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Access to Information and Protection of Privacy Act (ATIPP Act)

Frequently Asked Questions for Written Inquiries

The following information is intended to assist parties in participating in a written inquiry* conducted by the Information and Privacy Commissioner (IPC) under the *Access to Information and Protection of Privacy Act (ATIPP Act)*.

Definitions for words marked with an * can be found in the glossary at the end of this document.

All communication during an inquiry is to be directed to the Registrar of Inquiries (Registrar). The Registrar can be reached at 867-667-8468 ext. 2.



When does the IPC hold inquiries?

Most requests for review initially proceed to mediation to try to settle the issues for review. Where a request for review is not completely settled during mediation, a party can ask the IPC to conduct an inquiry. The IPC has discretion to decide whether to proceed to inquiry.

What happens in an inquiry?

An inquiry is the final stage in a request for review and is a formal adjudicative process conducted by the IPC. The parties to an inquiry are entitled to make representations * to the IPC about the issues identified for inquiry. In most inquiries, the representations are made in writing and the parties do not appear before the IPC.

If the IPC decides to proceed to inquiry, a notice of inquiry is issued to the parties. The notice of inquiry outlines the next steps in the inquiry. The notice of inquiry will confirm:

- the parties to the inquiry,
- the sections of the ATIPP Act that will be considered,
- the issues for inquiry,
- the timeline for notifying the IPC of any preliminary objections to the inquiry,
- the schedule for delivery and exchange of initial and reply submissions from the parties, and
- a deadline for requesting the IPC's approval for "in camera"* submission material.

At the inquiry, the IPC considers the Fact Report prepared by the mediator, the representations received from the parties, reviews any records in dispute, and decides how each issue should be resolved and makes her recommendation(s) *. The IPC issues a written report to the parties setting out her findings, recommendation(s) and reasons for the findings and recommendation(s).

Some of the things the IPC can recommend are:

- the release of some or all of the information in a record
- the modification of a fee waiver
- the correction of personal information

When does an inquiry conclude?

An inquiry concludes when the IPC issues her written report. If the written report includes recommendation(s), the public body * has 30 days to decide whether it will follow the IPC's recommendation(s) and give notice of that decision to the IPC and any other person given the report (i.e. the applicant and third parties, if applicable). If the public body does not give notice of its decision within

the required time, the public body is deemed to have refused to follow any recommendation(s). If the public body decides not to follow the IPC's recommendation(s), the public body must, in writing, inform the persons who received the IPC's report of their right to appeal to the Supreme Court of Yukon.

How long does an inquiry take?

The time to complete an inquiry and issue a written report depends on a number of factors including the number and complexity of the issues for inquiry, the nature and number of the records, the number of other inquiries underway and whether there are any procedural delays such as the need for additional submissions.

Who participates in an inquiry?

If the inquiry involves a decision of the public body to refuse access to records or information, the person who requested the inquiry, the public body and a third party are always provided an opportunity to participate in the inquiry.

If the inquiry is about a decision of the records manager such as an extension of time for responding to an access request or a fee waiver, the person who requested the inquiry and the records manager participate in the inquiry.

The IPC may decide to give notice of the inquiry and invite participation from any person who, in the opinion of the IPC, should have received notice of the inquiry or may be able to present useful information to aid in the disposition of the issues.

The person who asked for the review, the public body and any person given notice of the request for review may be represented at the inquiry by legal counsel or an agent.

All inquiry participants are collectively referred to as parties.

What is a written submission?

A party's representations to the IPC are made by way of a written submission. A submission contains a party's argument and evidence presented to persuade the IPC to resolve the issue in the inquiry in a particular way. Evidence is what a party provides, in addition to arguments, during the inquiry to prove or disprove the facts in dispute. The IPC is not bound by ordinary rules of evidence. However, where a party is submitting evidence, it is preferable that it be in affidavit form.

Parties are also encouraged to review any relevant IPC Inquiry Reports, other case law or statutory materials and include references to such material in their submission.

Mediation Material to preserve the integrity of the mediation process, a party may not refer to or include in its submission any information or records related to the mediation process and attempts to settle the issues including the mediator's opinions or recommendations on the issues. The IPC will not consider mediation materials in reaching a decision. If a submission contains any mediation material, the Registrar will require the party to remove the material from the submission. This does not include factual outcomes of mediation, for example, changes in the issues or exceptions claimed, the scope of disputed records or the amount of fees assessed by the records manager.

Can a submission be received *in camera (in private)?**

The IPC exchanges submissions received from a party with the other parties unless a party requests that some or all of its submission be kept private or *in camera*. If a party wishes to submit material in camera, it must obtain the IPC's approval ahead of time in accordance with the time limit set out in the notice of inquiry. The party seeking approval must submit to the Registrar a letter requesting the IPC's approval of the in camera information. The letter should provide the reasons why that material should be received *in camera* and include a copy of the submission with the proposed in camera portions highlighted.

