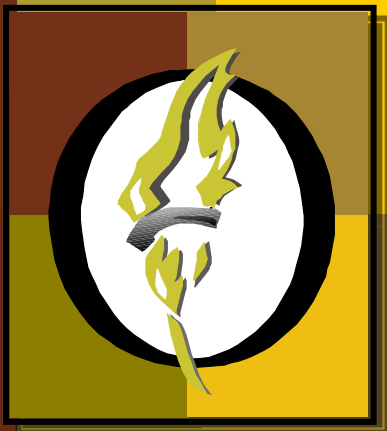


MANITOBA OMBUDSMAN



Investigation File: 2014-0177

Date: December 2, 2014

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EXECUTIVE SUMMARY

On January 15, 2014, PC Caucus made an access request for information under *The Freedom of Information and Protection of Privacy Act* (FIPPA) with Manitoba Labour and Immigration.

In response, the department provided PC Caucus with a number of records, including an April 2012 email. This record revealed that the minister of the department directed civil servants to invite immigrant service agencies to the Manitoba Legislature on April 19, 2012 to witness the minister table a resolution concerning the federal government decision affecting the delivery of services to immigrants in Manitoba. This record was not included when PC Caucus made a similar request under FIPPA for records to the same department on May 4, 2012.

Our office subsequently received a complaint by PC Caucus and opened an investigation to determine why the record in question was not provided to PC Caucus in response to their May 4, 2012 FIPPA request.

Manitoba Labour and Immigration indicated that the record should have been included in response to the May 4, 2012 FIPPA request by PC Caucus but that it was inadvertently missed during the department's search for records. The record was subsequently located by the department in June of 2012 when our office requested records as part of an investigation under *The Ombudsman Act*. The record, however, was not provided to PC Caucus at that time.

As such, our office reviewed the practices and procedures of the department with respect to the processing of FIPPA requests and interviewed staff involved in searching for and preparing records in response to FIPPA requests.

Our review found that in this particular matter, the search for records was delegated to an employee with little to no experience in processing FIPPA requests. In addition, there was no documentation as to how the search was conducted and who specifically was involved in the search.

Prior to the records being provided to PC Caucus on June 4, 2012, it was clear to the access and privacy coordinator that the search for responsive records at that point was inadequate and yet no action was taken to conduct a more comprehensive search. Similarly the department, after locating the email in question, failed to notify PC Caucus or our office that responsive records had not been included in its response to the 2012 FIPPA request.

There is no evidence that the department deliberately withheld records, in particular the email showing ministerial direction, when it initially processed the 2012 PC Caucus FIPPA request.



There is, however, no plausible explanation as to how this record was missed during the search. The record was in the email accounts of six staff, including the assistant deputy minister, the department's access and privacy coordinator and the person responsible for conducting the search for records and yet it was not included in the response package provided to PC Caucus.

Our office has made recommendations which we believe will assist public bodies in searching for and processing records in response to access to information requests under FIPPA. These include providing detailed instructions to ensure a comprehensive search is conducted and clearly documenting how such searches are carried out and access decisions made. Manitoba Labour and Immigration has advised our office that it accepts and will be implementing these recommendations.

OMBUDSMAN JURISDICTION UNDER *THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*

Manitoba Ombudsman is an independent office of the Legislative Assembly of Manitoba, reporting to the assembly through the Office of the Speaker. The responsibilities and authority of the ombudsman are set out in *The Ombudsman Act*, *The Freedom of Information and Protection of Privacy Act*, *The Personal Health Information Act*, and *The Public Interest Disclosure (Whistleblower Protection) Act*.

On April 15, 2014 Manitoba Ombudsman received a letter from the Official Opposition concerning two access to information requests made by PC Caucus under *The Freedom of Information and Protection of Privacy Act* (FIPPA). The first request was made on May 4, 2012 to Manitoba Immigration and Multiculturalism and responded to by the department on June 4, 2012. The second request was made to Manitoba Labour and Immigration on January 15, 2014 and responded to by the department on March 24, 2014.

The letter advised Manitoba Ombudsman that despite the two requests being similar, the records provided to PC Caucus in response to the second request included an important record (an email) that was not included in the response to the first request. The letter requested that Manitoba Ombudsman investigate how the email in question was omitted in the first request, and why this omission was not rectified when it was first discovered.

Under FIPPA, there is a duty to assist an applicant, which requires that a public body make every reasonable effort to assist the applicant and to respond openly, accurately and completely. Section 9 of FIPPA sets out this duty:

Duty to assist applicant



9 The head of a public body shall make every reasonable effort to assist an applicant and to respond without delay, openly, accurately and completely.

On April 15, 2014, Manitoba Ombudsman wrote to Manitoba Labour and Immigration, advising that our office would be reviewing the department's processing of the 2012 FIPPA request by PC Caucus. The review was conducted under Part 4 of FIPPA, in accordance with the Ombudsman's duties under clause 49(a)(i):

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 FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT (FIPPA)

Access and privacy legislation is based on two fundamental rights of people in a democratic society:

- the right to access information held by government and other public bodies, including information about ourselves, subject only to certain specified exceptions, and
- the right to privacy for personal information collected, stored, used and disclosed by public bodies.

In Manitoba, *The Freedom of Information and Protection of Privacy Act* (FIPPA) came into force on May 4, 1998 and replaced *The Freedom of Information Act*.

FIPPA applies to public bodies, which include provincial government departments and agencies and local public bodies. Local public bodies include educational bodies (such as school divisions, universities and colleges), health care bodies (such as hospitals and regional health authorities) and local government bodies (such as the City of Winnipeg, municipalities, local government districts, planning districts and conservation districts), and any other body in these categories designated in the regulations.

The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry – Justice Gerard La Forest



ROLES AND RESPONSIBILITIES OF PUBLIC BODY OFFICIALS UNDER FIPPA

Head of the Public Body

The head of a public body is responsible for all decisions and actions about access to information and protection of privacy made under FIPPA.

