



PRACTICAL APPROACHES TO ACCESS REQUESTS:

VIEWS FROM THE OMBUDSMAN'S OFFICE

Nancy Love

Manager, Access and Privacy Division

Gail Perry

Manager, Research and Education



OUTLINE OF SESSION

- Communicating with Applicants
- Documenting Access Decisions
- Preparing Complete Responses
- Applying Exceptions
- Severing
- Preparing Fee Estimates
- Responding to Complaints



ROLE OF THE OMBUDSMAN

The Ombudsman is an independent officer of the Legislative Assembly, who has broad powers of investigation, the ability to recommend corrective action and to report publicly

The Ombudsman's Office was established on the premise that the public should have the right to an independent review of decisions made by government bodies



OFFICE OF THE MANITOBA OMBUDSMAN

The office has two operational divisions:

The **Ombudsman Division** investigates under:

- ***The Ombudsman Act*** concerning administrative acts, decisions or omissions by any department or agency of the provincial government or a municipal government

The **Access and Privacy Division** investigates complaints and reviews compliance under:

- ***The Freedom of Information and Protection of Privacy Act (FIPPA)*** concerning access to general or personal information and privacy of personal information held by public bodies
- ***The Personal Health Information Act (PHIA)*** concerning access to one's own personal health information and privacy of that information held by trustees

M
A
N
I
T
O
B
A

O
M
B
U
D
S
M
A
N



PUBLIC BODIES UNDER FIPPA

Provincial Government (Departments and Government Agencies, Crown Corporations, Ministers' Offices, Executive Council Office)

Local Public Bodies:

- **Local Government Bodies** (City of Winnipeg, municipalities, local government districts, planning districts, conservation districts)
- **Educational Bodies** (school divisions, colleges, universities)
- **Health Care Bodies** (hospitals and regional health authorities)



TRUSTEES UNDER PHIA

- **Public Bodies** under FIPPA
- **Health Professionals** (licensed or registered to provide health care under an Act or designated in the regulations)
- **Health Care Facility** (hospital, personal care home, psychiatric facility, medical clinic, laboratory, CancerCare Manitoba, and community health centre or other facility designated in the regulations)
- **Health Services Agency** (an organization that provides health care under an agreement with another trustee)



ACCESS UNDER FIPPA AND PHIA

FIPPA and PHIA provide a framework for access:

- **Part 2** of FIPPA and PHIA sets out requirements for applicants making access requests and public bodies/trustees in responding to these requests
- Access and Privacy Regulation under FIPPA



COMMUNICATING WITH APPLICANTS

Communication with an applicant can be helpful at various stages of processing access requests:

- to clarify the request
- to explain the process to the applicant
- to respond to an applicant's questions about an access decision
- to assist the applicant and to respond without delay, openly, accurately and completely, in keeping with duty to assist an applicant (FIPPA s. 9; PHIA s. 6(2))



DOCUMENTING ACCESS DECISIONS

Thorough documentation during the decision-making process is critical to keeping track of how, why and by whom a decision was made because:

- processing the request occurs over the course of up to 30 days (or 60 days if an extension is taken under FIPPA) and often occurs in incremental steps, in the midst of doing other work
- receiving input from other employees or having multiple decision-makers
- responding to questions from applicants after they have been notified of a decision
- responding to complaints being investigated by Ombudsman's office
- preparing evidence for court if an appeal is made of a refusal of access decision



PREPARING COMPLETE RESPONSES

Section 12 of FIPPA sets out the required contents of a public body's written response to an applicant

Manitoba Ombudsman's evaluation of the contents of response letters where access was refused indicated that 44 (16%) of 268 response letters were fully compliant with section 12

Providing reasons for the refusal of access was particularly problematic (34% provided reasons)

Resources on our web site www.ombudsman.mb.ca/resources.htm:

- Checklist: Contents of a Complete Response under Section 12 of FIPPA
- Practice Note: Providing Reasons to an Applicant when Refusing Access under FIPPA
- Our report on the Evaluation of Compliance with Section 12 of FIPPA



APPLYING EXCEPTIONS

If, after all responsive records have been compiled and reviewed, it appears exceptions may apply to withhold access, these are some considerations to avoid pitfalls:

- exceptions apply to *information* in the record, which may be some or all of the information in a particular record
- exceptions fall into categories of mandatory or discretionary and
 - if a discretionary exception applies, there is an exercise of discretion to decide whether to give access to the information despite the exception applying
 - there are usually limits to both mandatory and discretionary exceptions (exceptions to the exception) to consider



