

MANITOBA OMBUDSMAN

2011 Access Practices Reassessment
of Manitoba Justice, University
of Manitoba, Manitoba Hydro, and
Manitoba Innovation, Energy and Mines

Audit Report under Section 49 of
*The Freedom of Information and
Protection of Privacy Act (FIPPA)*

December 2011

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OMBUDSMAN'S MESSAGE

In 2010, my office began assessing the FIPPA access practices of public bodies under our FIPPA Access Practices Assessment initiative. This initiative is an audit that examines four key components in the public body's processing of a FIPPA Application for Access. The audit does not assess the correctness of the access decision.

The four key components examined are: (1) compliance with the requirements of a response to an applicant under section 12 of the Act; (2) compliance with time requirements of the Act; (3) adequacy of records preparation; and (4) adequacy of the contents of the FIPPA file. These components are examined and assessed because they are fundamental to an efficient, thorough and accountable access decision.

The public bodies audited in 2010 were: Workers Compensation Board (WCB); Manitoba Justice; the University of Manitoba (U of M); Manitoba Hydro; and, Manitoba Innovation, Energy and Mines (IEM).

In January 2011, I issued a public report with recommendations about the 2010 audits (see http://www.ombudsman.mb.ca/pdf/2011_01_FAPA_Public_Audit_Report.pdf). Recommendations were made to four of the five of the public bodies (no recommendations were necessary for WCB). All recommendations were accepted.

Some of the 2010 recommendations made reference to two guides, *Guideline on Time Frames for Processing a FIPPA Request* and *The Standard Contents of a FIPPA File*. These guides are reproduced in Appendix A and B respectively, of this report.

Four follow-up audits to reassess the access practices of the public bodies in relation to the recommendations that were made in 2010, were conducted in the summer and fall of 2011. The reassessments are undertaken as a check-up rather than as an exhaustive review. This report provides our findings and observations on the four follow-up audits or reassessments.

Generally, the results indicate that the access practices of the four public bodies have improved significantly. Although there remains room for improvement for three of the four public bodies in some component areas that were reassessed, at this time, I am satisfied with the implementation of my recommendations. To ensure ongoing progress, my office may conduct an access practices assessment in the future to further monitor compliance with the 2010 recommendations.

In 2010, the overall performance average of Manitoba Justice, the University of Manitoba, Manitoba Hydro, and Manitoba Innovation, Energy and Mines was 52%. In 2011 it was 92%. Each of these public bodies has demonstrated that positive modifications to FIPPA access practices can effectively convert weaknesses into strengths.

Once again we gratefully acknowledge the full cooperation and assistance provided by Manitoba Justice, the University of Manitoba, Manitoba Hydro, and Manitoba Innovation, Energy and Mines.



BACKGROUND

AUTHORITY TO CONDUCT THE AUDIT

In addition to investigation of complaints, the Ombudsman may conduct audits and make recommendations to monitor and ensure compliance under FIPPA, as provided for in section 49 of the Act which states:

General powers and duties

49 In addition to the Ombudsman's powers and duties under Part 5 respecting complaints, the Ombudsman may

(a) conduct investigations and audits and make recommendations to monitor and ensure compliance

(i) with this Act and the regulations

THE AUDIT PROCESS

In July 2011, the public bodies were notified by letter of our intention to conduct the access practices reassessment. The reassessments occurred over the period of July-November 2011.

We reviewed completed FIPPA files (i.e. the files that are set up to process applications for access) where access was refused in whole, in part, or where records do not exist or cannot be located, for the period of January 1, 2011 to June 30, 2011. In total we reviewed 50 files.

For U of M and IEM, the number of files reviewed was the actual number of completed FIPPA files where access was refused in whole, in part, or where records do not exist or cannot be located, for the period of January 1, 2011 to June 30, 2011. For Justice and Hydro, which both had a much higher volume of FIPPA files relative to U of M and IEM, we used the same criteria in terms of time frame and type of access decisions, except we randomly selected a sample of 15 files from each for review.

Feedback meetings occurred after each audit was completed. At these meetings, the general findings of the audit were discussed in terms of compliance with the recommendations that were made in 2010. Individual audit reports were provided to each of the 4 public bodies in November 2011.