Under FIPPA, each Manitoba government department is treated as a separate public body. The minister is the head of the department however the deputy minister has authority to act on behalf of the minister with respect to FIPPA.

The head of a public body may also delegate any of his or her duties and powers under FIPPA, allowing that person to make decisions concerning access to information and protection of privacy on behalf of the public body.

Access and Privacy Officer

An access and privacy officer is any employee of a public body to whom the head of the public body has delegated a duty or power under FIPPA. The access and privacy officer is responsible for ensuring that the public body complies with the access and privacy requirements of FIPPA and is responsible for making the final decision concerning the release of records to an applicant. A public body may have more than one access and privacy officer.

Access and Privacy Coordinator

Each public body is required to appoint an employee as an access and privacy coordinator. The access and privacy coordinator is responsible for receiving applications for access to records and for the administration of the FIPPA. This includes ensuring that the public body complies with the requirements of the act concerning the collection, accuracy, retention, destruction, use, protection and disclosure of personal information.



INVESTIGATION

Background and Context

The federal government advised Manitoba Immigration and Multiculturalism on April 10, 2012 of changes regarding the management of immigrant settlement services. This raised concerns with a number of immigrant service agencies and the Manitoba government as to the impact of the changes on programming.

On April 18, 2012, the assistant deputy minister (ADM) of Manitoba Immigration and Multiculturalism, the interim director of the Multiculturalism Secretariat and the department's director of policy met with the minister of Manitoba Immigration and Multiculturalism via teleconference to discuss the issue. During this meeting, staff was directed by the minister to invite immigration services agencies to attend the Manitoba legislature on April 19, 2012 to witness the minister of Manitoba Immigration and Multiculturalism table a resolution concerning the federal government decision affecting the delivery of services to immigrants in Manitoba. Those individuals who attended the meeting with the minister indicated that they did not take notes at the meeting.

On April 18, 2012, emails with the ADM's name attached were sent to immigration stakeholders across the province. At least 500 emails were sent from the department office to various ethnic organizations, settlement agencies, business and industry groups, and language groups; an unknown number were distributed further by those original recipients. The subject line of the originating email was:

Subject: Invitation to Witness Resolution on Federal Centralization of Settlement Services

The text of the email reads:

I would like service agencies especially; to feel free to release staff and clients to attend tomorrow's session in the gallery of the Legislature, if they choose.

Attached to many of the emails was the following letter:

Dear Colleagues,

Tomorrow, Thursday, April 19, 2012, Honourable Christine Melnick, Minister of Immigration and Multiculturalism, will table a resolution that the Legislative Assembly of Manitoba call on the Government of Canada to immediately reverse its decision to



cancel the Settlement Annex of the Canada-Manitoba Immigration Agreement with the Provincial Government in order to maintain the successful Manitoba immigration model. The Manitoba Government Resolution is attached.

We would like to invite you to be at the Manitoba Legislative Building, 450 Broadway, at 2:00 p.m., tomorrow, Thursday, April 19, 2012, to witness this very important event.

*Sincerely,
Assistant Deputy Minister
Manitoba Immigration and Multiculturalism*

Also attached to the email was a copy of the government resolution that the minister of Manitoba Immigration and Multiculturalism was going to table. (Appendix A)

The contents of the ADM's email were leaked to the media and an April 19, 2012 report included allegations by the Opposition that civil servants were being inappropriately involved in political activities.

The issue generated a number of media stories over the following weeks with questions raised as to the direction provided to the ADM by political staff and/or the minister of Labour and Multiculturalism.

The 2012 FIPPA Requests

As a result of the controversy, three media outlets and PC Caucus filed access to information requests under FIPPA with Manitoba Immigration and Multiculturalism.

- 1) Media outlet #1 made its access request on April 30, 2012 and received a response from the department on May 30, 2012. The access request reads as follows:

All email correspondence to or from Assistant Deputy Minister of Immigration [name withheld] regarding the public attendance at the Legislature April 19, 2012.

- 2) Media outlet #2 made its access request May 3, 2012 and received a response from the department on June 1, 2012. The request reads as follows:

All emails, correspondence, ministerial briefing notes from April 16-May 3 between immigration and Multiculturalism assistant deputy minister [name withheld] deputy minister [name withheld], Minister [name withheld], chief of staff [name withheld]



and [name withheld] of cabinet communications regarding [name withheld] 3 emails to immigrant groups and immigrant support agencies in connection to the April 19th resolution on federal changes to immigration settlement services. I also request [name withheld] 3 emails.

- 3) PC Caucus made its access request on May 4, 2012 and received a response from the department on June 4, 2012. The request reads as follows:

Any electronic correspondence pertaining to the April 19, 2012 Resolution debate at the Manitoba Legislature between Assistant Deputy Minister [name withheld] and Ministerial staff, staff in the Department of Immigration and Multiculturalism, and settlement services organizations.

- 4) Media outlet #3 made its access request May 9, 2012 and received a response from the department on June 4, 2012. The request reads as follows:

All emails sent and received by assistant deputy minister [name withheld] between April 16th and 30th, regarding the April 19th legislature debate on federal immigration changes.

While the wording of each request is different the intent of the requesters is clear, that being to receive electronic correspondence sent to or from the ADM of Manitoba of Immigration and Multiculturalism concerning the invitation sent to service providers.

Department's Response to the 2012 FIPPA Requests

The response provided to the four applicants (media outlets and PC Caucus) regarding their respective FIPPA requests was identical. It included the following:

- Two-page cover letter
- 20 pages of emails (32 emails in total)
- 24 pages of records attached to emails (12 copies of the invitation letter sent by the ADM and 12 copies of the government's resolution)

The cover letter attached to the responsive records provided by Manitoba Immigration and Multiculturalism indicated that some responsive information of third parties was severed in accordance with subsection 17(1) and clauses 17(2)(e)(i) of FIPPA which state the following:



Disclosure harmful to a third party's privacy

17(1) *The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's privacy.*

Disclosures deemed to be an unreasonable invasion of privacy

17(2) *A disclosure of personal information about a third party is deemed to be an unreasonable invasion of the third party's privacy if*

(e) the personal information relates to the third party's employment, occupational or educational history;

(i) the personal information indicates the third party's racial or ethnic origin, religious or political beliefs or associations, or sexual orientation.

