INTRODUCTION

◆ Year in Review

1997 could be characterised as the year of increased workloads, challenges to the spirit of the Act, and change, all of which, in some way, have contributed to concerns about backlogs and delays. Steps are being taken to deal with these concerns, and it is anticipated that by mid-1999 we will realize significant control over the backlogs and delays we have been experiencing.

In 1997 there was an increase of 20 complaints representing a 40% increase, bringing the total number of complaints received to 70. While this may seem a small number, it should be noted that until recently, the unit undertaking the responsibilities under *The Freedom of Information Act* (FOI) for investigation, informal resolution add reporting consisted of the Ombudsman and one investigator, Ms. Gail Perry. Needless to say, the resources were strained by the increase in complaints.

In addition, during 1997 the contemplated changes in access and privacy legislation began to generate interest from within Manitoba, across Canada and internationally. This resulted in increased activities in our office relating to the role of the Ombudsman in the proposed legislation. There were many consultations, requests for information, speaking engagements and participation on panels, all of which added to the workload.

The Legislative Assembly Management Commission, to whom the Ombudsman submits requests for budget additions, met in late fall of 1997 and approved additional resources to accommodate the Ombudsman's responsibilities under the new legislation. Unfortunately, we were already experiencing backlogs at that time.

The Personal Health Information Act was proclaimed on December 11, 1997, and this necessitated organizational change within the office, as well as the need for space acquisition and recruitment of staff. As might be expected, the recruitment of staff and the acquisition of space were time consuming processes. At the time of writing this report which, in itself, has been the subject of delay, we have hired staff and acquired the space to attack the backlog.

The future presents a major challenge for this office in meeting the obligations placed on the Ombudsman under the new legislation. I am fortunate to have dedicated and hard-working staff who are committed to meeting the challenge head-on and who have spent many late nights and weekends working towards eliminating backlogs.

I am confident that with the stakeholders' commitment to the principles of access and privacy as spelled out in the new legislation, and with the commitment our office has to meeting its obligations under the legislation, we will be successful in meeting the challenge.

As indicated previously, experiences in 1997 suggested that there is an ongoing need to be vigilant in promoting compliance with the spirit of access legislation.

FOI legislation implies that access is the rule, and only where a record clearly falls within the ambit of an exemption should access be denied. In most cases we find denials of access are justified by provisions of the Act. Where there is some question about the releasability of a record, informal processes utilized by our office normally result in a resolution of the issue. In some cases it is necessary for the Ombudsman to make a formal recommendation, and it is rare that a recommendation is not accepted by a department or agency.

Two cases carried over from 1996 resulted in recommendations that were not accepted in 1997. In addition, a case started in 1997, ended in a recommendation in early 1998 which was also not accepted.
This, in itself, is not indicative of a major failing in the process. There is room for differing opinion between the Ombudsman and a department or agency. Differences, of course, can ultimately be decided upon by the

Courts.

Concerns do arise, however, when it appears that, at the outset, a department or agency is looking for reasons to deny rather than ways to provide access to records.

Access legislation is obviously access-biassed, and in order to deny access to records in the custody or control of a government department or agency, I believe one must clearly demonstrate the records fall within an exemption and that there is a reasonable expectation that harm will occur should there be release.

The three cases wherein recommendations for release of records were denied involved significant issues, specifically,

- *access to an electronic database (Consumer and Corporate Affairs, p. 20);*
- *right of access to public opinion polls (Manitoba Finance, p. 28); and*
- *the right of access to ministerial briefing notes (Manitoba Justice, p. 34)*

It appeared to me that the applications for access in these cases were initially met with reluctance to release, and efforts began to find reasons to support denial. Informal resolution processes intended to minimize the need for a formal recommendation were unsuccessful as it appeared that the Departments concerned were taking a no release stance.

The issues in these cases were not new in the field of access to information. In particular, access to briefing notes and public opinion polls had been considered in other Canadian jurisdictions having similar legislation, with briefing notes being considered for release on a record-by-record basis and polls being routinely released. Nevertheless, it was clear to our office that in these cases the positions on denial were firm, and even severing would not have been a consideration at that point.

As noted in the case summaries, the recommendations for access were not accepted and I concluded that the denials were unjustified by the spirit and provisions of the Act.

Although the Departments refused to accept the recommendations, I note that some positive considerations have been given to the issues by Manitoba Finance and Manitoba Justice. I understand that a policy is being developed for routine release of public opinion polls. I also am advised by Manitoba Justice that it will be considering ministerial briefing notes on a document-by-document basis, with consideration being given to severing where possible.

At times, tough decisions need to be made to demonstrate the commitment to the principles of accountability, openness and transparency. It is these tough decisions favouring access that show the vibrancy to the spirit of access. Commitment and adherence to the spirit of access is necessary to convince the public that government recognizes the enormous moral value of accountability, openness and transparency.

It should be of no surprise that our office will be vigilant in seeking commitment to the spirit of the legislation as well as the letter of the legislation when undertaking our obligations under *The Freedom of Information and Protection of Privacy Act* and *The Personal Health Information Act.*

◆ Legislation Proclaimed

- **Freedom of Information and Protection of Privacy Act**
- **Personal Health Information Act**

The Manitoba Legislature passed fundamental information rights law during the Third Session of the Thirty-

Sixth Assembly (June 27, 1997): *The Personal Health Information Act* (PHIA) and *The Freedom of Information and Protection of Personal Information Act* (FIPPA). PHIA was proclaimed on December 11, 1997 and FIPPA on May 4, 1998.

PHIA is the first personal health information privacy protection legislation in Canada. FIPPA, in effect, adds personal information privacy protection to the general access rights and exemptions embodied in *The Freedom of Information Act* which was repealed when FIPPA took force.

These companion statutes reflect a recognition of serious public concern for personal information privacy, especially in the face of rapidly growing use of computer and communications technologies to enhance private and public sector operations and services. In 1996, Manitoba Health and Culture, Heritage and Citizenship both issued discussion papers as a prelude to the development of new access and privacy legislation. One of the papers was conveyed in May, 1996, with the following comment from the Minister of Culture, Heritage and Citizenship:

During the last few years, the growth of electronic information technology has opened a vast range of information to a growing number of people. At the same time, many have felt their privacy is threatened by the sheer volume of information that potentially can be accessed and matched through electronic technologies... The intent of new legislation [FIPPA] is to accommodate technological change and balance the right to privacy and the right to access information.

On proclamation of PHIA, the Minister of Health said:

The Personal Health Information Act is designed to ensure that personal, sensitive health information about Manitobans is secure, while allowing the health system to utilize the benefits information technology has to offer. The intent is to ensure that personal information is properly protected by those to whom it is entrusted. [News Release, December 17, 1997]

Opinion surveys during the past 10 years show a deep and growing public concern over the collection, use, and disclosure of personal information in the face of technological, commercial, and social threats. Organizations which require or want to obtain personal information from individuals are increasingly being told that the public must have confidence in the information practices of those to whom this information is entrusted.

Both enactments take internationally accepted principles of fair information practice as their springboard. These principles will be explored in more detail in future Annual Reports, but notice is taken here of the right of an individual to have recourse to a fair and impartial review of access and privacy issues and complaints through the Office of the Ombudsman.

The Ombudsman's role in the new access and privacy legislation has been more clearly articulated and broadened from mainly complaint investigation to include auditing, monitoring, and ensuring compliance with the Acts. The Ombudsman may comment publicly on the implications of proposed legislative schemes or programs of public bodies as they affect access to information and protection of privacy. He may comment on the use and disclosure of personal information, and may appeal a decision of a public body to Court or intervene as a party to an appeal if the Ombudsman is of the opinion that the decision raises a significant issue of interpretation or that an appeal is clearly in the public interest. The Office also has a noteworthy role in informing the public about the Acts and receiving comments about access and privacy issues. In addition to submitting an annual report to the Legislature, the Ombudsman may, in the public interest, publish a special report on any matter within the scope of the powers and duties of the Office including any particular matter investigated by the Ombudsman.

The Legislature has provided additional resources to the Ombudsman's Office and a distinct Access and Privacy Division is being established.

FIPPA is being proclaimed in two phases: the first in 1998, to cover the provincial government and its

agencies, including Crown corporations; the second in 1999, for local public bodies including municipal governments, educational bodies such as universities and school authorities, and health care bodies such as regional health authorities and personal care homes.

PHIA, already in force, applies not only to public bodies, but also to personal health care professionals such as doctors and dentists, and to health care facilities such as personal care homes, psychiatric facilities, and medical clinics.

While not without controversy, the passage of these two Acts strengthens overall the information rights of Manitobans. Both access and privacy rights in an electronic information environment have been addressed and will no doubt be a central preoccupation of many public bodies and the Ombudsman's Office during the coming years. Part of this Office's message to the public and to public bodies will be that information rights are protected by principle and by law, and should be built into electronic and other information systems from the start. Ethical information practices are good and necessary business practices for any organization serving the public. In a nutshell, public information rights are no more a barrier to efficient and effective public services than democracy is to informed decision-making by governing authorities.

