LEGISLATIVE ASSEMBLY OF MANITOBA
THE STANDING COMMITTEE ON STATUTORY REGULATIONS AND ORDERS
Tuesday, 25 June, 1985

'IME - 10:00 a.m.

.OCATION - Winnipeg, Manitoba

:HAIRMAN - Mr. Conrad Santos (Burrows)

\TTENDANCE — QUORUM - 6

Members of the Committee present:

Hon. Messrs. Bucklaschuk and Plohman

Messrs. Birt, Carroll, Fox, Harper, Kovnats, Mercier, Santos and Steen

VITNESSES: Mr. David Matas, Manitoba Association for Rights and Liberties

Mr. Ben Hanuschak, Manitoba Progressive Party

Mr. Neil Sandell and Mr. Kelly Armstrong, ACCESS - The Manitoba Coalition for Freedom of Information

Mr. Mel Holley, Public Interest Law Department - Legal Aid Manitoba

Mr. Murray Smith, Manitoba Teachers' Society

AATTERS UNDER DISCUSSION:

Bill No. 5 - The Freedom of Information Act; Loi sur la liberté d'accès à l'information

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MR. CHAIRMAN, C. Santos: The Committee on Statutory Regulations and Orders is being called to order.

I have here a list of persons wishing to appear before his Committee. The list reads as follows: Sidney Green, Q.C., Manitoba Progressive Party; Mr. Ben Hanuschak, Manitoba Progressive Party; Mr. David Matas, Manitoba Association for Rights and Liberties; Mr. Neil Sandell, Mr. Kelly Armstrong, Mr. Ken Gibbons, all of ACCESS Manitoba Coalition on Freedom for Information; Mr. Mel Holley, Public Interest Law - Legal Aid; Mr. Murray Smith, Manitoba Teachers' Society; and Mr. Walter Kucharczyk, Private Citizen.

We have a request from the third on the list, Mr. David Matas, who is scheduled to leave, to take a flight by 10:30, to have the permission of the Committee to be the first one to present. Is there leave by the Committee? (Agreed) Leave granted.

Mr. David Matas.

MR. A. KOVNATS: I think just out of courtesy that maybe Mr. Hanuschak should be asked if he minds Mr. Matas going ahead of him.

MR. CHAIRMAN: As a matter of courtesy, Mr. Hanuschak's permission is being requested by the committee.

MR. B. HANUSCHAK: Yes, I understand that. I have no objection, Mr. Chairman.

MR. CHAIRMAN: Mr. Matas.

MR. D. MATAS: Thank you very much. Not to alarm the committee unduly, my plane doesn't leave at 10:30. I just have to leave at 10:30 to catch a plane. — (Interjection) — No, definitely not.

We have a written brief, which has a number of detailed comments and I don't intend to go through all the details. What I wanted to do is just pick out some of the main items and talk to you about those concerns, but before I do that, I want to point out to you that everything in there is a concern of ours even if I don't mention it specifically.

I also want to point out that this brief is not my work alone and, in fact, there's a number of people from MARL who participated in its formulation; in particular, Heather Leonoff, Andrew Allentuck, Sybil Shack and a student, Lisa Caldwell.

In terms of the specific provisions, what I'd like to draw first to your attention is our concern about the provision about fees, which basically says in the bill that they should be set by regulation. We feel that it's important that there be some limit in the bill on the fees that can be charged, either a specific dollar amount or a principle that there be just reproduction costs or reasonable time, as is in the federal bill, beyond a certain amount of charge for time, beyond a certain amount of time, the principle that cost cannot be excessive.

We're worried about exorbitant costs being charged that would be an indirect deterrent even when there's no legal deterrent to information. So that's one recommendation we want to draw to your attention.

The second recommendation is we feel it's important that people be given reasons for refusal if they're denied access. They should be told whether the documents exists or not and they should be told, if it exists and it's refused, the category of refusal. Now the bill, in theory, provides for that, but it also provides that there can be refusal by lapse if there's no decision given within 30 days, or if they ask for an extension, then no decision after a longer period of time, there shall be a deemed refusal. If there's a deemed refusal, then there's no obligation, subsequently, to give the reasons for the refusal or any indication whether the record exists or not. We say even if there's a refusal by lapse, that the government should all the same make some effort to determine whether the document exists or not, tell the applicant for information whether the document exists, and if they do come to the decision, even after the lapsed time to refuse it, give the category of refusal. That's a second point I draw to your attention.

Thirdly, the bill says, and we think quite rightly, that a person should be able to object about personal information in his file that's inaccurate. We say in

addition to that that a person should be able to have inaccurate information removed from his file, and if his request for removal is denied, then he should have a right to appeal that request for removal, so that a person wouldn't be continually faced with the situation of having inaccurate information remaining on his file even with an objection on his part added to the file.

In terms of Cabinet confidences, we're concerned about the exemption about policy analysis. We feel that the whole notion of Cabinet confidences is too broad. We do not feel it appropriate that government documents simply because they come before Cabinet· are covered with a cloak of secrecy. We understand that proposals by civil servants or even individual Cabinet Ministers would not appropriately be disclosed because of the notion of government solidarity. There is analyses that are not proposals or that can be divorced or severed from the proposals that would be useful for public discussion. The federal bill is better in this respect in the sense that its exemption only applies to analyses that are presented to Cabinet before the decisions are made, but allows for these analyses to be released after the decisions are made. However, we go even beyond that and we feel it's appropriate for these analyses to be released, the canvassing of alternatives, if not the specific proposals attached to specific persons. We feel it's appropriate for these analyses to be reached even before the decisions are made, so that the public can participate fully in the discussion of what decisions the government should come to and would know the range of alternatives that are being canvassed.

Another point we draw to your attention is the protection of personal privacy. We're concerned both with greater access to information and protection of personal privacy. The bill quite rightly says that personal privacy can be protected, but if the government or the department head should decide to release information and decides that in its own wisdom that this release would not be a violation of personal privacy, the person concerned has no right to object. We feel before that sort of decision is made and the government does release the information, that in its opinion does not violate personal privacy, the person concerned should be notified, be given a chance to object and if his objection is not successful, be given a chance to appeal.

There is a concern we have about federal-provincial relations. There is an exemption about federal-provincial relations and that also parallels an exemption in the federal bill or the federal act. It's, to a certain extent, anomalous to have two jurisdictions, both of which have access to information acts, and both of which have this exemption and can allow either jurisdiction to deny information or access to information, which would be otherwise accessible.

There are some key elements of federal-provincial relations to which the public is entitled to information. For instance there's been a debate ranging for years about who is responsible for what portion of the costs in health care or post-secondary education. Each government might well feel that the release of that information would be damaging to federal-provincial relations; yet, the public has a right to know which government is paying which portion of the health costs and the post-secondary education costs.

So we feel that that exemption is too broad and shouldn't be used to deny access to information that would be otherwise accessible under the acts of both jurisdictions.

Finally, I point out to you there is an exemption for personal records filed prior to the act, and we feel that this simply should not be there. There are other exemptions like protection of personal privacy, and all of the others that we feel are sufficient to cover any interest that need to be protected. This, to our knowledge, has no parallel in the federal legislation, and we feel that the information that the government has should be accessible from the date of enactment of this bill and it should cover all the information, not just the information accumulated from the date of the enactment of the bill.

Now those are the major points I want to point out. I could just say, by way of conclusion, that we welcome the bill; we welcome the spirit of the bill. We feel there's a lot of good things in here. We're pointing out things that we feel need to be improved, but we do that in the spirit of attempting to make the bill better than it is, rather than because we are critical of the general drift of the bill. That's basically what I have to say.

MR. CHAIRMAN: Thank you, Mr. Matas. Are there any questions from the members of the committee?

Mr. Attorney-General.

HON. R. PENNER: Mr. Matas, thank you very much for a helpful submission and my thanks to MARL for a helpful brief. I simply want to assure you, as I will be assuring others, that we will be examining the submissions made very carefully, contributions made by other members of the committee, and it may well be the case that by the time we get to clause-by-clause, the help that we've received from such submissions will be taken into account and some amendments offered at the committee stage. What has been said is not falling on deaf ears.

But specifically, having said that, the last point that you made related to Section 41(1), the personal privacy and the sunrise clause. Would it be your opinion that this section might be strengthened if there's a distinction made, assuming that we have to have such a section in there, that it might be strengthened in terms of accessed principles; if a distinction is made between third party reports and other information; that is, if there is in the file, let us say, pre the proclamation date, a lot of facts and material plus, let's say, an opinion of a psychiatrist. What if this section made a distinction; at least that, a distinction between the report of the psychiatrist prepared some years back and just other factual material?

MR. D. MATAS: Mr. Chairman, our feeling is that taking a report of a psychiatrist under 48(1) which is, I assume, the section you're referring to.

HON. R. PENNER: No, I was referring to 41(1). I'm sorry 48(1), yes.

MR. D. MATAS: Our feeling is, Mr. Chairman, that something like a psychiatrist's report could be protected under 41(1) in the sense that it's information about the psychiatrist as well as about the person concerned. In a sense, it gives information about what he said and

/e feel that it would be appropriate for the psychiatrist o be notified and have an opportunity to object, and he doesn't object, then it could be released. That's he way we feel that should be handled.

We do make a suggestion for an improvement in ;ection 48 if it should be kept. We feel it's important o deal with the situation where you do talk about the ierson who made the record consenting. We feel that here has to be something to deal with the situation /here the person dies or where there is no person ivailable to consent and there has to be some provision or that.

We feel, as I said before, that there are other irovisions of the act that could simply deal with this unrise situation as you call it. I would say even ifterwards, if there's a psychiatrist's report in the file hat was filed after the coming into force of the act hat should be dealt with under the act on its general irinciples and if there's a concern arising here, and I hink perhaps there is, then it should be dealt with by /ay of principle that applies no matter what the time ather than by having a sunrise clause.

ION. R. PENNER: Thank for your reply.

I still want to deal with the access to personal nformation clauses, recognizing as we must, at least iased on the federal experience, that those kinds of ipplications will exceed other kinds of applications in ibout a ratio of 10 to 1 - because you have expressed ome concern about cost as government must be concerned about costs, and fees set must bear a elationship to costs incurred to some extent. I'm not alking about user fees in the strict sense.

You raised the question of the process pursuant to vhich an applicant given access to a personal file feels hat there is some problem with the information in the ile and wants it corrected and you've suggested that t's insufficient to allow the applicant to file in that file, is this bill does, a statement of correction. Almost nvariably such files will have matters of fact and matters of opinion. Do you see that there is a distinction there, hat you might be into an endless, intractable, insolvable argument about opinion, whereas straight natters of fact, birth date, residences, employment, employment history, all those kinds of things which can)e fairly easily objectively ascertained, might be the kind of thing which we're prepared to look at, could)e actually corrected in the file?

