

## **Transcript Episode 8 Diane McLeod-McKay**

### **Ron Kruzeniski:**

Well, today I have the pleasure of talking with Diane McLeod-McKay. She is a lawyer who holds three offices. She is the Ombudsman in Yukon, the Access and Privacy Commissioner and the Public Interest Commissioner. That sounds like busy enough that I'm really pleased that she has time to talk to me today. So I'm going to start by saying Diane, tell us a little bit about your career leading up to becoming Ombudsman and Commissioner in the Yukon and how your career path led you to Whitehorse.

### **Diane McLeod-McKay:**

Well, thank you very much, Ron. I'm very pleased to be here today to talk with you about our new law. How did I get to Whitehorse? Well, so I'll just start with my career. I have been in access and privacy in the field for going on 25 years now, and I've certainly looked at these laws in many capacities. I worked in health region for about 15 years, worked in private practice for a couple of years, acted as a consultant for BC government for many years, was the Director for the Personal Information Protection Act for the Alberta Information Privacy Commissioner Office, and then to this role in Yukon. So that's kind of what led me to Yukon. This position opened up and I thought it was a really fantastic opportunity. There isn't a lot of these jobs in Canada, so I jumped at the opportunity to throw my hat in the ring, and I'd never been to Yukon and I thought, well, that looks like a great place to go and do my thing.

I've been here since 2013. I arrived in Yukon in the middle of a major blizzard. Had never been here before. Went up for my interview, thought I probably should see what this place looks like. And I got downtown and I fell in love with the place immediately. It was beautiful. And there was a coffee shop as far as the eye could see on every corner. So I thought, yep, this works for me.

### **Ron Kruzeniski:**

That is great. So that is just about what, eight years ago?

### **Diane McLeod-McKay:**

Yeah, eight and a half now. Yep. I can't believe it's already been that long.

### **Ron Kruzeniski:**

So, on April one of 2021, you ended up with a new updated version of The Access and Privacy Act, and I wonder if you can just sort of tell us a bit about the history as to how that came about. Was there consultations or discussions or did you lobby intently? What was the history of its development?

### **Diane McLeod-McKay:**

Well, I'm glad you asked that because the act itself had been in place in Yukon on the original Access to Information and Protection Privacy Act that I will call ATIPA going forward. What went into effect in Yukon in 1995 and in the 25 years plus that it had been in effect, it really didn't have much substantial changes there were a number of things that led to what actually ended up being an entire rewrite of the legislation. The liberal government came into effect in 2016, and they had put forward a mandate on adopting a one government approach to improve service delivery to Yukoners. It's pretty common that governments look at those kinds of approaches when trying to improve their service delivery model. They were looking at developing a client centred service delivery model that involved integrating

programs and services across government, which of course, by its nature involves the sharing of personal information between government public bodies.

They also wanted to use the personal information within public bodies to generate data on how to improve services both to individual Yukoners and the public at large. So this involved using technology to generate information about how best to achieve that objective. One of their key objectives was to enhance service delivery by providing more services online, which in hindsight was a really good step considering the global pandemic that we wound up in several years later in the fact that we'd actually moved some of those services online, which was very beneficial during that period. And I guess we still are in it to a certain extent. So in order to deliver services online in a secure manner required the ability to authenticate the user of the service. Their plan was to create a centralized digital identity management service that would be responsible for authenticating users as a source of truth.

So a public body can rely on the services so that they can be sure that they are delivering services to the person that they say they are and individuals can be assured that the risk of fraud would be reduced significantly. However, under the prior legislation, none of that was possible. What happened was they decided to actually modernize the legislation. When the act was coming up for review in 2015. This was of course the first act. I actually issued a very lengthy set of comments and recommendations that really focused on the technology of the day, the risk to privacy, the need to enhance access to information in a number of ways, and set out a bit of a roadmap that I thought would be beneficial for the Yukon government to consider while they're looking at the amendments to their legislation.

As it turned out, they in fact utilized my document in large part to develop the new legislation in addition to drawing on some of the modern pieces of privacy and access to information legislation that were being developed in Canada and around the world. So Yukon ended up with this kind of unique piece of public sector access and privacy legislation, and I give them a lot of credit. The law is a interesting law with lots of interesting features in it.

