REPORT ON THE HUU-AY-AHT *FREEDOM OF INFORMATION & PROTECTION OF PRIVACY ACT*

July 17, 2015

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Independent Review Commissioner

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To the Executive Council of Huu-ay-aht First Nation:

Report of the Independent Review Commissioner for the Freedom of Information and Protection of Privacy Act

As Independent Review Commissioner under the Huu-ay-aht *Freedom of Information and Protection of Privacy Act* ("Act"), it is my honour to present to Executive Council my report on my review of the Act.

I was appointed as Independent Review Commissioner under the Act and my appointment was extended to July 20, 2015. Since my appointment, I have, as mandated by the Act, received input on the operation of the Act and have conducted research on the Act's operation. This is my written report on the Act's operation.

The Act shares many features of other First Nations freedom of information and privacy laws, as well as laws of other governments in Canada. It also has some important, and laudable, differences. This report identifies the Act's strengths while also identifying possible amendments. It also suggests ways in which citizens might better understand, and therefore exercise, their rights under the Act. This includes increasing their awareness of the reason for the existence of exemptions to the right of public access to personal information, privileged information, and other information.

My review has revealed that the Act has many commendable aspects to it and, in one important area, is ahead of most laws of this kind elsewhere in Canada. By requiring Executive Council to designate records that are publicly available, without a specific request for access under the Act, Huu-ay-aht is pro-actively able to make information available in a way that most other governments do not. The ability of the People's Assembly to expand the categories of records that are publicly available is also a valuable feature of the Act.

As Executive Council is aware, I am required to present this report at the first People's Assembly after is delivery to you, and look forward to arranging for this through Huu-ay-aht officials. I would also be happy to discuss any aspect of this report that Executive Council wishes to discuss.

It has been a great honour to be asked to do this review and I hope that this report is of value to Huu-ay-aht First Nation.

David Loukidelis QC
Independent Review Commissioner
Information and Privacy Commissioner for British Columbia, 1999-2010

INTRODUCTION

The Huu-ay-aht *Freedom of Information and Protection of Privacy Act* ("Act") came into force in 2012. It represents the desire of Huu-ay-aht for public administration and affairs to be conducted in an open and transparent manner. The Act calls for Executive Council to, each year, designate records that are to be made available to the public. These records are chosen, according to legislated criteria, from records submitted to Executive Council by Huu-ay-aht bodies.

This contrasts favourably with the approach taken in all other similar laws in Canada, which require citizens to make individual, specific requests. That approach means that some information that should be public, in the interests of openness and accountability, may never become public. Unless someone knows what to ask for, or takes the time to do so, important information may remain hidden.

By not requiring specific requests for records held by Huu-ay-aht bodies or the government itself, Executive Council has the opportunity to deliberate on what information should, in the public interest, be made available pro-actively. The fact that Executive Council's work in this area becomes publicly known is also important. The role of the People's Assembly in over-riding Executive Council's decisions in this area is also a commendable feature of the Act.

This report nonetheless identifies areas in which the Act might be amended, starting with the test for Executive Council designation, and including whether the existing approach might be complemented by a new right for citizens to make specific requests for other, non-designated records.

The overall message, however, is that the Act represents a very sound approach to access to information in the interests of openness and accountability of Huu-ay-aht government and bodies. The report does, however, discuss issues that Executive Council might consider for amendment, including in the area of personal privacy for citizens.

OVERVIEW OF THE ACT

The stated purposes of the Act, which is well drafted, are to make Huu-ay-aht bodies "more open, accountable and transparent" and to ensure that the "personal privacy of individuals is protected" (s. 1). The first goal is achieved by giving individuals a right of access to records designated by Executive Council as "public records". The second goal is achieved in two ways. The Act gives individuals a right of access to, and to request correction of, their own personal information. It also places limits on the ability of government to collect, use and disclose personal information.

Executive Council is required, before April 1 of each year, to publish a directory of records of each Huu-ay-aht body. Huu-ay-aht bodies include the government, Huu-ay-aht public bodies and Huu-ay-aht business enterprises. This directory must describe the categories of records in the custody or control of each body, and information about their location, format, and so on. Once a record has been designated as a public record, it must be made available for inspection by the public in accordance with the *Government Act*.

