

OVERVIEW OF OMBUDSMAN MANITOBA COMMENTS
FIPPA REVIEW
June 9, 2004

INTRODUCTION

Following is a thematic overview of the comments we have made in the more detailed "Spreadsheet Containing Ombudsman Manitoba Comments" attached as *Appendix 2*. To preserve the full context of the Act for examining our annotations, the spreadsheet includes all the provisions of the legislation, whether or not we made comments.

COMMENTS

1. OMBUDSMAN INVESTIGATION ISSUES

Abuse of process

FIPPA section 63(1)(b)

Section 63(1)(b) of FIPPA provides the Ombudsman with the discretion not to investigate a complaint if the Ombudsman is of the opinion that it is trivial, frivolous, and vexatious or not made in good faith. We suggest that "abuse of process" be included as a reason for refusing to investigate.

Gathering evidence

FIPPA sections 50(2), 50(3), 50(4), new section between sections 64(3) and 65 and section 86(2)

Section 50(2) concerns the production of records from public bodies. There may be circumstances where the Ombudsman may require evidence from individuals or organizations that are not public bodies. This section should be broadened so that it would be similar to section 30(1) of *The Ombudsman Act* (OA) and permit us to request records from any person. This could be accomplished by replacing references to "public body" with "any person".

Similarly, sections 50(3), 50(4), 64(3), 65 and 86(2) should be amended to facilitate the production of records from entities that are not public bodies, extend the duty to cooperate with the Ombudsman and protect employees of non-public body entities from adverse employment action.

Reporting verbally

FIPPA sections 66(1), 66(2), 66(3), 67(2), and 67(3)

Section 66(1) sets out the provisions for reporting out on investigations. Sections 36, 37 and 38 of OA permit verbal and written reports. By making sections 66(1) and 66(2) of FIPPA parallel with the OA, the Ombudsman would be able to provide verbal reports under FIPPA where appropriate. This would assist the Office in providing more timely service to complainants, public bodies and others. So that the Ombudsman can provide verbal reports, we suggest substituting "reporting" for the phrases "a report" or "a written report".

Nevertheless, we believe that there are some instances when information should continue to be provided in writing as currently required under FIPPA. No change should be made to providing the following in writing: recommendations under section 66(1) and notices of appeal under sections 67(2) and 67(3).

Making recommendations***FIPPA section 66(4)(b)***

Section 66(4)(b) requires the public body to provide reasons for not implementing “the recommendations”. There may be circumstances where a public body would accept some, but not all, of the recommendations. Therefore, consideration should be given to replacing “the recommendations” with “any recommendations”.

Conditions for appeal or intervention***FIPPA section 68(3)***

Section 68(3) limits the Ombudsman’s discretion to appeal a decision or intervene as a party to an appeal. The Ombudsman may only appeal or intervene if he or she is of the opinion that the decision raises a significant issue of statutory interpretation or is otherwise clearly in the public interest. The corresponding section under section 50 of PHIA does not impose these conditions. Consideration should be given to making these appeal provisions consistent for FIPPA and PHIA.

Time limits***FIPPA section 85(2)***

The time limit for commencing a prosecution under section 85(2) of FIPPA is two years after the commission of the alleged offence. It may take some time before an individual or our office becomes aware of an alleged offence. Consideration should be given to amending this section to allow for the commencement of prosecutions not later than two years after the discovery of an alleged offence.

2. PURPOSE OF FIPPA***FIPPA section 2***

To emphasize the importance of openness, transparency and accountability, wording similar to that in section 2 of the Nova Scotia *Freedom of Information and Protection of Privacy Act* should be considered for this section. In our view, such a change would make access and privacy rights more meaningful by fostering public trust and confidence.

Section 2 of the Nova Scotia FIPPA provides as follows:

Purpose of the Act**2** *The purpose of this Act is*

- (a) *to ensure that public bodies are fully accountable to the public by*
 - (i) *giving the public a right of access to records,*
 - (ii) *giving individuals a right of access to, and a right to correction of, personal information about themselves,*
 - (iii) *specifying limited exceptions to the rights of access,*
 - (iv) *preventing the unauthorized collection, use or disclosure of personal information by public bodies, and*
 - (v) *providing for an independent review of decisions made pursuant to this Act;*
- and
- (b) *to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to*
 - (i) *facilitate informed public participation in policy formulation,*
 - (ii) *ensure fairness in government decision-making,*
 - (iii) *permit the airing and reconciliation of divergent views;*

to protect the privacy of individuals with respect to personal information about themselves held by public bodies and to provide individuals with a right of access to that information.