Let me just pursue that for the sake of clarity. Someone comes and the file says that Joe Blow was)orn in Winnipeg, June 20, 1924 - that is not my birthday and says and produces records to show that in fact ie was born in Winnipeg on June 20, 1934. Now clearly, ilmost administratively, a correction could be made; ve're not incurring great costs. But if the file says that ie's been diagnosed at some times as being a manic depressive, and he says, I'm not a manic depressive you obviously can't have a trial about that, or do you hink you could? Do you suggest we should?

MR. D. MATAS: Mr. Chairman, we are not suggesting hat the omission of fact be changed to omission of act and omission of opinion; error or omission of fact, or error or omission of opinion. That is not the scope of our suggestion. The scope of our suggestion deals vith the opportunity to remove as well as to correct.

Now there can be a legitimate debate about what is fact and what is opinion. You may have an applicant who sees a statement in the file which she says is erroneous and the government would say, well, it may be erroneous but we say that that's not a fact, that's an opinion. You may get a dispute, not so much about whether the opinion is erroneous as about whether the statement is fact or opinion.

Now, we feel that that's not intractable because there are mechanisms in place to resolve the disputes that are generated by the coming into effect of this act; those mechanisms could resolve this sort of dispute as well as any other sort of dispute. I would point out that a statement of fact that is erroneous and is left in the file can be damaging even though there's an applicant's correction on the file.

So we feel that a person who sees this erroneous information and knows it's going to be left in the file even with his objection, is going to feel victimized unless he has that sort of recourse and will have a continuing complaint. We feel it's important to give that person the opportunity to resolve that complaint.

HON. R. PENNER: I realize my question came across a little bit convoluted, and it may explain the reason why your answer comes across to me as a little bit convoluted. Are you agreeing that we can at least attempt to make a distinction between fact and opinion, in the case of fact at least, instead of just hanging a correction, remove any material found to be factually erroneous?

MR. D. MATAS: Mr. Chairman, yes, I'm agreeing to that.

HON. R. PENNER: Thank you.

MR. CHAIRMAN: Are there other questions?

The Member for Fort Garry.

MR. C. BIRT: Mr. Matas, are you suggesting that the opinion, in this case it would be a professional opinion probably, whether it be a social worker, whether it be a doctor, it might be a teacher's report, a whole series of opinions going in on the makeup of a file of a particular individual. I can appreciate some of this may be third party, but dealing with the professional opinion in its broadest sense, it may have been rendered some 20 or 30 years ago.

Is it your suggestion that you attempt to undo that and redo it, 20 or 30 years later, keeping in mind how various professional things have developed and certain opinions may have been in the infancy or perhaps incorrect in hindsight? Are you attempting to rewrite history? Is that what you're suggesting?

MR. D. MATAS: No, not attempting to rewrite history, attempting to write history accurately. To take the example the Attorney-General gave. If in a report that was done 30 years ago, the person's birthdate wrong . . .

MR. C. BIRT: I'm not dealing with factual. I'm dealing with the opinion.

MR. D. MATAS: We're not suggesting that opinion be corrected. The bill right now says "error or omission

of fact." We don't suggest a change in that, that it say "error or omission of fact or opinion." We would leave that in "restricted to fact" alone.

Our suggestion is simply that where there is an error or omission of fact, the error or omission of fact be removed from the file and not be left there with an objection from the person concerned which is what the bill provides for now.

MR. C. BIRT: In answer to what I believe the Attorney-General was asking you, you were attempting to say whether or not an opinion is, in fact, correct. If it's incorrect then I want to correct that fact which is redoing the opinion.

MR. D. MATAS: An opinion within its body may contain an error of fact and if the fact is corrected I suppose you could say the opinion is corrected. This is getting into a realm of hypothesis about how a document would look with errors of fact removed and corrected. It may well be that if the facts were changed, the opinion would have changed and that it's difficult to say but all we can say in principle is that we're not suggesting that opinions be changed. If the people who formed the opinions want to change their opinions on the basis of the correct facts, that's up to them and if they're not around to do that, that can't be done.

MR. CHAIRMAN: Are there other questions? Seeing none, the Chair wishes to thank Mr. Matas for making this presentation on behalf of the Manitoba Association of Rights and Liberties.

MR. D. MATAS: I thank the indulgence of the Committee for hearing us out of order.

MR. CHAIRMAN: The Committee can do anything by leave.

The first person may list in fact in the order they are presented. Mr. Sideny Green from the Manitoba Progressive Party.

A MEMBER: Mr. Chairman, Mr. Green regrets that he is unable to appear this morning.

MR. CHAIRMAN: His name will presumably be put at the last of the list.

Mr. Ben Hanuschak from the Manitoba Progressive Party.

MR. B. HANASCHAK: Thank you, Mr. Chairman.

By way of my opening remarks, I simply wish to state this and that is, Mr. Chairman, raise the question why is this bill needed at all. You will recall, Mr. Chairman, listening to the previous delegate, many of the comments were related not so much to freedom of information as to accuracy, that is freedom of access to information, but more to the question of accuracy of information, which is a somewhat different issue.

In respect to freedom of information, a Minister's freedom to disseminate, to disclose information, I ask the question, Mr. Chairman, is there any Minister who feels that there is something that he cannot do by way of disseminating of information, by way of responding to requests for information that he cannot do without the assistance of this law? Has any Minister ever been put in the situation where he had to say, I'm sorry, sir, I cannot answer your question; I cannot provide you the information that you wish because of the absence of a law which would allow me to do that.

Mr. Chairman, I've been in public life for many, many years. I cannot recall any one instance during my term as a Minister of the Crown, that I felt in some way restricted in providing information. So really, Mr. Chairman, the presence of this bill on the Order Paper raises the question, why the need for this bill at all? What is it that government feels that it cannot do in the absence of this legislation? The only conclusion I can come to is that there are three reasons.

One, it would appear that somebody feels that it might be dangerous simply to say to the people of Manitoba that the people of Manitoba are free to obtain the information which they seek and leaving it up to the good judgment of the Government of the Day, of the Ministers, to disclose whatever information they feel is reasonable and proper to be disclosed.

So therefore it's felt that there have to be some restrictions in place and really, with the exception of one section of the act, essentially that's what the bill deals with, is restrictions.

We have two other concerns, Mr. Chairman, and one is that the nature of this legislation will tend to politicize the process of dissemination of information and, thirdly, that now a Cabinet Minister, a government official has the protection of legislation to hide behind. If somebody complains about not having received sufficient information, adequate information, not having received information at all, the Minister or his access officer - and I'll come to that later - will be able to waive the act and say, well look, sir, we proceeded under the terms of a piece of legislation passed by the Legislative Assembly of Manitoba. You are not satisfied with the information that you received, you are not satisfied with the fact that you were denied information. The act tells you what you can do. You can go to the Ombudsman you're not satisfied with what he'll do for you, you car go to courts. So really, in that sense, the act ther becomes a shield, a form of protection for th Government of the Day.

Mr. Chairman, I have some comments which I pu down in writing, which I'd be quite willing to pass oı to you and I believe that I have sufficient copies fo every member of your committee.

Honourable Members: The Manitoba Progressiv Party wishes to congratulate the Government o Manitoba for truth in titling this piece of legislation The title is "Freedom of Information". There is n question that this bill is designed to protect freedon of information. But one must bear in mind that in th process of dissemination of government informatior other than that offered gratuitously on the initiative c government, there are two parties involved - the on seeking information and the government agency fror which information is sought.

Section 3 reads as follows: "Subject to this ac every person has, upon application, a right of acces to any record in the custody or under the control c a department, including any record which disclose information about the applicant."

If one were to read no further, it would seem thε this bill protects the right and freedom of the perso

›king government information. But if one reads the ire bill, one can only conclude, regardless of the orney-General's statement upon introducing this bill second reading, that in practice, this bill will do ıctly the opposite. It will legalize the government's ions to withhold information.

So, if there is a right to withhold information, then government is correct in calling this bill "Freedom nformation". But it must be noted that it does more allow the government to withhold information or to ke access to it more cumbersome and difficult, than oes to protect the citizen's right of access to same. 'haps to remove all doubt as to the government's ent, the title should be amended to read: overnment's Freedom to Deny and/or Obstruct cess to Information Act". This is what the Mantoba ogressive Party intends to demonstrate to this nmittee.

t is also our intention to point out two other ections to the bill, which I have mentioned earlier, Chairman, that it will politicize the process of semination of information and that it provides the ernment with a shield to hide behind.

wish to return to the first point - that is that this does not provide freedom of acess, but rather structs access to information.

Now let me review the existing practice, one which d existed quite successfully, to a greater or lesser gree, for 115 years. One seeking information would her approach the Minister's office, or if the matter re of a technical nature, one might go directly to branch of the department where the information uested is contained. If one was denied information re, one complained to the Minister. If that failed to oduce a response to the satisfaction of the person ›king information, then there's a process under The ctions Act every four years or so, at which time the zen can attempt to elect a government which would more responsive to him or her.

Now let me outline the scenario which will occur if s bill were to become law. Some of what I will einafter describe shall occur, because the law states t it shall be mandatory. Some may occur, depending the mood of the government official with whom one y be dealing.

No. 1 - Previously I could telephone or write a letter he Minister's office or to a branch of his department d obtain the information sought. Now I will be told t I must go to an "access officer" appointed under ction 56(1). Later in this brief I shall deal with further ıcerns about "access officers".

2. I go with my request to the "access officer". Will access officer provide me with information? The cer is prohibited from so doing, because my request n the form of a personal office call, telephone call letter, and Section 4 of the bill states that "Every plication shall be made in prescribed form." I am n handed a form prescribed under Section 61(a) by Lieutenant-Governor-in-Council to fill out.

3. I do that, or at least I think I have done it. But lo d behold, Section 4 goes on to state that I "shall ovide sufficient detail . . . ." Unfortunately, I have way of knowing what constitutes "sufficient detail" cause that is dependent on the level of experience he officer or employuee assigned to provide me the ormation and I don't know how experienced he or she may be, so therefore I don't know if I provided sufficient detail. So regardless of what the Attorney-General may have said that the intent of the legislation should be, an unco-operative Minister or access officer could continue requesting additional detail, claiming that that provided is insufficient, ad infinitum.

Let's assume that I have completed the prescribed form correctly and have provided sufficient detail. Now the access officer draws my attention to Section 7. It states that I shall pay a fee prior to obtaining the information in an amount set by Cabinet. The amount? Who knows. In Ottawa, you may have read a story in Saturday's Free Press, I believe - in Ottawa fees for information have reached $25,000, and if we have no assurance that the fees would not be at a deterrent level. I'm not suggesting for one moment, Mr. Chairman, that I envisage there being a flat fee for any type of information of $25,000.00. I'm not making a ridiculous suggestion of that kind, but what I am saying, Mr. Chairman, is that the level at which the fees may be set may be - because we had no assurance otherwise - they may be at a deterrent level.