RECENT COURT DECISION

Manitoba's Court of Queen's Bench ruled on seven cases under *The Freedom of Information Act* between September 30, 1988, when the Act came into force, and May 4, 1998, when it was repealed.

The first of these decisions was discussed in our 1990 Annual Report, the second in our 1993 report and the third and fourth in our 1994 Annual Report. The fifth case, although referred to in our 1995 report, was not the subject of a written decision by the Court. The sixth decision was discussed in our 1996 Annual Report.

The seventh decision was delivered on January 21, 1997, and is discussed below.

The Freedom of Information Act provides that where access is withheld by a department or agency, the first level of review is by complaint to the Provincial Ombudsman. If a complaint is not supported by the Ombudsman or a department does not act on a recommendation by the Ombudsman to release, an Applicant can proceed to Court.

The matter ruled upon by the Court in 1997 was the subject of an Ombudsman case summary in our 1995 Annual Report under the heading "Manitoba Health" (pp. 30-33, "Personal Privacy under the Microscope"). From our review of the matter, it was my opinion that the position of Manitoba Health to withhold the requested records was not justified by the provisions of *The Freedom of Information Act*. The Applicant was advised of his right to appeal the refused access to Court, which he did. The following is the result.

Swan v. The Minister of Health of Manitoba (Suit #Cl 96-01-96026)

The Applicant was refused access to "Copies of the total amounts paid by Manitoba Health to each of [23 laboratories/clinics]...for diagnostic testing in...1991/92, 1992/93 and 1993/94." Manitoba Health denied access on the basis of clause 41(1)(b) of *The Freedom of Information Act*, which sets out:

> ***Protection of personal privacy.***
> ***41(1)*** *...the head of a department shall refuse to give access to any record the disclosure of which would constitute an unreasonable invasion of the privacy of a third party, including but not restricted to a record which discloses*
>
> *(b) personal details of a taxation matter, financial transaction or other pecuniary matter in which the third party is or has been involved.*

In the Court's written decision, Madam Justice Duval noted certain principles of *The Freedom of Information Act*:

> *The Act provides, in s. 3, that every person has, upon application, a right of access to any record in the custody or under the control of a government department. Section 34 of the Act states that in any appeal under the Act, the burden of proof is on the head of the government department to establish that the applicant has no right of access to the record...*
>
> *The onus of establishing on a balance of probabilities that the exemption applies lies with the respondent. The exemption must be strictly interpreted. For an exemption to apply, the record must fall squarely within the ambit of the exempting section. See Marchand v. Manitoba (Minister of Government Services) (1990), 74 D.L.R. (4th) 186 (Man. Q.B.). In Maislin Industries Ltd. v. Minister for Industry Trade and Commerce, Regional Economic Expansion (now Minister for Regional and Industrial Expansion) et al. (1984), B Admin. L.R. 305 (F.C.T.D.), Jerome, A.C.J., in dealing with the provisions of the Access to Information Act, S.C. 1980-81-82-83, c. 111, stated at p. 309:*

> *...[S]ince the basic principle of these statutes is to codify the right of public access to government information two things follow: first, that such public access ought not be frustrated by the Courts except upon the clearest grounds so that doubt ought to be resolved in favour of disclosure;...*
>
> *The purpose of the Act is to clearly establish the individual's right of access to any record in the custody or under the control of a government department...*

The Court identified the issue in this particular case as being:

> *...whether the records would disclose personal details of a financial transaction or other pecuniary matter in which the third parties have been involved, thereby constituting an unreasonable invasion of the privacy of the third parties. If so, the records are exempt from disclosure pursuant to the provisions of clause 41(1)(b) of the Act.*

Essentially, it was the position of the Applicant that the records would not disclose "personal details" of a financial transaction or other pecuniary matter in which the laboratories and radiology clinics had been involved and that disclosure would not constitute an "unreasonable invasion of privacy."

The Department submitted, in part, that the Court must determine whether or not it is required to generate records which it indicated did not exist. It was noted that the Department maintained the records of each facility's billings and payments through the medical/facility's billing number rather than under the facility's name. It was noted that the request was for payment made to the facilities as opposed to payments made to medical directors.

The Department's submission also included the argument that the word "personal" means "relating to the person," the person being each individual facility. It was submitted that the requested information was private information that each individual facility would consider its own and respecting which there was an expectation of confidentiality.

The Court concluded that the records of each facility's billings existed despite the fact that the Department elected to record them in the name of the facility director. It was stated by the Court that the records were "easily identifiable" and the Department would not be required to generate or create new records in the matter.

The Court considered the word "personal" and the term "personal information." The Court also distinguished section 41 of *The Freedom of Information Act*, concerning "Protection of personal privacy" from section 42, "Commercial information belonging to third party," although the latter provision was not advanced by the Department. The Court stated:

> *Section 41 should be considered in conjunction with s. 42 of the Act. Sections 41 and 42 do not address the same interests of a third party involved in a commercial or financial transaction with the government. The Legislature must be taken to have addressed different concerns respecting the protection of the interests of a third party: the unreasonable invasion of privacy concern identified in s. 41, and the expectation of confidentiality concern, or the prejudice or financial loss concern, identified in s. 42...*
>
> *The Legislature has attempted to balance the individual's right to privacy with the public's interest in disclosure of information within the knowledge and under the control of a government institution or department. In certain cases, the Legislature has decided that information about an identifiable individual can be disclosed, such as information pertaining to the classification, salary range and benefits, or employment responsibilities of a third party who is or was an officer or employee of a department or a member of the staff of a minister (clause 41(2)(a)), or pertaining to financial or other details of a contract for personal services between a third party and a department (clause 41(2)(b)).*

The Judge observed that there was no evidence presented as to whether any of the laboratories and radiology clinics were incorporated entities or had the status of a person in law. However, regardless, the Judge stated that the laboratories and radiology clinics were third parties within the meaning of *The Freedom of Information Act*. The Court concluded that:

> *...the word "personal" relates to an individual or a natural person rather than to a person in law, such as a corporation, or to a non-natural entity, such as an association or an organization.*

Having considered the nature of the exemption specified in clause 41(1)(b) of the Act, the Court concluded that the Department:

> *...has not established on a balance of probabilities that the exemption applies in this case. Provided that disclosure of the billings of each laboratory and radiology clinic does not result in disclosure of the billings of an identifiable individual, then that information does not constitute a personal detail within the meaning of subsection 41(1) of the Act. However, if the laboratory or radiology clinic is a sole proprietorship, then the information is a personal detail of a pecuniary matter related to an identifiable individual...*

A clinic that made a submission at the hearing was identified by the Court as being a sole proprietorship and, therefore, subject to the clause 41(1)(b) exemption.

The Court ordered that Manitoba Health give the Applicant access to records disclosing the total amounts paid by the Department to each of the laboratories and radiology clinics listed by the Applicant, excluding any sole proprietorships.

STATISTICAL INFORMATION

Seventy complaints were received by our office in 1997. Of these, 45 were closed and 25 were carried forward to 1998. Our office also closed the 1 case carried over from 1995 and the 11 cases carried over from 1996. In total, 57 cases were closed in 1997.

The disposition of the 70 complaints received in 1997 was:

12 - Resolved or partially resolved
21 - Not Supported
11 - Discontinued by Ombudsman
1 - Discontinued by Client
25 - Pending

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Complaints Received in 1997 by Category and Disposition

Child and Family Services	**..... 3**
- Refused access	Not Supported
- Refused access	Not Supported
- Refused access	Not Supported
Consumer and Corporate Affairs	**..... 1**
- Refused access	Pending
Education and Training	**..... 4**
- Refused access	Pending
- Presumed refusal	Not Supported
- Refused access	Pending
- Refused access	Supported; Resolved Informally
Environment	**..... 1**
- Refused access	Not Supported
Finance	**..... 2**
- Contesting extension	Supported
- Refused access	Pending
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Health	**.....**	**7**
- Refused access	Supported; Resolved Informally	
- Refused access	Pending	
- Refused access	Pending	
- Refused access	Pending	
- Refused access	Pending	
- Refused access	Pending	
- Refused access	Pending	
Highways & Transportation	**.....**	**10**
- Refused access	Partially Supported; Partially Resolved Informally*	
- Contesting extension	Not Supported	
- Contesting extension	Not Supported	
- Contesting extension	Not Supported	
- Contesting extension	Not Supported	
- Contesting extension	Not Supported	
- Contesting extension	Not Supported	
- Contesting extension	Not Supported	
- Contesting extension	Not Supported	
- Contesting extension	Not Supported	
Industry, Trade and Tourism	**.....**	**1**
- Refused access	Pending	
Justice	**.....**	**15**
- Refused access	Pending	
- Refused access	Pending	
- Refused access	Partially Supported; Partially Resolved Informally	
- Refused access	Pending	
- Refused access	Not Supported	
- Refused access	Pending	
- Refused access	Pending	
- Refused access	Pending	
- Refused access	Pending	
- Refused access	Pending	
- Refused access	Pending	
- Refused access	Pending	
- Refused access	Pending	
- Refused access	Pending	
- Refused access	Supported; Resolved	
Manitoba Labour	**.....**	**3**
- Refused access	Not Supported	
- Refused access	Partially Supported; Partially Resolved Informally	
- Refused access	Supported	