For the IPC to agree to receive material in camera, it must be information that:

- if revealed would result in the disclosure of some or all the details of the disputed information in the record, or
- might itself be subject to an exception under the ATIPP Act.

If the IPC agrees to receive in camera evidence and arguments, it will be kept from the other parties and will not be revealed in the written report. The Registrar will inform the parties if the IPC's decision is to accept material on an in camera basis.

What if a party does not make a submission?

If any party does not make a submission by the date specified by the IPC, the inquiry may proceed and a decision may be made in the absence of any submission.

What is the sequence for submissions?

- The public body provides the initial submission. If the IPC considers it appropriate, the IPC may ask other parties to provide an initial submission. A party's initial submission should include its

argument about how the relevant sections of the legislation apply in the circumstances of their case and explain how the evidence supports its position.

- The applicant or third party provides a response submission. It should focus on the issues set out in the notice of inquiry and the information provided by the other parties in their initial submission.
- The parties that provided initial submissions are then given an opportunity to provide a reply submission. The reply submission must only reply to what is contained in the response submission.

The Notice of Inquiry sets out the date by which submissions must be received in the IPC's office. At any stage of the inquiry process, the IPC may request an additional submission from any party where necessary or desirable. Unsolicited supplementary or additional submissions will only be considered in exceptional circumstances.

Can I request an extension of time for providing a written inquiry submission?

The notice of inquiry will set out the date for receipt of the written inquiry submissions. If a party requires an extension of time for providing a submission, the party must send a letter to the Registrar at least three days before the due date for the submission. The letter should include the reasons for requesting an extension. The IPC will then decide whether to allow or refuse an extension of time to provide the submission. The Registrar will notify the parties of the IPC's decision.

How are submissions accepted and exchanged?

The Registrar accepts and exchanges submission on behalf of the parties.

The IPC accepts written submissions in all formats (i.e. mail, in-person, fax, and email). There are significant security risks however associated with the use of e-mail communication so we strongly recommend that you encrypt e-mail submissions. Please contact our office if you require additional information about how to encrypt documents. Submissions should be addressed to:

Attention: Registrar
Office of the Information and Privacy Commissioner
Suite 201 – 211 Hawkins Street
Whitehorse, YT Y1A 1X3

Email: info@ombudsman.yk.ca
Fax: 867-667-8469

How do I make a preliminary objection?

A party who wants to make a preliminary objection must direct their objection to the IPC. The notice of inquiry specifies the date by which any preliminary objections must be made to the IPC. The objections must be provided in writing. The party objecting should state the objection(s) and include any relevant supporting information. Before making a decision, the IPC will decide whether to give the other parties an opportunity to make representations. The IPC will make a decision about the objection(s) before proceeding further with the review. The IPC will provide her decision in writing to the parties.

Who has the burden of proof in an inquiry?

Section 54 of the ATIPP Act sets out the burden of proof in an inquiry.

Where a public body has decided to refuse access to records or information that relates to a third party:

- if the record contains **personal information**, then it is up to the **applicant** to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy
- if the record contains any information **other than personal information**, then it is up to the **third party** to prove that the applicant has no right of access to the information or record. For example, where there is information that may be harmful to business interests of a third party, it would be up to the third party to prove that the applicant has no right of access.

In all other cases, it is up to the **public body** to prove that the applicant has no right of access to the information or record.

If the inquiry concerns an extension of time to respond or a fee waiver, it is up to the **records manager** to prove that the extension or fee is justifiable.

The ATIPP Act is silent on the burden of proof regarding requests for corrections or complaints made about the collection, use and disclosure of personal information by a public body contrary to the ATIPP Act. When conducting the inquiry, the IPC will decide which party bears the burden of proof for these issues.

How should a public body prepare the records for the IPC?

Paragraph 53 (1)(b) of the ATIPP Act authorizes the IPC to require the public body to produce the records in issue for her examination. In special circumstances, the IPC may agree to an onsite examination of the records.

The Notice of Inquiry specifies the record(s) and the date by which the public body must provide the

record(s) to the IPC. The public body is required to provide an unredacted copy of the record(s). The record(s) must be submitted with the public body’s initial submission, in a separate envelope marked “Records at Issue (For IPC Only Not Exchanged Amongst the Parties.)”

Each record must be marked with a number. If a record consists of more than one page, the pages must also be numbered. The Information that has been severed or the pages withheld must be clearly highlighted or underlined. Highlighting must be done in a way that leaves severed and refused portions legible to the IPC. The information must not be obscured by any markings. The exceptions relied on to sever information or refuse a record must be clearly marked immediately next to the information that was severed or adjacent in the margins in the record.

The public body should attach to the records a **Schedule of Records** identifying:

- the record number;
- the type of record;
- creation date of record;
- who the record is from and to;
- the number of pages within that record. Number those pages accordingly (See example)
- whether the record is severed (separated or obliterated) (“S”) or refused (withheld entirely) (“R”); and,
- the exception(s) claimed for each record.

Because the schedule of records is provided to the other parties, the public body should not include any information that the public body seeks to withhold from the other parties.