SEVERING

- Where part of the information in a record is subject to an exception to disclosure, the Acts require that if that information can be reasonably severed from the record, an applicant has the right of access to the remainder of the record
- Intent is to release as much information in a record as possible without revealing the information that is subject to an exception

(FIPPA s. 7(2); PHIA s. 11(2))



DETERMINING WHETHER SEVERING IS REASONABLE

M
A
N
I
T
O
B
A

O
M
B
U
D
S
M
A
N

Severing may be unreasonable if:

- the remaining information is meaningless
- it results in providing an applicant with an incomprehensible record consisting of unconnected words or phrases

The Court of Queen's Bench, in an appeal under FIPPA, provided a decision that demonstrated an opinion on severing in *Kattenburg v. The Minister of Industry, Trade and Tourism* (Suit No. CI 98-01-08704)



PREPARING FEE ESTIMATES UNDER FIPPA

The right of access under FIPPA is subject to the applicant's payment of any fees required by the regulations (FIPPA s. 7(3))

The Regulations sets out four types of fees: search and preparation, computer programming and data processing, copying, and delivery

Fee estimates for search and preparation time must be in accordance with the legislation and reasonable in the circumstances of the request

An applicant has up to 30 days from the day the estimate is given to indicate if it is accepted or to modify the request to change to amount of the fee (FIPPA s. 82(3))



REQUIREMENTS OF FIPPA FOR SEARCH AND PREPARATION FEE

When? Whenever the public body determines that search and preparation related to the application will take more than two hours

How? On the prescribed Estimate of Costs form in Schedule A, Form 2 of the FIPPA Regulation

How much? \$15.00 for each half-hour in excess of two hours

For what? Section 4 of the Access and Privacy Regulation states that a fee estimate cannot include time spent on the following activities:

- transferring an application to another public body
- preparing a fee estimate
- reviewing the responsive records to determine whether any exceptions to disclosure apply, prior to any severing of the records
- copying records supplied to the applicant
- preparing an explanation of the records to the applicant



DETERMINING WHAT IS CHARGEABLE

Time is chargeable for the following search and preparation activities:

Search to locate requested records:

- reviewing file lists or systems to determine location of responsive records
- gathering records or retrieving records from storage
- examining files to locate responsive records

Preparation of responsive records:

- copying the original records to have a working copy or copies
- severing the records by obscuring the excepted information and noting the specific provisions on the severed records



ESTIMATING CHARGEABLE TIME

- Ensure that only chargeable activities are included in estimate
- Determine the best approach to calculate how much time may be needed (this will need to be determined on a case-by-case basis)
- Whenever possible, estimate search and/or preparation time based on a sample of the records



FEES UNDER PHIA

A trustee may charge a reasonable fee for permitting examination of personal health information and providing a copy, but the fee must not exceed the amount provided for in the regulations (PHIA s. 10)

PHIA does not have prescribed fees in its regulations so reasonableness is the basis for determining fees



RESPONDING TO COMPLAINTS

An individual who makes an access request may complain to the Ombudsman about any decision, act or failure to act that relates to the request

- a complaint is an allegation against a public body/trustee
- in order for Manitoba Ombudsman to investigate the complaint, there has to be an understanding of the rationale for the decision
- it is the responsibility of the public body/trustee to explain its access decision or failure to act
- Manitoba Ombudsman provides an opinion of whether the decision was in accordance with FIPPA or PHIA

Suggested Format for Providing Records to the Ombudsman's Office in an investigation of a Refused Access Complaint under FIPPA, available at www.ombudsman.mb.ca/resources.htm



RESOURCES

Manitoba Health (PHIA)

- PHIA website: www.gov.mb.ca/health/phia/index.html

Manitoba Culture, Heritage and Tourism (FIPPA)

- www.gov.mb.ca/chc/fippa

Statutory Publications (Copies of Acts)

- www.gov.mb.ca/chc/statpub/

Manitoba Ombudsman

- www.ombudsman.mb.ca



MANITOBA OMBUDSMAN

Winnipeg Office (Ombudsman Act, FIPPA and PHIA)

750-500 Portage Avenue

Winnipeg, MB R3C 3X1

Phone: (204) 982-9130

Toll-free: 1-800-665-0531

Fax: (204) 942-7803

Brandon Office (Ombudsman Act)

603-1011 Rosser Avenue

Brandon, MB R7A 0L5

Telephone: (204) 571-5151

Toll free: 1-888-543-8230

Fax: (204) 571-5157

Our website: www.ombudsman.mb.ca

M
A
N
I
T
O
B
A

O
M
B
U
D
S
M
A
N