Now suppose I've done all of the foregoing. The access officer has the information requested by me at his fingertips. He's got it there. In the absence of this legislation, I would have been able to obtain the information then and there. He would have said, well, here I have the information, here's a photocopy of it. But now I will be told under Section 6(1)(a) that I must be sent written notice stating whether the government agrees or refuses to provide me the information, and that the government has 30 days to inform me.

Mr. Chairman, when I was in the process of drafing this and I checked and rechecked this section, and it says that the head of a department which receives an application shall, within 30 days, send written notice - it doesn't say he'll pick up the phone and say, Ben, you can have the information - he's got to a written notice to the applicant as to whether or not the head agrees or refuses to give the applicant access to the record.

I am notified in writing, and then, of course, as I had mentioned earlier, he has 30 days time, he can sit on it for 30 days, and if I phone him a week later and say, can I have the information, he will, I suppose very politely, remind me that he has 30 days to reply to my request, because the act says so, and he'll be able to hide behind this piece of legislation and there wouldn't be a thing that one could do about it as long as this act is the law of the land.

I am notified in writing that the government agrees to provide me the information sought. You and I may know that it is found in every office of a department in the province, but under Section 61(d), which outlines the role of Cabinet, the Lieutenant-Governor-in-Council, insofar as administration of this act is concerned, the government gives itself the right to specify the manner and place where I may obtain access to such information. The government can pass a regulation and say that this type of information will only be available in one particular office. It may continue to be in every office where such information has been contained to date. On the other hand, the government may specify a particular office. It may be Winnipeg, Brandon, Churchill, on top of Mount Everest, or wherever it chooses.

Now the foregoing would be a procedure without any snags. Now some snags could develop. Consider the following: An applicant applies for information about himself related to a case coming to a head after this bill becomes law. Now for example, and I want to say at the outset, Mr. Chairman, it may be that my examples are not the best because somebody in government might dig up a section within a collective agreement or within some other legislation, which may make this a bad example. So even if the examples are not the best, I would suggest to you, Mr. Chairman, that the concern is still valid, that cases of that kind could arise.

For example, there may be a dispute regarding sick leave, holiday pay, worker's compensation, etc. To resolve the matter one may have to examine records prior to and after the enactment of the bill. Section 3, which seems to have no restrictions, would make it appear that that should be possible. But Section 48(1) may bar access to records made prior to it becoming law, because Section 48(1) says that the head of a department may refuse to give access to any record which was made prior to the coming into force of this section. It's not mandatory, I know, but he has the authority to refuse access.

Now if a case should arise on the day of proclamation of the bill or shortly thereafter, an applicant for information could receive very little or nothing. Using the examples that I've given, there may be very little; there may be no information contained in his file after the proclamation, during the period of time from the date of proclamation of the bill to the time that he requests the information. All of it was accumulated prior to the proclamation of the bill and the Minister has the right to say, sorry, under this law I cannot provide you access to that information.

But then, of course, we note that Section 48(1) is subject to Section 48(2) - there's an error there, it should not be 20 - unfortunately it offers no relief. In fact Section 48(2) is somewhat absurd. It gives an applicant right of access to information predating the legislation if the person who made the record consents to access being given. Mr. Chairman, you're talking about one and the same person. You go to the person who has the record; who is in control of the record; you go to the Minister or to his designate; and then it says if the person who made the record consents - but like I said, it could be one and same person - the Minister or one of his staff, so what hope or what chance is there of getting consent? You're asking one and the same person, the head of the department, from whom the information is sought, is the same person who was responsible for having recorded it.

Another snag, Section 12(1) states that the government can deny providing information if it cannot be reasonably severed from exempt information. Now here, Mr. Chairman, the fear is that this will open the door legally, with the blessing of law, to an inseverable system of filing information, with the protection of law, and then no information be available to the public, because the information could be compiled in such a manner that the response will have to be, sorry, it's all enmeshed with exempt information and there is no way of severing it, therefore we cannot provide you the information.

Now Section 39(2) would seem to suggest that environmental impact studies will now be open to public scrutiny, and I suppose environmentalists in the Province of Manitoba would now cheer. They would now say, well prior to the government allowing industry to establish in some part of our province, an industry of a type that may be of some concern to environmentalists, that may pollute the environment, that now we will have access to the environmental impact studies. Now, unfortunately under Section 42(2)(a), environmental tests conducted for a fee paid by a third party are exempt. Now isn't that an easy way to keep what may become unfavourable environmental impact studies under wraps? Have them paid for by third parties, perhaps by the ultimate beneficiaries, and then they're barred from public sight.

In other words, if a government feels quite secure that the environmental impact study will turn out in its favour, it will undertake it on its own. It will have some reservations so it goes to the applicant, say to the industry that wants to locate; it says, look, why don't you do the - or the industry says, well we really don't have the wherewithal to do an environmental impact study, so the government says, well okay we'll do it, but you pay us for us. Would you mind? And it will save a lot of embarrassment or it could conceivably save a lot of embarrassment in the future. And the industry that applies to locate here, pays for the environmental impact study, and then it becomes exempt from public scrutiny.

Now let us deal with cases where application for information is denied. At the present time, one would complain to the Minister. If one had a valid case and if the Minister is conscious of the importance of open government being perceived by the public vis-a-vis his chances of being re-elected, then the Minister most likely will instruct the employee to give the applicant the information. But when this bill becomes law, the Minister will be able to say the draftsmen of the act anticipated cases of refusal to provide information and, hence, there is a provision for appeal to the Ombudsman, so the Minister says, look, my hands are tied; I really can't do anything about this and anyway I don't have to under the law. The law allows you for appeal to the Ombudsman; here's the address and the telephone number of the Ombudsman, go to him.

In cases where the Minister may have appointed an access officer, the Minister has the full protect of the law against any recourse because Section 56(2) states that any action by an access officer shall be conclusively deemed to be the action of the Minister. So, he says, yes, what the access officer did is what I would have done and he did it in my name, so it's tantamount to being my action. So, the Minister's reply will have to be dictated by the law and which would have to be the access officer's actions are deemed to be my actions and if one is not satisfied, one may complain to the Ombudsman.

The complaint to the Ombudsman must be on a form prescribed under Section 15(3) of the act. Mr. Chairman, this is dangerous too. If one were to read The Ombudsman Act one would find that the Ombudsman has complete freedom and latitude in running his shop whichever way he wishes to. The government is going to prescribe the form of the complaint; the questions that you will have to answer; the blanks that you will have to fill in - and your complaint is against the government because it's the government that refused

ıe information. You're going to the Ombudsman and ou fill out a form prepared by government to complain ;gainst it, rather than a form prepared by an)mbudsman who is not responsible to government but ɔ the Legislative Assembly of Manitoba. You know, ıis is tantamount to having our courts allowing persons bout to be charged with offences to prepare the form f charge that they're going to complete to be laid gainst themselves.

The delay and obstruction in seeking information from overnment could continue. There's no time limit on ıe Ombudsman's investigation. After all that, there ıay be the time and expense of an appeal to the courts. 'here's a strange section in the act which is nothing ıore than legalizing a minimum delay of 90 days in roviding information. That is Section 47. "A head of department may refuse access to a record where the ead," and I'm quoting from the act now, "believes n reasonable grounds that the report will be published r otherwise made available to the public within 90 ays."

The Minister need not make a promise or a ommitment that such will be done. All the Minister eed do is have a belief on reasonable grounds that uch will happen. One may have a belief on reasonable rounds that the sun will rise in the west tomorrow and ıis section is just as ludicrous.

ION. R. PENNER: What reasonable grounds are ɦose?

MR. B. HANUSCHAK: Yes, I'm sure that the Flat Earth ;ociety may come up with very reasonable grounds /hich would be quite acceptable to members of the 'lat Earth Society. It offers excellent protection against ıformation sought immediately prior to or during an lection campaign.

At the outset, we had indicated we had two other oncerns. One of them is that the bill will politicize the rocess of dissemination of government information. 'he public will no longer have direct access to the arious branches of government departments in the ourse of seeking information. All information will be unnelled through the Minister responsible for this act. : sort of has overtones of a "Ministry of Public :nlightment," I believe it was called, in propaganda in ne administration.

As indicated before, the actions of the access officers /ill be deemed to be the actions of the Ministers they epresent. This gives persons who could be political ıppointees because these people are not going to be ıppointed under the provisions of The Civil Service ıct. They're going to be appointed by the Minister. This ;ives persons who could be political appointees a remendous amount of control over the public's right f access to government. This could be extremely langerous to democracy.

Our third concern is that if this bill becomes law that ı government would be able to use it as a shield against :harges of not providing open government. I mentioned hat in my opening remarks. A government would then e able to say that it is opening its records to the public o the extent required by the law passed by the .egislative Assembly. Then they will say, blame the .egislative Assembly, the opposition voted for this too; or it's not our fault that there weren't sufficient opposition members to vote this bill down; or that their opposition to the bill was not convincing enough to persuade us to withdraw the bill. Now, this having become law, the opposition members also become part of the group which make this law.

We do not believe that a government should use the Legislative Assembly in this fashion. We don't believe that the government needs to use the Legislative Assembly in this fashion to provide information to the public. As political parties come and go through the offices of government, they should be able to demonstrate their openness and accessibility without the support of legislation.

Without in any way compromising our position on this bill, Mr. Chairman, but recognizing the workings of the legislative process, we recognize the fact that this probably will become law. If the government should still be determined to proceed with this legislation, we hope that a section similar to that contained in the federal act be incorporated which would set a time limit on the life of the act. There's a time limit of three years on the federal Access To Information Act at the end of which the act has to go back to a Committee of the House of Commons for the Members of the House of Commons to review the successes or the failures of the application of the act. I would suggest that if this must become law, which I hope it won't, but if it will that at least a section of this kind be incorporated into the bill.

I have two other concerns, Mr. Chairman. We participate in the election of a Legislative Assembly. The members of the party which elects the - I was going to say majority but it's not always so and up until a week ago it was a plurality of members forms the government in the Province of Ontario. I do not regard my member of the Legislative Assembly or a Cabinet Minister as my doctor or psychiatrist. Do you know, Mr. Chairman, there's a section in the bill, Section 40: "The head of a department," meaning the Minister or it could mean one of the truth squad, one of his access officers, "may refuse to give access to any record where there are reasonable grounds to believe that disclosure of the record might result in physical or serious psychological harm to the applicant."

Mr. Chairman, I understand what probably the root of the basic intent was; the type of information that there was concern about, but that's not the way the section reads. The Minister can wave this section in my face in response to my requests for any type of information, he might say, no, I can't disclose this information to you because, in my opinion, this may result in psychological harm to you. Well, I neither wish Mr. Pawley, the Premier of Manitoba, nor the Attorney-General, nor any member of the Assembly from either side of the House to be my psychiatrist, to tell me what may cause me psychological harm or not. There are many things that I read which affect me psychologically; I read the newspaper and I read of some of the things that go on in government, in the House, and they affect me psychologically, but I'll be the judge of that whether I will continue reading it or not. I don't want a Minister to tell me that you are going to be denied that information because, in my opinion, it's going to cause you psychological harm.