Schedule of Records

A Schedule of Records should follow this format.

Record #	Type of Record	Date of Record	From	To	No. of Pages	Severed (S) or Refused (R)	Exceptions Claimed
1	Email	6/1/2018	SD	BT	5 pages 1.1, 1.2, 1.3, 1.4, 1.5	S	s. 25(1), 25(4), s.16(1)(e)
2	Attachment to	5/14/2018	SD	BT	2 pages 2.1, 2.2	S	s. 25(1), 25(2)
3	Cabinet Minute	6/7/2018			3 pages 3.1,3.2,3.3	R	s. 15(1)(a)

Why does the IPC publish reports?

The IPC reports publishes reports on our website for educational purposes. To protect individuals' privacy names and other identifying personal information is removed from the report. The names of public bodies and parties who are businesses or corporate bodies are published in the report.

What if the public body does not follow the recommendation(s) of the IPC?

An applicant may appeal to the Yukon Supreme Court a decision by a public body to not follow the Information and Privacy Commissioner's recommendation(s) or a determination by the Information and Privacy Commissioner that the public body is authorized or required to refuse access to all or part of the record. You must initiate your appeal within thirty days after receiving the public body's decision to follow/not follow any recommendation(s).

Where can I get more information?

For any questions about the inquiry process, please contact the Registrar of Inquiries.

Office of the Information and Privacy Commissioner
Suite 201, 211 Hawkins Street
Whitehorse, Yukon Y1A 1X3

Ph: 867-667-8468 ext. 2 Toll Free: 1-800-661-0408 ext. 8468

The Office is open between 8:30 A.M. and 4:30 P.M. from Monday to Friday.

This document was prepared to assist the public and public bodies subject to the Access to Information and Protection of Privacy Act (ATIPP Act) prepare for an inquiry conducted by the Information and Privacy Commissioner. This document is for administrative purposes only and is not intended, nor is it a substitute for legal advice. As this document is used for administrative purposes, it is subject to change without notice.

Glossary

Affidavit: A written statement of facts made under oath. Affidavits are a means of providing evidence. An affidavit must be affirmed or sworn before a Notary Public for the Yukon Territory.

Applicant: A person who makes a request under for access to a record the ATIPP Act. Also a person who makes a request for correction of their personal information in a record, or requests a review of the records manager's grant of an extension of time to respond to a request or a refusal to waive a fee.

Burden of Proof: The party with the burden of proof must convince the IPC of its case in order to be successful at the inquiry. In most cases, the Notice of Inquiry states which party bears the burden of proof.

Evidence: Information submitted to prove or to disprove a fact or allegation. This may include documents, physical evidence and oral or written testimony. Evidence received by affidavit is sworn evidence.

In Camera: In private. Evidence, arguments or records received in private are considered to be in camera.

Inquiry: The second stage in the review process. An adjudicative process in which the IPC receives submissions from the parties, considers and decides all questions of fact and law in relation to the issues for inquiry and disposes of the issues in a written report.

Party: The person who requested the review, the public body, and a third if applicable.

Public Body: An organization or entity that is subject to the ATIPP Act. Public bodies include departments, secretariats or other similar executive agencies of the Government of Yukon, boards, commissions, foundations and corporations that are agents of the Government of Yukon and those organizations listed in Schedule A of the ATIPP Act.

Mediation: The first stage in a request for review. The IPC authorizes a mediator to try to settle the issues for review. Mediation may succeed in settling the issue(s), reducing the number of records in dispute, clarifying issue(s) and help the parties better understand the ATIPP Act. If the matter cannot be totally settled in mediation, the IPC may conduct an inquiry.

Records Manager: A member of the public service designated as the "records manager" for the purposes of the ATIPP Act. The records manager has authority to extend the timelines for a response and to decide whether to waive all or part of the fees associated with a request.

Registrar of Inquiries: The IPC staff member responsible for all administrative aspects of inquiries.

Representations: Information provided to the IPC by a party about the issue(s) for inquiry. Representations are usually made in writing by way of a submission (defined below).

Review: An Applicant can request the IPC review certain decisions of the public body or records manager. Reviews proceed in two stages. When the IPC receives a request to review a decision, most cases proceed to mediation. If the issue(s) are not completely settled in mediation, the IPC can decide to proceed to the inquiry stage of a review.

The ATIPP Act authorizes the IPC to review the following.

- a refusal by a public body to grant access to a record,
- a decision by a public body to separate or obliterate information from a record,
- a refusal by a public body to correct or annotate a record,
- a decision by a public body to release a third party's personal or business information,
- a complaint that a public body improperly collected, used, or disclosed personal information,
- a decision of the records manager to extend the time limit for responding to a request for access to records,
- a decision of the records manager to refuse to waive a part or all of the fee for processing a access request,
- a decision by the records manager to declare a request for access to a record abandoned.

Submission: The written argument and evidence in support of a party's position provided to the IPC.

Third party: In relation to a request for access to a record or information or for correction of personal information, means any person, group of persons or organization other than the person who made the request or the public body.