Manitoba Hydro	**.....**	**1**
- Access Guide complaint	Discontinued by client	
Manitoba Public Insurance	**.....**	**2**
- Refused access	Supported; Resolved Informally	
- Refused access	Pending	
Manitoba Telephone System	**.....**	**11**
- Presumed refusal	Discontinued by Ombudsman	
- Presumed refusal	Discontinued by Ombudsman	
- Presumed refusal	Discontinued by Ombudsman	
- Presumed refusal	Discontinued by Ombudsman	
- Presumed refusal	Discontinued by Ombudsman	
- Presumed refusal	Discontinued by Ombudsman	
- Presumed refusal	Discontinued by Ombudsman	
- Presumed refusal	Discontinued by Ombudsman	
- Presumed refusal	Discontinued by Ombudsman	
- Presumed refusal	Discontinued by Ombudsman	
Natural Resources	**.....**	**4**
- Presumed refusal	Not Supported	
- Refused access	Not Supported	
- Refused access	Partially Supported; Partially Resolved Informally	
- Refused access	Not Supported	
Northern Affairs	**.....**	**1**
- Refused access	Partially Supported; Partially Resolved Informally	
Rural Development	**.....**	**3**
- Presumed refusal	Not Supported	
- Refused access	Pending	
- Refused access	Supported; Resolved Informally	
Workers Compensation Board	**.....**	**1**

- Refused access	Not Supported
TOTAL	**70**

* Cases where it was felt access should be granted to some of the records originally denied and where informal procedures resulted in access being granted.

Disposition of Complaints Carried Over from 1996.

There were twelve complaints carried over to 1997 from 1996. One was carried over to 1998 and eleven were concluded as follows:

NO.	DEPARTMENT/OTHER	COMPLAINT	DISPOSITION
1.	Agriculture	Refused access	Not Supported
2.	Consumer & Corporate Affairs	Refused access	Supported; Report with Recommendation
3.	Environment	Refused access	Partially Supported; Partially Resolved Informally*
4.	Family Services	Refused access	Not Supported
5.	Finance	Refused access	Not Supported
6.	Highways & Transportation	Refused access	Partially Supported; Partially Resolved Informally
7.	Highways & Transportation	Refused access	Pending
8.	Housing	Refused access	Not Supported
9.	Justice	Refused access	Partially Supported; Report with Recommendation
10.	Manitoba Public Insurance	Refused access	Partially Supported; Report with Recommendation
11.	Manitoba Telephone System	Refused access	Partially Supported; Partially Resolved Informally
12.	Workers Compensation Board	Refused access	Not Supported
	TOTAL		12

* Cases where it was felt access should be granted to some of the records which were originally denied and where informal procedures resulted in access being granted.

Disposition of Complaints Carried Over from 1995.

There were two complaints carried over to 1997 from 1995. One was carried over to 1998 and the other was concluded as follows:

NO.	DEPARTMENT/OTHER	COMPLAINT	DISPOSITION
1.	Health	Refused access	Not Supported; Resolved Informally
2.	Health	Refused access	Pending
	TOTAL		2

Sources of Complaints

Camp Morton	1
Ile des Chenes	1
Lorette	1
Mountain Road	1
Norway House	1
Otterburne	1
St. Georges	1
Winnipeg	62
Subtotal	**69**
Out of Province	
Alberta	1
Subtotal	**1**
TOTAL	**70**

MANITOBA CONSUMER & CORPORATE AFFAIRS

Our office received one complaint of refused access against Manitoba Consumer and Corporate Affairs in 1997. At the time of writing this report, the case is pending. However, a notable complaint, received in 1996, concerning the Department's Vital Statistics Agency, was completed in 1997.

The case concerned the Department's refusal to provide a copy of an electronic database recording death events in Manitoba. As discussed below, our investigation of the complaint led to a recommendation of release with severing.

The right of access to records under *The Freedom of Information Act* is set out in section 3 of the Act as follows:

> ***Right of access.***
> ***3*** *Subject to this Act, every person has, upon application, a right of access to any record in the custody or under the control of a department, including any record which discloses information about the applicant.*

Usually, it is the exceptions to access, called "exemptions" under the Act, that are the reason for non-disclosure. Exemptions recognize that release of certain records or release of records in certain circumstances would constitute an unreasonable invasion of a third party's personal privacy, or would cause harm to a third party in a commercial situation, or could reasonably be expected to harm the government or a government department in certain situations.

Less frequently encountered is section 66 of the Act. It provides that a few specified pieces of legislation and parts of legislation prevail over *The Freedom of Information Act*.

In this case, the Department maintained that the requested records did not fall under *The Freedom of Information Act* at all because they fell within sections 31 to 33 of *The Vital Statistics Act*, provisions set out in section 66 of *The Freedom of Information Act*.

However, the application of the law is dependent on the facts. Based on the wording of the Applicant's request in this case, *The Freedom of Information Act* and *The Vital Statistics Act*, I could not accept that *The Freedom of Information Act* did not apply to the request. Further, based on our review, I was of the opinion that release of the requested record, with appropriate severing, would be in keeping with the provisions and the spirit of the Act.

♦ 96-150-1-F3
Covering Your Databases to Death

A request was made for "...an electronic copy of the computer database at the Vital Statistics Agency that records death events in Manitoba. In particular,...data for the years 1994 and 1995."

The Access Officer responded that the requested record was excluded under section 66 of *The Freedom of Information Act*, which refers to sections 31 to 33 of *The Vital Statistics Act*. Subsection 66(c) of *The Freedom of Information Act* sets out:

> ***Other enactments prevail***
> ***66*** *Without restricting the generality of subsection 64(1), and notwithstanding section 65, this Act*

does not apply to the right of access and the procedures for gaining access to records, and the restrictions on access to records, contained in the following provisions:

(c) Sections 31 to 33 of The Vital Statistics Act.

The Access Officer advised the Applicant:

Section 66 of The Freedom of Information Act provides that the procedures set out in sections 31 to 33 of The Vital Statistics Act respecting the right of access, procedures for gaining access, and restrictions on access to the records of registrations of births, stillbirths, marriages, or deaths, apply. Section 31 of The Vital Statistics Act, in conjunction with sections 32 and 33, sets out a code of access to the information kept by the Vital Statistics Agency respecting the registration of births, still births, marriages or deaths. These procedures and restrictions apply to all death registration information, not only to the certificates and documents specifically referred to in sections 32 or 33.

Upon receipt of the Applicant's complaint to our office, enquiries were made, meetings were held with the Department and the legislation and other relevant information was reviewed

I note that sections 31 to 33 of *The Vital Statistics Act* set out a right of access and procedure for gaining access to a certificate of registration of death or a certified copy or photographic print of any registration of death. The provisions in *The Vital Statistics Act* describe the procedure for gaining access to these paper records showing individual death events.

The Applicant in this case was not requesting a Certificate of Death or a certified copy or photographic print of death registrations. The Applicant was requesting an electronic record, consisting of bytes of information that could be drawn together to provide information on every death event for the requested years, 1994 and 1995. The requested record was different in form and content from the paper records accessible under sections 31 to 33 of *The Vital Statistics Act* and could not be accessed by the procedure outlined in those provisions of *The Vital Statistics Act*.

The Department advised that the requested record was derived from the paper record entitled "Registration of Death". This, in my opinion, was not relevant. Although a record may include information from another record, it is still a separate record. Accordingly, in my opinion, the requested record was not a record addressed in sections 31 to 33 of *The Vital Statistics Act* and would, therefore, fall under *The Freedom of Information Act*.

If it were intended that all records kept by the Agency were to be exempt from the provisions of *The Freedom of Information Act*, I believe *The Vital Statistics Act*, in its entirety, would have been exempted under *The Freedom of Information Act.*

The Department advised that, in the event *The Freedom of Information Act* applied, it was concerned that disclosure of information contained in the record would constitute an unreasonable invasion of the privacy of third parties, specifically the deceased and their families. Clause 41(1)(a) of *The Freedom of Information Act* provides:

Protection of personal privacy.

41(1) *...the head of a department shall refuse to give access to any record the disclosure of which would constitute an unreasonable invasion of the privacy of a third party, including but not restricted to a record which discloses*

(a) personal details of the educational, medical, criminal, employment or family history of the third party;

The Department expressed concern that the requested record contained personal identifiers, most obviously names and identification where, for example, the death(s) occurred in a small community or where the nature of the death(s) was unusual. The Applicant stated that he was not seeking information that would identify

individuals and was seeking the requested information with personal identifiers removed.

Our office noted that subsection 12(1) of *The Freedom of Information Act* provides for severing of a record where it sets out:

> ***Severability.***
> ***12(1)*** *Notwithstanding any other provision of this Act, where a department receives an application for access to a record which contains exempt information, the head of the department shall give access to all the information in the record which is not exempt and which can reasonably be severed from the exempt information.*

There were several discussions between our office and the Department on the severing of the requested record. The issue related to what information could be released that would meet the request and would not constitute an unreasonable invasion of the privacy of a third party. It was my opinion that the record could be reasonably severed such that disclosure of the requested information would not constitute an unreasonable invasion of the privacy of a third party.

