

## CHAPTER 5

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### INVESTIGATIONS AND COURT REVIEWS

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### SECTION 89 Definitions

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**89** In this Part

“access to information complaint” means a complaint made under

- (a) section 49(refusal of access request),
- (b) subsection 54(4) (determination of cost estimate),
- (c) subsection 56(3) (refusal to grant waiver),
- (d) subsection 58(2) (determination of abandonment of access request),
- (e) section 61 (third party complaint),
- (f) subsection 62(5)(grant of extension to head), or
- (g) section 66 (head’s response to access request)

“complainant”, in respect of a complaint, means

- (a) in the case where an individual files the complaint on behalf of another individual in accordance with subsection 118(1), the individual on whose behalf the complaint is filed, or
- (b) in any other case, the person who files the complaint;

“complaint” means any of the following filed with the commissioner in accordance with section 90:

- (a) a personal information correction complaint,
- (b) a privacy complaint,
- (c) an access to information complaint,
- (d) a complaint made under subsection 118(3) (determination of unreasonable invasion of minor’s privacy);

“Court” means the Supreme Court;

“investigation” means an investigation by the commissioner in accordance with Division 2 into

(a) complaint, or

(b) in the absence of a complaint, the decision or matter referred to in a notice provided under subsection 94(2);

“investigation report”, in respect of a complaint, means the report a copy of which is provided by the commissioner under paragraph 101(b) after completion of the investigation into the complaint;

“personal information correction complaint” means a complaint made under section 36;

“privacy complaint” means a complaint made under section 37;

“recommendation” means a recommendation set out in an investigation report;

“respondent” means

(a) in the case of an access to information complaint made under section 49, or subsection 54(4), 56(3) or 58(2), the access and privacy officer,

(b) in the case of any other type of complaint, the head of the public body to whom the complaint relates,

(c) in the case of an investigation conducted in the absence of a complaint under subsection 94(1), the person who would be the respondent under paragraph (a) or (b) if a complaint were filed in respect of the decision or matter that is the subject of the investigation, or

(d) in the case of an application to Court, the person named as the respondent in the application.

## DIVISION 2 – COMPLAINTS AND INVESTIGATIONS

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### SECTION 90 Filing a complaint

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This provision establishes the process for privacy complaints under Part 2 of the Act and access complaints under Part 3. Definitions for this part of the Act are from **section 89** of the Act.

**“ACCESS TO INFORMATION COMPLAINT”** means a complaint under section/subsection:

- 49 (refusal of access request),
- 54(4) (determination of cost estimate),
- 56(3) (refusal to grant waiver),
- 58(2) (determination of abandonment of access request),
- 61 (third party complaint),
- 62(5) (grant of extension to head),
- 66 (head’s response to access request).

This provision establishes timelines for individuals who have made an access (ATIPP) request and want to request an investigation by the Information and Privacy Commissioner (IPC). This section also states that an individual has requested a court to review the decision of a **“HEAD”**, cannot make a complaint to the Commissioner. This section also requires a **“THIRD PARTY”** to request an investigation, 5 business days before the response date of the ATIPP request.

**“COMPLAINANT”** means in the case where an individual files the complaint on behalf of another individual in accordance with subsection 118(1), the individual on whose behalf the complaint is filed, or in any other case, the person who files the complaint.

A **“COMPLAINT”** means any of the following:

- A personal information correction complaint,
- A privacy complaint,
- An access to information complaint,
- A complaint made under subsection 118(3) – determination of unreasonable invasion of minor’s privacy.

**“COURT”** means the Supreme Court of Yukon.

**“INVESTIGATION”** means an investigation by the Commissioner in accordance with Division 2 into a complaint, or in the absence of a complaint, the decision or matter referred to in a notice provided under subsection 94(2).

**“INVESTIGATION REPORT”** in respect to a complaint, means the report a copy of which is provided by the Commissioner under paragraph 101(b) after completion of the investigation into the complaint.

**“PERSONAL INFORMATION CORRECTION COMPLAINT”** means a complaint made under section 36.

**“PRIVACY COMPLAINT”** means a complaint made under section 37.

**“RECOMMENDATION”** means a recommendation set out in an investigation report.

**“RESPONDENT”** means:

- in the case of an access to information complaint made under section 49, 54(4), 56(3) or 58(2) the Access and Privacy Officer,
- in the case of any other type of complaint, the head of the public body to whom the complaint relates,
- in the case of an investigation conducted in the absence of a complaint under subsection 94(1), the person who would be the respondent under paragraph (a) or (b) if a complaint were filed in respect of the decision or matter that is the subject of the investigation, or
- in the case of an application of Court, the person named as the respondent in the application.