GENERAL FINDINGS

OVERALL PERFORMANCE AVERAGES

- ◆ Justice - 100%
- ◆ U of M - 93%
- ◆ Hydro - 90%
- ◆ IEM - 85%

Average 92%

OVERALL COMPONENT CATEGORY AVERAGES

- ◆ Compliance with section 12 - an average of 94% of the files reviewed were compliant with section 12
- ◆ Compliance with time requirements - an average of 89% of the files reviewed were compliant with time requirements
- ◆ Adequacy of records preparation - an average of 88% of the files reviewed had adequate records preparation
- ◆ Adequacy of the contents of the FIPPA file - an average of 95% of the files reviewed had adequate contents/documentation

Average 92%

COMPLIANCE WITH SECTION 12

What is Required

Section 12 of FIPPA sets out the mandatory elements that are required in a response to an applicant.

What was Assessed

In assessing compliance, if one or more required element was missing from the response letter it was determined to be not compliant.

What We Found

- ◆ Justice had 100% compliance with section 12
- ◆ U of M had 82% compliance with section 12 (2 responses were not compliant)
- ◆ Hydro had 93% compliance with section 12 (1 response was not compliant)
- ◆ IEM had 100% compliance with section 12

Average 94%

COMPLIANCE WITH TIME REQUIREMENTS

What is Required

Compliance with the time frames set out in FIPPA is required.

What was Assessed

If the response from the public body was sent to the applicant within the time limits required by FIPPA, (taking into account any extensions taken or fee estimates), the response was determined to be compliant.

What We Found

- Justice - Not assessed because a recommendation related to timeliness was not made in 2010
- U of M had 100% compliance with time requirements
- Hydro had 67% compliance with time requirements (5 responses were not compliant)
- IEM had 100% compliance with time requirements

Average 89%

ADEQUACY OF RECORDS PREPARATION

What is Expected

When access to part of the records is refused, the FIPPA file should contain a copy of the severed and unsevered records. Where information has been severed, the applicable section of FIPPA should be cited beside the passage that is being withheld. When information is withheld in whole, if all the exceptions apply to each word, then the exceptions can be noted on the first page.

What was Assessed

If records existed and the unsevered records and the severed records were in the FIPPA file with the exceptions fully cited and noted where they applied, the records preparation was determined to be adequate.

What We Found

- Justice's records were adequately prepared in 100% of its files
- U of M's records were adequately prepared in 100% of its files
- Hydro's records were adequately prepared in 100% of its files
- IEM's records were adequately prepared in 50% of its files (of the 2 files that had responsive records, 1 file was inadequate)

Average 88%

ADEQUACY OF THE CONTENTS OF THE FIPPA FILE

What is Expected

Thorough documentation during the decision-making process is essential to keep track of how, why and by whom decisions were made. Documentation should show why the access decision was made, who was involved in the decision and their contribution, why an exception applies, and where applicable, the consideration of any limits to the exception and the exercise of discretion. It is also important to document the search that was undertaken especially where the decision is that records do not exist or cannot be located. In our view, adequacy of the contents of the FIPPA file can be achieved by adopting the guideline, *The Standard Contents of a FIPPA File* (see Appendix B).

What was Assessed

If the file contained sufficient information and documentation to explain, support, or substantiate each aspect of the access decision, the file documentation was determined to be adequate.

What We Found

- Justice had adequate contents/documentation in 100% of its files
- U of M had adequate contents/documentation in 91% of its files (1 file had inadequate contents)
- Hydro had adequate contents/documentation in 100% of its files
- IEM had adequate contents/documentation in 89% of its files (1 file had inadequate contents/documentation)

Average 95%

2011 KEY FINDINGS AND OBSERVATIONS FOR EACH PUBLIC BODY

Justice

In the 2010 audit, records preparation, section 12 compliance, and the adequacy of the contents of the FIPPA files were identified as weaknesses. Justice's overall average in 2010 was 72%.

The following recommendations were made to Justice to address the weaknesses that were identified:

Recommendation # 1

It is recommended that Justice keep a copy of the severed and unsevered records in the central FIPPA file.

