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Building *Nunavut* Together
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Bâtir le *Nunavut* ensemble

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Department of Executive and Intergovernmental Affairs

Kavamaliqiyikkut

Ministère de l'Exécutif et des Affaires Intergouvernementales

ATIPP Manual Part 3: The Information and Privacy Commissioner

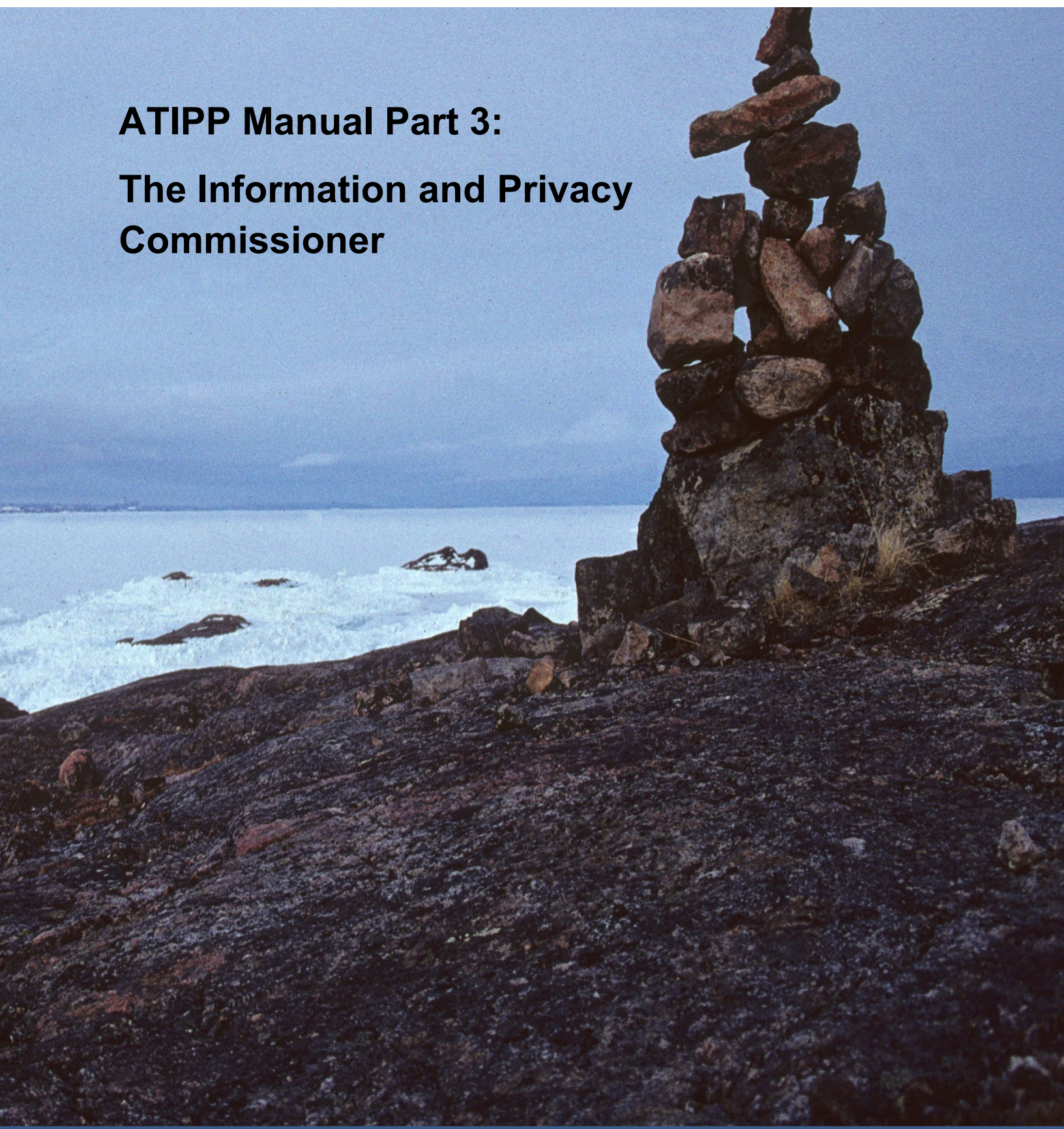


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1—Introduction



1.1 About the ATIPP Manuals

This manual is part 3 of a 4-part comprehensive guide on the *Access to Information and Protection of Privacy (ATIPP) Act* and Regulations for processing Access for Information requests. These manuals are meant to provide clarity, direction and practical examples to help you understand the *ATIPP Act*, however it is not meant to replace the *ATIPP Act* as a reference for ATIPP requests. All ATIPP Coordinators are expected to be familiar with the *ATIPP Act* and its provisions.

Part 1 covers the foundations of the *ATIPP Act*, the people and organizations involved in the ATIPP process, and the request process in general. Part 2 covers exemptions listed under the *Act* and how to apply them, part 3 covers the Information and Privacy Commissioner (IPC) and how they are involved in the ATIPP process, and part 4 covers the assessment of fees for ATIPP requests.

However, these manuals do not cover issues related to protecting privacy outside of ATIPP requests, such as privacy breaches or how to do Privacy Impact Assessments. For these and other privacy issues, please see the Privacy Management Manual document. These manuals also don't deal with information that is outside of the scope of the *ATIPP Act*, such as court records or legislative assembly records.

If you are looking for a short, step-by-step guide to processing an ATIPP request, please see the *ATIPP Processing Guidelines*. For other ATIPP-related documents, please see the ATIPP Intranet page or the *Access to Information and Protection of Privacy* folder on the V-drive.

1.2 Definitions

There are many terms and acronyms surrounding the *ATIPP Act* and ATIPP requests. These are some of the most frequently used ones:

- *Applicant*: The person or organization that is making an ATIPP request.
- *ATIPP Act* (or the 'Act'): Nunavut's *Access to Information and Protection of Privacy Act*. The law that states that people have a right to access information held by the Government of Nunavut and other public bodies, and lays out how privacy must be protected. This is sometimes referred to as "*ATIPPA*".
- *ATIPP Coordinator*: An employee of a public body who is responsible for handling ATIPP requests for their public body. They are also often responsible for privacy related issues such as privacy breaches or privacy impact assessments. The ATIPP coordinator role may be a dedicated role or something done on the corner of an employee's desk.
- *ATIPP Regulations* (or the '*Regulations*'): Nunavut's *Access to Information and Protection of Privacy Regulations*. Last updated in 2015, these are a specific legal document that clarifies many of the things mentioned in the *ATIPP Act* itself. This includes things like what fees can be charged, how requests for information can be made, the list of public bodies, and so on.