**Ron Kruzeniski:**

In preparing for our discussion, I read a summary of the changes and certainly were quite a few, but wanted to say what are the four or five or if you think it gets to six significant changes in the legislation that you're particularly pleased with or impressed about?

**Diane McLeod-McKay:**

Yeah, there are a number of things actually. So, because of the background that I just gave you, the legislation of course, integrated, established integrated programs and services to facilitate increased data sharing. Now that can only occur in the legislation if it's approved by the Commissioner and executive council. I found that quite interesting because that way there's some controls on how these programs and services can be created. And then some consultation with my office on what that looks like. That's really useful because it helps to build in those controls that are necessary when it comes to increased data sharing between public bodies. I thought that was a really great addition. It of course, also establish the personal identity service to facilitate the secure means to deliver services online. That project is in process, and we've been working closely with Yukon government on their privacy impact assessments as they work to develop that identity service.

It authorizes data linking by one or more public bodies, again if approved by commissioner and executive council. And I like the way that they built in those controls so that there's always some step that needs to be taken in actual transparency around what is occurring because all of those orders have to be published, so I thought was really great. The privacy side of the equation, they actually built in the limitation principles into the act. So I thought that was good. So it controls the amount of information

that people are collecting, using, and disclosing and ensuring it's only for legitimate purposes as needed. It also codified privacy management program requirements into the act. So, the number of offices had put out some privacy management program guidelines, and that actually made its way into the act as a mandatory requirement. It clarified accountability. The last act we had, public bodies were responsible for things, but who in public bodies were responsible was always a question.

So it clarified that the head is accountable and the head in our legislation is the senior official, which is essentially the ministers of our Yukon government departments. It designated privacy officers and clarified rules and responsibility for them. It codified the requirement to have policies and procedures and quite lengthy lists of information security requirements, which we were really pleased about. It included mandatory breach reporting and that actually is both internal and to affected individuals and to the privacy Commissioner. So there's not too many public sector privacy laws in Canada that have mandatory breach reporting, so I thought this was very positive. Mandatory privacy impact assessments and security threat risk assessments with IPC oversight on those, which is excellent because that really does help build privacy management into an organization when technology and programs and services are being delivered. So it's like a privacy by design model that really facilitates compliance.

So I'm a big, big fan of privacy impact assessments and it expanded the information privacy Commissioner's powers regarding investigation and compliance review. So I have own motion investigations. That's a new novel thing for Yukon. So I was pleased to see that. And I had the authority to conduct compliance audits. In terms of access, I'll just identify a few things that the act did. So it mandated requirements to make certain categories of information publicly accessible, which is excellent because we now have an open source data portal with Yukon government where there's all kinds of information that the public can access, which was not accessible before, and it is approving to be a really useful resource. It included a public interest override and it clarified the public bodies that were subject to the act. Most of the acts, and it may be the same in yours too, Ron, where they have that bucket list of agencies, of governments, boards, etc. And nobody really knew whether they were subject to the act or not. So it created a lot of uncertainty. So that added over a hundred new public bodies to the list. So that's excellent because now it's clear to Yukoners and to the public bodies that they're subject to the legislation,

**Ron Kruzeniski:**

And that's quite a list.

**Diane McLeod-McKay:**

It is.

**Ron Kruzeniski:**

So how has implementation gone from your point of view? Any particularly successes and any particular challenges?

**Diane McLeod-McKay:**

Well, we are 10 whole months into the legislation, legislation being enforced. So, there's always flipping back and forth between the legislation to make sure you've got all the pieces when you're analyzing various things from the Yukon government side of the equation. It took them about three years to get the regulations developed, which is why it took so long to bring the act into effect. But they used their time wisely while they were waiting for that to happen. And they did a lot of work on developing toolkits for designated privacy officers, designated access officers training packages, which are currently still

under development. We modified PIA tools. We worked in tandem to do some of that work, and we did a lot of work and we see we, because we really support Yukon government in trying to facilitate compliance as much as possible. So we worked on developing processes and templates for breach reporting.

