

Manitoba Ombudsman

REPORT WITH RECOMMENDATIONS ISSUED ON MARCH 17, 2011

AND

RESPONSE TO THE RECOMMENDATIONS

UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASES 2011-0004 and 2011-0005

MANITOBA CONSERVATION

ACCESS COMPLAINTS: FAILURE TO REPLY TO REQUESTS FOR FEE WAIVERS

PROVISIONS CONSIDERED: 9, 9(2) of the Access and Privacy Regulation

PUBLICLY RELEASED ON SEPTEMBER 26, 2011

SUMMARY OF REPORT WITH RECOMMENDATIONS AND RESPONSE

The complainant received fee estimates concerning two applications for access submitted to Manitoba Conservation. He sent the department two letters requesting that the fees be waived. Complaints were made after nearly three months because the complainant had not received any reply. After a lengthy delay, the department wrote to the complainant to inform him that he had not provided sufficient information concerning the fee waivers. The Ombudsman determined that the department did not make reasonable efforts to reply to the complainant's requests for fee waivers. The Ombudsman found that the department did not fulfill its duty to assist the applicant as required by section 9 of FIPPA. The Ombudsman recommended that the department waive the fees payable for both applications and provide the Ombudsman with a copy of its response letter to the complainant about the fee waiver.

The public body responded to the Ombudsman's report in accordance with the requirements of FIPPA. The public body accepted the recommendations and agreed to waive the fees in both cases. The public body provided the Ombudsman with a copy of its response letter to the complainant which indicated that fees would be waived for both applications.

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MANITOBA CONSERVATION

ACCESS COMPLAINTS: FAILURE TO REPLY TO REQUESTS FOR FEE WAIVERS

PROVISIONS CONSIDERED: 9, 9(2) of the Access and Privacy Regulation

ISSUED ON MARCH 17, 2011

SUMMARY: The complainant had received fee estimates concerning two applications for access submitted to Manitoba Conservation. He sent the department two letters requesting that the fees be waived. Complaints were made after nearly three months because the complainant had not received any reply. After a lengthy delay, the department wrote to the complainant to inform him that he did not provide sufficient information concerning the fee waivers. The Ombudsman determined that the department did not make reasonable efforts to reply to the complainant's requests for fee waivers. The Ombudsman found that the department did not fulfill its duty to assist the applicant as required by section 9 of FIPPA. The Ombudsman therefore recommended that the department waive the fees payable for both applications.

THE COMPLAINTS

The complainant submitted two applications for access to Manitoba Conservation on September 16, 2010. On September 29, 2010, the department notified the complainant that search and preparation fees were payable for processing his requests and it issued a fee estimate for each request as permitted under FIPPA.

Case: 2011-0004

Access Request:

- *all data collected with respect to [company's name]*
- *all photographs*
- *all infractions and status of these infractions, past and present.*

Search and Preparation Fee:
Time in excess of two hours.....4.5 hours
Estimated cost (at \$15.00 each half hour).....\$135.00

Case: 2011-0005

Access Request:
- all data collected with respect to [company's name] and/or [applicant's name].
- all photographs
- all infractions and status of these infractions, past and present

Search and Preparation Fee:
Time in excess of two hours.....8.5 hours
Estimated cost (at \$15.00 each half hour).....\$255.00

In the September 29 letter, the department also advised the complainant that section 9 of the Access and Privacy Regulation under FIPPA provides the department with discretion to waive payment of all or part of the fees in certain circumstances. The department informed the complainant that he could make a written request for a fee waiver by providing detailed reasons based on the clauses in section 9 of the Regulation.

On October 13, 2010 the complainant sent the department two letters requesting that the fees be waived under the following clauses of section 9 of the Regulation:

Case: 2011-0004

I would ask that the fees be waived in this matter on the following grounds:

(c) the records relate to a matter of public interest concerning public health or safety or the environment

The information was requested in order to ensure that [company's name] remains in good standing with Conservation with respect to rules and regulations regarding the environment. It is important for [company's name] to know its status with regards to any infractions on file.

Case: 2011-0005

I would ask that the fees be waived in this matter on the following grounds:

(a) payment would impose an unreasonable financial hardship on the applicant

As you are aware, the hog industry continues to be in ever increasing financial difficulty. Costs are going up and income keeps going down. Expenses add up quickly. It would

definitely be an unreasonable financial hardship to have to come up with monies for these additional fees.

(b) the request for access relates to the applicant's own personal information and waiving the fees would be reasonable and fair in the circumstances.

The information requested relates personally to me. Unlike an elaborate business or a large corporation, [company's name] is my own operation and any information pertaining to [company's name] affects me directly. For this reason, it would be reasonable and fair to waive the fees in this matter.

(c) the record relates to a matter of public interest concerning public health or safety or the environment

The reason the information was requested is to ensure that I remain in good standing with Conservation with respect to rules and regulations regarding the environment. I want to be aware of any infractions on file and the status of these infractions.

On January 5, 2011, our office received complaints about Manitoba Conservation's failures to reply to the complainant's requests for fee waivers.

POSITION OF MANITOBA CONSERVATION

On September 29, 2010, the department provided the complainant with two Estimates of Costs showing the search and preparation fees payable for each application. In its letter to the complainant, the department stated that it would consider waiving all or part of the fees payable upon receiving reasons to support the waivers as set out in clauses 9(1)(a), (b) and (c) of the Regulation under FIPPA.

During the course of our investigation, we asked the department to explain the delay in replying to the requests for fee waivers submitted on October 13, 2010. Manitoba Conservation stated that due to workload issues, it was unable to respond in a timely manner. It further stated that it is in the process of amending procedures which would address the issues of timely and efficient responses to applications for access.

