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Legislative Assembly of Manitoba

STANDING COMMITTEE

on

PRIVILEGES AND ELECTIONS

42 Elizabeth II

Chairperson
Mrs. Shirley Render
Constituency of St. Vital

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Thirty-Fifth Legislature

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LEGISLATIVE ASSEMBLY OF MANITOBA

THE STANDING COMMITTEE ON PRIVILEGES AND ELECTIONS

Tuesday, June 22, 1993

TIME — 7 p.m.

LOCATION — Winnipeg, Manitoba

CHAIRPERSON — Mrs.Shirley Render(St. Vital)

ATTENDANCE - 11 — QUORUM - 6

Members of the Committee present:

Hon. Mr. Ducharme, Hon. Mrs. Mitchelson, Hon. Mr. Praznik

Ms. Barrett, Messrs. Lamoureux, Laurendeau, Martindale, Penner, Mrs. Render, Mr. Sveinson, Ms. Wowchuk

WITNESSES:

Rod Lauder, Private Citizen

Sherry Wiebe, Liberal Research Office

Russell Wychreschuk, Private Citizen

Eric Marshall, Manitoba Library Association

Gordon D. Gillespie, Private Citizen

WRITTEN SUBMISSIONS:

Ken Rubin, Private Citizen

Dave Taylor, Concerned Citizens of Manitoba Inc.

Bill McGaffin and Vic Fron, Private Citizens

Gordon Earle, Ombudsman of Manitoba

MATTERS UNDER DISCUSSION:

Public hearings on The Freedom of Information Act

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Madam Chairperson: Will the Standing Committee on Privileges and Elections please come to order. This committee will proceed with public presentations to undertake a comprehensive review of the operation of the Manitoba Freedom of Information Act.

I have a list of persons wishing to appear before the committee. For the committee's benefit copies of the presenters list have been distributed.

I will just read the names: Mr. Rod Lauder, Private Citizen; Ms. Sherry Wiebe, Liberal Research Office; Mr. Russell Wychreschuk, Private Citizen; Eric Marshall and Rick Walker, Manitoba Library Association; Michael Nickerson, Private Citizen; Gordon Gillespie, Private Citizen; Julie Van De Spiegle, Private Citizen; Zenon Gawron, Private Citizen.

I also have a list of persons who have sent in copies of their written submissions for consideration by the committee. Copies of the written briefs have been circulated to members of the committee, and I will read the names for the record: Mr. Ken Rubin, Private Citizen; Mr. Dave Taylor, Concerned Citizens of Manitoba, Inc.; Mr. Bill McGaffin and Mr. Vic Fron, Private Citizens; Mr. Gordon Earle, the Ombudsman of Manitoba.

* (1910)

Now, should anyone else present wish to appear before this committee who has not already preregistered, would you please advise the Chamber staff at the back of the room, and your name will be added to the list.

Just as a reminder to the members of the public and to the committee, this committee moved a motion at the meeting on May 31, 1993, to set a time limit on the length of public presentations to 20 minutes per presenter. The members of this committee will have up to 10 minutes to ask questions of the presenter.

We will now proceed with public presentations. Will Mr. Rod Lauder please come forward. Mr. Lauder, do you have a written presentation that can be distributed?

Mr. Rod Lauder (Private Citizen): I am just going to read from notes, although maybe in keeping with the act I could say that it will be available within 30 days and if it is over 20 pages you will have to pay me two cents a copy or 10 cents a copy.

I think I really wanted to come tonight because in the course of my work, and just as a private citizen, I have made applications or assisted individuals to make applications under The Freedom of Information Act and thought it was important that you get some feedback on that.

I think what I would like to do is kind of break it into three sections: one which is just a few thoughts about why I think the act is important; secondly, a section on what are some of the concerns or problems that have arisen in either assisting people to apply under the act or in my own experience; and then, thirdly, just some thoughts on things to think about if you are looking at things to think about in terms of this act.

I would preface that with saying, one of the things that has struck me as curious, and I need to thank the provincial archivist for doing his best to enlighten me, is just why this is taking place now. It struck me as curious, given that the actual act itself says this ought to have been done with three years after the act came into force, and here we are going on five or six years and this is just now happening. So it usually sends up an alarm bell in my head that there is something amiss. It is either our government is even working more slowly than usual, or maybe people are thinking this is not such a good idea to have around or something.

Being assured that people do think it is a good idea to have around, I would like to add my thoughts to that, which are that I have been involved for the last 15 years in assisting people primarily who are disabled, either labelled mentally retarded or physically disabled, and in almost all instances, of course, people with disabilities, or at least a vast majority of people with disabilities, also face the issue of poverty. It seemed to me, in my experience, that the act is an important mechanism whereby we can empower people, especially poor people and especially people with disabilities. It is a way of holding accountable those people who would control the lives of people with disabilities and poor people and control critical aspects of their lives, for example, finances and health care.

My experience is just the simple process of going through an application is in itself a way of people starting to feel like they are taking control of their lives. One of the nice things about the process is there is a form that you can photocopy that does not have any great requirements to it other than writing in a sentence about what sort of information you like, and it is at least made clear in the departments that I deal with that you ought not to get too worried about figuring out what you need to exactly be asking for because there are officers available there to help you to do that. That is their job and that is indeed a very helpful thing.

There is also a sense of control and power that flows from just the knowledge about how a government goes about documenting your life. It also can provide an important springboard for further action. One example, which one of the member's around the table is very familiar with, is a woman who had a lot of concerns about her social situation in life, and particularly the fact that, as a woman, she was not eligible to be deemed the head of the household.

That started through her applying through a Freedom of Information application to say why is that and does this affect other women in my situation, and asking for the information and trying to get some documentation about how many other women might be in the same sort of situation as she was, and, of course, finding that it was not exactly something that anyone goes around documenting is how many people are we refusing rights to in terms of being seen as the head of the household. But that, in turn, kind of spurred her on to go after it and indeed create a policy change within the department of Income Security.

That is one major way. Another thing that it does is it changes the nature of relationships. It changes the way in which the people, who control data and information about people who are poor and disenfranchised in many ways, relate to each other and it is almost always for the better. Workers, overnight, or at least upon receiving an application from the FOI officer, often get immediately more respectful and understanding.

The change often takes place then before the person may even see any information on their file. The worker is put on notice that they are no longer dealing with a passive vessel. It works to create change and get results as well.

One woman, for example, had spent years, according to her, trying to get information about the deed to her property. Her property payments were made by welfare, the mortgage was paid off, the finance company goes bankrupt and nobody ever sends her a copy of the discharge of mortgage form.

She is in a position now where, of course, it would be seen as an asset by welfare, but it is still nice to be able to know it is your house to control and sell. If welfare then wants to take a chunk of money back, they can do that, but it is still your

house and it is your property and you ought to have the deed to it.

The Freedom of Information Act allowed her to go after that because the workers kept telling her she did not need to be turning to them, because they did not have the information in the file. What they really meant to say was your file is so thick, we do not want to have to look through your file to find the information. Of course, when we were able to look through it and we were able to find it, we were able to at least photocopy it. Unfortunately, then another department of the government says you have to have the original. You cannot just have a photocopy of something out of a file. But the important thing for her was to get results and she got them.

It also, of course, is unfortunate because in many instances, where government workers refuse to give information, they end up spending more time trying to dig out all the information that a person then might have to go after to get that information and then sit with that person while they wade through the information, than if they had just simply responded in the first place by giving them the information. So it is a peculiar situation where workers are called to be accountable, and they end up having to spend more time on these situations than if they had just simply dealt with it without having to go through this formal process.

* (1920)

It can also be a lever for change, I think, in just that way. If I or the person can approach an agency and say, look, deal with us now, sit with us now and spend time with us now, or we will go after the information ourselves and we will just try to sort out what we ought to do about it. It creates an impetus on the agency to say, gee, maybe it would be worth our while to spend two hours meeting with you now, rather than, you know, maybe six hours over the course of three days having a worker sit in a room with you while you sort through your file.

There is not only change on an individual level, but there is also change on an agency level I think. I think it is pretty true, at least within the Income Security department where I have had the most experience, that it seems to have made the entire department far more respectful about what information gets recorded in a file and what does not. In fact, almost to the erring in the opposite extreme, where you will go and a person will know that they had a conversation with a worker maybe two or three times in the course of a week and some fairly important things were discussed, but they are not recorded in the file, because the worker, if anything, is going to err on underrecording rather than overrecording.

One of the nice things about it is that it means access to policy manuals and that is why—it is not that my presentation was this big, it was just that I wanted to show that there were two examples of me being able to get policy manuals which we were told you could not get unless you worked in the department or you were kind of a specially designated agency to have these things.

So I have the Income Security manual and the Home Care manual. That has been real nice, but it also creates a new interesting thing, which is the Income Security manual, for example, is a very well-organized manual, where I got the cover to it and everything and you have all the rules and they are neatly laid out, and every year Income Security has changes to it and I get to, through The Freedom of Information Act, then have the lever to say, well, if you want me to put a Freedom of Information Act request in I will, but otherwise could you just send me the policy updates every so often?

On the other hand, I have a Home Care manual here which I had to plunk into my own binder and which, when I asked for updates to it, I was told there had not been any updates since 1991. So that becomes then an interesting way for the public and I think perhaps, you know, members of the Legislature to keep track of how government departments themselves are organized in comparison to each other. We have two departments, both of which are concerned about the well-being of individuals. One department's manual is in a shambles, one department's manual is immaculate, at least by comparison.

That information is very useful and, of course, it is immensely powerful for a person to be able to come into a public place and be able to sit down and say, ah ha, these are the rules of the game. I do not have to just rely on my worker because I was told different stories by different workers. If anyone has ever talked about a tax interpretation, you know what that is about. You can talk to five people about a tax return question and they will all give you five answers. Same thing when you are often talking with workers is that they will interpret the

very same rule in different ways, and it is real important for people to have that. That is a tool or that is a result of The Freedom and Information Act. It is putting that sort of information in the hands of people.

So overall, the act is an important vehicle for ensuring the democratic rights of individuals, ensuring that those rights are preserved and that we are governed in a free and open fashion. That to me seems to be what government is all about.

Some problems have arisen and I need to just have someone tell me when I started, when my 20 minutes are going to be up.

Madam Chairperson: You have about seven minutes left.

Mr. Lauder: All right.

Well, one of the problems for people on welfare, of course, is that they are poor and that means the provision right now is that they are supposed to use their special needs money if they want to go after information that they might want copies of within the act. After the first 20 pages, they are supposed to be paying for it. The provision in the welfare manual says you can use your special needs money.

People on welfare tend to think of that as the thing that they need for really, really essential things. To force it to be a choice between getting information on myself or maybe getting the dresser for my baby is a tough, tough choice for people. So I think the end result of that is, it discourages people from going after information, particularly poor people.

Another problem is, the right to information is not publicized. Workers do not inform people that they can do this, nor is there any written notice of rights or appeal mechanisms posted in welfare offices or home care offices or any other offices where individual files are kept, at least not in my experience.