Recommendation # 2

It is recommended that Justice comply with the required contents of a response letter under section 12 of FIPPA for each request.

Recommendation # 3

It is recommended that effective upon notifying the Ombudsman of the acceptance of this recommendation, that Justice adopt the guideline, "The Standard Contents of a FIPPA File" as its standard for FIPPA file documentation.

Recommendation # 4

It is recommended that Justice ensure that staff who are involved in the processing of a FIPPA request include the Coordinator in the email distribution so that all emails and attachments are printed and placed in the central FIPPA file.

2011 KEY FINDINGS: 15 FIPPA FILES WERE REVIEWED

- Compliance with Section 12 - 100% of responses were compliant with section 12
- Compliance with Time Requirements - Not assessed because a recommendation related to timeliness was not made in 2010
- Adequacy of Records Preparation - 100% of the files had adequate records preparation
- Adequacy of the Contents of the FIPPA File - 100% of the files had adequate contents/documentation

Average 100%

Comparison of 2010 and 2011 Findings

	2010	2011
COMPLIANCE WITH S. 12	64%	100%
COMPLIANCE WITH TIME REQUIREMENTS	98%	Not Applicable
ADEQUACY OF RECORDS PREP	76%	100%
ADEQUACY OF CONTENTS OF FILE	50%	100%
AVERAGE	72%	100%



OBSERVATIONS

- Strengths that were observed in the 2010 assessment continued to be in evidence in 2011: the department's dedication to customer service is excellent - clearly there is a department-wide effort to assist applicants however possible; there are numerous examples where the department may not have had responsive records but still compiled and/or provided related information that might be helpful to applicants; there are many instances where extensive explanations are provided about the information that was requested and how it is kept; there is constructive communication with applicants; there is a positive team effort across the department throughout the processing of requests; and, the FIPPA tracking database the department uses is a good tool and is restricted to those who have a need to use it for the purposes of processing the request.
- The 2011 reassessment determined that there was significant improvement in all categories that were reassessed and that the recommendations made by the Ombudsman in 2010 were effectively implemented.
- The 2011 reassessment identified new good practices including: the consistent use of a tracking sheet in each FIPPA file to ensure the adequacy of the required contents for each FIPPA file; documentation of file activity, usually on the file folder or in a printed file memo; and, a concerted effort on the part of the department's FIPPA coordinators to receive, print and file emails that are relevant to the FIPPA file.

University of Manitoba

In the 2010 audit, section 12 compliance, timeliness, the adequacy of the contents of the FIPPA file, and the adequacy of records preparation were identified as weaknesses. U of M's overall average in 2010 was 59%.

The following recommendations were made to the University of Manitoba to address the weaknesses that were identified:

Recommendation # 1

It is recommended that U of M ensure that all responses are compliant with section 12.

Recommendation # 2

It is recommended that U of M comply with the time requirements of the Act.

Recommendation # 3

It is recommended that effective upon notifying the Ombudsman of the acceptance of this recommendation, that U of M adopt "The Guideline on Time Frames for Processing a FIPPA Request" to facilitate compliance with time requirements of the Act.

Recommendation # 4

It is recommended that U of M conduct a line-by-line review for each record that is reviewed in response to an Application of Access.

Recommendation # 5

It is recommended that when information is withheld, that the applicable exceptions are noted on the FIPPA file copy of the record beside the information that is being withheld.

Recommendation # 6

It is recommended that effective upon notifying the Ombudsman of the acceptance of this recommendation, that U of M adopt the guideline, "The Standard Contents of a FIPPA File" as its standard for FIPPA file documentation.