My other concern, Mr. Chairman, is the government says we're going to pass a law and we're going to tell

the whole world that the 1 million people of Manitoba now have freedom of access to information. Mr. Chairman, as I said at the outset, if there was freedom of access to information, then why do we need a law? The fact of the matter is, Mr. Chairman, that somebody in government, perhaps the First Minister, perhaps the Attorney-General had discovered that there is not freedom of access to information in his government.

I came across one example, Mr. Chairman, and I will give you copies of that example - if I may just take the time of the committee. On January 29th, very recently, shortly before the first reading of this bill which was some time in March, Mr. Murdoch MacKay from the firm of Christie, MacKay and Company, wrote to the Honourable Pete Adam, at that time Minister of Government Services. His request was very simple. He said, "We have been asked by a client to obtain the criteria for payments under the disaster assistance which were announced by your government some time ago." The flood disaster assistance that is. A very, very simple request.

The letter goes on to say that "Our client advises that the attendances at the board produce no criteria and our client has been advised that there are no regulations or policies which can be given to citizens." Then he is a bit more specific in his request; he wants to know how the limit of $30,000 is arrived at; he wants to know whether it can be one item or it has to be more than one; if the cap is 30,000, we're interested in knowing whether any number of items could get up to that amount.

Anyway, it would appear that Mr. MacKay had provided sufficient detail and if even if he hadn't, I suggest to you, Mr. Chairman, that the first paragraph would suffice. That was on January 29th.

Quite promptly on February 8th, Mr. MacKay receives a response from this government: "Your letter dated January 29th addressed to the Honourable Pete Adam has been referred to us by his successor," this is from the Manitoba Diaster Assistance Board, ". . . his successor, the Honourable John Plohman for reply." A reply from the Chairman, Mr. A. St. Hilaire is as follows: "It is not the policy of the board to disclose the type of information you are seeking to anyone outside this office."

That, Mr. Chairman, may have been the reason that prompted the government to bring in this legislation. This may be one example of many. The request was quite simple.

The guidelines and the criteria were subsequently provided with a letter of apology; there was a misunderstanding; we didn't know the exact nature of the flood damage that your client suffered, etc. The fact of the matter is that if Mr. MacKay did not have a client who had suffered flood damage? What if somebody off the street were to go down to the Disaster Board and say, I want a copy of the guidelines - somebody might be interested in buying a house in a part of Winnipeg that's prone to flooding. He has no claim to submit, but he wants to know what the guidelines are, that if he were to buy a house in an area that's prone to flooding, what type of relief can he reasonably expect to receive from government, if the flooding were to occur today because that may give him some indication of what he may be able to expect in the future?

Mr. Chairman, it's because there has been evidence of refusal to disclose information that may have prompted the government to bring in this bill but in the process of doing so, as I've said, with the exception of one section the rest of the act is really obstructions and roadblocks to the obtaining of information.

In closing, Mr. Chairman, I repeat that freedom of information, freedom to provide information was always there. This act does not provide the people of Manitoba with anything more than they had previously. As I've said, if a Minister refuses to disclose information, The Elections Act has a way of dealing with governments of that kind.

Thank you, Mr. Chairman.

MR. CHAIRMAN: Mr. Hanuschak is now ready for questions from members of the committee.

Mr. Attorney-General.

HON. R. PENNER: Subtantially, Mr. Hanuschak, you said, leave things the way they are.

MR. B. HANUSCHAK: Yes.

HON. R. PENNER: You've just provided us with an example - I presume more might be found - where a Minister or someone purporting to speak in the name of a Minister refused information. It seems to me that the particular example that you've provided argues the other case as the law was on February 8, 1985. What would have been the recourse of the individual represented by Mr. MacKay? The good will of the Minister?

MR. B. HANUSCHAK: Yes, Mr. Chairman, I would think that the First Minister would have the intestinal fortitude to call in the errant Minister and do what must be done in his office to him. In other words, what I'm saying is if a government is committed to the principle of open government and if a First Minister sees evidence of some Minister running his department in a manner that's something other than, less than open government, then ream him out. Surely the Premier doesn't need a law to tell his Minister, look, this information should be available to the public; give it to Mr. MacKay; give it to John Doe; give it to Joe Blow. He doesn't need a law.

HON. R. PENNER: Instead of the rule of law, that is, a written statute specifying what shall be given and what shall happen if it is refused including resort to the courts, you would leave it up to the Government of the Day and the particular Minister or the particular First Minister, the good will of that Minister - the rule of persons, not the rule of law?

MR. B. HANUSCHAK: Mr. Chairman, when I hear politicians make commitments, promises during election campaigns, and I have made them and I've always felt committed to the promises that I made, and I would like to think that other politicians are equally committed to the promises that they make. If a government makes a commitment on the hustings to open government, I would like to believe that it means what it says, and it will be open government and just that, and it doesn't

need a law to be open government. If it does not live up to its commitment, then, as I said, there's an Elections Act and we know what the electorate does to governments that do not live up to their commitments.

HON. R. PENNER: Politicians say they believe in open government, therefore there is open governments. You have great faith, Mr. Hanuschak.

MR. B. HANUSCHAK: I do not say that because they say they are open government that there is open government; they must practise it and demonstrate that there is open government.

HON. R. PENNER: In criticizing this bill rather fulsomely, Mr. Hanuschak, you spent some of the time, a great deal of the time sketching out various scenarios about how evil-intentioned Ministers are going to frustrate this bill. Now there seems to be a contradiction, does there not? You have this scenario of all of these evil-intentioned Ministers, who spent all of their time putting out a bill how to provide information; and we're now going to spend the next couple of years finding out, in fact, how to frustrate the bill; and yet you tell us that these same Ministers are very fine persons who believe in open government and are going to provide information. Don't you see a contradiction there?

MR. B. HANUSCHAK: There's no contradiction at all. What I am saying is that now we have a piece of legislation which legalizes the process of being evil intentioned. A Minister can now be evil-intentioned under the law, and he has the protection of The Freedom of Information Act. The application for information can become longer, more cumbersome.

HON. R. PENNER: So what you're saying is that no law can prevent there being evil-intentioned Ministers, but you would prefer to have evil-intentioned Ministers not subject to the law, rather than subject to the law. Is that what you're saying?

MR. B. HANUSCHAK: No, they are subject to a law. Every member of the Legislative Assembly is subject to a law, and the law has to come into effect every five years. There is a law.

HON. R. PENNER: You were complaining, Mr. Hanuschak, about a 30-day delay and a 90-day delay. You are now prepared to contemplate a five-year delay.

MR. B. HANUSCHAK: The public has a way of making its feelings to governments known very rapidly and very quickly, and an astute government hopefully would detect that and respond accordingly within a period of shorter than 30 days, as on one occasion one of your Ministers did, within a matter of hours, responded to a complaint and whipped out a directive to all the schools or all the librarians in Manitoba.

HON. R. PENNER: It's true that this particular government not only preaches open government, it practises it, but not every government might be so benign. Are you familiar, Mr. Hanuschak, with Section 16 of The Legislative Library Act?

MR. B. HANUSCHAK: Section 16 of The Legislative Library Act?

HON. R. PENNER: This is not a trick question. I don't suppose that you necessarily would be. Perhaps . . .

MR. B. HANUSCHAK: I am familiar with The Legislative Library Act. I have read it. At the moment the contents of Section 16 do not come to mind.

HON. R. PENNER: I'll read you Section 16, and this is the way things are which I think you're defending, and I know you're defending.

Section 16: "Where the public interest so requires, the Lieutenant-Governor-in-Council, Cabinet, may direct that any public record in a department or agency, or any public record transferred to the branch, shall not be made available for public inspection for such a period of time as the Lieutenant-Governor-in-Council may designate." That is the law now, unfettered discretion in the hands of government to say, we're putting the lid on it. You want that to maintain?

MR. B. HANUSCHAK: I'm not aware of any person in the Province of Manitoba having suffered as a result of that section, for whatever number of years that that section has been in existence, and I would suspect that section has been in existence since Day One of the Legislative Assembly.

HON. R. PENNER: I have no further questions.

MR. CHAIRMAN: There are no further questions from the Attorney-General. Are there other questions from the members of the committee?

Hearing none, the Chair wishes to thank Mr. Hanuschak for making this presentation.

MR. B. HANUSCHAK: Thank you, Mr. Chairman.

MR. CHAIRMAN: For the convenience of the next presenter, we would request the press, or whoever owns that microphone on the podium, to put it on the side so that the paper can be placed on it by the presenter.

The next person to make presentation, and there are three of them, I don't know how they will do it together: Mr. Neil Sandell, Kelly Armstrong and Mr. Ken Gibbons, of ACCESS, Manitoba Coalition for Freedom of Information.

MR. N. SANDELL: These media types always create disruptions here. Ms. Kelly Armstrong has made a miraculous transformation and is Mr. Kelly Armstrong, the editor of the Sun. He may join me up here.

First, let me introduce myself. My name is Neil Sandell. I represent ACCESS - the Manitoba Coalition for Freedom of Information. This is a broadly based media and academic group. We represent the editorial employees of the Free Press, the Winnipeg Sun, the Manitoba Communty Newspapers Association, so basically, rural newspapers, television producers, radio producers who work for CBC, the Canadian Wire Service Guild, which is basically Canadian Press reporters, reporters who work for CBC, ACTRA, the Institute for Urban Studies and the Centre for Investigative Journalism in Ottawa.

In preparing our brief, we decided to go to some experts to get their opinions and some of what we have pulled together is based on the opinions like John McCamus. Mr. McCamus is the Dean of Osgoode Hall Law School and in 1979 and'80 was the chief researcher for the Ontario Government's initiative into freedom of information. They had a commission of inquiry. We spoke to Peter Calamai, who is a Southam news correspondent in Ottawa. He himself has filed over 100 requests under the federal act, so is a very strong user of the federal act and knows the failings of that act and the strengths of this act.

We spoke to Tom Riley, who for six years was the Executive Secretary of the International Freedom of Information Institute in London, England. He's now a private consultant, and we knocked our own heads together as well.

Basically, on balance, we think this is a pretty good act and a wonderful initiative. There's a lot to commend it. Anyone who know the history of the fight for freedom of information in Canada knows that the idea of judicial review has been very hard fought and is a crucial element to this act and we endorse the first tier of appeal, which is the Ombudsman. It's very important that that first tier of appeal be somebody who is not politically appointed and the Ombudsman or, in the case of the Federal Government, the Access Commissioner is appointed for a fixed term of office.

We endorse the idea of weighing the public interest for disclosure against private interest. That's a very important legal test. This act is very broad in the sense that it allows access, not only to government departments, but also to commissions, to boards, to Crown corporations and there are a number of limitations on exemptions which we think strengthen the act.

