

**By Courier**

June 9, 2004

Honourable Eric Robinson  
Minister of Culture, Heritage and Tourism  
Room 118, Legislative Building  
Winnipeg MB R3C 0V8

Dear Mr. Robinson:

I am pleased to have the opportunity to add our input and suggestions relating to *The Freedom of Information and Protection of Privacy Act* (FIPPA) as part of the mandatory, comprehensive, and public review of the operation of the Act required under section 98 and now underway.

The Manitoba Office of the Ombudsman has provided independent oversight of *The Freedom of Information Act* from 1988 to 1998, and FIPPA from 1998 to the present day. During these years, we have investigated complaints, made recommendations, conducted special investigations and commented on the administration of the legislation both in special reports and annual reports to the legislature.

Based on the lengthy experience of our office, we are providing the attached comments on the specific provisions of the legislation along with highlights of certain issues for consideration.

Generally speaking, I believe the purposes and principles incorporated in FIPPA are consistent with similar legislation in other Canadian jurisdictions. While there are differences in some of the specific provisions of the various statutes, FIPPA, as written, seems to support the principles of open and accountable government. Nevertheless, what is needed is a visible commitment to the legislation, both in word and deed.

While I have previously commented on Manitoba's access and privacy legislation in my annual reports to the legislature, I appreciate this opportunity to reinforce and expand on some of these thoughts.

In a parliamentary democracy, there is no greater accountability mechanism than public scrutiny of decisions made and actions taken by and on behalf of the elected representatives of the people. At the same time, protection of personal privacy guards fundamental individual and societal values such as personal autonomy, freedom, and human dignity. These complementary rights of access and privacy are basic to the

means of knowing and understanding, for self-determination and personal autonomy, and are at once hallmarks and underpinnings of free, compassionate, and democratic societies.

Information access and privacy rights are generally accepted as essential facets of democratic societies, though they are not absolute or unqualified rights. Both rights have been described in terms of their fundamental values to our society. For example:

- *The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.* [Supreme Court of Canada Justice G. V. La Forest, Dagg v. Canada (Minister of Finance), Supreme Court Reports, Part 3, 1997 Vol. 2, File No. 24786, pp. 432-433.]
- [According to Alan F. Westin (Privacy and Freedom [1970] pp. 349-50)]...*society has come to realize that privacy is at the heart of liberty in a modern state.... Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.* [Supreme Court of Canada Justice G. V. La Forest, R. v. Dyment [1988] 2 S.C.R. File Number 19786, pp. 417.]

FIPPA has been in effect for slightly more than six years. We believe that the Legislature's decision to approve the provision requiring a timely and full review of the statute was wise, and should be renewed, especially in view of changing information and communication technologies that are rapidly and radically transforming our information and knowledge environment. This first review provides an opportunity to reexamine the strengths and weaknesses of the Act, and to take account of public experience with the application of its provisions.

The enactment of FIPPA in 1997 marked the first major revision of Manitoba's access legislation since *The Freedom of Information Act* (FOIA) was passed in 1985 with the unanimous approval of the Legislature, then proclaimed in 1988. A focus of the new legislation was to make the protection of personal information privacy a legal right where it had been, in effect, an exemption to access under FOIA.

There were some changes to the access provisions of FOIA, but they were minor by comparison with the addition of the new personal information privacy rights and the landmark statute brought in by the Government in 1997 to protect personal health information: *The Personal Health Information Act* (PHIA). FIPPA and PHIA are complementary statutes covering personal information and personal health information respectively. These Acts are being reviewed simultaneously as they are mutually dependent. We are submitting our comments on PHIA separately, but the Acts have been considered by us as a whole.

The current review of FIPPA is of particular importance to the public's access to information rights since information privacy protection rather than access was arguably

the Government's central consideration in developing FIPPA and introducing PHIA. When considering the right of access to information, it is instructive to reflect on the first Court of Queen's Bench judgement under Manitoba's Freedom of Information Act (1990) where Justice Oliphant articulated a clear principle that continues under FIPPA:

*[Exemptions] must be strictly interpreted and, to come within the scope of an exemption the record must fall squarely within the ambit of the exempting section.*

He also wrote:

*The importance placed by the legislators on the right of the public to have access to government records is indicated, I think by the fact that the head of the department bears the onus of establishing that the applicant has no right of access.*

Mandatory exceptions must be adhered to and neither the Court nor the Ombudsman may compel the release of information found to be strictly and properly within the bounds of such an exception.

Our experience has suggested that, broadly speaking, mandatory and discretionary exceptions are applied properly, and that they are seen to be properly applied when there is a genuine commitment by government to be helpful and cooperative in keeping with section 9 of FIPPA, which reads:

***Duty to assist applicant***

***9 The head of a public body shall make every reasonable effort to assist an applicant and to respond without delay, openly, accurately and completely.***

However, at times that commitment has not been visible and this tends to erode the public trust and confidence in open, transparent and accountable government.