**Subsection (1)** establishes timelines for a complainant wanting to request an investigation by the Commissioner. This provision also disqualifies an individual from making a complaint to the Commissioner if they have already requested a court to review the decision of a head.

**90(1)** Subject to subsection 106(2), a person who has a right under this Act to make a complaint, and who wishes to have the complaint investigated by the commissioner, must file the complaint.

**Subsection (1)(a)** requires a third party to request an investigation 5 business days before the response date of the ATIPP request.

**Note:** This provision does not apply to confidential third party business information (**section 69**) as they do not have a right to request a review should a head decide to disclose such information if it is deemed to be in the public interest under **section 82**.

**90(1)(a)** in the case of an access to information complaint made under section 61 (third party complaint), at least five business days before the response date for the access request to which the complaint relates; or

**Section (1)(b)** requires a complaint to be filed 30 business days after the individual is aware of the matter to which they wish to complain about.

**90(1)(b)** in the case of any other type of complaint, not later than 30 business days after the day on which the complainant is provided with notice of, or becomes aware of, the decision or matter that is to be the subject of the complaint.

**Section 90(2)** allows the Commissioner to accept a complaint that falls outside of the time identified.

**90(2)** The commissioner may accept a complaint for filing despite the expiry of the time provided for filing of the complaint under paragraph (1)(b), if satisfied that the complainant's inability to file the complaint within the time provided was because of circumstances beyond the control of the complainant.

### Filing a complaint

Section 90 of the ATIPP Act provides that a person who has made an ATIPP request, also has the right to ask the Information and Privacy Commissioner (IPC) to investigate a complaint, decision, or failure to act (on the part of the head of a public body) as it relates to the request in question (**section 65(1)**).

Third parties have the right to ask the Information and Privacy Commissioner to review the decision of a public body to provide access to records where disclosure might be an unreasonable invasion of their personal privacy under **section 70**, or might harm their business interests under **section 77**. If the public body decides to grant access in response to a request under Part 3 of the Act, a third party that has been given notice under the Act may file a complaint before any records or parts of records are disclosed (**section 61**).

A person who believes that his or her personal information has been collected, used or disclosed in contravention of Part 2 of the Act may also ask the Commissioner to investigate the matter (**section 90**).

The right to an impartial review of decisions or actions of a public body is fundamental to guaranteeing access to information and protection of privacy rights. The review mechanism ensures that these rights are interpreted consistently among public bodies and the purposes of the Act are achieved. The Commissioner's reports summarize the issues, arguments, findings and may provide recommendations and/or guidance to public bodies regarding their compliance with the Act.

Certain matters that may be the subject of a request for review can also be grounds for a complaint to the Commissioner under **section 49** of the Act. These are:

- a decision to extend the time limit under **section 62** for responding to a request;
  - the amount of a fee charged or the refusal to waive all or part of a fee under **section 55**;
  - a refusal to make a correction to personal information, as requested under **section 36**;
- and

- the collection, use or disclosure of personal information in contravention of Part 2 of the Act under **section 37**.

## REQUESTING A REVIEW

**Section 90** of the Act sets out the process for requesting a review.

A person must deliver a request for a review to the Commissioner within **30 business days** of receiving notification of a public body's decision. Third parties have **5 business days** in which to seek a review under **section 61**.

Failure by a public body to respond in time to a request for access to a record is treated as a decision to refuse access (deemed refusal) **section 64(6)**.

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### SECTION 91 Commissioner's decision to investigate or dismiss complaint

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This provision provides the Information and Privacy Commissioner (IPC) with the ability to accept and investigate the complaint, or dismiss the complaint. The Commissioner must decide within **10 business days** and notify all affected parties and provide the rationale.

**91(1)** Not later than 10 business days after the day on which a complaint is filed, the commissioner must

**91(1)(a)** decide whether to

**91(1)(a)(i)** investigate the complaint in accordance with subsection (2), or

**91(1)(a)(ii)** dismiss the complaint in accordance with subsection (3); and

**91(1)(b)** provide a notice of the decision, with reasons, to

**91(1)(b)(i)** the complainant,

**91(1)(b)(ii)** the respondent,

**91(1)(b)(iii)** if the commissioner decides to investigate a complaint made under section 66 in respect of the decision of a head to deny the complainant access to a third party's information, the third party, and

**91(1)(b)(iv)** any other person to whom the commissioner considers it would be

**91(2)** Without delay after the commissioner decides to investigate a complaint, the commissioner must commence the investigation unless the commissioner decides to

conduct a consultation with the complainant and the respondent in accordance with section 93.

