

MANITOBA OMBUDSMAN PRACTICE NOTE

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PROVIDING NOTICE TO A THIRD PARTY UNDER SECTION 33 OF FIPPA

OVERVIEW

Access applications often involve information about third parties. Under FIPPA, there is a requirement to provide notice to an affected third party when the public sector body is considering giving access to the information. The process set out under sections 33 and 34 of FIPPA ensure that third parties have an opportunity to provide their views on whether the information should be released.

FIPPA sets out mandatory exceptions that protect information about a third party:

- if release of personal information could be an unreasonable invasion of an individual's privacy (section 17)
- if release of business information could be harmful to a third party's business interests (section 18)

If a public sector body can satisfy all elements of a specific provision in section 17 or 18 and access is being refused, there is no requirement to provide notice to the third party. The public sector body should document its rationale that all elements of the provision apply.

If the public sector body cannot establish with reasonable certainty that all of the elements of an exception apply, consultation with the third party is necessary, either informally or by providing written notice under section 33 of FIPPA.

As an example, in order to refuse access under clause 18(1)(b), the public sector body must establish:

- the type of information (commercial, financial, labour relations, scientific or technical information), and
- that the information was supplied to the public sector body by a third party, either explicitly or implicitly in confidence, and
- that the information has been treated consistently as confidential information by the third party.

If information is lacking to support any of these required elements, consultation with a third party is required.

Informal consultation with a third party may assist in determining whether exceptions under section 17 or 18 apply and it can also be used to determine whether the third party consents to disclosure as provided under clauses 17(4)(a) and 18(3)(a). In order for consent to be meaningful, the individual or business would need to know the information to which the consent relates. It may be necessary to provide a copy of the information to the third party to ensure there is no misunderstanding about the information to be released. If the third party verbally consents to the disclosure, a public sector body may wish to obtain written consent.

Sections 33 and 34 of FIPPA set out a formal process to notify a third party who may be affected by giving access. Notice must also be provided to the applicant.

There are time limits for the third party to provide representations and for the public sector body to make the access decision. The Act sets out how the access decision is to be communicated to the affected third party and the applicant. Both the third party and the applicant have a right of complaint to the Ombudsman about the access decision.

Sample notices to third parties and applicants have been prepared by Manitoba Culture, Heritage, Tourism and Sport and are available on its FIPPA web site at www.gov.mb.ca/chc/fippa/formsletters/sampleindex.html

NOTICE TO THE THIRD PARTY

The public sector body must make reasonable efforts to locate the third party and provide notice as soon as possible. Generally, notice would involve sending a letter to the third party at the person's last known address. Section 78 of FIPPA describes the manner in which notice may be provided.

The required contents of the notice are set out in subsection 33(3) of FIPPA. The notice must:

- state that a request has been made for access to a record that may contain information which, if disclosed to the applicant, might invade the privacy or affect the business interests of the third party, and
- include a copy of the record or part of it containing the information in question or describe the contents of the record, and
- state that within 20 days after the notice is given, the third party may, in writing, consent to the disclosure or make representations to the public sector body explaining why the information should not be disclosed.

The individual or business receiving the notice may not have heard of FIPPA and additional information may be needed to assist the recipient in understanding the process. A copy of the relevant exceptions being considered by the public sector body should be included to help the third party provide representations.

In some situations it may be sufficient to provide the third party with a detailed description of the information contained in the records. It is critical that the third party know what the information is and in many cases this can only be achieved by providing a copy of the records or a representative sample.

The third party should be advised that the public sector body must make a decision whether or not to give access within 30 days of the notice, regardless of whether the third party responds to the notice and gives representations.

The notice should include contact information for an employee of the public sector body who can answer any questions the third party may have.

The identity of the applicant should not be disclosed to the third party. It is the personal information of the applicant and must be protected in accordance with Part 3 of FIPPA. It can only be disclosed to the third party if the disclosure is authorized under section 44 of FIPPA, for example, if the applicant consented to the disclosure.