2011 KEY FINDINGS: 11 FIPPA FILES WERE REVIEWED

- Compliance with Section 12 - 82% of responses were compliant with section 12 (2 responses were not compliant)
- Compliance with Time Requirements - 100% of responses were completed within required time frames
- Adequacy of Records Preparation - 100% of the files had adequate records preparation
- Adequacy of the Contents of the FIPPA File - 91% of the files had adequate contents/documentation (1 file had inadequate contents/documentation)

Average 93%

Comparison of 2010 and 2011 Findings

	2010	2011
COMPLIANCE WITH S. 12	86%	82%
COMPLIANCE WITH TIME REQUIREMENTS	79%	100%
ADEQUACY OF RECORDS PREP	50%	100%
ADEQUACY OF CONTENTS OF FILE	21%	91%
AVERAGE	59%	93%

OBSERVATIONS

- Strengths that were observed in the 2010 assessment continued to be in evidence in 2011: genuine and positive efforts to assist applicants; constructive communication with applicants to clarify, resolve, and satisfy requests; acknowledgement letters sent to applicants; and effort to deliver information to applicants even if it is not precisely responsive but possibly of use.
- The 2011 reassessment determined that there was a significant overall improvement in U of M's performance with outstanding improvements in adequacy of the contents of the FIPPA file, adequacy of records preparation, and timeliness.
- The 2011 reassessment identified a variety of good practices including the use of various templates/forms (*File/Document Review Summary, Guideline on Times Frames for Processing a FIPPA Request*, a file tracking sheet, and a running memo to file) to assist in timely, thorough and well-documented processing of FIPPA applications.
- The FIPPA files are well-organized and the responsive records are contained in a separate file folder within the FIPPA file, clearly bundled as severed and unsevered. Review of the responsive records appears to be a careful and thorough line-by-line review.
- Generally, the response letters to applicants provide clear articulation of the access decision and in some instances a helpful index of records or a description of the responsive records was provided. A copy of the records package that is sent to the applicant is appended to the file copy of the response letter; this is a good practice because it provides certainty as to what the applicant received.
- Two response letters were determined to be not compliant because reasons for the refusal were not provided for some exceptions that were claimed; providing reasons for the refusal is a requirement of subclause 12(1)(c)(ii) of FIPPA. One file had inadequate documentation of the access decision.

Going forward, U of M should ensure that reasons for a refusal are provided in the response letter to an applicant and also ensure adequate contents/documentation of the FIPPA file.



Hydro

In the 2010 audit, adequacy of records preparation, compliance with section 12, the format of the response letters, the adequacy of the contents of the FIPPA files, and timeliness were identified as weaknesses. Hydro's overall average in 2010 was 41%.

The following recommendations were made to Hydro to address the weaknesses that were identified:

Recommendation # 1

It is recommended that Hydro ensure that non-voluminous severed and unsevered records are kept in the FIPPA file.

Recommendation # 2

It is recommended that for each request, Hydro comply with the required contents of a response letter under section 12 of FIPPA.

Recommendation # 3

It is recommended that Hydro include in all of its response letters, the Hydro FIPPA file number and the wording of the applicant's request.

Recommendation # 4

It is recommended that effective upon notifying the Ombudsman of the acceptance of this recommendation, that Hydro adopt the guideline, "The Standard Contents of a FIPPA File" as its standard for FIPPA file documentation.

Recommendation # 5

It is recommended that Hydro comply with the time requirements of the Act.

Recommendation # 6

It is recommended that effective upon notifying the Ombudsman of the acceptance of this recommendation, that Hydro adopt "The Guideline on Time Frames for Processing a FIPPA Request" to facilitate compliance with time requirements of the Act.

Recommendation # 7

It is recommended that Hydro advise the Ombudsman of actions that will be taken to ensure compliance with the time frames required by the Act. (Hydro advised the Ombudsman in November 2010 of actions that would be taken.)

2011 KEY FINDINGS: 15 FIPPA FILES WERE REVIEWED

- Compliance with Section 12 - 93% of responses were compliant with section 12 (1 response was not compliant)
- Compliance with Time Requirements - 67% of responses were completed within required time frames (5 responses were not compliant)
- Adequacy of Records Preparation - 100% of the files had adequate records preparation
- Adequacy of the Contents of the FIPPA File - 100% of the files had adequate contents/documentation

Average 90%

Comparison of 2010 and 2011 Key Findings

	2010	2011
COMPLIANCE WITH S. 12	46%	93%
COMPLIANCE WITH TIME REQUIREMENTS	18%	67%
ADEQUACY OF RECORDS PREP	69%	100%
ADEQUACY OF CONTENTS OF FILE	32%	100%
AVERAGE	41%	90%