An informal resolution to this matter could not be reached. Accordingly, I recommended that Manitoba Consumer and Corporate Affairs release the requested record to the Applicant with appropriate severing to protect the personal privacy of third parties.

In accordance with *The Freedom of Information Act*, the Department provided a written response to the Ombudsman's recommendation. Two new issues were raised in the Department's response.

The Department held that, if *The Freedom of Information Act* applied, severing would "effectively create a new database and record." The Department made reference to the cost of "creating such a record", that there is no requirement under *The Freedom of Information Act* to "create" such a record and that, if this "new database" were linked to some other database, the Department could not be sure that it could not be used to identify individuals even if the "new database" were "anonymized."

In my opinion, the severing of an existing record would not constitute the creation of a new record. *The Freedom of Information Act* sets out that a department "shall" give access to all the information in a record which is not exempt and which can reasonably be severed from exempt information. Under *The Freedom of Information Act* regulation, severing is part of the search and preparation of a record and where, in responding to an application, a department reasonably incurs computer programming or electronic data processing costs, these could be included in the Estimate of Costs provided to the Applicant. The Applicant could then agree to proceed with the request or not. Finally, our office was not provided with evidence to support that there was a reasonable expectation that the severed record could be linked to other databases, resulting in harm.

The Department also stated that general statistical information from a variety of sources and custom statistical reports from the Manitoba Bureau of Statistics could be obtained, providing excellent information on the causes and patterns of deaths in Manitoba.

This, in my view, was not a relevant issue where *The Freedom of Information Act* obliges a department to provide access to a requested record subject only to the application of exemptions and severing.

This access issue could not be resolved informally and the Department did not accept the recommendation made in this matter. Accordingly, the Applicant was advised of his right to appeal to the Court of Queen's Bench.

MANITOBA EDUCATION AND TRAINING

There were four complaints received against Manitoba Education and Training in 1997. One, concerning presumed refusal, was not supported. Three complaints concerned refused access. One of these was not supported, while two were supported and resolved informally.

In one case Manitoba Education and Training denied access to certain records as it was felt that the records, which were essentially administrative records, would not be of interest to the Applicant. When our office contacted the Department, we noted that, notwithstanding the contents of a record, if the record is subject to release, it is the Applicant who should decide on its relevancy. It was clear to our office that the Department acted in good faith at the outset and, when we raised the issue, it readily agreed to release the records. Once the Applicant was made aware of these "new records", he advised that he wanted access to only one of them.

The Department provided the Applicant with a copy of the additional record, resolving the complaint.

MANITOBA ENVIRONMENT

One Freedom of Information Act complaint was made against Manitoba Environment in 1997. It was not supported. However, the case is a good example of how government can provide information, by way of explanation, outside of the access to information legislation.

Government's obligation to answer citizens' questions and provide records of all kinds pre-dates *The Freedom of Information Act*. Citizens should remember that the legislated process for accessing records held by government is just one way to seek information. Departments should, wherever possible, routinely and informally provide information, including access to records.

Where individuals use *The Freedom of Information Act*, they too should be as clear and concise as possible to assist a department in identifying the requested record.

In this particular case, the Applicant used an application for access to pose approximately ten questions relating to a general environmental concern. No identifiable record was requested.

The Access Officer's response indicated that the Department had no records respecting the general issue implicit in the questions.

The Freedom of Information Act sets out:

> ***Contents of refusal.***
> ***6(2)*** *Where the head refuses to give the applicant access to the record, the notice...shall state the right of the applicant to file a complaint with the Ombudsman about the refusal to give access, and the notice shall further state*
> *(a) in the case of a record which the department claims does not exist or cannot be located, that the record does not exist or cannot be located.*

Enquiries were made with the Access Officer concerning the search made in the Department to locate any records relating to the questions posed in the application for access. Our office was advised that the request was referred to appropriate senior personnel in the Department. They were asked if there were any records in the Department relating to the request and, if not, whether there was any information that could be put together that would respond to the request. The Access Officer advised that it was determined there were no records in the Department which would satisfy the request.

From our review, I had no basis on which to conclude that there were records at Manitoba Environment relating to the specific questions posed in the application for access. However, I noted that based on the Department's mandate, knowledge and experience, an answer to the Applicant's questions could be made separately to *The Freedom of Information Act* process.

Subsequently, the Department sent the Applicant a letter addressing the concerns underlying his questions in the application for access.

I was satisfied that the Department not only acted appropriately under *The Freedom of Information Act*, but also met its administrative obligations to respond to citizen enquiries.

The Freedom of Information Act is a means for seeking identifiable records in the custody or control of a department. Framing a request by posing questions results in a vague application that usually cannot be properly responded to by a department.

MANITOBA FAMILY SERVICES

There were three complaints filed against Manitoba Family Services in 1997. They were received from the same Applicant, and they were similar in terms of the information sought and the issues raised. The complaints were not supported.

The following case summary sets out the complex statutory consideration given by our office in one of these complaints. It also provides an interesting contrast to the case summary under "Manitoba Consumer and Corporate Affairs." Clause 66(a) of *The Freedom of Information Act* was considered in both this and the earlier case, and both cases centred on records concerning death. However, different types of records and different legislation came into play with different results.

♦ 97-141-1-F3
These Death Records ARE Confidential

Initially, an application was made for *"...all records ...about the death of children in care of Child and Family services , since January 1, 1993."* Through discussion with the Department, the application was altered and became a request for "actual files" about the death of children in the care of Child and Family Services since 1994.

The Access Officer for Manitoba Family Services advised the Applicant that child death statistics for 1994-1997 would be released but that access to "actual files" was being denied for reason of subsection 66(a) of *The Freedom of Information Act*. Subsection 66(a) of the Act provides:

> ***Other enactments prevail***
> ***66*** *Without restricting the generality of subsection 64(1), and notwithstanding section 65, this Act does not apply to the right of access and the procedures for gaining access to records, and the restrictions on access to records, contained in...:*
> *(a) The Child Welfare Act and any regulations thereunder, and any enactment which may be substituted therefor.*

The Child Welfare Act was replaced by *The Child and Family Services Act*. Part VI of *The Child and Family Services Act* contains procedures for gaining access to records and also restrictions on access to records. Subsection 76(3) provides the following (emphasis added):

> ***Records are confidential***
> ***76(3)*** *Subject to this section, a record <u>made under</u> this Act is confidential and no person shall disclose or communicate information from the record in any form to any person except*
> *(a) where giving evidence in court; or*
> *(b) by order of a court; or*
> *(c) to the director or an agency; or*
> *(d) to a person employed, retained or consulted by the director or an agency; or*
> *(d.1) to the children's advocate; or*
> *(d.2) where the disclosure is by the children's advocate under section 8.10; or*
> *(e) by the director or an agency to another agency including entities out of the province which perform substantially the same functions as an agency where reasonably required by that agency or entity*
> *(i) to provide service to the person who is the subject of the record, or*
> *(ii) to protect a child; or*
> *(f) to a student placed with the director or an agency by contract or agreement with an*

educational institution; or
(g) where a disclosure or communication is required for purposes of this Act; or
(h) by the director or an agency for the purpose of providing to the person who is the subject of the record, services under Part 2 of The Vulnerable Persons Living with a Mental Disability Act, or for the purpose of an application for the appointment of a substitute decision maker under Part 4 of that Act.

We were advised that each of the files to which the Applicant requested access was opened in relation to a child death and included the specialized service that the Chief Medical Examiner of Manitoba and his staff provide to the Minister of Family Services respecting the death of a child in the care of an agency.

As explanation of the role of the Chief Medical Examiner, subsections 10(1) and (3) of *The Fatality Inquiries Act* set out:

Child and Family Services agencies
10(1) *Where the chief medical examiner receives an inquiry report with respect to a deceased child and, at the time of death of the child or within the two year period preceding the death,*
(a) the child is or was in the care of an agency as defined in The Child and Family Services Act; or
(b) a parent, guardian or sibling of the child is or was in receipt of services under The Child and Family Services Act;
the chief medical examiner shall, for the purpose of assessing the quality or standard of care or service provided to the child or to the parent, guardian or sibling of the child, examine the records of the agency with respect to the child or the parent, guardian or sibling and shall review the actions taken by the agency in relation to the child or the parent, guardian or sibling.

CME to report to minister
10(3) *Upon completion of an examination or a review under subsection (1), the chief medical examiner shall, in the form and manner prescribed, immediately submit a written report to the minister charged by the Lieutenant Governor in Council with administration of The Child and Family Services Act.*

Such a report contains factual information concerning the events preceding the death of a child and may include recommendations to the Minister of Family Services.