- *ATIPP request/request for information*: A request for any information held by a public body. The *ATIPP Act* has rules for how these requests must be handled by the public body.
- *Deputy Head*: This position is the highest ranking public servant in each department. The name may change department to department but they are often referred to as the *Deputy Minister*. This position has certain authority delegated from the Minister and is ultimately responsible for all operations of a public body. They may need to be included at certain stages of the ATIPP process. It is important that discussions happen internally in each department regarding when this happens and when the Deputy Head is involved.
- *Executive Council*: The cabinet of Nunavut's territorial government.
- *Exemption*: One of several specific reasons why a public body may refuse to give out information listed in the *ATIPP Act*.
- *Head of the Public Body*: The Minister responsible for a department or public agency. The Head is ultimately in charge of everything ATIPP related, but usually formally delegates this responsibility to one or more ATIPP Coordinators and the Deputy Head of a public body.
- *Information and Privacy Commissioner (IPC)*: An independent official in charge of monitoring the Government of Nunavut and its public bodies to make sure access to information and privacy rights are being upheld. The IPC investigates possible privacy issues and, if an applicant requests, will review the decisions of a public body relating to an ATIPP request. The IPC is the subject of this manual.
- *Nunavut Court of Justice*: The consolidated Nunavut court. Following a review by the Information and Privacy Commissioner, if an applicant is unhappy with a decision made by a public body, they can appeal the decision to the court.
- *Office of Primary Interest (OPI)*: The division or person within a public body who likely has the records being requested.
- *Personal information*: Information about someone that can be identified to them specifically. Personal information is defined in section 2 of the *ATIPP Act* and includes:
 - a) The individual's name, home or business address or home or business telephone number,
 - b) The individual's race, colour, national or ethnic origin or religious or political beliefs or associations,
 - c) The individual's age, sex, sexual orientation, marital status or family status,
 - d) An identifying number, symbol or other particular assigned to the individual,
 - e) The individual's fingerprints, blood type or inheritable characteristics
 - f) Information about the individual's health and health care history, including information about a physical or mental disability,
 - g) Information about the individual's educational, financial, criminal or employment history, anyone else's opinion about the individual, and,
 - h) The individual's personal opinions, except where they are about someone else.
- *Public body*: Any department of the Government of Nunavut, as well all of the government-related organizations listed under Schedule A of the *ATIPP Regulations*.