**91(3)** The commissioner may dismiss a complaint if satisfied that

**91(3)(a)** the respondent has adequately addressed the subject matter of the complaint;

**91(3)(b)** the investigation is unnecessary, having regard to all circumstances relevant to the complaint, including that the subject matter of the complaint is, or already has been, the subject of an investigation or an investigation report;

**91(3)(c)** the complaint is frivolous or vexatious; or

**91(3)(d)** the complaint was made in bad faith.

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### **SECTION 92 Head's response to access request if third party complaint**

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This provision requires the head to not respond to an access request until the Commissioner has resolved or dismissed a complaint.

**Subsection 1** states that once a decision from the Commissioner's office has been made, the head is required to respond to the applicant not later than 5 business days.

**92(1)** Despite subsection 64(1), if the commissioner decides to investigate an access to information complaint made under section 61, the head whose response to the access request is the subject of the complaint must respond to the applicant in respect of the information to which the complaint relates

**92(1)(a)** not earlier than the day described in paragraph (2)(a) or (b), as applicable, and

**92(1)(b)** not later than five business days after that day.

**92(2)** For the purpose of subsection (1), the day is, as applicable

**92(2)(a)** the day on which the head is provided with the investigation report in respect of the complaint; or

**92(2)(b)** the day on which the head is provided with a notice of dismissal of the complaint in accordance with subparagraph 93(4)(a)(ii).

Under **subsection (2)(b)**, if the complaint is dismissed, the head can commence with the request.

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### **SECTION 93 Commissioner may conduct consultation with complainant and respondent**

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This provision enables the Commissioner to resolve the complaint informally through a mediation process known as **Informal Case Resolution (ICR)**.

Mediation must be completed in **60 days (maximum)**. Mediation is intended to help the public body and the person requesting a review arrive at a settlement, which may resolve matters at issue so that a formal (investigation) is not required. If mediation is failing or the Commissioner thinks an agreement will not result, the Commissioner can suspend the mediation process and open an investigation.

**93(1)** Subject to subsection (2), the commissioner may conduct a consultation with the complainant and the respondent for the purpose of resolving the complainant's complaint without an investigation by providing, not later than seven business days after the day on which the complaint was filed, a notice to each of them that explains the commissioner's intention to consult.

**93(2)** A consultation under subsection (1) may be conducted for a maximum period of 60 days, the first day of the period being the day on which the complaint to which the consultation relates is filed.

**93(3)** Subject to subsection (4), the commissioner may conduct a consultation under this section in any manner that they consider appropriate to resolve the matter that is the subject of a complaint.

**93(4)** The commissioner must

**93(4)(a)** without delay after a complainant consents to the dismissal of their complaint

**93(4)(a)(i)** dismiss the complaint, and

**93(4)(a)(ii)** provide to the complainant and the respondent a notice of the dismissal; or

**93(4)(b)** without delay after the commissioner makes a determination that continuing the consultation is not likely to result in the resolution of the matter to which the consultation relates

**93(4)(b)(i)** commence an investigation into the complaint, and

**93(4)(b)(ii)** provide to the complainant and the respondent a notice of commencement of the investigation.

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#### **SECTION 94 Commissioner may investigate in absence of complaint**

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This provision allows the Information and Privacy Commissioner (IPC) to conduct an investigation on matters to which an individual could complain about.

This provision is intended to allow the Commissioner to proactively resolve issues through an investigation. The Commissioner must decide to exercise this authority within one year after the matter arises, to notify the Head of the public body of the issue to be investigated and reasons why an own motion investigation is practicable in the circumstances.

**94(1)** Subject to subsection (2), the commissioner may conduct an investigation into a decision or matter that the commissioner reasonably believes could be the subject of a complaint only if the commissioner

**94(1)(a)** is satisfied that an investigation into the decision or matter in the absence of a complaint is practicable and warranted; and

**94(1)(b)** provides the notice described in subsection (2) not later than one year after the day on which the decision was made or the matter arose.

**94(2)** Before the commissioner conducts an investigation under subsection (1), the commissioner must provide to the respondent, and to any other person to whom the commissioner considers it would be appropriate to provide a notice, a notice that

**94(2)(a)** states

**94(2)(a)(i)** the commissioner's intention to conduct an investigation in respect of a decision or matter for which a complaint has not been filed, and

**94(2)(a)(ii)** the reasons why the commissioner is satisfied that an investigation into the decision or matter is practicable and warranted in the absence of a complaint; and

**94(3)** For greater certainty

**94(3)(a)** the provisions of this Division apply, with any necessary modifications, to an investigation conducted under this section;

**94(3)(b)** the commissioner is not to be considered the complainant in respect of an investigation conducted under this section.