What we've done is address ourselves to ways that we think the act can be strengthened and we've made detailed suggestions, and I hope you'll take the time to read through our brief when you go clause-by-clause.

I'd like to address some of our major concerns and I'd like to speak to the question of user fees, and the question of the response time in the act. We have a few comments on the issue of personal records which Mr. Matas spent time speaking about, the role of the Ombudsman and some general comments on the way this act can work better.

ACCESS rejects the idea of user fees for preparing and copying records and we do this for some very good reasons. It's the experience in the federal act that user fees are coming in very high. Typically, they would cost between $500 and $2,000 to fulfill a request for information. When you apply for information, you're really applying for a pig in a poke. You don't know what you are getting until you get these papers and, in fact, after you've paid your money up front, an exemption may be slapped on this application, so you may get nothing.

In fact, what is happening is that the people who are using the act are people who can afford to use the act; primarily, business clients, large media concerns, opposition parties. What's so important about this act is that it gives access to information to people who need it to make informed choices and those people can be anyone from public interest groups, to academics, to small media, to students, to the disadvantaged.

I can't imagine the Social Planning Council of Winnipeg or the Manitoba Anti Poverty Organization being able to afford even a $300 request. A colleague of mine, Cecil Rosner, made a request for something as simple as a report on an explosion. He was asked for $500.00. That's a pretty hefty price to pay, so fees pose an artificial and unnecessary deterrent to providing access to people.

They can also provide a wonderful stalling tactic to politicians or civil servants who don't want to cough up the information and that is being used in certain cases in Ottawa. You might wonder, why impose user fees? One argument is that you need to get some of the money back because it's quite expensive to provide all of this information. In fact, any discussion with people within the Federal Civil Service or discussions with provincial civil servants who are involved in gathering records bears out that the federal act reclaims very little of the actual costs of administering the act. In some cases, because in the federal act you pay for the research time, you pay for a disorganized department and some are very disorganized in their filing systems.

The question arises, how do you weed out frivolous requests? There's a fear that there will be blanket requests for information that will take hours and hours to fulfill and this will be nuisance. We recognize that there may be individuals who will make those kinds of requests. What we say is, first of all, the process of applying for the information is a deterrent. The very fact that you have to sift through pages and pages of material before you find exactly what you want is a deterrent, so it's a very labour intensive process.

Furthermore, I think you have to make a judgment here when you decide whether you need a deterrent fee. The judgment is it in the public interests to deter a few from making frivolous requests and at the same time knock out whole classes of people because they can't afford the fees. You may be denying the frivolous requests, but you are also denying hundreds of other requests that are legitimate simply because the fee is too high.

I would say, at the very least, if this committee decides that you need some sort of fee, that a token entrance fee be put in the legislation. If you leave the question of fees simply to the regulations, then you're leaving the administration of this act open to all kinds of abuse and I've spoken to some of those kinds of abuse.

It's a serious issue. We don't charge people to come into public libraries. The reason we don't is because we think that access to knowledge in our society is a fundamental democratic right. I would say access to what government is doing is a fundamental democratic right. It allows us to make informed decisions and this government has recognized that in introducing this act.

The question of response times. The benchmark in this bill is 30 days for responding to a request for following up on for asking for an extension and that seems to follow the federal act which is also 30 days. It's our opinion that once the public service gets its act together so to speak and knows how to find things and is through the period of adjustment, that time period can be compressed to 20 days and we strongly suggest a benchmark of 20 days after a phase-in period. The Manitoba bureaucracy is by no means as complicated as the federal bureaucracy. Furthermore, the federal experience is that you need this time pressure to get requests filled.

We have a number of suggestions about exemptions. An important one is that background policy papers should be available at least once the decision has been made. That's the case in the federal act.

Sections 44 and 45 give what we think is quite a sweeping exemption to accessing materials that have to do with relations to local authorities, municipal governments, school divisions. These local authorities are all creatures of the Provincial Government. They survive to a large part on grants from the Provincial Government and we think that if you're going to provide access to information, these groups should be included. After all, you've included Crown corporations, commissions, boards - why not local authorities?

One of the strengths of the federal bill is the mandatory three-year review. This allows a fine tuning of the act. We strongly suggest that this be built into this act.

We have some concerns about the provisions that have to do with personal records and protection of personal data. By and large, we feel that this is a flawed area of the act. There is inadequate provision for protecting information from access by third parties. There's no provision for correcting records and then there's this so-called sunrise clause. Our basic feeling about this is that these inadequacies should be shored up in committee. Rather than sidetracking the entire bill, shore these up, put a band-aid solution on them and, at an earliest possible date, introduce a very well-thought-out, well-drafted privacy act. In the federal experience, the two bills were presented as companion bills; the Privacy Act and the Access To Information Act.

We don't want to see this basically sound bill get hung up on these privacy provisions, so do what you can - I think people here have already identified the problems and the committee members are aware of them - and introduce an additional bill, a companion bill later.

The issue of the Ombudsman. We like the idea of having an objective third party as a first line of appeal. We see some weaknesses in appointing an Ombudsman as opposed to an Access Commissioner. In this bill the Ombudsman can initiate complaints but can't take them to court. Now the Federal Access Commissioner can. The Ombudsman can't be called to testify at a judicial hearing.

Section 57 has this sweeping no mandamus clause where the Ombudsman is protected from any kind of court action. Now we see the need for the Ombudsman to be protected from civil and criminal proceedings, but what if the Ombudsman isn't doing his job? How does the applicant get the Ombudsman to do his job through court action?

Now you may say, this isn't going to happen but in fact in the federal experience, just recently, CBC Marketplace took the Federal Access Commissioner to court for stalling and not acting on a complaint, and although CBC lost that case, the principle is established. The federal act is much narrower and I think that there should be the opportunity for applicants to go to court if the Ombudsman isn't doing his job.

I think it's useful to look to the experience of other jurisdictions that have used freedom of information bills. If we take a look at The Quebec Act which is regarded as the strongest act in Canada, I would say, they don't have any fees. The world hasn't fallen in. If we take a look at the response time, the United States Freedom of Information Act for years has had a 10 day response time.

I think it's an auspicious occasion to introduce this act. We endorse it. We think that basically it's sound. We would like to see it improved.

MR. CHAIRMAN: Thank you, Mr. Sandell.

Are there some members of the committee who want to ask questions to Mr. Sandell?

The Member for St. Norbert.

MR. G. MERCIER: Thank you, Mr. Chairman.

In your investigation of experience in other jurisdictions where there have been appeals to the courts, have you any information with respect to the costs incurred by the applicants in appealing these decisions to the courts?

MR. N. SANDELL: I don't.

MR. G. MERCIER: Do you have any - I guess it's difficult, you don't have any basis to do it - but I have a concern that the costs of appeal to the courts may be very substantial and may be restrictive in allowing people to proceed with that type of action.

MR. N. SANDELL: I would say a few things to that. I think it's always a concern in going to court that you have those costs, not simply in this act. This act does allow a waiver by the court in the case of an argument that establishes a principle, so there is that out.

I would say that even though it may cost, this is not any justification for not having a provision for judicial recourse. This is the price we have to pay, basically.

MR. G. MERCIER: Other people who have studied this type of legislation have suggested a further interim step where you might have a commission composed of a representative of the government, another one appointed by the opposition, who together would select a chairman, and that they, prior to getting to a court decision, could make a ruling. That might be a less expensive decision making process. Have you looked at or had any discussion on that?

MR. N. SANDELL: Are you suggesting a third tier in the middle? I've heard that suggestion. My opinion is that there will be occasions when the government will force the applicant to go to court, will force the applicant to jump through all the hoops to get information that they know they have to release, and putting a third tier will only delay that by who knows how many days. So I have that concern about having a third tier.

Not only that, I have a concern about having a commission that has appointments that have the consent of political parties, because that recognizes that the appeal procedure should be connected with political parties. I don't think it should.

MR. G. MERCIER: In the act, "applicant" is simply defined as a person who applies for access. There appear to be no limitations on the qualifications of an applicant. It could be a person outside Manitoba,

outside the country. Do you have any concerns about that?

MR. N. SANDELL: I don't. There has been a policy of reciprocity in the federal act, the United States act, and where you restrict access to citizenship, all that happens is you give rise to businesses that will file for people. So I don't think it achieves much.

MR. G. MERCIER: One other technical question, Mr. Chairman. Section 2(2)(c) it allows in the case of a record produced for visual or oral reception, permits the applicant to view or hear the record. It would seem to me that it would be important to the applicant to need a copy of that record.

MR. N. SANDELL: I would think so. It's my impression that where the bill says "provide a copy" it not only means paper copies, but whatever form the data come in. I would hope that's the case.

MR. G. MERCIER: It doesn't seem to say that, although I stand to be corrected. It simply says ". . . the head of the department shall be presumed to be given access to the record under this act where the head in the case of a record produced for visual or aural reception, permits the applicant to view or hear the record." Perhaps we can give some consideration to amending that so that a record can be obtained by the applicant.

MR. N. SANDELL: Yes, if it turns out to be a loophole, I think it's important to plug it. By the same token, as we were studying the act, there's a provision early on, I believe it's - I forget what it's titled. We've mentioned it in our brief, that the applicant can either inspect the information or get a copy of it. Well, at whose discretion? It's of no use to me as an applicant to be able to inspect a sheaf of documents if I can't - so by changing an "or" to an "and" we might be able to plug that loophole, but I think it's a good point. Page 22, we addressed that particular question.

HON. R. PENNER: Mr. Chairperson, I should first of all ask you for a ruling since the brief has been presented on behalf of ACTRA, among others, and I'm a member of ACTRA. Is that a conflict of interest?

MR. N. SANDELL: You'll receive your fee later.

MR. CHAIRMAN: The Attorney-General is wearing two hats.

HON. R. PENNER: Okay, well I'll take off one of them and I'm now just wearing the Attorney-General's hat.

First of all, I would like to thank very much ACCESS for what is clearly, and I think all members of the committee would recognize, a very, very well thought out and helpful submission and I would like to assure Mr. Sandell and the committee, ACCESS that many - perhaps not all - of the suggestions made will be given consideration and may well result in some amendments being brought forward at the committee stage. That's not a promise so much as a hope.

I would like to just address a couple of questions and the fact that I'm not questioning other things should not be taken as evidence that I haven't read and studied and thought about this submission, I have. Mr. Sandell, you say, and I accept of course, that the question of fees is a serious issue. My understanding with respect to federal information is that the average cost of an application or the average fee charged an applicant under the federal system is $11.35, measured against a cost and you did advert to a big discrepancy between cost and fees of about $1,700.00. That is the Federal Treasury Board people estimate that about $1,700 may be expended on each application in fulfilling the requirements. That too, no doubt, is an average.