Another problem is, there does not appear to be any way to negotiate, at least it is not publicized that you can go after what might be seen as a fee waiver or at least an elimination of fees. Now, when you have somebody—the only reason I knew about this is because I had attended a workshop by Ken Rubin a few years ago and he talked about all the tricks of the trade as to how you get around having to pay for information. For a lot of other folks, they may not be aware of those and that is important for them to be aware of.

On one occasion I was told that I could not ask for the same information twice. A branch of Family Services threatened not to allow me to copy information because they had previously granted me access so that when I went back to wanting to copy it, they said, you have already looked at it. Now, that was a result when I said I simply could find someone to submit the same request.

Another problem I have encountered is that government workers may play games with the requests. For example, I have requested copies of policy statements and directives and memos sent by the director of Continuing Care for a four-month period. I was advised by the Freedom of Information officer that upon consultation with Continuing Care it would be a good idea to narrow the request to one month since I might be overwhelmed by the amount of material I got back over the four-month period.

So I duly informed them that I would narrow my request. The letter I got back says, at least in part: Your original application requested access to copies of any memos, directives or policy statements issued by the director or her designate to Continuing Care, Home Care supervisory staff for the period of October to January 31. We have been advised by the central access co-ordinator that you altered your initial application to copies of any memos, directives or policy statements issued by the director for the month of January 1992.

Then the key paragraph is: Please be advised that access to any memos, directives or policy statements issued by the director of Continuing Care or staff for the month of January 1992 cannot be granted as none have been issued and therefore do not exist at Manitoba Health. Of course, what it turns out is, when you follow up on that, it was that they do not do any of that, at least according to their own department, in the form of memos and directives like welfare does. What they do is they talk about it at staff meetings and that is how they disseminate the news.

Well, that is a little distressing again, but it also is, I think, a case of having games played with requests as you put them in.

I think another concern, and I again do not want to run out of time, is the act has a clause that I think is too broad. Section 39, I believe it is, is

something that I believe Ken Rubin refers to as the Mack truck clause, because you could drive almost anything through it. Hardly, it relates to the fact that exemptions can be had for anything that falls under the category of opinion, advice or recommendations.

For example, I asked for a copy of the Developmental Centre's vocational training department program review. I got about four pages back, an introduction on how the review was carried out and the names of those on the review. The rest was exempted under this clause. Ironically, I received almost the entire report of the confidential act accreditation survey for the developmental centre.

I think another example of how this might get used is that, I am told, for this committee's informational purposes, a committee of civil servants convened about three years ago to review this act and suggest changes. This would, I think, be worthwhile information to this committee and to the public, and yet I think it is likely, if I applied for that civil servant's report, that it would be exempted under this clause.

Similarly, Bill 30, which is currently before the House, has had numerous drafts and is based on recommendations made by a committee that was formed of government workers and the public. That committee had previously submitted a prior set of recommendations that were available to the public. The final set of recommendations which went to the minister are, of course, exempt under Section 39 of this act. So I think there is a major problem there in that Section 39 is far too broad.

* (1930)

Finally, I think that Section 39 is probably the biggest thing, but one other point I would make is that I found, when I have asked for information about agencies supported primarily by the public purse, they have been exempt from examination. So, whereas I can get information on the developmental centre, for example, when I ask for information on St. Amant Centre or the Pelican Lake Training Centre, which I am sure the government must have a fair amount of documentation on, I am told it is a private agency, even though it is funded by the public purse to a large degree, that I am not eligible or I am not able to get the information.

Madam Chairperson: Mr. Lauder, I will just interrupt. You have one minute left.

Mr. Lauder: So three or four quick recommendations.

One is, I think it would be important to create a fee waiver provision in the regulations that might be added at the back of the manual. This will help encourage people on a limited income to exercise their right to information.

Secondly, I think it would be important to publicize by, for example, posters the act itself in all departments, especially those departments where individual records are kept.

Thirdly, I think it is important to educate freedom of information officers, particularly those in each branch of the department, those who might otherwise indulge in game playing.

Fourthly, I think Section 39 of the act ought to come under some fairly rigorous scrutiny with the view of eliminating, for example, the phrase "to a department" and "to a minister" which is in there, because it is one thing to a minister, but it is another thing when it says you can eliminate anything, any opinion given anywhere within the department. That makes it a little too broad.

Madam Chairperson: Thank you very much. I know that some of the committee members have questions.

Hon. Bonnie Mitchelson (Minister of Culture, Heritage and Citizenship): Thank you very much, Mr. Lauder. That was a good presentation. Obviously, you have had a fair amount of experience in using The Freedom of Information Act over the past number of years.

Could I just ask what your occupation might be, or your line of work? Obviously, you appear to be working on behalf of several clients. Is that your main occupation?

Mr. Lauder: Yes, I work as an advocacy co-ordinator for a disability organization. I am also on the board of Winnipeg Citizen Advocacy.

Mrs. Mitchelson: I am sorry. I did not hear. On the board of—

Mr. Lauder: Winnipeg Citizen Advocacy, which is a group that recruits individuals to act as citizen advocates for people with disabilities.

Mrs. Mitchelson: Okay. Might I ask a question? You can tell me if I am out of line or not, but I know that you did make a comment about the cost to

some of your clients. Do you charge your clients a fee for the service that you provide for them, or are you paid by the organization to advocate on behalf of them?

Mr. Lauder: I am paid by the organization and in those instances where—for example, Winnipeg Citizen Advocacy, part of that can be working as a crisis or a short-term advocate. In those situations, it is sort of outside my work hours and on my own time and, therefore, I still would not charge them for those situations.

Mrs. Mitchelson: Okay. Thank you.

Ms. Becky Barrett (Wellington): I have a comment and, then, maybe just one question. I liked very much your talking about how the act can empower people and the positives. You brought some different perspective to the things that can be done with this act. Obviously, you have spent a great deal of time and provide some of the ideas that I think we are looking for as to how to make this act better.

I wanted to give you an opportunity, because you had such a small amount of time, to maybe expand on one or more of your recommendations. Is there one recommendation in particular you would like to speak to for a moment or so, knowing we only have 10 minutes in total for questions, but is there one that you would like to have a little more time to flesh out?

Mr. Lauder: Well, you know I guess it would just be again going back to Section 39. I would just say I think that it is a very troublesome one. Every time I kept trying to play with what ought to be done with it, I kept thinking, well, you can eliminate a word here or change things there, but I guess the thing that intrigued me the most was eliminating the clause entirely.

There is, I think, two sections earlier, another exemption around cabinet confidences which seems to me to cover the really critical documents that might be injurious, but there are just so many things that could be lumped into that clause. The more I kept trying to think, well, gee, maybe if you just said you could go after information for three years instead of it having to be 30 years old, as it now seems to read. In the way I read that act, if you have something really dicey in terms of policy, you could go after it if it was 30 years old, but you could not go after it if it was anything less than that—or if you eliminated the words "opinions and advice" and just made it "recommendations," but then, you know, people would probably just phrase everything using the word "recommendations."

So I might leave that to some of the other presenters if they bring that concern. Maybe they have given that more thought. Other than to say that I just think that is enormously troublesome and, I think, at the very least, one ought to look at eliminating the phrase "to a department" that is in there. I would have to just quickly grab it, but I think you will be able to figure out what I mean, and otherwise maybe look at deep-sixing the entire clause.

Mr. Kevin Lamoureux (Inkster): Just one question, but then again I would like to comment that I concur with you at the thought of the Mack truck with Section 39, and it is always encouraging when you get a presenter before committee that provides a solution to a particular problem. But you also made reference to a waiver fee. Do you see this more as a means test? How would you implement something of that nature? Are you talking about dropping the fee entirely?

Mr. Lauder: I think it is obviously a bit of a problem because there are ways around it. On the one hand, you do not want this to become the recreational activity of, as I think W5 or somebody noted, a prison inmate or something. On the other hand, the truth of it is, is that there are ways around the fees now.

I wish I could provide you with a definitive answer other than to say poor folk sure are not going to be jumping at the chance to go after their files and to get copies of important documentation within their files if they know that it is going to cost them $40 of their special needs money to get the copies that they need to give them a sense of what a department has been doing to them, again, particularly for people who might be served by numerous departments, which of course fits many people. If you are receiving continuing care services and welfare and one or two other departments' services, you could ostensibly have files in three or four departments that you might like to go after, and you could therefore be chewing up all your special needs money just getting your own copy of what the government is saying about you but not telling you.

Mr. Lamoureux: Maybe even if you could be a bit more specific in the sense that you yourself, are

you aware of some individuals because of the cost factor that were unable to get what they were looking for?

* (1940)

Mr. Lauder: Usually, in most of those instances we have then turned around and used the gimmicks of breaking the application down or telling the relevant department that we were going to break the application down into smaller applications and reapply if that is what they wanted us to do. In most cases then, the government department relents. My concern would be for those individuals who do not know those gimmicks, those tricks of the trade, what might happen.

When I went to—again, just to highlight the differences amongst departments—Income Security, for example, when they realized the pattern of my requests for their manual said, well, we know you have asked for it in 20-page chunks, but we would be happy to deliver it to you all in one big manual if that is what you would like. Whereas the response that I got from Continuing Care was, here is the manual but it is going to cost you $120. So I just think there is going to be so much flux between departments and between workers that that has to be something that gets addressed some way.

Mr. Doug Martindale (Burrows): Thank you, Mr. Lauder, for your excellent presentation. I have learned a lot about how to use The Freedom of Information Act to get information since I have only personally put in one request myself.

My question is: Do you think that this act is encouraging more openness on the part of government, based on your experience, and do you think that it could be used to encourage even more openness in the future? An example that I would like to use is that there is one government department that has a gag order on all their staff, who are not supposed to talk to opposition MLAs, and so when we phone they say, phone the minister's office, the Minister of Health (Mr. Orchard). It takes much longer to go through the minister's office. However, if I were to phone and ask for information and—

Madam Chairperson: May I ask the members on one side of the table please to keep their conversation down low.

Mr. Martindale: What one might do is to say to the staff, I think you have a choice, you can co-operate and provide information or we will file a Freedom of Information request. I suppose the staff would say, well, I am following the minister's orders, so I think I better follow those orders. Eventually maybe the message would get to the minister that it would be preferable in terms of staff time and the cost to have staff provide information to opposition MLAs rather than having to go through a Freedom of Information request every time. Do you have an opinion or a suggestion on that? Do you think it would work, based on your experience?

Madam Chairperson: I do have to advise you that you have about one minute for your answer.

Mr. Lauder: Let me save some time on that and say, Mr. Martindale, you are right. You are absolutely right. I would encourage such a use of the act.

Madam Chairperson: Thank you very much, Mr. Lauder. Are there any—Mr. Martindale, did you have another question? Thank you very much.

I would now like to ask Ms. Sherry Wiebe. Her presentation has been distributed to everyone.

Ms. Sherry Wiebe (Liberal Research Office): I appreciate the opportunity to be here this evening and to make a presentation to all members. Thank you very much for presenting me with that opportunity.

As you know and has already been stated, my name is Sherry Wiebe. I am the director of the research department for the Liberal caucus. My role here then is somewhat different than the other private citizens here this evening.

I have two specific reasons that I am appearing before you. First is that I believe that broad access to government information is in the public interest; and second, I have used The Freedom of Information Act as a research tool, along with my department, since it was proclaimed on September 30 of 1988.