The Commissioner may decide to conduct an audit of privacy protection in a program of a public body that holds personal information. The Commissioner's practice is to make all Investigation Reports and Privacy Audit Reports public. This is a method of reviewing a public body's protection of personal information to help in determining whether the public body is in compliance with the requirements of Part 2 of the Act. It also serves as a guide for remedial measures that may be necessary to adequately protect the personal information in its custody or under its control.

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## **SECTION 95 Commissioner's investigative powers**

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This provision provides clarity to the scope and content of the Information and Privacy Commissioner's investigation powers.

The Commissioner has all the powers of the court when conducting an investigation under **section 90**, or in giving advice and recommendations under **section 86(4)** of the ATIPP Act.

These include the power to compel witnesses to attend and answer questions at an inquiry, to compel records to be produced, to hold a person in contempt and to obtain assistance from law enforcement officers.

The Commissioner may require any record to be produced and may examine any information in a record, including personal information, whether or not the record is subject to the provisions of the Act (section 95(1)(c)). A public body must produce any record or copy of a record requested by the Commissioner within 10 business days of the request. Records must be produced despite any privilege of the law of evidence that might otherwise apply.

**95(1)** In conducting an investigation, the commissioner

**95(1)(a)** has the same power as is vested in the Court to summon a person to appear before the commissioner;

**95(1)(b)** has the same power as is vested in the Court to compel a person summoned under paragraph (a) to give oral or written testimony on oath;

**95(1)(c)** has the same power as is vested in the Court to compel a respondent to produce to the commissioner information or a record of any of the following types, if it is held by the public body to which the investigation relates and is relevant to the investigation:

**95(1)(c)(i)** information or a record that is not subject to a legal privilege,

**95(1)(c)(ii)** if the investigation relates to a complaint under section 66 and the subject matter of the complaint is a determination or decision referred to in paragraph 64(1)(b), information or a record that is subject to a legal privilege and that

**95(1)(c)(ii)(A)** if an access information summary exists for the access request to which the investigation relates, is referred to in the access information summary, or

**95(1)(c)(ii)(B)** otherwise, is information or a record that would be reasonably expected to be included in an access information summary as information identified as relevant to the access request if an access information summary had been prepared for the access request;

**95(1)(d)** has the same power as is vested in the Court to examine information or a record that is produced to the commissioner;

**95(1)(e)** may enter any premises occupied by a public body on satisfying any security requirements of the public body relating to the premises;

**95(1)(f)** may converse in private with any person in the premises entered under paragraph (e);

**95(1)(g)** may conduct interviews with the head or an employee of a public body that the commissioner reasonably believes may know or hold information relevant to an investigation;

**95(1)(h)** may receive and consider evidence of any other type that is relevant to the investigation, whether or not the evidence would be admissible in a proceeding before a court;

**95(1)(i)** may, in respect of a decision or matter under investigation, determine

**95(1)(i)(i)** each question of fact arising in relation to the decision or matter, and

**95(1)(i)(ii)** each question of law arising in relation to the decision or matter;

**95(1)(j)** if the commissioner considers that it is practicable and fair to do so in the circumstances, may join two or more complaints related to the same or similar decisions or matters for the purpose of conducting a single investigation into the complaints; or

**95(1)(k)** may administer oaths.

**95(2)** The commissioner must conduct each investigation in private.

The recommendations in **subsection 2** is to require these proceedings to be private due the sensitivity of information that is under investigation. This approach mirrors Alberta, Saskatchewan and Federal legislation.

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## **SECTION 96 Permission to make submissions**

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This provision clarifies that both the complainant and respondent can be represented by an agent during the investigation. The Commissioner has discretion to allow other persons to make submissions or reply to submissions provided.

**96(1)** During an investigation, the commissioner must permit the complainant and the respondent

**96(1)(a)** to make submissions to the commissioner in respect of each decision or matter that is the subject of the investigation; and

**96(1)(b)** to be represented by an agent during the investigation.

**96(2)** In respect of submissions made to the commissioner during an investigation, the commissioner may decide

**96(2)(a)** whether to permit a person, other than the complainant or respondent, to make submissions in respect of a decision or matter that is the subject of the investigation;

**96(2)(b)** whether to permit a person to make submissions in reply to submissions made by another person; and

**96(2)(c)** whether submissions are to be made orally or in writing.

**96(3)** A person who is permitted to make submissions under subsection (2) may do so through an agent.

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### **SECTION 97 Duty to produce information and records**

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This provision clarifies that the Commissioner has the power to compel the production of records. If records are requested, the respondent has 10 business days to produce the records.