Still, as part of the preamble, the information is that while the average free may be very low, there are fees of the kind that you've indicated of $500, in some instances, some reported instances, here and there, of more, that these are almost entirely related to what might be called professional applicants - and I'm not using that pejoratively - members of the media doing an investigative job, which it is their job to do and going through a whole number of records; that these are the applications which build up the heavy user fees. Would you not see, as a matter of public policy, the desirability of distinguishing in some way, because you're proposing no cost whatsoever, no fee whatsoever, between the ordinary person - very much in the news these days, the ordinary person - and the professional. You see, you use the library analogy and the library analogy doesn't quite . . . breaks down in this instance everybody who goes to the library. Virtually everybody who goes to the library goes as an individual to borrow some books at about the same level of cost to the library system.

But here you seem to be suggesting that the system subsidize the media, perhaps to the extent of $20,000-$25,000 in doing its job.

MR. N. SANDELL: First, to address your major concern, and then I'd like to address the statistics. If you draw classes of people who can access information and apply fees differently to them, how will you distinguish between Neil Sandell, private citizen applying for a specific kind of information and Neil Sandell as a member of a news organization or a member of a company or whoever. I think it's dangerous to draw those distinctions because it opens the bill up to a kind of discrimination, a very obvious discrimination.

I would say in analyzing those fees, what the Government of Canada says about fees, I would guess that those statistics don't account for applications that weren't filled because the fee request was too high. They do account for the deductible feature that some departments have. You're nodding your head; you know what I mean. For the other members, some departments have a kind of first $25 worth of copying is free; $25.01 you get your bill.

HON. R. PENNER: For one cent or for $25.01?

MR. N. SANDELL: For $25.01, so I don't think the statistics reflect accurately who's using the act. Furthermore, there's no way of knowing what people have just simply not tried to use the act because they know they're going to get a big fee bill.

Assuming that the committee endorses a three-year review, it would be obviously a point that a committee

three years down the road would want to study. Has no fees had a significant effect and who is applying and who isn't applying? To reiterate, I think it's a dangerous policy to start saying certain classes of citizen have to pay and certain don't.

MR. CHAIRMAN: Mr. Armstrong.

MR. K. ARMSTRONG: When the members of the coalition waded into this, this entire area of fees, it was probably the longest debate we had and the stickiest portion of the bill to deal with. I sympathize with the Attorney-General's thoughts that I don't believe that the Government of Manitoba should subsidize any news organization to the tune of however many dollars at any time.

How do you then remove that from an individual whose means do not allow him to use the apparatus? Quite literally, we could not come up with a workable solution. Do you apply means tests? Neil has expressed the objections to identifying classes of users of the legislation. If the committee in its wisdom can somehow come up with something that accomplishes that, certainly I don't think you would hurt any media feelings if we paid our way and the people who couldn't still had access to the information.

One of our major concerns is that the kinds of requests that we can see coming forward under this act are, in fact, by and large from people whose means might not allow them to do it. So, in effect, they will and still come to the media, in an advocacy position, can you find out the information for me? Our position on that was if we make it simple enough for every day people to use this piece of legislation, there is no need for the media to put itself in that advocacy role to apply for information on behalf of individuals who can, in fact, use the legislation if it's accessible.

I wish we had sort of more profound and wonderful answers on that question but it is a sticky sort of situation. I think I could probably speak for every media outlet, we don't mind paying our way. We just can't see how you can separate that from the people who can't pay their way.

HON. R. PENNER: Just a supplementary question to Mr. Sandell, who proposed the three-year review period and I believe that was also contained in the brief from the Progressive Party. Assuming that we do that, and certainly it will be considered, was it your suggestion that the three-year test period be the one with fees or the one with no fees?

MR. N. SANDELL: I bet you know the answer to that. We suggest try it without fees first.

HON. R. PENNER: Okay, I just wanted to be sure of that.

MR. N. SANDELL: Mr. Chairman, may I raise one other point that I didn't in my presentation? I had a long discussion with Peter Calamai, who's used the act, The Federal Act, and he stressed something called "finding aids." What a finding aid is is something that allows the user to use the act efficiently. We've got an access guide written into the act and that's very important.

What users of The Federal Act are suggesting is if we could only see the government's internal filing index - each department has a filing index - then we'd be able to zero in on exactly what we want. We'd save ourselves time. We'd save the access officer time, no confidentiality would be breached by seeing what kind of index the government is keeping. So I'd really strongly urge that the idea of internal department indexes be added to the access guides, and certainly made available.

MR. CHAIRMAN: Are there other questions from other members of the committee? Hearing none, the Chair wishes to thank Mr. Sandell and his group, ACCESS.

The next person on our list of those who are wishing to make presentation is Mr. Mel Holley, representing Public Interest Law - Legal Aid.

Mr. Holley.

MR. M. HOLLEY: Thank you, Mr. Chairman. Mr. Chairman, I have copies of the brief for the members of the Committee.

MR. CHAIRMAN: Thank you.

MR. M. HOLLEY: My written brief begins, Sir, with a brief description of the Public Interest Law Department and our reasons for our appearance today. Perhaps if I can skip over that, you can read it at your leisure.

Beginning on Page 3, our Comments and Recommendations, our first item is a Statement of Principle. I believe the ACCESS brief also called for a statement of principle. We would like to see one and we do endorse the one containing The Federal Act.

In the absence of a statement of principle though, we have gone on to analyze certain sections and definitions which we think will be of importance in interpreting the act, not to read them, but generally to say that our impression was that they were very good.

Specifically on record. The definition of record includes things such as manuals, handbooks and guidelines used by department officials. This is something that in our business we've always considered as internal law, the thing that you can never get at, the policies that are being used to interpret things and we think it is very good that they are included in the access.

Again with the definition of department including Crown agency, Crown corporation, board, etc., more and more, Sir, we think that those organizations are the things that have a direct and immediate effect on our life, rather than some government department off on the hill.

The final thing which I think is extremely important is severability. Having gone through the act in detail, section-by-section, there are so many areas with exemptions and so many sort of questions we have about some of the limitations on the exemptions. We think that severability is an extremely important thing. We think that the way the severability provision is written, it is very clear and the intent from it should be very clear, and I'll have one further comment on severability later on, but just to say that for us it was a good thing to see it there and we think that it was extremely necessary.

On Page 5 of my written brief, we have some comments on the application procedures. There's some notice forms which we think it would be useful to have in standard form all across departments. There are other sections requiring notices of reports to be sent to applicants. We would suggest some means of ensuring that they arrive, such as registered mail, etc.

To touch on the question of user fees, I'll attempt to be brief. There's much been said about it. Our position is that any type of user fee will certainly have an effect upon low-income Manitobans. Rather than assess it in detail, we'll simply say it, and then we'll say that in consideration of the delaying tactics that were mentioned previously, we don't think that user fees of the type covering the search and research time and things like that, are something that an applicant would have control over, and because of that we would simply urge you not to invoke those kinds of fees, but simply to have fees applicable to the actual cost of reproduction.

One final point on the application procedures. The failure to respond, we've called them Sections 8 and 11(4). We would submit that there really is no reason why a department head should not respond to each and every application. Section 6(2) I believe it is specifically spells out that department heads shall advise an applicant either that their record does not exist or that it does exist and specifically what provision of the act denies access. We think that should apply in all cases.

Moving on to Page 6 of my written brief. Severability, this is the only further comment we would like to make on that. As I say, we think it is a critical section of the act and this may be an overabundance of caution, but we would simply add an amendment so that department heads, when they're providing information severed from a record, be required to advise applicants of the specific provisions of the act used to withhold other information from the same record. Now it may be that was what envisaged in the act and it may be that that is the interpretation that will be placed upon it. Out of an abundance of caution, we would recommend that it be built in.

The next general section of comment relate to the Ombudsman. First a minor point which we picked up from the federal act as well, which is that the Ombudsman has the authority to accept and investigate complaints filed by a third party on behalf of an applicant. Generally speaking, one of the main problems, as we see it with the Ombudsman's procedure, is the lack of specific time or guideline to be placed upon the Ombudsman for responding and for conducting the investigation.

We note, using the Canadian Bar Association model bill, they have an information commissioner and - and the bill says that the information commissioner shall respond with the results of the investigation within 30 days. We're not suggesting that 30 days is appropriate in this case in this province, but there should be some time limits on the response by the Ombudsman. We know from practical experience that the Ombudsman's Office is tremendously overworked, tremendously understaffed and often takes a long time to respond to enquiries and complaints.

With respect to the provisions of a complaint initiated by the Ombudsman, we thought about this and, frankly, we think that complaints initiated by the Ombudsman will tend to be very important complaints. We suspected that the Ombudsman's complaints will deal with some principle of importance or a question of interpretation and, therefore, judicial review would be appropriate specifically for Ombudsman's complaints rather than just the opposite of having them ruled out.

Again, perhaps a minor point. The Ombudsman is prevented from giving evidence in court and no statement made in the course of an Ombudsman's investigation can be used in court. We think that the Ombudsman's report and recommendations should be admissible to court. Depending on how Section 23 is read, that may or may not be the case and we think that should be clarified so that the Ombudsman's report and recommendations are admissible in court.

One other point we think requires comment - the informal resolution section for the Ombudsman. It's our view, Mr. Chairman, that attempts at informal resolution should only be made with the consent of the applicant. There should be specific time limits on the attempt at the informal resolution and, automatically if the informal resolution fails then a formal investigation ought to be resumed or commenced.

A final point of importance with respect to the appeal process and the Ombudsman. We note that in another piece of legislation in New Brunswick, an applicant has the right to take his complaint to the Ombudsman or to the Court of Queen's Bench. In view of the potential problems with the Ombudsman's procedure, we would ask that you consider adopting some kind of similar section in this act.

Personal Records. There's been much said about this as well. Simply, our comments are quite brief, in fact. An individual can place on the record a written objection respecting error or omission of fact. We would submit that it's more appropriate to provide a complaint or appeal mechanism which would result in corrections of error or omissions of fact. The Nova Scotia Freedom of Information Act allows a person to seek injunctive relief to correct such misinformation.

There was a larger debate with respect to opinion information. Our suggestion with respect to that would be to give the applicant a right to place on the record an explanation or an interpretation of such opinion information. For the purposes of expediency we would point you to the wording, I believe it's in Section 12(2 which simply says that place upon the record such additional information as he believes is necessary to explain or interpret the record. I could go into that with some examples but I don't think it's necessary.

Like the people who have spoken before us, sir, we have some problem with the business about the psychological harm in Section 49. We believe that this section has potential for abuse. The section actually doesn't say personal information. It says "any record" which is a problem for us. We don't think it is necessarily appropriate to have department heads or the Ombudsman making assessments of psychological harm and then determining what degree of psychological harm would warrant refusal of access.

I believe it's referred as the sunrise clause, Section 48. We really question the need for that. We don't think an applicant should be denied information about himself simply because the record came into existence before the legislation came into existence. We do not thin

hat the provision in Section 48(2) would cover this. Ve think that in many cases it would not be possible, ;ay, if the third party is dead; in some cases it would ıot be appropriate.

