

Manitoba Ombudsman

REPORT WITH RECOMMENDATIONS ISSUED ON OCTOBER 17, 2011

AND

RESPONSE TO THE RECOMMENDATIONS ISSUED ON DECEMBER 19, 2011

UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2011-0443

MANITOBA WATER STEWARDSHIP

ACCESS COMPLAINT: FAILURE TO RESPOND

PROVISIONS CONSIDERED: 9, 11(1)

PUBLICLY RELEASED ON DECEMBER 28, 2011

SUMMARY OF REPORT WITH RECOMMENDATIONS AND RESPONSE

The complainant applied for records related to the establishment and operation of the Fairford Water Control Structure and/or the Assiniboine Diversion from the 1960s to present and records respecting the flooding of Lake St. Martin, and made a complaint that Manitoba Water Stewardship did not respond to his access request. Our investigation determined that the public body failed to respond within the time period required under *The Freedom of Information and Protection of Privacy Act* (FIPPA). The Ombudsman also found that the public body failed in its duty to assist an applicant by not responding openly, completely and without delay. The investigation report contained three recommendations made to the public body.

The public body responded to the Ombudsman's report in accordance with the requirements of FIPPA and accepted the three recommendations. Its response included that it was considering the use of a research agreement to facilitate access. Our office reminded the public body of its obligation to comply with the recommendations within 15 days of acceptance of the recommendations unless an extension was approved by the Ombudsman. The public body was granted additional time by the Ombudsman to either comply with the recommendations or to execute a research agreement with the complainant. On December 15, 2011 the public body advised that a research agreement had been signed by both parties.

Manitoba Ombudsman

REPORT WITH RECOMMENDATIONS UNDER *THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*

CASE 2011-0443

MANITOBA WATER STEWARDSHIP

ACCESS COMPLAINT: FAILURE TO RESPOND

PROVISIONS CONSIDERED: 9, 11(1)

REPORT ISSUED ON OCTOBER 17, 2011

SUMMARY: The complainant applied for records related to the establishment and operation of the Fairford Water Control Structure and/or the Assiniboine Diversion from the 1960s to present and records respecting the flooding of Lake St. Martin, and alleged that the public body did not respond to his request for access within the time limit set out under *The Freedom of Information and Protection of Privacy Act* (FIPPA). Our investigation determined that the public body failed to respond within the time period provided for under FIPPA and has yet to respond to the request. The Ombudsman found that the complaint was supported. The Ombudsman also found that the public body failed in its duty to assist an applicant. This report contains recommendations to the public body.

THE COMPLAINT

The complainant submitted an application for access under *The Freedom of Information and Protection of Privacy Act* (FIPPA) to Manitoba Water Stewardship. The application was worded as follows:

Records of all documents internal and external and with the Federal Government, including telephone calls, e-mail, memoranda, letters related to the establishment in the late 1960s and subsequent operation of the Fairford Water Control Structure, Manitoba and/or the Assiniboine Diversion, to the present day, or related to damage caused by flooding of Lake St. Martin, but limited only to those matters which affect First Nations, i.e., Lake St. Martin, Little Saskatchewan, or Fairford, or questions related to the purchase or expropriation of lands in the area of Lake St. Martin regardless of the ownership of the lands, or the establishment of flood levels.

The complainant filed a complaint with the Ombudsman. The complaint was received by our office on August 11, 2011 and alleged that the public body had failed to respond to the request within the legislated time period.

PRELIMINARY MATTER

The complainant had submitted a prior complaint to our office on January 14, 2011 about the public body's failure to respond to this request. That complaint was considered to have been informally resolved as we were not able to establish that the public body had, in fact, received an application for access under FIPPA. At that time, our office provided the complainant with information respecting FIPPA and where and how to send his application(s) for access to information. The complainant advised that he subsequently submitted an application for access on the prescribed form to the public body in February 2011.

POSITION OF MANITOBA WATER STEWARDSHIP

The public body was made aware of the complainant's request for access in January 2011, however, the prescribed application for access form may not have been received until February 2011. As at today's date, the public body has not responded to the complainant to advise whether access to the requested records will be granted.

ANALYSIS OF ISSUES AND FINDINGS

Did Manitoba Water Stewardship fail to respond to a request as set out in subsection 11(1) of FIPPA?

FIPPA prescribes a time limit in which a public body is required to respond to a request for access:

Time limit for responding

11(1) The head of a public body shall make every reasonable effort to respond to a request in writing within 30 days after receiving it unless

(a) the time limit for responding is extended under section 15; or

(b) the request has been transferred under section 16 to another public body.