If the third party has consented to or requested the release of the information, notice is not required (subsection 33(2)). For example, the public sector body may have informally consulted with the third party and during this consultation the third party consented to the release.

NOTICE TO THE APPLICANT

Notice must also be given to the applicant to inform that an additional period of time is needed while a third party is given an opportunity to respond to the public sector body.

The contents of the notice are set out in subsection 33(4) of FIPPA. The notice must state that:

- the record requested may contain information which, if disclosed, might invade the privacy or affect the business interests of a third party, and
- the third party is being given an opportunity to make representations concerning disclosure, and
- an access decision will be made within 30 days after the day notice is given to the third party, unless the time limit for responding is extended under section 15.

The applicant may not know the identity of the third party. The public sector body should exercise caution in not revealing the third party's identity.

REPRESENTATIONS BY A THIRD PARTY

Representations by a third party must be made in writing unless the public sector body permits them to be made orally (subsection 33(5)).

It may be helpful to have further contact with the third party to clarify any additional information required to assist the public sector body in determining whether an exception applies.

NOTICE OF THE ACCESS DECISION

A public sector body must decide whether or not to give access within 30 days after notice is given to the third party. To ensure that the third party has been allowed time to provide representations, the access decision cannot be made before the earlier of:

- 21 days after the notice is given, and
- the day a response is received from the third party.

Subsection 34(2) requires that a public sector body provide written notice of its decision, including reasons for the decision, to both the applicant and the third party.

Decision to Refuse Access

If access is being refused in whole or in part, a public sector body should document its rationale that all elements of the provision apply. The notice of decision to the applicant must contain the information required in a response under clause 12(1)(c) of FIPPA. The applicant must be advised that a complaint may be made to the Ombudsman and that the time limit to complain is 21 days after the notice of decision. The notice should also include the contact information for Manitoba Ombudsman and advise that a prescribed complaint form is required (a copy may be enclosed with the notice).

Decision to Give Access

If the decision is to give access, the public sector body's consideration of the third party's representations should be documented. The notice to the third party must inform that a complaint may be made to the Ombudsman and that the time limit to complain is 21 days after the notice of decision. The notice should also include the contact information for Manitoba Ombudsman and advise that a prescribed complaint form is required (a copy may be enclosed with the notice).

The public sector body cannot release the information until the third party has been given an opportunity to contest the decision by making a complaint to the Ombudsman. As a best practice, the public sector body should ensure that a complaint has not been made before it releases the information.

COMPLAINT ABOUT THE DECISION

Applicants and third parties both have a right to complain to the Ombudsman about access decisions where notice has been given under section 33.

By the Applicant

If the public sector body decides to refuse access in whole or in part, the applicant has a right to complain to the Ombudsman about the decision (subsection 59(1)). The complaint must be made within 21 days after the notice of decision is given.

By the Third Party

If the public sector body decides to give access after it has provided notice to the third party, the third party may complain to the Ombudsman about that decision (subsection 59(2)). The complaint must be made within 21 days after the notice of decision is given.

OMBUDSMAN MAY REQUEST A REVIEW BY THE ADJUDICATOR

In the event the Ombudsman makes a recommendation with which the public body does not comply, the Ombudsman may ask the Information and Privacy Adjudicator to review the matter (section 66.1). Specifically, the Ombudsman may ask the Adjudicator to review any decision by the head of a public body to give access to a record in circumstances where a third party is notified of the decision under section 33 (clause 66.1(2)(b)). Upon completing a review, the Adjudicator must make an order on the issues (subsection 66.8(1)).

APPLICANTS AND THIRD PARTIES MAY APPEAL TO COURT

Applicants and third parties have a right to appeal the public body's decision to the Court of Queen's Bench if a complaint has been made to the Ombudsman, the Ombudsman's report about the complaint has been provided, the deadline for the Ombudsman to request a review by the Adjudicator has expired and the Ombudsman has not requested a review (subsection 67(2)):

- the applicant may appeal a decision to refuse access (clause 67(1)(a))
- the third party may appeal a decision to give access (clause 67(1)(b))