The directory of records drives public access to information under the Act. This is because Executive Council must, by March 31 of each year, review the directory of records just mentioned. It must then designate which records are public records that the public may access. Records may only be made public records if the benefit of their disclosure "significantly outweighs any harm from public disclosure" (s. 4(a)).

Further, records cannot be designated for public disclosure if they contain information that could reasonably be expected to unreasonably invade the personal privacy of someone. Nor can they be designated if disclosure could reasonably be expected to significantly harm the commercial or financial interests of someone other than a Huu-ay-aht body. The Act sets out factors that Executive Council must consider in balancing benefit and harm when designating public records.

The People's Assembly is given a significant role in deciding which records should be publicly available. The Act authorizes the People's Assembly to pass a resolution overriding Executive Council's decision and designating records as public records, or cancelling a designation. A vote of more than 60% of eligible voters who vote is required.

Another notable feature of the Act's approach to openness is the duty of the head of any Huu-ay-aht body to, without delay, disclose information about a risk of significant harm to the environment or to public health or safety. The duty also applies where disclosure of information is, for any other reason, clearly in the public interest. This duty over-rides any action by Executive Council or the People's Assembly in designating public records. It also over-rides any protection for privacy, financial interests of anyone, or even law enforcement interests (though notice must be given where disclosure of law enforcement information is intended).

Personal privacy of Huu-ay-aht citizens is protected under the Act. It limits the purposes for which personal information of citizens may be collected, used and disclosed. It also governs how personal information is collected. Huu-ay-aht bodies must also make reasonable efforts to ensure personal information they use to make a decision directly affecting someone is accurate and complete. Individuals are given a right to request correction of their personal information. An important feature is that an individual may request access to her or his own personal information, enabling the individual to know what information Huu-ay-aht has, what it does with it, and who it is disclosed to. To support this right, Huu-ay-aht bodies must retain personal information for one year after using it to make a decision directly affecting an individual.

REVIEW OF THE ACT'S FREEDOM OF INFORMATION PROVISIONS

Scope of bodies covered

The Act covers the records of any "Huu-ay-aht body", which section 1 defines as including the government (as defined in the *Government Act*), Huu-ay-aht public bodies and Huu-ay-aht business enterprises (as defined in the *Financial Administration Act*). It defines a Huu-ay-aht physician to be an entity other than a Huu-ay-aht business enterprise that is owned or controlled, directly or indirectly, by the government.

On its face, this is a wide scope, including in light of the definition of Huu-ay-aht public body. The Act does not, however, enable Executive Council to designate any newly-created entity that might not otherwise fall within the existing definition as a Huu-ay-aht body under the Act. Consideration could be given to amending the Act to enable Executive Council, by resolution, to designate a new entity that is not otherwise covered. Of course, Executive Council may consider that the likelihood of this power being required is not significant, and thus decide not to adopt this suggestion.

Designation of public records

The key feature of the Act's freedom of information provisions is the pro-active public disclosure, without a specific access request, of records designated as public records. Most freedom of information laws in Canada do not, unlike the Act, take this approach, which is highly commendable. It is true that British Columbia's *Freedom of Information and Protection of Privacy Act* was recently amended to permit the responsible minister, or a public body, to designate records that must be made publicly available without request, but this recent change has regrettably not found real traction to date. By contrast, Huu-ay-aht has made use of this provision in order to enhance openness and transparency.

As outlined above, the Act imposes on Executive Council a positive duty to, each year, review directories of records of Huu-ay-aht bodies and then designate which records are public records.[1] In my view, requiring an annual review is desirable, since it ensures that Executive Council, as the executive body of Huu-ay-aht government, has no choice in the matter. It must consider the public interest in openness, accountability and transparency in deciding what information should be available to citizens.

The Act should therefore, in my view, continue to require Executive Council to do this each year (and to require it to consider the Huu-ay-aht body records directories that it receives each year). I acknowledge that this imposes a burden on Executive Council, and Huu-ay-aht bodies, each year, but this helps ensure that the stock of public records is kept current. This enables Executive Council to regularly assess what the public interest requires (including by accounting

[1] By contrast, the British Columbia law gives the minister, and local public bodies, discretion to designate records, but does not require this to be done. As indicated above, this has yet to be done in any meaningful way.

for events of the preceding and upcoming year, by accounting for creation of new individual records and categories of records, and by accounting for the kinds of requests for access received in the previous year). I recommend that this valuable feature of the Act be retained.