The reliance of the public body on these provisions to refuse access to this information is not at issue with respect to this investigation. The cover letter attached to the records provided to the PC Caucus and media outlets was signed by one of the department's two delegated access and privacy officers. The ADM, who was the other access and privacy officer at the time, would normally make access decisions concerning immigration matters but because the requests were for his records, it was decided that the department's other designated access and privacy officer would be the signatory.

The response packages were sent out to the media and PC Caucus between May 30, 2012 and June 4, 2012. As required by FIPPA, the applicants were advised of their right to file a complaint with Manitoba Ombudsman as per subsection 59(1) of the act within sixty days of receiving the department's response package.

Manitoba Ombudsman did not receive a complaint from any of the four applicants. It should be noted that Manitoba Ombudsman is only aware of a FIPPA request if a complaint is filed. The office does not review responses provided by public bodies unless an applicant files a formal complaint.

Investigation under *The Ombudsman Act* in 2012

As already noted, the invitation sent to settlement agencies by the ADM raised concerns regarding the alleged politicization of the civil service. Manitoba Ombudsman subsequently received a written complaint under *The Ombudsman Act* from a member of the public who stated that "civil servants must perform, and be perceived to perform, their duties in an impartial manner in order to keep the public's trust." The complaint alleged that by sending the invitation, the ADM "crossed that line."



As a result, Manitoba Ombudsman initiated an investigation under *The Ombudsman Act* into the matter in June of 2012 and issued its report in December 2013 (a copy can be found at <https://www.ombudsman.mb.ca/>).

The report revealed that in April 2012, the minister of Manitoba Immigration and Multiculturalism had directed civil servants to issue the invitation in question. As a result of this new information, PC Caucus filed another FIPPA request in January 2014, once again seeking records with respect to this matter.

The 2014 FIPPA Request

On January 15, 2014, Manitoba Labour and Immigration received the following FIPPA access request from PC Caucus:

Please provide a record of any electronic correspondence from 2010 to 2014 pertaining to the April 19, 2012 Resolution Debate at the Manitoba Legislature between Assistant Deputy Minister [name withheld] and Ministerial Staff, Staff in the Department of Immigration and Multiculturalism, and settlement services organizations.

The department responded by letter March 24, 2014, granting access in part. It indicated that, similar to the 2012 request, the personal information of third parties was being withheld as required by FIPPA.

Even though the wording was similar to the 2012 FIPPA request by PC Caucus, the 2014 response by the department included significantly more records than were provided in response to the 2012 FIPPA request (94 pages vs. 44 pages). Some of the additional records provided were the result of the expanded time frame of the 2014 request as records were now being sought from 2010 to 2014. Most of the additional records provided in response to the 2014 access request, however, existed in 2012 and should have been included in the 2012 response by the department to PC Caucus and media. More specifically, there are two records that gave rise to this complaint, both of which are emails sent on April 18, 2012.



Email #1

From: [Interim Director Multiculturalism Secretariat]
Sent: April-18-12 12:34 PM
To: [Assistant Deputy Minister's Executive Assistant]
Cc: [Assistant Deputy Minister, Director of Policy, Policy Analyst, Access and Privacy Coordinator]
Subject: Re: Invitation to Attend Resolution on Federal Centralization on Settlement Services
Importance: High

As requested by the Minister (emphasis ours), please see attached a draft letter of invitation for people and organizations to attend and support the resolution, tomorrow. [Executive Assistant to Deputy Minister], please print for [Assistant Deputy Minister's] review. I have also attached the resolution the minister read yesterday in the house.

[Assistant Deputy Minister], will you sign this note/letter? I have your name on it. May be, it might not be a good idea. Please advise.

The Plan:

[Policy analyst] is working on the list for the Business Council to send to
[Coordinator of Settlement Information] will send through her contacts.
[Interim Director Multiculturalism Secretariat] will send to MEAAC and MIC
[Interim Director Multiculturalism Secretariat] will also send to the multi network



Email #2

From: [Policy Analyst]
 Sent: April-18-12 12:54 PM
 To: [Interim Director Multiculturalism Secretariat, Assistant Deputy Minister's Executive Assistant, Assistant Deputy Minister]
 Subject: Re: Invitation to Attend Resolution on Federal Centralization on Settlement Services
 Attachments: business stakeholders.xisx

Business stakeholders list.

From: [Interim Director Multiculturalism Secretariat]
 Sent: April-18-12 12:34 PM
 To: [Assistant Deputy Minister's Executive Assistant]
 Cc: [Assistant Deputy Minister, Director of Policy, Policy Analyst, Access and Privacy Coordinator]
 Subject: Re: Invitation to Attend Resolution on Federal Centralization on Settlement Services
 Importance: High

As requested by the Minister (emphasis ours), *please see attached a draft letter of invitation for people and organizations to attend and support the resolution, tomorrow.* [Executive Assistant to Deputy Minister], *please print for [Assistant Deputy Minister's] review. I have also attached the resolution the minister read yesterday in the house.*

[Assistant Deputy Minister], *will you sign this note/letter? I have your name on it. Maybe, it might not be a good idea. Please advise.*

The Plan:

- [Policy analyst] *is working on the list for the Business Council to send to*
- [Coordinator of Settlement Information] *will send through her contacts.*
- [Interim Director Multiculturalism Secretariat] *will send to MEAAC and MIC*

Email #1 and Email #2 were included in the response package to PC Caucus in March of 2014. At this point, as a result of the investigation by the Ombudsman under *The Ombudsman Act*, it was public knowledge that the minister of Manitoba Immigration and Multiculturalism had directed civil servants to invite settlement groups to the Manitoba Legislature.