Contemporary society demands participation in the process of governing. Its interest is no longer served by outdated paternalistic traditions which saw decisions shrouded in secrecy. Governing from behind closed doors was overwhelmingly rejected by the citizens of this country in the constitutional referendum results that were disclosed in October of 1992.

Members of contemporary society demand involvement in decisions of all levels of

government, whether at the school or hospital board level or whether at the First Minister's level. Effective involvement requires open and full disclosure of information, for it is only with all of the facts before them that individuals will be able to contribute meaningfully to debate and to evaluate government's performance.

The people governments are elected to serve are cynical about the processes of government. They have been given a proverbial pat on the head and told that government would look after them. Do not ask any questions. Just trust us to spend your money wisely, politicians have said.

A more educated and individual-rights-oriented society has brought our political system to a crossroads. It sits in disrepute. Politicians can either continue to ignore the message of voters and generate widespread and chronic apathy or they can respond by looking at new and innovative ways to bring people the system is supposed to serve back into the process.

That is not an easy task, and there is no one right answer. However, a step in the right direction would be a genuine commitment to open government. Policies and actions must be consistent with the rhetoric of open-door politics. Restoring faith in our political system requires an act of faith on the part of politicians. They must believe that citizens can appreciate information presented in a clear and logical way. This situation can be likened to the patient-doctor relationship.

In the past, the physician presented a diagnosis and prescribed a treatment; patients simply then did what they were told. Today, even the vocabulary has changed. We no longer talk about patients, but we talk instead about health care consumers, about clients, and we also acknowledge that it is their right to have all information fully disclosed and to participate in treatment decisions. People of this province, and the people of this country, have no less a vested interest in the political system than they do in their health care decisions.

A positive step for the current Progressive Conservative government would be a more liberal —you note that it is a small "l" that I have stated here—policy of disclosure—[interjection] I do not want anyone to think that was a typo. The nature of the commitment to openness is evidenced by the policies implemented. Please allow me to give you an example. A short time ago one of my staff telephoned the Manitoba Literacy Office to request current statistics on literacy. Although the office had the information, we were referred to the Education minister's office. The minister's office promised to get back to us. Once our request had been vetted and approved, the Literacy Office provided the information within three days. The minister's office sent the identical information about two weeks later.

I hope that members of the public do not have to endure this kind of approval process. Certainly representatives of opposition parties must bear this burden. This may seem reasonable to some, but there are several principles which should be considered before drawing a conclusion. The first is that opposition parties serve a counterbalancing role in our democratic system. Opposition members of the Legislative Assembly ask questions, put forward alternatives and argue policy positions designed to hold the government accountable for its actions. Opposition parties in our system represent a broad-based constituency. In Manitoba at this time, they represent a combined plurality close to that represented by the government.

Furthermore, even those voters who supported the governing party are entitled to have government actions scrutinized. Second, where the inquiry is for routine and factual information, the direction to staff to send all opposition party requests to a minister's office creates needless anxiety, bureaucracy and inefficiency. We would have been pleased to have the short StatsCan report that we received faxed to us or read over the phone.

This government policy of referral, whether expressed or implied, has been in effect throughout the time I have been the research director. As a result of the government's refusal to provide us with even the most mundane and innocuous information, we have made considerable use of The Freedom of Information Act. It has given us information to which we, as opposition caucus, would not otherwise have had access.

We have compiled the following information regarding our use of the act. Our analysis and in fact our recording of all of our requests is not exhaustive. Since 1989, we have made in excess of 74 Freedom of Information Act applications. Of

these, approximately 15 or so requests were granted.

The denials were based on grounds provided by the act. The majority were denied on one ground while 27 percent were based on multiple grounds. One of the most common grounds for denial was that the record did not exist within the Access Guide number specified. An applicant is required to specify an Access Guide number, of which there are 72 for Executive Council alone. An applicant must guess where a particular document or report may be found. Access officers are only required to check those areas identified. If the specified item is not found there, the request is denied.

An applicant can resubmit the application but must rely on the process of elimination to identify where the desired item may be located. It may be that private citizens obtained greater assistance in this regard, but it is an experience that has been both frustrating and inefficient for all concerned, I am sure, for those who respond to our requests as much as those who make them.

* (1950)

Our recommendation then is that the Access Guide numbering system should be reviewed and simplified. If the onus rests with applicants to guess where the desired record is located, access officers should be directed to more aggressively search for areas where the record might reasonably be located. Alternatively, assistance should be provided to applicants to narrow their search.

In one instance, a report on a survey of patients admitted to acute care beds and referred to by a minister in Estimates was requested. It was denied in a letter under signature of Frank Maynard, Deputy Minister of Health, because it was not in final form. The position taken was that the report was not a record pursuant to The Freedom of Information Act. However, the letter went on to advise that even if it were a record, access would have been denied pursuant to other sections of the act.

So our recommendation that interpretation guidelines and policy directions should be provided to access officers that would result in the spirit of the legislation being fulfilled rather than enabling the access officer to use narrow and literal interpretations of the act to deny access.

A second common ground for denial was protection of privacy of third parties pursuant to Sections 41 and 42 of the act. While the act should protect the privacy of individuals, it has been used to deny access in particular to the employment contracts of political employees. These contracts have come into common use over the past three years. Whereas previously the public could readily determine the terms of political as well as civil service staff, that is no longer the case.

Other grounds for denial have included solicitor-client privilege pursuant to Section 40 of the act. For example, during the debate surrounding the legality of the sale agreement of hydroelectric power to Ontario in 1991, we applied for release of the legal opinion obtained by Manitoba Hydro regarding the validity of the contract of sale. We were denied the request on the basis of solicitor-client privilege. Surely, in a matter of such vital public interest, there should have been disclosure, yet other legislated reasons for denial include betrayal of cabinet confidences, interference with Manitoba's economic interest and possible interference with intergovernmental relations.

A section frequently involved has been Section 39, which has already been referred to this evening as the Mack truck clause and one which we have seen used against us quite frequently. It states that a request may be refused where the record discloses an opinion, advice or recommendation to a minister for consideration on policy or decision making. This gives broad discretion to the access officer. It might be argued that almost any departmental document provides some opinion or advice. It is our recommendation that the broad discretion for denial of access pursuant to Clauses 39 through 49 as listed should be reviewed to ensure the most narrow definition of the refusal. These clauses should also be reviewed to ensure that documents, reports and records not intended to be denied are excluded from the use of the discretionary refusal, in other words, "will be released or revealed," rather than "denied access to."

By far, the most serious concern that we have with regard to The Freedom of Information Act is the huge discretion given under the act to refuse requests for information. As you are aware, the exemptions under the act may be divided into two types. They are both mandatory and discretionary

exemptions. Disclosure of cabinet confidences falls under Section 38. Disclosure which would constitute invasion of privacy of third parties is under Section 41. Disclosure of commercial information, Section 42 and Disclosure of a record obtained in confidence from a government is Section 45, these make denial of access mandatory. In other words, if you make a request for anything that falls within that purview, it must, by virtue of the legislation be denied.

New Brunswick has legislated that all exemptions in their act will be discretionary. This enables the access officer in that province to determine whether or not it is in the public interest to release the requested information. There may be times in Manitoba when it is in the public interest to reveal certain cabinet confidences, and if indeed the spirit of the act is to favour disclosure, an amendment to this effect would favour and reinforce that policy.

It is our recommendation that the mandatory exemption clauses should be reviewed and an amendment to make them discretionary considered. Also, materials considered as the subject of these clauses should be narrowly defined. Informing the public should be a priority of the government as long as it does not interfere with the normal operations of the department. The 30-day time limits with extensions should be reduced, if at all possible.

The use of technology should facilitate a more efficient process. Shortening the time limits would not impose any sort of unreasonable hardship and may discourage officials from sitting on information which could be disclosed but may be useless after 30 days, particularly to members of the opposition. As you know, most often our information and our need for information is on a timely basis. Our recommendation is to consider reduction of the time limits where the information needs only to be copied and requires no compilation or analysis.

Once a request has been made and denied, it has been the experience in my department that the appeal to the Ombudsman has in no instance resulted in overturning a prior decision, that is, in no instance in which we have made the appeal. When exemptions are discretionary, it seems that department heads are likely to err on the side denying access to the information and relying on the discretionary exemption.

Perhaps when the section states that access is discretionary, the policy of the act in favour of disclosure should be the paramount consideration. It has been our experience that once access is denied on the basis of a discretionary exemption, the Ombudsman has no choice but to accept that exercise of discretion. It would be our recommendation that the appeal mechanism be reviewed to give the Ombudsman greater power to overturn a decision of an access officer, even where it involves the use of discretion.

During my research for this presentation, I reviewed the access legislation of the federal government and the provinces. The legislation differs in only small details from province to province. The British Columbia legislation, which has not yet been proclaimed, is commendable because it includes a section outlining the purposes of the act, a preamble, in other words. It is also written in plain language which makes it understandable for the people who are supposed to benefit from it.

The Ontario legislation contains a provision which should be included in our act. It creates a special obligation on government to disclose information whether or not a special request has been made for it. For this obligation to arise, there must be reasonable and probable grounds to believe that disclosure is in the public interest and that the information reveals a grave environmental health or safety hazard to the public.

A similar provision should be included in the Manitoba legislation. We would recommend that there be consideration given to introducing a clause which creates such a special obligation.

The final matter that I wish to touch upon today is the issue of political interference with respect to FOI applications. Let me illustrate this by an example which occurred in connection with a request that my department made. In December of 1991, we made a Freedom of Information request for the advertising budget for the rural Grow Bond program. The person in charge of fulfilling our request prepared two replies and presented them to the Premier's press secretary for her determination as to which option should be released to our office. When the Premier was questioned in the House concerning this action he denied that this amounted to political interference with the act. He stated on December 15, 1992, and I quote, "A person can consult anyone a person

chooses for advice on a matter. The reality is that this government is abiding by the letter of the legislation absolutely and whoever asks whom about what matters are able to be released publicly, it is challengeable to the Ombudsman."

Members of the committee, it is unfortunate that an act that is entitled The Freedom of Information Act is interpreted according to its letter rather than according to the spirit with which it was intended and proclaimed. It is precisely because of the potential for political interference and because of the problems that are contained and have been identified within the act, some of which I have enumerated this evening and others of which I will continue to enumerate later this evening, it is certainly because of those that we must clearly authorize the release rather than the denial of access to information, and that kind of provision should be contained within The Freedom of Information Act. Thank you.

Madam Chairperson: Thank you very much. I know there are some committee members who have questions.

Mr. Jack Penner (Emerson): Sherry, you have made a good presentation and you have made a number of recommendations, I think some very worthy recommendations. However, there are some areas that I question, one of them being the area of anonymity of specific persons and information regarding specific people. Do you believe that governments should have the right to maintain information on individuals and/or specific projects in a manner that would guard its security while, if and when certain projects are negotiated and/or an individual's personal livelihood might be at stake?

