Review Report in 2004 telling the GN that it needed to exercise its discretion properly. Since then, there have been dozens of Review Reports about the GN's failure to exercise discretion, up to and including the current fiscal year.

There is something fundamentally wrong with the ATIPPA system when the GN can repeatedly commit a legal error, but nothing changes. That does not serve anyone well.

In Review Report 21-193, after explaining the problem and why conventional approaches are undesirable, I wrote the following:

[23] There is a better way, and that is for Nunavut's public bodies to equip themselves to follow the law, and explicitly exercise their discretion as part of their response to every ATIPP request. This may require some re-ordering with the GN, but it does not need to cost a cent. Perhaps ATIPP coordinators can be clothed with more authority; or perhaps they can be given easy access to a departmental official, such as a deputy minister or associate/assistant deputy minister, who is ready to exercise discretion in a timely way.

[24] The Department of Executive and Intergovernmental Affairs (EIA) has administrative responsibility for the ATIPPA. It is up to EIA to decide how to organize the ATIPP function so that discretionary decisions are made in accordance with law. The current system for applying discretion is not working. It is, in fact, a non-system. As a result, the statutory requirements of the ATIPPA are routinely unmet, as they were in this case.

I am ready to work with the GN to increase its capacity to exercise discretion. We will have to wait and see if the GN is ready to meet the challenge, or if it will continue to be satisfied with routinely failing to meet its legal obligations.

Review Reports in 2020-21

The most visible products of our office are the final decisions, commonly referred to as Review Reports. Like a judge's decision in court, our Review Reports explain the legal principles and apply them to the facts of a given case. They lay down the analytical framework that we will follow in future decisions, and that we expect GN public bodies to follow. The full text of the Review Reports is available on the NUIPC website (www.atipp-nu.ca) and also on the Canadian Legal Information Institute website (www.canlii.org).

In 2020-21 there were 27 Review Reports. That is a record-tying number. The reason for the high number of Review Reports is the former Commissioner's commitment to reducing the backlog before she retired, and my commitment to eliminate, as quickly as possible, whatever was left. With the year-end backlog at zero, it is likely that the number of Review Reports will be lower in 2021-22.

Table 3 shows the number of Review Reports per year in the last ten years. The upward trend is unmistakable, although there is also much variability from year to year:

Fiscal Year	Reports
2020-21	27
2019-20	19
2018-19	6
2017-18	27
2016-17	18
2015-16	7
2014-15	10
2013-14	5
2012-13	5
2011-12	3

The five most significant Review Reports

Rather than provide a summary of each Review Report, as in previous annual reports, I would like to draw attention to the five most significant Review Reports. They are significant either because of the legal issue they raise, or because of what the case shows about ATIPPA administration.

1. Review Report 21-195

The Applicant is a GN employee who was unsuccessful in a job competition. They applied to see their reference checks. The reference checks were almost entirely redacted. The Commissioner finds that the department properly applied the exemption in s 22, but recommends the department revisit the case and correctly apply its discretion. The Commissioner also recommends the department consider whether its policy on disclosure of reference checks is in keeping with Inuit societal values.

Why is this report significant? It is the first report that explicitly considers Inuit Qaujimajatuqangit and Inuit societal values.

2. Review Report 21-193

The Applicant requested documents related to security concerns at Nunavut's COVID-19 isolation hubs. The Department of Health released 262 pages of responsive documents, with extensive redactions. The Applicant seeks review of the claimed exemptions. The Commissioner finds that some exemptions were properly applied, but recommends further disclosure, especially in relation to the names of contractors and their officers and employees.

Why is this report significant? It raises the GN's inability or unwillingness to exercise its discretion, as required by the law, to release information even when it does not have to.

3. Review Report 21-189

An employee of a public body "leaked" to a third party the name of a person who had filed an access request, along with the subject-matter of the request. The public body did not discover the leak until about a year later. The public body took certain steps to respond to the leak. The Commissioner finds there was a privacy breach. The Commissioner also finds that the public body's response was mostly adequate, but recommends certain additional steps to help prevent similar breaches.

Why is this report significant? It underlines how important it is that everyone involved in the ATIPP system abides by the law.

4. Review Report 20-180

A GN employee complained of a privacy breach because two managers had obtained personal information (including medical information) about them, and had disclosed it to third parties. The Commissioner found that no adequate investigation had been made into these serious allegations. The Commissioner recommended that the department complete an investigation within 60 days, and recommended the development of policy and procedure to address privacy breaches such as this one.

Why is this report significant? It deals with the inadequacy of the department's internal investigation, which is a key step in any privacy breach.

5. Review Report 20-168

The Department of Health notified the Commissioner of a privacy breach at a community health centre. A health-centre employee looked at a person's medical records for an unauthorized purpose. The Commissioner found there was a privacy breach. The Commissioner made various recommendations to strengthen privacy protections, including a new privacy oath, a code of values and ethics, and mandatory privacy training. The Commissioner also made recommendations concerning technical privacy safeguards in the Meditech system.