It should be acknowledged, however, that involving Executive Council in determining what is disclosed has both the advantage and disadvantage of being a decision that is ultimately political in nature. The advantage is that Executive Council, as the executive body of Huu-ay-aht, is accountable for decisions it makes about transparency, with the check and balance of an over-ride by the People's Assembly. On the other hand, Executive Council's involvement could be criticized as being too political in nature. This is a policy question, of course, for Executive Council.

Enhancing openness

On the other hand, it has to be said that the Act takes a different approach to what may be disclosed, and the threshold for Executive Council designation is high. As noted earlier, a record may only be designated as a public record if the benefit of its disclosure "significantly outweighs any harm from public disclosure" (s. 4(a)). A record cannot be designated for public disclosure if it contains information that could reasonably be expected to unreasonably invade the personal privacy of someone. Nor can it be designated if disclosure could reasonably be expected to significantly harm the commercial or financial interests of someone other than a Huu-ay-aht body. The Act sets out factors that Executive Council must consider in balancing benefit and harm when designating public records.

Section 5 sets out the factors that Executive Council must consider in determining the public benefit in disclosure. It sets out a detailed list of public interest factors that align with the Act's overall goals of openness, accountability and transparency. They include whether disclosure would contribute to: promoting open, accountable and transparent government; upholding and respecting the Constitution and Huu-ay-aht laws; promoting a health and vibrant community for all; making government decisions in the best interests of present and future generations; and the meeting of the highest ethical standards. These and other section 5 factors are commendable—they are the kind of factors that other such laws do not set out, but should.

Section 6 provides that in determining harm from disclosure, Executive Council must consider all "relevant circumstances", including whether disclosure "could reasonably be expected to harm" any the following interests: "deliberative processes", a law enforcement matter; privileged information; financial or economic interests of a Huu-ay-aht body; or harm Huu-ay-aht language, culture, heritage or spiritual or cultural practices.[2]

Many of these factors are found in freedom of information laws of other governments in Canada. Others go further by recognizing the importance of promoting various public interest objectives and fundamental values of Huu-ay-aht. These include respecting and upholding the

[2] This list is not exhaustive: section 6 also mentions other interests.

Constitution, making government decisions in the best interests of present and future generations and the meeting of the highest ethical standards. Other such laws do not explicitly recognize these interests. Also noteworthy is the recognition of the importance of protecting Huu-ay-aht language, culture, heritage or spiritual or cultural practices.[3] Another unique aspect of the law is that it requires Executive Council to consider whether disclosure would promote managing, protecting and disposing of interests in Huu-ay-aht lands fairly and effectively. These factors undoubtedly reflect fundamentally-important policy choices on behalf of Huu-ay-aht, which I acknowledge and respect.

Two notable issues are, however, raised by the present approach in sections 4 through 6. Section 4, again, provides that Executive Council will designate records as publicly available only where it determines that the benefit from disclosure "significantly outweighs" any harm Executive Council identifies.

First, freedom of information laws almost universally take a different approach, making disclosure the default position. Disclosure can only be refused where harm is established (and on a case-by-case basis, not by category of record). The Act is, if not unique, at least unusual in reversing the presumption and making non-disclosure the default.

It is open to Executive Council to consider amending the Act so that the default under section 4 is a disclosure designation, with Executive Council only declining to designate a category of records where disclosure could reasonably be expected to cause harm (or perhaps significant harm) to an identified interest under section 6. This reversal of the balance would promote the public interest in openness, accountability and transparency identified in section 1.[4]

Second, the Act sets the bar quite high by requiring Executive Council to determine that the benefit of disclosure "significantly" outweighs any harm. The courts, and information and privacy commissioner rulings in British Columbia and elsewhere, make it clear that the word "significantly" or similar forms of that word require detailed and convincing evidence of harm or benefit before the test is met. Of course, Executive Council's authority under section 4 is in the nature of a legislative act, but the truth is, the test it is required to consider is an onerous one.

In addition, section 4 refers to "any" harm and section 6 requires the Executive Council to consider "all relevant circumstances" in assessing harm. This means that the harms identified in section 6 are not exhaustive. In other words, Executive Council could in theory identify harms that are not listed and thus decide not to designate records as public records. This is open-ended and leaves unsaid what Executive Council might decide is a 'harm' for section 4

[3] Section 13(10(h) of the Tsawassen First Nation *Freedom of Information and Protection of Privacy Act* similarly protects information the disclosure of which could reasonably be expected to "harm the spiritual or cultural practices of the Tsawassen First Nation".