* (2000)

Ms. Wiebe: So you are suggesting that pursuant to the commercial interests clause or the discretion that is allowed pursuant to that. Actually I think that is a mandatory provision and, in fact, one of the recommendations I have made is that the right to refusal be made discretionary rather than mandatory. In other words, somebody can make a determination, an access officer can make a determination of whether it is appropriate to release that information, and we are not suggesting that all of that information which can be injurious to some third party should be released. We are suggesting that in many instances it is in the public interest that the information be released and that that determination be made and be subject to appeal by the Ombudsman.

Mr. Penner: If, for instance, an individual had, or if there were some information on file regarding the well-being or the financial well-being of a person and an individual or an organization came along and requested information on that person or that person's business in regard to investments or investment opportunities, should government be required under The Freedom of Information Act to release that sort of information?

Ms. Wiebe: If I understand you correctly you are suggesting that in certain instances somebody's opportunity to invest, or the kind of benefits they might reap from that investment, might be in some way negatively impacted by the release of information.

It is not our intent that information be released that might do harm to individuals who are seeking legitimately to make a living, who are in business and who submit proposals, for example, or information that would render them less competitive with others. That is not our objective in all of this.

With regard to commercial ventures, our interest would be more along the lines of after the fact releasing information in connection with tender proposals, for example, and tender calls. Yet our experience to date has been that kind of information, even after the fact, is denied.

Mr. Penner: Well, I refer specifically to your reference to one of the departments and the rural bond issue. As you know, very often a firm's proposal, or a proposal call for that matter on a specific project and/or investments by individuals through the bond process might well jeopardize a project if information was released either at the wrong time or given into the wrong hands. So the competitive factor still remains.

I think there is a point in time when one must consider those areas where secrecy of negotiation and/or investment is maintained, the same as pertinent information to certain individuals and the privacy of those individuals contained in some of the files, whether it be in health services or whether it be in municipal-type information that has very often been requested. I refer specifically to when I was the minister. I mean there was a number of times when information was requested on

municipal matters which was simply out of the hands of the Department of Municipal Affairs, at that time, to release because it was municipal information that was being stored on behalf of a given municipality.

Ms. Wiebe: Madam Chairperson, may I just respond to that comment. With regard to the rural bond issue and that request—and I appreciate what you are suggesting about a competitive position and negotiations and so on. Yet our inquiry had to do with bottom-line costs in connection with the advertising. That advertising might have been conducted by any number of sources. We were not aware of what those might have been and we were interested in a bottom-line cost. I fail to see, with all due respect, how that might have impacted negatively the person who was responsible for that program.

Mr. Penner: I am not sure whether the presentation you are making is a personal presentation, or whether it is in fact your party's or your caucus's presentation, or whether you are presenting on behalf of them.

The question I put to you now is simply, would you encourage the municipalities being put on to the same Freedom of Information Act that the provincial government is and no other jurisdictions are?

Ms. Wiebe: Madam Chairperson, I realize that now I have been asked to put forward a Liberal policy. If I am not incorrect in this, I think our position has been to date that we would favour more open access to municipal records.

Madam Chairperson: Are there any further questions? If not, thank you very much for your presentation.

I would now like to ask Mr. Russell Wychreschuk to come forward. Do you have a written presentation?

Mr. Russell Wychreschuk (Private Citizen): No, all I have is crib notes for myself to keep my line of thought.

Madam Chairperson: That is fine.

Mr. Wychreschuk: Madam Chairperson, committee members, I also appreciate the opportunity to come here, and I thank you. As you know, my name is Russell Wychreschuk, and I am a resident of Beausejour, and I represent myself.

It is rather timely that I came up third after the previous speaker, because that is exactly the point I am here. I would like to propose a serious consideration of an amendment to The Freedom of Information Act that it include school boards, municipal boards and hospital boards. It is my understanding that there are other parts of Canada, provinces such as British Columbia, Ontario and Quebec which include these boards. I have a strong feeling that it should be the same in Manitoba.

The reason I feel like that is that all taxpayers should have access to information regardless of the level of government. It is important to me to be able to make valuable contributions to programming, whether at the municipality or at the school board, and without the specific information on programming or budget details, you cannot make a decent presentation, and you always get cornered by rebuttal. Also for anyone who wishes to make a platform as a trustee candidate, they should know some of the details of the working at that level.

I understand that all these would have limitations in the sense that the applicant would have to pay for it and there would have to be a time limit or time allowed for the people to provide it. This proposal is based on experience of difficulties of attaining information and, in fact, denial of information at those levels.

It seems that if these boards were included and it was made very clear, it would also take care of differences such as: different information being given to different people by boards; different information received from different divisions to the same person. So with those difficulties and frustrations, I have this feeling that there should be an amendment.

In conclusion, I hope there would be an amendment to include school boards, municipal boards and hospital boards under The Freedom of Information Act. Thank you.

Madam Chairperson: Thank you very much. Are there any questions?

Ms. Rosann Wowchuk (Swan River): Thank you for your presentation. I just want to ask a couple of questions for clarification. It is my understanding that through municipalities you can get most information that you want except those that might relate to personal matters.

I am not sure what kind of information you would be looking for through municipalities or school boards that you do not have access to now.

Mr. Wychreschuk: In terms of municipality, that was a minor request, and it was more in one of the commissions or committees that they have.

The point was bigger with school boards. The only information a resident has is the Auditor's summary, which is submitted to the Department of Education, and if you review that, it is very, very general. For instance, they will have lines: salaries, $5 million; supplies, $3.5 million. They in fact will not even specify which school it is or what the salaries refer to. Therefore, you cannot deal with a special program in the schools such as special education or computer or whatever you want to deal with, or if you in fact want to know information on how much is spent on trustees.

It was this past winter that MLAs got scrutinized very closely on what funds are being spent on them, which is not the case with trustees or town councillors. So that is it. All you can get is a general summary sheet, and you cannot deal with schools or programming. That is mostly with school boards.

* (2010)

Madam Chairperson: Are there any further questions?

Mr. Lamoureux: Yes, I have just one question. Who, in your opinion, would be responsible for coming up with the funds to set up the access requests? Would it be the province, or would you have each school board, for example, responsible for providing those funds?

Mr. Wychreschuk: I am not completely familiar with how that would be set up. My vision was that if I simply went to the school board and made a request, that with a reasonable amount of time, they would provide the information.

Madam Chairperson: Any further questions? Thank you very much.

Eric Marshall and Rick Walker.

Mr. Eric Marshall (Manitoba Library Association): My name is Eric Marshall. Rick Walker is here to assist me more with any questions. I am speaking on behalf of the Manitoba Library Association, and our brief has been put together by a number of different people. Rick is here to back me up in case somebody comes up with a question that was not in the part of the brief I was involved with.

The Manitoba Library Association consists of some 300 librarians and others interested in libraries across the province, and we certainly view access to government information as a key to the healthy functioning of a modern democracy. Now our members dispense the published information on a regular daily basis to a variety of users, so we are not ourselves heavy users of the access to information act, but we do on occasion have to recommend that our clients do use the act in order to obtain information which we do not hold in our various libraries.

Our association has been very interested in the act ever since its proclamation. As the first speaker mentioned, one of the problems which he identified and which we also have, is the fact that the act itself was not particularly well publicized. We, therefore, organized a workshop, in May 1989, for our own members and others who are interested in the act and how to use it. Again, in January of this year, we organized another forum at which various groups could express their views on how to improve the act. Madam Chair, I believe you were present at that particular forum.

Now, we have looked at various published reports to try and find out how the act is going, and one of the first things which we found out was that the publication of the annual reports related to the act do take rather a long time to appear. Now they do eventually appear, but they seem to take roughly 12 months to appear, so the ones for 1992 have not seen the light of day as yet. We would sort of like to suggest that if the relevant authorities could try and move a little faster on publishing these, maybe aiming towards something like three months beyond the end of the report year, this would improve things.

With regard to the Access Guide itself, most of our members feel that the guide which is put out in Manitoba is one of the better ones. However, with all of such guides there are problems with updating it, and of course, to reprint a volume of this size is considerable expense, and we therefore understand the problems involved. We would like to suggest less costly formats such as producing the thing on a computer disk might well be looked into as an alternative way of producing updates at rather more frequent intervals. At the end of my

presentation I will come on to another possible way in which this could be disseminated.

With regard to the functions of the Ombudsman in relation to the act, we have noticed from his report that his office takes something of the order of three and a half months on average to deal with a complaint. Now, we are not entirely sure whether he is short of resources or whether delays are coming from the various departments that he is having to deal with, as this sort of information does not appear in his report. One possible way of letting us know what is happening here is if the Ombudsman report included the dates at which he places the inquiry and the date on which he gets a response, this would make his report there a little more meaningful.

We would like to suggest, particularly in view of the fact that when people are wanting information they do want it reasonably quickly, and if for some reason the department concerned fails to deliver it and the Ombudsman is asked to look into it and this takes again a long time, it may well be that if there is no sort of time limit here that the information does not appear until it is essentially useless. So we would like to suggest that maybe the Ombudsman should have a time limit by which he should be in a position to make a reply, and we would like to suggest that one should aim towards 30 days. Now that may be a little excessive initially, but we would certainly like to suggest that the time limit be included in that particular area.

We have noticed with regard to appeals that, again, if the Ombudsman is not able to satisfactorily get an answer from the department, that the complainant should be allowed to appeal to the Court of Queen's Bench. If this time limit which we were suggesting is 30 days, but whatever time limit is agreed upon, then the complainant should be able to move ahead to appeal to a higher authority.

We would also suggest that it might be advisable to amend the act to allow the Ombudsman to report immediately to the Legislature on complaints that are not appealed but raise questions about some department or agency in compliance with The Freedom of Information Act.

We have noticed that there have been, at least, I think there are three mentioned in the 1991 report that he felt were not dealt with satisfactorily, that the people did not appeal this to higher court, and whether this was a question of expense, or whether the person had lost so much time that they were exhausted and did not wish to proceed any further, this may indicate that there is some question about some department or agency who is, as it were, dragging their feet in this.

We would also like to have one other suggestion with regard to the appeal process, and this is to amend the act to empower the Ombudsman and/or a judge to award court costs to a complainant in advance of court proceedings. We view this as one of the areas where the complainant is probably not willing to go forward to appeal this because of the potentially large expenses involved in going through court proceedings.

We have already heard mention in two of the previous speakers with regard to some of the problems, particularly in Section 39, with regard to the release of documentation with regard to policies. We would certainly support that there should be some amendment of the act to allow the factual documentation to be released after a policy, a cabinet policy has been announced, and separate from that factual documentation any deliberations or recommendations which the cabinet may be making on the basis of that information. But if the documentation itself could be released after the recommendations have been made, we feel that this would be particularly useful.

We have noticed that there may be some amendments to the act necessary to bring in line standards of privacy protection with regard to personal information within Manitoba, which does not seem to be quite in line with that in some other jurisdictions. We have already had, just mentioned a few moments ago, with creating a separate but parallel municipal freedom of information and protection of privacy act if they have in Manitoba, and I believe they will have when it is released in British Columbia.

We would finally like to suggest that the government should be developing a co-ordinated, government-wide information policy for the government and parallel strategic information policy for the people of Manitoba. In consultation with Manitoba Library Association and other interested groups and individuals, this policy could be developed over time.

