

# MANITOBA OMBUDSMAN PRACTICE NOTE

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## DISTINGUISHING BETWEEN ACCESS TO INFORMATION REQUESTS AND AUTHORIZED DISCLOSURES UNDER FIPPA AND PHIA

### INTRODUCTION

FIPPA and PHIA set out rules concerning the rights of individuals and the obligations of public bodies and trustees related to access to information and information privacy. These include rules relating to the release of information by public bodies and trustees to persons outside of their organizations.

Such release of information under FIPPA or PHIA can be made either:

- in response to a requester's access to information request for general information, personal information or personal health information made under Part 2 of the Act, or
- through a public body's or trustee's disclosure of personal or personal health information under Part 3 of the Act.

Part 2 ("Access to Information") and Part 3 ("Protection of Privacy") of the Acts have distinct rules. In considering the release of information outside of the organization, a public body or trustee will be working with either one set of rules or the other. It must therefore be clear whether the potential release is access to information or authorized disclosure.

The aim of this Practice Note is to clarify the difference between the two concepts. The basic differences between access to information and authorized disclosure are listed on the following page. The distinctions are then further developed.

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**NOTE:** This Practice Note only concerns actions taken under FIPPA or PHIA. As a best practice, a public body or trustee may, by way of policy, choose to release information by active dissemination (for example, on a web site or in an annual report) or routine disclosure (for example, when a person attends their office and asks for information).

## DIFFERENCES BETWEEN ACCESS TO INFORMATION AND AUTHORIZED DISCLOSURES

<b>Access to Information Under Part 2</b>	<b>Authorized Disclosure Under Part 3</b>
The rules relating to access to information are found in Part 2 of FIPPA and PHIA.	Authorized disclosure of information is a privacy concept; the rules concerning privacy are contained in Part 3 of FIPPA and PHIA.
Access to information is a right, exercised by a requester making an access to information request under FIPPA or PHIA.	Authorized disclosure is a choice available to a public body or trustee to release information subject to prevailing privacy rules in FIPPA and PHIA.
An access to information request triggers a formal, time-based process outlined under FIPPA for personal information or under PHIA for personal health information.	There is no process set out under FIPPA or PHIA for undertaking an authorized disclosure of information.
Access to information applies to personal information and general (non-personal) information under FIPPA and to personal health information under PHIA.	Authorized disclosure, being a privacy concept, applies only to personal information under FIPPA and personal health information under PHIA.
A public body or trustee should not probe into why or for what purpose the requester is making an access request. However, a requester may need to provide contextual information to enable the public body or trustee to identify records responsive to the request.	If a public body or trustee chooses to disclose personal or personal health information, it must ensure that it is authorized to do so by at least one of the disclosure provisions under FIPPA or PHIA. This requires knowledge of why the disclosure will be made.
In an access to information request under FIPPA or PHIA, release is the rule, subject to applicable exceptions that should be interpreted narrowly.	FIPPA and PHIA authorize disclosure to be made in certain circumstances, but do not impose on the public body or trustee a duty to disclose. A duty to disclose can, however, be imposed by another Act or by virtue of a court order, for example. Fulfilling a duty to disclose in such circumstances would be allowable as an authorized disclosure under FIPPA or PHIA.
Where excepted information can reasonably be severed from a record, it must be severed, and access must be given to the remainder of the record. This provides as much access to the requested information as possible.	If the public body or trustee chooses to disclose information, the disclosure must be limited to the minimum amount necessary to accomplish the purpose for which it is disclosed.
In the access to information process under FIPPA and PHIA, a requester who does not receive access to all of the requested records has the right of complaint to the Ombudsman.	A complaint about a decision not to disclose may be made to the Ombudsman only by a family member of a deceased person, where disclosure was not made under 44(1)(z) of FIPPA. A complaint about a decision to disclose may be made to the Ombudsman by an individual who believes that disclosure of his or her personal or personal health information was not authorized under FIPPA or PHIA.

