

MANITOBA OMBUDSMAN PRACTICE NOTE

Practice Notes are prepared by Manitoba Ombudsman to assist persons using the legislation. They are intended as advice only and are not a substitute for the legislation.

Manitoba Ombudsman
750 – 500 Portage Avenue
Winnipeg, Manitoba R3C 3X1
Phone: (204) 982-9130 Toll free 1-800-665-0531
Fax: (204) 942-7803
Web site: www.ombudsman.mb.ca

CONSIDERATIONS FOR APPLYING EXCEPTIONS WHEN REFUSING ACCESS UNDER *THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT (FIPPA)*

An applicant has a right of access to information in the custody or control of a public body, subject to the limited and specific exceptions set out in Part 2 of FIPPA. All parts of an exception must be considered, including any subsections and clauses, in order to determine whether to rely on the exception to refuse access.

In the event of a complaint to the Ombudsman about the decision to refuse access or an appeal to the Court of Queen's Bench, the onus is on a public body to establish that the exception applies to the withheld information.

The following are some considerations for applying exceptions prior to responding to an applicant under section 12 of FIPPA:

1. Fulfilling the duty to assist an applicant

The duty to assist an applicant under section 9 of FIPPA includes the requirement to respond openly, accurately and completely. Undertaking the considerations noted below will help you to fulfill the duty to assist.

2. Ensure all responsive records are compiled

Decisions to apply exceptions cannot be made on the assumption that the records exist or can be located. Searches should be conducted for all responsive records and these records should be compiled prior to considering the applicability of any exceptions.

3. Review the contents of the records on a line-by-line basis

Exceptions apply to *information* in the record, which may be part or all of the information in a particular record. Decisions to apply exceptions cannot be based on assumptions about the contents because records often contain information that is not subject to any exception. The information in the record must be reviewed on a line-by-line basis to determine if an exception applies. More than one exception may apply to the record or to the same information within the record.

4. Consider the applicability of *specific* provisions within the exception

When access is refused, the public body is required under section 12 of FIPPA to inform the applicant of the specific provisions on which the refusal is based and the reasons for the refusal. Accordingly, when considering the applicability of exceptions, the specific, rather than the general, provisions must be reviewed to determine if they apply.

For example, if the public body is determining whether release of the information would harm the business interests of a third party under clause 18(1)(c), it must consider the specific provisions of subclauses (i) to (v) to determine which of these specific provisions apply. It is not sufficient to rely on clause 18(1)(c) generally.

5. Ensure all of the required elements of the exception apply to the information

In order for an exception to apply, the information must clearly fit within the wording of the exception. Below are some factors to consider when applying exceptions.

Each exception has required elements that must be met in order to rely on the exception. For example, clause 23(1)(a) has two basic required elements: the information must reveal one or more of the specified types listed in the clause (advice, opinions, proposals, recommendations, analyses or policy options); and it must have been either developed by or for the public body or a minister.

When there are a range of choices within a required element, usually indicated with “or” between the choices, a public body should determine which of the choices are applicable. For example, in clause 23(1)(a), which of the types of information would be revealed and why does the public body believe that the information fits into this type? Was it developed by *or* for the public body *or* a minister?

If an exception requires the information to have been provided in confidence, determine the circumstances in which the information was provided and the basis for the expectation of confidentiality. Some examples of this relate to third party privacy under clauses 17(2)(c) and 18(1)(b) and information provided by another government under subsection 20(1). Did the third party have an expectation of confidentiality and why does the public body believe this to be the case? Was the third party’s expectation of confidentiality implied or explicit?

Some exceptions require a particular consequence to reasonably be expected to result from disclosure of the information. Examples of this are in section 24 where disclosure could be harmful to individual or public safety and subsection 25(1) which sets out exceptions where disclosure could be harmful to law enforcement or legal proceedings. A public body should determine the basis for the expected harm and also why that harm is reasonably expected to occur. A *reasonable expectation* of harm requires that the harm be more than a possible likelihood, it must be a probable outcome.

Exceptions may require a record to have been prepared for a particular purpose. Some examples are cabinet confidences under subsection 19(1) and solicitor-client privilege under subsection 27(1). A public body would need to determine the circumstances in which the record was prepared to ensure that it meets the stated purpose contained in the provision.

6. Exceptions fall into categories of mandatory or discretionary

A mandatory exception contains the words "the head of a public body *shall* refuse to disclose information...". If information falls under a mandatory exception, a public body is required to refuse access, unless an exception to the exception applies (see #8 below).

A discretionary exception contains the words "the head of a public body *may* refuse to disclose information...". If information falls under a discretionary exception, a public body may choose to refuse or grant access, unless an exception to the exception applies (see #8 below).

7. When applying a discretionary exception, discretion must be exercised to decide whether to give access to the information

As a public body is permitted, not required, to refuse access to information that falls under a discretionary exception, there is a second step of exercising discretion to decide whether to release all, part or none of the information in question.

The exercise of discretion cannot be arbitrary. It must be an active decision based on the specific circumstances and it usually involves consideration of whether release of the information could cause harm. A public body must consider all relevant factors in order to determine whether, in the circumstances, it is appropriate to release the information.

For more information, please see our Practice Note, *The Exercise of Discretion when Applying Discretionary Exceptions to Refuse Access under The Freedom of Information and Protection of Privacy Act (FIPPA)*.

8. Limits to mandatory and discretionary exceptions must be considered

Many exceptions under FIPPA contain provisions which limit the application of the exception. These limiting provisions, sometimes identified in the Act as exceptions to the exception, set out circumstances in which the exception would not apply. If one of the circumstances applies, access cannot be refused under that exception.

For example, if an exception under subsection 18(1) of FIPPA applies to the information, but one of the circumstances described under subsection 18(3) was applicable (eg. consent was sought and given under clause 18(3)(a)), the information cannot be refused under subsection 18(1). The information must be released, unless another exception applies to the information.

9. Consider severing

When exceptions do not apply to all of the information in a record, an applicant has a right of access to part of the record if the excepted information can be reasonably severed from the record (subsection 7(2) of FIPPA). This requires that the public body give consideration to whether severing can reasonably be conducted in order to provide access to the remainder of the record. It may be appropriate to sever single words, phrases, lines, paragraphs or pages of a record.

10. Document the basis for the decision to refuse access

Document the basis for deciding that an exception applies. This should include details of how each of the required elements of the exception apply to the withheld information, consideration of any limits to the exception and the factors considered when exercising discretion. It is also advisable to document who was involved in making the decision in case further explanation is required at a later date.

Keeping a record of the basis for applying an exception will assist a public body in preparing a response letter in accordance with section 12 and will enable the public body respond to any questions from the applicant, a complaint investigation by Manitoba Ombudsman or an appeal to the Court of Queen's Bench. Inadequate documentation of the details of decisions can result in a public body having to re-construct the decision, often duplicating the work of the staff involved in the original decision. Responding to complaints made to the Ombudsman requires timely and thorough responses, which is facilitated by good record-keeping about the decision.