- *Record*: Information in any form; written, photographed, videoed, or recorded in any other way.
- *Third party*: Another person or organization, who is not the applicant or a public body. Usually used in the context of ‘information about a third party’ or ‘third party review’.

1.3 About the Information and Privacy Commissioner

The Information and Privacy Commissioner (IPC) is an independent officer of the Government of Nunavut, established under the *ATIPP Act*. The IPC is one of several independent officers of the government, such as the Languages Commissioner of Nunavut, the Ethics Commissioner, or the Representative for Children and Youth. Broadly speaking, these positions operate independently from the government and do not take direction from any government position.

The IPC and their office are funded directly from the Legislative Assembly of Nunavut itself and as such are not part of any government department or public body. The general purpose of the IPC is to safeguard the *ATIPP Act* by reviewing decisions made by public bodies that relate to the *ATIPP Act*, and generally making sure the *Act* is being followed appropriately. The *Act* defines the duties of the IPC as well as their responsibilities.

The IPC and any employees of the Office of the IPC are not liable under the *Act* for anything they do or do not do in good faith as part of their job.

Sections 28 through 36 of the *ATIPP Act* given the IPC their power and authority for reviewing the decisions of public bodies under the *ATIPP Act*, but they also have powers and authority related to Protection of Privacy under part 2 of the *Act*.

1.4 Appointment and dismissal

The IPC is appointed directly by the Commissioner of Nunavut, as recommended by the legislative assembly. IPCs are appointed for five-year terms, and can stay on for up to six months if they are not reappointed and a successor is not found in that time period.

The IPC can resign at any time by notifying the Speaker of the legislature, and they can be removed or suspended by the Commissioner of Nunavut. If needed, the Commissioner of Nunavut can appoint an acting IPC.

1.5 Mandate, powers, and responsibilities

Discretionary Reports: Section 67 of the *ATIPP Act* gives the IPC the ability to investigate how the *Act* is being implemented, gather information and feedback on how the *Act* functions and changes that could be made to it, as well as comment on the privacy implications of proposed legislation or government programs. Some of these reports are published on the IPC’s website, but many of them are made directly to the public body responsible. Some of these discretionary reports are summarized in the IPC’s annual report.

Mandatory Reviews and reports: One of the main functions of the IPC is their ability to review decisions made by a public body that relate to the *ATIPP Act*. Under section 34 of the *ATIPP Act*, the IPC has the ability to require a public body to give them any records the IPC thinks are relevant to that review. Refusal to comply with this lawful requirement is an offense under the *ATIPP Act*.

IPC Annual reports: The IPC must give an annual report to the legislature on the previous year, covering the activities of the Office of the IPC as well as the implementation of the *Act* in that time. These reports generally have summaries of reviews undertaken by IPC, as well as general observations and recommendations regarding the operations of the *Act* and administration of this *Act* by public bodies.