* (2020)

One of the other things that we would like to suggest, it does not directly fall perhaps within the

purview of the deliberations today, but we are in the computer age and there are computer networks being developed across the province. We already have a network known as MBnet, and we did mention a little while ago that the access guide should be produced in a machine-readable form. If in that form it could be plugged into the network, then the thing would be very widely available, and in due course, I am sure, the MBnet will be linked to many libraries across the province, and in this way then the whole thing would be much more readily available. Of course, it is much easier to update a machine-readable form than it is in a printed copy; therefore, everybody in any of the libraries with access to the network would have access to the most recent information. Perhaps as time goes by, other sorts of government information could be linked into this network.

So thank you very much. That is my presentation. You have a copy of the full report which has the yellow paper on the front cover.

Madam Chairperson: Thank you very much, Mr. Marshall.

Mr. Marcel Laurendeau (St. Norbert): Mr. Marshall, thank you very much for the brief. There are a number of issues in it, but seeing as I do not have a lot of time to ask some questions because I know other members probably want to ask you some questions, if you could inform us when the MBnet forum is being held I would appreciate that, for one thing.

Mr. Marshall: We did have a conference of the association just recently at which we did have one session on that, and we are looking to having more information on this as time goes by. Within our association we have just had a new executive elected, and they will be looking into organizing something of this sort, and I will pass on to ensure that you and this committee are informed of any actions we do have in that area. We do keep the minister informed of our programs, and we can maybe, when we pass the information on to her, put some additional copies in so members of this committee can be kept informed of our proposals in that area.

Mr. Laurendeau: How are we finding the laser disks now within the library system. Are they becoming more readily available? Are we finding them easier to access?

Mr. Marshall: Oh, indeed, yes. They are becoming much more common. Winnipeg Public Library, quite recently, in Centennial has some laser disks. Most of the academic libraries you will find have a wider range of them because of the broader range of activities at the universities, and many special libraries, of course, have very specialized ones. These are a relatively inexpensive way of distributing a large amount of information. The software which allows you to access is often much more user-friendly then you find on the big computer systems.

Ms. Barrett: An excellent presentation that covers a broad range of issues that I think will serve us very well as we deliberate any possible changes to the act. I would like to ask you to expand just briefly on the concerns that you raised under the Local Government heading on page 5 about the problems or the potential problems with the City of Winnipeg given the changes to the City of Winnipeg Act. I am a little unclear. Can you clarify that for me, please?

Mr. Marshall: I will do my best to clarify this. At the present moment, I am under the impression that it is relatively easy to obtain from the City of Winnipeg information on a very wide range of subjects. The City of Winnipeg does not have a cabinet and therefore there are no exclusions because of, you know, the way things are in the province with regard to cabinet documents. There has been some suggestion that possibly the City of Winnipeg might decide to form a sort of inner cabinet in which case if an act similar to the provincial one came into being, then they might invoke some clause to exclude sort of the cabinet or whatever they decide to call a similar organization, a similar setup, and that would possibly reduce the access to information within the City of Winnipeg.

Ms. Barrett: So what you are saying is that currently that situation does not occur, but should changes to the City Council structure take place, there is the possibility of having the city have the same kinds of problems with their Freedom of Information that you see happening with the provincial cabinet kind of system. Is that correct?

Mr. Marshall: Yes, that is essentially the way we look at it. The possibility arises anyway.

Ms. Barrett: Thank you.

Madam Chairperson: Are there any further questions? Thank you very much, Mr. Marshall and Mr. Walker, for being here tonight.

I would like to call upon Mr. Michael Nickerson.

Mr. Gordon Gillespie. Okay. We have your written presentation which has been distributed to all committee members. When you are ready, Mr. Gillespie.

Mr. Gordon D. Gillespie (Private Citizen): Madam Chairperson, members of the committee, the existing legislation is weak, deceptive, toothless and fatally flawed. It provides a citizen with no practical, effective recourse to the courts. It gives the appearance of being policed by the Ombudsman, an independent watchdog, appointed and funded by the government.

The Ombudsman and his staff, appointed under The Civil Service Act, are subject, at any time, to elimination by that same government. Such was the case two or three years ago when the government of Newfoundland eliminated its Ombudsman as a cost-cutting measure.

If an applicant is refused access, he or she can complain to the Ombudsman. The Ombudsman has no power to compel a department or a Crown corporation to produce information which it has refused to provide to an applicant. The Ombudsman acts only as a mediator. If he is unsuccessful, his role ends. It is then left to the applicant to appeal to the Manitoba Court of Queen's Bench by filing an originating notice of motion. How many Manitobans know what that is, let alone how to file one?

That means hiring a lawyer. Most Manitobans have neither the time nor the money. Furthermore, what if you do not live in Winnipeg, Portage, Brandon, Dauphin, The Pas or Thompson? According to Mr. Doug Brautigan, Deputy Registrar of the Manitoba Court of Queen's Bench, Winnipeg centre, those are the only locations where you can have your motion heard. This makes every Manitoban who does not live in one of those six locations a second-class citizen.

What do they do in Lynn Lake, Churchill, Elphinstone or Dominion City, Manitoba? For those fortunate enough to live in the right place, there is then the matter of cost. The filing fee for the motion is $25. A lawyer will cost a lot more. Court time is expensive. In one case, a simple variation to a maintenance order would have cost $700. That was according to Mr. Mike Ward in one of his columns in the Winnipeg Free Press.

Why should citizens who are already paying enough in taxes for government services have to shell out that kind of money just to find out what information their government is holding on them? This effectively defeats the purpose of the legislation.

Ross Perot once pointed out that America has 5 percent of the world's population, 50 percent of it is lawyers, and hardly any American can afford one.

* (2030)

The existing legislation was drafted by lawyers on Broadway in Winnipeg for lawyers and for those Manitobans fortunate enough to live in one of the six centres that hears motions. It is token legislation, carefully and cleverly crafted and designed to deceive the people into believing they have a right, when for all practical purposes that right is unenforceable.

The bureaucracy which collected the information, much of it through the enormous coercive powers of the state and the government of the day, the political party which controls the bureaucracy, have virtually complete control over the retention, use and release of that information. If they do not want you to have it, you simply do not get it, at least not without a fight.

Let the chicken dance begin. A classic example is Bruce Miller, access officer for the Manitoba Justice department. Myself and others have filed complaints with the Ombudsman over the refusal of the Justice department to respond to requests for information. Miller simply ignored us. He is also ignoring repeated requests from the Ombudsman, in spite of the fact that subsection 17.2 of The Freedom of Information Act requires him to respond "Forthwith upon receiving the request from the Ombudsman." In my case, the request to Miller by the Ombudsman was made April 27, 1993. As of today, June 22, 1993, two months later, Miller still has not responded.

Several months ago, a friend of mine advised me that after five months he was still waiting for an answer from Miller, in response to a similar request from the Ombudsman.

As a lawyer, Miller knows there is not much anyone can do about it. This is the kind of bureaucratic arrogance that Michael Kirby, president of the Australian Appeal Court, warned

about to a conference on the Law and Technology in Vancouver in September of 1989. All that Miller is doing is stonewalling, stalling and wasting everybody's time and money, besides defying the law. He does not care. He gets paid his annual salary of $80,000 regularly every two weeks. Time and money—yours—mean nothing to him. The government has plenty of both in abundance. Not so with the average Manitoban, especially with the 51,000 unemployed and a like number on social assistance.

One of the previous speakers spoke about the games that are sometimes played by these Freedom of Information officers. As an example, with the Justice department, I have eight files with them. They roll them all into one, some 1,300 pages, and then that automatically triggers a fee over a certain number of hours, search and preparation, this kind of thing, and they want to charge me $160. Well, I only want the information from one file, and when I requested that, that is the two months that I have been waiting for. It has about 20 pages in it. They simply will not, they refuse to respond to it. They have even gone so far in that particular instance, where they rolled all the files together, to charge me for items which the regulations specifically say you cannot charge for. That is the kind of games that gentleman was referring to, I believe.

At least those are the kinds of games that I have encountered when dealing with the so-called Justice department. So the fight to obtain the information becomes a lopsided struggle between David and Goliath. The odd determined citizen who appeals to the courts will most likely have to take time off work—if he has a job.

Queen's Bench sits weekdays from ten to four. If he does not live in one of the six centres, he will have to incur travel and lodging costs. If he has to do legal research to present his case, he will find that in April 1993, the Filmon government denied access to the public after 5 p.m. weekdays and on Saturdays to the Great Hall Law Library in the Law Courts, a publicly funded facility—lawyers only.

The issue is further exacerbated with the recent spate of Mulroney appointments to the Manitoba Court of Queen's Bench. These included Kris Stefanson, appointed Chief Judge of the Manitoba Provincial Court by Filmon and McCrae on November 1, 1988. Stefanson highly politicized that court. The appointment of Stefanson—brother of Eric, Minister of Industry, Trade and Tourism, and their other brother, Tom, Chairman of MTS—heralded the spread of the Tory political cancer to Queen's Bench.

There is no appeal from a Queen's Bench decision on FOI, Freedom of Information appeals. Their decision is final, and the only bench that Stefanson is fit to sit on is a park.

Reviews of files kept by credit bureaus have shown that a high percentage of them contain incorrect information. One percentage that comes to mind is 35 percent. I know from first hand personal experience with both the federal and provincial governments that a lot of information on file about me was nothing more than malicious gossip, inference and innuendo, false and misleading, hearsay, uninformed, ignorant opinions, self-serving hype and outright lies, much of it generated by the same bureaucrats who control the collection, generation, use, retention and release of information which the present legislation effectively leaves in their hands. They are virtually unaccountable, a law unto themselves. Ask Bruce Miller, Q.C., appointed by McCrae.

That is too much power to leave in the hands of faceless bureaucrats with respect to information that can ruin a person's life without him or her even knowing it. Former Justice Linden of the Ontario Court of Appeal said not long ago that false information is like a runaway locomotive. It destroys everything in its path, including individuals and whole communities.

If it is the intention of the Legislature to give the citizens of Manitoba access to information which their government holds about them, they should not be obstructed by bureaucrats like Bruce Miller attempting to thwart the will of the Legislature, bureaucrats who treat information obtained from citizens as though it were their own personal property to do with as they please. Nor should a citizen be forced at private expense to take his case to court to obtain information about himself, which was acquired by the government at public expense. The playing field must be levelled by:

(1) compelling bureaucrats like Bruce Miller to obey the law and to provide the information forthwith unless there is a compelling and legitimate reason for not doing so.

(2) giving the Ombudsman the right to appeal to the Queen's Bench on behalf of an

applicant. The Ombudsman has the resources or access to them. The average citizen does not. The federal Information Commissioner already has such powers.

(3) making—and I have added a couple of words here—the full process equally available to all Manitobans, not just those in the six judicial centres.

Respectfully submitted, G. Gillespie.

Madam Chairperson: Thank you, Mr. Gillespie. I know there are some questions.

Ms. Barrett: As is stated in the House on regular occasions by ministers answering questions without acknowledging the preamble, which I am going to suggest is your paper up to the recommendations, I do not have any comments on that, but I would like to say that I think some of your suggestions in the recommendations are very valid and I particularly like the second one. I think that is well worth investigating since the federal Information Commissioner already has that power. I think that is possibly one that we could very seriously look at.