3. RECORDS TO WHICH THE ACT APPLIES

FIPPA section 4

Under section 32(1)(a) of FIPPA, a public body may refuse to disclose records that are *freely available to the public or are available for purchase by the public*. For greater clarity, we believe that section 32(1)(a) should be moved to section 4, so that these records would be excluded from the Act.

4. RELATIONSHIP WITH PHIA

FIPPA section 6

In our experience, it is sometimes difficult to determine which Act applies when a record contains both personal information and personal health information. Consideration should be given to amending the section to limit the application of PHIA to personal health information rather than to a *record containing* personal health information.

5. FEES

Clarification

FIPPA section 7(3)

Under section 7(3), the right of access is subject to the payment of any fee required by the regulations. For greater clarity, we would suggest that this section reference section 82 of FIPPA concerning fees, fee estimates and fee waivers, as well as section 9(1)(c) of the regulations concerning fee waivers.

Fee waiver

FIPPA Regulation section 9(1)(c)

Section 9(1)(c) of the FIPPA regulation permits a public body to waive all or part of the fees if the record relates to a matter of public interest concerning public health or safety or the environment. To promote openness and accountability, consideration should be given to extending the exemption to any matter of public interest.

6. STATEMENT OF REASONS FOR DECISIONS

FIPPA new section between sections 9 and 10, as well as 59(1)

Under FIPPA, individuals are allowed a right of access to “records” containing information under the custody or control of public bodies. If public bodies do not record information, however, it cannot be subject to an access request. In our experience, there have been instances where a public body did not record information that was crucial to helping an individual understand a decision that affected him or her.

The New Zealand *Official Information Act* (1982) addresses this concern at section 23 (1):

Right of access by person to reasons for decisions affecting that person –

(1) ... where a Department or Minister of the Crown or organisation makes, on or after the 1st day of July 1983, a decision or recommendation in respect of any person, being a decision or recommendation in respect of that person in his or its personal capacity, that

person has the right to and shall, on request made within a reasonable time of the making of the decision or recommendation, be given a written statement of –

- (a) The findings on material issues of fact; and*
- (b) ...a reference to the information on which the findings were based; and*
- (c) The reasons for the decision or recommendation.*

For openness, transparency and accountability, consideration should be given to creating a right of access to information which would require public bodies to provide a written statement, upon request, for any decisions that affected the applicant. The statement must contain findings of fact, a reference to the information the findings of fact were based upon and the reasons for the decision.

A corresponding right to make a complaint to the Ombudsman (under section 59 of FIPPA) would also have to be created.

7. PUBLIC BODY RESPONSE

FIPPA sections 11(2), 12(1)(c)(ii) and 12(1)(c)(iv)

Failure to Respond

Under section 11(2) of FIPPA, if a public body fails to respond to a request within 30 days, it is to be treated as a decision to refuse access. Section 17(1) of the old *Freedom of Information Act* (FOI) required that the Ombudsman immediately ask the public body to provide the applicant with written reasons for the refusal to give access. Section 17(2) of the old FOI Act specified the content of the written reasons. These FOI sections were not incorporated into FIPPA.

For greater accountability relating to failure to respond, consideration should be given to incorporating the statutory procedures set out in section 17 of Manitoba's repealed *Freedom of Information Act*.

Contents of Response

Section 12(1)(c)(ii) of FIPPA sets out the contents of the public body's response to an access request. In our experience, many responses provided to applicants by public bodies are inadequate. When providing reasons for refusing access, many public bodies merely cite the exception without providing an explanation for why the exception applies.

Consideration should be given to amending this section so that it would require that public bodies provide a description of the record, the specific provision of FIPPA relied on and the reasons why it applies in its response to an applicant.

Time Limit to Complain

Section 12(1)(c)(iv) of FIPPA requires public bodies to advise applicants of their right to make a complaint to the Ombudsman. FIPPA does not currently require public bodies to advise applicants of the time limit for making a complaint. We would suggest that this section be amended to include a reference to the time limits under sections 60(2) of FIPPA in the response.

8. ABUSE OF PROCESS

FIPPA section 13(1)

Section 13(1) of FIPPA permits public bodies to refuse access if a request is repetitive, incomprehensible or has already been provided. We suggest that “abuse of process” be included as a reason for refusing access. This refusal would, of course, be subject to a complaint to the Ombudsman.

9. THIRD PARTY PRIVACY

FIPPA section 17(1)

Section 17(1) of FIPPA states that a public body must refuse to disclose personal information if it would be an unreasonable invasion of a third party’s privacy. Sections 17(2) and (3) provide factors to be considered when determining what constitutes a deemed or “unreasonable invasion of privacy”. In our experience, responses from many public bodies are inadequate, as only section 17(1) will be referenced in the response and not also the reason and specific provision under section 17(2) or 17(3) on which the refusal is based.

For greater clarity, we suggest that section 17(1) specifically reference sections 17(2) and (3) of FIPPA.

10. PUBLIC INTEREST EXCEPTION

FIPPA sections 17, 18 and 19

To promote openness and accountability, consideration should be given to creating a discretionary public interest exemption to the mandatory exceptions under sections 17 (third party privacy), 18 (third party business interests), and 19 (cabinet confidences). If releasing information is clearly in the public interest, then the Head of the public body should have the discretion to disclose the information despite any requirements of sections 17, 18 or 19.

11. CABINET CONFIDENCES

FIPPA sections 19(1)

Section 19(1) of FIPPA states that a public body must refuse to disclose information if it would reveal the substance of Cabinet deliberations. Clauses 19(1)(a) to (e) list examples of the types of records and documents that might reveal the substance of Cabinet deliberations.

In our experience, when public bodies determine that the form of a record falls within clauses (a) to (e), they have a tendency to withhold the record without giving consideration as to whether the content of the record contains information that would reveal the *substance of deliberations*. For greater clarity, consideration should be given to deleting clauses (a) to (e) and the word “including”. The form of the information being considered under FIPPA should not detract from the function and intent of the provision.

12. THIRTY-YEAR TIME LIMITS

FIPPA sections 19(2)(b), 22(2)(b) and 23(2)(a)

Sections 19(2)(b), 22(2)(b) and 23(2)(a) permit the release of Cabinet confidences, local public body confidences and advice to a public body that are more than 30 years old. Consideration should be given to reducing this time limit to ten years.

13. ADVICE TO A PUBLIC BODY***FIPPA section 23(1)***

Section 23(1) provides a public body with the discretion to withhold information that could reasonably be expected to reveal advice to a public body. We understand that this section is intended to encourage open and frank communication within the public body, prior to making a decision.

In our experience, public bodies tend to apply this section too broadly. We believe that once a decision has been made, the information should be releasable subject to a reasonable expectation of harm test.

14. NOTICE***FIPPA section 87***

Currently, the concept of notice occurs only in relation to collection under section 37(2) of FIPPA. In our experience, individuals are not always sure of the public body's practices respecting the collection, use, retention and disclosure of their personal information. For clarity, transparency and better understanding, consideration should be given to requiring that public bodies provide notice relating to their practices, similar to PHIA section 66(1)(d).

PHIA section 66(1)(d) is a regulation making power that requires trustees to provide notice to individuals about their right to examine, copy and correct their own personal health information. In addition, trustees are also required to provide information related to their practices respecting collection, use, retention and disclosure of personal health information.

15. ACCURACY***FIPPA section 38***

Section 38 of FIPPA requires public bodies to ensure that personal information is accurate and complete. Section 16 of PHIA requires trustees to ensure that personal health information is accurate, up to date, complete and not misleading. Consideration should be given to making this section consistent with PHIA.

16. STATEMENT OF DISAGREEMENT***FIPPA section 39(3)(b)***

Section 39(3)(b) outlines how a public body is to respond when it refuses to grant a request for correction to an individual's own personal information. Under PHIA, if a trustee refuses to make a correction, the individual has a right to file a statement of disagreement. There is no corresponding provision under FIPPA. Consideration should be given to making this section consistent with PHIA.

17. AGREEMENT FOR INFORMATION TECHNOLOGY SERVICES***FIPPA section 44(2)***

Section 44(2) requires a public body to enter into a written agreement for information technology services. The agreement must include protections against such risks as unauthorized access, use, disclosure or destruction. For greater protection, consideration should be given to adding retention and alteration to this section.

FIPPA new section at section 44

Currently, public bodies are permitted to disclose personal information to a provider of information technology services, pursuant to a written agreement.

Under PHIA section 25(5), information provided to an information manager is “deemed to be maintained by the trustee”. Consideration should be given to including a section similar to section 25(5) of PHIA, which would make it clear that information disclosed to a provider of information technology services, under FIPPA, is deemed to be maintained by the public body.

18. PRIVACY ASSESSMENT REVIEW COMMITTEE (PARC)***FIPPA sections 46*****Notice to the Ombudsman**

The model set out under section 46 authorizes uses and disclosures that would not otherwise be permitted under FIPPA. We feel that our office should be made aware of the advice given by PARC so that we would have the opportunity to provide comment on the matter. In keeping with the Ombudsman’s duty to monitor and ensure compliance, consideration should be given to providing notice to the Ombudsman when a proposal or request is referred to PARC.

Decisions of Ministers

For openness and transparency, consideration should be given to having the decisions of Ministers, based on advice of PARC, made available in the form of an Annual Report.

19. PRIVACY IMPACT ASSESSMENT (PIA)***FIPPA section 49(d)***

PIAs are analytical tools that are useful in assessing and understanding the potential impact of a proposed program, service or system on information privacy. Some jurisdictions have made the use of PIAs mandatory, either by law or policy. We support the use of PIAs to ensure compliance with FIPPA.

20. COMPLAINT FORM***FIPPA section 60(1)***

Our office has already provided our concerns related to the prescribed complaint form to Culture, Heritage and Tourism, together with a draft replacement form for consideration. Our comments about the prescribed form have not changed.

Our suggested amendments are intended to make the complaint procedure and investigative process clearer and more efficient. Generally, the current form does not provide the most basic information necessary to begin an investigation under FIPPA. For example, the form does not:

- require the name of the public body;
- require the signature of the complainant;
- request details of a privacy complaint;
- request that relevant documentation be attached;
- provide space for representative information; and
- photocopy or fax legibly because of the shaded areas.

21. NO FURTHER APPEAL EXCEPT WITH LEAVE

FIPPA section 74

Currently, a decision of the court under FIPPA is final and binding and there is no appeal from it. Under PHIA, the Court of Appeal can give leave to hear a matter. Consideration should be given to amending this section so that it is similar to PHIA's.

22. SECURITY SAFEGUARDS FOR PERSONAL INFORMATION

FIPPA sections 59(3) and 87(j)

Right of Complaint

Section 41 imposes a duty on public bodies to protect personal information. Unlike section 39(2)(b) of PHIA, however, FIPPA does not provide individuals with the right to complain if public bodies fail to protect their personal information. For consistency with PHIA, consideration should be given to providing a right of complaint for failures to protect personal information.

Security Safeguards

FIPPA does not set out specific security safeguards for the protection of personal information. In contrast, the PHIA Regulation includes the following security safeguard provisions:

- Section 2 (Written security policies and procedures),
- Section 3 (Access restrictions and other precautions),
- Section 4 (Additional safeguards for electronic health information systems),
- Section 5 (Authorized access for employees),
- Section 6 (Orientation and training for employees),
- Section 7 (Pledge of confidentiality for employees) and
- Section 8 (Audit).

For transparency, we would suggest enacting a regulation setting out similar security safeguard provisions as PHIA.

Retention and destruction

FIPPA does not set out specific requirements for the retention and destruction of personal information as does section 17 of PHIA. Consideration should be given to making FIPPA consistent with PHIA.

23. REVIEW OF FIPPA

FIPPA section 98

Consideration should be given to periodically reviewing the Act.