**97(1)** Subject to subsections (2) and (3), a respondent must produce to the commissioner the information and records (or, if appropriate, copies of the information or records) that the commissioner compels the respondent to produce under paragraph 95(1)(c) not later than 10 business days after the day on which the commissioner provides to the respondent a written request for production that

**97(1)(a)** states the commissioner's authority for making the request;

**97(1)(b)** specifies the requested information and records; and

**97(1)(c)** specifies the date by which, in accordance with this section, the respondent must produce the information and records to the commissioner.

**Subsection 2** clarifies that the Commissioner can request records subject to legal privilege and a respondent is only required to produce information that they hold.

**97(2)** The duty of a respondent to produce information and records under subsection (1) applies

**97(2)(a)** only in relation to the information and records that the respondent, or an employee or delegate of the respondent, holds;

**97(2)(b)** despite any provision of any other enactment to the contrary; and

**97(2)(c)** in the case of information and records compelled under subparagraph 95(1)(c)(ii), despite any of the information or records being subject to a legal privilege.

**Subsection 3** allows the respondent to have the Commissioner physically examine the record if the respondent believes producing a copy for the Commissioner would result in the risk of the security of the record.

**97(3)** A respondent may, in substitution of the production of information or a record (or copies of the information or record) in accordance with subsection (1), provide the

commissioner with a reasonable opportunity to examine the information, record or copy if

**97(3)(a)** the respondent reasonably believes that producing or copying the information or record

**97(3)(a)(i)** in the case of information or a record that is subject to a legal privilege

**97(3)(a)(i)(A)** could result in a risk to the security of the information or record, or

**97(3)(a)(i)(B)** could reasonably be expected to result in privileged information being revealed to a person other than the commissioner or a delegate of the commissioner, or

**97(3)(a)(i)(B)(ii)** in the case of information or a record that is not subject to a legal privilege, could result in a risk to the security of the information or record; or

**97(3)(b)** producing or copying the information or record is not reasonably practicable, having regard to the nature of the information or record.

**Subsection 4** clarifies that all records must be returned to the respondent at the conclusion of the investigation.

**97(4)** On the conclusion of an investigation, the commissioner must return to the respondent all the information, records and copies that the respondent produced to the commissioner under this section.

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#### **SECTION 98 No waiver of privilege**

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This provision clarifies that legal privilege is not waived when a respondent provides legally privileged information to the Commissioner.

**98** The production of information or a record in accordance with subsection 97(1) does not constitute a waiver of any legal privilege to which the information or record is subject by the person who is vested with or claims the privilege.

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#### **SECTION 99 Evidence inadmissible**

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These provisions clarify that any evidence given in the course of an investigation is inadmissible against the person unless the information will be used to prosecute perjury, obstructing the Commissioner in the course of their investigation, or to request a court review of a decision made under this Act.

**99** Evidence given, disclosed or produced by a person during an investigation is inadmissible against the person in any proceeding other than

**99(a)** the prosecution of an offence under section 131 of the *Criminal Code* (Canada) (perjury) in respect of a statement made by a person under this Act;

**99(b)** an application to the Court under subsection 105(1) or 106(1);

An application to the Court may be made in accordance with the stated provisions under **section 105** Court review if recommendation rejected, and **section 106** Court review in absence of complaint.

**99(c)** the prosecution of an offence under subsection 121(5); or

This provision speaks to section 121 Offences.

**99(d)** an appeal of a decision in respect of a proceeding referred to in paragraphs (a) to (c).

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### **SECTION 100 Time limit for investigation**

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This provision clarifies that an investigation must be completed in 90 days. Any days used to complete mediation are not included in the calculation of the 90 days. An investigation can be extended for up to 60 days if the complainant agrees to the extension.

**100(1)** Subject to subsection (2), the commissioner must complete an investigation conducted in relation to a complaint not later than 90 days after the day on which the complaint is filed, unless the complainant agrees, in writing and before the expiry of the 90 days, to extend the investigation for a period not exceeding 60 days, the first day of that period being the 91<sup>st</sup> day after the day on which the complaint was filed.

This provision states an investigation by the Information and Privacy Commissioner must be completed within 90 days after receipt of the request for investigation.

The Commissioner may extend the period for the review for up to another 60 days with written consent from the applicant, before the end of the original 90 days. The Commissioner must notify all parties that there will be a review of the extension and provide an anticipated date for the completion of the review. The intent of the Act is to ensure that an independent investigation of decisions can take place, so, even if the process is not completed within the extended time limit, the Commissioner has the power to complete the inquiry.

**100(2)** If a consultation under section 93 is conducted in respect of an investigation, the period beginning on the day on which the commissioner provides the notice in accordance with subsection 93(1) and ending on the day on which the commissioner provides a notice in accordance with subparagraph 93(4)(b)(ii) is not to be included in the calculation of the 90 days described in subsection (1).