My office put out guidelines and various other kinds of documents that could be used by the public bodies, for example, for time extensions because in the new act time extensions have to come to my office. We had a lot of time to get ready and a lot of good work was done up front to prepare for the legislation. So that's kind of the background to the in-between when the law was passed and went through the house. In terms of challenges, we have a lot of work to do. Yukon government is working really hard at implementing the legislation. When I first arrived in Yukon back in 2013, the privacy management provisions of the ATTIP Act were never implemented. So, there was a lot of work the first five years that I was here, I spent a lot of time trying to help them establish privacy management programs, policies, procedures, and really have privacy being managed effectively, privacy impact assessments and various other things that I help them with.

When this act came into effect, they were ready, they knew what they needed to do, and they're still working on making it happen, and we are supporting them as much as we can in being successful in that, but it does take time. With the new act, the terminology is different, so there's differences in our act, as I've mentioned before, than some of the other public sector privacy laws and other jurisdiction. Plus now with our adjudications, we're starting from scratch with interpretations. So that means a lot more work for us when we're actually doing adjudications or investigations and trying to determine what these things mean in this particular context of this law. That's some of the things that we've been dealing with.

**Ron Kruzeniski:**

Earlier you talked about the government wanting a digital identification, and then we have the pandemic come along and we have vaccination passports and proof of vaccinations, et cetera. Did that speed up the digital ID process or slow it down? How did the two sort of interrelate?

**Diane McLeod-McKay:**

I can tell you it would've been good to have that in place when we got to that stage because it's not in place. In fact, the regulations have yet to be developed for that. They're working hard at trying to get it set up. But it is taking a bit of a backseat in terms of the regulation development because the pandemic of course required all of our council and Yukon government to be working hard at developing all kinds of regulations under our Emergency Measures Act, under our Public Health and Safety legislation. So they've been really busy. So I just recently heard that they're starting to drop the regulation. So no, we don't have it yet. It definitely did create some challenges for us when Yukon government moved ahead with their vaccine verification platforms and trying to get the credentials out to Yukoners. And we're still working through some of the privacy impact assessments and trying to find ways to ensure that that's happening securely and evaluating the systems that they're using for that.

**Ron Kruzeniski:**

Just a clarification on the changes and because they sort of wanted one centralized service delivery model in Saskatchewan, we have different government institutions, Ministry of Highways, Ministry of Agriculture, Ministry of Labour, Ministry of Education. Do I sense from that that you wouldn't have government institutions like that? You just have one big institution called the government of Yukon, or did I understand that properly or improperly?

**Diane McLeod-McKay:**

Perhaps it's the way I stated it, Ron. But yes, we're set up any other government in Canada. We have what's called the Yukon government, of course, which falls under the purview of cabinet. And then we have departments. So we don't have ministries, we have departments. So we have all the same kinds of departments as other jurisdictions, Department of Health, Department of Education, Department of Justice, et cetera, et cetera. And those are all public bodies in and of themselves under the act.

**Ron Kruzeniski:**

But when it comes to data sharing and the challenges when I've thought about it is you start to have data from social services that link to data from education, it's linked from data to health. And is that then where if they want to do any linking between those departments, they would have to get your approval?

**Diane McLeod-McKay:**

That's allowed in the legislation, but they have to submit privacy impact assessments to my office. And in terms of the integrated programs and services, so that again, would have to go through the approval of the Commissioner and executive council, and that would be a process of determining exactly what the program is, why it exists, what they're sharing. And then it would also require information sharing agreements to be set up between the various public bodies to ensure that they're meeting all the legislative requirements.

**Ron Kruzeniski:**

This question might have been more appropriately asked a year ago, but what should an organization do, or I guess if an organization was new to the territory, would they have to do to mainly adjust and be compliant to the new act?

**Diane McLeod-McKay:**

Okay, so if we're talking about a newly added public body, is that what you mean?

**Ron Kruzeniski:**

Right. Yeah.

**Diane McLeod-McKay:**

Well, they would have to do a lot of things. Like I said, all the codified... The privacy management program piece is all codified in the legislation. Extensive information security requirements, policies, procedures must be in place. So they would have a lot to do. We had sort of something similar when our health information privacy legislation came into effect. And I'm thinking now that if they're adding public bodies, that would be new. It would be smaller public bodies like our boards and commissions that were just added. In order to help small healthcare custodians in the territory, which would be our private sector custodians, I actually created a toolkit that more or less simplifies how they can incorporate the legislation into their organization, including some templates for consent, breach management, audits that they have to conduct, ways to do that.