Emails #1 and Email #2, however, were not provided to PC Caucus or media when Manitoba Immigration and Multiculturalism responded to the four requests between May 30, 2012 and June 4, 2012.



Analysis

Why were Emails #1 and #2 not included in the 2012 package provided to PC Caucus and media

As part of our analysis, we reviewed how the search for responsive records was conducted by the department in response to these FIPPA requests. This included reviewing departmental practices and policies in place for processing access requests and interviewing staff from Manitoba Labour and Immigration, including the access and privacy coordinator, the access and privacy officer, the respective deputy ministers when the FIPPA requests at issue were made in 2012 (and the follow-up request by PC Caucus in 2014), and staff who were the senders and recipients of Email #1 and #2.

Manitoba Ombudsman also interviewed all staff involved in searching and printing off records with respect to the 2012 FIPPA request, except for one individual who is no longer employed with the civil service and was unable to be located.

Our office also reviewed the 2012 FIPPA response packages provided to PC Caucus and three media outlets and the department's four FIPPA files relating to these requests.

Finally our office reviewed records (emails, briefing notes, memos, letters etc.) in relation to the Committee of Supply hearing on May 30, 2012 during which the minister of Immigration and Multiculturalism was questioned by the Opposition about her alleged involvement in directing civil servants to issue an invitation to service groups to witness the introduction of the provincial government resolution.

It should be noted that Manitoba Ombudsman has all the powers and protections of a commissioner under Part V of *The Manitoba Evidence Act* when conducting an investigation under FIPPA. This includes the authority to receive evidence under oath/affirmation.

In this matter, individuals who were involved in searching and printing off records for the 2012 FIPPA request were interviewed under oath and cautioned that evidence provided may be used with respect to the offence provision in section 85 of FIPPA which states as follows:

Offences

85(1) *Any person who wilfully*

(b) makes a false statement to, or misleads or attempts to mislead, the Ombudsman or another person in performing duties or exercising powers under this Act;

(c) obstructs the Ombudsman or another person in performing duties or exercising powers under this Act;



is guilty of an offence and liable on summary conviction to a fine of not more than \$50,000

Department's Procedures for Processing Access Requests

When a FIPPA request is received by Manitoba Labour and Immigration it is forwarded to the department's access and privacy coordinator. Information relating to that application is then entered into a computer database (Appendix B) and assigned a file number. The database includes information such as:

- date request received
- deadline for responding to the request
- branch (within the department) where records would be located
- name and contact information of requester

There is a section in the database where it can be noted if the request is a blanket request which is one that would involve multiple government departments. There is also an area for estimating/calculating search and preparation fees that may be associated with processing access requests.

If the request is for a matter relating to labour it is sent to a designated employee for processing. If it is an access request concerning immigration, it remains with the access and privacy coordinator. The coordinator and the designated employee from labour are responsible for logging information into the database. The assistant deputy minister's executive assistant also provides assistance from time to time. Only these three employees have access to the database where access requests are logged. The deputy minister's office has a read-only access to the database.

In 2012, the department did not include the labour division however the mechanics of processing requests were much the same. In 2012, Manitoba Immigration and Multiculturalism as it was known then, received 78 FIPPA requests according to The Freedom of Information and Protection of Privacy 2012 Annual Report produced by the provincial government. According to staff many of the requests, at least those with respect to immigration, were from applicants to the Provincial Nominee Program who wanted access to their personal files.

The access and privacy coordinator advised that the deputy minister's office would generally not be notified about routine types of access requests (ex. individuals seeking their own personal information) but would be advised if a request from the media or the Opposition was received. The access and privacy coordinator advised that this is done as the requests could potentially involve sensitive/controversial issues which may require a response from government.



Our office was advised by the ADM that the department does not inform or advise Cabinet Communications, a politically appointed branch of government, of any FIPPA requests it receives, even if there are requests from the media or the Opposition.

In terms of processing access requests, it was the responsibility of the access and privacy coordinator to determine who had responsive records and to ask those individuals to conduct a search. We were advised that this was normally done verbally as immigration was a relatively small division.

Once responsive records were located, the access and privacy coordinator was responsible for determining if any exceptions in FIPPA were applicable which would require the department to refuse access to information. In some instances, the coordinator indicated she would seek advice from Civil Legal Services or consult with the Information and Privacy Policy Secretariat which provides support to Manitoba government on information accessibility, confidentiality and privacy policy issues under FIPPA.

The coordinator would be responsible for drafting the response letter to inform the applicant of the department's access decision. Once the response package was complete, it would be reviewed by the deputy minister (DM). The DM in 2012 advised our office that he would not necessarily review all of the records in the package but would check to see what types of records were being withheld and what provisions in FIPPA were being applied to that particular information. The response package would then be signed off by the access and privacy officer (the ADM or the department's other designate) and provided to the applicant.

Search for Records for the 2012 FIPPA Requests

Between April 30, 2012 and May 9, 2012, Manitoba Immigration and Multiculturalism received four FIPPA requests relating to the invitation sent to settlement services to attend the legislature. The access and privacy coordinator for the department was an experienced civil servant who had been with government for over 30 years, with much of that time in senior positions. The coordinator was well-experienced with FIPPA in terms of conducting searches for records and the applying of provisions of the legislation to records.

At the time of the FIPPA requests, the coordinator was serving as the acting director of finance and administration of Manitoba Immigration and Multiculturalism but still retained the role of the department's access and privacy coordinator.

When the first access request (from media outlet #1) was received on April 30, 2012, the ADM and the DM were notified of the request. It was decided by the ADM and the access and privacy



coordinator, that given that the ADM's records were the subject of the access requests, he should not be involved in processing those requests in order to avoid any perceived conflict of interest. Additionally, the ADM indicated to our office that he was too busy dealing with the implications of the federal government announcement to search for records. The access and privacy coordinator advised our office that given her workload at the time, she decided to delegate the responsibility to search for responsive records to the ADM's executive assistant.

