

By Courier

June 9, 2004

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

Dear Mr. Robinson:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

He also wrote:

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

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

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

Duty to assist applicant

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

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

Some negative indicators of a lack of commitment are where:

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

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

I further suggested then:

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

A number of provinces hold these forums annually.

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

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

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

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

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

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

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

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

1. PRIVACY IMPACT ASSESSMENT (PIA)

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

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

2. CONSENT

▪ Authorization to collect *FIPPA section 36*

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

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

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

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

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

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

4. Access and Privacy Commissioner versus Ombudsman

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

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

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

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

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

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

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

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

Yours truly,

Barry E. Tuckett
Manitoba Ombudsman

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

Attachments

OVERVIEW OF OMBUDSMAN MANITOBA COMMENTS
FIPPA REVIEW
June 9, 2004

INTRODUCTION

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

COMMENTS

1. OMBUDSMAN INVESTIGATION ISSUES

Abuse of process

FIPPA section 63(1)(b)

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

Gathering evidence

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

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

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

Reporting verbally

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

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

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

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

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

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

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

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

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

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

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

Section 2 of the Nova Scotia FIPPA provides as follows:

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

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

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

3. RECORDS TO WHICH THE ACT APPLIES

FIPPA section 4

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

4. RELATIONSHIP WITH PHIA

FIPPA section 6

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

5. FEES

Clarification

FIPPA section 7(3)

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

Fee waiver

FIPPA Regulation section 9(1)(c)

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

6. STATEMENT OF REASONS FOR DECISIONS

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

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

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

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

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

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

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

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

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

7. PUBLIC BODY RESPONSE

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

Failure to Respond

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

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

Contents of Response

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

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

Time Limit to Complain

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

8. ABUSE OF PROCESS

FIPPA section 13(1)

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

9. THIRD PARTY PRIVACY

FIPPA section 17(1)

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

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

10. PUBLIC INTEREST EXCEPTION

FIPPA sections 17, 18 and 19

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

11. CABINET CONFIDENCES

FIPPA sections 19(1)

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

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

12. THIRTY-YEAR TIME LIMITS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FIPPA new section at section 44

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

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

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

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

Decisions of Ministers

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

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

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

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

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

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

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

21. NO FURTHER APPEAL EXCEPT WITH LEAVE

FIPPA section 74

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

22. SECURITY SAFEGUARDS FOR PERSONAL INFORMATION

FIPPA sections 59(3) and 87(j)

Right of Complaint

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

Security Safeguards

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

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

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

Retention and destruction

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

23. REVIEW OF FIPPA

FIPPA section 98

Consideration should be given to periodically reviewing the Act.

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT
SPREADSHEET CONTAINING OMBUDSMAN MANITOBA COMMENTS
FIPPA REVIEW
 June 9, 2004

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT	COMMENTS
PART 1	
INTRODUCTORY PROVISIONS	
Definitions	
1 In this Act,	
" applicant " means a person who makes a request for access to a record under section 8;	
" Cabinet " means the Executive Council appointed under <i>The Executive Government Organization Act</i> , and includes a committee of the Executive Council;	
" court ", for the purpose of an appeal under section 67 or 68, means the Court of Queen's Bench;	
" department " means a department, branch or office of the executive government of the province;	
" educational body " means	
(a) a school division or school district established under <i>The Public Schools Act</i> ,	
(b) The University of Manitoba,	
(c) The University of Winnipeg,	
(c) Brandon University,	
(d) a college established under <i>The Colleges Act</i> , and	
(e) any other body designated as an educational body in the regulations;	
" employee ", in relation to a public body, includes a person retained under a contract to perform services for the public body;	
" enactment " means an Act or regulation;	
" government agency " means	
(a) any board, commission, association, agency, or similar body, whether incorporated or unincorporated, all the members of which, or all the members of the board of management or board of directors or governing board of which, are appointed by an Act of the Legislature or by the Lieutenant Governor in Council, and	
(b) any other body designated as a government agency in the regulations;	
" head ", in relation to a public body, means	

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(a) in the case of a department, the minister who presides over it,	
(b) in the case of an incorporated government agency, its chief executive officer,	
(c) in the case of an unincorporated government agency, the minister who is charged by the Lieutenant Governor in Council with the administration of the Act under which the agency is established or who is otherwise responsible for the agency, and	
(d) in any other case, the person or group of persons designated under section 80 or the regulations as the head of the public body;	
"health care body" means	
(a) a hospital designated under <i>The Health Services Insurance Act</i> ,	
(b) a regional health authority established under <i>The Regional Health Authorities Act</i> ,	
(c) the board of a health and social services district established under <i>The District Health and Social Services Act</i> ,	
(d) the board of a hospital district established under <i>The Health Services Act</i> , and	
(e) any other body designated as a health care body in the regulations;	
"judicial administration record" means a record containing information relating to a judge, master, magistrate or justice of the peace, including information relating to	
(a) the scheduling of judges, hearings and trials,	
(b) the content of judicial training programs,	
(c) statistics of judicial activity prepared by or for a judge,	
(d) a judicial directive, and	
(e) any record of the Judicial Inquiry Board, the Judicial Council established under <i>The Provincial Court Act</i> or the Masters Judicial Council established under <i>The Court of Queen's Bench Act</i> ,	
"law enforcement" means any action taken for the purpose of enforcing an enactment, including	
(a) policing,	
(b) investigations or inspections that lead or could lead to a penalty or sanction being imposed, or that are otherwise conducted for the purpose of enforcing an enactment, and	
(c) proceedings that lead or could lead to a penalty or sanction being imposed, or that are otherwise conducted for the purpose of enforcing an enactment;	
"local government body" means	

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(a) The City of Winnipeg,	
(b) a municipality,	
(c) a local government district,	
(d) a local committee, community council or incorporated community council under <i>The Northern Affairs Act</i> ,	
(e) a planning district established under <i>The Planning Act</i> ,	
(f) a conservation district established under <i>The Conservation Districts Act</i> ,	
(g) any other body designated as a local government body in the regulations;	
"local public body" means	
(a) an educational body,	
(b) a health care body, and	
(c) a local government body;	
"minister" means a member of Cabinet;	
"officer of the Legislative Assembly" means the Speaker of the Legislative Assembly, the Clerk of the Legislative Assembly, the Chief Electoral Officer, the Ombudsman, the Children's Advocate, the Auditor General, and the commissioner appointed under The Legislative Assembly and Executive Council Conflict of Interest Act;	
"Ombudsman" means the Ombudsman appointed under <i>The Ombudsman Act</i> ;	
"personal health information" means recorded information about an identifiable individual that relates to	
(a) the individual's health, or health care history, including genetic information about the individual,	
(b) the provision of health care to the individual, or	
(c) payment for health care provided to the individual, and includes	
(d) the PHIN as defined in <i>The Personal Health Information Act</i> and any other identifying number, symbol or particular assigned to an individual, and	
(e) any identifying information about the individual that is collected in the course of, and is incidental to, the provision of health care or payment for health care;	
"personal information" means recorded information about an identifiable individual, including	
(a) the individual's name,	

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT	COMMENTS
(b) the individual's home address, or home telephone, facsimile or e-mail number,	
(c) information about the individual's age, sex, sexual orientation, marital or family status,	
(d) information about the individual's ancestry, race, colour, nationality, or national or ethnic origin,	
(e) information about the individual's religion or creed, or religious belief, association or activity,	
(f) personal health information about the individual,	
(g) the individual's blood type, fingerprints or other hereditary characteristics,	
(h) information about the individual's political belief, association or activity,	
(i) information about the individual's education, employment or occupation, or educational, employment or occupational history,	
(j) information about the individual's source of income or financial circumstances, activities or history,	
(k) information about the individual's criminal history, including regulatory offences,	
(l) the individual's own personal views or opinions, except if they are about another person,	
(m) the views or opinions expressed about the individual by another person, and	
(n) an identifying number, symbol or other particular assigned to the individual;	
"personal information bank" means a collection of personal information that is organized or retrievable by the name of an individual or by an identifying number, symbol or other particular assigned to an individual;	
"public body" means	
(a) a department,	
(b) a government agency,	
(c) the Executive Council Office,	
(d) the office of a minister, and	
(e) a local public body,	
but does not include	
(f) the office of a Member of the Legislative Assembly who is not a minister,	

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(g) the office of an officer of the Legislative Assembly, or	
(h) The Court of Appeal, the Court of Queen's Bench or the Provincial Court;	
"public registry" means a registry of information designated in the regulations that is maintained by a public body and is available to the general public;	
"record" means a record of information in any form, and includes information that is written, photographed, recorded or stored in any manner, on any storage medium or by any means including by graphic, electronic or mechanical means, but does not include electronic software or any mechanism that produces records;	
"responsible minister" means the minister charged by the Lieutenant Governor in Council with the administration of this Act;	
"review committee" means the Privacy Assessment Review Committee established by the minister under section 77;	
"third party" means a person, group of persons or an organization other than the applicant or a public body.	

**THE FREEDOM OF INFORMATION AND PROTECTION OF
PRIVACY ACT**

COMMENTS

<p>Purposes of this Act 2 The purposes of this Act are</p>	<p>To emphasize the importance of openness, transparency and accountability, we feel that wording similar to that in section 2 of the Nova Scotia <i>Freedom of Information and Protection of Privacy Act</i> should be considered for this section. It is our belief that such a change would make access and privacy rights more meaningful by fostering public trust and confidence.</p> <p>Section 2 of the Nova Scotia FIPPA provides as follows:</p> <p>Purpose of the Act 2 <i>The purpose of this Act is</i></p> <p>(a) <i>to ensure that public bodies are fully accountable to the public by</i></p> <ul style="list-style-type: none"> (i) <i>giving the public a right of access to records,</i> (ii) <i>giving individuals a right of access to, and a right to correction of, personal information about themselves,</i> (iii) <i>specifying limited exceptions to the rights of access,</i> (iv) <i>preventing the unauthorized collection, use or disclosure of personal information by public bodies, and</i> (v) <i>providing for an independent review of decisions made pursuant to this Act;</i> <p>and</p> <p>(b) <i>to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to</i></p> <ul style="list-style-type: none"> (i) <i>facilitate informed public participation in policy formulation,</i> (ii) <i>ensure fairness in government decision-making,</i> (iii) <i>permit the airing and reconciliation of divergent views;</i> <p>(c) <i>to protect the privacy of individuals with respect to personal information about themselves held by public bodies and to provide individuals with a right of access to that information.</i></p>
<p>(a) to allow any person a right of access to records in the custody or under the control of public bodies, subject to the limited and specific exceptions set out in this Act;</p>	
<p>(b) to allow individuals a right of access to records containing personal information about themselves in the custody or under the control of public bodies, subject to the limited and specific exceptions set out in this Act;</p>	
<p>(c) to allow individuals a right to request corrections to records containing personal information about themselves in the custody or under the control of public bodies;</p>	

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT	COMMENTS
(d) to control the manner in which public bodies may collect personal information from individuals and to protect individuals against unauthorized use or disclosure of personal information by public bodies; and	
(e) to provide for an independent review of the decisions of public bodies under this Act.	
Scope of this Act 3 This Act	
(a) is in addition to and does not replace existing procedures for access to records or information normally available to the public, including any requirement to pay fees;	
(b) does not prohibit the transfer, storage or destruction of any record in accordance with any other enactment of Manitoba or Canada or a by-law or resolution of a government agency or local public body;	
(c) does not limit the information otherwise available by law to a party to legal proceedings; and	
(d) does not affect the power of a court or tribunal to compel a witness to testify or to compel the production of documents.	
Records to which this Act applies 4 This Act applies to all records in the custody or under the control of a public body but does not apply to	
(a) information in a court record, a record of a judge, master, magistrate or justice of the peace, a judicial administration record or a record relating to support services provided to a judge or judicial officer of a court;	
(b) a note made by or for, or a communication or draft decision of, a person who is acting in a judicial or quasi-judicial capacity;	
(c) a record of a Member of the Legislative Assembly who is not a minister;	
(d) a personal or constituency record of a minister;	
(e) a record made by or for an officer of the Legislative Assembly;	
(f) a record made by or for an elected official of a local public body relating to constituency matters;	
(g) teaching materials or research information of an employee of an educational institution;	
(h) a question that is to be used on an examination or test;	

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT	COMMENTS
(i) a record relating to a prosecution or an inquest under <i>The Fatality Inquiries Act</i> if all proceedings concerning the prosecution or inquest have not been completed;	
(j) records acquired by the Archives of Manitoba or the archives of a public body from a person or entity other than a public body; and	
(k) a record originating from a credit union that is in the custody or under the control of the Credit Union Deposit Guarantee Corporation under <i>The Credit Unions and Caisses Populaires Act</i> .	
	For greater clarity, we believe that section 32(1)(a) should be moved here so that records that are <i>freely available to the public or are available for purchase by the public</i> would be excluded from the Act.
5(1) Repealed on May 4, 2001, by subsection (3).	
Conflict with another Act 5(2) If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless the other enactment expressly provides that the other enactment applies despite this Act.	
Sunset provision 5(3) Three years after section 7 comes into force, subsection (1) of this section is repealed and subsection (2) of this section comes into force.	
PART 2 ACCESS TO INFORMATION	
DIVISION 1 APPLICATION OF THIS PART	
Part does not apply to individual's personal health information 6 An individual seeking access to a record containing his or her own personal health information must request access under <i>The Personal Health Information Act</i> , and this Part does not apply.	In our experience, it is sometimes difficult to determine if PHIA or FIPPA applies when a record contains both personal information and personal health information. For greater certainty, this section should be amended as follows: Part does not apply to individual's personal health information 6 An individual seeking access to a record containing his or her own personal health information must request access under <i>The Personal Health Information Act</i> , and this Part does not apply.
DIVISION 2	
OBTAINING ACCESS TO RECORDS	