OBSERVATIONS

- Strengths that were observed in the 2010 assessment continued to be in evidence in 2011: response letters to applicants offer additional information that may be of interest and use by providing explanations as to why a record does not exist and by providing context, historical background, and clarifying information even though the additional information may not be perfectly responsive to the request; and, the initial administrative processing steps are efficient.
- The 2011 reassessment determined that there was a significant overall improvement in Hydro's performance in all categories.
- The 2011 reassessment noted that Hydro is documenting actions undertaken during the processing of applications for access.
- One response letter was not compliant with section 12 because the specific provision on which the refusal was based was not provided to the applicant; informing the applicant of the specific provision on which the refusal is based is a requirement of subclause 12(1)(c)(ii) of FIPPA.
- Concerning the 2010 Recommendation # 3, two response letters did not reference the Hydro FIPPA file number but the responses did quote the wording of the applicant's request.
- 5 responses were not compliant with time requirements. Of these 5 responses, the average number of days late was approximately 6.

Going forward, Hydro should ensure: compliance with the time requirements of FIPPA; compliance with the requirements of section 12; and, that its FIPPA file number is referenced in all response letters to applicants.

Innovation Energy and Mines

In the 2010 audit, section 12 compliance, timeliness, the adequacy of records preparation and the adequacy of the contents of the FIPPA file were identified as weaknesses. IEM's overall average in 2010 was 36%.

The following recommendations were made to IEM to address the weaknesses that were identified:

Recommendation # 1

It is recommended that IEM ensure that all responses are compliant with section 12.

Recommendation # 2

It is recommended that IEM comply with the time requirements of the Act.

Recommendation # 3

It is recommended that effective upon notifying the Ombudsman of the acceptance of this recommendation, that IEM adopt "The Guideline on Time Frames for Processing a FIPPA Request" to facilitate compliance with time requirements of the Act.

Recommendation # 4

It is recommended that IEM advise the Ombudsman of actions that will be taken to ensure compliance with the time frames required by the Act. (IEM advised the Ombudsman in December 2010 of actions that would be taken.)

Recommendation # 5

It is recommended that IEM conduct a line-by-line review of each record responsive to an Application for Access.

Recommendation # 6

It is recommended that IEM ensure that when a portion of information is withheld from a record, that the applicable exceptions are fully cited on the FIPPA file copy of the record beside the information that is being withheld.

Recommendation # 7

It is recommended that effective upon notifying the Ombudsman of the acceptance of this recommendation, that IEM adopt the guideline, "The Standard Contents of a FIPPA File" as its standard for FIPPA file documentation.

2011 KEY FINDINGS: 15 FIPPA FILES WERE REVIEWED

- Compliance with Section 12 - 100% of responses were compliant with section 12
- Compliance with Time Requirements - 100% of responses were completed within required time frames
- Adequacy of Records Preparation - 50% of the files had adequate records preparation (of the 2 files that had responsive records, 1 file was inadequate)
- Adequacy of the Contents of the FIPPA File - 89% of the files had adequate contents/documentation (1 of the 9 files had inadequate contents/documentation)

Average 85%

Comparison of 2010 and 2011 Key Findings

	2010	2011
COMPLIANCE WITH S. 12	90%	100%
COMPLIANCE WITH TIME REQUIREMENTS	30%	100%
ADEQUACY OF RECORDS PREP	13%	50%
ADEQUACY OF CONTENTS OF FILE	10%	89%
AVERAGE	36%	85%

OBSERVATIONS

- Strengths that were observed in the 2010 assessment continued to be in evidence in 2011: effort to assist applicants is positive; communication with applicants to clarify, resolve, and satisfy requests is productive and constructive; response letters are excellent because they provide helpful information and comprehensive reasons about why access is being refused; the initial processing of the Application for Access is efficient; and, back-up coverage between the Access and Privacy Officer and the Access and Privacy Coordinator continues to be in place so that there are no absence-related delays in the processing of requests.
- The 2011 reassessment determined that there was a significant overall improvement in IEM's performance in all categories, with outstanding improvements in adequacy of the contents of the FIPPA file, timeliness, and adequacy of records preparation.
- The 2011 reassessment noted that IEM is consistently now using a file tracking sheet (a good practice that was begun in late 2010) to document activity/decisions and record dates of key events or actions taken.