**100(3)** The commissioner must complete an investigation conducted in the absence of a complaint not later than 90 days after the day on which the commissioner provides a notice to the respondent in accordance with subsection 94(2).

See **section 93** of this Chapter for more information on mediation.

## INVESTIGATION IN THE ABSENCE OF COMPLAINT

The time limit for investigation is the same with or without complaint. The Commissioner has 90 days to complete an investigation, after the day in which the Commissioner provides a notice to the respondent. See **section 94** for more information about the Commissioner's power to investigate in absence of complaint.

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### SECTION 101 Investigation Report

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This provision requires the Information and Privacy Commissioner to complete their investigation report in 30 business days and requires the Commissioner to provide a copy to the parties involved in the complaint.

The Commissioner may provide the head of a public body with advice and recommendations on matters respecting the rights or obligations of a head under the Act.

**101** Not later than 30 business days after the day on which an investigation must be completed under section 100, the commissioner must

**101(a)** prepare a report that sets out, in respect of the subject matter of the investigation

**101(a)(i)** each determination of a question of fact or a question of law made by the commissioner,

**101(a)(ii)** the commissioner's reasons for each determination referred to in subparagraph (i),

**101(a)(iii)** based on the determinations referred to in subparagraph (i), each recommendation, if any, that the commissioner believes would adequately address the subject matter of the complaint if complied with by the respondent, and

**101(a)(iv)** the reasons for each recommendation referred to in subparagraph (iii); and

**Subsection (b)** requires the Commissioner to provide the report to the parties subject to the complaint.

**101(b)** provide a copy of the report to

**101(b)(i)** the complainant,

**101(b)(ii)** the respondent, and

**101(b)(iii)** any other person to whom a notice was provided under subparagraph 91(1)(b)(iii) or (iv), or subsection 94(2).

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**SECTION 102 Burden of proof**

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This provision outlines who the burden of proof lies with, depending on the circumstances and individual requesting the information.

**102** For the purpose of the commissioner's determination of a question of fact or question of law in respect of an investigation

**Subsection (a)** places the burden of proof on the complainant for complaints related to the correction of personal information.

**102(a)** in the case of an investigation into a personal information correction complaint, the complainant has the burden of proving that

**102(a)(ii)** the head of a public body failed to take any action under that subsection; or

**Subsection (b)** explains the how this provision places the burden of proof on the third party who does not want their personal information or non-confidential business information to be disclosed. That is, the third party must demonstrate that the applicant has no right of access to the record.

**102(b)** in the case of an investigation into an access to information complaint made under section 61 in respect of a head's intention to grant access to a third party's information, the third party has the burden of proving that a grant of access to their information would be harmful to them; and

The provision under **subsection (c)** clarifies that the burden of proof is on the respondent for any decision they made under this act.

**102(c)** in the case of an access to information complaint made under section 66 that relates to a determination or decision to withhold information or a record under paragraph 64(1)(b), the head who made the determination or decision has the burden of proving that the complainant has no right of access under this Act to the information or record.

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**SECTION 103 Duty of confidentiality**

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The provisions place an obligation on the Office of the Information and Privacy Commissioner's Office (OIPC) not to disclose any information provided in the course of an investigation. This includes ensuring reasonable security arrangements are in place to protect the information.

**103** Subject to paragraph 111(1)(d) and subsection 113(2), during an investigation or the preparation of a report under paragraph 101(a), the commissioner, a delegate of the commissioner and any other person acting under the direction of the commissioner

must not disclose to another person, and must take reasonable measures not to disclose to another person, information and records of the following types that they obtain, or of which they become aware, during the investigation:

**103(a)** generally excluded information;

This provision covers information such as judicial information and any information described under **section 38** of the Act.

**103(b)** information or a record to which access is prohibited under Division 8 of Part 3;

This provision covers information or a record to which access is prohibited under Division 8 of Part 3 (**section 67 to 71**) for example cabinet information.

**103(c)** information or a record to which the head of a responsive public body has decided to deny an applicant access under Division 9 of Part 3;

This provision covers information or a record to which the head of a responsive public body has decided to deny an applicant access under Division 9 of Part 3 (**section 72 to 81**) such as information subject to legal privilege;

**103(d)** information or a record the existence of which the head of a responsive public body has decided not to reveal in response to an access request in accordance with subsection 64(3).

This provision covers information or a record the existence of which the head of a responsive public body has decided not to reveal. Under this provision the Commissioner can neither confirm nor deny the existence of a record or information. Revealing the existence or non-existence of said record, would constitute a breach of their duty to confidentiality.

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## **SECTION 104 Response to investigation report**

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This provision establishes timelines to respond to the Commissioner's report and its recommendations.