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT	COMMENTS
<p>Right of access 7(1) Subject to this Act, an applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.</p>	
<p>Severing information 7(2) The right of access to a record does not extend to information that is excepted from disclosure under Division 3 or 4 of this Part, but if that information can reasonably be severed from the record, an applicant has a right of access to the remainder of the record.</p>	
<p>Fee 7(3) The right of access to a record is subject to the payment of any fee required by the regulations.</p>	<p>For greater clarity, this section should, in addition to the regulation, make reference to section 82. Fee 7(3) The right of access to a record is subject to the payment of any fee required by section 82 and the regulations.</p>
<p>How to make a request 8(1) To obtain access to a record, a person must make a request to the public body that the person believes has custody or control of the record.</p>	
<p>Prescribed form 8(2) A request must be in the prescribed form and must provide enough detail to enable an experienced officer or employee of the public body to identify the record.</p>	
<p>Oral request 8(3) An applicant may make an oral request for access to a record if the applicant</p>	
<p>(a) has a limited ability to read or write English or French; or</p>	
<p>(b) has a disability or condition that impairs his or her ability to make a written request.</p>	
<p>Duty to assist applicant 9 The head of a public body shall make every reasonable effort to assist an applicant and to respond without delay, openly, accurately and completely.</p>	

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

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	<p>Under FIPPA, individuals are allowed a right of access to “records” containing information under the custody or control of public bodies. If public bodies do not record information, however, it cannot be subject to an access request. In our experience, there have been instances where a public body did not record information that was crucial to helping an individual understand a decision that affected him or her.</p> <p>The New Zealand <i>Official Information Act</i> (1982) addresses this concern at section 23 (1): Right of access by person to reasons for decisions affecting that person – <i>(1) ...where a Department or Minister of the Crown or organisation makes, on or after the 1st day of July 1983, a decision or recommendation in respect of any person, being a decision or recommendation in respect of that person in his or its personal capacity, that person has the right to and shall, on request made within a reasonable time of the making of the decision or recommendation, be given a written statement of –</i> <i>(a) The findings on material issues of fact; and</i> <i>(b) ...a reference to the information on which the findings were based; and</i> <i>(c) The reasons for the decision or recommendation.</i></p> <p>For openness, transparency and accountability, consideration should be given to creating a right of access to information which would require public bodies to provide a written statement, upon request, for any decisions that affected the applicant. The statement must contain findings of fact, a reference to the information the findings of fact were based upon and the reasons for the decision.</p> <p>A corresponding right to make a complaint to the Ombudsman (under section 59 of FIPPA) would also have to be created.</p>
<p>Access to records in electronic form 10(1) If information requested is in an electronic form in the custody or under the control of a public body, the head of the public body shall produce a record for the applicant if</p>	
<p>(a) it can be produced using the normal computer hardware and software and technical expertise of the public body; and</p>	
<p>(b) producing it would not interfere unreasonably with the operations of the public body.</p>	
<p>Creating a record in the form requested 10(2) If a record exists but is not in the form requested by the applicant, the head of the public body may create a record in the form requested if the head is of the opinion that it would be simpler or less costly for the public body to do so.</p>	

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<p>Time limit for responding 11(1) The head of a public body shall make every reasonable effort to respond to a request in writing within 30 days after receiving it unless</p>	
(a) the time limit for responding is extended under section 15; or	
(b) the request has been transferred under section 16 to another public body.	
<p>Failure to respond 11(2) The failure of the head of a public body to respond to a request within the 30 day period or any extended period is to be treated as a decision to refuse access to the record.</p>	See comments between sections 59(4) and 59(5).
<p>Contents of response 12(1) In a response under section 11, the head of the public body shall inform the applicant</p>	
(a) whether access to the record or part of the record is granted or refused;	
(b) if access to the record or part of the record is granted, where, when and how access will be given; and	
(c) if access to the record or part of the record is refused,	
(i) in the case of a record that does not exist or cannot be located, that the record does not exist or cannot be located,	
(ii) in the case of a record that exists and can be located, the reasons for the refusal and the specific provision of this Act on which the refusal is based,	<p>Public bodies often merely cite the exception. They do not routinely provide an explanation for why the exception applies, as FIPPA requires. Consideration should be given to amending this section as follows:</p> <p>(ii) in the case of a record that exists and can be located, a description of the record, the reasons for the refusal and the specific provision of this Act on which the refusal is based, and the reasons why it applies.</p>
(iii) of the title and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and	
(iv) that the applicant may make a complaint to the Ombudsman about the refusal.	Public bodies are not required to advise applicants of the time limit for making a complaint to the Ombudsman's Office. So applicants are aware of the time limit for making a complaint, consideration should be given to referencing section 60(2) within section 12(1)(c)(iv).
<p>Refusal to confirm or deny existence of record 12(2) Despite clause (1)(c), the head of a public body may, in a response, refuse to confirm or deny the existence of</p>	
(a) a record containing information described in section 24 or 25; or	

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(b) a record containing personal information about a third party if disclosing the existence of the record would be an unreasonable invasion of the third party's privacy.	
Repetitive or incomprehensible request 13(1) A head of a public body may refuse to give access to a record or a part of a record if the request is repetitive or incomprehensible or is for information already provided to the applicant or that is publicly available.	Under FIPPA, there is no provision to refuse a request for access on the basis that it is an abuse of process. We would suggest that an amendment be considered to include this as a reason for refusal. This refusal would, of course, be subject to a complaint to the Ombudsman.
Notice 13(2) In the circumstances mentioned in subsection (1), the head shall state in the response given under section 11	
(a) that the request is refused and the reason why;	
(b) the reasons for the head's decision; and	
(c) that the applicant may make a complaint to the Ombudsman about the refusal.	
How access will be given 14(1) Subject to subsection 7(2), the right of access is met under this Part,	
(a) if the applicant has asked for a copy and the record can reasonably be reproduced, by giving the applicant a copy of the record; or	
(b) if the applicant has asked to examine a record or has asked for a copy of a record that cannot reasonably be reproduced, by permitting the applicant to examine the record or a part of it or by giving him or her access in accordance with the regulations.	
Explanation 14(2) The head of a public body who gives access to a record may give the applicant any additional information that the head believes may be necessary to explain it.	
Extending the time limit for responding 15(1) The head of a public body may extend the time for responding to a request for up to an additional 30 days, or for a longer period if the Ombudsman agrees, if	
(a) the applicant does not give enough detail to enable the public body to identify a requested record;	
(b) a large number of records is requested or must be searched, and responding within the time period set out in section 11 would interfere unreasonably with the operations of the public body;	

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(c) time is needed to consult with a third party or another public body before deciding whether or not to grant access to a record; or	
(d) a third party makes a complaint under subsection 59(2).	
Notice of extension to applicant 15(2) If the time is extended under subsection (1), the head of the public body shall send a written notice to the applicant setting out	
(a) the reason for the extension;	
(b) when a response can be expected; and	
(c) that the applicant may make a complaint to the Ombudsman about the extension.	
Transferring a request 16(1) Within seven days after a public body receives a request for access to a record, the head of the public body may transfer it to another public body if	
(a) the record was produced by or for the other public body;	
(b) the other public body was the first to obtain the record; or	
(c) the record is in the custody or under the control of the other public body.	
Response within 30 days after transfer 16(2) If a request is transferred under subsection (1),	
(a) the head of the public body who transferred the request shall notify the applicant of the transfer in writing as soon as possible; and	
(b) the head of the public body to which the request is transferred shall make every reasonable effort to respond to the request within 30 days after receiving it unless that time limit is extended under section 15 or notice is given to a third party under section 33.	
DIVISION 3	
MANDATORY EXCEPTIONS TO DISCLOSURE	

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT	COMMENTS
PRIVACY OF A THIRD PARTY	
<p>Disclosure harmful to a third party's privacy 17(1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's privacy.</p>	<p>COMMENT 1: In our experience, public bodies often rely solely on section 17(1) without giving consideration to sections 17(2) or (3). Consideration should be given to amending this section as follows so it makes reference to sections 17(2) and (3), as follows:</p> <p>The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's privacy <i>under subsections 17(2) or 17(3).</i></p> <p>COMMENT 2: Consideration should be given to creating a discretionary public interest exemption to the mandatory exceptions for third party privacy. If releasing the information is clearly in the public interest, then the Head of the public body should have the discretion to disclose the information despite any requirements of section 17.</p>
<p>Disclosures deemed to be an unreasonable invasion of privacy 17(2) A disclosure of personal information about a third party is deemed to be an unreasonable invasion of the third party's privacy if</p>	
(a) the personal information is personal health information;	
(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of a law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;	
(c) disclosure could reasonably be expected to reveal the identity of a third party who has provided information in confidence to a public body for the purposes of law enforcement or the administration of an enactment;	
(d) the personal information relates to eligibility for or receipt of income assistance, legal aid benefits, social service benefits or similar benefits, or to the determination of benefit levels;	
(e) the personal information relates to the third party's employment, occupational or educational history;	
(f) the personal information was collected on a tax return or for the purpose of determining tax liability or collecting a tax;	
(g) the personal information describes the third party's source of income or financial circumstances, activities or history;	

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(h) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations; or	
(i) the personal information indicates the third party's racial or ethnic origin, religious or political beliefs or associations, or sexual orientation.	
<p>Determining unreasonable invasion of privacy 17(3) In determining under subsection (1) whether a disclosure of personal information not described in subsection (2) would unreasonably invade a third party's privacy, the head of a public body shall consider all the relevant circumstances including, but not limited to, whether</p>	
(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Manitoba or a public body to public scrutiny;	
(b) the disclosure is likely to promote public health or safety or protection of the environment;	
(c) the disclosure will assist in a fair determination of the applicant's rights;	
(d) the disclosure may unfairly expose the third party to harm;	
(e) the personal information has been provided, explicitly or implicitly, in confidence;	
(f) the personal information is highly sensitive;	
(g) the personal information is likely to be inaccurate or unreliable;	
(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant; and	
(i) the disclosure would be inconsistent with the purpose for which the personal information was obtained.	
<p>When disclosure not unreasonable 17(4) Despite subsection (2), disclosure of personal information is not an unreasonable invasion of a third party's privacy if</p>	
(a) the third party has consented to or requested the disclosure;	
(b) there are compelling circumstances affecting the mental or physical health or the safety of the applicant or another person and notice of the disclosure is mailed to the last known address of the third party;	
(c) an enactment of Manitoba or Canada expressly authorizes or requires the disclosure;	
(d) the disclosure is for research purposes and is in accordance with section 47;	
(e) the information is about the third party's job classification, salary range, benefits, employment responsibilities or travel expenses	

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(i) as an officer or employee of a public body,	
(ii) as a minister, or	
(iii) as an elected or appointed member of the governing council or body of a local public body or as a member of the staff of such a council or body;	
(f) the disclosure reveals financial or other details of a contract to supply goods or services to or on behalf of a public body;	
(g) the disclosure reveals information about a discretionary benefit of a financial nature granted to the third party by a public body, including the granting of a licence or permit;	
(h) the information is about an individual who has been dead for more than 10 years; or	
(i) the record requested by the applicant is publicly available.	
Disclosure with third party's consent 17(5) If the third party consents to or requests disclosure under clause (4)(a), the head of the public body may	
(a) require the consent or request to be in writing; and	
(b) comply with the requirement to disclose by disclosing the information directly to the third party rather than to the applicant.	
Volume disclosure from a public registry 17(6) The head of a public body shall not disclose to an applicant under this Part personal information in a public registry on a volume or bulk basis.	
BUSINESS INTERESTS OF THIRD PARTIES	
Disclosure harmful to a third party's business interests 18(1) The head of a public body shall refuse to disclose to an applicant information that would reveal	Consideration should be given to creating a discretionary public interest exemption to the mandatory exceptions for third party's business interest. If releasing the information is clearly in the public interest, then the Head of the public body should have the discretion to disclose the information despite any requirements of section 18.
(a) a trade secret of a third party;	
(b) commercial, financial, labour relations, scientific or technical information supplied to the public body by a third party, explicitly or implicitly, on a confidential basis and treated consistently as confidential information by the third party; or	
(c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to	
(i) harm the competitive position of a third party,	
(ii) interfere with contractual or other negotiations of a third party,	
(iii) result in significant financial loss or gain to a third party,	

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(iv) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied, or	
(v) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.	
Tax return information 18(2) The head of a public body shall refuse to disclose to an applicant information about a third party that was collected on a tax return or for the purpose of determining tax liability or collecting a tax.	
Exceptions	
18(3) Subsections (1) and (2) do not apply if	
(a) the third party consents to the disclosure;	
(b) the information is publicly available;	
(c) an enactment of Manitoba or Canada expressly authorizes or requires the disclosure; or	
(d) the information discloses the final results of a product or environmental test conducted by or for the public body, unless the test was done for a fee paid by the third party.	
Disclosure in the public interest	
18(4) Subject to section 33 and the other exceptions in this Act, a head of a public body may disclose a record that contains information described in subsection (1) or (2) if, in the opinion of the head, the private interest of the third party in non-disclosure is clearly outweighed by the public interest in disclosure for the purposes of	
(a) public health or safety or protection of the environment;	
(b) improved competition; or	
(c) government regulation of undesirable trade practices.	