Representative files were reviewed. Typically, they disclosed, in addition to the Chief Medical Examiner's report, communications between officials of Manitoba Family Services concerning the death of a child, correspondence between the Chief Medical Examiner's office and Manitoba Family Services relating to the preparation of the Chief Medical Examiner's report and Court orders relating to child placement.

The Court orders are public records and therefore fell outside of *The Freedom of Information Act*.

The Fatality Inquiries Act and *The Child and Family Services Act* were relevant to the other file contents.

Subsection 10(4) of *The Fatality Inquiries Act* addresses the confidentiality of the Chief Medical Examiner's report. It states:

Confidentiality of CME report
10(4) *A report under subsection (3) is confidential and, for this purpose, is governed by the provisions of Part VI of The Child and Family Services Act as if the report formed part of a record to which Part VI applied and is not governed by section 42 of this Act.*

Part VI of *The Child and Family Services Act* includes subsection 76(3) relating to access to records and

restrictions on the access to records made under *The Child and Family Services Act*. I understand that records are made under *The Child and Family Services Act* by virtue of subsection 4(2) of that Act, which sets out in part:

> ***Powers of director***
> ***4(2)*** *For the purpose of carrying out the provisions of this Act, the director may...*
> *(c) conduct enquiries and carry out investigations with respect to the welfare of any child dealt with under this Act;...*
> *(e) solicit, accept and review reports from individuals or organizations concerned or involved with the welfare of children, families or both;...*
> *(h) do any other thing in accordance with the provisions of this Act that the minister may require.*

Based on our review of representative records, the law and procedure relating to the death of children in care of Child an Family Services, I was of the opinion that the requested records were produced or received in connection with the death of a child under care. The records included documentation produced or received in connection with an enquiry into the welfare of a child or families for consideration of the Minister of Family Services. I was of the view that these records were made under *The Child and Family Services Act*.

Our review of *The Child and Family Services Act* and the wording of section 66 of *The Freedom of Information Act* indicated that the requested records came under the access and privacy provisions of *The Child and Family Services Act* and not *The Freedom of Information Act*. Accordingly, I was unable to recommend release of the requested records.

MANITOBA FINANCE

Whereas 1996 was a favourable year for Manitoba Finance in the handling of Freedom of Information Act complaints, 1997 was not.

There were two complaints in 1997. One complaint contested the Department's extension of the 30-day response time under the Act. Although there was no indication that the Department had acted in bad faith, the complaint was supported. The other case, concerning refused access, resulted in a recommendation and criticism by the Ombudsman.

The record in this case, requested in December 1997, was documentation of public opinions obtained and paid for by the government. The Department maintained its position not to release the record until after the Budget Speech was presented in March 1998.

While I appreciate the sensitivity surrounding the use of the polling results, the principle of access requires disclosure unless disclosure would clearly be in conflict with an exemption to disclosure. As there was no evidence in this case to support that an exemption applied, I could only conclude that the Department's position was not justified by the spirit or provisions of *The Freedom of Information Act*.

♦ 97-250-2-F3
Poll-arized

A Freedom of Information Act request was made to access: "Results of telephone survey conducted by Western Opinion Research on pre-budge (sic) issues in October, 1997."

The Department responded that access to the request was being denied. It was stated that the "record(s) identified within the Department falls under Subsections 38(1) and 39(1)(a) of The Freedom of Information Act dealing with Cabinet confidences and policy opinions, advice or recommendations."

The provisions identified in the departmental response set out:

> ***Cabinet confidences.***
> ***38(1)*** *Subject to subsection (2), the head of a department shall refuse to give access to any record which discloses a confidence of the Cabinet, including but not restricted to a record which discloses*
> *(a) an agenda prepared for a Cabinet meeting; or*
> *(b) policy analysis or similar briefing material prepared for consideration by the Cabinet; or*
> *(c) a proposal or recommendation prepared, or reviewed and approved, by a minister for presentation to the Cabinet; or*
> *(d) a communication or discussion between ministers on a matter relating to the making of a government decision or the formulation of government policy.*
>
> ***Policy opinions, advice or recommendations****.*
> ***39(1)*** *Subject to subsection (4), the head of a department may refuse to give access to any record which discloses*
> *(a) an opinion, advice or a recommendation submitted by an officer or employee of a department, or a member of the staff of a minister, to a department or to a minister for consideration in*
> *(i) the formulation of a policy, or*
> *(ii) the making of a decision, or*
> *(iii) the development of a negotiating position of or by the department or the government;*

Subsection 39(2) sets out exceptions to the above exemption and states that clause 39(1)(a) does not apply to:

> *(f) a report prepared by a consultant who was not, at the time the report was prepared, an officer or employee of a department or a member of the staff of a minister.*

The request made was for the "results" of a telephone survey conducted by Manitoba Finance. We understand that the Department had a report from Western Opinion Research which disclosed the results of the telephone survey.

Clearly, the polling results did not fall within clause 39(1)(a). Further, I had no evidence, nor did it seem to me, that the opinions of citizens about an issue would disclose any Cabinet confidences as set out in subsection 38(1).

I therefore recommended that the requested record be released to the Applicant in accordance with *The Freedom of Information Act*.

As provided for under the Act, the Department responded in writing to the recommendation. The response stated that the department disagreed with the conclusion and recommendation in my report and that it would not be implementing the recommendation.

The Department indicated that the 1998 budget preparation involved coordination and assembling of information, including extensive public consultation, and a presentation to the Cabinet by the Minister of Finance. It was further noted that the requested record was part of the material used in the Cabinet decision-making process.

The Department requested a further meeting where the arguments against release could be more formally presented to our office. The Department indicated it felt the matter could be resolved to our mutual satisfaction. However, we were also advised that this meeting could not take place for over a week, after March 6, 1998.

The complaint had been received more than two months earlier. Our office had contacted the Department to begin our investigation the day after receipt. Clearly, reasonable time had been given to the Department to provide our office with evidence to support the Department's position that release of the records would disclose a Cabinet confidence as envisioned by *The Freedom of Information Act*.

Evidence had not been provided prior to the recommendation which would support denial. Similarly, the Department's response to the recommendation did not provide evidence from either the document in question or any other record which would support the denial.

The requested record was the result of public opinions obtained and paid for by the government. It did not appear that a record showing the results of public opinions would disclose policy analysis or briefing material prepared for consideration by Cabinet, or any proposal or recommendation prepared or reviewed and approved by a Minister for presentation to Cabinet.

Accordingly, I advised the Applicant and the Department that the response to our recommendation was not justified.

As a postscript, the government has advised it plans to adopt a formal policy on releasing public opinion polls. As of the writing of this Report, I understand that a policy has been drafted but has not yet been adopted.

MANITOBA HEALTH

As has been the pattern over the years, we received a relatively high number of complaints in 1997 against Manitoba Health. This is a Department that is responsible for many programs that impact, in some way, on most Manitobans. Seven complaints were received, all concerning refused access and, at the time of writing this Report, one is pending.

Of the six completed cases, four were not supported and two were supported and resolved informally. I am pleased to add that even in cases that were not supported, there was a willingness by the Department to provide the Applicant an opportunity to receive other related documentation or information within the Department.

The complaints included a request for consulting studies and contracts entered into by the Home Care Equipment Branch; documents pertaining to and including a contract entered into by Winnipeg's hospitals and the Urban Shared Services Corporation; all costs associated with setting up Regional Health Association offices; and specified information on chemotherapy outreach centres.

One of the supported cases related to access to documents pertaining to the evaluation of the drug Betasaron for inclusion on the Pharmacare benefits list. The case was resolved informally as, further to our review, the Department agreed to release additional information without the need for a recommendation.

The case is summarized below. It is an example of how effective severing promotes the fullest possible access while protecting information that cannot be released by law. It is also a good example of a department willing to take a second look and keeping an open mind where access rights are concerned.

♦ 97-270-2-F3
Drug Story

The Applicant requested access to "...documents pertaining to the evaluation of the drug Betasaron for inclusion on the Pharmacare benefits list." He complained to our office that he was supplied "only a single 190 page report and denied access to other material under section 39(1) and 42(1) of The Freedom of Information Act."

Clauses 39(1)(a)(i)(ii) and 42(1)(b) of *The Freedom of Information Act* provide:

> ***Policy opinions, advice or recommendations.***
> ***39(1)*** *...the head of a department may refuse to give access to any record which discloses*
> *(a) an opinion, advice or a recommendation submitted by an officer or employee of a department, or a member of the staff of a Minister, to a department or to a Minister for consideration in*
> *(i) the formulation of a policy, or*
> *(ii) the making of a decision,...*
>
> ***Commercial information belonging to third party.***
> ***42(1)*** *Subject to this section, the head of a department shall refuse to give access to any record*
> *(b) which discloses financial, commercial, scientific or technical information supplied to a department by a third party on a confidential basis and treated consistently as confidential information by the third party;*

Upon receipt of the complaint, enquiries were made with Manitoba Health and the withheld records were reviewed and considered in relation to *The Freedom of Information Act*.

Our review indicated that there were records that fell within the clause 42(1)(b) exemption. They were scientific and commercial in nature and information provided to our office showed they were submitted to the Department in confidence and were consistently held by the third party as confidential. Further, the third party did not consent to their release.

