



Manitoba Access to Information Network

Recommendations to Amend Manitoba's Freedom of Information and Protection of Privacy Act

Submitted to Honourable Eric Robinson, Minister of
Culture, Heritage and Tourism
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Submitted by:

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SECTION 10 - ACCESS TO RECORDS IN ELECTRONIC FORM

Recommendation 1: Repeal the entire Section 10.

Comments: There is no justification for placing extra restrictions on the obligation of a public body to disclose records kept in electronic form. Any difficulties, which may arise, can be dealt with by charging appropriate fees.

SECTION 13 - REPETITIVE OR ABUSIVE REQUESTS

Recommendation 2: Repeal the entire Section 13.

Comment: This section will be replaced by Section 49.7, which empowers the Commissioner to issue an order permitting a public body to disregard repetitive and abusive requests.

SECTION 18 - BUSINESS INTERESTS OF THIRD PARTIES

Recommendation 3: Delete the words "unless the test was done for a fee paid by the third party" from paragraph 18(3)(d).

Comment: Similar wording was found in paragraph 23(3)(d) of Bill 50 but was deleted by a government amendment.

Recommendation 4: Add the following to the end of subsection 18(3):

- e) the disclosure reveals financial or other details of a contract to supply goods or services to or on behalf of a public body;
- f) the disclosure reveals information about a discretionary benefit of a financial nature granted to a third party by a public body including the granting of a license or permit.

Comment: These provisions mirror paragraphs 17(4)(f) and (g) of the Act.

Recommendation 5: Repeal Subsection 18(4).

Comment: This subsection allows for limited disclosure where a head determines that it is in the public interest to do so. It is proposed to replace this section with a general public interest override section.



SECTION 19 - CABINET CONFIDENCES

Recommendation 6: Replace Subsection 19(2) with the following:

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;
- b) the record is more than 10 years old;
- c) the record consists of background explanations or analysis presented to Cabinet for its consideration in making a decision if:
 - i. the decision has been made public,
 - ii. the decision has been implemented, or
 - iii. 5 years or more have passed since the decision was made or considered.

Comments: Proposed paragraph 19(2)(c) is taken from paragraph 12(2)(c) of the B.C. Act.

SECTION 22 - LOCAL PUBLIC BODY CONFIDENCES

Recommendation 7: Change "30 years" to "10 years" in paragraph 22(2)(b).

Comment: This makes the period for non-disclosure by local public bodies the same as those for cabinet papers and advice to a public body.

SECTION 23 - ADVICE TO A PUBLIC BODY

Recommendation 8: Replace paragraph 23(1)(a) with the following:

- a) an opinion, advice or recommendation submitted by an officer or employee of a public body or a member of the staff of a minister to a public body or a minister;

Comments: This amendment would limit the scope of the exemption from disclosure to advice provided by employees of the public body. The wording is based on paragraph 39(1)(a) of the old Access to Information Act.



Recommendation 9: Repeal paragraph 23(1)(b).

Comments: The paragraph is vague and over broad. Any consultations and deliberations which it is in the public interest to keep confidential are already protected by paragraphs (a), (c), (d), (e) and (f).

Recommendation 10: Change "30 years" to "10 years" in paragraph 23(2)(a).

Comment: This makes the period of protection for advice to a public body the same as the proposed period of protection for cabinet records.

Recommendation 11: Add the following to the end of Subsection 23(2):

- i) a report prepared by a consultant, who was not, at the time the report was prepared, an employee of the department or a member of the staff of the Minister;

Comment: This is a provision of Section 39(2)(f) of the old Access to Information Act which was not included in the new Act.

Recommendation 12: Add the following to the end of Subsection 23(2):

- j) a public opinion poll;
- k) a report on the results of field research undertaken before a policy is formulated;
- l) a description of the methodology used in a statistical survey, public opinion poll or field research.

Comments: Paragraphs (j) and (k) are taken from paragraphs 13(2) (b) and (j) of the B.C. Act. Paragraph (l) is a new provision which is intended to ensure that when poll or survey results are disclosed a description of the methodology used in conducting the poll or survey is also disclosed.

Recommendation 13: In subsection 23(3) replace the words " a tax policy or other economic policy of a public body" with "a proposed tax or budgetary change which has not yet been made public."

Comments: Once a tax or budgetary change is announced, there is no further justification for not disclosing the background research which led to the change.



SECTION 32 - INFORMATION THAT IS OR WILL BE AVAILABLE TO THE PUBLIC

Recommendation 14: Add the words "at a cost to the applicant which does not exceed the fee which the public body would be entitled to charge for disclosure of the information requested by the applicant under this Act."