Two comments with respect to the courts. Perhaps 'll deal with Section 36 first which is the "no further ıppeal." The act says that there's no appeal beyond he Queen's Bench. We don't think that justice will ıecessarily be done or be seen to be done unless the ull range of appeal is provided for this legislation. In ıddition, we believe that the views of the Court of Appeal vould help introduce consistency into this relatively ıew area of law in the province.

If I can go back to Section 35(2), again this relates o the courts. I believe this is a very important section ınd I appreciate that it was difficult to write and I believe appreciate why it was there, but we still have a lot ɔf problem with it. Basically, sir, it is the section which ;ays that when access is a matter of discretion for department heads, the court does not have the right :o decide whether or not the discretion was exercised ɔroperly but merely whether or not the information falls ·nto an exempted category. We really think that there are only two ways around this. One is that you give specific criteria with respect to each kind of information to each department head, and you set up a set of rules on which discretion is to be exercised or you give someone the power of review.

Now obviously, one of the reasons this was reasons this was written is because it would be clearly impractical to follow the first suggestion. We think, therefore, that you should allow the courts to review the manner in which the discretion was exercised. We would submit that this shouldn't cause a problem. We hardly think that the courts will open the floodgates, for want of a better expression, and that you can count upon the courts to behave reasonably responsibly in this matter while at the same time ensuring people that discretionary decisions made by bureaucrats will be subject to some kind of outside review.

Cabinet confidences and policy opinions; with respect to time limits we note a couple of precedents and simply suggest that you consider a shorter period of time, perhaps between 10 and 20 years.

A key problem and an area in which we spent quite a bit of time was policy opinions and advice and recommendations. We ran through various scenarios where we felt this could be a problem and the conclusion we came to is that the exemptions seem reasonable, the limitations on the exemptions are good, but they don't necessarily go far enough. There may be cases when the limitations on the exemption are not enough and, to put it simply, what we'd like to see is that there could be some broad limitation so that if, in fact, what we are talking about is background fact or information of any kind, background fact of any kind, that it be made available whether or not it is covered in any one of these specific limitations on the exemptions.

Some comments on third-party privacy. We'd recommend the deletion of clauses (i) and (ii) for Section 41(2)(c). We would also recommend that 41(3)(c) be amended so that the right of access is available immediately after the third party is deceased rather than the current 10 year provision.

With respect to Section 41(4)(b) which is the consent of the third party with respect to the release of personal information. That section appears to transfer the onus from a department head to the third party in deciding whether or not the information shall be released. We thought about this and we understand that there are some times when this is appropriate. An example which was given to us might be that when an applicant has convinced an uninformed and gullible third party to give consent. That's good. If it's in there to prevent things like that and it's a good idea, we would submit that there are or might be occasions when that is not the case and that section could be clarified.

A small point, access for research purposes. The head has to get a written undertaking that the information will not be disclosed. We thought there should be some clear duty in that to maintain confidentiality and perhaps some provision for a penalty if it is released.

Commercial information, a release of information belonging to a third party. There are some very broad classes of exemption there. We do not think that some of the information contained in these classes of exemption would necessarily have to be excluded. We think, in fact, there might be cases when it would be in the public interest to release information which is included specifically in the classes of exemption. The only effective limitation on that, in fact, does apply to the public interest section.

The public interest section, basically, 42(4), represents the limitations on Section 41. We don't think that the limitations again are broad enough to cover all of the classes of information under the exemption which might have to be released in the public interest or could be released in the public interest. If there are questions perhaps we can give examples of that. Once again, the problem arises in this section is that disclosure in the public interest is discretionary. We have a problem because again under 35(2) that discretion wouldn't be reviewable by a court, or perhaps more appropriately it would be but the court's review would be meaningless.

Federal-provincial relations, Sections 44 and 45 and confidence. We think that - again this a matter of discretion - the only guidelines for the department head exercising discretion with respect to federal-provincial information is this: It won't be released if the information could reasonably be expected to be injurious to the conduct by the government of federal-provincial relations. There are no limitations on this and no guidelines for the individual bureaucrat. It's possible that the government knows exactly what would be injurious to those relations but it's conceivable that some bureaucrat somewhere down the line may not know that or may not be fully informed about that, the implications of such a decision, and we think that because there are no guidelines or no apparent instructions for people to interpret that then, again, that kind of discretion is one which should be subject to judicial review.

Information obtained in confidence. We do fully appreciate the necessity to keep in confidence information as it relates to negotiations between the Federal and Provincial Governments or this government and the other Provincial Governments. We don't think, however, that that confidentiality should apply to sublevel governments - municipal governments, school boards, things like that. Someone from ACCESS pointed out, in fact, you create those levels of

government and they exist to a large extent by virtue of the will of the Legislature and upon money provided for the Legislature.

We would add one thing which is that a substantial amount of the information that you get from municipal governments, school boards and things like that, is information that they by statute are required to give to you and that you by statute are required to review to assess whether or not they're doing a good job. Because that kind of information is not a matter of negotiation but a matter of duty, we think it is something that should be in the public domain.

One final thing with respect to Section 45 in confidence. We would submit there should be an amendment so that information obtained in that manner could be released if it were in the public interest to do so.

To wrap up my initial comments, the ACCESS guide we think is a very positive step. We've looked at the specific provisions for it. The description of the organizational structure of departments, a description of records by title and function, we think is worded very good. We assume that it will work out equally well and the specific provision respecting the availability of the ACCESS guide we think is a very positive step in making sure that people can get at it at least and know what it means.

Out of necessity, of course, all of the comments have been on areas which we have some concern with. Generally though, we commend the government for the introduction of the legislation. Having gone through it clause-by-clause on a number of occasions, we, I think, recognized the difficulty in balancing on the one hand privacy and confidentiality, on the other hand what we think is the absolute right of the public to freedom of information.

We have also reviewed other Canadian legislations and we think that this bill stacks up fairly well in respect of those. The introduction of the legislation raises significant expectations. We hope that they can be met. We have every confidence, sir, that the government will encourage day-to-day practices which will support the intent of the legislation. Thank you.

MR. CHAIRMAN: Thank you, Mr. Holley.

Are there questions from members of the Committee? The Attorney-General.

HON. R. PENNER: I have just a couple. First of all, I suppose I should declare conflict of interest again since the public interest department of Legal Aid is nominally . . .

MR. CHAIRMAN: I suggest the Attorney-General take his hat off.

HON. R. PENNER: All right, as long as I don't have to take off my jacket. My first question is frivolous. I notice that on Page 18, it says "A review of other Canadian freedom of information legislations suggests that the proposed Manitoba bill represents an improvement over similar legislation available to many other Canadians." Verbally, you said it stacks up fairly well, which is less forthcoming. Which one of these should I accept?

MR. M. HOLLEY: Somewhere in-between. We think it's very good. There are some improvements and there are some areas that can still be improved.

HON. R. PENNER: I'd like to thank the public interest department and Mel Holley for a very thorough and an excellent brief. Like the ACCESS brief that I've noted particularly and the MARL brief, it's going to be very helpful and we'll try within the time constraints that we have to take a look at some possible amendments to meet some of the concerns not only made but articulated very well.

I think I only have, Mr. Holley, two questions. On Page 8 at the bottom, informal resolutions. What's the thinking behind the suggestion that attempts at informal resolution should only be made with the consent of the applicant? Could you elaborate on that? What's the thinking there?

MR. M. HOLLEY: There are some situations and, again, I can think of examples from our own experience where people shy away from the Ombudsman because they see it taking too long and it might become another step in a procedure.

Supposing, for instance, your complaint is that there has been an inappropriate time delay. You then go to the Ombudsman. The Ombudsman says, well, I'll try and work it out informally. It takes two or three weeks to do that and then comes back, can work it out informally, then goes to a formal investigation, and after that you have to go to court. We think simply that informed consent should be given when the Ombudsman proposes that he attempted an informal resolution.

HON. R. PENNER: Would it not be difficult with the Ombudsman, given the way in which the Ombudsman functions, to distinguish between formal and informal functioning of the Ombudsman in this context?

MR. M. HOLLEY: I believe it would, yes. I'm not sure that it is done in this act, but I think it would.

HON. R. PENNER: Be difficult?

MR. M. HOLLEY: No, it wouldn't be difficult.

HON. R. PENNER: It wouldn't be difficult?

MR. M. HOLLEY: Yes, it could be done.

HON. R. PENNER: Okay, thank you. Mr. Chairman, on Page 11 you raised an issue that has been raised by others, and certainly does give us pause and did when we were drafting the act, and has to do with personal records.

Earlier on I think you were present when I was seeking to distinguish, I think for Mr. Matas, with respect to the sunrise clause between information that is not third party information. That is a file will have information in it which contains, in many instances, obviously not in all, obviously not in most, but could contain, let's say, the report of a psychiatrist or psychologist or some professional making an assessment and it would have that kind of information, but also might have a lot of

other information which is more of the factual kind. Would you see some merit to seeking to amend the section to make a distinction, at least between the relatively non-controversial or troublesome information of the factual kind and the third party reports from professionals who are not employees of the government, but who provide assessments of individuals in that area, which is often a difficult area?

MR. M. HOLLEY: No, Sir, I think there should be general principles with respect to the release of information contained in such files. On the point of - we'll call it professional information - let's say an opinion submitted by a psychiatrist. An interesting example was brought up by one person who asked, "Are you attempting to rewrite history."

Supposing for instance that a psychiatrist or a psychologist gave an opinion 25 years ago, that a child was mentally retarded, and with the advents of technology and knowledge in that field, that 15 years later it was determined in fact that the child simply had a minor learning disability, which led to the assessment that was made 15, 25 years ago. We thought, in fact, it would be too complex to attempt to draw those kinds of distinctions with respect to information contained in various types of files. That's why we went back and early in our brief suggested that in addition to the absolute right to correct factual errors or omissions, we also put in that the applicant have a right with respect to just that kind of information, opinion information, to submit and have on the record information which would contradict or clarify that. We thought that was a more appropriate way of dealing with it, because it really will be difficult - and I appreciate the difficulty in trying to separate the various categories of information on each file with respect to each type of department and the information that it contains.

HON. R. PENNER: Thank you very much.

MR. CHAIRMAN: The Member for Niakwa.

MR. A. KOVNATS: Just a couple of questions. I've been listening with great interest, and I think that you supported the idea of using the Ombudsman for an appeal or a final appeal, or some sort of an appeal, and you did state that the Ombudsman's Department is understaffed. I saw that somewhere in your brief.

I sat right in this committee at one time, not too long ago, where the Ombudsman asked for additional staff. Are we taking a department, the Ombudsman's Department, or is it being suggested that there be more staff added to the Ombudsman's Department, because obviously at this point he couldn't possibly handle what this bill is suggesting that he handles? Are you suggesting or are you supporting that the Ombudsman's Department be increased in staff?