Mr. Penner: I certainly appreciate the presentation that you make, Mr. Gillespie. You make some interesting accusations in your presentation. I am wondering, Mr. Gillespie, whether you have a brother?

Mr. Gillespie: Pardon me?

Mr. Penner: Have you a brother?

Mr. Gillespie: What has that got to do with it?

Mr. Penner: Have you a brother?

Mr. Gillespie: What has that got to do with it?

Mr. Penner: What does he do for a living?

Mr. Gillespie: My brother?

Mr. Penner: Yes.

Mr. Gillespie: What has that got to do with this?

Mr. Penner: Well, we have a situation here, Mr. Gillespie, where you accuse one of our Justices of highly politicizing the judicial system simply because he has a brother that is involved in the political system.

Mr. Gillespie: No, I did not say because he had a brother, it was because of his own personal actions, and I only related it to the fact that he is related to a cabinet minister. That is all I said.

Mr. Penner: So I am asking you—

Mr. Gillespie: I did not make a correlation necessarily they were doing it because he was a cabinet minister, but I thought this was information that the public should be aware of.

Mr. Penner: So I am asking you, Mr. Gillespie, whether you have a brother.

Mr. Gillespie: I am telling you it is none of your business.

Mr. Penner: I am simply wondering what his occupation is and whether—

Mr. Gillespie: I am telling you that is none of your business.

Mr. Penner: —whether that has any—

Mr. Gillespie: I have nothing further to say about brothers.

Mr. Penner: Thank you, Mr. Gillespie.

Madam Chairperson: Are there any further questions? Thank you, Mr. Gillespie.

Mr. Gillespie: Thank you, Madam Chairperson, members of the committee.

* (2040)

Madam Chairperson: Would Julie Van De Spiegle please come forward? Call one more time—Julie Van De Spiegle.

I would like to ask Zenon Gawron.

Okay, I have gone through the list of people who had preregistered. Is there anybody here this evening that has not preregistered and would like to make a presentation?

Ms. Barrett: Could the minister tell the committee and the members of the public who are here today what the process will be from now on, because this is a slightly different public hearing process in this piece of legislation than we are normally used to. We do not have a new piece of legislation that we are dealing with or specific amendments to the Freedom of Information Act, so I wonder if the minister could explain to us what the next steps will be.

Mrs. Mitchelson: I think the intent was, of course, to listen to the public and receive their presentations. I believe then, at the last committee meeting that we held, it was determined that staff that are responsible for the Freedom of Information Act will go back and write a report as a result of the committee hearings. That report will be written by—I think we gave a deadline of December 30, 1993.

I am trying to remember what the process was after that. After December 30, 1993, was the committee to reconvene again and consider the draft report from staff and then determine at that point where to go if there was a desire by the committee to recommend any amendments to the legislation?

There is one other point to be made. There was a person, and his name was on the list, who is not here tonight, who had indicated he had wanted to make presentation and would have preferred to have done that on Saturday because he indicated he was working this evening. We attempted to reach him today. The ad did read that we would hold hearings on Saturday, if necessary. I think the discussion around that at the last committee meeting was there might be some people from out of town that could not come in and be here during the week and we would attempt to accommodate on Saturday if necessary.

We have attempted to reach this person twice today without success to indicate that we did not have enough presenters that we felt we would have to, you know, call a Saturday committee meeting. I guess, I might ask what the will of the committee would be? I would like to recommend, if I could, that the Clerk's Office attempt again, either now because we are finished presentations tonight, and possibly tomorrow, to see whether indeed we could attempt to accommodate that presentation sometime tomorrow or sometime Thursday or sometime Friday, whenever a time might be suitable to the presenter? If we could accomplish that, maybe check with the House leader to see whether we could not just call the committee for half an hour together at some point that might accommodate, if that is possible.

Could I ask for some comments from the opposition or whether that might be agreeable to the committee?

Mr. Lamoureux: Madam Chairperson, I think that is fair and it might—again, I do not know the individual that has actually requested it. If the individual would be quite content on making a written presentation and supplying it to each caucus office, that in itself might suffice as long as the individual, if he does or she does submit it, it would be taken as being read much like the other written submissions that we have received and the same consideration given to it.

Ms. Wowchuk: I just wanted to ask the minister, since the ad has gone out that there could possibly be hearings on Saturday, is there still that possibility that more people could register for hearings? If that is the case then—the minister is shaking her head.

Mrs. Mitchelson: Madam Chairperson, people would have had to register. There still is the opportunity for people to present written briefs and presentations should they desire to do that up until Saturday, I think. That was the intent anyway. There have not been any calls to the Clerk's Office indicating that there are more presenters that do want to present.

Ms. Barrett: A further clarification on that, the ad that went into the newspapers, did it state that there was a deadline to call the Clerk's Office to make presentations?

According to the act, the ad that was placed in the newspapers throughout the province, it gives two dates for presentations to be made, and the second is Saturday, June 26, if necessary. There is, however, no date or no deadline for contacting the Clerk's Office to put one's name on for Saturday, so I think technically we still need to be prepared for the possibility of meeting for this individual who has already said that he wished to be on Saturday, or others. Just to have that clarified, there might very well be people who would still call in because we did not put a deadline on it.

Mrs. Mitchelson: I guess then it might be incumbent upon us until Friday to ensure that no people do phone. If there are names that are added to the list, then we would contemplate and notify the committee members on Friday. I do not think it would be necessary for us all to show up at 10 a.m. on Saturday morning, just in case somebody arrives on Saturday morning. I think in the ad it did say, if necessary on Saturday, and there was a contact number for the Clerk's Office. So if we sort of keep things open until Friday afternoon and then determine whether there is a need. When the House shuts down at 12:30, is that satisfactory?

Madam Chairperson: Committee rise.

COMMITTEE ROSE AT: 8:47 p.m.

WRITTEN SUBMISSIONS PRESENTED BUT NOT READ

Brief to the Standing Committee on Privileges and Elections

I would like to briefly provide the committee with several key improvements needed to the 1985 Manitoba Freedom of Information Act as proclaimed in 1988.

I am a native Manitoban transplanted out East and a public interest researcher residing in Ottawa. I am a frequent user of FOI legislation in Canada and have authored several access and privacy studies. I have made over 100 requests under the Manitoba FOI Act, some of which resulted in complaints, time delays, fees and exemptions. Applications ranged from requesting data on the Manitoba Government-CSIS agreement to workplace safety reports.

1. Statutory Review Process

First, I hope that the committee will proceed in a nonpartisan fashion to do a thorough review. I am disappointed that the committee is exercising its legal review mandate at the very last minute, a year later than it could have. The public was given very short notice and has little opportunity to make presentations. I am concerned too that the committee has not called the government or the Ombudsman first and has no plans to hear from specific government agencies. I also believe that it is a conflict of interest for the minister responsible for FOI or any other government minister to sit on the committee reviewing the legislation. Having said that, my submission is meant to be constructive and I would be delighted to appear as a witness and respond to questions.

2. Usage and Public Education

The Manitoba FOI Act has had little public use. One of the problems has been that the act has not been well publicized or the subject of much public education and training for public officials. This must be rectified.

3. Exemptions and Administrative Barriers

I believe that 20 days is plenty of time to respond to FOI requests that fees for preparation should be abolished and that fee waivers for public interest purposes should be applied.

There are too many exemptions in the act and no need for any of them to be mandatory. There are too few injury tests, reasonable time frames, and no effective public interest override provisions.

It is mindless secrecy, for instance, to exempt policy advice and cabinet confidences for 30 years. Something is out of whack when over half of the replies to applications submitted to Manitoba are either totally or partly exempt.

Exemptions play too large a part in the act instead of the main legal principle put forward being that records are available for daily public inspection as a public service.

4. Privacy Protection

Manitoba, unlike other jurisdictions, has no privacy protection provisions. The right to access and correct personal information is important. It is necessary to have fair personal information use and disclosure practices. Strict regulations vetting any computer matching and testing, for instance, for AIDS drug use is needed.

5. Binding Review

It is time to allow for binding enforcement powers in cases of information denial or creative avoidance practices. This more effective type of independent review exists in other provinces. An ombudsman just has persuasive powers and cannot review information or privacy protection problems in the private sector.

6. Broader Coverage

Not only should the act apply to the local level and to all government-funded bodies, it should as well be extended to the private sector. Corporations and organizations should be open too and adopt disclosure and privacy protection codes that can be enforceable through independent binding review.

7. Modernization of Access

It is time for FOI acts to recognize that many records are computerized, to recognize that record-keeping standards and access/retrieval means must be regulated in the public interest. Technology must be used to assist openness and contribute to the provision of a service for the daily inspection of records.

8. Open Government

Different jurisdictions have other tools in place to ensure open government, such as open meeting requirements and citizen plebiscite initiatives. This committee can strike out on a bold course for a better style of government.

I trust these comments are of help.

Ken Rubin
Ottawa, Ontario

* * *

Brief presented before the public review of The Freedom of Information Act by Concerned Citizens of Manitoba Inc.

In a fair and democratic society, citizens are able to obtain information pertaining to the activities and expenditures of their government. This has to be a fundamental right. Exemptions must be clearly delineated and defined in the act and should be kept to a minimum. The operation of government must fall under the scrutiny of the public it is elected to serve.

Section 42(1)

Over the last 13 years, Concerned Citizens of Manitoba has endeavoured to acquire information about a federal Crown corporation, Atomic Energy of Canada Ltd. This corporation is exempt under the federal act, and therefore is not subject to the scrutiny of the public, yet it receives millions of dollars in taxpayer subsidies each year. Recently, the most common phrase used by this corporation to avoid revealing their secrets is that the information is "proprietary or of a commercially sensitive nature." This has pertained to safety documents of reactors and to shipments of nuclear waste which have entered our province.

Certainly on the federal level, we have learned to expect these methods of hiding information. However, a recent experience in the use of Manitoba's act produced the same results. I refer you to Section 42(1) "Commercial information belonging to a third party." The ambiguity of definitions such as "trade secrets," "competitive position," "significant financial loss or gain" can be used to withhold information.

In order to demonstrate the weakness of this section, we would like to describe our recent experience. The provincial department of Industry, Trade and Tourism provides "Environmental Industry Development Initiative" grants of up to $25,000 for environmental business developments. This grant was set up as a result of funds obtained from a tax on liquor bottles and disposable diapers. A $25,000 grant was given for a joint venture between AECL, who are in the business of selling nuclear reactors, and the AGRA corporation, who are involved in the business of uranium enrichment.

Our group wanted to know if our tax dollars were to be spent to develop products and services related to the nuclear industry. We applied for a copy of AECL's application form, which resulted in our request being denied under Section 42(1)b. We filed a complaint with the Ombudsman and were also denied this information on March 9, 1993. At that time, we were also informed that no part of the document could even be severed due to commercial sensitivity. We were then given the option of filing an appeal with the Court of Queen's Bench, which would have cost $90 to initiate. Our group declined.

