

# MANITOBA OMBUDSMAN PRACTICE NOTE

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## **MAKING EFFECTIVE WRITTEN REPRESENTATIONS IN RESPONDING TO COMPLAINTS ABOUT REFUSED ACCESS UNDER *THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT (FIPPA)***

Under subsection 59(1) of FIPPA, an applicant has a right to make an access complaint to the Ombudsman about any decision, act or failure to act by a public body that relates to the request. This includes a complaint about a decision to refuse access to all or part of the requested records. This Practice Note has been prepared as a companion to our Practice Note *Responding to a Complaint about a Refusal of Access under The Freedom of Information and Protection of Privacy Act*, to assist public bodies in making effective written representations when responding to the Ombudsman about a refusal of access complaint.

When Manitoba Ombudsman investigates a complaint concerning a refusal of access, a public body would be asked to provide our office with: (1) a copy of the withheld responsive records indicating where each exception applies; and (2) representations to explain the decision to rely on the exceptions cited to refuse access. Under subsection 64(2), the Ombudsman may decide whether representations are to be made orally or in writing. Generally, for refusal of access complaints, a public body would be asked to provide written representations. There could be other information relevant to a particular complaint that may also be requested from a public body.

The foundation of effective representations is laid long before a complaint to the Ombudsman is made. It begins with thorough documentation during the FIPPA decision-making process. Thorough documentation provides a sound basis upon which public bodies can construct the access decision letter to an applicant. The decision letter then becomes a crucial building block upon which representations are built. Well-documented decisions enable public bodies to provide comprehensive and effective representations during a complaint investigation, which often takes place long after decisions have been discussed and made. In our Practice Note *Documenting Access Decisions under FIPPA and PHIA*, we offer best practices for public bodies (and trustees) to follow.

Each exception under the Act has certain requirements that must be satisfied. It is important that a public body addresses each component of these requirements for each exception.

If representations are too general or if the necessary connections between the exception and the withheld information are not clearly made, the representations will not establish that the exception applies. To be effective, representations should not restate or rephrase the language of an exception; they should clearly establish, explain, and provide evidence to support the public body's case for relying on the exception that has been cited. Generally, providing concise written representations is an efficient process that enables a public body to describe in its own words, the basis for its decision. Additionally, statements made in a public body's representations are often cited in our reports so that a public body's position is accurately represented.

When making written representations to the Ombudsman, public bodies should demonstrate the following:

- **For both mandatory and discretionary exceptions**, a full explanation should be provided to clearly demonstrate how all of the required elements of each exception apply to the withheld information.
- **For both mandatory and discretionary exceptions**, where there are also provisions that limit the application of the exception to disclosure, we need to consider whether any such provisions could apply, thereby providing for the release of the information. An explanation of the public body's consideration of whether any would apply should be provided. For example, if the public body has cited subclause 18(1)(c)(i), the public body's consideration of the applicability of subsection 18(3) should be explained.
- **For discretionary exceptions**, a public body has the discretion to give access rather than refuse access to the information. Therefore, a public body should provide an explanation of the reasons for refusing access including the factors that were considered to be relevant, in order to demonstrate that its exercise of discretion was reasonable. Our Practice Note, *The Exercise of Discretion When Applying Discretionary Exceptions to Refuse Access under FIPPA*, provides suggestions for public bodies when applying discretionary exceptions.
- **Where an exception states that the information or record must be one of the types listed in the exception**, identify the particular type of information or record and provide reasons to explain why it fits into this category. Some examples are clause 18(1)(b) which requires the information to fall within the categories of commercial, financial, labour relations, scientific or technical information, and clause 23(1)(a) which requires the information to fall within the categories of advice, opinions, proposals, recommendations, analyses or policy options.
- **Where an exception states that a particular consequence would result from disclosure of the information**, describe the consequence in detail and provide an explanation to establish a reasonable expectation of the harm described in the exception. Some examples are section 24 where disclosure would be harmful to individual or public safety and subsection 25(1) which sets out exceptions where disclosure would be harmful to law enforcement or legal proceedings.
- **Where an exception states that a record was prepared for a particular purpose**, provide facts to support this claim. Some examples are cabinet confidences under subsection 19(1) and solicitor-client privilege under subsection 27(1).

- **Where an exception states that the information was provided in confidence**, supply details of the circumstances in which the information was provided and explain the basis for the expectation of confidentiality. Some examples relate to third party privacy under clauses 17(2)(c) and 18(1)(b) and information provided by another government under subsection 20(1).