Some negative indicators of a lack of commitment are where:

- Government looks first for a way to deny access rather than for ways to provide access.
- Government exercises discretion to refuse access without providing appropriate explanations and valid reasons.
- Government refuses access based on irrelevant considerations not supported by the legislation.
- Government routinely takes the maximum time permitted under the legislation to respond to applications for access.

In my 1994 Annual Report to the legislature, I raised similar observations and offered some suggestions that I believe are still relevant today. I suggested then, as I do now, that those who are involved in the administration of the access and privacy legislation require ongoing training, advice, and support to ensure that there is consistency across public bodies in terms of the understanding of and commitment to the legislation.

I further suggested then:

- that a statement renewing the government's commitment to the access principles embodied in the Act be given by the highest levels of authority to direct and guide Access Officers in the handling of access requests; and,
- that a forum be held annually where access and privacy issues can be brought forward and discussed, where specialists can share their expertise with those responsible for administering the legislation, and where Access Officers and Coordinators have the opportunity to share their experiences and knowledge, and strengthen their commitment to the principles of access and privacy rights.

A number of provinces hold these forums annually.

I believe these steps would assist in demonstrating to the public that government recognizes the importance of access and privacy legislation in building public trust and confidence in the workings of government at a time when it seems there is a crisis of public confidence.

Our specific comments for consideration of changes relating to FIPPA are provided in the attached FIPPA Overview document (*Appendix 1*); spreadsheets for the Act and its Regulation (*Appendix 2*); a letter dated August 22, 2003, regarding amendments to the existing Complaint Form prescribed by Regulation (*Appendix 3*). The *Elements of Consent for Personal Information under FIPPA* prepared by our Office is also attached for reference purposes, not as a specific suggestion for change (*Appendix 4*). These documents, together with my letter, should be taken as representing our legislative concerns based on our experience with FIPPA since its proclamation. Once the Government has developed and introduced amendments to the legislation, we anticipate that there will be a further opportunity to comment.

We have provided our comments on the spreadsheets with regard for the roles of the Government and the Legislature in making amendments to the Act. We have refrained from using the word "recommend" at this stage in our comments since it carries a distinct meaning for our office under Manitoba's access and privacy legislation. We have generally urged that "consideration" be given to changing the legislation. Our use of this rather low-key word should not be taken to downplay the seriousness of our suggestions.

We have also refrained from commenting on a number of important provisions in the statute that may be subject to amendments since we do not feel that this is the appropriate stage to anticipate or presuppose amendments that may be introduced to the Legislative Assembly. For example, we have not commented on the fee regime under FIPPA, but we have made some of our concerns known through our Annual Report for the year 2000 prompted by the Government's news release of May 19, 2000, announcing its intention to review FIPPA. This communication suggested to us, in part, that the Government was contemplating changes in the legislation's fee structure because of the resource costs of administering FIPPA. Our comments at that time concluded with the following paragraphs:

*Nowhere are fees charged on the basis of a full cost-recovery regime. To do so would be inconsistent with the purposes of access and privacy legislation. It would be counterproductive to pass legislation providing legal access to information rights that encourage transactional openness, democratic accountability, and public involvement in government and then effectively disqualify people by imposing prohibitive fees to exercise the rights. Modest fees are assessed to act more as a mild deterrent to inappropriate use of the legislation and are usually leavened by fee waiver provisions to support equitable access rights for all.*

*We would suggest that balancing limited government resources with the rights of access to information held in trust by the government on behalf of the public will have to be more than an exercise in bookkeeping. Part of the reckoning must include the admittedly unquantifiable, but nevertheless real social, economic, and political values of the rights of access, and recognition that open and visible accountability plays a critical role in supporting the prudent, professional, and principled conduct of government. Part of the payback is public confidence in the acts and decisions of government.*

We are not aware of any reason to change our opinion at this time. We believe other means should be considered to deter inappropriate use of the legislation. Partly to this end, we are urging consideration be given to amending section 13(1) to include an abuse of process component, allowing public bodies to exercise a limited discretion in responding to applicant's access request, so long as this discretion remains subject to review by our office.

There are also several comments that I wish to cover in this letter rather than in the attachments. They are:

**1. PRIVACY IMPACT ASSESSMENT (PIA)**

PIAs are analytical tools that are particularly useful in assessing and understanding the potential impact of a proposed program, practices, service or system on information privacy. They may also be applied to existing programs. A number of jurisdictions have made the use of PIAs mandatory, either by law or policy including Alberta, British Columbia, Canada, and Ontario. We strongly support the open and transparent use of PIAs to ensure compliance with FIPPA to the extent possible and to maintain or obtain the trust and confidence of Manitobans on how the Government manages its personal and personal health information.