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CABINET CONFIDENCES	
<p>Cabinet confidences 19(1) The head of a public body shall refuse to disclose to an applicant information that would reveal the substance of deliberations of Cabinet, including</p>	<p>COMMENT 1 Consideration should be given to creating a discretionary public interest exemption to the mandatory exceptions for cabinet confidences. If releasing the information is clearly in the public interest, then the Head of the public body should have the discretion to disclose the information despite any requirements of section 19.</p> <p>COMMENT 2 In our experience, when public bodies determine that the form of a record falls within clauses (a) to (e), they have a tendency to withhold the record without giving consideration as to whether the content of the record contains information that would reveal the <i>substance of deliberations</i>. For greater clarity, consideration should be given to deleting clauses (a) to (e) and the word “including”. The form of the information being considered under FIPPA should not detract from the function and intent of the provision.</p> <p>COMMENT 3 For greater clarity, consideration should be given to referencing cabinet committees within this section.</p>
(a) an agenda, minute or other record of the deliberations or decisions of Cabinet;	
(b) discussion papers, policy analyses, proposals, advice or similar briefing material submitted or prepared for submission to Cabinet;	
(c) a proposal or recommendation prepared for, or reviewed and approved by, a minister for submission to Cabinet;	
(d) a record that reflects communications among ministers relating directly to the making of a government decision or the formulation of government policy; and	
(e) a record prepared to brief a minister about a matter that is before, or is proposed to be brought before, Cabinet or that is the subject of communications among ministers relating directly to government decisions or the formulation of government policy.	
Exceptions 19(2) Subsection (1) does not apply if	
(a) the Cabinet for which, or in respect of which, the record has been prepared consents to the disclosure; or	

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(b) the record is more than 30 years old.	<p>COMMENT 1 This is one of the longest time limits in Canada. Consideration should be given to changing the time limit to 10 years.</p> <p>COMMENT 2 Consideration should be also be given to creating an additional exception permitting the release of information as set out in sections 12(2)(b) and (c) of the British Columbia <i>Freedom of Information and Protection of Privacy Act</i>.</p> <p>The BC FIPPA provides as follows: Cabinet Confidences 12. ... (2) <i>Subsection (1) does not apply to</i> (b) <i>information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or</i> (c) <i>information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if</i> (i) <i>the decision has been made public,</i> (ii) <i>the decision has been implemented, or</i> (iii) <i>5 or more years have passed since the decision was made or considered.</i></p> <p>COMMENT 3 Consideration should be given to creating a discretionary public interest exemption to the mandatory exceptions for cabinet confidences. If releasing the information is clearly in the public interest, then the Head of the public body may disclose the information despite any requirements of section 19.</p>
INFORMATION PROVIDED BY ANOTHER GOVERNMENT	
Information provided by another government to department or government agency 20(1) The head of a department or government agency shall refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal information provided, explicitly or implicitly, in confidence by any of the following or their agencies:	
(a) the Government of Canada;	
(b) the government of another province or territory of Canada;	
(c) a local public body;	

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(d) the government of a foreign country, or of a state, province or territory of a foreign country;	
(e) an organization representing one or more governments; or	
(f) an international organization of states.	
Information provided by another government to a local public body	
20(2) The head of a local public body shall refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal information provided, explicitly or implicitly, in confidence by	
(a) a government, local public body, organization or agency described in subsection (1); or	
(b) the Government of Manitoba or a government agency.	
Exceptions	
20(3) Subsections (1) and (2) do not apply if the government, local public body, organization or agency that provided the information	
(a) consents to the disclosure; or	
(b) makes the information public.	
DIVISION 4	
DISCRETIONARY EXCEPTIONS TO DISCLOSURE	
RELATIONS BETWEEN MANITOBA AND OTHER GOVERNMENTS	
Disclosure harmful to relations between Manitoba and other governments	
21(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to harm relations between the Government of Manitoba or a government agency and any of the following or their agencies:	
(a) the Government of Canada;	
(b) the government of another province or territory of Canada;	
(c) a local public body;	
(d) the government of a foreign country, or of a state, province or territory of a foreign country;	
(e) an organization representing one or more governments; or	
(f) an international organization of states.	

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<p>Consent required for disclosure by local public body 21(2) When the request for access has been received by a local public body, the head of the local public body may disclose information referred to in subsection (1) only with the consent of the head of the department of the Government of Manitoba or government agency affected.</p>	
<p>LOCAL PUBLIC BODY CONFIDENCES</p>	
<p>Local public body confidences 22(1) The head of a local public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal</p>	
<p>(a) a draft of a resolution, by-law or other legal instrument by which the local public body acts; or</p>	
<p>(b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its elected officials or governing body, if an enactment or a resolution, by-law or other legal instrument by which the local public body acts authorizes the holding of that meeting in the absence of the public.</p>	
<p>Exceptions 22(2) Subsection (1) does not apply if</p>	
<p>(a) the draft of the resolution, by-law or other legal instrument or the subject matter of the deliberations has been considered in a meeting open to the public; or</p>	
<p>(b) the information referred to in subsection (1) is in a record that is more than 30 years old.</p>	<p>This is one of the longest time limits in Canada. Consideration should be given to changing the time limit to 10 years.</p>
<p>ADVICE TO A PUBLIC BODY</p>	
<p>Advice to a public body 23(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal</p>	<p>In our experience, public bodies tend to apply this section too broadly. We understand the rationale for this section is to encourage open and frank communication within the public body, prior to making a decision. However, once a decision has been made, it is our view that the information should be releasable subject to a reasonable expectation of harm test.</p>
<p>(a) advice, opinions, proposals, recommendations, analyses or policy options developed by or for the public body or a minister;</p>	
<p>(b) consultations or deliberations involving officers or employees of the public body or a minister;</p>	

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(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Manitoba or the public body, or considerations that relate to those negotiations;	
(d) plans relating to the management of personnel or the administration of the public body that have not yet been implemented;	
(e) the content of draft legislation, regulations, and orders of ministers or the Lieutenant Governor in Council; or	
(f) information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.	
Exceptions 23(2) Subsection (1) does not apply if the information	
(a) is in a record that is more than 30 years old;	This is one of the longest time limits in Canada. Consideration should be given to changing the time limit to 10 years.
(b) is an instruction or guideline issued to officers or employees of the public body;	
(c) is a substantive rule or statement of policy that has been adopted by the public body for the purpose of interpreting an enactment or administering a program or activity of the public body;	
(d) is the result of a product or environmental test conducted by or for the public body;	
(e) is a statement of the reasons for a decision made in the exercise of a quasi-judicial function or a discretionary power that affects the applicant;	
(f) is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal;	
(g) is a statistical survey; or	
(h) is a final report or final audit on the performance or efficiency of the public body or of any of its programs or policies, except where the information is a report or appraisal of the performance of an individual who is or was an officer or employee of the public body.	

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<p>Interpretation of "background research" 23(3) For the purpose of clause (2)(f), background research of a technical nature does not include economic or financial research undertaken in connection with the formulation of a tax policy or other economic policy of the public body.</p>	
<p>INDIVIDUAL OR PUBLIC SAFETY</p>	
<p>Disclosure harmful to individual or public safety 24 The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if disclosure could reasonably be expected to</p>	
<p>(a) threaten or harm the mental or physical health or the safety of another person;</p>	
<p>(b) result, in the opinion of a duly qualified physician, psychologist, or other appropriate expert, in serious harm to the applicant's mental or physical health or safety; or</p>	
<p>(c) threaten public safety.</p>	
<p>LAW ENFORCEMENT AND LEGAL PROCEEDINGS</p>	
<p>Disclosure harmful to law enforcement or legal proceedings 25(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to</p>	
<p>(a) harm a law enforcement matter;</p>	
<p>(b) prejudice the defence of Canada or of a foreign state allied to or associated with Canada or harm the detection, prevention or suppression of espionage, sabotage or terrorism;</p>	
<p>(c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement;</p>	
<p>(d) interfere with the gathering of, or reveal criminal intelligence that has a reasonable connection with, the detection, prevention or suppression of organized criminal activities or of serious and repetitive criminal activities;</p>	
<p>(e) endanger the life or safety of a law enforcement officer or any other person;</p>	
<p>(f) deprive a person of the right to a fair trial or impartial adjudication;</p>	
<p>(g) disclose a record that has been confiscated from a person by a peace officer in accordance with an enactment of Manitoba or Canada;</p>	
<p>(h) facilitate the escape from custody of an individual who is lawfully detained;</p>	

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(i) facilitate the commission of an unlawful act or interfere with the control of crime;	
(j) disclose technical information relating to weapons or potential weapons;	
(k) interfere with the proper custody or supervision of an individual who is lawfully detained;	
(l) reveal information in a correctional record supplied, explicitly or implicitly, in confidence;	
(m) expose to civil liability the author of a law enforcement record or a person who has been quoted or paraphrased in the record; or	
(n) be injurious to the conduct of existing or anticipated legal proceedings.	
<p>No disclosure if offence 25(2) The head of a public body shall refuse to disclose information to an applicant if the information is in a law enforcement record and the disclosure is prohibited under an enactment of Canada.</p>	
<p>Exceptions 25(3) Subsection (1) does not apply to</p>	
(a) a report, including statistical analysis, on the degree of success achieved by a law enforcement program, unless disclosure of the report could reasonably be expected to cause any harm or interference referred to in subsection (1); or	
(b) a record that provides a general outline of the structure or programs of a law enforcement agency.	
<p>SECURITY OF PROPERTY</p>	
<p>Disclosure harmful to security of property 26 The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to harm or threaten the security of any property or system, including a building, a vehicle, an electronic information system or a communications system.</p>	
<p>SOLICITOR-CLIENT PRIVILEGE</p>	
<p>Solicitor-client privilege 27(1) The head of a public body may refuse to disclose to an applicant</p>	
(a) information that is subject to solicitor-client privilege;	

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(b) information prepared by or for an agent or lawyer of the Minister of Justice and Attorney-General or the public body in relation to a matter involving the provision of legal advice or legal services or in relation to the investigation or prosecution of an offence; or	
(c) information in correspondence between an agent or lawyer of the Minister of Justice and Attorney-General or the public body and any other person in relation to a matter involving the provision of legal advice or legal services or in relation to the investigation or prosecution of an offence.	
Third party's solicitor-client privilege 27(2) The head of a public body shall refuse to disclose to an applicant information that is subject to a solicitor-client privilege of a person other than the public body.	
ECONOMIC AND OTHER INTERESTS OF A PUBLIC BODY	
Disclosure harmful to economic and other interests of a public body 28(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to harm the economic or financial interests or negotiating position of a public body or the Government of Manitoba, including the following information:	
(a) a trade secret of a public body or the Government of Manitoba;	
(b) financial, commercial, scientific, technical or other information in which a public body or the Government of Manitoba has a proprietary interest or right of use;	
(c) information the disclosure of which could reasonably be expected to	
(i) result in financial loss to,	
(ii) prejudice the competitive position of, or	
(iii) interfere with or prejudice contractual or other negotiations of, a public body or the Government of Manitoba;	
(d) innovative scientific or technical information obtained through research by an employee of a public body or the Government of Manitoba; or	
(e) information the disclosure of which could reasonably be expected to result in an undue loss or benefit to a person, or premature disclosure of a pending policy decision, including but not limited to,	
(i) a contemplated change in taxes or other source of revenue,	
(ii) a contemplated change in government borrowing,	

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(iii) a contemplated change in the conditions of operation of a financial institution, stock exchange, or commodities exchange, or of any self-regulating association recognized by The Manitoba Securities Commission under an enactment of Manitoba, or	
(iv) a contemplated sale or purchase of securities, bonds or foreign or Canadian currency.	
Exception 28(2) Subsection (1) does not apply to the results of a product or environmental test conducted by or for a public body, unless the test was done for the purpose of developing methods of testing or for the purpose of testing products for possible purchase.	
TESTING PROCEDURES, TESTS AND AUDITS	
Testing procedures, tests and audits 29 The head of a public body may refuse to disclose to an applicant information relating to	
(a) testing or auditing procedures or techniques; or	
(b) details of specific tests to be given or audits to be conducted; if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits.	
CONFIDENTIAL EVALUATIONS	
Confidential evaluations about the applicant 30 The head of a public body may refuse to disclose to an applicant personal information that has been provided in confidence, explicitly or implicitly, for purposes of determining the applicant's suitability, eligibility or qualifications for employment, or for the purpose of awarding a contract.	
PRESERVATION OF HERITAGE RESOURCES AND LIFE FORMS	
Disclosure harmful to preservation of heritage resources and life forms 31(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to result in damage to or interfere with the preservation, protection or conservation of	
(a) a heritage resource as defined in <i>The Heritage Resources Act</i> , or	
(b) any rare, endangered, threatened or vulnerable life form, including plants, vertebrates and invertebrates.	

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<p>Information re designation of sites 31(2) The head of a public body may refuse to disclose to an applicant information relating to a contemplated designation of a heritage site, a municipal heritage site or a heritage object under <i>The Heritage Resources Act</i>.</p>	
<p>INFORMATION THAT IS OR WILL BE AVAILABLE TO THE PUBLIC</p>	
<p>Information that is or will be available to the public 32(1) The head of a public body may refuse to disclose to an applicant information</p>	See comments at section 4.
<p>(a) that is freely available to the public or is available for purchase by the public; or</p>	
<p>(b) that will be made available to the public within 90 days after the applicant's request is received.</p>	
<p>Notification when information becomes available 32(2) When the head of a public body has refused to disclose information under clause (1)(b), the head shall</p>	
<p>(a) notify the applicant when the information becomes available; and</p>	
<p>(b) if the information is not available to the public within 90 days after the applicant's request is received, reconsider the request as if it were a new request received on the last day of the 90 day period and not refuse access to the information under clause (1)(b).</p>	
<p>DIVISION 5</p>	
<p>THIRD PARTY INTERVENTION</p>	
<p>Notice to third party 33(1) When the head of a public body is considering giving access to a record the disclosure of which might</p>	
<p>(a) result in an unreasonable invasion of a third party's privacy under section 17; or</p>	
<p>(b) affect a third party's interests described in subsection 18(1) or (2); the head shall, where practicable and as soon as practicable, give written notice to the third party in accordance with subsection (3).</p>	
<p>Waiver of notice requirement 33(2) A third party is deemed to have waived the requirement for notice in subsection (1) in a case where the third party has consented to or requested the disclosure.</p>	
<p>Content of notice 33(3) A notice under subsection (1) must</p>	

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(a) state that a request has been made for access to a record that may contain information the disclosure of which might invade the privacy or affect the interests of the third party;	
(b) include a copy of the record or part of it containing the information in question or describe the contents of the record; and	
(c) state that, within 20 days after the notice is given, the third party may, in writing, consent to the disclosure or make representations to the head of the public body explaining why the information should not be disclosed.	
Further details of notice 33(4) When notice is given under subsection (1), the head of the public body shall also give the applicant a notice stating that	
(a) the record requested by the applicant may contain information the disclosure of which might invade the privacy or affect the interests of a third party;	
(b) the third party is being given an opportunity to make representations concerning disclosure; and	
(c) a decision respecting disclosure will be made within 30 days after the day notice is given under subsection (1), unless the time limit for responding is extended under section 15.	
Written representations 33(5) Representations by a third party under this section must be made in writing unless the head permits them to be made orally.	
Decision within 30 days 34(1) Within 30 days after notice is given under subsection 33(1), the head of the public body shall decide whether or not to give access to the record or to part of the record, but no decision may be made before the earlier of	
(a) 21 days after the notice is given; and	
(b) the day a response is received from the third party.	
Notice of decision 34(2) On reaching a decision under subsection (1), the head of the public body shall give written notice of the decision, including reasons for the decision, to the applicant and the third party.	
Extended time limit 34(3) Subsection 15(1) applies with necessary modifications to the period set out in subsection (1).	