There were other records that, in our opinion, clearly fell within the clause 39(1)(a) exemption in that they disclosed advice, recommendation or opinion provided by one government official to another for the purpose of making a decision.

However, our review also revealed records that did not seem to fall within the cited exemptions. These records included correspondence from members of the public which appeared to be severable, promotional information that did not appear to be subject to any exemptions and information received from the Federal Government and other provinces as well as inter-departmental communication. We asked that the release of these records be considered by the Department.

After considering these records further, the Department agreed to their release. This included the promotional material and inter-departmental communications identified by our office. The Department also agreed to release correspondence from members of the public with personal identifiers severed for reason of clause 41(1)(a) of *The Freedom of Information Act* concerning protection of personal privacy. Our office supported the proposed severing.

Also, after the Department made checks with the Federal Government and other provinces which had provided records to Manitoba, the Department agreed to release these records with one exception. This was a record received from a province that maintained that the record had been provided to Manitoba in confidence as set out in clause 45(1)(b) of the Act. This other province did not consent to release of the record.

The Freedom of Information exemptions which the Department relied on in severing the public correspondence and in withholding the out-of-province record were the following:

> ***Protection of personal privacy.***
> ***41(1)*** *...the head of a department shall refuse to give access to any record the disclosure of which would constitute an unreasonable invasion of the privacy of a third party, including but not restricted to a record which discloses*
>
> *(a) personal details of the educational, medical, criminal, employment or family history of the third party;*
>
> ***Information obtained in confidence.***
> ***45(1)*** *...the head of a department shall refuse to give access to any record obtained in confidence from*
>
> *(b) the government of any other province or a department thereof;*

Further to our review, the Department decided to release records coming within the request which, in the opinion of our office, were releasable or releasable with severing under *The Freedom of Information Act*. The withholding and severing of other records coming under the request were, in my opinion, justified under the Act.

MANITOBA HIGHWAYS & TRANSPORTATION

The ten complaints received against Manitoba Highways and Transportation may be misleading. One complaint related to refused access, while nine other complaints contested extension of the 30-day time for response. These nine complaints were received from one applicant and related to a series of related requests filed on a single occasion. The case of refused access was partially supported and, I am pleased to report, resolved informally. The nine complaints contesting extension were not supported.

Subsection 11(1) of *The Freedom of Information Act* sets out:

> ***Extension of time limits.***
> ***11(1)*** *The head of a department which receives an application may extend the 30 day limit set out in subsection 6(1) for up to 30 further days if, in order to process the application, the department must*
> *(a) search for, or examine, such a large number of records that meeting the 30 day limit would unreasonably interfere with the operations of the department; or*
> *(b) consult with another office of the department, or with another department, in circumstances such that the consultations cannot reasonably be completed within 30 days.*

The issue relating to the Department's extensions was whether, in order to process the applications, the Department had to consult with other offices such that the consultations could not reasonably be completed in thirty days.

Our review included enquiries with the Department, a meeting with the Access Coordinator who was handling the applications for access and a review of the requested files.

We were advised that the processing of the requests involved consultation with personnel from within and outside of the Department. The requested files were housed at the Provincial Archives and arrangements had to be made with Archives to review the files. The Access Coordinator advised that it was clear after reviewing the files that exemptions applied to certain records and portions of records. He said that preparation of the records for viewing by the Applicant would require the copying of the records at Manitoba Archives and, to properly consider release and/or severing of these copies, consultations would have to be made with the offices of the Minister and Deputy Minister and the Access Officer who would ultimately make the decision on access.

Based on our review, I was satisfied that the Department had reason to believe an extension was required. The Department's decision was supported by our review of the requested records, the need, in our opinion, for discussions with other relevant offices and the need for preparing the records for reviewing and severing where necessary.

MANITOBA INDUSTRY TRADE & TOURISM

In our 1995 Annual Report, I described a difficult investigation involving Manitoba Industry Trade and Tourism which resulted in a recommendation. We received no complaints against the Department in 1996. In 1997, we received just one complaint against Manitoba Industry Trade and Tourism which was not supported.

The request was for a "copy of the agreement between the Manitoba Government and Regal Greetings regarding the sale of A.E. McKenzie Seeds." Access was denied based on exemptions concerning commercial information belonging to a third party and the economic interests of Manitoba.

Our review indicated that the record was one that disclosed financial and commercial information of the parties, which included third parties as well as the Province of Manitoba. It was also apparent from our review that information was supplied to the Department by third parties on a confidential basis. We were advised that this information had been maintained as confidential. Enquiries were made about the release of this record, but consent was not provided.

Additionally, the Department was of the view that release of the record could reasonably be expected to prejudice the competitive position of a third party. This related to the competitive nature of the business in question and the fact that disclosure of terms of the agreement could be expected to reveal information that would be unfairly advantageous to competitors.

The Department was also of the position that release of the record could reasonably be expected to interfere with the government's contractual or other negotiations. This related, again, to information that was supplied in confidence, the role of the Department in administering this agreement and the effect that release of this contract would have on future negotiations. The Department's position, based on these considerations, did not seem to be unreasonable.

Based on our review, I was of the opinion that exemptions under *The Freedom of Information Act* applied to the requested record and, therefore, was unable to recommend its release.

MANITOBA JUSTICE

The 1997 complaint record of Manitoba Justice was not good. I have already commented earlier in this Report about my concerns respecting this Department.

There were 15 complaints in 1997, 11 of which have been completed at the time of reporting. One complaint concerned presumed refusal. It was supported. The balance of complaints concerned refused access. Of these, 10 cases have been completed. Three of the complaints were not supported, six were partially supported and resolved, and one complaint was supported and was the subject of a recommendation.

The following is a summary of that case. As noted earlier in this Report, it concerns the issue of access to ministerial briefing notes and the exemption concerning policy opinions, advice or recommendations.

♦ 96-110-3-F3
Access under the Blanket?
A Case of Too Little Too Late

A request was made for: "Any & all records of the Justice Minister's "Office Files" relating to Headingley Correctional Institution from January 1, 1995 to the present."

The requested records consisted of 123 pages. The Department provided partial access, with 43 pages being partially severed and 40 pages being totally withheld. In not releasing the balance of the records, the Department relied on paragraph 39(1)(a)(ii), clauses 40(1)(a)(b) and (d) and clauses 41(1)(a) and (b) of *The Freedom of Information Act*. These provisions set out the following:

> ***Policy opinions, advice or recommendations.***
> ***39(1)*** *...the head of a department may refuse to give access to any record which discloses*
> *(a) an opinion, advice or a recommendation submitted by an officer or employee of a department, or a member of the staff of a minister, to a department or to a minister for consideration in...*
> *(ii) the making of a decision,...*
>
> ***Law enforcement and legal proceedings.***
> ***40(1)*** *The head of a department may refuse to give access to any record the disclosure of which could reasonably be expected*
> *(a) to be injurious either to the enforcement of an enactment or to the conduct of an investigation under an enactment; or*
> *(b) to facilitate the commission of an offence or to threaten the security of a correctional institution or other building, a computer or communications system, or any other property or system; or...*
> *(d) to be injurious to the conduct of existing or anticipated legal proceedings.*
>
> ***Protection of personal privacy.***
> ***41(1)*** *...the head of a department shall refuse to give access to any record the disclosure of which would constitute an unreasonable invasion of the privacy of a third party, including but not restricted to a record which discloses*
> *(a) personal details of the educational, medical, criminal, employment or family history of the third party; or*
> *(b) personal details of a taxation matter, financial transaction or other pecuniary matter in which the third party is or has been involved.*

Early in our review, our office advised the Department that much of the withheld information appeared to be factual rather than advice, recommendation or opinion and that there was no evidence from the record or otherwise that the information was submitted for consideration in the formulation of a policy, the making of a decision or the development of a negotiating position. Discussions and meetings took place between our office and the Department in an attempt to resolve the matter. As this could not be achieved more informally, it was agreed that our office would provide written comments to Manitoba Justice stating our concerns about the withholding and severing of certain records.

By letter dated February 26, 1997, a comprehensive letter was sent to the Department, outlining our comments on each withheld or severed record that we questioned. The letter concluded that we looked forward to the Department's response to our comments and, if we remained of the opinion that the withholding of all or part of these records was not in accordance with *The Freedom of Information Act*, a recommendation would be made pursuant to subsection 25(1) of the Act.

The intention was to receive further comment from the Department to help clarify the Department's position for withholding specific records or to attempt to resolve this matter informally with further release to the Applicant. Had our February 26, 1997, comments been in the form of a recommendation, the Department would have been required, under *The Freedom of Information Act*, to respond within two weeks of receiving that communication. However, it was still our feeling that a resolution would more likely be achieved through the informal process than through the formal recommendation process.

Enquiries on the status of the Department's response were made by our office on March 7, April 17, May 6, July 7 and August 22, 1997. It was indicated that the report was being considered and a response would be forthcoming soon.