MR. M. HOLLEY: I would say my comments are simply based upon the experience that I have had with the Ombudsman in my professional capacity. I can't answer that question, I think the Ombudsman should answer it.

MR. A. KOVNATS: Just one other question. It's for my clarification and education. You made reference to a department head. Would that be the same as head or head of department which is reference in the bill?

MR. M. HOLLEY: Yes I would, Sir.

MR. CHAIRMAN: The Member for St. Norbert.

MR. G. MERCIER: Thank you, Mr. Chairman.

Mr. Holley, do you raise any point that has already not yet been commented on earlier this morning in any other brief?

MR. M. HOLLEY: I'm not sure I understand the question. Your question is in this brief, or do I now wish to raise other points?

MR. G. MERCIER: No, in your brief, are you raising any point, any new point that has not been commented on earlier this morning by other people who have made submissions to the Committee?

MR. M. HOLLEY: Yes, Sir, I believe we do and I believe in some cases we have touched upon a similar point but brought a different perspective to that point.

MR. G. MERCIER: Mr. Holley, how much time was spent by you and others in Legal Aid in preparing this brief?

MR. M. HOLLEY: I really couldn't answer that question off the cuff, Sir.

MR. G. MERCIER: Mr. Chairman, is there no record kept by your department of the time expended on projects?

MR. M. HOLLEY: Generally speaking there is. It's my understanding that - well I really won't comment on Legal Aid policy. I'll simply say that in our department, the Public Interest Law Department, we are not required, in the strict sense in the way that some departments, say the Criminal Law Department, where there's a rebate for the Federal Government to keep a strict hour-by-hour, time-by-time record. We do have time management systems in our department and we could probably, if required, assess the amount of time it took each of us to prepare this.

MR. CHAIRMAN: Are there other questions from other members of the committee?

Hearing none, the Chair wishes to thank Mr. Holley from the Public Interest Law Legal Aid Department.

MR. M. HOLLEY: Thank you, sir.

MR. CHAIRMAN: The next person on our list of those who are wishing to make presentations to this committee is Mr. Murray Smith, representing the Manitoba Teachers' Society.

Mr. Smith.

MR. M. SMITH: I do have copies of the brief for members of the committee if you would like them.

MR. CHAIRMAN: Thank you. Mr. Smith.

MR. M. SMITH: I'm Murray Smith. I'm the President of the Manitoba Teachers' Society.

The Teachers' Society is very pleased to be addressing comments to this committee of the Legislature regarding Bill 5. The concept of a statute recognizing the right of public access to most of the documentation and information materials produced by the Government has been under discussion in our province for at least the past 20 years. The introduction of legislation to authorize and enforce public access is most welcome.

The members of the committee may think it surprising, unexpected, that the Teachers' Society would be present for this particular piece of legislation. I think our interest in it derives from two sources. One is that we have been very interested in the disclosure of school budget information and members of the Assembly will be aware that there was a regulation adopted recently which provided for access - not a regulation, an amendment to The Public Schools Act, which provided for access to school division and district budgets. In our opinion, it didn't go as far as we would like, but it was a very important step. We know the value of that kind of access.

Secondly, we have a good deal of involvement with the personal files of our members, the questions of what will be kept in those personal files, who shall have access to them, the degree of confidentiality; so it's from that background that we make these comments.

The society appreciates that the legislative provisions advanced in Bill 5 have been worded precisely. Attention has been given to including ample definitions, the level of consideration to the format and practical detail in this proposed legislation is superior to that in many of the existing statutes. It's encouraging to observe that the force and effect of The Freedom of Information Act are unlikely to be diminished due to interpretive difficulties.

The society would like to comment favourably on certain salient sections which, in our opinion, strengthen the bill. The society strongly endorses the reference in Section 3 to the right of access to government records, providing recognition that all persons have a right to request and acquire such information. Attention has been paid to establishing a series of procedures for exercising this right. The society welcomes the decentralized operational and decision-making procedures. Requests for information can be directed to employees of a department. Attempts to centralize the application process and decision-making responsibilities within a single office would have proven to be more time consuming.

The provisions of Section 5 are most important to the intent of the legislation. It calls for a determination to be made regarding a request for access within a time line of 30 days, thereby preventing requests from remaining unaddressed for an indeterminable period of time, or interminable period. Section 5 also requires notice to be given to the applicant of the right to file a complaint. We support this recognition of the right of members to convey dissatisfaction.

The society notes with approval that Section 14 enables applicants to lodge a complaint with the Ombudsman, ensuring an impartial examination.

Sections of Bill 5 specify exemptions from the disclosure requirments. These indications act to clarify for all the intent of the legislation and preclude th need for random and variable interpretations on th part of the civil servants responsible for providing th access.

Section 50 requires an access guide to be prepare describing the procedures and identifying contac persons within each government department. Sectio 51 mandates the distribution of it. We favour such effort to notify members of the public of their rights of acces and the methods by which these rights can be exercisec A right that you don't feel you can exercise is of littl value to you.

Bill 5 expresses its largely open and comprehensiv purpose in Section 63(1) with reference to th preservation of other rights of access. We're please that the proposed legislation is not to be regarded a restricting or extinguishing any custom or practice, an right or privilege whereby access has already bee authorized to a group or class of records.

The society approves of the particular reference i Section 2(2) to the mandate for accessibility, includin information stored by electronic means. As th information age becomes increasingly contemporar and ever greater portions of the material prepared an stored by the government will exist within compute programs, the act will remain practical and its inter will thus be preserved.

The society has reservations about one aspect c the bill approached in two separate yet related section:

Section 13 seeks to permit a person to have a writte objection attached to comments relating to that perso contained in a record. However, the bill does not provid to facilitate some form of adjudication of alleged error in fact from a personal record and the subsequer removal of information determined to be false c misleading. Apparently, while additions can b appended to personal information held in governmer files, the deletion of recorded errors, in fact, in thes files is not to be allowed. The distinction we're makin clearly is between matters of opinion where it is usef to have an opinion and a dissenting or contrary opinio both in the file, and a matter of fact which can b determined to be an error and which should then simpl be removed.

In the example of teachers' personal files, for instanc having an evaluation of the teacher by a principal an then the teacher's own comments attached to th evaluation is one thing, but if there were a documer in the teachers' files which said that such and such qualification were obtained in 1968, whereas in fa they were obtained in 1966, the teacher would war the right to have that factual error deleted so the issu would never arise again.

Under that section we would think perhaps a expression like 'inaccurate' or 'erroneous' and perhap also 'inappropriate', that opens a slightly differer notion, but we have rather strong ideas as to wh should be included in an individual's personal file. It our belief that it's possible for items which are total inappropriate to be included in that file and to reduc its usefulness and pose some potential for damage t the individual.

Under Section 48(1) access may be denied for record made prior to the enactment of the proposed legislatio I've heard two or three people this morning say th they don't believe that that exemption is necessar

We would agree. We believe that if the files are to be open, then everything that is in the files regardless of when it was prepared should be open in the same way and the teachers' files provide an example of that. When a school division adopts a policy that the teacher's personal files are accessible to the teacher, it means everything that is in the file, not merely the things from that date on. We don't see much risk involved in permitting that access to everything in the file.

We suggest that both Section 13 and 48(1) be redrafted to recognize the right of persons to obtain personal materials prepared and held by the Government of Manitoba and to have verifiable errors in fact removed from such records.

The Society strongly endorses the principle of right of access advanced by the bill. If its intent is implemented within the spirit of the right of public access to government information, this legislation could serve to make the function of government less remote. Unless secretive in the perception of the citizenry of the Province of Manitoba, it could re-enforce an awareness of the Government of Manitoba as a genuinely public service.

Thank you for your attention.

MR. CHAIRMAN: Thank you, Mr. Smith.

Are there questions for Mr. Smith to answer?

The Member for River Heights.

MR. W. STEEN: Mr. Smith, can you briefly outline to me and maybe to other members of the Committee what is the current practice with teachers? The principal of the school that the teacher is teaching at obviously does an evaluation once a year. Is that file open to that teacher?

MR. M. SMITH: The first point I'd make is that what we identify as the teacher's personal file is maintained in the division office rather than in the school and the principal is one of the contributors to that file. For instance, an evaluation carried out on a teacher would be completed by the principal, discussed with the teacher who signs it to say that she has had a chance to review it, but not to indicate agreement or disagreement. The teacher has the right to add a different perspective on any of the issues which have been included in the evaluation. The evaluation goes to the superintendent and becomes a part of the division office files. So it's there that the personal file is maintained and is accessible to the teacher.

I would probably be overstating the case to say that such files are always accessible to teachers. They are in most division offices and it's our policy that they should always be, but not all divisions have adopted a free access mode.

MR. W. STEEN: Mr. Smith, when a teacher moves from one division to another division, does the file travel with the teacher?

MR. M. SMITH: Not by custom, no. It's not like the cumulative file on a student which, generally speaking, moves from one school to another or from one division to another. In fact, our policy is quite simple and that is that nothing in the personal file should be shared beyond the responsible officials in that school division without the consent of the teacher concerned.

MR. CHAIRMAN: Are there other questions for Mr. Smith?

Mr. Attorney-General.

HON. R. PENNER: I just wanted to thank the Society and Mr. Smith, for their brief and assure them, as I have others, that we will be, between now and the next time this Committee meets, looking at the possibility of some amendments.

I particularly note the universality of comments with respect to Section 48(1) and I think we can find ways of strengthening and improving 48(1) and to the extent necessary, (13), which is related to it. This is not to say that we won't be looking at other areas as well.

MR. M. SMITH: I appreciate that.

MR. CHAIRMAN: Thank you, Mr. Smith.

MR. M. SMITH: Thank you, Chairperson and members.

MR. CHAIRMAN: Since all presentations of those persons who are or have been present here today have been heard regarding Bill No. 1, Bill No. 5, The Freedom of Information Act.

Is it the wish of the committee to proceed immediately to the consideration of the bill or does the committee wish to give a second chance to those who have the opportunity to present, but for one reason or another were not able to do so today?

Mr. Attorney-General.

HON. R. PENNER: I suggest that we've heard, for example, Mr. Green from his party and it would, I don't think, be doing a disservice to commence consideration of the bill. I'm sure that we'll be able to hear from Mr. Kucharczyk informally in any event.

MR. CHAIRMAN: Do the members of the Committee wish to go page-by-page, clause-by-clause or the bill in its entirety.

The Member for River Heights.

MR. W. STEEN: I would suggest, Mr. Chairman, that the Attorney-General is correct and that we have given an opportunity to interested parties to make representation before the committee and at the next sitting of this Committee we should then start going clause-by-clause.

MR. CHAIRMAN: So we shall start the initiation of the meeting next time we meet as will be announced during the House by considering the bill clause-by-clause.

What is the pleaure of the Committee?

HON. R. PENNER: Committee rise.

MR. CHAIRMAN: Committee rise? Agreed? Committee rise.

COMMITTEE ROSE AT: 12:30 p.m.