And I think what we're doing here is envisioning developing something similar for the smaller public bodies in the territory to help them meet their compliance obligations. And that would be more for the kinds of bodies that exist all the time, like Yukon Medical Council for example. Some of the boards and

committees only meet from time to time and would largely get their support from Yukon government for their services because Yukon government generally acts as a secretariat to them for those purposes. So it would be some of those other kinds of bodies that are existing day-to-day that might need that support in order to meet those obligations under the legislation.

**Ron Kruzeniski:**

As this act was developed and/or looking forward, are there any changes you'd like to see to the legislation in the future?

**Diane McLeod-McKay:**

It's early days, Ron. But it's funny, when you start looking at a piece of legislation, I looked at this law for a long time before it came into effect, and you don't realize all the pitfalls until you start actually trying to apply it. There's a whole bunch of little things that are coming up that we're sort of tracking as we go and trying to sort through. But a couple of things that I'm already wanting to see changes to, and there's no offence for failing to follow the breach reporting requirements. I made a number of comments about that when this legislation was going through the house, and I am now seeing a little bit of fallout from that. And I do think that needs to happen. That's one thing. I would like to see mandatory training for both access and privacy.

Access is a tough business and access officers need help and just as much as privacy folks do. I would like to see some more training there. I would like to see the mandatory PIAs expanded so that they are required for more things under the legislation. Our municipalities in Yukon are not subject to these laws. They should be, and I still think they need to be added, and I would now be calling for order making power. I think that there's a lot of benefits to that. I won't go into it in detail, but I'll just say this, that I do think it actually helps the public bodies work more effectively when you're going through adjudications if the risk at the end of the day is an order. So there's a number of reasons why I think that needs to happen here, but I won't go into that in a whole lot of detail.

And of course, since this legislation went through the house in 2018, technologies are advancing, such as artificial intelligence and machine learning. I think that I partnered with the BC Information Privacy Commissioner and the BC Ombudsman person, and we created some sort of a regulatory guidance document that could be used, and it was geared primarily at the public sector to look at some regulatory amendments that could be made to facilitate the use of artificial intelligence and machine learning. That's where I'm at right now. Tomorrow is another day, Ron. I might have more things to add.

**Ron Kruzeniski:**

People listening to this podcast, they may say, "I want to study the proposed changes," either looking at the act or maybe a little bit more of a layperson's summary of the changes. Where would be the best place they go to get that sort of information?

**Diane McLeod-McKay:**

Right. Well, those people that really, really like reading laws, of course they can find the law on the Yukon Laws website. And of course on CanLII, there isn't really a good summary that I could point to other than some of the comments that I made about the legislation on my website. Under the news and events, I have a couple of documents. In September 28th, 2021, I actually wrote an op-ed for our newspapers and published that on my website that really talks about the access provisions of the new act and sort of highlights the changes. And on October 9th, 2019, I made a number of comments that kind of reviewed the key aspects of the legislation and at the time some of the comments that I had

about the bill and maybe some areas of concern that I was trying to highlight for the legislature. Those are some resources that people can look at. And of course, anybody can always contact my office, they can access our email on our website, and of course our phone number is on there as well.

**Ron Kruzeniski:**

Well, great. That is all the questions I have Diane, but thank you very, very much for taking the time to do this, and I see the upcoming years continuing to be interesting and challenging for you and kind of exciting, but sound like you got some really good provisions in this version of the bill.

**Diane McLeod-McKay:**

I am excited about it. I love what I do. It's great work and I know that it has its challenges, but it sure has its exciting aspects as I'm sure you know. And it's been my pleasure to be able to talk to you today, Ron, and to share what's happening in Yukon and public sector access and privacy.

**Ron Kruzeniski:**

So, one last question on April 1st, are you going to go to one of those coffee shops in Whitehorse and bring out a small anniversary cake and celebrate the first year of this legislation?

**Diane McLeod-McKay:**

Yes. Well, April 1st is April Fools, so maybe I can come up with something funny to add to that. But perhaps I will do that.

**Ron Kruzeniski:**

Thanks very much, Diane.

**Diane McLeod-McKay:**

Okay, Ron. Thank you.