

# MANITOBA OMBUDSMAN PRACTICE NOTE

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## THE EXERCISE OF DISCRETION WHEN APPLYING DISCRETIONARY EXCEPTIONS TO REFUSE ACCESS UNDER *THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT (FIPPA)*

Most exceptions to disclosure under FIPPA are discretionary. This Practice Note has been prepared to assist public bodies in applying discretionary exceptions when refusing access. It also outlines what to include in representations to our office during a complaint investigation when explaining the application of discretionary exceptions.

### HOW TO APPLY A DISCRETIONARY EXCEPTION

A discretionary exception gives a public body the option to disclose even if the exception can technically apply. When considering whether to withhold information under a discretionary exception a public body's decision necessarily involves two steps:

1. The first step is to determine if the information properly falls within the discretionary exception, and no limits to the exception apply. If the exception applies, go to step two.
2. The second step is to consider all relevant factors including the purposes of FIPPA, and then exercise discretion to either withhold or release some or all of the information. This requires looking at the specific circumstances of the situation and considering whether or not the information can be disclosed despite the fact that it qualifies for exception.

The exercise of discretion should take into account all relevant circumstances, including those that may weigh in favour of releasing the information. The proper exercise of discretion is governed by the spirit and purposes of FIPPA. One of the main purposes of the Act is to provide access, subject to limited and specific exceptions. With this purpose in mind, some factors to consider are the following:

- If disclosure of the information would increase public confidence in the operation of the public body and transparency of government decision-making.
- Whether the requested information is about the requester.
- If there are factors personal to the requester or the situation that might weigh in favour of release of the requested information.
- Whether concerns that the information would be taken out of context could be addressed by providing an explanation of the context in the response to the applicant.

- Whether the request can be handled by severing the record and providing the applicant with some information or as much information as possible, rather than no information at all.
- The age of the record.

### **WHAT PUBLIC BODIES CAN EXPECT WHEN A COMPLAINT IS MADE TO THE OMBUDSMAN**

When Manitoba Ombudsman investigates a complaint concerning a refusal of access, a public body would be asked to provide our office with a copy of the records containing the withheld information and representations to explain the decision to rely on the exceptions cited to refuse access. When a discretionary exception is relied on to refuse access, the representations must also specifically address the public body's exercise of discretion.

On review of a discretionary exception by our office, a public body would need to demonstrate in its representations: (1) that the requirements of the exception are present without limits, and how the exception applies to the withheld information; and, (2) that through a reasonable consideration of factors specific to the circumstances, it has properly exercised its discretion in determining that the information should not be disclosed to an applicant.

When explaining the exercise of discretion to the Ombudsman, the public body should provide our office with the relevant factors that were considered and the reasons why this led to a decision to refuse access. This explanation is separate from the public body's reasons for relying on the exception but in some situations there could be overlap when the discretionary exception contains some type of a harm (for example, harm to law enforcement and legal proceedings under section 25).

As with all access decisions made under the Act, it is important that the public body documents the details of how the act of discretion was carried out including the factors that were considered and why it decided not to release information that was withheld. This documentation will enable the public body to provide information to support its decision when responding to a complaint being investigated by Manitoba Ombudsman. It will also enable the public body to properly:

- support the basis for access decisions internally
- explain the basis for decisions to a requester
- prepare evidence for the Information and Privacy Adjudicator where the Ombudsman requests the review of a matter where a public body has not complied with a recommendation
- prepare evidence for Court if an applicant appeals a refusal of access decision where discretionary exceptions were relied upon

Public bodies may wish to develop their own guidelines to assist in the exercise of discretion. Some of the factors suggested in this Practice Note may be of assistance.