Comment: This amendment is intended to prevent public bodies from packaging information for sale at a price which is beyond the reach of ordinary citizens.

SECTION 34.1 - PUBLIC INTEREST PARAMOUNT

Recommendation 15: Add the following after section 44:

DIVISION 6: PUBLIC INTEREST PARAMOUNT

Information must be disclosed if in the public interest:

34.1 (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information:

- a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
- b) the disclosure of which is, for any other reason, clearly in the public interest.

34.1(2) Subsection (1) applies despite any other provision of this Act.

34.1(3) Before disclosing information under subsection (1), the head of a public body must, if practicable, notify:

- a) any third party to whom the information relates, and
- b) the Commissioner.

34.1(4) If it is not practicable to comply with subsection (3), the head of the public body must mail a notice of disclosure in the prescribed form:

- a) to the last known address of the third party, and
- b) to the Commissioner.



Comment: The section is based on Section 25 of the B.C. Act. It provides for a general "public interest" override of the exemptions from disclosure under the Act. A decision of a head of a public body made under this section is subject to appeal to the Commissioner.

SECTION 44 - DISCLOSURE OF PERSONAL INFORMATION

Recommendation 16: Repeal paragraph 44(1)(g)

Comment: This paragraph permits the government to use personal information, without the consent of the subject, for "the purpose of managing or administering personnel of the Government of Manitoba or a public body." There is no reason why employees of public bodies should not have the same rights to privacy with respect to their personal information as anyone else.

SECTIONS 49.1 TO 49.7 - INFORMATION AND PRIVACY COMMISSIONER

Recommendation 17: Repeal Section 49 and substitute the following:

Appointment of Information and Privacy Commissioner 49.1(1) on the recommendation of the Legislative Assembly, the Lieutenant Governor shall appoint as the Information and Privacy Commissioner a person who has been unanimously recommended by a special Committee of the Legislative Assembly for the appointment.

Commissioner is officer:

49.1(2) The Commissioner is an officer of the Legislature.

Commissioner's term:

49.1(3) Subject to section 49.2, the Commissioner holds office for a term of six years.

Prohibition on reappointment:

49.1(4) A person who is appointed under this section is not eligible to be reappointed as Commissioner.

Resignation of Commissioner:

49.2(1) The Commissioner may resign at any time by notifying the Speaker of the Legislative Assembly or, if there is no speaker or the speaker is absent from Manitoba, by notifying the clerk of the Legislative Assembly.



Removal or suspension of Commissioner:

49.2(2) The Lieutenant Governor in Council shall remove the Commissioner from office or suspend the Commissioner for cause or incapacity on the recommendation of 2/3 of the members present in the Legislative Assembly.

Removal or suspension between sittings:

49.2(3) If the Legislative Assembly is not sitting, the Lieutenant Governor in Council may suspend the Commissioner for cause or incapacity.

Acting Commissioner:

49.3(1) The Lieutenant Governor in Council may appoint an acting Commissioner if:

- a) the office of Commissioner is or becomes vacant when the Legislative Assembly is not sitting;
- b) the Commissioner is suspended when the Legislative Assembly is not sitting;
- c) the Commissioner is removed or suspended or the office of the Commissioner becomes vacant when the Legislative Assembly is sitting, but
- d) no recommendation is made by the Assembly under subsection 49.1(1) before the end of the session; or
- e) the Commissioner is temporarily absent because of illness or for another reason.

Term of acting Commissioner:

49.3(2) An acting Commissioner holds office until

- a) a person is appointed under subsection 49.1(1);
- b) the suspension of the Commissioner ends;
- c) the Legislative Assembly has sat for 20 days after the date of the acting Commissioner's appointment; or
- d) the Commissioner returns to office after a temporary absence;

whichever is the case and whichever occurs first.



Salary, expenses and benefits of Commissioner:

49.4(1) A Commissioner appointed under subsection 49.1(1) or 49.3(1) is entitled

- a) to be paid, out of the consolidated revenue fund, a salary equal to the salary paid to the Chief Judge of the Provincial Court of Manitoba; and
- b) to be reimbursed for reasonable traveling and out of pocket expenses personally incurred in performing the duties of the office.

Application of the Civil Service Superannuation Act:

49.4(2) The Lieutenant Governor in Council may order that The Civil Service Superannuation Act applies to the Commissioner.

Staff of Commissioner:

49.5(1) The Commissioner may appoint, in accordance with The Civil Service Act, employees necessary to enable the Commissioner to perform the duties of the office.