In testimony to our office, the access and privacy coordinator indicated that she provided some verbal instructions to the ADM's executive assistant but could not recall specific details. She did, however, describe those instructions as "sparse and inadequate."

As the executive assistant began to search for records in response to the first FIPPA request, three other access requests (two from media and one from PC Caucus) were received by the department. Given the access requests were essentially seeking the same records – electronic correspondence sent by or to the ADM with respect to the invitation to service providers – the department decided to process the four requests together.

How the Search for Records was Conducted

The ADM's executive assistant was responsible for searching for records responsive to the FIPPA requests made by PC Caucus and the media. In her testimony, she advised that she searched the ADM's email account but was unable to say with certainty whether she searched by subject, name or date. She noted that the ADM kept emails in a number of folders (as many as 27) which made it challenging to locate records. She indicated that she searched both the inbox, outbox and file folders.

The ADM's executive assistant also advised our office that she carried out her search while completing the daily tasks associated with her own position. As a result, she said there were times she had to log out of the ADM's email account to access her own email account. She indicated that when she would return to the ADM's email account, she would not be sure as to the last email she had viewed. She indicated that she did not write down or note where she was at in her search which would have allowed her to return to the right spot. She advised our office that this may have resulted in her potentially missing emails.

The ADM's executive assistant advised our office that she did not ask anyone else in the department to search for records or consult with anyone during her search. She indicated that after reviewing the ADM's email account, she printed off what she deemed to be responsive records and provided those records to the access and privacy coordinator. She indicated that this concluded her involvement with these four FIPPA requests.



The ADM's executive assistant could not explain how she failed to locate Email #1 or Email #2 when searching the ADM's mailbox. It is noted that the executive assistant was also a recipient of Email #1 and therefore the record would also be located in her email account. She indicated that she specifically notes emails she receives which require her to take some kind of action. We note that Email #1 was such an email as it requested that she print off a letter for the ADM to review.

The access and privacy coordinator indicated that she had no direct involvement with the search for responsive records except for the request by media outlet #2 because it identified some staff in Cabinet Communications. The coordinator indicated that the ADM's executive assistant would not know these individuals and therefore the coordinator contacted Cabinet Communications to see what responsive records they might have in their possession.

Response Package for 2012 Requests

The response package provided to PC Caucus and media outlets contained 20 pages of email records and another 24 pages of attachments (the email invitation sent by the ADM and the government's resolution).

The ADM's executive assistant testified that to the best of her knowledge, she was the only who searched and printed off responsive records for the FIPPA requests. Our review of the final package, however, shows that there were six people who printed off responsive records that ultimately were included in the response package provided to the applicants. The number of pages of records printed off by each individual is indicated below in brackets.

- ADM's executive assistant (9)
- access and privacy coordinator (2)
- interim director Multiculturalism Secretariat (5)
- policy analyst (2)
- coordinator of settlement information (1)
- regional EAL program coordinator (1)

Our office interviewed all of the individuals who printed off records (except the regional EAL program coordinator who is no longer with the civil service) in order to determine the following:

- who provided instructions with respect to the search
- what were the specifics of those instructions
- how did individuals carry out their search for responsive records
- who did they provide those records to



ADM's Executive Assistant

The ADM's executive assistant printed off nine pages of emails from the ADM's email account and provided those records to the access and privacy coordinator for processing. The nine pages of records consisted of 17 emails. In some instances the ADM was the sender of the email while in others he was a recipient.

Of the 17 emails, 13 were sent or received on April 18, 2012 – the same date of Email #1 and Email #2. One of the emails printed off by the executive assistant was received by the ADM at 12:49 pm on April 18, 2012. We note that email #1 which was also in his inbox, was received at 12:34 pm, just 15 minutes earlier. It is noted that the subject matter in both emails referenced the government's resolution on settlement services. It is not clear how the email received by the ADM at 12:49 pm could be located but not Email #1 or for that matter Email #2 which was in the ADM's inbox at 12:54 pm on April 18, 2012. The executive assistant testified that she reviewed emails that were both sent and received by the ADM on April 18, 2012. She could not explain how those records were missed other than to say that her search was not as thorough as it needed to be. She testified that she was not directed to withhold any records. She stated:

That email (Email #1) would have raised a red flag if I had seen it

Access and Privacy Coordinator

The access and privacy coordinator printed off two pages of records which consisted of two emails. She advised our office that after receiving the package of responsive records from the ADM's executive assistant, she realized that some records had been missed. As a result, she searched her email account and printed off the two additional emails. The first email the coordinator printed off was sent to her (and other staff) from the interim director of the Multiculturalism Secretariat. The second was also an email from the interim director in which the coordinator was copied. The two emails were received by the coordinator at the following times:

- April 18, 2012 @ 12:50 pm
- April 18, 2012 @ 1:04 pm

The access and privacy coordinator could not explain why she recalled these two emails and subsequently printed them off but did not recall Email #1 which was also sent to her by the interim director of the Multiculturalism Secretariat on the same day (April 18, 2014 @ 12:34 pm). In response, she told our office that she was "overwhelmed" with respect to her workload and that she just missed Email #1.



The coordinator could not explain as to why, when she realized that the executive assistant's search had missed records, that a more comprehensive search was not undertaken at that time.

The access and privacy coordinator said she was not directed by anyone to withhold the emails in question. She indicated that the minister's office was not involved in processing the requests aside from contacting the ADM on June 6, 2012 to see if the department was up to date on all FIPPA requests. The coordinator said Email #1 and Email #2 were just missed in the search. She stated:

There was nothing deliberate. There were no political reasons to keep them (the emails) out...There was no political interference.

Interim Director Multiculturalism Secretariat

The interim director printed off five pages of records. He testified that he did not recall specifically the instructions provided to him in terms of conducting the search but indicated that the access and privacy coordinator asked him to search and print off any responsive records. This contradicts the evidence provided by the access and privacy coordinator who indicated that she did not ask anyone other than the ADM's executive assistant to search for responsive records. This contradiction was raised with the coordinator who maintained that she did not ask the interim director to search for records in response to the 2012 FIPPA requests.

