



## Yukon Ombudsman

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BY HAND

January 26, 2010

The Honourable Ted Staffen,  
Speaker of the Legislative Assembly  
and Chair of the Select Committee  
on Whistle-blower Protection  
P.O. Box 2703  
Whitehorse, YT Y1A 2C6

Dear Mr. Staffen:

### **Re: Whistle-blower Protection Legislation**

Further to my request of December 19, 2009, I look forward to attending a meeting of the Select Committee on Whistle-Blower Protection (Committee) on January 27, 2010. As the Committee is currently receiving written submissions regarding whistle-blower protection legislation, and in preparation for our discussion, I am providing the following comments.

Most of the central issues in the Discussion Paper do not relate to the function or responsibilities of my positions, so I have not responded to them. However, in my capacity as Ombudsman and Information and Privacy Commissioner I can provide the following general commentary as it relates to the *Ombudsman Act* and *Access to Information and Protection of Privacy (ATIPP) Act*, at this time.

The Committee's role, as set out in the Discussion Paper, is "to assess the central issues and gather views about what should be included in such a bill and report those views to the Legislative Assembly." Essentially the Committee is trying to answer the questions – should the Yukon have whistle-blower protection legislation and, if so, what form should it take?

In general, I support the development of an effective whistle-blower protection regime, in the form of a stand alone Act and/or amendments to current legislation, that would

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afford protection from reprisals to individuals who disclose misconduct or a wrongdoing, in the public interest. A small jurisdiction like the Yukon is particularly susceptible to conflicts of interest which may constrain an individual's ability to take action or make a disclosure of a misconduct or wrongdoing without protection from reprisals. In my view, it is essential that any whistle-blower protection regime include an independent body to which an allegation can be brought in order to facilitate disclosure and investigation and ensure accountability.

The Manitoba *Public Interest Disclosure (Whistle-blower Protection) Act* has the broadest scope of such legislation in Canada. The Manitoba Act regulates government departments and bodies as well as other designated publicly funded bodies and organizations as set out in a Schedule. It also provides protection from reprisals for any person who makes a disclosure of a misconduct or wrongdoing regardless of whether they are a government employee, employed by the private sector, or a person contracting with government. A whistle-blower protection regime modeled on the inclusive Manitoba legislation would serve the Yukon public well.

### **Yukon Ombudsman Act**

The Committee's Discussion Paper suggests that the *Ombudsman Act* may already be an avenue for protecting individuals, including employees, who expose certain actions. This is incorrect. One of the limitations of the *Ombudsman Act* is that a complainant must be personally aggrieved (section 11(2)). In addition, the Ombudsman may refuse to investigate a complaint where the subject matter of the complaint primarily affects a person other than the complainant and the complainant does not have sufficient personal interest in it. (section 14(b)). By definition, a whistle-blower disclosure is one in which there is a public interest and unless it was a matter in which the whistle-blower was also personally aggrieved, I would not have jurisdiction to investigate.

In addition, the *Ombudsman Act* lacks a provision for the Ombudsman to conduct an 'own motion' investigation into a matter of administration affecting the public interest. As a result, the Ombudsman process cannot be responsive to a general complaint about, for example, gross mismanagement or maladministration within the public sector. It is crucial in the contemplation of whistle-blower protection legislation that these types of wrongdoing not be excluded from its scope.

The Model Ombudsman Act<sup>1</sup>, upon which many jurisdictions model their Ombudsman legislation, recommends that all such laws include a provision prohibiting any reprisals or benefits, in connection with a complainant's employment, for having

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<sup>1</sup> United States Ombudsman Association (USOA)

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launched or participated in any Ombudsman investigation. The Yukon *Ombudsman Act* does not include such a protection. The risk of retaliation by an employer has, in the past, been a deterrent for certain complainants to come forward.

### ***Yukon Access to Information and Protection of Privacy Act***

The Committee's Discussion Paper makes reference to the fact that the Yukon ATIPP Act deals with disclosure but does not address protecting those who disclose information. To be clear, the ATIPP Act does not authorize disclosure, by an individual, of information obtained through the course of their employment or otherwise. The ATIPP Act governs the actions of public bodies, not individuals.

Many similar access and privacy laws across Canada authorize disclosure of records or information in the public interest, which in some circumstances may assist whistle-blower type reporting. However, the Yukon ATIPP Act does not have a 'public interest' provision.

Regardless, the Yukon ATIPP Act has been designed for a specific purpose and does not contemplate whistle-blower type disclosures, investigations or protections.

The purpose of the Yukon ATIPP Act is to make public bodies more accountable to the public while balancing the right of public access to information and the responsibility of protecting individuals' personal privacy.

It is important that a whistle-blower protection regime respects the intent of the ATIPP Act while providing for specific disclosures and protections.

### **Role of the Yukon Ombudsman and Information and Privacy Commissioner**

The function of the Ombudsman is to provide independent, impartial investigation and assessment of complaints about government actions, and to recommend corrective measures where appropriate. Likewise, one of the functions of the Information and Privacy Commissioner is review of government decisions pursuant to the ATIPP Act. Similar oversight functions have led the three Canadian provinces (Manitoba, New Brunswick and Nova Scotia) that have passed whistle-blower protection legislation to vest some of the responsibilities under each of their Acts with their Ombudsman. Should such an approach be considered in the Yukon, I expect to participate in discussions when that decision is being made.

In addition, it is my responsibility under the ATIPP Act to comment on the implications for access to information or for protection of privacy of a proposed

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legislative scheme (section 42(c)). I will therefore be providing comment on any draft whistle-blower protection legislation in that context.

As noted above, the Ombudsman and Information and Privacy Commissioner has an essential role in promoting fairness, openness and accountability in public administration. As such, I will make myself available to provide further, more specific commentary should details regarding the scope and process of the legislation be developed.

I look forward to our meeting for a more fulsome discussion of these issues.

Yours truly,

ORIGINAL SIGNED BY



Tracy-Anne McPhee  
Ombudsman

TAM/cbl

cc. Select Committee Members  
Floyd McCormack, Clerk of the Assembly

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