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<p>Complaint about decision to give access 34(4) If the head of the public body decides to give access to the record or part of the record, the notice under subsection (2) must state that the applicant will be given access unless the third party makes a complaint to the Ombudsman under Part 5 within 21 days after the notice is given.</p>	
<p>Complaint about decision to refuse access 34(5) If the head of the public body decides not to give access to the record or part of the record, the notice under subsection (2) must state that the applicant may make a complaint to the Ombudsman under Part 5 within 21 days after the notice is given.</p>	
<p>PART 3</p>	
<p>PROTECTION OF PRIVACY</p>	
<p>DIVISION 1</p>	
<p>APPLICATION OF THIS PART</p>	
<p>Part does not apply to personal health information 35 This Part does not apply to personal health information to which The Personal Health Information Act applies.</p>	
<p>DIVISION 2</p>	
<p>COLLECTION, CORRECTION AND RETENTION OF PERSONAL INFORMATION</p>	
<p>COLLECTION OF INFORMATION</p>	
<p>Purpose of collection of information 36(1) No personal information may be collected by or for a public body unless</p>	
<p>(a) collection of the information is authorized by or under an enactment of Manitoba or of Canada;</p>	
<p>(b) the information relates directly to and is necessary for an existing program or activity of the public body; or</p>	
<p>(c) the information is collected for law enforcement purposes or crime prevention.</p>	
<p>Limit on amount of information collected 36(2) A public body shall collect only as much personal information about an individual as is reasonably necessary to accomplish the purpose for which it is collected.</p>	
<p>Manner of collection 37(1) Personal information must be collected by or for a public body directly from the individual the information is about unless</p>	

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(a) another method of collection is authorized by that individual, or by an enactment of Manitoba or Canada;	
(b) collection of the information directly from the individual could reasonably be expected to cause harm to the individual or to another person;	
(c) collection of the information is in the interest of the individual and time or circumstances do not permit collection directly from the individual;	
(d) collection of the information directly from the individual could reasonably be expected to result in inaccurate information being collected;	
(e) the information may be disclosed to the public body under Division 3 of this Part;	
(f) the information is collected for inclusion in a public registry;	
(g) the information is collected for law enforcement purposes or crime prevention;	
(h) the information is collected for the purpose of existing or anticipated legal proceedings to which the Government of Manitoba or the public body is a party;	
(i) the information is collected for use in providing legal advice or legal services to the Government of Manitoba or the public body;	
(j) the information concerns	
(i) the history, release or supervision of an individual in the custody of or under the control or supervision of a correctional authority, or	
(ii) the security of a correctional institution;	
(k) the information is collected for the purpose of enforcing a maintenance order under <i>The Family Maintenance Act</i> ;	
(l) the information is collected for the purpose of informing The Public Trustee or the Vulnerable Persons Commissioner about clients or potential clients;	
(m) the information is collected for the purpose of	
(i) determining the eligibility of an individual to participate in a program of or receive a benefit or service from the Government of Manitoba or the public body and is collected in the course of processing an application made by or on behalf of the individual the information is about, or	

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(ii) verifying the eligibility of an individual who is participating in a program of or receiving a benefit or service from the Government of Manitoba or the public body;	
(n) the information is collected for the purpose of	
(i) determining the amount of or collecting a fine, debt, tax or payment owing to the Government of Manitoba or the public body, or an assignee of either of them, or	
(ii) making a payment;	
(o) the information is collected for the purpose of managing or administering personnel of the Government of Manitoba or the public body;	
(p) the information is collected for the purpose of auditing, monitoring or evaluating the activities of the Government of Manitoba or the public body; or	
(q) the information is collected for the purpose of determining suitability for an honour or award, including an honorary degree, scholarship, prize or bursary.	
<p>Individual must be informed 37(2) A public body that collects personal information directly from the individual the information is about shall inform the individual of</p>	
(a) the purpose for which the information is collected;	
(b) the legal authority for the collection; and	
(c) the title, business address and telephone number of an officer or employee of the public body who can answer the individual's questions about the collection.	
<p>When notice not required 37(3) A public body need not comply with subsection (2) if it has recently provided the individual with the information referred to in that subsection about the collection of the same or similar personal information for the same or a related purpose.</p>	
<p>ACCURACY OF INFORMATION</p>	
<p>Accuracy of personal information 38 If personal information about an individual will be used by a public body to make a decision that directly affects the individual, the public body shall take reasonable steps to ensure that the information is accurate and complete.</p>	<p>This section does not match the related section in PHIA, which also says that information must be “up to date” and “not misleading.” Therefore, PHIA imposes a higher standard than FIPPA. Consideration should be given to amending this section so that FIPPA is consistent with PHIA.</p>

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT	COMMENTS
CORRECTION OF INFORMATION	
<p>Right to request correction 39(1) An applicant who has been given access to a record containing his or her personal information under Part 2 and who believes there is an error or omission in the information may request the head of the public body that has the information in its custody or under its control to correct the information.</p>	
<p>Written request 39(2) A request must be in writing.</p>	
<p>Head's response 39(3) Within 30 days after receiving a request under subsection (1), the head of the public body shall</p>	
<p>(a) make the requested correction and notify the applicant of the correction; or</p>	
<p>(b) notify the applicant of the head's refusal to correct the record and the reason for the refusal, that the request for correction has been added to the record, and that the individual has a right to make a complaint about the refusal under Part 5.</p>	<p>PHIA permits the individual the right to file a statement of disagreement but FIPPA does not. We suggest that consideration be given to incorporating the statement of disagreement scheme from PHIA into FIPPA.</p>
<p>Extended time limit 39(4) Subsection 15(1) applies with necessary modifications to the period set out in subsection (3).</p>	
<p>Notice to others 39(5) On correcting a record or adding a request for correction to a record under this section, the head of the public body shall, where practicable, notify any other public body or third party to whom the information has been disclosed during the year before the correction was requested that the correction has been made or a request for correction has been added.</p>	
<p>Correction required 39(6) On being notified under subsection (5) of a correction or request for correction, a public body must make the correction or add the request for correction to any record of that information in its custody or under its control.</p>	

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT	COMMENTS
RETENTION OF INFORMATION	
<p>Retention of personal information 40(1) A public body that uses personal information about an individual to make a decision that directly affects the individual shall, in the absence of another legal requirement to do so, establish and comply with a written policy concerning the retention of the personal information.</p>	
<p>Content of retention policy 40(2) A policy under subsection (1) must</p>	
<p>(a) require that personal information be retained for a reasonable period of time so that the individual the information is about has a reasonable opportunity to obtain access to it; and</p>	
<p>(b) comply with any additional requirements set out in the regulations.</p>	
<p>Protection of personal information 41 The head of a public body shall, in accordance with any requirements set out in the regulations, protect personal information by making reasonable security arrangements against such risks as unauthorized access, use, disclosure or destruction.</p>	
<p>DIVISION 3</p>	
<p>RESTRICTIONS ON USE AND DISCLOSURE OF PERSONAL INFORMATION</p>	
<p>GENERAL DUTIES OF PUBLIC BODIES</p>	
<p>General duty of public bodies 42(1) A public body shall not use or disclose personal information except as authorized under this Division.</p>	
<p>Limit on amount of information used or disclosed 42(2) Every use and disclosure by a public body of personal information must be limited to the minimum amount of information necessary to accomplish the purpose for which it is used or disclosed.</p>	
<p>Limit on employees 42(3) A public body shall limit the use and disclosure of personal information in its custody or under its control to those of its employees or agents who need to know the information to carry out the purpose for which the information was collected or received or to carry out a purpose authorized under section 43.</p>	

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT	COMMENTS
RESTRICTIONS ON USE OF INFORMATION	
Use of personal information	
43 A public body may use personal information only	
(a) for the purpose for which the information was collected or compiled under subsection 36(1) or for a use consistent with that purpose under section 45;	
(b) if the individual the information is about has consented to the use; or	
(c) for a purpose for which that information may be disclosed to the public body under section 44, 46, 47 or 48 or for a use approved under section 46.	
RESTRICTIONS ON DISCLOSURE OF INFORMATION	
Disclosure of personal information	
44(1) A public body may disclose personal information only	
(a) for the purpose for which the information was collected or compiled under subsection 36(1) or for a use consistent with that purpose under section 45;	
(b) if the individual the information is about has consented to its disclosure;	
(c) in accordance with Part 2;	
(d) for the purpose of complying with an enactment of Manitoba or Canada, or with a treaty, arrangement or agreement entered into under an enactment of Manitoba or Canada;	
(e) in accordance with an enactment of Manitoba or Canada that authorizes or requires the disclosure;	
(f) to a minister or an elected official of the public body, if the information is necessary to carry out his or her responsibilities;	
(g) for the purpose of managing or administering personnel of the Government of Manitoba or the public body;	
(h) to the Auditor General or any other person or body for audit purposes;	
(i) to the Government of Canada in order to facilitate the monitoring, evaluation or auditing of shared cost programs or services;	
(j) for the purpose of determining or verifying an individual's suitability or eligibility for a program, service or benefit;	
(k) for the purpose of enforcing a maintenance order under <i>The Family Maintenance Act</i> ;	
(l) where necessary to protect the mental or physical health or the safety of any individual or group of individuals;	

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(m) for the purpose of complying with a subpoena, warrant or order issued or made by a court, person or body with jurisdiction to compel the production of information or with a rule of court that relates to the production of information;	
(n) for use in providing legal advice or legal services to the Government of Manitoba or the public body;	
(o) for the purpose of enforcing a legal right that the Government of Manitoba or the public body has against any person;	
(p) for the purpose of	
(i) determining the amount of or collecting a fine, debt, tax or payment owing by an individual to the Government of Manitoba or to the public body, or to an assignee of either of them, or	
(ii) making a payment;	
(q) for use in existing or anticipated legal proceedings to which the Government of Manitoba or the public body is a party;	
(r) for law enforcement purposes or crime prevention;	
(s) if the public body is a law enforcement agency and the information is disclosed to	
(i) another law enforcement agency in Canada, or	
(ii) a law enforcement agency in a foreign country under an arrangement, written agreement, treaty or legislative authority;	
(t) for the purpose of supervising an individual in the custody of or under the control or supervision of a correctional authority;	
(u) where disclosure is necessary for the security of a correctional institution;	
(v) by transfer to the Archives of Manitoba or to the archives of the public body for records management or archival purposes;	
(w) to an officer of the Legislature, if the information is necessary for the performance of the duties of that officer;	
(x) to an expert for the purposes of clause 24(b);	
(y) for the purpose of	
(i) contacting a relative or friend of an individual who is injured, incapacitated or ill,	
(ii) assisting in identifying a deceased individual, or	
(iii) informing the representative or a relative of a deceased individual, or any other person it is reasonable to inform in the circumstances, of the individual's death;	

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(z) to a relative of a deceased individual if the head of the public body reasonably believes that disclosure is not an unreasonable invasion of the deceased's privacy;	
(aa) subject to subsection (2), to a person providing information technology services to or for the public body;	
(bb) when the information is available to the public; or	
(cc) in accordance with sections 46, 47 or 48.	
<p>Agreement for information technology services 44(2) When a public body intends to disclose personal information to a provider of information technology services under clause (1)(aa), the public body shall enter into a written agreement with the provider for the protection of the personal information against such risks as unauthorized access, use, disclosure or destruction.</p>	To provide additional safeguards for personal information that is the subject of an information technology services agreement, consideration should be given to including retention and alteration in this section.
	Consideration should be given to including a section similar to section 25(5) of PHIA, which would make it clear that information disclosed to a provider of information technology services is deemed to be maintained by the public body.
<p>Consistent purposes 45 For the purpose of clauses 43(a) and 44(1)(a), a use or disclosure of personal information is consistent with the purpose for which the information was collected or compiled if the use or disclosure</p>	
(a) has a reasonable and direct connection to that purpose; and	
(b) is necessary for performing the statutory duties of, or for operating an authorized program or carrying out an activity of, the public body that uses or discloses the information.	
<p>Application 46(1) This section applies only to uses and disclosures not otherwise authorized under this Division.</p>	<p>COMMENT 1 As we understand, the Privacy Assessment Review Committee (PARC) authorizes uses and disclosures that would not otherwise be authorized under FIPPA. We feel that our office should be made aware of the advice given by PARC so that we would have the opportunity to provide comment on the matter. See also comments at sections 46(3) and 46(4).</p> <p>COMMENT 2 For openness and transparency, consideration should be given to having the decisions of Ministers, based on advice of PARC, made available in the form of an Annual Report.</p>
<p>Assessment required for other uses and disclosures 46(2) When a public body</p>	

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(a) proposes to use or disclose personal information in order to link information databases or match personal information in one information database with information in another; or	
(b) receives a request for disclosure on a volume or bulk basis of personal information in a public registry or another collection of personal information;	
the personal information may be used or disclosed only if an approval is given by the head of the public body under this section.	
Government must refer to review committee 46(3) If a proposal or request is made under subsection (2) by or to a department or a government agency, the head must refer it to the review committee for its advice.	In keeping with the Ombudsman's duty to monitor and ensure compliance, we would suggest that in addition to referring a proposal or request to the review committee, that the department or government agency also notifies our office of the proposal or request.
Local public body may refer to review committee 46(4) If a proposal or request is made under subsection (2) by or to a local public body, the head may refer it to the review committee for its advice.	In keeping with the Ombudsman's duty to monitor and ensure compliance, we would suggest that in addition to referring a proposal or request to the review committee, that the local public body also notifies our office of the proposal or request.
Review committee to provide advice 46(5) The review committee shall assess a proposal or request referred to it under this section and provide advice to the head of the public body about the matters referred to in subsection (6).	
Conditions of approval 46(6) The head may approve the proposal or request only if	
(a) any advice that was requested from the review committee has been received and considered;	
(b) the head is satisfied that	
(i) the purpose of the proposal or request cannot reasonably be accomplished unless the personal information is provided in a form that identifies individuals,	
(ii) it is unreasonable or impractical to obtain consent from the individuals the personal information is about, and	
(iii) the use or disclosure is not likely to harm the individuals the personal information is about and the benefits to be derived from the use or disclosure are clearly in the public interest;	
(c) the head has approved conditions relating to	
(i) the use of the personal information,	
(ii) the protection of the personal information, including security and confidentiality,	