It was the interim director who wrote Email #1 which confirms that the minister directed staff to invite service groups to the legislature. The interim director could offer no explanation as to why he printed off five pages of emails but missed Email #1. All of the emails printed off by the director were ones that he had sent out April 18, 2012, the same day in which he wrote and sent Email #1.

The five pages of records printed off by the director and included in the 2012 response package provided to PC Caucus and media applicants contained six emails. The emails were sent out by the director on the following dates and at the following times:

- April 18, 2012 at 12:49 pm
- April 18, 2012 at 1:08 pm
- April 18, 2012 at 1:29 pm
- April 18, 2012 at 2:08 pm
- April 18, 2012 at 2:20 pm
- April 18, 2012 at 4:44 pm



Email #1, which contains the text *As requested by the minister* (in reference to the invitation to settlement groups to attend the Manitoba legislature) was written by the director and sent on April 18, 2012 at 12:34 pm. The subject matter dealt with the government's resolution on federal centralization of settlement services, similar to the six emails that were located. It is not clear how a search could be conducted – whether it was by name, date or subject matter – and the six emails as noted above located but not Email #1.

The interim director advised our office that he did not deliberately withhold records nor was he asked by anyone not to include Email #1 or Email #2 with the other records he found. He stated:

It's an unfortunate incident for this email (Email #1) to be missed. It was not deliberate. It was due to the nature of the workload and wasn't on purpose to hide this

Policy Analyst

The policy analyst could not recall anyone asking him to search for records. He could not recall printing off records and he could not recall to whom he would have given them. Both emails that the policy analyst printed off for the 2012 FIPPA response package provided to PC Caucus and media applicants were emails he sent at the following times.

- April 18th, 2012 at 1:06 pm
- April 18th, 2012 at 1:13 pm

We note that Emails #1 and #2, which were not included in the response package, are dated at the following times:

- Email #1 – April 18, 2012 at 12:34 pm
- Email #2 – April 18, 2012 at 12:54 pm

It is noted that the policy analyst wrote and sent Email #2 in response to Email #1, the record which shows that the minister directed civil servants to issue the invitation in question. The analyst could not explain why he did not locate Email #2 which would have been in his sent box where the other two emails which he did retrieve were located. He indicated that he was not directed by anyone to withhold any records related to the 2012 FIPPA requests. He stated:

It (email #1) didn't really stick out to me very much



Coordinator of Settlement Information

The coordinator could not recall anyone asking her to search for records. She could not remember printing off the two emails included in the package to the FIPPA applicants and could not recall who she would have provided them to when the requests were being processed.

Preparation of 2012 Package

The access and privacy coordinator testified that she reviewed the records provided to her by the ADM's executive assistant and prepared the response letter to the applicants. She indicated that certain records that were provided to her were not included in the final package as they were deemed not responsive to the request (the records were correspondence sent by an individual not identified in any of the FIPPA requests).

The coordinator indicated that she reviewed the responsive records in order to determine if any of the exceptions in FIPPA applied. She concluded that certain clauses with respect to subsection 17(1) of FIPPA were applicable concerning the personal information of third parties. The application of those provisions is not at issue.

The coordinator then indicated that the package was provided to the office of the deputy minister for review. She indicated that the ADM, whose records were the subject of the requests, did not review the package that was prepared. The ADM testified that he did not see or review the 2012 FIPPA response packages.

The DM advised our office that he didn't specifically recall reviewing the response package but said he assumed he would have seen it. He indicated that in such instances he typically focuses on what records are being withheld and under what provisions of FIPPA and that is likely what he would have done in this case.

He indicated that he became aware that the minister provided direction to civil servants regarding the invitation when the issue was first reported in the media. This would have been prior to his reviewing the FIPPA response packages subsequently sent to PC Caucus and the media. The DM indicated that the fact the minister provided direction would not necessarily indicate the existence of a responsive record documenting those ministerial instructions. He indicated that he did not question staff as to whether such a record might exist.

The DM advised our office that he was not aware of the existence of Email #1 or Email #2 (he was not copied in on any of that correspondence) and assumed that the response package that he would have been provided by the access and privacy coordinator for review was complete. The DM advised that he had no discussions with the minister as to the contents of the FIPPA response packages provided to PC Caucus and media applicants.



Discovery of Email #1 and Email #2

Less than two weeks after response packages were sent to the four applicants, Manitoba Ombudsman, in a June 12, 2012 letter to Manitoba Immigration and Multiculturalism, requested records for its investigation under *The Ombudsman Act* into the alleged politicization of the civil service.

Our office was informed that shortly thereafter, a meeting was held by the ADM who advised staff of the ombudsman investigation and requested that they conduct a search for responsive records. The search was coordinated by the access and privacy coordinator.

The department advised our office that it conducted a more thorough search than what had been undertaken in response to the four FIPPA requests as the request by the ombudsman was broader in scope. It was during this more comprehensive search that the department indicates that Email #1 and Email #2 were located. The emails were found by several staff and subsequently included in the package sent to the ombudsman on June 22, 2012.

Staff indicated to our office that there was no discussion as to whether Email #1 and Email #2 should be provided to the FIPPA applicants or if the Ombudsman should be alerted that records that should have been included in the FIPPA response package provided to PC Caucus and media applicants were in fact not included.

The access and privacy coordinator indicated that she thought it was best to leave the issue to the ombudsman to deal with even though she acknowledged that the ombudsman would not be aware of the FIPPA requests or what records had been provided in response to those requests. As noted earlier, the ombudsman would only become involved if the applicants made a complaint to our office.

The ADM testified that he was aware that records provided to the ombudsman should have also been included in the response package to the PC Caucus and media applicants. When questioned as to why the department did not advise the FIPPA applicants that records were missing from the 2012 response package, he indicated that there was no policy or requirement under FIPPA to guide the department with respect to informing applicants about responsive records discovered after the response packages have been sent out.