Government of Nunavut Annual Report: The Department of Executive and Intergovernmental Affairs responds to the general recommendations and observation in the IPC's annual reports in their own, discretionary, annual report.

Delegation: The IPC also has the ability to hire and delegate their powers to another person, who is part of the Office of the IPC. The IPC, as with any worker who deals with the *ATIPP Act*, must take an oath of confidentiality to not reveal any information they learn unless it is allowed by the *Act*.

1.6 Advisory and monitoring role

Outside of their legal requirements, the Information and Privacy Commissioner has the ability to proactively do or commission research into how the *Act* is being implemented. The IPC could, for example, do a survey on public awareness of the *ATIPP Act*, ask media outlets how frequently they use the *ATIPP* process to request information, or study systemic delays in *ATIPP* requests.

The IPC also offers their advice to public bodies on relevant issues. This usually takes the form of consulting on Privacy Impact Assessments and proposed legislation.

1.7 Power to disregard requests

Section 53 gives the Information and Privacy Commissioner the ability to allow public bodies to not respond to an *ATIPP* request that:

- a) *is frivolous or vexatious;*
- b) *is not made in good faith;*
- c) *concerns a trivial matter;*
- d) *amounts to an abuse of the right to access; or*
- e) *would unreasonably interfere with the operations of the public body because of its repetitious or systematic nature.*

Access to information is a right: this is an important part of the IPC's role as the guardian and watchdog of the *ATIPP Act*. Requests to disregard a request are rarely accepted; however if a public body wants to ask the IPC for permission to do so, they should write a detailed letter explaining the situation and giving strong reasoning why the request should be disregarded (remembering that applicants have a right to access information). The public body should show that they worked with the applicant to the extent possible, and that they made every reasonable effort to assist them throughout the ATIPP Process.

It's important to remember that the purpose of the *ATIPP Act* is to give individuals a **right** to access information produced by public bodies, which means that the standard to disregard this right is applied narrowly and judiciously.

2—Reviews by the Information and Privacy Commissioner



2.1 Introduction

The right to an impartial review of decisions or actions of a public body is fundamental to guaranteeing access to information rights. The review mechanism ensures that these rights are interpreted consistently among public bodies and the purposes of the *ATIPP Act* are achieved.

This section describes the process of a review by the Information and Privacy Commissioner from how a review is initiated to the step before the IPC's review is released. As with other parts of the manual, it focuses on how it applies to an ATIPP coordinator.

This section covers both ATIPP request reviews and privacy breach reviews. These generally follow the same process, with differences on the time limit of the investigation and some other small differences. For that reason, this part of the manual will assume that the review is an ATIPP review and note any relevant differences between the two types when they appear.

2.2 Request for review

ATIPP reviews begin with an applicant requesting that the Information and Privacy Commissioner review the decision made by a public body. Reviews are, by law, done in private and they are done via written submission. The Applicant provides submissions as to why the decision of the public body was unfair, inaccurate or incorrect, and the public body provides submissions to justify why they made the decisions that they did.

Below are the categories of reviews that the Information and Privacy Commissioner undertakes:

- all or part of a record has been withheld from the applicant;
- the applicant is told that a record does not exist or cannot be found;
- the public body refuses to confirm or deny the existence of a record;
- the public body has not appropriately responded to the applicant within the 25 business day period (effectively a refusal to process the request);
- the applicant disagrees with the need to take an extension;
- a request to correct the applicant's personal information was denied;
- a third party wants to review the decision to give access to a record that affects them;
- the applicant believes that fees should be lessened or waived (section 14 of the *ATIPP Regulations*)

Reviews may go beyond the complaint of the applicant

Regardless of the reason a complainant initiated a review, the IPC may review additional matters or make recommendations on other issues that they come across during their analysis of facts and records.

The IPC must conduct a review, unless they believe that the request "*is frivolous or vexatious, is not made in good faith, concerns a trivial matter, or amounts to an abuse of the right to access*" (section 31).

The Office of the IPC has a Request for Review form on their website.