[4] I note here that this change would still accommodate third-party personal privacy interests and third-party commercial or financial interests, since section 4(b) would continue to apply and protect those interests.

purposes. This is not a criticism, but I note that such laws almost universally set out an exhaustive, explicit, list of the harms that are to be protected against.[5]

If Executive Council decides not to amend the Act to make disclosure the default, it could consider lowering the threshold in the current section 4, so that the benefit in disclosure need not "significantly outweigh" any harm it identifies. This could be achieved by removing the word "significantly" from section 4(a). It could also consider amending section 4 to limit the harms that must be considered to those set out in section 6 (which are consistent with similar provisions in other freedom of information laws).

Enhancing openness through a right to request records

If Executive Council wishes, the existing pro-active approach to openness could be complemented by adding to the Act a right to request access to specific records. As noted earlier, as laudable as the current approach is, it provides for only an annual review of what should be available. There may well be circumstances where specific issues of interest arise during a given year that make faster disclosure of specific records desirable. Huu-ay-aht could disclose the records voluntarily, before the next annual review under the Act, but individual citizens may wish to see other documents.[6] A right to request access would deal with this, adding strength and flexibility to the Act.

As indicated earlier, most freedom of information laws work this way. An example is Part 2 of the Tsawassen *Freedom of Information and Protection of Privacy Act*. Section 5 gives any member of the Tsawassen First Nation, or any other person the Tsawassen chief administrative officer approves, a right to request access to any record in the custody or control of a Tsawassen institution. Exceptions apply to protect individual privacy, business and other interests. These are similar to the factors under sections 5 and 6 of the Huu-ay-aht Act. Those factors could be applied to such individual access requests.

In addition, section 12 of the Tsawwassen Act provides that the chief administrative officer must regularly make an effort to post, without access request, on the Tsawwassen website any information that would be available if requested. This type of pro-active disclosure would enhance flexibility, since it would not require action of Executive Council each year. This change could be made even if Huu-ay-aht does not amend the Act to allow individual access requests as suggest above.

[5] Please see below, as well, for another consideration: adding provisions to permit access to records on individual request, similar to the approach under the Tsawassen First Nation law.

[6] Any such disclosure would have to protect individual privacy and the financial and business interests of third parties, as provided in the Act.

Public interest disclosure

Section 9 of the Act requires a Huu-ay-aht body to disclose information publicly, without access request, where the public interest requires it. The language used is essentially the same as section 25 of the British Columbia law. The Information and Privacy Commissioner of British Columbia recently published a report in which she decided that the threshold for triggering public interest disclosure is much lower than had been thought.[7] This does not, of course, bind Huu-ay-aht at all, but Huu-ay-aht may wish to consider whether this interpretation should be applied under section 9. This would require consideration of whether any Huu-ay-aht bodies have any information that, applying this standard, would have to be disclosed.

If the Act's approach stays as it is, I recommend that it be amended to make it clear that the existing right to inspect Huu-ay-aht public records includes a right to request copies (a cost-recovery fee could be levied also). This right to copies may be understood to already exist implicitly, but making it express would be desirable.[8]

Informing and engaging Huu-ay-aht citizens

Perhaps one of the most difficult aspects of access to information and privacy for any government is how to inform citizens of their rights and engage them. There is no magic bullet, of course. I note that Huu-ay-aht government already has some very good general information posted on its website, to inform citizens about openness. I recommend a two-pronged approach to enhancing public understanding.

First, I recommend that the government prepare a short, plain-language user's guide to the Act and make it available on the Huu-ay-aht government website and in person. This document could be modelled on similar documents produced by the British Columbia government. It could also explain citizens' privacy rights under the Act. In addition, a one- or two-page tip sheet informing citizens how to exercise their right of access to public records could be prepared.

Second, the government could consider conducting one or two evening workshops for citizens interested in learning more about their access and privacy rights, and how to exercise them. This would also give the government an opportunity to demonstrate its commitment to openness and transparency, by explaining how that is achieved in various ways.

Both of these tracks should be followed regularly over the years, keeping them current and helping to build community involvement in these areas.