The ADM also indicated that he was busy with the fallout from the federal government announcement and believed that the minister's role would be explained by others.

The DM who signed off on the package of records provided to the Manitoba Ombudsman on June 22, 2012 in response to *The Ombudsman Act* investigation, indicated that he was not aware that there were records included in the package that should have been provided in response to the FIPPA requests just weeks earlier.



It wasn't until PC Caucus submitted an access request in 2014 that the Opposition, and subsequently our office, became aware that the department had not provided PC Caucus and media applicants with all of the responsive records in their custody when processing the 2012 FIPPA requests records.

The access and privacy coordinator and the ADM were both actively involved in putting together the 2014 FIPPA response package for the Opposition. The coordinator said records collected during the 2012 FIPPA request along with records gathered for the Manitoba Ombudsman investigation under *The Ombudsman Act* were included in addition to any new records deemed responsive as a result of the expanded time frame of the 2014 request.

In 2014, the department had a different DM than 2012. He advised our office that he would have reviewed the 2014 response package provided to PC Caucus but indicated that he was unaware that it contained records that should have been included in the department's 2012 response. He advised that he did not become aware that it was an issue until it was reported in the media.



FINDINGS

Our review of the department's processing of the 2012 FIPPA access requests by the PC Caucus and media outlets raised a number of concerns.

Search for responsive records was delegated to an employee with minimal experience with FIPPA.

The task of searching for responsive records was assigned to the ADM's executive assistant who was unfamiliar with the legislation and whose experience in processing FIPPA requests was limited. She had assisted in some previous FIPPA-related searches for records but had never conducted a search on her own. Her past experience was largely confined to formatting the response letters sent to applicants.

Failure to provide proper instructions regarding the search for responsive records.

Not only was the individual tasked with carrying out the search for responsive records inexperienced, the access and privacy coordinator failed to provide her with proper instructions as to how to conduct such a search. While the coordinator could not recall specifically what instructions were given, she described them to our office as "sparse and inadequate."

The ADM's executive assistant who searched for responsive records advised our office that her search was not a "methodical" search. As previously noted in this report, the executive assistant could not recall specifically whether she searched by name, subject, matter or date. This made it impossible to replicate the search to see how the records in question could have been missed as indicated by the department.

Search should have produced records in question

Even though there was little direction provided to the individual responsible for conducting the search, it would seem that locating responsive records in this matter, including those that were missed, would be fairly straightforward. All four requests identified the electronic correspondence of one individual – the assistant deputy minister. The subject matter was identified in the requests and the time frame in terms of when potentially responsive records would be generated was narrow, approximately two weeks. Within that two week period, however, it was obvious that responsive records would likely be found in a two or three day



window (April 18-20, 2012) when the invitation was sent and the government resolution introduced.

The executive assistant who conducted the search indicated that she did in fact focus on that three-day period when conducting her search. Whether a search for responsive records was conducted by name or subject matter, it is unclear as to how the records in question would not have been located, particularly given the fact that other emails from the same time period, with the same subject matter and also addressed to the ADM, were located.

Access and Privacy Coordinator failed to address adequacy of search for records

The access and privacy coordinator was aware that the initial search conducted by the ADM's executive assistant was inadequate. When she was first provided with the responsive records by the executive assistant, she immediately realized that records were missing which is why she printed off two emails that were in her inbox. Nevertheless, the coordinator chose not to go back and redo the search or question the executive assistant at the time about the adequacy of her search, even though it was apparent to her that responsive records were missing.

No Documentation

A review of the department's FIPPA files revealed that there was no documentation as to how the search was carried out. There is no record as to whether the ADM's executive assistant searched the ADM's email account by name, subject matter or date. There is no documentation as to who was asked to search or what instructions they were given and by whom. Several individuals searched and printed off records for the 2012 response packages but there is no record to explain how they became involved, who provided them with instruction and to whom they provided the records they subsequently retrieved.

The access and privacy coordinator indicated that she did not ask anyone else to search or print off records other than the ADM's executive assistant. This contradicted evidence provided by the interim director of the Multiculturalism Secretariat who indicated that the coordinator asked him to search for records and that he provided those records to her. Several individuals advised our office that they could not recall how it came to be that they printed records off that were included in the 2012 response package, making it impossible to reconstruct the search in an effort to determine how the email in question may have been missed as is the case indicated by the department.



Department failed to take any action once email in question was discovered

Individuals indicated that the emails in question were discovered by several individuals when searching for records in response to the investigation under *The Ombudsman Act* by the ombudsman in June of 2012. The discovery of these emails would have occurred approximately two weeks after the response packages were provided to the PC Caucus and media outlets – packages which did not include these records.

The department, however, did not take any action to notify the applicants (PC Caucus and media outlets) that additional responsive records to their request had been located, in particular a record which confirmed ministerial involvement/direction in the issuing of the invitation.

Our office was advised by the access and privacy coordinator, the ADM, and others that there was no discussion as to what should be done once the email in question was discovered. Several staff indicated that they never recognized the significance or importance of the email (a record which contradicted public statements of the Minister as to her role in the issuing of the invitation) even though there were a number of media stories regarding the issues at the time. Staff indicated that their main concern and focus was with dealing with the implications of the federal government's announcement.

The access and privacy coordinator indicated that she thought she would leave the matter with the ombudsman. The ombudsman, however, was never advised during the course of the 2012 investigation under *The Ombudsman Act* that records had not been provided to parties who had made the 2012 FIPPA requests. It would be almost two years (22 months) before it was revealed that the email in question had not been provided to the FIPPA applicants in 2012 and then it only came to light because of a follow up FIPPA request by PC Caucus.

Administrative Improvements

During the course of our investigation the provincial government addressed one of the important issues with respect to this matter. In a June 4, 2014 memo to deputy ministers, the Clerk of the Executive Council instructed that any new or additional records that surface after an access decision has been provided should be provided to FIPPA applicants (Appendix C). As a result it is not necessary for our office to address this issue in our recommendations.



