

fus2002-033

**A NON-COMPLIANT RESPONSE TO AN ACCESS REQUEST
FIPPA – Access (inadequate response) – City of Winnipeg
s. 12(1), 60, 23(1)(a), 18(1)(c)**

***Introduction:** The case summarized below represents one of many examples where the “contents of response” under section 12(1) of The Freedom of Information and Protection of Privacy Act (FIPPA) were not followed by a public body.*

What should be so easy – a plain reading of the legislation that sets out what must be included in a letter from the head of the public body to an applicant for access – seems difficult for many public bodies to follow. Our office does not understand why this is the situation. We continue to educate public bodies on this issue, with our written aid, “CHECKLIST: Contents of a Complete Response under section 12 of FIPPA”, by discussions in the course of investigations and through our public comments.

Section 12(1) sets out that where access to a record or part of a record is refused and the record exists and can be located, the public body must inform the individual in writing of:

- 1) the reasons for refusal;*
- 2) the specific provisions of FIPPA on which refusal is based;*
- 3) the title and business telephone number of an officer of the public body who can answer the applicant’s questions about refusal; and*
- 4) that the applicant may make a complaint to the Ombudsman about the refusal.*

We note that the public bodies usually do include reference to section 60 of FIPPA, which sets out a time the limit for complaints to be made to the Ombudsman, an element that is not included in section 12(1). It is our experience that the public bodies’ inclusion of this important information is handled very well.

Usually, it is items one and two above that are not adequately addressed. It is to be noted that there is a difference between “reasons for refusal” and “the specific provisions of FIPPA on which refusal is based”.

It is not sufficient that public bodies merely provide a section number for refusal or even quote the section being relied upon. An individual must know why access to a record has been denied. Whereas exceptions in the legislation typically provide several “or’s” and a series of possible conditions for withholding access, the question is on what basis was the particular record or part of a record withheld? This requires honing in on the specific provisions of the exception that apply to a specific record. Our office has gone further to say that, in the case of a discretionary exception – where a public body can choose to withhold access or release – the response should indicate why the public body chose to withhold or limit access instead of granting it.

The FIPPA Resource Manual for the Provincial Government, collaboratively produced by Civil Legal Services (Manitoba Justice) and Access and Privacy Services (Manitoba Culture, Heritage and Tourism, which oversees the

administration of the Act), is very good in discussing what constitutes a proper response under section 12(1) and includes instructive sample letters as reference.

In the case summarized below, the public body's initial response arguably included only one of the elements required in a proper response under FIPPA. Once we brought this to the public body's attention, a proper response was provided to the individual.

An individual complained to our office under FIPPA that he had not received a reply from the City of Winnipeg (Waste and Water Department) to his application for access and it had been 90 days since he had applied for the record. Under FIPPA, a failure to respond after 90 days is considered to be a refusal of access. Yet, in this case, it was apparent that the public body had provided a response to the individual within 90 days. The response, however, was not compliant with section 12(1) of the legislation.

Section 12(1) of FIPPA sets out:

Contents of response

12(1) *In a response under section 11, the head of the public body shall inform the applicant*

(a) whether access to the record or part of the record is granted or refused;

(b) if access to the record or part of the record is granted, where, when and how access will be given; and

(c) if access to the record or part of the record is refused,

(i) in the case of a record that does not exist or cannot be located, that the record does not exist or cannot be located,

(ii) in the case of a record that exists and can be located, the reasons for the refusal and the specific provision of this Act on which the refusal is based,

(iii) of the title and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and

(iv) that the applicant may make a complaint to the Ombudsman about the refusal.

The City of Winnipeg's response to the individual's request for the "Report on Cathodic Protection Study (Wardrop & Ass.) Oct/Nov 2000..." was as follows:

We have received your request for our report on the Cathodic Protection Study, made under the Freedom of Information and Protection of Privacy Act. The study report remains in draft form and is not available for release at this time. However, I have requested that the report be completed not later than the end of January 2002. On completion, we would be happy to make arrangements with you to view the report. Alternately, we could provide you with a copy at cost. We will contact you when the report is complete to make appropriate arrangements.

In discussing the complaint with the City, we noted that its response letter did not comply with the requirements of section 12(1) of FIPPA. Accordingly, the City issued a new response, which read as follows:

Your request for access to the subject report is refused based on Clause 23(1)(a) of FIPPA, which states:

"The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal advice, opinions, proposals,

recommendations, analyses or policy options developed by or for the public body”.

The scope of the requested report is to undertake analyses, provide professional opinion and make recommendations to the City of Winnipeg, and in our interpretation falls within the above Clause.

In addition, your request for access to the subject report is refused based on Clause 18(1)(c) of FIPPA, which states:

“The head of a public body shall refuse to disclose to an applicant information that would reveal commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to:

- (i) harm the competitive position of a third party [or]
- (ii) interfere with contractual or other negotiations of a third party [or]
- (iii) result in significant financial loss or gain to a third party”.

This report and study has been undertaken by a consulting engineer that must take professional responsibility for its contents by affixing and signing their engineering seal. Because the report is in draft form, the consulting engineer has not yet affixed and signed their seal, and as such it could reasonably cause harm to the consulting engineer if their draft conclusions and recommendations were disclosed.

The final report will be released to the public once the appropriate elected body of the City of Winnipeg has considered it. At that time we will notify you that the final report is available.

The new response to the individual set out the City’s reasons for refusal and the specific provisions of FIPPA on which refusal was based. Although not quoted in this summary, the response also included the name and business telephone number of a departmental officer and provided the required information about making a complaint to the Ombudsman about the refusal of access.

With the issuance of the new response, we advised the individual and the City of Winnipeg that we were satisfied that the response was in compliance with FIPPA. This is not to say that, had a complaint about the response been made to our office, we would not have asked questions relating to the response in conjunction with our review of the withheld information. Examples of the kind of questions we would normally ask in relation to the provisions cited would be: with respect to the mandatory exception 18(1)(c) -- what is the nature of the harm that could reasonably be anticipated to the third party by disclosure of the requested record; and, with respect to the discretionary exception 23(1) -- why did the City choose to withhold the record rather than release it?

In this case, the individual advised our office that the issuance of the new response was helpful. He did not make a complaint to our office about the refused access.