We note that Manitoba Health has taken what seems to be a very appropriate step by introducing a privacy impact assessment requirement by policy, though its scope of application might be usefully expanded. Other personal information can be as sensitive as personal health information for Manitobans. I would also note that FIPPA provides a limited privacy impact assessment process through the Privacy Assessment Review Committee (PARC). While PARC's purpose and function are significant, this mechanism is not a substitute for more broadly based use of privacy impact assessments. We also suggest that the decisions based on PARC's advice have also not reached a level of public openness and transparency appropriate for an advisory and subsequent decision-making process that is available to the Government for uses and disclosures of personal information that are not otherwise authorized under FIPPA's Division 3 of Part 3.

## 2. CONSENT

### ▪ Authorization to collect *FIPPA section 36*

Section 36 of FIPPA sets out that a public body may not collect personal information unless authorized to do so. In our experience, there are circumstances where individuals need programs or services so much that they essentially feel compelled or coerced into giving consent, regardless of the merit of the purpose of collection. In our view, an “authorization to collect” model with good notification requirements may arguably provide stronger protection than a “consent to collect” model.

### ▪ Consent to Use and Disclosure *FIPPA sections 43(b), 44(1)(b), 47(4)(b)(iii) and section 87(h)*

Although public bodies must be authorized to collect personal information, the use and disclosure of such information requires consent. The concept of consent occurs in the following provisions of FIPPA: use (section 43), disclosure (section 44) and research (section 47). While the requirement for consent is set out, the form of that consent has not been articulated. Under section 87(h), this could be addressed in a regulation.

As noted in the “Elements of Consent for Personal Information under FIPPA” developed by our office (*Appendix 4*), it may be appropriate for consent to take different forms in different situations. We are not certain that prescribing the form that consent should take would solve issues where individuals feel compelled by circumstances to provide their consent. There also may be circumstances where notice offers a sufficient degree of openness and transparency to provide protection comparable to consent.

## 3. PHIA & FIPPA AND THE FEDERAL PERSONAL INFORMATION PROTECTION AND ELECTRONIC DOCUMENTS ACT – (PIPEDA)

There is a serious gap in the privacy rights of employees who work in the provincially regulated private sector that is not covered by PHIA or by PIPEDA. FIPPA, of course, does not apply at all to the private sector. These employees do not have the same personal and personal health information protections as those who are within the scope of access and privacy legislation. This is inequitable.

## 4. Access and Privacy Commissioner versus Ombudsman

Most jurisdictions in Canada have an established independent office of the Ombudsman that promotes fairness through the investigation of complaints relating to administrative acts, decisions or omissions by public bodies. Most jurisdictions also have an independent office of an Access and Privacy Commissioner that promotes respect for access and privacy rights and ensures compliance with their jurisdiction’s access and privacy legislation. At the federal level there is both an Access Commissioner and a Privacy Commissioner.

In Manitoba, the independent oversight role under access and privacy legislation has been added to the Ombudsman role. Some have suggested that the more formal order power oversight model, such as exists in British Columbia, Alberta,

Ontario, and Quebec, can be more effective and timely than the recommendation model in terms of compliance with access and privacy rights. Others feel that the less formal recommendation power model as practised by the federal level, Saskatchewan, Manitoba, New Brunswick, Nova Scotia, and the Yukon Territories is just as effective and timely. I believe that each model has its merits, and that issues of effectiveness and timeliness are influenced more by the degree of commitment than by order or recommendation power.

My concern is that the independent oversight body should be clearly identified as an Access and Privacy Commissioner's office. I believe it is in the interest of the government and the Legislative Assembly to indicate to the public the importance of access and privacy rights by clearly establishing an Access and Privacy Commissioner role.

After many years of undertaking this role as Ombudsman, I find it is unfortunate that this important role in promoting access and privacy rights is unknown in far too many circles. Manitobans and Canadians need to know that our province has, in fact, not only enacted legislation that respects access and privacy rights, but also has established an independent oversight office dedicated to investigating complaints, auditing and monitoring to ensure compliance with the statutes.

Whether or not there is a separate Commissioner and office or the Ombudsman is appointed to that role in addition to the role under *The Ombudsman Act* is not the issue. In my opinion, I believe the role of Access and Privacy Commissioner for the province needs to be visible and this can be accomplished by referring to the head of the independent oversight office as an Access and Privacy Commissioner.

In view of the complementary nature of FIPPA and PHIA, I am providing a copy of these comments to your colleague, the Honourable Jim Rondeau, Minister of Health Living.

In concluding this part of our comments, I would be pleased to meet with you or staff of your department to discuss any matter arising from these comments or relating to possible amendments to FIPPA.

Yours truly,

Barry E. Tuckett  
Manitoba Ombudsman

cc. Honourable Jim Rondeau, Minister of Healthy Living  
Gordon Dodds, Culture, Heritage and Tourism  
Sue Bishop, Culture, Heritage and Tourism

Attachments