As of September 4, 1997, we had received no reply from the Department to our February 26, 1997, letter, and we had no indication when a reply would be forthcoming. Accordingly, a recommendation was made respecting release. It was recommended that an additional 35 pages be released in full and another 20 pages be released in part.

Shortly thereafter, the Department provided a written response to the recommendation indicating that it would not be releasing any more records or parts of records. The Department provided its view on what it felt were significant issues arising out of the application for access. The Department advised it had taken some time to consult with persons knowledgeable in the area and to arrange for detailed legal research to be conducted.

The Department's 8-page response centered around the issue it identified, that being:

> *...whether briefing notes prepared by departmental staff for the Minister are accessible... [which]... raises the interpretation to be given to the term "advice" as found in Section 39(1)(a) of the Act.*

The following sets out the Department's response to the recommendation and the comments made to the Department by our office with respect to the response.

Department's Response

The Access Officer stated:

> *...Section 39(1) of the Act authorizes the head of a Department to refuse access to any record which discloses "an opinion, advice or a recommendation". These three terms are set out as alternatives in the legislation - suggesting to me, that they represent different concepts. The task, therefore, is to determine how, when and in what fashion "advice" may be different from an opinion or a recommendation. The answer to this question appears to lie in the proper meaning of the word "advice" as interpreted by the case law and other authoritative sources.*

The Access Officer then discussed principles of statutory interpretation, noted dictionary definitions of the words "opinion", "advice" and "recommendation", cited Supreme Court of Canada decisions concerning a taxation assessment matter and a Charter case on "right to counsel", and looked at similar provisions to clause 39(1)(a) in the Canadian Bar Association's 1979 model Freedom of Information Bill and the access/privacy legislation of British Columbia and Ontario. The Access Officer stated that "the word "advice" can have a dual meaning; a view (as in opinion) and counsel as to a course of action (as in recommendation), but also "factual information."

Comments

Clause 39(1)(a) provides that a head of a Department (access officer) "may refuse to give access to any record" which discloses "an opinion, advice, or recommendation...." Being a discretionary provision, clause 39(1)(a) equally allows the Access Officer to release such information.

Mr. Justice Oliphant in Marchand v. The Minister of Government Services of Manitoba (1990), 69 ManR(2d)303QB stated:

> *...the thrust of the Act is to allow citizens a right of access to any record in the custody or under the control of a department of the Government of Manitoba.*
>
> *The right of access is, of course, subject to the exemptions. The exemptions derogate from the thrust of the Act. They 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.*

The Access Officer stated that the word "advice" can have "dual meaning" and he chose to interpret the word as meaning "factual information" thereby broadening the scope of the exemption. This interpretation, in my opinion, was unreasonable as it could have the effect of being so broad as to include within the scope of clause 39(1)(a) any written information between one government officer to another.

The Access Officer also cited provisions in the model Freedom of Information Bill of The Canadian Bar Association, *The Freedom of Information and Protection of Privacy Act of British Columbia* and *The Freedom of Information and Protection of Privacy Act in Ontario*, wherein it was noted that factual information was an exception to exemptions. As Manitoba's Freedom of Information Act does not generally set out factual information as an exception to the exemption, the Access Officer seemed to interpret this as meaning that factual information is intended to be included in the definition of "advice" as it is used in clause 39(1)(a).

In my opinion, this interpretation has the effect of providing a very broad provision for non-disclosure which is in contrast with other Canadian legislation, where non-disclosure is much more restrictive. It seemed to me that this broad interpretation, with its resulting restriction on the accessibility of factual information, was contrary to the thrust of Manitoba's Freedom of Information legislation.

Department's Response

The Access Officer stated "...the mere fact that the document contains an opinion, advice or a recommendation is not, in itself, sufficient" to bring a document under the clause 39(1)(a) exemption; "the document must have been intended or in fact have been used for consideration in the making of a decision." On this point, the Department made reference to some of the briefing notes coming within this application that concern issues that arose after the riot at the Headingley Correctional Institution. The Access Officer advised that information was provided to the Minister on a wide range of issues and was not simply intended to provide information. The Access Officer suggested the briefing notes acted as a basis for the making of a wide range of decisions.

Comments

I was unable to establish from what had been presented by the Department or from reading the withheld information, that the release of the records would "disclose" advice, recommendation or opinion used for consideration in the formulation of a particular policy, the making of a particular decision or the development of a negotiating position. In addition, I was left to wonder for what reason the Department would choose not to release this information. While the Legislature provided the Access Officer with the discretion to withhold access under clause 39(1)(a), it seemed to me that discretion should be exercised wisely and for a supportable reason. It did not seem good enough to choose non-disclosure merely because it was an available option.

Further, the Department's comments related only to records prepared after the Headingley riot. Only two of the records in question were prepared after the riot. With respect to other ministerial briefing notes that pre-dated the riot, the Department offered no comment on how they related to the formulation of a particular policy, the making of a particular decision or the development of a particular negotiating position.

Also, the Department's response related only to ministerial briefing notes. Seven additional records that were the subject of the recommendation were not ministerial briefing notes and were not addressed in the response.

Four of the seven records contained factual information (with the exception of one passage that was clearly a recommendation) between government employees. The Department had not discharged its onus of proof that clause 39(1)(a) or any other exemption of *The Freedom of Information Act* applied to these records.

Some records were personal service contracts between the Department and third parties. Certain details had originally been severed by the Department on the basis of the subsection 41(1) exemption, that their release would constitute an unreasonable invasion of the personal privacy of third parties. Our office had drawn the Department's attention to clause 41(2)(b) of the Act, which is an exception to that exemption, as follows:

> ***Limitation on exemption.***
> ***41(2)*** *Subsection (1) does not apply to a record which*
> *(b) discloses financial or other details of a contract for personal services between a third party and a department;*

The Department had not provided a response with respect to these records and, therefore, I found the denial was unjustified.

A report was provided to the Applicant by our office, advising him of the Department's response to the recommendation and my comments.

The report stated that it appeared the Department had spent considerable effort in looking for ways to deny access rather than to provide access. The Department had not accepted that any of the documents under review was releasable with or without severing. It appeared the Department had broadened its interpretation of the exemption under clause 39(1)(a) of *The Freedom of Information Act* to such an extent as to blanket the records under review to support non-disclosure. While this exemption provides the Department with the discretion to release the records, the Department chose to refuse access with little and, in most cases, no information to justify its decision of non-disclosure. I stated that this, in my opinion, is wrong.

However, I also noted that the Department raised a principle that a record containing a recitation of facts could be interpreted as advice. This did not go unheard and, in my opinion, has some validity. Where a recitation of facts communicated from one government official to another has the effect of revealing the formulation of a particular policy, the making of a particular decision or the development of a particular negotiating position under consideration, one might be able to conclude that this constitutes advice and, at that point, severing should be considered.

In my opinion, however, that was not the situation with the records in question and the Department provided

no information or insufficient information to cause me to conclude otherwise. It was my view that the response by Manitoba Justice to the September 4, 1997, recommendation was unjustified by the provisions of *The Freedom of Information Act*.

The Applicant was advised of his right to appeal to the Court of Queen's Bench.

Subsequently, on November 27, 1997, the Department wrote a letter to the Applicant. The Access Officer stated:

> *It appears that the Ombudsman and the Department of Justice have differing views with respect to the interpretation of a particular section within The Freedom of Information Act. Nonetheless, the Ombudsman's view is entitled to considerable weight and, as a consequence, I asked the Department to review all of the outstanding documents one more time to see if, in light of the Ombudsman's view, further documents ought to be released. In essence, this was intended to be a "double check" on the conclusions originally reached by the Department.*
>
> *As a result of this review, a conclusion has been reached that certain additional documents ought to be released pursuant to the Act.*

The Department released four pages that had previously been withheld and 18 pages that had previously been severed. As well, three pages that had previously been severed were released with less severing.

Our concern about the Department's approach to the release of ministerial briefing notes remained. The fundamental principle involved in this case related to the accessibility of documents prepared for a minister. It appeared to me that Manitoba Justice was broadening the interpretation of opinion, advice or recommendation to such an extent as to exclude from disclosure briefing notes prepared by departmental staff to a minister. This broad interpretation favoured denial of access to this class of documents which, in my opinion, raised questions about the spirit of openness as envisioned by the Act. The release of some of the requested records did not satisfy me that the Department would not continue to rely on this broad interpretation to deny access to ministerial briefing notes.

A meeting was held with the Access Officer to discuss our respective views. By letter dated January 29, 1998, the Access Officer wrote:

> *In our recent discussions, in (sic) became apparent that some of our correspondence may have left you with the impression that we have approached the "briefing note" issue as an all encompassing, all-or-nothing issue: i.e., briefing notes are either accessible as a class or non-accessible as a class. As I outlined in our discussions, we agree with you that the issue needs to be assessed on a document-by-document basis. That is, therefore, common ground between our offices.*

I welcome this commitment by Manitoba Justice to a document-by-document analysis being made where requests for ministerial records are concerned.

MANITOBA NATURAL RESOURCES

I am pleased to report that after several years of difficulties, the 1997 Freedom of Information record of Manitoba Natural Resources was favourable.