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(iii) the removal or destruction of individual identifiers at the earliest reasonable time, where appropriate, and	
(iv) any subsequent use or disclosure of the personal information in a form that identifies individuals without the express written authorization of the public body; and	
(d) the recipient of the personal information has entered into a written agreement to comply with the approved conditions.	
Disclosure for research purposes 47(1) A public body may disclose personal information for a research purpose only in accordance with this section.	
Referral to review committee 47(2) The head of a public body that receives a request for disclosure of personal information for a research purpose may refer the request to the review committee for its advice.	
Review committee to provide advice 47(3) The review committee shall assess the request and provide advice to the head of the public body about the matters referred to in subsection (4).	
Conditions of disclosure 47(4) The head of the public body may disclose personal information for a research purpose only if	
(a) any advice that was requested from the review committee has been received and considered;	
(b) the head is satisfied that	
(i) the personal information is requested for a bona fide research purpose,	
(ii) the research purpose cannot reasonably be accomplished unless the personal information is provided in a form that identifies individuals,	
(iii) it is unreasonable or impractical for the person proposing the research to obtain consent from the individuals the personal information is about, and	
(iv) disclosure of the personal information, and any information linkage, is not likely to harm the individuals the information is about and the benefits to be derived from the research and any information linkage are clearly in the public interest;	
(c) the head of the public body has approved conditions relating to	
(i) the protection of the personal information, including use, security and confidentiality,	

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(ii) the removal or destruction of individual identifiers at the earliest reasonable time, and	
(iii) the prohibition of any subsequent use or disclosure of the personal information in a form that identifies individuals without the express written authorization of the public body; and	
(d) the person to whom the personal information is disclosed has entered into a written agreement to comply with the approved conditions.	
<p>Disclosure of records more than 100 years old 48 The head of a public body or the archives of a public body may disclose personal information in a record that is more than 100 years old.</p>	
<p>PART 4</p>	
<p>POWERS AND DUTIES OF THE OMBUDSMAN</p>	
<p>General powers and duties 49 In addition to the Ombudsman's powers and duties under Part 5 respecting complaints, the Ombudsman may</p>	
(a) conduct investigations and audits and make recommendations to monitor and ensure compliance	
(i) with this Act and the regulations, and	
(ii) with requirements respecting the security and destruction of records set out in any other enactment or in a by-law or other legal instrument by which a local public body acts;	
(b) inform the public about this Act;	
(c) receive comments from the public about the administration of this Act;	
(d) comment on the implications for access to information or for protection of privacy of proposed legislative schemes or programs of public bodies;	<p>COMMENT 1 We note that PHIA includes “practices” of Trustees and would suggest that this also be included in FIPPA.</p> <p>COMMENT 2 The Ombudsman’s Office reviews current legislation and programs under section 49(d). Consideration should be given to requiring that public bodies complete a Privacy Impact Assessment (PIA) for proposed legislative schemes, programs or practices. Upon completion, the PIAs would be submitted to the Ombudsman where they would be placed in a registry. This would generally be in keeping with practices in Alberta, British Columbia, Ontario, and Canada..</p>
(e) comment on the implications for protection of privacy of	

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(i) using or disclosing personal information for record linkage, or	
(ii) using information technology in the collection, storage, use or transfer of personal information;	
(f) bring to the attention of the head of a public body any failure to fulfil the duty to assist applicants;	
(g) recommend to a public body, after giving the head an opportunity to make representations, that the public body	
(i) cease or modify a specified practice of collecting, using or disclosing information that contravenes this Act, or	
(ii) destroy a collection of personal information that was not collected in accordance with this Act;	
(h) make recommendations to the head of a public body or the responsible minister about the administration of this Act;	
(i) consult with any person with experience or expertise in any matter related to the purposes of this Act; and	
(j) engage in or commission research into anything affecting the achievement of the purposes of this Act.	
<p>Evidence Act powers 50(1) The Ombudsman has all the powers and protections of a commissioner under Part V of <i>The Manitoba Evidence Act</i> when conducting an investigation under this Act.</p>	
<p>Production of records 50(2) The Ombudsman may require any record in the custody or under the control of a public body that the Ombudsman considers relevant to an investigation to be produced to the Ombudsman and may examine any information in a record, including personal information.</p>	<p>There have been circumstances where our office required evidence from individuals/organizations who were not public bodies. This section should be broadened so that it would be similar to section 30(1) of The Ombudsman Act (OA) so that we could request records from non-public bodies.</p> <p>Evidence 30(1) Subject to section 34, the Ombudsman may require any person who, in his opinion, is able to give any information relating to any matter being investigated by him or her: (a) to furnish the information to him or her; and (b) to produce any record, document, paper or thing that in his or her opinion relates to the matter being investigated and that may be in the possession or under the control of that person. whether or not that person is an officer, employee or member of the department, agency of the government or municipality and whether or not the document, paper or thing is in the custody or under the control of a department, agency of the government or municipality.</p>

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<p>Records to be produced within 14 days 50(3) A public body shall produce to the Ombudsman within 14 days any record or a copy of a record required under this section, despite any other enactment or any privilege of the law of evidence.</p>	<p>For consistency with revised section 50(2) Records produced within 14 days 50(3) A public body Any person shall produce to the Ombudsman within 14 days any record or a copy of a record required to be produced under this section despite any other enactment or any privilege of the law of evidence.</p>
<p>Examination of record on site 50(4) If a public body is required to produce a record under this section and it is not practicable to make a copy of it, the head of the public body may require the Ombudsman to examine the original at its site.</p>	<p>For consistency with revised section 50(2) Examination of record on site 50(4) If a public body person is required to produce a record under this section and it is not practicable to make a copy of it, the head of the public body person may require the Ombudsman to examine the original at its site.</p>
<p>Right of entry 51 Despite any other enactment or any privilege of the law of evidence, in exercising powers or performing duties under this Act, the Ombudsman has the right</p>	
<p>(a) to enter any office of a public body and examine and make copies of any record in the custody of the public body; and</p>	
<p>(b) to converse in private with any officer or employee of a public body.</p>	
<p>Investigation in private 52 The Ombudsman shall conduct every investigation in private.</p>	
<p>Statements and reports not admissible in evidence 53(1) A statement made or an answer given by a person during an investigation by the Ombudsman, and a report or recommendation of the Ombudsman, is inadmissible in evidence in a court or in any other proceeding, except</p>	
<p>(a) in a prosecution for perjury in respect of sworn testimony;</p>	
<p>(b) in a prosecution for an offence under this Act; or</p>	
<p>(c) in an appeal to the court under this Act, when the Ombudsman is a party.</p>	
<p>Not compellable as witness 53(2) The Ombudsman, and anyone acting for or under the direction of the Ombudsman, shall not be required to give evidence in a court or in any other proceeding about information that comes to the knowledge of the Ombudsman in performing duties or exercising powers under this Act.</p>	
<p>Information provided under qualified privilege 54 Anything said, any information supplied, and any record produced by a person during an investigation by the Ombudsman under this Act is privileged in the same manner as if it were said, supplied or produced in a proceeding in a court.</p>	

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<p>Ombudsman restricted as to disclosure of information 55(1) The Ombudsman, and anyone acting for or under the direction of the Ombudsman, shall not disclose information obtained in performing duties or exercising powers under this Act, except as provided in subsections (2) to (5).</p>	
<p>When disclosure permitted 55(2) The Ombudsman may disclose, or may authorize anyone acting for or under the direction of the Ombudsman to disclose, information that is necessary to</p>	
<p>(a) perform a duty or exercise a power of the Ombudsman under this Act; or</p>	
<p>(b) establish the grounds for findings and recommendations contained in a report under this Act.</p>	
<p>Reasonable precautions to avoid disclosure 55(3) In conducting an investigation and in performing any other duty or exercising any power under this Act, the Ombudsman, and anyone acting for or under the direction of the Ombudsman, shall take every reasonable precaution to avoid disclosing and shall not disclose</p>	
<p>(a) any information the head of a public body is authorized or required to refuse to disclose under Part 2; or</p>	
<p>(b) whether information exists, if the head of a public body is authorized to refuse to confirm or deny that the information exists under subsection 12(2).</p>	
<p>Information about offences 55(4) The Ombudsman may disclose to the Minister of Justice and Attorney General information relating to the commission of an offence under this or any other enactment of Manitoba or Canada if the Ombudsman considers there is reason to believe an offence has been committed.</p>	
<p>Information relating to a prosecution or appeal 55(5) The Ombudsman may disclose, or may authorize anyone acting for or under the direction of the Ombudsman to disclose, information in the course of a prosecution or an appeal referred to in subsection 53(1).</p>	
<p>Delegation 56 The Ombudsman may delegate to any person on his or her staff any duty or power under this Act.</p>	

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<p>Protection from liability 57 No proceedings lie against the Ombudsman, or against any person acting for or under the direction of the Ombudsman, for anything done, reported or said in good faith in the exercise or performance or the intended exercise or performance of a duty or power under this Act.</p>	
<p>Annual report 58(1) The Ombudsman shall make an annual report to the Legislative Assembly on</p>	
<p>(a) the work of the Ombudsman's office in relation to this Act;</p>	
<p>(b) the Ombudsman's recommendations and whether public bodies have complied with the recommendations;</p>	
<p>(c) any complaints or investigations resulting from a decision, act or failure to act; and</p>	
<p>(d) any other matters about access to information and protection of privacy that the Ombudsman considers appropriate.</p>	
<p>Report to be laid before Legislative Assembly 58(2) The report shall be given to the Speaker who shall lay it before the Legislative Assembly if it is in session and if it is not in session, then within 15 days after the beginning of the next session.</p>	
<p>Special report 58(3) In the public interest, the Ombudsman may publish a special report relating to any matter within the scope of the powers and duties of the Ombudsman under this Act, including a report referring to and commenting on any particular matter investigated by the Ombudsman.</p>	
<p>PART 5</p>	
<p>COMPLAINTS</p>	
<p>MAKING A COMPLAINT</p>	
<p>Right to make a complaint about access 59(1) A person who has requested access to a record under Part 2 of this Act may make a complaint to the Ombudsman about any decision, act or failure to act of the head that relates to the request, including a refusal to make a correction under section 39.</p>	<p>We note that if a new right of access for written statements of reasons for decisions is created (between sections 9 and 10), a corresponding right of complaint will be required.</p>

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<p>Complaint by a third party about access 59(2) A third party notified under section 33 of a decision by the head of a public body to give access may make a complaint to the Ombudsman about the decision.</p>	
<p>Complaint about privacy 59(3) An individual who believes that his or her own personal information has been collected, used or disclosed in violation of Part 3 may make a complaint to the Ombudsman.</p>	<p>Consideration should be given to including a provision similar to section 39(2)(b) of PHIA to provide a right of complaint for failures to protect personal information. Amend this section to include a right of complaint that a public body has failed to protect an individual's personal information in a secure manner as required by this Act.</p> <p>See also comment at section 87(j).</p>
<p>Complaint by relative of deceased 59(4) A relative of a deceased individual may make a complaint to the Ombudsman about a decision of a head of a public body not to disclose personal information under clause 44(1)(z).</p>	
	<p>For greater accountability relating to failure to respond, consideration should be given to incorporating the statutory procedures set out in section 17 of Manitoba's repealed Freedom of Information Act as follows:</p> <p>Reasons for refusal 17(1) Where a complaint relates to a presumed refusal of access failure to respond under section 8 or subsection 11(4) 11(2), the Ombudsman shall, immediately upon beginning the investigation, request the head of the department involved in the complaint to give the applicant written notice of the reasons for the refusal to give access.</p> <p>Contents of notice 17(2) <i>Forthwith upon receiving the request from the Ombudsman under subsection (1), the head shall send to the applicant a written notice stating:</i></p> <ul style="list-style-type: none"> (a) <i>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;</i> (b) <i>in the case of a record which does exist and can be located, the specific provision of this Act upon which the refusal to give access is based.</i>
<p>Ombudsman may initiate a complaint 59(5) The Ombudsman may initiate a complaint respecting any matter about which the Ombudsman is satisfied there are reasonable grounds to investigate under this Act.</p>	
<p>How to make a complaint 60(1) A complaint to the Ombudsman must be in the prescribed form.</p>	<p>Our office has already provided our concerns related to the prescribed complaint form to Culture, Heritage and Tourism, together with a draft replacement form for consideration. A copy of this correspondence, dated August 22, 2003, is attached to this package as <i>Appendix 1</i>. Our comments about the prescribed form have not changed.</p>

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<p>60-day time limit 60(2) A complaint under subsection 59(1) or (4) must be delivered to the Ombudsman within 60 days after the person complaining is notified of the decision, unless the complaint relates to a decision under subsection 34(5).</p>	
<p>120-day time limit for failure to respond 60(3) If the head of a public body fails to respond in time to a request for access to a record, the failure is to be treated as a decision to refuse access, in which case the complaint must be delivered to the Ombudsman within 120 days after the request for access was made.</p>	
<p>Notifying others of a complaint 61 As soon as practicable after receiving a complaint, the Ombudsman shall notify the head of the public body concerned and any other person who, in the Ombudsman's opinion, is affected by it.</p>	
<p>INVESTIGATION</p>	
<p>Investigation 62(1) Subject to section 63, on receiving a complaint the Ombudsman shall investigate it.</p>	
<p>Informal resolution 62(2) The Ombudsman may take any steps the Ombudsman considers appropriate to resolve a complaint informally to the satisfaction of the parties and in a manner consistent with the purposes of this Act.</p>	
<p>Decision to not deal with a complaint 63(1) The Ombudsman may decide not to investigate a complaint if the Ombudsman is of the opinion that,</p>	
<p>(a) in the case of a complaint about privacy referred to in subsection 59(3), the length of time that has elapsed since the date the subject matter of the complaint arose makes an investigation no longer practicable or desirable;</p>	
<p>(b) the subject matter of the complaint is trivial or the complaint is not made in good faith or is frivolous or vexatious; or</p>	<p>Consideration should be given to adding "abuse of process" to this section.</p>
<p>(c) the circumstances of the complaint do not require investigation.</p>	