In conclusion we simply wanted to know if our tax dollars were being spent on the development of a nuclear-related business. We were not requesting trade secrets or threatening to endanger AECL's competitive position.

In this case the public was refused information which we feel they should have the right to know. In this case, the Department of Trade and Tourism and AECL have been able to use public funds for confidential purposes. When The Freedom of Information Act provides a shroud of secrecy for government or other agencies to operate under, there is something seriously amiss. We encourage you to revise this section (42)1 of the act so that the public can scrutinize the practices of government.

Destruction of Records

In our experience with Freedom of Information requests, we have also run into difficulty acquiring data which predates 1980. We were informed by a Freedom of Information Officer, Wilf Boehm, late last year that records of the Department of Environment prior to 1980 had been destroyed. In this particular case Concerned Citizens of Manitoba were attempting to acquire information about long-lived radioisotopes which had been released into the Winnipeg River.

The minister himself, Mr. Cummings, recently commented in a letter to our group, March 30, 1993, that investigations are being initiated; " . . . because of the increasing number of situations being encountered in Manitoba and other jurisdictions where seemingly harmless past practices surrounding the use and disposal of chemicals and other materials have resulted in serious contamination."

Certainly the sheer quantity of paper must be reduced in order to be stored. However, many of the toxins released into our environment have longer lives that 13 years. In our situation, the radioisotopes which were released into the Winnipeg River, e.g., Cesium 137, have half-lives of close to 30 years. It is for this reason that we feel the review should address the destruction of files and find a suitable method for ensuring that information such as that listed above be available on the public record.

Thank you for hearing our concerns.

Dave Taylor
Concerned Citizens of Manitoba Inc.
Winnipeg, Manitoba

* * *

Submitted to the Standing Committee on Privileges and Elections is our written brief as to the need for the Manitoba Freedom of Information Act to apply to all levels of municipal governments in the province of Manitoba, and elsewhere.

Attached are letters from the provincial Ombudsman advising that the Freedom of Information Act does not apply to municipal governments. Also attached is a letter from the Honourable Bonnie Mitchelson advising of same and also advising as to what procedure we should follow to see if The Freedom of Information Act should include municipal governments.

The purpose of our brief is to show the committee that at present we, as citizens of our community, have no legal right to know what our town council is doing.

Our experience clearly demonstrates that democracy does not exist when dealing with our town council. As our brief will outline, letters, newspaper articles and even a petition with the names of over one-third of the people who voted in the town election cannot gain any right to see information dealing with the operations of our council and mayor.

As citizens of our town, the time has come, as it has all over Canada, for politicians to be accountable to the people who have elected them and whom they serve.

After dealing with our town council, it is clear that we have no democracy and there is no accountability to the citizens by our elected council.

Thank you for granting us the opportunity to present our written brief to the standing committee.

Yours truly,

Mr. Vic J. Fron
Dauphin, Manitoba

In late winter of 1991, early 1992, the Town of Dauphin hired a Winnipeg-based consultant company to prepare an audit of the operations of the Town of Dauphin. Rumours circulated that our town had this audit prepared, and the cost to us, the taxpayers, was around $25,000.

On the 16th of February, 1992, the Town of Dauphin let the community know that indeed there was an audit and that there were problems within the operation of the town.

On March 18, 1992, the Town of Dauphin fired the secretary-treasurer. Not even the person who was asked to resign knows why the council and mayor wanted him out. On March 25, 1993, council completely closed the door to the public, even on committee meetings dealing with the Arthur Anderson audit.

On March 27, 1992, we wrote and asked our town and mayor to make this audit available to the people of Dauphin. We wanted to know what problems there were within our town, and why our secretary-treasurer was fired and given over $52,000 severance pay. Further, why is the council and mayor taking the stand that the Arthur Anderson report was commissioned by council for council and for council's use only?

In a community where we have debentures in excess of $3 million, we as taxpayers want to know why we spent close to $25,000 on a report while the community is in tough economic times.

On April 8, 1992, council and mayor made portions of the audit available.

On April 14, 1992, we pointed out to council that they were elected officers of the town, not employees. In our letter, we outlined parts of the audit that we felt the citizens wanted to see. In reality, the most important part of the audit has been withheld.

A subsequent letter from council and the mayor advised that they had released all they were going to release.

We want to bring to your attention that before we started to lobby the Town of Dauphin to make the audit public, we contacted the provincial Municipal

Affairs department, at which time we were advised that a town council does not have to disclose any part of the audit, and that the public cannot force a municipal government to make public its operation. We were also advised then that there is no Freedom of Information Act in the province that applies to municipal governments.

With this information in hand, we discussed what our chances would be to get the town to release the audit. We started a small petition on March 17, 1992. Immediately the citizens of our town started to rally behind our cause. We sent our letter of March 27, 1992, and before we could complete our petition, the town decided to release limited parts of the audit.

Before we continue to outline our documented information, on requesting the release of the Town of Dauphin's internal audit, we should make clear to you, the committee, the reason why the complete Arthur Anderson report has never been released to date.

When this consulting company was hired to do an audit on the operation of the Town of Dauphin, part of the audit was to evaluate not only the town administration staff and its operations, but also an evaluation of the mayor and council.

However, the evaluation of the mayor and council was not done by the consulting company, it was done by senior administration staff of the Town of Dauphin. Why, we will never know, would a municipal government spend almost $25,000 for an audit of its operations and have its own staff do part of the audit?

We have been advised by reliable sources that the evaluation of the mayor and council of the time was very poor and this rating was never made public. Shameful.

Do we as citizens not have the right to know what kind of job our municipal government is doing? Are they working for our best interests? In terms of their re-election, we would think this information would be vital to the voters in this community. If there are extenuating circumstances, or explanations to be given, we are certain councillors would be able to do that.

But the question remains, should a municipal government be able to hide their evaluation from the people they serve?

We, as the electorate, only get one thing out of voting for a municipal politician—the satisfaction of exercising our right to vote. Once we vote, we appear to lose whatever rights we had before the election.

As mentioned earlier in our brief, when municipal governments have to work in the public eye, mayors and councillors seem to change, like Dr. Jekyl and Mr. Hyde. When the Town of Dauphin was advised that a large petition was going to be presented to the town requesting all the rest of the audit be released, councillors started to come out from behind the closed-door policy and complete copies of the audit were given out to previous town officials. More interesting, the former mayor and present mayor agreed in May-June 1992, and publicly stated, that the whole audit should be made public.

During May and mid-June 1992, we reactivated our petition. We obtained great support from the citizens of Dauphin. A copy of the petition is enclosed.

Our petition obtained 1,023 signatures. We attended the town council meeting of June 1, 1992, at which time we presented the town council and mayor with the petition. We used Section 123 of The Municipal Act to have the town recognize and acknowledge our petition. We presented an opening letter which is also enclosed. This council meeting was the first and last time that the municipal government of Dauphin discussed the Arthur Anderson report in public. The decision of the council was that before releasing the remainder of the audit, the town would have to contact their lawyer to make sure they were not releasing information on personnel. According to town officials, our petition was the largest ever presented to the Town of Dauphin since its incorporation as a town.

We want the standing committee to understand that we, as citizens of Dauphin, have nowhere to go and no one to turn to in dealing with a mayor and council that does not want to make anything public about what our council is doing and how it operates.

We have no rights, no freedoms. How can a municipal government be protected in this manner? Where is the representation to the voters? Are municipal politicians untouchable? Once they are voted in for a four-year term, there is nothing that can be done to them. They have the right to do what they want and do not have to be accountable

to anyone. Stop and think about this. We are told we live in one of the most democratic, free countries in the world. Will you show us where this freedom is when dealing with an elected municipal government?

From the outset our town, when dealing with the public, wanted the audit made public, yet, they made all their decisions in-camera. This shows you how weak municipal governments are when faced with the public that has voted them in. When we presented the Town of Dauphin with our final petition of over 1,000 signatures, our council and mayor were going to once again discuss the releasing of the remaining parts of the audit and our petition behind closed doors. Interesting things happened when confronted by the citizens. The council discussed the petition and the audit in front of the people whom they represent.

How can we, as citizens, trust and have any faith in our municipal government when they stay behind closed doors and do whatever they want and get away with their decisions, whether these interests are good for the community they serve or not. Take this same group of municipal politicians and place them in front of the electorate, and you suddenly see a difference in their ideas and actions. All of a sudden they want to listen to the people that they represent.

We ask the standing committee, is this not a very unstable situation in the sense it shows our municipal governments are not listening or doing what they have been voted to do? Here in Dauphin, the question remains, has our municipal government ever worked for the betterment of the citizens that live in this town?

On July 30, 1992, we and the citizens got our answer to the request to have the rest of the audit released. Attached is the Town of Dauphin's final decision on the Arthur Anderson needs assessment.

This letter and the letter attached are the most important parts of our brief presentation to you, the Standing Committee on Privileges and Elections for the Province of Manitoba. These two letters themselves clearly show the need for more Freedom of Information to be extended to cover municipal governments in Manitoba.

In the town's letter of July 30, 1992, the town stated that they cannot release parts pertaining to the evaluations of mayor and council because the Dauphin municipal government has assured the two people who did the rating of mayor and council that their evaluation would be confidential.

One of the two people who did the evaluation wrote the town a letter, dated March 30, 1993, and stated that all portions of the audit should be made available to the public.

Now we, as citizens of Dauphin, can more easily relate to the words of Fred McGuinness, columnist: "Secrecy is the death of democracy." The municipal government of July 30, 1992, of Dauphin turned the remaining portion of the audit into an issue of personnel matters and the town has to protect the staff. One more item which was discovered by us was that the Arthur Anderson Company gave out four assessment forms to be done on the mayor and council. We were told that only two staff members did the evaluation.

Left with two possible avenues to follow in order to have the remaining parts of the audit released, we now focused our attention on the possibility of a new town council being elected in October 1992. Before and during the campaign, our now present mayor used a platform of having the Town of Dauphin Council and mayor becoming more accountable and open to the public that they serve.

On December 14, 1992, we addressed the new mayor and council asking for the remaining parts of the audit to be released. On February 18, 1993, we received our reply. Eighty-two percent of the audit was released previously, and that was final. Now, all of a sudden supporters of open municipal government were hiding behind closed doors. One new councillor stated that we have no business seeing evaluations of council. The present mayor mentioned he could not see what we would do with the rest of the audit. What would it benefit us?

Again, we are living with a municipal government that does not believe in openness or in allowing the electorate a say in the operation of our community. Our new municipal government seems to think that releasing the audit would be used for our own interests. Well, they are totally wrong. The citizens of Dauphin need to see how our elected officials operate.

Our last avenue is to see if this government will change The Freedom of Information Act to apply to municipal governments. As you will see in our overview, we are not the only town facing problems

of municipal governments not being accountable to the people they serve.

OVERVIEW

In a country where The Freedom of Information Act applies to federal and provincial governments and yet not to municipal governments, that is unacceptable. We believe that democracy should be exercised when dealing with municipal governments. It is often the case that municipal governments condemn the actions of the province when dealing with municipal affairs. However, the way we understand parts of The Municipal Act, even town councils do not have to be accountable to the province for their actions.