Commissioner may retain consultants and others:

49.5(2) The Commissioner may retain any consultants, mediators or other persons and may establish their remuneration and other terms and conditions of their retainers.

Non-application of the Civil Service Act:

49.5(3) The Civil Service Act does not apply in respect of a person retained under subsection (2).

Special report:

49.5(4) The Commissioner may make a special report to the Legislative Assembly if, in the Commissioner's opinion,

- a) the amounts provided for the office of Commissioner in the estimates; or
- b) the staff resources of the Commissioner; are inadequate for fulfilling the duties of the office.



General powers of Commissioner:

49.6(1) In addition to the Commissioner's powers and duties under Part 5 with respect to reviews, the Commissioner is generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may:

- a) conduct investigations and audits to ensure compliance with any provision of this Act;
- b) make an order described in subsection 66(1.2) whether or not a complaint is made;
- c) inform the public about this Act;
- d) receive comments from the public concerning the administration of this Act;
- e) engage in or commission research into anything affecting the achievement of the purposes of this Act;
- f) comment on the implications for access to information or for protection of privacy of proposed legislative schemes or programs of public bodies;
- g) comment on the implications for access to information or for protection of privacy of automated systems for collection, storage, analysis or transfer of information;
- h) comment on the implications for protection of privacy of using or disclosing personal information for record linkage;
- i) authorize the collection of personal information from resources other than the individual the information is about; and
- j) bring to the attention of the head of the public body any failure to meet the prescribed standards for fulfilling the duty to assist applicants.

Commissioner may investigate complaints:

49.6(2) Without limiting subsection (1), the Commissioner may investigate and attempt to resolve complaints that:

- a) a duty imposed by this Act or the regulations has not been performed;
- b) an extension of time for responding to a request is not in accordance with section 11;



- c) a fee required under this Act is inappropriate;
- d) a correction of personal information requested under subsection 39(1) has been refused without justification; and
- e) personal information has been collected, used or disclosed by a public body in contravention of Part 3.

Power to authorize a public body to disregard requests:

49.7 If the head of a public body asks, the Commissioner may authorize the public body to disregard requests under section 8 that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body.

49.8 The Commissioner may authorize a mediator to investigate and to try to settle a any complaint to the Commissioner.

Inquiry by Commissioner:

49.9 (1) If a complaint is not referred to a mediator or is not settled under section 49.8, the Commissioner must conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry.

49.9(2) An inquiry under subsection (1) may be conducted in private.

49.9(3) The person who made the complaint, the head of the public body concerned any third party who is entitled to receive notice under Subsection 33(1) is entitled to notice of the inquiry and to make representations to the Commissioner during the inquiry.

49.9(4) The Commissioner may decide:

- a) whether representations are to be made orally or in writing, and;
- b) whether a person is entitled to be present during or to have access to or to comment on representations made to the Commissioner by another person.

49.9(5) All persons entitle to make representations to an inquiry may be represented at the inquiry by counsel or an agent.



Burden of proof:

49.91(1) At an inquiry into 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.

49.91(2) However, if the record or part that the applicant is refused access to contains 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 personal privacy.

49.91 (3) At an inquiry into a decision to give an applicant access to all or part of a record containing information that relates to a third party,

- a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and;
- b) in any other case, 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.

Commissioner's orders:

49.92(1) On completing an inquiry under section 49.91, the Commissioner must dispose of the issues by making an order under this section.

49.92(2) If the inquiry is into a decision of the head of a public body to give or to refuse to give access to all or part of a record, the Commissioner must, by order, do one of the following:

- a) require the head to give the applicant access to all or part of the record, if the Commissioner determines that the head is not authorized or required to refuse access;
- b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access;
- c) require the head to refuse access to all or part of the record, if the Commissioner determines that the head is required to refuse access.



49.92(3) If the inquiry is into any other matter, the Commissioner may, by order, do one or more of the following:

- a) require that a duty imposed by this Act or the regulations be performed;
- b) confirm, excuse or reduce a fee, or order a refund, in the appropriate circumstances, including if a time limit is not met;
- c) confirm a decision not to correct personal information or specify how personal information is to be corrected;
- d) require a public body to stop collecting, using or disclosing personal information in contravention of this Act;
- e) require the head of a public body to destroy personal information collected in contravention of this Act.

49.92(4) The Commissioner may specify any terms or conditions in an order made under this section.