Going forward, IEM should ensure that a line-by-line review is conducted for each record responsive to an Application for Access and ensure adequate documentation of the decision-making process as set out in the guideline *The Standard Contents of a FIPPA File* referenced in the 2010 Recommendation #7.

APPENDIX A

Guideline on Time Frames for Processing a FIPPA Request

Time Frames (Working Days)	Guidelines
Day 1 - Day 2	<ul style="list-style-type: none"> ➤ the request is received and reviewed ➤ the applicant is contacted as necessary ➤ the request is dated/date stamped ➤ the request is numbered ➤ the due date is calculated ➤ the request is logged in to the electronic tracking system ➤ a FIPPA file is set up (paper/electronic) ➤ the Manitoba Culture, Heritage and Tourism FIPPA reporting form is completed and faxed (if required) ➤ an acknowledgement letter is sent to the applicant ➤ a notification email is sent to the area that would likely have the responsive records along with a date by which the responsive records are due to the Coordinator/Officer
Day 3 - Day 7	<ul style="list-style-type: none"> ➤ the records search is undertaken ➤ by the end of day 7, the responsive records are provided to the Coordinator/Officer with the information considered harmful to release marked and pages tagged with an explanation of the harm
Day 8 - Day 10	<ul style="list-style-type: none"> ➤ a preliminary assessment of the responsive records is done ➤ the pages are numbered if necessary ➤ copies are made as needed ➤ determine if time extension is warranted ➤ determine if third parties need to be notified ➤ consult with staff as necessary ➤ determine if a fee estimate is required and if so, prepare it and send to applicant
Day 11	<ul style="list-style-type: none"> ➤ create and complete an index of the records that includes the FIPPA file number, a description of the type of record, the date of each record, the number of pages, the possible exceptions that might be applicable to part or to all of the records, and any comments
Day 12 - Day 16	<ul style="list-style-type: none"> ➤ conduct a line-by-line review of the records ➤ consult with staff as necessary ➤ consult with third parties as necessary ➤ obtain a legal opinion or comments as necessary ➤ make copies as necessary ➤ sever records if necessary and note the exceptions on the record ➤ note the exceptions and the reasons for their application on the index of the records ➤ prepare the draft response to the applicant
Day 17 - Day 18	<ul style="list-style-type: none"> ➤ final consultations and discussions within the public body, as necessary ➤ at the end of day 18, all decisions are finalized
Day 19 - Day 20	<ul style="list-style-type: none"> ➤ the response is finalized and sent out to the applicant

APPENDIX B

The Standard Contents of a FIPPA File

- the assigned FIPPA file number;
- a tracking document that tracks the date with the actions taken on the file;
- the Application for Access and the date it was received;
- all correspondence and communications, including emails, faxes sent (with transmission reports and covering sheets) and faxes received, that are related to the file;
- notes with dates of the substance of consultations (emails and attachments, faxes, telephone conversations, meetings) with the applicant, third parties, public body staff, another public body's staff, and legal counsel;
- legal advice and legal opinions, if applicable;
- if fees applied, notes about how the fees were calculated including the activities for which a fee was charged, how much time was estimated for each chargeable activity, the basis for deciding that the amounts of time are reasonable in relation to the request, and, the amount of the fee;
- if an extension was taken, notes about why a specific provision under section 15 applies;
- notes about the search for the records indicating the locations searched, especially where the conclusion is that records do not exist or cannot be located;
- notes of why and how each exception applies and who made the decision;
- where applicable, notes of the consideration given to any limits to the exception (often identified as exceptions to the exception);
- for discretionary exceptions, notes about the reasons why the choice was made to not release;
- a copy of the records, and if information is withheld, a copy of the severed records with the applicable exceptions placed beside the withheld information, and the unsevered records;
- a copy of the response letter to the applicant; and,
- any correspondence, notes and documents relating to a complaint to the Ombudsman or to a review by the Information and Privacy Adjudicator, if requested by the Ombudsman.