

MANITOBA OMBUDSMAN PRACTICE NOTE

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THE DUTY TO ASSIST UNDER FIPPA AND PHIA

The duty to assist under *The Freedom of Information and Protection of Privacy Act* (FIPPA) and *The Personal Health Information Act* (PHIA) relates to access requests under Part 2 of both Acts. The Acts require public bodies and trustees to “make every reasonable effort to assist” a requester and “to respond without delay, openly, accurately and completely” (section 9 of FIPPA and subsection 6(2) of PHIA).

The duty to assist is additional to other obligations under the Acts that must be met to fulfill the formal access process (e.g. responding within time limits and providing the prescribed contents in refused access responses). This duty should always be considered and be applied in a manner that is reasonable on a case-by-case basis and throughout the application process.

ELEMENTS OF THE DUTY TO ASSIST

Make Every Reasonable Effort to Assist

The first element of the duty to assist is to make “every reasonable effort” to assist a requester. This includes providing assistance proactively and in response to a requester asking for help.

At the stage of applying for access, reasonable efforts to assist would include:

- discussing whether the request can be accommodated informally outside of the Acts (e.g. is this the type of information that would be routinely released by the entity? does the requester really want an answer to a question rather than access to a record? is there another Act that provides a right of access?)
- explaining access to information processes under the Acts (e.g. informing that a FIPPA request must be made on the prescribed form, providing a copy and providing assistance to complete the form)
- assisting in the making of verbal requests:
 - under FIPPA, an applicant may make an oral request for access to a record if the requester has a limited ability to read or write English or French or has a disability or condition that impairs his or her ability to make a written request (subsection 8(3))
 - under PHIA, an access request may be verbal although the trustee may require it be in writing (subsection 5(3))

- determining whether the request can be clarified in the interests of focusing on certain key records and avoiding unnecessary costs to the requester:
 - the objective would be to narrow the request while still meeting the requester's access needs and not dissuading the request
 - Note: the time for responding does not stop when an entity is clarifying a request with a requester

Reasonable efforts to assist a requester throughout the processing of the request would include explaining various processes under the Acts, such as how to:

- modify an access request to reduce the amount of fees
- make a request for a waiver of access fees under subsection 9(1) of the Access and Privacy Regulation under FIPPA
- make a request for a correction to personal or personal health information

Respond Without Delay

The next element of the duty to assist is to respond without delay. The public body or trustee should begin working on the access request upon receipt to ensure a timely response.

There are also specific requirements in FIPPA and PHIA to respond to the requester within the legislated time limit. In many circumstances, requests can be responded to in advance of the time limit. An entity should not work to that deadline. This is explicitly set out in PHIA, which requires a trustee to respond "as promptly as required in the circumstances" but no later than the time limit under the Act (subsection 6(1)). PHIA does not permit the time limit to be extended.

Under FIPPA, a public body must "make every reasonable effort" to respond within the 30-day time limit (subsection 11(1)). Extensions for responding under FIPPA cannot be made on the basis of a public body's delay in taking action to process the access request.

Respond Openly

To respond openly requires public bodies and trustees to be transparent. This duty can be fulfilled in communicating with requesters to explain access decisions, such as:

- explaining the basis under FIPPA for an extension of the time limit for responding
- explaining the basis of fees being charged in relation to the access request and reasons for a decision not to waive the fees

An example of openness is providing information to the requester to explain a record to which access has been given. Under FIPPA, a public body that provides access to a record may give any additional information believed necessary to explain the record (subsection 14(2)). Under PHIA, a trustee, if asked, must provide an explanation of any term, code or abbreviation used in the personal health information (subsection 7(2)).

Another example of openness is creating a record. Under FIPPA, if a record exists but is not in the form requested by the applicant, the public body may create a record in the form requested if in its opinion it would be simpler or less costly to do so (subsection 10(2)). FIPPA and PHIA do not require an entity to create a record in this or any other context, but an entity could

discuss with the requester whether this approach would meet his or her request and, if so, create a new record.

Respond Accurately

The duty to respond accurately requires having sufficient information upon which to base the access decision, such as through:

- conducting an adequate search for responsive records:
 - it is not sufficient to believe that there are no responsive records
 - reasonable efforts would include a strategy to identify and locate all responsive records
 - the entity should search all reasonable locations, including off-site locations, where the requested records might be found
 - the search should include records in the entity's "control", if not possession, for example records maintained by agents, consultants or other contracted services
 - if adequate searches have not been conducted, all relevant records would not be identified and the resulting response would be inaccurate and incomplete
- thoroughly reviewing the records before claiming exceptions to refuse access:
 - it is not sufficient to assume that an exception applies
 - the records must be reviewed on a line-by-line basis

Respond Completely

The duty to respond completely includes responding in relation to all of the requested records. A complete response when access is not provided to all of the requested records would include the following:

- if requested records do not exist or cannot be located:
 - explaining the searches conducted to attempt to locate the records
 - if the records were destroyed, explaining the records management processes and destruction policies that were followed
- if access to part or all of the responsive records is refused:
 - section 12 of FIPPA sets out the required contents of a complete written response, including providing the specific provision and reasons for the refusal
 - subsection 7(1) of PHIA sets out the required contents of a written response concerning a refusal of access to personal health information

COMPLAINT INVESTIGATIONS BY MANITOBA OMBUDSMAN ABOUT DUTY TO ASSIST

Both FIPPA and PHIA provide a right of complaint to the Ombudsman "about any decision, act or failure to act" that relates to the request (subsection 59(1) of FIPPA and subsection 39(1) of PHIA). A requester may complain specifically about a failure to fulfill the duty to assist, or the Ombudsman may consider whether the duty to assist was met in an investigation of any type of access complaint. Additionally, under FIPPA, the Ombudsman may bring to the attention of the head of a public body any failure to fulfill the duty to assist applicants (clause 49(f) of FIPPA).

POSTSCRIPT ON PROVIDING ASSISTANCE

Although the duty to assist applies to access requests made under Part 2 of FIPPA and PHIA, our office is of the view that this should be a principle that underlies all actions under the Acts. For example, with respect to the Part 3 protection of privacy provisions of FIPPA and PHIA, as best practice and in the spirit of the legislation, entities should be able to explain privacy practices and provide assistance with respect to an individual's privacy concerns.