## **ACCESS TO INFORMATION**

Part 2 of FIPPA and PHIA sets out a formal access to information process that is triggered once a person makes a request for access to a record. The request will require a response from the public body or trustee, which will have to be in writing (except where all requested information in a PHIA request is provided at the time of request). Specific contents are required in the response, which must be made within a particular time-frame.

Under FIPPA, it will usually be clear that an access to information request is being made because the Act requires that a particular form is used (subsection 8(2)). However, a requester may make an oral request if he or she has a limited ability to read or write English or French or has a disability or condition that affects his or her ability to make a written request (subsection 8(3)). In that event, it would be expected that the public body would help complete the form on the individual's behalf as there is a duty to make every reasonable effort to assist an applicant (subsection 9).

Under PHIA, a request for information does not have to be made in writing, but the trustee may require that it is (subsection 5(2)). In that event, there is no requirement of how the written request is to be set out. A trustee has a duty to make every reasonable effort to assist an individual making a request (subsection 6(2)).

The requester has a right of access to the requested information under FIPPA or PHIA, subject to specific exceptions set out in Part 2 of the Act. The exceptions or limitations should be interpreted narrowly. Severing of excepted information is required, resulting in as much information as possible being released. The reason why the access request is being made or for what purpose the information will be used should not be probed by a public body or trustee. The context of the access request may, however, be relevant to identifying records that would be responsive to the request.

Under FIPPA and PHIA, a requester has a right to make a complaint about access, including that he or she did not receive all of the information that was requested (FIPPA subsection 59(1) and PHIA subsection 39(1)). Note, however, that sections 33 and 34 of FIPPA address the possibility that an access request may, in the opinion of another person (third party), invade their personal privacy or affect their interests and a process for considering this is provided. This may result in a complaint to the Ombudsman by the third party where a public body has decided to give access to the requested record.

## **AUTHORIZED DISCLOSURE (APPLICABLE ONLY TO PERSONAL AND PERSONAL HEALTH INFORMATION)**

Part 3 of FIPPA and PHIA sets out rules on how public bodies and trustees are required to protect the personal and personal health information they maintain. These rules became operational once FIPPA and PHIA came into effect and public bodies and trustees must comply with them. The rules are a minimum standard, but public bodies and trustees can voluntarily follow a higher level of privacy protection.

For a disclosure to be compliant with FIPPA or PHIA, it must be "authorized" or permitted by the Act (FIPPA subsection 42(1) and PHIA subsection 20(1)). A public body or trustee will be authorized to disclose personal or personal health information if one or more of the situations described in section 44 of FIPPA or section 22, 23, 23.1, 23.2 or 24 of PHIA applies. In most of these situations by far, the public body or trustee is not required to provide the information

outside of the organization but rather may choose to do so. The few instances where disclosure is required include the situation of a subpoena and when the sharing of information is required by law. It is the subpoena or other requirement under law that requires the disclosure whereas PHIA allows the disclosure to be made in those circumstances.

There is no one process for initiating or undertaking an authorized disclosure under FIPPA and PHIA. Best practices dictate that the public body or trustee should document the considerations made in choosing to make the disclosure and the nature of disclosure (for example, what information was disclosed, to whom, when and under what circumstances). Context is relevant in choosing to disclose personal or personal health information and the circumstances for sharing information should be considered on a case-by-case basis.

Both FIPPA and PHIA require that every disclosure must be limited to the minimum amount of information necessary to accomplish the purpose for which it is disclosed (FIPPA subsection 42(2) and PHIA subsection 20(2)). Therefore, the release of information by way of disclosure should be narrowly interpreted.

If the individual the personal or personal health information is about is of the belief that a disclosure was made contrary to FIPPA or PHIA, he or she has the right to make a privacy complaint to the Ombudsman. Ordinarily, there is no complaint available to someone who did not obtain information by way of disclosure; the exception to this is a FIPPA complaint that can be made to the Ombudsman by a relative of a deceased person where a public body did not disclose personal information under clause 44(1)(z) (subsection 59(4)).