Why is this report significant? It is an example of how the handling of personal health information in community health centres needs to be improved.



**“...THE HANDLING OF
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Review Report recommendations not accepted

Section 68(1) of the ATIPPA requires that I provide information about any Review Reports for which the head of a public body has not accepted the Commissioner's recommendations.

The ATIPPA says that the head of a public body (usually the minister of a department) must respond to a Review Report. The head is not required to accept the Commissioner's recommendations. The head may make any decision the head thinks is proper. All responses are posted to the NUIPC website.

Here is the problem: It is not always clear whether a public body has accepted or rejected the NUIPC recommendations. For example, if the NUIPC makes five recommendations, and the public body accepts two of them and is silent on the other three, what does that mean? Or if a public body writes that it accepts all recommendations, but then explains why it is not going to implement some of them, what does that mean? Or if a public body says something so vague that it's not clear if the recommendations are accepted or rejected, what does that mean?

The most complete responses are those received from the Nunavut Housing Corporation. They are detailed and fully reasoned. One may agree or disagree with them, but at least everyone knows exactly where they stand. I encourage other public bodies to do the same. Vague or incomplete responses are not in keeping with the spirit of the law.

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Minister's response: Minister says investigation has already been done, and "it was concluded that the breach likely did not occur." Other recommendations are not addressed by minister.

2. Review Report 20-179

A pediatric health chart went missing from a community health centre. The Department of Health notified the Commissioner's office. The Commissioner made recommendations concerning the department's privacy breach policy and for the management of paper-based medical charts.

Minister's response: "...the Department of Health welcomes your report and accepts your recommendations. Health staff will work on implementing the majority of your recommendations...". There is no explanation why only "a majority" of recommendations are being implemented if they have all been accepted.

3. Review Report 20-178

The Applicant was a former GN employee who applied broadly for information about their employment. The Commissioner found that the file was not well handled. The Commissioner made recommendations about training of and resources for ATIPP Coordinators.

Minister's response: "...the Department of Human Resources is committed to continuing..." certain activities concerning training and resources for ATIPP coordinators. The minister does not specifically accept or reject the Commissioner's recommendations.

4. Review Report 20-174

The Applicant was a former GN employee who applied broadly for information about their employment. There were problems with delays, and CGS assessed a fee of close to \$8,000. The Applicant asked for review. The Commissioner made a number of recommendations about training, processing, and fees.

Minister's response: The minister said that the Applicant had narrowed their request, and so no fee was collected after all. The minister did not address the Commissioner's other recommendations.

5. Review Report 20-170

The applicant applied for briefing notes from the Nunavut Housing Corporation. Records were disclosed with redactions. The NHC's explanation of its redactions was brief, and little or no context was provided for the documents (e.g. author, recipient, intended use). The Commissioner made recommendations for further disclosure, and recommended that the NHC, in future, provide more detailed recommendations.

NHC's response: Some recommendations for further disclosure accepted. The rest are not accepted.

6. Review Report 20-169

The Commissioner received a number of queries and complaints from Local Housing Organizations (LHOs) regarding information requested from them by the Nunavut Housing Corporation. The Commissioner recommends the NHC undertake a Privacy Impact Assessment, and recommends other measures to clarify the relationship between the LHOs and the NHC.

NHC's response: Most recommendations accepted. A Privacy Impact Assessment will be undertaken. Some recommendations are not accepted.

Priorities for the next five years

My term as Information and Privacy Commissioner runs from January 11, 2021, to January 10, 2026. I have six things I would like to accomplish in that period:

- Run a high-functioning office that makes good decisions quickly, and which operates as an information and privacy resource both for GN employees and for citizens.
- Amend the ATIPPA to give the Commissioner the power to order the disclosure of documents. This could and should be done right away. About half of Canadian jurisdictions already have this power. It was recently done in the NWT. This is a simple amendment that will have an immediate, significant, positive effect on the operation of the ATIPPA in Nunavut.
- Review the ATIPPA. Nunavut is still working with a first-generation ATIPP law. The foundation of our ATIPPA goes back to pre-division days. It is no longer adequate to deal with modern government and modern technology.
- Enact health-specific information legislation. This is a long-standing recommendation of the former Commissioner. The ATIPPA is inadequate to deal with information and privacy in the health system. Every other Canadian jurisdiction has health-specific legislation. There is no reason that Nunavut should be so far behind.
- Gradually increase the capacity of the office so that it can handle the increase in work that will come with health-specific information legislation, and also with the extension of the ATIPPA to Nunavut's municipalities.
- Groom a successor who is Inuk or a long-term Northerner. I believe this position should eventually be filled by someone who is fluent in Inuktitut and is able to move the work of this office forward according to the spirit of Inuit Qaujimajatuqangit.

My success as Information and Privacy Commissioner will be measured by whether, at the end of my term, those six priorities have been accomplished. None of these priorities is entirely in my control. Making progress on all of them will require the active commitment and cooperation of the Executive Council and members of the Legislative Assembly.



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