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<p>Notifying the complainant 63(2) The Ombudsman shall inform the complainant and the head of the public body in writing if he or she decides not to investigate a complaint, and give reasons for the decision.</p>	
<p>Representations to the Ombudsman 64(1) During an investigation, the Ombudsman shall give the complainant and the head of the public body concerned an opportunity to make representations to the Ombudsman. The Ombudsman may also give any other person who has been notified of the complaint under section 61 an opportunity to make representations. However, no one is entitled to be present during an investigation or to have access to or to comment on representations made to the Ombudsman by another person.</p>	
<p>Written or oral representations 64(2) The Ombudsman may decide whether representations are to be made orally or in writing.</p>	
<p>Representations by counsel 64(3) Representations may be made to the Ombudsman through counsel or an agent.</p>	
	<p>Section 45 of PHIA places a duty on trustees to cooperate with the Ombudsman. Consideration should be given to creating a similar requirement so that any person is required to cooperate with the Ombudsman</p>
<p>90-day time limit for investigation 65 An investigation must be completed and a report made under section 66 within 90 days after a complaint is made, unless the Ombudsman</p>	
<p>(a) notifies the complainant, the head of the public body and any other person who has made representations to the Ombudsman that the Ombudsman is extending that period; and</p>	
<p>(b) gives an anticipated date for providing the report.</p>	
<p>OMBUDSMAN'S REPORT ABOUT A COMPLAINT</p>	
<p>Report 66(1) On completing an investigation of a complaint, the Ombudsman shall prepare a report containing the Ombudsman's findings about the complaint and any recommendations the Ombudsman considers appropriate respecting the complaint.</p>	<p>We considered <i>The Ombudsman Act</i> in our discussion of this provision. It was our thought that making section 66 parallel with the OA would provide our office with the ability to report out on files verbally where appropriate. Report 66(1) On completing an investigation of a complaint, the Ombudsman shall prepare a report containing the Ombudsman's his or her findings about the complaint and any recommendations the Ombudsman considers appropriate respecting the complaint.</p>

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Report sent to complainant and others 66(2) The Ombudsman	
(a) shall give a copy of the report to the complainant and the head of the public body concerned; and	For consistency with section 66(1). (a) shall give a copy of the report to the complainant and the head of the public body concerned; and
(b) may give a copy of the report to any other person who has made representations to the Ombudsman.	For consistency with section 66(1). (b) may give a copy of the report to any other person who has made representations to the Ombudsman.
Notice of right to appeal 66(3) If the Ombudsman finds that a complaint	
(a) relating to the refusal of access to a record or part of a record; or	
(b) by a third party notified under section 33 of a decision by the head of a public body to give access;	
is unjustified, the report must include a notice to the complainant of the right to appeal the decision to the court under section 67, and of the time limit for an appeal.	For consistency with section 66(1). is unjustified, the Ombudsman shall notify report must include a notice to the complainant of the right to appeal the decision to the court under section 67, and of the time limit for an appeal.
Head's response to the report	
66(4) If the report contains recommendations, the head of the public body shall, within 15 days after receiving the report, send the Ombudsman a written response indicating	
(a) that the head accepts the recommendations and describing any action the head has taken or proposes to take to implement them; or	
(b) the reasons why the head refuses to take action to implement the recommendations.	Public bodies may accept some recommendations and not others. We would suggest this section be changed from "the recommendations" to "any recommendation."
Notice to the complainant	
66(5) The Ombudsman shall notify the complainant about the head's response without delay. In the case of a response that indicates a refusal to take action on any of the Ombudsman's recommendations, the Ombudsman shall also, if the complainant has been refused access to a record or part of a record or is a third party notified under section 33 of a decision by the head of a public body to give access, inform the complainant	
(a) that he or she may appeal the decision to the court under section 67 and of the time limit for an appeal; and	
(b) if the Ombudsman so chooses, that the Ombudsman intends to appeal the decision to the court under section 68.	

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<p>Compliance with recommendations 66(6) When the head of a public body accepts the recommendations in a report, the head shall comply with the recommendations</p>	
<p>(a) within 15 days of acceptance, if the complaint is about access under subsection 59(1), (2) or (4); and</p>	
<p>(b) within 45 days in any other case; or within such additional period as the Ombudsman considers reasonable.</p>	
<p>APPEAL TO COURT</p>	
<p>Appeal to court 67(1) A person who</p>	
<p>(a) has been refused access to a record or part of a record requested under subsection 8(1); or</p>	
<p>(b) is a third party notified under section 33 of a decision by the head of a public body to give access; may appeal the decision to the court.</p>	
<p>Appeal only if complaint has been made 67(2) An appeal may be made under subsection (1) only if the person has made a complaint to the Ombudsman about the decision and the Ombudsman has provided a report under section 66.</p>	<p>For consistency with revised section 66. Appeal only if complaint has been made 67(2) An appeal may be made under subsection (1) only if the person has made a complaint to the Ombudsman about the decision and the Ombudsman has provided a reported under section 66.</p>
<p>Appeal within 30 days 67(3) An appeal may be made by filing an application with the court within 30 days after the person receives the Ombudsman's report under subsection 66(2) or a notice under subsection 66(5), or within such longer period as the court may allow in special circumstances.</p>	<p>It is our suggestion that our office would be notifying complainants in writing of their right to appeal. Amend this section as follows: 67(3) An appeal may be made by filing an application with the court within 30 days after the person receives the Ombudsman's report provides notice to the person under subsection 66(2) 66(3) or a notice under subsection 66(5), or within such longer period as the court may allow in special circumstances.</p>
<p>Head to be named as respondent 67(4) The application must name the head of the public body involved in the complaint as the respondent.</p>	
<p>Appeal served on head and others 67(5) The person appealing shall, within 15 days of filing the application, serve a copy of it on</p>	
<p>(a) the head of the public body;</p>	
<p>(b) the Ombudsman; and</p>	

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(c) in the case of an appeal by a third party notified under section 33 of a decision to give access to a record, on the person requesting access.	
Appeal by the Ombudsman 68(1) The Ombudsman may appeal a decision described in subsection 67(1) to the court within the time limit set by subsection 67(3), if the Ombudsman has obtained the consent of the person who has the right of appeal.	
Ombudsman may intervene 68(2) The Ombudsman has a right to intervene as a party to an appeal under section 67.	
Conditions for appeal or intervention 68(3) The Ombudsman may appeal a decision or intervene as a party to an appeal only if the Ombudsman is of the opinion that the decision raises a significant issue of statutory interpretation or that an appeal is otherwise clearly in the public interest.	<p>We note that the corresponding section in PHIA does not impose limitations on the Ombudsman's discretion to appeal to court. Consideration should be given to making these appeal provisions consistent for FIPPA and PHIA.</p>
Appeal served on head and others 68(4) The Ombudsman shall, within 15 days after filing an application for appeal, serve a copy of it on	
(a) the head of the public body; and	
(b) the person requesting access to the record if he or she is not the person who gave consent under subsection (1).	
Appeal as a new matter 69 The court shall consider an appeal under section 67 or 68 as a new matter and may hear evidence by affidavit.	
Burden of proof 70(1) If an appeal under section 67 or 68 relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.	
Burden of proof: personal information 70(2) Despite subsection (1), if the appeal relates to a decision to give or refuse to give access to a record or part of a record containing personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's privacy.	

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<p>Burden of proof: non-personal information 70(3) If the appeal relates to a decision to give access to all or part of a record containing information that is not personal information about a third party, it is up to the third party to prove that the applicant has no right of access to the record or part of the record.</p>	
<p>Court may order production of records 71 Despite any other enactment or any privilege of the law of evidence, for the purpose of an appeal under section 67 or 68 the court may order production of any record in the custody or under the control of a public body for examination by the court.</p>	
<p>Court to take precautions against disclosing 72 On an appeal under section 67 or 68, the court shall take every reasonable precaution, including receiving representations ex parte, conducting hearings in private and examining records in private, to avoid disclosure</p>	
<p>(a) of any information the head of a public body is authorized or required to refuse to disclose under Part 2; or</p>	
<p>(b) as to whether information exists, if the head of a public body is authorized to refuse to confirm or deny that the information exists under subsection 12(2).</p>	
<p>Powers of court on appeal 73(1) On hearing an appeal under section 67 or 68, the court may,</p>	
<p>(a) if it determines that the head of the public body is authorized or required to refuse access to a record under</p>	
<p>Part 2, dismiss the appeal; or</p>	
<p>(b) if it determines that the head is not authorized or required to refuse access to all or part of a record under Part 2,</p>	
<p>(i) order the head of the public body to give the applicant access to all or part of the record, and</p>	
<p>(ii) make any other order that the court considers appropriate.</p>	
<p>Order of court where record contains excepted information 73(2) If the court finds that a record or part of a record falls within an exception to disclosure under Part 2, the court shall not order the head to give the applicant access to that record or part of it, regardless of whether the exception requires or merely authorizes the head to refuse access.</p>	

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<p>No further appeal 74 A decision of the court under section 73 is final and binding and there is no appeal from it.</p>	<p>Under PHIA, the Court of Appeal can give leave to hear a matter. Consideration should be given to amending this section as follows:</p> <p>74 Except with leave of The Court of Appeal, a decision of the court under section 73 is final and binding and there is no appeal from it.</p>
<p>PART 6 GENERAL PROVISIONS</p>	
<p>Directory</p>	
<p>75(1) The responsible minister shall</p>	
<p>(a) prepare a directory to assist in identifying and locating records in the custody or under the control of public bodies;</p>	
<p>(b) make every reasonable effort to ensure that the directory is kept up to date;</p>	
<p>(c) ensure that copies of the directory are made available to public bodies; and</p>	
<p>(d) ensure that copies of the directory are available to the public through libraries and electronic information networks.</p>	
<p>Contents of directory</p>	
<p>75(2) The directory must include</p>	
<p>(a) a description of the mandates, functions and organization of each public body;</p>	
<p>(b) a description of records, including personal information banks, in the custody or under the control of each public body; and</p>	
<p>(c) the title, business address and business telephone number of an officer or employee of each public body who may be contacted for information about this Act.</p>	
<p>Personal information banks</p>	
<p>75(3) The description of a personal information bank required under clause (2)(b) must include the following:</p>	
<p>(a) the name of the personal information bank;</p>	
<p>(b) a description of the kind of information in the personal information bank and of the categories of individuals whom the information is about;</p>	
<p>(c) the authority and purposes for collecting the information;</p>	
<p>(d) the purposes for which the information is used or disclosed; and</p>	
<p>(e) the categories of persons who use the information or to whom it is disclosed.</p>	

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<p>Disclosure for non-declared purpose 75(4) If personal information is used or disclosed by a public body for a purpose that is not included in the directory under subsection (1), the head of the public body shall</p>	
<p>(a) keep a record of the use or disclosure and either attach or link that record to the personal information; and</p>	
<p>(b) notify the responsible minister of the use or disclosure for inclusion in the directory.</p>	
<p>Application of this section to local public bodies 75(5) Clauses (3)(d) and (e) and subsection (4) do not apply to local public bodies. However, the head of a local public body shall maintain an up-to-date list of the purposes for which information in a personal information bank in the custody or under the control of the local public body is used or disclosed, and make the list available to the public.</p>	
<p>Public bodies to provide information 75(6) The head of a public body shall provide to the responsible minister any information that the minister requires to prepare the directory and ensure that it is kept up to date.</p>	
<p>Records available without an application 76(1) The head of a public body may specify records or categories of records that are in the custody or under the control of the public body and that are available to the public without an application for access under this Act.</p>	
<p>Fee 76(2) The head of a public body may require a person who asks for a copy of a record available under subsection (1) to pay a fee to the public body, unless such a record can otherwise be accessed without a fee.</p>	
<p>Privacy Assessment Review Committee 77 In accordance with the regulations, the responsible minister shall establish a Privacy Assessment Review Committee for the purposes of sections 46 and 47.</p>	
<p>Giving notice under this Act 78 When this Act requires a notice or document to be given to a person, it is to be given</p>	
<p>(a) by sending it to that person by prepaid mail to the person's last known address;</p>	

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(b) by personal service;	
(c) by substitutional service if so authorized by the Ombudsman; or	
(d) by electronic transmission or telephone transmission of a facsimile of a copy of the notice or document.	
Exercising rights of another person 79 Any right or power conferred on an individual by this Act may be exercised	
(a) by any person with written authorization from the individual to act on the individual's behalf;	
(b) by a committee appointed for the individual under <i>The Mental Health Act</i> or a substitute decision maker appointed for the individual under <i>The Vulnerable Persons Living with a Mental Disability Act</i> , if the exercise of the right or power relates to the powers and duties of the committee or substitute decision maker;	
(c) by an attorney acting under a power of attorney granted by the individual, if the exercise of the right or power relates to the powers and duties conferred by the power of attorney;	
(d) by the parent or guardian of a minor when, in the opinion of the head of the public body concerned, the exercise of the right or power by the parent or guardian would not constitute an unreasonable invasion of the minor's privacy; or	
(e) if the individual is deceased, by the individual's personal representative if the exercise of the right or power relates to the administration of the individual's estate.	
Designation of head by local public body 80 A local public body shall, by by-law or resolution, designate a person or group of persons as the head of the local public body for the purposes of this Act.	
Delegation by the head of a public body 81 The head of a public body may delegate to any person on the staff of the public body any duty or power of the head under this Act.	
Fees 82(1) The head of a public body may require an applicant to pay to the public body fees for making an application, and for search, preparation, copying and delivery services as provided for in the regulations.	