There is a requirement under FIPPA to make every reasonable effort to respond to the request within 30 days of receipt, unless extended under section 15 or transferred under section 16. The public body did not proceed with a transfer nor an extension. Therefore, the 30 day time limit for responding to the application was March 11, 2011.

On August 23, 2011 we notified the public body in writing of the complainant's formal complaint. Our letter requested that the public body provide its response to the complainant by September 15, 2011, and include in its response letter, the reason(s) for the delay. We also asked the public body to confirm the date it received the access request. The public body has yet to provide our office with information respecting the date of receipt. Furthermore, it has not responded to the complainant, nor has it provided any written reason to explain the delay.

Between August 23 and the date of this report, our office has contacted the public body by telephone on numerous occasions asking for the status of its response. Each time, we have stressed the urgency of providing a response to the complainant, such response to include an explanation for the delay.

The public body has not yet responded to the complainant, nor has it provided any written reason(s) for the delay. The Ombudsman found that Manitoba Water Stewardship failed to respond within the time period as set out in subsection 11(1) of FIPPA.

Did Manitoba Water Stewardship fulfill its duty to assist an applicant as set out in section 9 of FIPPA?

FIPPA imposes a duty on public bodies that reasonable efforts be made to assist applicants, in terms of responding without delay, openly, accurately and completely. Section 9 of FIPPA states as follows:

Duty to assist applicant

9 The head of a public body shall make every reasonable effort to assist an applicant and to respond without delay, openly, accurately and completely.

The public body has yet to respond to the complainant regarding whether access will be granted nor has it provided a letter indicating any reason for the delay. In fact, according to our records and based on conversation with the complainant, the public body has not provided any correspondence to the complainant since the date of his request in February, 2011. At one point, the public body indicated to our office that it was unclear as to how to process the request, i.e., whether the records would be refused or whether a fee estimate would be provided. Since that time, the public body advised our office verbally that any and all fees would be waived, in light of the public body's delay in responding to the request and therefore a formal fee estimate, anticipated to be in the neighborhood of \$4,000.00, was not provided. This information was conveyed by our office to the complainant. More recently, the public body indicated that there could be other procedures through which the complainant could obtain access to the records he is requesting. Regardless, in speaking with the complainant, he advised that he wishes to continue with his access request under FIPPA.

Also recently, the public body informed our office that it intends to meet with the complainant in the near future to ascertain what records, or categories of records, the complainant is interested in receiving. To our knowledge, the public body has not yet created a record that depicts the categories of records responsive to the complainant's request.

The Ombudsman found that Manitoba Water Stewardship failed in its duty to make every reasonable effort to assist an applicant and to respond openly, completely and without delay.

RECOMMENDATIONS

The Ombudsman makes the following recommendations, in consideration of the various attempts made by our office to resolve this matter.

1. The Ombudsman recommends that the public body respond to the complainant and provide a decision on whether access will be granted, in accordance with section 12 of FIPPA. In efforts to expedite the process, the Ombudsman recommends that this response include a list, itemizing the records, or categories of records, relevant to the request, from which the complainant may choose the records he is interested in obtaining.
2. The Ombudsman recommends that the public body explain and apologize for the delay to the complainant in its response.
3. The Ombudsman recommends that the public body submit to our office a copy of its response on the date that it is provided to the complainant.

HEAD'S RESPONSE TO THE RECOMMENDATIONS

Under subsection 66(4), Manitoba Water Stewardship must respond to the Ombudsman's report in writing within 15 days of receiving this report. As this report is being sent by courier to the head on this date, the head shall respond by November 1, 2011. The head's response must contain the following information:

Head's response to the report

66(4) *If the report contains recommendations, the head of the public body shall, within 15 days after receiving the report, send the Ombudsman a written response indicating*

- (a) that the head accepts the recommendations and describing any action the head has taken or proposes to take to implement them; or*
- (b) the reasons why the head refuses to take action to implement the recommendations.*

OMBUDSMAN TO NOTIFY THE COMPLAINANT OF THE HEAD'S RESPONSE

When the Ombudsman has received Manitoba Water Stewardship's response to her recommendations, she will notify the complainant about the head's response as required under subsection 66(5).

HEAD'S COMPLIANCE WITH RECOMMENDATIONS

If the head accepts the recommendations, subsection 66(6) requires the head to comply with the recommendations within 15 days of acceptance of the recommendations or within an additional period if the Ombudsman considers it to be reasonable. Accordingly, the head should provide written notice to the Ombudsman and information to demonstrate that the public body has complied with the recommendations and did so within the specified time period.