**Subsection 1** states a respondent has 15 business days to notify the complainant and Commissioner if they will accept or reject the recommendations, including rationale if a recommendation was rejected.

**104(1)** Not later than 15 business days after the day on which an investigation report is provided to a respondent under subparagraph 101(b)(ii), the respondent must, in respect of each recommendation set out in the investigation report

**104(1)(a)** decide whether to

**104(1)(a)(i)** accept the recommendation in accordance with subsection (2), or

**104(1)(a)(ii)** reject the recommendation; and

**104(1)(b)** provide

**104(1)(i)(A)** their decision, and

**104(1)(i)(B)** in the case of the rejection of a recommendation, their reasons for the rejection and a statement notifying the complainant of their right to apply to the Court for a review of the decision or matter to which the recommendation relates, and

**104(1)(ii)** a copy of the notice to the commissioner.

**Subsection 2** states that if the respondent accepts a recommendation and is either the access to information officer or the head, they must comply with the recommendation in 15 business days or request an extension from the Commissioner.

**104(2)** If a respondent accepts a recommendation set out in an investigation report, the respondent must comply with the recommendation not later than

**104(2)(a)** if the respondent is the access and privacy officer, 15 business days after the day on which the notice of acceptance under subparagraph (1)(b)(i) is provided to the complainant; or

**104(2)(b)** if the respondent is the head of a public body

**104(2)(b)(i)** 15 business days after the day on which the notice of acceptance under subparagraph (1)(b)(i) is provided to the complainant, or

**Subsection 3** requires a request for an extension not later than 10 business days before the recommendation is to be implemented.

**104(3)** If the head of a public body reasonably believes that the public body is unable to comply with a recommendation in accordance with subparagraph (2)(b)(i), the head may, not later than 10 business days before the end of the period referred to in that subparagraph, make a written request to the commissioner for an extension of the time within which the head must comply with the recommendation.

**Subsection 4** requires the Commissioner to decide whether to grant an extension not later than 5 business days before the recommendation is to be implemented.

**104(4)** If the commissioner receives a request under subsection (3), the commissioner must, not later than five business days before the end of the period referred to in subparagraph (2)(b)(i)

**104(4)(a)** decide whether to

**104(4)(a)(i)** grant an extension of time that would permit, in the opinion of the commissioner, the public body to comply with the recommendation in a reasonable and cost-effective manner, or

**104(4)(a)(ii)** refuse to grant the extension; and

**104(4)(b)** provide a notice to the head and the complainant to whom the recommendation relates that

**104(4)(b)(i)** includes their decision with reasons, and

**104(4)(b)(ii)** if the commissioner grants an extension, specifies the date by which the respondent must comply with the recommendation under subparagraph (2)(b)(ii).

**Subsection 5** states that a recommendation is deemed to be refused if the respondent does not reply to the Commissioner within 15 business day or accepts a recommendation and does not implement it within 15 business days.

**104(5)** A respondent is considered to have rejected a recommendation in the following circumstances:

**105(5)(a)** the recommendation is set out in an investigation report but the respondent does not provide a notice in accordance with paragraph (1)(b) within the 15 business days described in subsection (1);

**105(5)(b)** the respondent accepts the recommendation but does not comply with it as required under subsection (2).

## DIVISION 3 – COURT REVIEW

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### SECTION 105 Court review if recommendation rejected

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This provision establishes timelines for a complainant to apply to a court to have a decision reviewed and allows both the minister responsible for this Act (Minister of the Department of Highways and Public Works) and the Information and Privacy Commissioner (IPC) to intervene in any case brought before a court. This provision requires a complainant to apply to a court if a respondent rejected a recommendation made by the commissioner within 30 business days.

“**COURT**” means the Supreme Court of Yukon.

“**COMPLAINANT**” means in the case where an individual files the complaint on behalf of another individual in accordance with subsection 118(1), the individual on whose behalf the complaint is filed, or in any other case, the person who files the complaint.

**105(1)** Subject to subsection (7), if a respondent rejects a recommendation under subparagraph 104(1)(a)(ii), or is considered to have rejected a recommendation under subsection 104(5), the complainant may apply to the Court for a review of the decision or matter to which the recommendation relates not later than 30 business days after

**105(1)(a)** if the respondent provided a notice of the rejection to the complainant in accordance with paragraph 104(1)(b), the day on which the respondent provided the notice;

**Subsection (1)(a)** requires that a court application needs to be made 30 business days from the date the complainant was notified that the head rejected the Commissioner’s recommendation.

**Subsection (1)(b)** requires if a notice was not provided to the complainant, this provision requires that a court application be made 30 business days from the date the respondent was required to have decided.