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[7] Investigation Report F15-02, found at https://www.oipc.bc.ca/investigation-reports/1814.

[8] An example already exists in the Act. Section 20(2)(c) authorizes an individual who has requested access to her or his own personal information to ask for a copy, on payment of a fee set by Executive Council.

REVIEW OF THE ACT'S PRIVACY PROVISIONS

Sections 6 through 21 of the Act set out a number of privacy protections for Huu-ay-aht citizens. These are consistent with internationally-recognized privacy principles, with the following observations.

First, section 15 requires any public officer to notify the head of a Huu-ay-aht body if the officer is aware of an unauthorized disclosure of personal information. This is a good feature, but Huu-ay-aht should consider enhancing this provision. It could, as more and more privacy laws do, require the Huu-ay-aht body to notify affected individuals where there is a risk of harm to them (this could be personal injury or financial other harm). An example is the test found in section 34.1 of Alberta's *Personal Information Protection Act*, which uses the test of real risk of significant harm to trigger notification to those affected.[9]

Second, the Act does not place any obligation on Huu-ay-aht bodies to protect individuals' personal information from unauthorized disclosure, access or use. Most laws internationally contain such a duty. Section 30 of British Columbia's *Freedom of Information and Protection of Privacy Act*, for example, requires public bodies to implement "reasonable measures" to protect against such risks. This is not a standard of perfection and it is not technologically prescriptive, which is good. Executive Council should consider adding this provision, to ensure that all Huu-ay-aht bodies protect the personal information of citizens, and are seen to do so.

Third, the section 18 authority to disclose personal information parallels similar provisions in other such laws. An unusual feature, however, is found in section 18(3). This authorizes Executive Council to authorize the disclosure of an individual's personal information "in a specific case or specified circumstances" if Executive Council considers this to be in the "best interests of Huu-ay-aht". The test for disclosure, and the need for Executive Council approval, mean the bar is set quite high, but this is an unusual provision, albeit one that provides flexibility. I am not suggesting it should be deleted, but do note that this is not something found in other privacy laws in Canada, such that Executive Council may wish to consider deleting this provision.

RECORDS MANAGEMENT

Part 6 of the Act makes Huu-ay-aht bodies and public officers, as well as Executive Council, responsible for records management. My only comment is that these provisions are common, but are very welcome, in legislation of this kind.

[9] https://www.canlii.org/en/ab/laws/stat/sa-2003-c-p-6.5/latest/sa-2003-c-p-6.5.html#sec34.1subsec1.

CONCLUSION

As will be obvious from the above findings and recommendations, my independent review of the Act has revealed many strengths in the Act. It can be improved, as all laws can improved from time to time, but overall the Act will serve Huu-ay-aht very well.

My recommendations are discussed in detail above, and summarized here:

1. Executive Council should consider amending the Act to enable it to designate, by resolution, a newly-created body as a "Huu-ay-aht body" for the purposes of the Act.

2. The Act should continue to require Executive Council to review the directories of records each year, in order to keep the directory of public records current.

3. Executive Council should consider amending section 4 of the Act to make disclosure of records the default position, not the withholding of records. In other words, Executive Council would be required designate a record as public unless an identified harm from disclosure significantly outweighs the benefit from disclosure.

4. If section 4 is not amended as just recommended, Executive Council should consider changing the test under section 4 so that disclosure is required where the benefit from disclosure outweighs the harm, no "significantly outweighs".

5. Executive Council should consider amending sections 4 and 6 so that the kinds of harm listed in section 6 are an exhaustive list of the relevant harms, not a list of examples.

6. Executive Council should consider further enhancing openness and transparency under the Act by adding a new right to request access to records that are not designated as public records under section 4.

7. Executive Council should consider amending the Act to require the Executive Director, or another designated official, to publicly disclose information, without access request, where it is information that would be available if an access request were made.

8. Executive Council should consider amending the Act to require all Huu-ay-aht bodies to implement reasonable measures to protect citizens' personal information from such risks as unauthorized access, use, disclosure or destruction.

9. To enhance citizens' awareness of their access and privacy rights, Huu-ay-aht government should consider producing new educational materials, specifically, a user's guide to the Act and similar materials, as well as citizen education sessions about the Act.

All of this is respectfully submitted.

July 17, 2015

David Loukidelis QC
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(Information and Privacy Commissioner for BC, 1999-2010)