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<p>Estimate of fees 82(2) If an applicant is required to pay fees under subsection (1) other than an application fee, the head of a public body shall give the applicant an estimate of the total fee before providing the services.</p>	
<p>Acceptance of estimate within 30 days 82(3) The applicant has up to 30 days from the day the estimate is given to indicate if it is accepted or to modify the request in order to change the amount of the fees, after which the application is considered abandoned.</p>	
<p>Effect of estimate on time limits 82(4) When an estimate is given to an applicant under this section, the time within which the head is required to respond under subsection 11(1) is suspended until the applicant notifies the head that the applicant wishes to proceed with the application.</p>	
<p>Waiver of fees 82(5) The head of a public body may waive the payment of all or part of a fee in accordance with the regulations.</p>	
<p>Fee not to exceed actual cost 82(6) The search, preparation, copying and delivery fees referred to in subsection (1) must not exceed the actual costs of the services.</p>	
<p>Annual report of responsible minister 83(1) The responsible minister shall prepare an annual report and lay a copy of it before the Legislative Assembly if it is in session and, if it is not, within 15 days after the beginning of the next session.</p>	
<p>Contents of report 83(2) The report under subsection (1) shall include information as to</p>	
<p>(a) the number of requests for access that have been made, granted or denied;</p>	
<p>(b) the specific provisions of this Act upon which refusals of access have been based;</p>	
<p>(c) the number of applications to correct personal information that have been made;</p>	
<p>(d) the requests and proposals approved by the head of each public body under sections 46 and 47; and</p>	

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(e) the fees charged for access to records.	
<p>Protection from liability 84 No action lies and no proceeding may be brought against the Government of Manitoba, a public body, the head of a public body, an elected official of a local public body or any person acting for or under the direction of the head of a public body for damages resulting from</p>	
(a) the disclosure of or failure to disclose, in good faith, all or part of a record or information under this Act or any consequences of that disclosure or failure to disclose; or	
(b) the failure to give a notice required by this Act if reasonable care is taken to give the required notice.	
<p>Offences</p>	
85(1) Any person who wilfully	
(a) discloses personal information in contravention of Part 3 of this Act;	
(b) makes a false statement to, or misleads or attempts to mislead, the Ombudsman or another person in performing duties or exercising powers under this Act;	
(c) obstructs the Ombudsman or another person in performing duties or exercising powers under this Act; or	
(d) destroys a record or erases information in a record that is subject to this Act with the intent to evade a request for access to records;	
is guilty of an offence and liable on summary conviction to a fine of not more than \$50,000.	
<p>Prosecution within two years 85(2) A prosecution under this Act may be commenced not later than two years after the commission of the alleged offence.</p>	<p>Our experience underlines that it may take some time before an individual or our office becomes aware of an alleged offence. This being the case, we suggest that this section be amended as follows:</p> <p>85(2) prosecution under this Act may be commenced not later than two years after <i>discovery that</i> the alleged offence was <i>committed</i>.</p>
<p>Defence under other enactments 86(1) No person is guilty of an offence under any other enactment by reason of complying with a request or requirement to produce a record or provide information or evidence to the Ombudsman, or a person acting for or under the direction of the Ombudsman, under this Act.</p>	

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<p>No adverse employment action 86(2) A public body or a person acting on behalf of a public body shall not take any adverse employment action against an employee because the employee has complied with a request or requirement to produce a record or provide information or evidence to the Ombudsman, or a person acting for or under the direction of the Ombudsman, under this Act.</p>	<p>For consistency with the revised section 50(2). 65(2) A public body or a person acting on behalf of a public body shall not take any No adverse employment action shall be taken against an employee individual because the employee individual has complied with a request or requirement to produce a record or provide information or evidence to the Ombudsman, or a person acting for or under the direction of the Ombudsman, under this Act.</p>
<p>Regulations 87 The Lieutenant Governor in Council may make regulations</p>	<p>Individuals are not always sure of the public body's practices respecting the collection, use, retention and disclosure of their personal information. For clarity, transparency and better understanding, we would suggest consideration be given to requiring that public bodies provide notice relating to their practices, similar to PHIA section 66(1)(d). PHIA section 66(1)(d) is a regulation making power that requires trustees to provide notice to individuals about their right to examine, copy and correct their own information. In addition, trustees are also required to provide information related to their practices respecting collection, use, retention and disclosure of personal health information.</p>
<p>(a) designating a person or group of persons as the head of a public body for the purpose of clause (d) of the definition "head" in section 1;</p>	
<p>(b) designating agencies, boards, commissions, corporations, offices, associations or other bodies as educational bodies, government agencies, health care bodies or local government bodies;</p>	
<p>(c) designating public registries for the purpose of the definition "public registry" in section 1;</p>	
<p>(d) respecting fees to be paid under this Act and providing for circumstances in which fees may be waived in whole or in part;</p>	
<p>(e) respecting forms for the purposes of this Act;</p>	
<p>(f) respecting procedures to be followed in making, transferring, and responding to requests under Part 2 of this Act;</p>	
<p>(g) for the purpose of clause 40(2)(b), governing policies of public bodies concerning retention periods for personal information and respecting the destruction of personal information;</p>	<p>Consideration should be given to enacting a regulation concerning retention and destruction similar to section 17 of PHIA.</p>
<p>(h) respecting the giving of consents by individuals under this Act;</p>	
<p>(i) respecting written agreements for the purposes of sections 44, 46 and 47;</p>	

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(j) respecting standards for and requiring administrative, technical and physical safeguards to ensure the security and confidentiality of records and personal information in the custody or under the control of public bodies;	Consideration should be given to including requirements similar to the following sections from the PHIA regulation: <ul style="list-style-type: none"> ▪ 2 (Written security policies and procedures), ▪ 3 (Access restrictions and other precautions), ▪ 4 (Additional safeguards for electronic health information systems), ▪ 5 (Authorized access for employees), ▪ 6 (Orientation and training for employees), ▪ 7 (Pledge of confidentiality for employees) and ▪ 8 (Audit).
(k) respecting the appointment of members of the review committee established under section 77 and governing the duties and functions of the review committee and all related matters;	
(l) respecting the kind of information that public bodies must provide to the responsible minister, including information the minister requires for preparing the directory under section 75 or the annual report under section 83;	
(m) providing that other enactments of Manitoba, or any provisions of them, prevail despite this Act;	
(n) defining any word or expression used in this Act but not defined in this Act;	
(o) respecting any other matter the Lieutenant Governor in Council considers necessary or advisable to carry out the intent of this Act.	
PART 7	
CONSEQUENTIAL, REVIEW, REPEAL AND COMING INTO FORCE	
CONSEQUENTIAL AMENDMENTS	
88 to 97	
NOTE: These sections contained consequential amendments to other Acts, which amendments are now included in those Acts.	
REVIEW	
Review of this Act 98 Within five years after section 7 comes into force, the minister shall undertake a comprehensive review of the operation of this Act that involves public representations and shall, within one year after the review is undertaken or within such further time as the Legislative Assembly may allow, submit a report on the review to the Assembly.	Consideration should be given to periodically reviewing the Act.

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REPEAL AND C.C.S.M. REFERENCE	
Repeal 99 <i>The Freedom of Information Act</i> , S.M. 1985-86, c. 6, is repealed.	
C.C.S.M. reference 100 This Act may be cited as <i>The Freedom of Information and Protection of Privacy Act</i> and referred to as chapter F175 of the Continuing Consolidation of the Statutes of Manitoba.	
COMING INTO FORCE	
Coming into force of Act 101(1) Except as provided in subsection (3), this Act comes into force on a day fixed by proclamation.	
Coming into force for local public bodies 101(2) The proclamation of clause (d) of the definition "head" in section 1, clause (e) of the definition "public body" in section 1, and sections 4(f), 20(2), 21(2), 22, 46(4), 49(a)(ii), 75(5) and 80, or any portion of them, may relate to all or any of the following categories of local public bodies:	
(a) educational bodies;	
(b) health care bodies;	
(c) local government bodies.	
Coming into force for The City of Winnipeg 101(2.1) If a proclamation under subsection (2) relates to local government bodies, the proclamation may be made applicable to The City of Winnipeg at an earlier date than to other local government bodies.	
Coming into force of Division 1 of Parts 2 and 3 101(3) If <i>The Personal Health Information Act</i> is not in force on the day this Act is proclaimed, Division 1 of Part 2 and Division 1 of Part 3 do not come into force on the proclamation of this Act but instead come into force on the day <i>The Personal Health Information Act</i> comes into force.	
NOTE: S.M. 1997, c. 50, except clause (d) of the definition "head" in section 1, clause (e) of the definition "public body" in section 1, and sections 4(f), 20(2), 21(2), 22, 46(4), 49(a)(ii), 75(5) and 80, was proclaimed in force May 4, 1998.	

**THE FREEDOM OF INFORMATION AND PROTECTION OF
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The provisions enumerated above were proclaimed in force in relation to The City of Winnipeg on August 31, 1998, and in relation to educational bodies, health care bodies, and local government bodies except The City of Winnipeg on April 3, 2000.

The Personal Health Information Act, S.M. 1997, c. 5, was proclaimed in force December 11, 1997.

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Access and Privacy Directory means the directory required under section 75 of the Act to assist in identifying and locating records in the custody or under the control of public bodies;	
access and privacy officer means any employee of a public body to whom the head has delegated a duty or power under section 81 of the Act;	
Act means <i>The Freedom of Information and Protection of Privacy Act</i> .	
Appointment of access and privacy coordinator 2 Every public body shall appoint an employee as an access and privacy coordinator who is responsible for receiving applications for access to records and for the day-to-day administration of the Act.	
APPLICATIONS	
Application for access 3(1) A person requesting access to a record shall complete an application in Form 1 of Schedule A.	
3(2) Where practicable, the application must be submitted to the access and privacy coordinator at the location of the public body identified in the Access and Privacy Directory	
3(3) An application shall be date stamped on the day it is received.	
3(4) If the public body considers that verification of the applicant's identity or that of a third party is necessary in order to respond to the application, the public body may at anytime require the applicant to provide suitable identification.	
Search and preparation fee 4(1) An applicant shall pay a search and preparation fee to the public body whenever the public body estimates that search and preparation related to the application will take more than two hours.	
4(2) The fee payable for search and preparation is \$15.00 for each half-hour in excess of two hours.	

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<p>4(3) When calculating search and preparation time, a public body shall include time spent in severing any relevant record under subsection 7(2) of the Act, but shall not include time spent</p>	
<p>(a) in connection with transferring an application to another public body under section 16 of the Act ;</p>	
<p>(b) preparing an estimate of fees under section 7;</p>	
<p>(c) reviewing any relevant record to determine whether any of the exceptions to disclosure apply, prior to any severing of the record;</p>	
<p>(d) copying a record supplied to the applicant; or</p>	
<p>(e) preparing an explanation of a record under subsection 14(2) of the Act.</p>	
<p>Copying fees 5(1) An applicant who is given a copy of a record shall pay the following copying fees to the public body:</p>	
<p>(a) 20 cents for each page for paper copies made by a photocopier or computer printer;</p>	
<p>(b) 50 cents for each page for paper copies made from a micro printer,</p>	
<p>(c) actual costs for any other method of providing copies</p>	
<p>5(2) Despite subsection (1), an applicant requesting copies of his or her own personal information is not required to pay a copying fee if the total copying fee payable is less than \$10.00.</p>	
<p>Computer programming and data processing fees 6 When a public body needs to use computer programming or incurs data processing costs in responding to an application, the applicant shall pay to the public body</p>	
<p>(a) \$10.00 for each fifteen minutes of internal programming data processing; or</p>	
<p>(b) the actual cost of external programming or data processing incurred by the public body.</p>	
<p>Matters for which no fee is payable 7 No fee is payable by an applicant for</p>	
<p>(a) making an application for access to a record</p>	

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT -- REGULATION	COMMENTS
(b) using the Access and Privacy Directory, any file list, file plan or similar record used by a public body to identify, locate or describe records, unless the applicant requires a copy, in which case 20 cents is payable for each page; or	
(c) regular mailing costs, other than special courier delivery which shall be charged to the applicant at actual cost.	
Estimate of fees 8(1) In accordance with subsection 82(2) of the Act, a public body shall give an applicant an estimate of fees in Form 2 of Schedule A when it reasonably considers that, in responding to the request,	
(a) search and preparation is likely to take longer than two hours; or	
(b) computer programming or data processing fees will be incurred.	
8(2) After receiving an estimate of fees, an applicant who still wishes to proceed with the application shall sign and return a copy of Form 2 of Schedule A to the public body along with payment of the estimated fees.	
8(3) The estimate of fees is binding on the public body, and if the actual cost of search and preparation or computer programming or data processing is less than the estimate, the public body shall refund the difference to the applicant.	
8(4) In addition, a public body shall refund the amount of estimated fees paid by an applicant if access to every record the applicant has requested is refused.	
WAIVER OF FEES	
Waiver of fees 9(1) At the applicant's request, the head of a public body may waive all or part of the fees payable under this regulation if the head is satisfied that	
(a) payment would impose an unreasonable financial hardship on the applicant;	
(b) the request for access relates to the applicant's own personal information and waiving the fees would be reasonable and fair in the circumstances; or	

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT -- REGULATION	COMMENTS
(c) the record relates to a matter of public interest concerning public health or safety or the environment.	Currently, fee waiver is restricted to records relating to matters of public interest concerning health, safety or the environment. Consideration should be given to expanding fee waivers to all matters of public interest as follows: The record relates to a matter of public interest concerning public health or safety or the environment.
9(2) Either when access is granted or before it is granted, the head of the public body shall inform the applicant in writing as to the head's decision about waiving the fees.	
9(3) In this section, "head", in relation to a public body that is a department, means the deputy minister of the department or person holding an equivalent office.	
FORM OF COMPLAINT	
Form of complaint 10 A complaint to the Ombudsman under Part 5 of the Act shall be in Form 3 of Schedule 4.	
DESIGNATION OF GOVERNMENT AGENCIES AND PUBLIC REGISTRIES	
Designation of government agencies 11 The bodies set out in Schedule B are designated as government agencies for the purposes of the Act.	
Designation of public registries 12 The registries of information set out in Schedule C are designated as public registries for the purposes of the Act.	
REVIEW COMMITTEE	
Privacy Assessment Review Committee 13(l) The review committee established under section 77 of the Act shall consist of the Provincial Archivist as well as an appointee of the deputy minister of each of the following departments:	
(a) the Department of Consumer and Corporate Affairs;	
(b) the Department of Education and Training;	
(c) the Department of Family Services;	
(d) the Department of Health;	
(e) the Department of Highways and Transportation;	
(f) the Department of Industry, Trade and Tourism;	
(g) the Department of justice.	