49.92(5) The Commissioner must give a copy of an order made under this section to all of the following:

- a) the person who made the complaint;
- b) the head of the public body concerned;
- c) any person given notice under section 33;
- d) the minister responsible for this Act.

Duty to comply with orders:

49.93(1) Not later than 30 days after being given a copy of an order of the Commissioner, the head of the public body concerned must comply with the order unless an application for judicial review of the order is brought before that period ends.

49.93(2) If an application for judicial review is brought before the end of the period referred to in subsection (1), the order of the Commissioner is stayed from the date the application is brought until a court orders otherwise.

Comments: Sections 49.1 to 49.7 are taken from the NDP amendments to Bill 50. They are based on Sections 37 to 43 of the B.C. Act Sections 49.8 to 49.93 are based on Sections 55 to 59 of the B.C. Act.



FEE REGULATIONS

Recommendation 18: Amend Section 4(2) of the Regulation to restore search and preparation fees from \$15 per half-hour to \$10 per half-hour.

Comment: There has been a 50% increase in fees since the previous regulation. This increase amounts to an obvious and significant barrier to access to information. The decision to raise fees by 50% is not justified by the history of application processing costs.

Recommendation 19: Amend paragraph 9(1)(c) of the regulation by deleting the words "concerning public health or safety or the environment."

Comment: This would create a general discretion to waive fees where a request for a record relates to a matter of public interest.

Recommendation 20: Replace section 9 (1) of the regulation with the following:

At the applicant's request, the head of a public body or the Commissioner may waive all or part of the fees payable under this regulation if the head or the Commissioner is satisfied that:

- a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment;

Comment: This amendment would be consistent with the Alberta Act.



FURTHER REVIEW AND CONSULTATION

Recommendation 21: Under Section 58 (3) of the Freedom of Information and Protection of Privacy Act, commission the Ombudsman to do an urgent, systematic evaluation of his ten year's experience with the access provisions of the Freedom of Information and Protection of Privacy Act.

Comments: A model for such a study already exists in the Ombudsman's special report of November 1999 entitled: A Privacy Snapshot: Taken September 1999. The federal Information Commissioner has published three such studies.

Recommendation 22: Commission a value for money audit (efficiency, cost effectiveness, timeliness) of the Ombudsman's execution of his office's powers and duties under the Freedom of Information and Protection of Privacy Act.

Comments: The Provincial Ombudsman's annual report is delayed by nine months as are practically all of his individual complaint investigations. Access delayed is access denied. The Ombudsman attributes this to under funding from the Government. The auditor should examine the relative value for money of the Ombudsman function versus the commissioner function. An urgent audit submitted to the Legislative Assembly Management Commission should result in the funding and management problems being resolved for the next fiscal year, 2000/01.

Recommendation 23: In partnership with the University of Manitoba Department of Political Studies, The Roblin Professorship in Manitoba Government and/or the Templeton Endowment for Democracy commission a published scholarly evaluation of and public symposium on the Freedom of Information and Protection of Privacy Act as it contributes to a modern, electronic democracy.

Comments: The Government of Manitoba has engaged in many similar partnerships in the past, e.g. Legislative Internship Program. Such a partnership would involve the scholarly community and the next generation and involve them in the future of the larger Manitoba society.

Recommendation 24: Invite all current and past users of the Freedom of Information and Protection of Privacy Act to submit their views on the efficacy of the Act in answering their information and privacy needs.

Comments: The Application for Access and Complaint forms in Schedule A of the FIPPA regulations could be modified to encourage applicants and complainants to submit their



considered views each time that they use the Act. Past users have left their addresses on file and they could be surveyed. Such a survey of knowledgeable, experienced users is preferable to public opinion polls and focus groups which involve the uninformed.

Recommendation 25: Commission a full statutory review of the Freedom of Information and Protection of Privacy Act by an all party legislative committee at least within three years of proclamation or as soon as the above research has been completed and the effect of recommended budgetary, management and statutory changes can be evaluated.

Comments: The statutory review under the original Freedom of Information Act was not done properly as in other Canadian jurisdictions (viz Canada, Ontario, British Columbia). Such a review must compel testimony not only from citizen users but also from civil servant administrators of the Act.



PROCLAMATION FOR LOCAL PUBLIC BODIES

Recommendation 26: The provisions which make the Act apply to local public bodies should not be proclaimed until after the amendments to the Act recommended in this brief have been adopted.

Comments: The proposed amendments will require significant changes in the way in which local public bodies organize their access procedures. If local public bodies are brought under the Act in its present form it will require considerable additional time and expense to modify procedures and retrain staff to deal with amendments to the Act.