For privacy breach reviews, the review can also be initiated by the Office of the IPC itself, if they suspect that there has been a breach of privacy. The review process is the same, regardless of who initiates it. For more information on this process, please see the Privacy Management Manual.

Section 55(2) establishes that nobody is liable under the *Act* if they provide information to the IPC in good faith as part of a review. However, if they deliberately mislead, obstruct, or do not follow legal requirements (such as refusing to share documents) of the IPC or their Office, they can be charged with up to 6 months in jail and a fine up to \$5,000.

2.3 Time frame for review

The *ATIPP Act* states that the applicant must request a review by the IPC within 30 days of the decision of the head of a public body that they want the IPC to review. The IPC can allow for an extension of this time for any reason they see as reasonable.

Following the request by the applicant, the IPC has 180 days to complete a review and provide the public body and applicant with her recommendations.

2.4 Mediation

The Information and Privacy Commissioner frequently works with applicants and the public body to see if the process can be resolved outside of a formal request for review. This is a valuable step that can save everyone significant time and effort, and it is best to work with the IPC and the applicant to resolve the whole (or at least part of) the issue at this stage.

This is not a mandatory procedure and is at the discretion of the IPC.

2.5 Review process

When the review process begins, the Information and Privacy Commissioner will contact the ATIPP coordinator, asking them to provide certain documents to help the IPC in their investigation. These normally include:

- the original ATIPP request;
- the public body's written decision;
- any correspondence related to the request, issue, and/or decision;
- the exemption rationale;
- severed and unsevered copies of the records;
- supporting documentation such as a breakdown of the fee estimate, an explanation of time extension, or a justification for the refusal to correct personal information; and

- other issues, relevant copies of policies, procedures, any other internal documentation on the request, and the basis for the public body's position.

Under section 34 of the *Act*, the IPC can request from a public body any record that the *ATIPP Act* applies to and it must be given to them, including information that would be severed under the *Act*.

Justifying Decisions: The public body will also be asked to reiterate the reasons for the decision(s) in question. The justifications made in the exemption rationale and elsewhere should be clear and robust enough that no further explanation is necessary; however it may be useful to find legal precedent or previous IPC decisions and court decisions from Nunavut or other Canadian jurisdictions.

The applicant will also be asked to provide reasons why they believe that they are correct. Once this has been collected from both parties, each side will have a chance to respond to the other one. This exchange may happen a few times, depending on the complexity of the review and if the applicant is using a lawyer. Generally the public body provides at least two submission;

- An initial submission with the information requested by the Information and Privacy Commissioner; and,
- A second submission responding to the applicant's response to the public body's initial submission.

Confidential submissions: submissions to the IPC from the public body are generally provided to the applicant for response, but it is possible to make a **confidential** submission just to the IPC. It is important that you provide it separately from the general submission to her office and to mark it as confidential in **red ink or font**.

The Records do not speak for themselves:

In submissions to the IPC, ATIPP Coordinators are encouraged to provide full and detailed explanations as to why a decision was made. You should not rely on the IPCr to understand why you've made a decision to sever information from release based on the records alone. You should provide as much information as possible, including:

- the page number where the information was severed;
- why the information meets the criteria in the Act for exemption;
- why the exemption is necessary under the circumstances and how the harm to the public body outweighs the applicant's right to access; and,
- other important context regarding the specific circumstances surrounding the request.

Following the collection of records and the exchange of ideas, the public body will likely have little contact with the IPC until their review report is released, unless their office requires more information.

2.6 Burden of proof

Section 33 of the Act lays out the burden of proof for ATIPP request reviews, according to the issue being reviewed. If the public body withheld information, other than the personal information of third parties, the public body must prove the applicant does not have a right to the information. The IPC, if not provided evidence or proof that the public body has made their decision to not release properly, will likely recommend either the public body provides additional information supporting the exemption, or will recommend release of the records.