RECOMMENDATIONS

Based on our findings, the Manitoba Ombudsman recommends the following:

1. That the public body commits to providing clear direction and adequate training to those employees engaged in the search for responsive records, to ensure that employees fully understand their responsibilities.

Once the scope of an access request has been determined, the public body must ensure that the individual conducting the search has been provided with the following: the scope of the request, direction as to where to locate records, and specific keywords if the search requires reviewing electronic records.

When delegating the coordinator must provide clear direction to any support or administrative staff conducting a search for records.

2. That the public body document all relevant details relating to the search for responsive records. This would include: how the public body determined the scope of the request, who conducted the search, what records were searched, in which locations the search took place and the results of the search.
3. That the head of the public body, within 15 days after receiving the report, send the ombudsman a written response indicating:
 - that the head accepts the recommendations and describing any action the head has taken or proposes to take to implement them; or
 - the reasons why the head refuses to take action to implement the recommendations.

Government Response

In response, I was advised by the Deputy Minister of Labour and Immigration that the department accepts all of the recommendations and will be taking prompt action to implement these recommendations.

Manitoba Ombudsman
December 2, 2014



Appendix A – Government Resolution

Hon. Ms. MELNICK — Federal Centralization of Settlement Services

WHEREAS in 1995, the Provincial Government took advantage of the Government of Canada's offer to develop devolved immigration settlement services agreements; and

WHEREAS in 1998, the Governments of Canada and Manitoba signed the Canada-Manitoba Immigration Agreement with two critical components, a Settlement Annex and a Provincial Nominee Program Annex; and

WHEREAS Manitoba's business and community leaders were key architects of the Manitoba immigration model and continue to be strong supporters of this successful approach today; and

WHEREAS Manitoba's successful Provincial Nominee Program accounts for 77% of all immigration to Manitoba; and

WHEREAS preliminary figures show that this program played a key role in bringing nearly 16,000 immigrants to Manitoba in 2011; and

WHEREAS since 1999, under the Provincial Nominee Program, over 100,000 new immigrants have settled in Manitoba with more than 25,000 choosing to settle in rural Manitoba contributing to over 130 communities including Brandon, Winkler, Morden, Steinbach, Dauphin and Neepawa; and

WHEREAS the settlement services component of the Canada-Manitoba Immigration Agreement has ensured an effective, integrated Manitoba model of settlement service delivery that is key to ensuring immigrants have the supports they need to be contributing members of Manitoba's economy; and

WHEREAS this important agreement enables the Provincial Government to work directly with over 200 not-for-profit and institutional service providers to ensure immigrants have arrival orientation, labour market supports, adult language training, and integration services; and

WHEREAS an independent evaluation of participants in Manitoba's Provincial Nominee Program showed 85% of respondents were working after three months, and 83% of respondents were working in their fields or a related field; and

WHEREAS the Government of Canada has announced it is cancelling the Settlement Annex of the Canada-Manitoba Immigration Agreement.



THEREFORE BE IT RESOLVED that the Legislative Assembly of Manitoba call on the Government of Canada to immediately reverse its decision to cancel the Settlement Annex of the Canada-Manitoba Immigration Agreement with the Provincial Government in order to maintain the successful Manitoba immigration model.



Appendix B – Freedom of Information and Protection of Privacy Application Record

May 01 11:41 AM Govt of Manitoba 3/3
 day 01 of May 2012, Govt of Manitoba ->(204) 948-2882 Page 3 of 3

Freedom of Information and Protection of Privacy Application Record

FIPPA Number: 2012-82 Date Received: April 30, 2012 Response Deadline: May 30, 2012 Branch: Immigration
 First Name: Last Name: Address: Room ??? Legislative Building Postal Code: R3C 0V8
 City: Winnipeg Province: MB State: Canada Phone: Fax:

Request: All email correspondence to or from Assistant Deputy Minister of Immigration Ben Rempel regarding public attendance at the Legislature April 19, 2012.

Blanket:	List Departments Involved in Blanket:
No	

Request Tracking		Branch Decision:	
Actual Response Date:	Extension Date:	Reason for Extension:	
Exemptions Used:			

FIPPA Processors...as best as you are able, record the following for each role. Use Quarter-hour increments

	Hourly Rate \$\$	Request Time	Ombudsman Investigation Time	Court Appeal Time
Deputy Minister				
Access Officer				
Access Coordinator				
Legal Counsel				
FIPPA Processors...Record the following:				
Number of Copies				

FIPPA Processors...for every person in your area who works on this request:

1. Add each person's time spent and record one grand total in the time box.
 2. Multiply each person's time spent by their salary to get a total \$\$ figure PER PERSON.
- Then add all PER PERSON totals and record ONE grand total dollar figure in the Total \$\$ box

	Request		Ombudsman Investigation		Court Appeal	
	Time	Total \$\$	Time	Total \$\$	Time	Total \$\$
Staff other than above						
Clerical						

Fee Estimate Given

Actual fees Paid for:	
Search and Preparation	
Programming	
Photocopying	



Appendix C – Memo from Clerk of the Executive Council



Memorandum

Date: June 4, 2014

To: Deputy Ministers From: *Milton Sussman*
Clerk of the Executive Council and
Cabinet Secretary
Room 215 Legislative Building

Subject FIPPA RESPONSES

Responding to FIPPA requests is an essential component of open and transparent government operations. Responses involve gathering and assessing records related to a request and providing an appropriate response to the applicant. Record searches should be thorough and complete to ensure all the appropriate information is provided when the FIPPA response is issued to the applicant.

After an access decision has been provided, should new or additional records surface that are responsive to the request, I would like departments to ensure they take the necessary steps to provide the new information to the applicant. I recognize that this would be an unusual circumstance given the effort to find records, but when it does occur, it's important that departments immediately take corrective and proactive steps needed to provide the information. This is part of the openness we wish to foster in responding completely and appropriately to FIPPA requests.

Thank you.

Milton Sussman



Manitoba Ombudsman

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