**105(1)(b)** if the respondent did not provide a notice of the rejection to the complainant in accordance with paragraph 104(1)(b), the day on which the respondent is considered to have rejected the recommendation under paragraph 104(5)(a); or

**Subsection (1)(c)** states if a recommendation was accepted by a respondent and not implemented within the required timeline, the court application has to be made within 30 business days from the date the recommendation was to be implemented.

**105(1)(c)** if the respondent provided a notice of acceptance to the complainant in accordance with paragraph 104(1)(b) but did not comply with the recommendation as

required under subsection 104(2), the day on which the respondent was required under subsection 104(2) to comply with the recommendation.

**Subsection 2** allows the minister responsible for this act to intervene in a court application.

**105(2)** The minister responsible for this Act may intervene in an application made under subsection (1).

**Subsection 3** allows the Commissioner to intervene in a court application.

**105(3)** The commissioner may intervene in an application made under subsection (1).

**Subsection 4** allows a court to require information/record to be produced and to examine it.

**105(4)** Despite any provision of an enactment and despite information or a record being subject to a legal privilege, the Court may, in a proceeding before it in respect of an application under subsection (1)

**105(4)(a)** require a person who holds the information or record for or on behalf of a public body to produce it to the Court; and

**105(4)(b)** examine the information or record produced.

**Subsection 5** clarifies that legal privilege is not waived for any documents requested to be produced by the court.

**“LEGAL PRIVILEGE”** means solicitor-client privilege, litigation privilege or any other type of legal privilege (including a privilege of the law of evidence).

**105(5)** The production to the Court of information or a record in respect of an application made under subsection (1) does not constitute a waiver of any legal privilege to which the information or record is subject by the person who is vested with or claims the privilege.

**Subsection 6**, these provisions place an obligation on the court to take reasonable measures to prevent the release of information under certain circumstances.

**105(6)** In a proceeding before the Court in respect of an application made under subsection (1), the Court must take reasonable measures to prevent the disclosure of information and records of the following types:

**105(6)(a)** general excluded information;

**105(6)(b)** information or a record to which access is prohibited under Division 8 of Part 3;

**105(6)(c)** information or a record to which the head of a responsive public body has decided to deny the applicant (to whom the proceeding relates) access under Division 9 of Part 3;

**105(6)(d)** information or a record the existence of which the head of a responsive public body has decided not to reveal in response to an access request (to which the proceeding relates) in accordance with subsection 64(3).

**105(7)** This section does not apply to a complainant who makes a complaint under subsection 54(4) or 56(3).

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### **SECTION 106 Court review in absence of complaint**

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This provision clarifies that a person must file an application to the court within 30 business days after receiving a notice of a decision made under this Act.

This provision enables a person to make a court application without having to request an investigation from the Commissioner. If a person makes a court application, they cannot request an investigation be done by the Commissioner.

**106(1)** Not later than 30 business days after the day on which a notice is provided to a person of a decision made under this Act that relates to or affects their access request or personal information, the person may apply to the Court for a review of the decision.

**106(2)** If a person makes an application under subsection (1), the person may not, despite having a right to do so under another provision of this Act, file a complaint under section 90 in respect of the decision that is the subject of the application.

**106(3)** Subsections 105(2), (4), (5) and (6) apply, with any necessary modifications, to an application made under subsection (1).

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### **SECTION 107 Disposition of application**

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This provision clarifies that the courts have the authority to take any action it considers necessary, including dismissing the court application.

**107** After hearing an application made under subsection 105(1) or 106(1), the Court may

**107(a)** make an order, in addition to or instead of any other order, directing the respondent to take any action that the Court considers necessary in the circumstances;  
or

**107(b)** dismiss the application.

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**SECTION 108 Costs**

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This provision clarifies how court costs will be incurred for the proceeding and by which party.

**108(1)** Subject to subsection (2), the costs of, and incidental to, all proceedings in respect of an application made under subsection 105(1) or 106(1) are to follow the event unless the Court orders otherwise.

**108(2)** The Court may order costs as follows:

**108(2)(a)** if the Court is of the opinion that the determination of a matter considered during its review of an application is in the public interest, the Court may award costs to the applicant even if the applicant is not successful in the result;

**Subsection (2)(a)** allows the court to award the cost to the applicant, even if they lose, if the court believes it is in the public interest to do so.

**Subsection (2)(b)** enables the court to award costs to the respondent if the application is frivolous or vexatious or is an abuse of the right of access.

**108(2)(b)** if the Court is of the opinion that the applicant's bringing of an application was frivolous or vexatious, or amounts to an abuse of the right of access to information under this Act, the Court may award costs to the respondent.