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13(2) The Provincial Archivist is the chairperson of the review committee.	
13(3) Five members of the committee are a quorum.	
Repeal 14 The Access to Records Regulation, Manitoba Regulation 296/88, is repealed.	
Coming into force 15 This regulation comes into force on May 4, 1998.	
SCHEDULE B (section 11)	
GOVERNMENT AGENCIES	
AGRICULTURE	
Manitoba Livestock Manure Management Initiative Inc.	
CONSUMER AND CORPORATE AFFAIRS	
Landlord and Tenant Advisory Committee	
EDUCATION AND TRAINING	
Advisory Council on Education Finance	
Apprenticeship and Trades Qualifications Board and Trades Advisory Committee	
Board of Teacher Education and Certification Certificate Review Committee	
Council on Learning Technologies Collective Agreement Board	
Provincial Evaluations Committee	
ENVIRONMENT	
Manitoba Product Stewardship Corporation Tire Stewardship Board	
EXECUTIVE COUNCIL	
Manitoba Round Table on the Environment and the Economy	
FAMILY SERVICES	
Anishinaabe Child and Family Services – West Awasic Agency of Northern Manitoba	

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT -- REGULATION	COMMENTS
Children's Aid Society of Manitoba operating as Child and Family Services of Central Manitoba	
Child and Family Services of Western Manitoba Chiropractic Review Panel	
Cree Nation Child and Family Caring Agency Dakota Ojibway Child and Family Services Dental Review Committee	
Island Lake First Nations Family Services	
Southeast Child and Family Services Taking Charge! Inc.	
West Region Child and Family Services Winnipeg Child and Family Services	
FINANCE	
Government Information Systems	
Management Organization (Man.) Inc.	
Health Information Services of Manitoba Inc.	
Manitoba Games Council	
Sport Manitoba	
Tax Appeals Commission	
HEALTH	
Advisory Committee on Aids	
Advisory Committee on Continuing Care Program	
Appeal Panel for Home Care	
HIGHWAYS AND TRANSPORTATION	
Taxicab Board	
HOUSING	
Manitoba Housing Authority	
JUSTICE	
Community justice Committees	
Community Notification Advisory Committee	
Manitoba Crime Prevention Awards Committee	
Urban Sports Camp Program Steering Committee	
NATURAL RESOURCES	
Assiniboine River Management Advisory Board	

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT -- REGULATION	COMMENTS
SCHEDULE C	
(Section 12)	
PUBLIC REGISTRIES	
AGRICULTURE	
Animal Industry Branch	
Livestock Brand Registry	
CONSUMER AND CORPORATE AFFAIRS	
Auto Injury Appeal Commission	
Record of Appeals	
Companies Office	
Business Names Registry	
Corporations Registry	
Cooperative and Credit Union Regulation Branch	
Credit Union and Caisse Populaire Registry	
Cooperative Registry	
Insurance Branch	
Insurance Companies Licensing	
Manitoba Securities Commission	
The Real Estate Brokers Act Registry	
The Securities Act Registry	
Property Registry	
Condominium Registry	
Depository Registry	
Personal Property Registry	
The Real Property Act Registry	
The Registry Act Registry	
Vital Statistics Special Operating Agency	
Change of Name Registry	
Marriage Commissioners Registry	
Marriage License Issuers Registry	
Religious Denominations Registry	
FAMILY SERVICES	
Child and Family Services Division	
Day Care Centres Licensing	
Community Living Division	
Residential Care Facilities Licensing	

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT -- REGULATION	COMMENTS
Register of Appointments of Substitute Decision Makers under The Vulnerable Persons Living with a Mental Disability	
HEALTH	
Community and Mental Health Division	
Ambulance Services Licensing	
Audiometric Technicians Certification	
Personal Care Homes Licensing	
HIGHWAYS AND TRANSPORTATION	
Driver and Vehicle Licensing Division	
Driver Licensing	
Driving School Instructors Registry	
Driving Schools Registry	
Vehicle Dealers Licensing	
Vehicle Registration	
Vehicle Safety Inspectors Registry	
Recyclers/Wreckers Licensing	
Motor Transport Board	
Public Service Vehicle Operators Licensing	
Taxicab Board	
Taxicab and Limousine Drivers Licensing	
Taxicab, Limousine, Handivan, and U-drive Operators Licensing	
INDUSTRY, TRADE AND TOURISM	
Manitoba Horse Racing Commission	
Racing Partnerships, Stables, Colors, Leases and Agents Licensing	
Racing Occupations Registry	
JUSTICE	
Criminal Justice Division	
Canadian Firearms Safety Course Reports	
Firearms Acquisition Records	
Private Investigators, Security Guards Licensing	
Weapons Inventory	
LABOUR	
Employment Standards Branch	

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT -- REGULATION	COMMENTS
Child Labour Permits	
Mechanical and Engineering Branch	
Gas and Oil-fired Equipment Installers Permits	
Trades Licensing	
Workplace Safety and Health Branch	
Blasters Licensing	
Hoistman Certification	
Industrial Audiometric: Technician Licensing	
LIQUOR CONTROL COMMISSION OF MANITOBA	
Licensing	
Licensed Premises Registry	
RURAL DEVELOPMENT	
Local Government Services	
Manitoba Assessment System	
THE FREEDOM OF INFORMATION AND PROTECTION	
OF PRIVACY ACT	
(C.C.S.M. c. F175)	
Access and Privacy Regulation	
Regulation 95/98	
Registered June 12, 1998	
Manitoba Regulation 64/98 amended	
1 The Access and Privacy Regulation, Manitoba Regulation 64/98, is amended by this regulation.	
2 Schedule B is amended by adding "Winnipeg Child and Family Services" in alphabetical order under the heading "FAMILY SERVICES".	

Ombudsman Manitoba

Appendix 3

750 - 500 Portage Avenue
Winnipeg, Manitoba R3C 3X1
Telephone: (204) 942-7800
Toll Free in Manitoba:
1-800-585-4437
Fax: (204) 942-7800
E-mail: ombudsman@ombudsman.mb.ca
500 av. Portage, P.O. 750
Winnipeg (MB) R3C3X1
Téléphone : (204) 942-7800
Sans frais au Manitoba :
1 800 585-4437
Télécopieur : (204) 942-7800
Courriel : ombudsman@ombudsman.mb.ca

August 22, 2003

Ms Sandra Hardy
Deputy Minister
Culture, Heritage and Tourism
112-450 Broadway
Winnipeg, MB R3C 0V8

Dear Ms Hardy:

During the past several years, our office has recognized a need to amend the complaint form prescribed under *The Freedom of Information and Protection of Privacy Act (Form 3 of Schedule A, Regulation 64/98)* to make it more useful and beneficial for the complainant, public body, and our office.

I have attached a copy of the existing form as well as a proposed replacement form that my office has drafted.

Our reasons for requesting the changes follow:

Generally, the current form does not require a complainant to provide the most basic information necessary to begin an investigation under FIPPA. For example, the form does not:

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

Our suggested changes address the limitations of the existing form. In our view, while the proposed form is longer, the amendments will make both the complaint procedure and the investigative process clearer and more efficient.

I expect that preparations for the review of the legislation are in preliminary stages, but I am not aware of any significant countervailing benefit in waiting for the completion of this

process before the FIPPA form is revised and adopted by regulation. We would be pleased to discuss our suggestions with you or departmental staff.

Thank you for your consideration of this matter.

Yours truly,

Barry E. Tuckett
Manitoba Ombudsman

Enclosure

**Freedom of
Information
and Protection
of Privacy
Act**

**DRAFT
COMPLAINT FORM**

PLEASE SEND THIS FORM TO:

Ombudsman Manitoba
750-500 Portage Avenue
Winnipeg, Manitoba R3C 3X1

Phone: (204) 982-9130
Toll Free: 1-800-665-0531
Fax: (204) 942-7803
Web site: www.ombudsman.mb.ca

The Ombudsman's Office will provide a copy of your completed form to the public body concerned. If you have any questions or concerns about this, please contact Ombudsman Manitoba.

(Please print clearly)

YOUR INFORMATION	
Last Name: _____	First Name: _____
Address: _____	

_____	Postal Code: _____
Daytime Telephone Number: _____	Fax Number: _____
May a message be left at your daytime telephone number? <input type="checkbox"/> Yes <input type="checkbox"/> No	

REPRESENTATION INFORMATION (Complete only if you want to be represented by another person)	
I authorize the following person to act on my behalf and to receive any personal information about me, as necessary for the purposes of this complaint.	
Last Name: _____	First Name: _____
Address: _____	

_____	Postal Code: _____
Daytime Telephone Number: _____	Fax Number: _____
May a message be left at this daytime telephone number? <input type="checkbox"/> Yes <input type="checkbox"/> No	

Please complete the appropriate complaint area on the back of this form.

COMPLAINT ABOUT ACCESS

Name of the public body to which this complaint relates: _____

Please select one of the following

- No Response** It has been more than 30 days since the public body received my application and there has been no reply.
- Time Extension** I have received notice of an extension of the 30 day time limit for responding. I contest the need for this extension.
- Fee/Fee Estimate** I have received notice that a fee applies. I contest this fee.
- Fee Waiver** I have requested a fee waiver and have been denied. I contest this decision.
- Refused Access** I have been refused access to all or part of the records for which I applied.
- Correction** My request for correction to my personal information as provided for in section 39 has been refused.
- Third Party** As a third party, I wish to contest under section 59(2) the public body's decision to give access to records against my wish.
- Complaint by Relative of Deceased Person** As a relative of a deceased person, I contest the decision of a public body not to disclose my relative's personal information under clause 44(1)(z).
- Other** Please specify: _____

Please attach copies of any documents relevant to your complaint (including application and response).

COMPLAINT ABOUT PRIVACY

Name of the public body to which this complaint relates: _____

Please select all that apply:

I have reason to believe that one or more of the following has occurred:

- Collection** My personal information has been collected by the public body in violation of Part 3 of *The Freedom of Information and Protection of Privacy Act*.
- Use** My personal information has been used within the public body in violation of Part 3 of *The Freedom of Information and Protection of Privacy Act*.
- Disclosure** My personal information has been disclosed outside of the public body in violation of Part 3 of *The Freedom of Information and Protection of Privacy Act*.
- Other** Please specify: _____

Please attach a description of your privacy complaint explaining what happened (who, what, where, when, how and why). Specify the personal information involved in your complaint and enclose any relevant documentation.

Your Signature: _____

Date: _____

COMPLAINT



To the Manitoba Ombudsman:

I wish to complain under *The Freedom of Information and Protection of Privacy Act* that:

Check (✓) the appropriate box

- I have not received a reply to my application. It has been _____ days since I applied.
- I have received notice that an extension beyond 30 days is being sought. I contest the need for this extension.
- I have been denied access to all or part of the records for which I applied.
- My request for correction to my personal information as provided for in section 39 has been refused.
- As a third party, I wish to contest under section 59(2) a public body's decision to give access to records against my wish.
- I believe my own personal information has been collected (____), or used (____), or disclosed (____) in violation of Part 3, Protection of Privacy.
- As a relative of a deceased person, I contest the decision of a public body not to disclose my relative's personal information under clause 44(1)(z).
- Other? Please specify: _____

Surname: _____	First Name: _____
Address: _____	

_____	Postal Code: _____
Daytime Telephone Number: _____	Fax Number: _____

PLEASE SEND THIS FORM TO: Manitoba Ombudsman
750 - 500 Portage Avenue
Winnipeg, Manitoba R3C 3X1

FOR THE USE OF THE OFFICE OF THE OMBUDSMAN

Date Complaint Received : _____

**ELEMENTS OF CONSENT FOR
PERSONAL INFORMATION UNDER FIPPA:**

In offering the following elements of consent that should be addressed by a public body with recorded information about an identifiable individual, the Ombudsman's Office is not suggesting that there is a single consent form, activity or process by which informed consent may be obtained in the use or disclosure of personal information.

Personal information may only be collected, used or disclosed for purposes authorized under *The Freedom of Information and Protection of Privacy Act*. Note that obtaining consent may not be employed as a means of collecting personal information not otherwise authorized under the Act. There is no provision for consent in relation to the collection of personal information from the individual the information is about, but this process is available for use and disclosure of information lawfully collected. FIPPA provides for the collection of personal information from other sources in a limited number of circumstances, including when authorized by the individual.

Notwithstanding this, the limitation principle applies to the collection of personal information as well as to its use and disclosure. In other words, every collection, use and disclosure must be limited to the minimum amount of personal information necessary to meet the authorized purpose.

It is the duty of public bodies to ensure that consent is obtained in a manner that is consistent with legislative provisions under *The Freedom of Information and Protection of Privacy Act*. Under the legislation, consent may be required whenever personal information is used by or disclosed to someone other than the individual the information is about.

We have put forward generic elements that could, in our opinion, be addressed in a flexible, reasonable, and effective manner so long as the process follows the law and the result is meaningful consent where it is required or sought. Addressing each of the elements of consent can contribute to ensuring that the public body is providing the minimum amount of information through clear, specific and informed consent.

To ensure that the public body will use and disclose the minimum amount of personal information necessary to accomplish its purpose, the consent should be in writing and should address the following elements of consent:

- a. the specific personal information to be used or disclosed;
- b. the identity of the person, organization or public body that the personal information may be used by or disclosed to;
- c. all the purposes for the use or disclosure;
- d. a statement from the public body:
 - affirming that a third-party recipient will be instructed not to use or disclose the personal information provided by the public body, except for a purpose specified in the consent, and
 - specifying the subsequent disclosures, if any, that a third-party recipient will be instructed it is permitted to make;
- e. an acknowledgement that the consenting individual has been made aware of:
 - why the personal information is needed, and
 - the risks and benefits to the individual of consenting or refusing to consent to the use or disclosure;

- f. the date the consent is effective, and the date the consent expires;
- g. a statement that the consent may be revoked or amended at any time.

To make our suggestion clear, we reiterate our opinion that a consent form need not articulate every one of these elements under all circumstances, but each of the components should have been carefully considered in the process of preparing such a form. While it is not our role to prescribe or approve a specific form in advance of its use, we would be pleased to discuss the suggested elements with you.

[July 2003]