It is important that if this committee recommends to the province that The Freedom of Information Act should apply to municipal governments, then the province should assure the citizens of Manitoba that their municipal governments will be more accountable and open to the people as well as the Province of Manitoba.

We have perhaps sufficiently made the point that we believe we have the right to know what municipal governments are doing.

The need for The Freedom of Information Act does not only apply to having the audit released when dealing with our town, but we also asked council to pass a special resolution to make available a copy of the town-rural water agreement.

In April of 1992, we requested a copy of the water agreement, which we finally received in January of 1993. The Public Utility Board approved the agreement before we, the public, could see the proposed agreement and voice our opinions. When we finally got a copy of the agreement we found that the water agreement was breaking town by-laws, but unfortunately it is too late. The agreement is already in place and signed and approved by our municipal government.

The Town of Dauphin provided a $50,000 severance package to the former secretary-treasurer. Lac du Bonnet provided their secretary-treasurer with a $65,000 settlement. The Town of Swan River gave their outgoing engineer an $80,000 severance package. The Shell River municipality had an audit done but the reeve was not willing to release the outcome of the audit. The list apparently goes on and on.

Thanks for your consideration of these matters.

Bill McGaffin and Vic Fron
Dauphin, Manitoba

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In response to the public hearings called by the Standing Committee on Privileges and Elections pursuant to Section 56 of the Freedom of Information Act (The FOI Act), I am pleased to submit this written brief of the Provincial Ombudsman.

Powers, Duties and Functions of the Ombudsman

As you will be aware, certain powers, duties and functions have been conferred on the Provincial Ombudsman under The FOI Act, including the following:

> Duties of Ombudsman
> 15(1) In addition to any other powers, duties and functions which may be conferred or imposed on the Ombudsman under this Act, the Ombudsman shall receive and investigate every complaint
>
> (a) by an applicant about
>
> (i) the refusal by the head of a department to give the applicant access to a record, or
>
> (ii) an extension under section 11 of the 30 day limit for responding to the applicant; and
>
> (b) by any person about the adequacy or availability of the Access Guide required to be published under this Act.*

*To date, no intended complaint has been made to the Ombudsman concerning the adequacy or availability of the Access Guide.

> Complaint by Ombudsman
> 15(2) Where the Ombudsman is satisfied that there are reasonable grounds to investigate any matter referred to in subsection (1), the Ombudsman may initiate a complaint under the matter, and subject to subsection 30(4) the provisions of this Act apply with necessary modifications to a complaint initiated by the Ombudsman.
>
> Report re access complaint.
> 25(1) Where a complaint relates to
>
> (a) the refusal by the head of a department to give an applicant access to a record; or

(b) an extension under section 11 of the 30 day limit for responding to an application;

the Ombudsman shall, upon completing the investigation, send to the applicant and to the head a report containing the findings of the investigation and the recommendations, if any, which the Ombudsman considers appropriate in respect of the complaint.

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

Annual report of Ombudsman.
55 The Ombudsman shall report annually to the Speaker of the assembly on the exercise and performance of the powers, duties and functions of the Ombudsman under this Act, and the Speaker shall cause the report to be laid before the assembly forthwith if the assembly is in session and if the assembly is not in session, within 15 days of the beginning of the next ensuing session.

Since the proclamation of The Freedom of Information Act on September 30, 1988, there have been almost 200 complaints filed with the Ombudsman concerning the administration of the act. These complaints, involving presumed refusals, actual refusals and the extension of the response time have been highlighted in the Ombudsman's annual reports along with the Ombudsman's general comments concerning government's administration of the act and the public's use of the act. The comments in this brief are somewhat of a departure from the kind of comments presented in the Ombudsman's annual reports in that the former are based not particularly upon the subject matter of complaints received, but are based upon the experiences encountered by our office as we work to resolve these complaints. Hence, the comments of this brief, rather than being complaint-specific, are more general and are directed to the nature and wording of The Freedom of Information Act and Regulation 296/88 (the Access to Records Regulation that comes under the legislation).

Fee Complaints Should be Included in The Freedom of Information Act

From time to time, our office has received complaints respecting the specific assessments of search and preparation fees under the Access to Records Regulation (the Regulation). Essentially, the complainants have alleged that particular fee estimates are unreasonably high, notwithstanding that subsection 7(2) of the Regulation provides that, where the actual search and preparation fee calculated is less than the estimate, the difference shall be refunded to the applicant. Some complainants to our office have suggested that the required outlay of money, even if ultimately refunded, can serve as a deterrent to an individual applying for access.

There are no provisions under The FOI Act to investigate, report and make recommendations regarding fees. However, the Ombudsman is authorized under The Ombudsman Act to investigate complaints against provincial government departments and agencies respecting administration where a person alleges they have been aggrieved, but the Ombudsman is authorized to investigate administrative complaints, investigations into the reasonableness of departments' application of the fee provisions have been reviewed by the Ombudsman under The Ombudsman Act.

Many of the principles and provisions of The Ombudsman Act and The Freedom of Information Act are the same: for example, the independence of the Ombudsman; the Ombudsman's ability to make recommendation and the Ombudsman's sweeping and probing powers of investigation. Nonetheless, there are significant differences between The Ombudsman Act and The Freedom of Information Act.

For instance, The FOI Act provides complainants with an appeal to court further to the Ombudsman's review of a complaint. Under The Ombudsman Act, the Ombudsman's decision or recommendation is final.

As a second example of the differences between the two acts, the Ombudsman, under The Ombudsman Act, is not authorized to investigate any decision recommendation, act or omission of the Executive Council or a Committee of the Executive Council, whereas under The FOI Act, the

Ombudsman is authorized to investigate an FOI complaint against Executive Council.

In one case reviewed by our office, a complaint was received by the Ombudsman against Executive Council concerning the assessment of fees. As the complaint had to be handled under The Ombudsman Act, the initial issue on jurisdiction had to be considered. While this issue was ultimately settled, this step would have been avoided had the issue of fees come under The Freedom of Information Act.

I note that under The Ontario Freedom of Information and Protection of Privacy Act, a person who is required to pay a fee under that act may ask the Freedom of Information Commissioner to review the amount of the fees assessed. Given the fact that in Manitoba fee complaints are being made to the Ombudsman and that the Ombudsman is already the first level of review under The FOI Act respecting other administrative issues under the act, I would recommend that the committee consider including, as an additional heading for complaint under The FOI Act, a review of the estimate of the search and preparation fee. This heading for complaint would be in addition to the four existing headings for complaint to the Ombudsman listed under Section 15 of The FOI Act and as listed on Form 3 the prescribed Complaint form under The FOI Act.

"Search and Preparation" Should be More Clearly Explained under Regulation 296/88

Section 4 of the Regulation sets out:

> "Estimate
> 4 Where at any time in the course of processing an application, the department that responds to the application reasonably anticipates that a search and preparation fee will be calculated under section 6, the department, before giving the applicant access to any record referred to in the application, shall provide the applicant with a written estimate of the search and preparation fee in Form 2 of Schedule A."

Subsection 6(2) of the Regulation expressly and clearly states what "search and preparation" time for the purposes of the Regulation shall not include, namely:

> (a) time spent by any department in relation to the forwarding or transferring of the application under Section 9 of the act;
>
> (b) time spent in preparing an estimate under Section 4;
>
> (c) time spent in reviewing any relevant records for exemptions, prior to the actual severing of the record;
>
> (d) if the applicant wants and is entitled to obtain a copy of any relevant record, time spent in copying the record;
>
> (e) time spent in preparing an explanation or interpretation of any relevant record under subsection 12(2) of the act.

The Regulation does not similarly set out what "search and preparation" does include. Instead, to determine what the term does include (as opposed to what it does not) one must read separately, subsection 6(1) where there is mention of "search for the record", subsection 6(2) where there is mention of "time spent in severing any relevant record" and "actual severing of the record" and section 6(3) which speaks of "the actual costs incurred . . . for computer programming or electronic data processing".

Our experience has been, and others share our view, that the term "search and preparation" is vague and confusing. It is possibly for this reason that our office has encountered FOI personnel who do not seem clear on what bases fees should be assessed. By our interpretation of the Regulation, "search and preparation" includes the time spent locating the record, the "actual severing of the record" (i.e. removing portions not to be disclosed) and the actual costs for out-of-department computer programming and electronic data processing.

But, does the term encompass other activities not listed by the Regulation? Does it include the time spent for contacting third parties to an application about their possible consent to release?

For example, in one of the complaints reviewed by our office, there were over 80 third parties within Manitoba and approximately 10 third parties outside of Manitoba, all of whom were contacted by a department. Does the term include the cost of photocopying records on which severing will be conducted, since severing cannot be made on the department's original documents?

These are just examples of questions that our office has encountered, and which even more frequently must be encountered by FOI personnel within departments. At this time, the legislation

provides no guidance. I would also suggest that the public is not formally or properly advised of the term "search and preparation" although they are asked to pay fees for the time involved in that activity. By our experience, most individuals do not refer to the Regulation itself. The individual who receives the prescribed Estimate of Costs (Form 2) will encounter the term "search and preparation" fee on the form. However, Form 2 provides no indication of what the term entails other than reference to subsections 6(1) and 6(3) of the Regulation.

In my opinion, section references to the Regulation are not sufficient to apprise the public about what the services are for which they are being asked to pay.

I would recommend that the committee consider the formulation of a positive definition or statement of what "search and preparations" does include (similar to Clauses (a) to (e) under subsection 6(2) of the Regulation) and that the Regulation further indicate whether this statement or definition is exhaustive or inclusionary. Also, I would recommend that the definition or statement of the term "search and preparation" be included on the prescribed Form 2, Estimate of Costs.

A Time Frame for Filing a Freedom of Information Act Complaint Should be Included in the Act

At times, there have been complaints filed with our office long after the application was made and responded to by the department. In no case so far has this interfered with the Ombudsman's review under The FOI Act as the records in question have still been available for consideration. However, on a couple of occasions reviewed by the Ombudsman, the question of the existence of the record came into question in view of the destruction schedule relating to the relevant records, as set out under The Legislative Library Act. As you will be aware, The Legislative Library Act provides a destruction schedule relating to records.

Several departments have expressed concern to our office respecting the responsibility of government departments or agencies to preserve records that are the subject of an application for access. These departments have noted that there is no time frame under The FOI Act for an applicant to bring a complaint to the Ombudsman. At the same time, the records in question are ultimately subject to destruction in accordance with schedules established under The Legislative Library Act. As The FOI Act now reads, a person might file an FOI complaint with the Ombudsman at any time subsequent to the processing of the application for access, possibly years later.

If a reasonable limitation period, fair to both applicants and the departments and agencies, could be identified and included under The FOI Act, the potential for conflict between The FOI Act and The Legislative Library Act could be avoided. The legitimate administrative concern raised by those working under The FOI Act could also be allayed. I would recommend that the committee consider implementing a time frame for the filing of a complaint to the Ombudsman under The FOI Act.

While there may be other comments which could be presented regarding The Freedom of Information Act, these few comments, which come immediately to mind, have been prepared (in haste to meet the committee's deadline) for your consideration. I trust that this information may be of some assistance to you in your deliberations.

Gordon S. Earle, Ombudsman
Province of Manitoba