For personal information about a third party, the burden of proof is on the applicant, who must provide reasons that they have a right to access the information. This being said, if you sever information under section 23(1), which requires the exemption of information from disclosure when it would be an unreasonable invasion of a third parties' personal privacy, the IPC may ask that you provide evidence that the information is:

1. about an identifiable individual; and,
2. release would be an unreasonable invasion of this individual's privacy.

The more work that you do to document and justify use of exemptions under the act during the administration of the request, the easier it is to provide to the IPC and, the less likely it will be that an applicant will request a review. Work up front will save you work in the long run.

For more information on the use of exemptions under the act, and justifying our discretion to use these exemptions, please refer to Part 2 of this Manual.

3—Information and Privacy Commissioner review findings



3.1 Introduction

The Information and Privacy Commissioner, following their review, will issue a review report with recommendations. While these recommendations are non-binding, the IPC publishes an annual report where she summarizes the findings of her recommendations for the year. These reports are presented to the Legislative Assembly of Nunavut. In addition, the IPC publishes her reviews and the public body's response to her reports on her website.

3.2 Report of the Information and Privacy Commissioner

Review Report: Once the Information and Privacy Commissioner has completed their review, they will release their findings and recommendations in a review report. This will be distributed to the person who asked for the review, the public body, and anyone else who was given notice of the review originally.

The Head of the Public Body (the Minister) Receives the Report: The IPC addresses the letter with the review report directly to the head of the public body under Schedule A of the ATIPP Regulations, in most cases this is the Minister responsible for the department. It is worthwhile for ATIPP Coordinators to reach out to this official during the review process, so they know that the letter is coming and that you are prepared to assist with responding.

In the report, the IPC will lay out the arguments of the public body and the applicant, note any relevant sections of the *ATIPP Act* or other legal points of reference, and then do a focused analysis of each decision of the public body. When the public body has severed information, the IPC will review each place that information has been withheld and recommend whether the information be released or not.

They will also review any other decisions and actions taken by the public body such as assessing fees, taking an extension, denying a request to correct information, examining the thoroughness of a search for records, and importantly, whether the public body has met its duty to assist the applicant.

The IPC will also issue other recommendations if they believe they are appropriate, such as calling for more training, recommending security or privacy reviews, or other situation-specific guidance.

3.3 Response by the public body

Section 36 states within 30 days of receiving a report by the IPC the head of the public body must reply to their office, the person who requested the review, and anyone else who received a copy of the request for review. This reply must include a response to each of the Information and Privacy Commissioner's recommendations, stating if the public body will follow them or not, as well as any other relevant decision that the head believes is appropriate.

When assisting with the drafting of this document, it is important to realize that this document will become a public record. Efforts should be made to reveal as little personal information of third parties as possible and to ensure that the public body fully justifies any decision to not follow the Information and Privacy Commissioner's recommendations.

It is important to take the recommendations seriously. There is nothing wrong with acknowledging that, upon a second review, the public body erred in its judgement and will now release additional information.

3.4 Review by Nunavut Court of Justice

Following the decision made by the public body, an applicant or third party can appeal the decision to the Nunavut Court of Justice. An applicant or third party who wants to appeal a decision must do so within 30 days after they receive the written notice of the decision.

If the appeal is regarding a decision to disclose or withhold information of a third party, the public body must, as soon as possible, notify the applicant or third party as appropriate.

Like the Information and Privacy Commissioner, the court can require a public body give them any record that falls under the *ATIPP Act* so that the court can examine it.

The court's decision is final and binding, and it will issue a ruling to the public body on whether or not they must follow certain courses of action including:

- Following a recommendation of the Information and Privacy Commissioner,
- Releasing records previously not released, and
- Other orders the Justice responsible for the review deems appropriate.

Notice that a review by the Nunavut Court of Justice has been initiated will be served on the Department of Justice on either the Director of the Legal and Constitutional Law Division or the Minister of Justice. The Legal and Constitutional Law Division will be the lead on the file. It is important that you work with them and provide any information requested of you during this process.

Appendix A – What a Normal Review (non-privacy breach) Will Look Like:

