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Manitoba Ombudsman

April 14, 2021

Kelvin Goertzen
Minister
Manitoba Legislative and Public Affairs
330 - 450 Broadway, Legislative Bldg
Winnipeg, MB R3C 0V8

Dear Minister Goertzen:

I am writing to you further to my recent discussion with your department regarding my observations of Bill 49, The Freedom of Information and Protection of Privacy Act (FIPPA). I appreciated the opportunity to meet with you on March 26, 2021, and share my observations about the practical implications of the proposed amendments and the extent to which they further the access to information and privacy principles which underpin the legislative regimes across Canada. My office's observations are based upon our experience in investigating complaints and providing oversight of the range of public bodies' (provincial departments and agencies, municipal governments, school divisions, universities and colleges as well as health-care bodies) decisions and compliance with the act. The purpose of this letter is to summarize the concerns raised for consideration during the committee stage of the legislative process.

One of the main purposes of all access to information legislation is to provide transparency so that people can see and understand the actions and decisions of government – the presumption is that government information is open to citizens unless it is subject to limited and specific exceptions to disclosure. This purpose also extends to the right of access to one's own personal information held by public bodies. During our meeting, I highlighted areas where the proposed amendments will have significant practical implications for the access and privacy rights of Manitobans and the effective oversight of the decisions of a public body, namely:

1. The citizens' right to timely access to information.
2. Expanding the grounds on which a public body can disregard or extend the timeline for response to a request for access.
3. The ombudsman's authority to review records claimed to be subject to privilege.
4. The period of review for FIPPA.

The citizen's right to timely access to information

Bill 49 increases the time limit for a response to an access request for general and personal information from the current limit of 30 days to 45 days. It also permits the public body to exercise its discretion to extend the time limit for an additional 45 days and includes additional reasons for the extension. This will add an additional month to the current maximum allowable limit for response before the public body is required to seek permission for an extended time limit from the ombudsman.

The 45- and 90-day time limits to respond to a request do not acknowledge that some citizens may need timely access to their own information in order to make informed decisions that affect their lives. For example, a citizen may be seeking their own information held by a public body so they can determine whether to pursue an appeal process in a matter that affects them, or other avenues of recourse. The inability to have timely access to one's own personal information may inadvertently prevent the citizen from accessing alternate dispute resolution or appeal mechanisms within the required time frame.

We observe that many public bodies hold both personal and personal health information of citizens and their employees. An inconsistency exists between the time limits under Bill 49 and the limit under Manitoba's Personal Health Information Act, which requires public bodies to respond no later than 30 calendar days. Extensions to a request for access to one's own personal health information is not permissible. It is possible that the two different response times will result in an individual receiving their information from one public body at two separate intervals, and is also likely to increase inefficiencies in the administration of access requests and complaints made to my office.

There are also practical implications for the timely access to general information, where a citizen's ability to participate in local democratic processes may be suppressed. For example, residents in a municipality may seek opportunity to contribute to council deliberations about development or infrastructure projects or other decisions that affect their property or other rights. The issues can be very complex. Often citizens seek access to municipal records to help them understand local issues and enable their participation in local decision making, particularly where there is a financial impact to the citizen. Longer response and extension time periods may adversely affect their participation in local issues, particularly where the access response is provided after a decision is already made by the municipal council. We also note that while most other jurisdictions vary in their response times including extension limits, no jurisdiction in Canada is permitted to respond by a time limit greater than 60 days without seeking approval from the commissioner/ombudsman. The requirement to obtain permission from the ombudsman for a response greater than 60 days should be considered to create a balance between the citizen's right of access to information and the need of the public body to fulfill the range of operational obligations of an organization. It also helps to promote transparency and accountability of public bodies to the citizens they serve.

Expanding the grounds on which a public body can disregard or extend the timeline for response to a request for access

Our second area of concern is the expanded grounds on which a public body can to either extend the time limit for response or disregard a request for access. We acknowledge that there are circumstances where the public body may not be able to fulfill its obligations to respond to access requests, regardless of volume, and continue to maintain its operations. In our view, these circumstances are largely *beyond the control* of the public body. This has been illustrated by the recent pandemic, past floods, or other unplanned crises the public body could not anticipate and their operations were adversely impacted. However, increasing the grounds for extension to include circumstances the public body can directly control, such as consulting with their own legal counsel, is inconsistent with categories of exceptional circumstances noted in the 2019 Report on Statutory Review. When a public body consults with counsel before making an access decision, timely advice should be provided. Legal counsel is instructed by the client, which is a public body, and this should not be grounds for extending the time to respond to an applicant's access request.

Similarly, FIPPA currently permits a public body to disregard access requests, provided certain criteria are met under section 13. We acknowledge that public bodies encounter requests that are incomprehensible, or are unduly repetitive or systematic and, as such, would unreasonably interfere with the operations of a public body. However, it is our position that such requests are the exception and not the rule. An excessively broad or systematic request may be the result of the applicant not understanding the public body's mandate or the records they maintain. Bill 49 removes the current obligation of the public body to undertake a two-part test when deciding to disregard a request under clause 13(1)(b). The current test requires the public body to assess the grounds to exercise their discretion to disregard and to consider how fulfilling the request would interfere with the operations of the public body. The practical implications of broadening the circumstances to disregard a request include:

- A public body that deems a request to be "unduly repetitive or systematic" (subclause 13(1)(c)(i)) or "excessively broad" (subclause 13(1)(c)(ii)) may result in a 'catch-22' situation for the applicant – if their request is too broad, the public body deems it to be "excessively broad" and may disregard it, and if the applicant breaks up their broad request into smaller requests, the public body may disregard those requests they deem to be "unduly repetitive or systematic."
- A decision to disregard made solely on the basis of its perceived interference with the operations of the public body (clause 13(1)(d)), could be influenced by the public body's own administrative decisions that affect its ability to fulfill its obligations under FIPPA, such as not having proper records management, efficient processes, and adequate resourcing to provide the public with access to information services under FIPPA.
- A group of concerned citizens, community-based organizations, advocacy groups and other actors use the access to information process to fulfill their role in civil society. Groups members who have a common interest in an issue may be considered associated applicants by the public body and their request for access may be restricted. This may deter citizens from making access requests.

- The name of an applicant is personal information, which is protected under FIPPA. The practice of grouping and tracking requests from applicants has implications for their privacy rights.

We further observe that the grounds to disregard a request to access information may also be used to disregard an applicant's request to correct a record containing their own personal information. One of the objectives of FIPPA is to ensure that public bodies collect and handle personal information responsibly to protect personal privacy. FIPPA is based on globally recognized principles of fair information practices. One of the ten privacy principles is accuracy. This principle requires that personal information be as accurate, complete, and up to date as necessary for the purpose in which it is used. To give effect to that principle, legislation across many countries provides an individual with the right to request a correction of any personal (or personal health) information to ensure accuracy or completeness. Bill 49 provides the public body the ability to disregard a request for correction of an individual's personal information under FIPPA (clause 9(2.1)). This is inconsistent with Manitoba's Personal Health information Act and is also incongruent with fair information practices principles.

In practice, the expanded circumstances for disregarding a request enable more subjectivity and may result in decision making across public bodies that can lead to inequities in citizens' ability to access information, including access to their own personal information. In some jurisdictions, the ability to disregard requests based upon the number of applications, associated applicants, or the interference with the public body's operations requires the approval of the oversight body. A return to the two-part test, or seeking permission from the commissioner/ombudsman to disregard in these three circumstances may safeguard against administrative variations in interpretation and inconsistency across public bodies, while strengthening the balance between a citizen's right of access and the daily operations of public bodies.

Ombudsman's authority to review records claimed to be subject to privilege

Bill 49 expands the basis to refuse access under section 27 to include information subject to solicitor-client privilege, litigation privilege, as well as information subject to any other legal privilege. Without clarity regarding the term "legal privilege," public bodies' decisions to apply this provision may not be well-supported, and/or there may be increased administrative and financial burden for both the public bodies who may consult with legal counsel and for my office in the course of completing our independent review of the public body's decision.

An independent oversight body provides a fair and transparent mechanism for citizens to disagree with decisions of public bodies. My office has the authority and the duty to ensure compliance with the act by reviewing the decisions of public bodies and resolving citizen complaints. This function is an essential component of all effective access to information and privacy protection legislation. In my office's comments published during the consultation phase, it was recommended that sections 50 and 51 be amended to provide certainty regarding the ombudsman's power to review records claimed to be subject to all types of privilege. Our commentary noted circumstances where jurisdictions with similarly worded provisions for

producing records in an investigation were subject to court intervention, both provincially and at the Supreme Court of Canada. As Bill 49 broadens the category in section 27 to legal privilege, it is my view that it is critically important to ensure clarity about the ombudsman's power to review records where a public body claimed legal privilege as the basis to refuse access. Confusion and administrative and financial burden in the system could be reduced by considering amendments consistent with recommendation 24 in our 2017 consultation comment. More importantly, the added clarity would strengthen the efficiency of our investigative process and preserve the function of an independent review of a public body's decisions, a foundational principle and stated purpose of FIPPA (clause 2(e)).

The period of review for FIPPA

Lastly, the fact that Bill 49 and Bill 54 increase the mandatory review period from five (5) to ten (10) years is of significant concern. While I recognize that legislative amendments can occur at any time prior to the mandatory review period, it is very important that the mandatory review occur no later than the current five-year period. We have to look no further than the current pandemic to acknowledge that the speed of innovation experienced in the public sector is unprecedented. New partnerships have been developed and funded to perform public functions and many public bodies have adopted new technology to enable online access to information and public services. These innovations have numerous potential benefits for society but they also impact fundamental democratic principles and human rights, including access to information and privacy rights of citizens. Citizens have concerns about the use and protection of their personal and personal health information. As advanced technologies, such as machine learning and artificial intelligence become more prominent in the provision of public services, it is imperative that the legislation be reviewed to ensure the privacy protection over personal and health information is at a level that citizens expect. Moreover, maintaining the five-year review period will ensure that the legislative regime continues to advance the principles of openness, transparency, accountability and fairness for Manitobans.

In closing, I would like to acknowledge that Bill 49 contains many positive amendments that advance access to information and privacy protection principles and the purposes of FIPPA. *It is my view that amended legislation is an opportunity to strengthen the principles on which it is based, to reduce barriers for citizens and be more responsive to the rights and protections of all Manitobans.*

As an independent officer of the Legislative Assembly of Manitoba mandated to oversee the act, I appreciate the opportunity to provide comment on the practical implications of the proposed amendments. As some of my comments relate to Bill 54, I have copied the minister responsible for PHIA. I look forward to subsequent discussions on the regulations.

I thank you for taking the time to receive my comments and consider them in the next stage of the legislative process. In the interest of transparency, I will be posting this letter on our website.

Sincerely,

Jill Perron
Manitoba Ombudsman

cc: Heather Stefanson, Minister of Health and Seniors Care
Elliot Sims, Deputy Minister, Legislative and Public Affairs