There were four complaints filed against Manitoba Natural Resources. One complaint of presumed refusal was not supported. Of three complaints of refused access, two were not supported, and the third was partly supported and resolved informally.

This case involved clause 41(2)(c) of *The Freedom of Information Act*. It is a difficult provision of the Act which, based on a mathematical formula, makes otherwise unreleasable, private information releasable where a small number of individuals receives, from a department or minister, a discretionary financial benefit.

♦ 97-360-3-F3
On Picking Critters and Crunching Numbers

The Applicant sought access to "...the list of names and addresses of all amphibian and reptile collectors and dealers in Manitoba in 1995 and 1996."

The Department denied access on the basis of subsection 41(1) of *The Freedom of Information Act*. Subsection 41(1) provides:

> ***Protection of personal privacy.***
> ***41(1)*** *...the head of a department shall refuse to give access to any record the disclosure of which would constitute an unreasonable invasion of the privacy of a third party...*

In his complaint form, the Applicant questioned how release of this information would be an unreasonable invasion of the privacy of the persons choosing to do business in Manitoba, harvesting a natural resource.

The requested record set out the following information for the years 1995/96 and 1996/97: name of amphibian dealers and collectors (pickers), address, city, province, postal code and licence number. The record showed collector licences as being either individual or family licences. In the case of family licences, each family member was named. We were advised that this information related to licences concerning amphibians only. We were advised provisions relating to reptiles in *The Wildlife Act* were repealed.

By regulation under *The Wildlife Act*, a person is required to have an amphibian and reptile picker's licence to undertake or sell an amphibian or reptile and a person is required to have an amphibian and reptile dealer's licence to engage in the business of buying or selling amphibians or reptiles. I understand it was for the purpose of obtaining a licence that individuals submitted their names and addresses to the Department. We were advised that the information was collected and maintained by the Department only because of licencing and that the record containing this information was not publicly available.

I was of the opinion that the linking of individuals' names and addresses qualifies as the personal information of these individuals. It seemed to me that to release this information without the individuals' consent would constitute an unreasonable invasion of the privacy of these individuals. The number of enquiries that would be required to be made by the Department to seek consent of the licence holders was, in my opinion, an unreasonable task.

However, in considering the application of subsection 41(1), our office also had to look at the limitations on that exemption, as set out in subsection 41(2) of the Act. The limitation having possible relevance in this case was clause 41(2)(c), which sets out:

Limitation on exemption.

41(2) *Subsection (1) does not apply to a record which*

(c) discloses details of a licence or permit, or a similar discretionary financial benefit, conferred on a third party by a department or minister, but only where

(i) the third party represents 1% or more of all persons and organizations in Manitoba receiving a similar benefit, and

(ii) the value of the benefit to the third party represents 1% or more of the total value of similar benefits provided to other persons and organizations in Manitoba.

Our review of the requested record indicated that it disclosed details of a licence. Further, we noted this licence was a discretionary financial benefit conferred on each licence holder by the Minister of Natural Resources. The question remaining was whether the number of individuals receiving the benefit fell within the mathematical formula.

In 1995-96, there were three persons issued an amphibian dealer's licence and, accordingly, each of these persons represented 1% or more of all persons and organizations in Manitoba receiving a similar benefit. It seemed to me that the value or benefit to each of these third parties was equal and, so, the value of the benefit received by each of them represented 1% or more of the total value of similar benefits provided to other persons and organizations in Manitoba. On this basis, I was of the view that the clause 41(2)(c) exception to the exemption applied to information respecting amphibian dealer's licences in 1995-96.

Similarly, in 1996-97, there was one person issued with an amphibian dealer's licence and, in 1995-96, 84 persons were licenced to catch and sell amphibians. On the basis of the type of benefit and the number of beneficiaries involved, I was of the view that clause 41(2)(c) made the information concerning these individuals releasable.

However, the number of persons shown as being licenced in 1996-97 to catch and sell amphibians was 113. This number exceeded 100 and, therefore, each of these third parties did not represent more than 1% of all persons and organizations in Manitoba receiving a similar benefit. Therefore, with respect to those licenced to catch and sell amphibians in 1996-97, clause 41(2)(c) did not apply and did not replace the application of subsection 41(1), a mandatory exemption to the release of this information. I was of the opinion that subsection 41(1) applied in that the release of names and addresses of individuals, collected for departmental purposes, would constitute an unreasonable invasion of their personal privacy.

After discussions with the Access Officer, the Department agreed to release to the Applicant the names and addresses of amphibian dealers licenced in 1995-96 and 1996-97, as well as the names and addresses of those persons licenced in 1995-96 to catch and sell amphibians. However, the Department severed the names and addresses of those licenced in 1996-97 to catch and sell amphibians for reason of subsection 41(1) of *The Freedom of Information Act*. As I was satisfied that the exemption applied to that part of the record, I was unable to recommend release of that portion.

MANITOBA NORTHERN AFFAIRS

Manitoba Northern Affairs is a department concerning which our office receives very few Freedom of Information complaints. One complaint was received against the Department in 1997. It was partially supported and resolved informally.

The Applicant requested "Records of Northern Flood Agreement negotiations since April 1, 1994...between Province of Manitoba and Norway House Cree Nation to date." The Department denied access on the basis of clause 43(c) of *The Freedom of Information Act*, that disclosure could reasonably be expected to interfere with contractual relations. The Department stated that there were ongoing negotiations in this matter.

While the purpose for an applicant's request is not relevant to the handling of a Freedom of Information Act application, it was because negotiations were ongoing that the Applicant was seeking information.

In preparing to review the records in question, we saw that they comprised dozens of boxes. Time was an issue to the Applicant and, so, another approach to reviewing all of the records was considered.

The resolution of a complaint, wherever possible, is a major consideration to our office. *The Freedom of Information Act* provides flexibility in the handling of complaints, where subsection 29(1) sets out:

> ***Informal resolution of complaint.***
> ***29(1)*** *Notwithstanding the procedures prescribed in sections 24 to 27, the Ombudsman may, in the course of or upon completing an investigation, undertake such other procedures as the Ombudsman deems appropriate for the purpose of resolving the complaint informally to the satisfaction of the parties thereto and in a manner consistent with the spirit of this Act.*

The Department advised it would provide the Applicant with specified records so long as their release would not be harmful to negotiations. Our office spoke with the Applicant and urged him to speak with the Department directly, which he did.

The Applicant advised both our office and the Department that he would be satisfied, as a start, with receiving a copy of the Memorandum of Understanding relating to the project and all advanced agreements subsequent to it.

The Department provided these records to the Applicant, who advised our office that his complaint was satisfied.

Our office continues to emphasize the benefits of applicants and departments communicating fully with each other about requests. Departments are well advised to speak with an applicant about his or her application before responding to it. Requests are sometimes not clear, and even when they are, they may not reflect what the applicant really wants. Access personnel who are aware of a department's records can assist an applicant about what information is available.

Also, as in this case, a request may encompass so many records that it cannot reasonably be handled by a department without further clarification from the applicant. More specific and focussed requests can overcome problems of expense to the applicant and onerous time considerations for all involved.

MANITOBA PUBLIC INSURANCE

Last year I was critical of the handling of a Freedom of Information Act matter by Manitoba Public Insurance (MPI). This year, our experience was much better.

There were two cases of refused access against MPI. One was supported where our office felt that the one record in question was releasable. The case was resolved informally. The other case was partially supported where our office was of the view that a handful of records in a very large request could be released. This case, too, was resolved informally.

Although the complaints were, in my opinion, substantiated in whole or in part, the Department showed a spirit of cooperation and a willingness to reconsider and alter its initial position on release. This is an example of good administration and respect for the principles of access under *The Freedom of Information Act*.

WORKERS COMPENSATION BOARD

There was one Freedom of Information Act complaint against the Workers Compensation Board in 1997. It was a complaint of refused access and was not supported.

As with the case discussed under Manitoba Environment, the application was in the form of a question rather than being a request for a record. The Applicant asked: What were the specific criteria/qualifications required for a Board of Commissioner for Workers Compensation to represent employers between the years 1986 to 1989.

Perhaps because of the form of the application, the Access Officer did not specifically answer if any records came under the request. Rather, he referred to *The Workers Compensation Act* which provides that commissioners are appointed by Cabinet, and he further stated that the Minister responsible for *The Workers Compensation Act* recommends a person to the Cabinet for appointment as a commissioner. He then cited clause 38(1)(c) of *The Freedom of Information Act*, which sets out:

> ***Cabinet Confidences.***
> ***38(1)*** *...the head of a department shall refuse to give access to any record which discloses a confidence of the Cabinet, including but not restricted to a record which discloses*
>
> *(c) a proposal or recommendation prepared, or reviewed and approved by a minister for presentation to the Cabinet;*

Our office asked the Access Officer whether there were any records relating to the request. We were advised that no such records were held by the Workers Compensation Board. Further to our enquiries, a review was made of the Minister's files, and we were informed that no information pertaining to the request was found there.

Based on the information provided to our office, it appeared that the records the Applicant was seeking did not exist.