Alternatively, if the head believes that an additional period of time is required to comply with the recommendations, the head's response to the Ombudsman under subsection 66(4) must include a request that the Ombudsman consider an additional period of time for compliance with the recommendations. A request for additional time must include the number of days being requested and the reasons why the additional time is needed.

October 17, 2011
Irene A. Hamilton
Manitoba Ombudsman

Manitoba Ombudsman

RESPONSE TO THE RECOMMENDATIONS UNDER *THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*

CASE 2011-0443

MANITOBA WATER STEWARDSHIP

ACCESS COMPLAINT: FAILURE TO RESPOND

PROVISIONS CONSIDERED: 9, 11(1)

RESPONSE ISSUED ON DECEMBER 19, 2011

SUMMARY: On November 1, 2011 Manitoba Water Stewardship provided its response to the Ombudsman, accepting the three recommendations. Its response also included that the public body was considering the use of a research agreement to facilitate access. The Ombudsman clarified with the public body that providing a response in compliance with subsection 12(1) of FIPPA did not contemplate pursuing a research agreement with the complainant. Therefore, the public body sought an extension of time to either comply with the recommendations or complete a research agreement satisfactory to the public body and the complainant, to which the Ombudsman agreed. On December 15, 2011 we received a letter from the public body advising that a research agreement had been signed by both parties.

RESPONSE TO THE RECOMMENDATIONS

Under subsection 66(4), Manitoba Water Stewardship was required to respond to the Ombudsman's report in writing within 15 days of receiving the report. As the report was sent by courier on October 17, 2011 the head had until November 1, 2011 to respond. The head's response was to contain the following information:

Head's response to the report

66(4) *If the report contains recommendations, the head of the public body shall, within 15 days after receiving the report, send the Ombudsman a written response indicating*

- (a) that the head accepts the recommendations and describing any action the head has taken or proposes to take to implement them; or*
- (b) the reasons why the head refuses to take action to implement the recommendations.*

Manitoba Water Stewardship provided its response to the Ombudsman on November 1, 2011 and accepted the following recommendations:

- 1. The Ombudsman recommends that the public body respond to the complainant and provide a decision on whether access will be granted, in accordance with section 12 of FIPPA. In efforts to expedite the process, the Ombudsman recommends that this response include a list, itemizing the records, or categories of records, relevant to the request, from which the complainant may choose the records he is interested in obtaining.**
- 2. The Ombudsman recommends that the public body explain and apologize for the delay to the complainant in its response.**
- 3. The Ombudsman recommends that the public body submit to our office a copy of its response on the date that it is provided to the complainant.**

Its response included the following:

The department realizes the importance of fulfilling our duty to assist and meeting the timelines as set out in the legislation. In accordance with your October 17th recommendation and advice, we have been in contact with the applicant. The department is currently undertaking the categorization of records, approximately 3,100 documents and another 9 boxes of documents, relevant to the request to enable the applicant to identify appropriate records. Upon completion of the listing and further discussion with the applicant, the department is proposing the use of a research agreement between the department and the applicant to facilitate access by the applicant to the relevant records.

On November 2, 2011 our office notified the complainant about the head's response as required under subsection 66(5). At that time, we explained in writing to both the complainant and the public body that fulfilling an access request under FIPPA did not contemplate a research agreement, but rather required that the public body provide a decision about access to the information that was being sought, and where access to that information was being refused, reasons for the refusal. Under subsection 66(6) of FIPPA, a public body must comply with the recommendations within 15 days of acceptance, or within an additional period of time the Ombudsman considers reasonable. The public body was reminded of its requirement to provide an access decision to the complainant and to comply with the recommendations by November 16, 2011, unless an extension was requested by the public body and subsequently agreed to by the Ombudsman.

On November 10, 2011 the public body requested that the Ombudsman allow an additional period of 30 days to December 15, 2011 in order to either comply with the three recommendations of October 17, 2011 or to complete a research agreement, satisfactory to both the complainant and the public body. On November 15, 2011 the Ombudsman agreed to an extension to December 15, 2011 for these purposes. On December 15, 2011 the public body advised the Ombudsman that a research agreement had been finalized and signed by both the complainant and the public body. Our office received a copy of this correspondence. As such, the request for access under FIPPA is withdrawn and our office considers this matter concluded.

Providing access to information in accordance with a research agreement can be an alternative to the FIPPA access process. However, in fairness to the FIPPA applicant, the public body should explore this option at the onset of receiving an access request.

Irene A. Hamilton
Manitoba Ombudsman