On March 11, 2011, Manitoba Conservation wrote to the complainant informing him that he had not provided adequate information to support his requests for fee waivers. The department stated that additional information was required, which would include:

- a) the type of financial hardship that would be incurred;*
- b) the circumstances involved whereby waiving the fees would be reasonable and fair or*
- c) how these requests relate to a matter of public interest.*

The letter stated that if the complainant provided the department with additional information to support his reasons or wished to modify his requests for information, it would revisit the assessment of the fees.

ANALYSIS OF ISSUES AND FINDINGS

1. Did Manitoba Conservation comply with its duty to assist the applicant as required by section 9 of FIPPA?

On October 13, 2010, the complainant sent the department two letters requesting that all fees as outlined in the Estimates of Costs be waived.

Subsection 9(2) of the Access and Privacy Regulation under FIPPA requires a public body to inform the applicant in writing of its decision about waiving fees:

Waiver of fees

9(2) Either when access is granted or before it is granted, the head of the public body shall inform the applicant in writing as to the head's decision about waiving the fees.

FIPPA does not prescribe a time limit for providing its decision about a fee waiver. However, section 9 of the Act sets out a duty to assist an applicant. This duty includes that a public body shall make every reasonable effort to assist an applicant by responding without delay:

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.

After waiting a period of time for a reply to his requests for fee waivers, the complainant submitted complaints to our office on January 5, 2011. On January 12, our office sent a letter notifying the department of the complaints. We advised the department to respond to the complainant's requests for fee waivers and provide a copy of the response letter(s) to our office by January 29. We also requested that the department provide the complainant with an explanation regarding the delay.

After another delay, Manitoba Conservation wrote to the complainant on March 11, and informed him that he had provided insufficient information to support his requests for fee waivers. The department stated that additional information was required.

In our opinion, the department did not make reasonable efforts to reply to the complainant's requests for fee waivers. In the first instance, the complainant waited for nearly three months for a reply before submitting complaints to the Ombudsman. After our office notified the department of the complaints on January 12, and requested that it provide a response to the complainant by January 29, the department did not write to the complainant until March 11. Five months after making requests for fee waivers, the complainant was informed that he had provided insufficient information and he still does not have a decision on whether the department will grant the waivers.

The Ombudsman found that Manitoba Conservation did not fulfill its duty to assist the applicant as required by section 9 of FIPPA.

RECOMMENDATIONS

Based on the finding, the Ombudsman is recommending that Manitoba Conservation:

1. Provide the complainant with a written response waiving the fees of \$390.00 payable for both applications for access.
2. Provide the Ombudsman with a copy of the response.

HEAD'S RESPONSE TO THE RECOMMENDATIONS

Under subsection 66(4), Manitoba Conservation must respond to the Ombudsman's report in writing within 15 days of receiving this report sent to the head on this date. The head shall respond by April 1, 2011 and the response must contain the following information:

Head's response to the report

66(4) *If the report contains recommendations, the head of the public body shall, within 15 days after receiving the report, send the Ombudsman a written response indicating (a) that the head accepts the recommendations and describing any action the head has taken or proposes to take to implement them; or*

(b) the reasons why the head refuses to take action to implement the recommendations.

OMBUDSMAN TO NOTIFY THE COMPLAINANT OF THE HEAD'S RESPONSE

After the Ombudsman has received Manitoba Conservation's response to her recommendations, she will notify the complainant about the head's response as required under subsection 66(5).

HEAD'S COMPLIANCE WITH RECOMMENDATIONS

If the head accepts the recommendations, clause 66(6)(a) requires the head to comply with the recommendation within 15 days of acceptance of the recommendation or within an additional period if the Ombudsman considers it to be reasonable. Accordingly, the head should provide written notice to the Ombudsman and information to demonstrate that the public body has complied with the recommendations and did so within the specified time period.

Alternatively, if the head believes that an additional period of time is required to comply with the recommendations, the head's response to the Ombudsman under subsection 66(4) must include a request that the Ombudsman consider an additional period of time for compliance with the recommendations. A request for additional time must include the number of days being requested and the reasons why the additional time is needed.

Irene A. Hamilton
Manitoba Ombudsman
March 17, 2011

Manitoba Ombudsman

RESPONSE TO THE RECOMMENDATIONS UNDER *THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*

CASES 2011-0004 AND 2011-0005

MANITOBA CONSERVATION

ACCESS COMPLAINTS: FAILURE TO REPLY TO REQUESTS FOR FEE WAIVERS

PROVISIONS CONSIDERED: 9, 9(2) of the Access and Privacy Regulation

SUMMARY: The public body responded to the Ombudsman's report in accordance with the requirements of FIPPA. The public body accepted the recommendations and agreed to waive the fees in both cases. The public body provided the Ombudsman with a copy of its response letter to the complainant which indicated that fees payable for both applications would be waived. Due to the volume of records responsive to both applications, the public body granted the complainant access to records in four separate installments.

RESPONSE TO THE RECOMMENDATIONS

Under subsection 66(4), Manitoba Conservation was required to respond to the Ombudsman's report in writing within 15 days of receiving the report. As the report was sent by courier on March 17, 2011 the head had until April 1, 2011 to respond. The head's response was to contain the following information:

Head's response to the report

66(4) *If the report contains recommendations, the head of the public body shall, within 15 days after receiving the report, send the Ombudsman a written response indicating*

(a) that the head accepts the recommendations and describing any action the head has taken or proposes to take to implement them; or

(b) the reasons why the head refuses to take action to implement the recommendations.

Manitoba Conservation provided its response to the Ombudsman on April 1, 2011 and accepted the recommendations as follows:

1. Provide the complainant with a written response waiving the fees of \$390.00 payable for both applications for access.

In a written response dated April 1 to the complainant, Manitoba Conservation agreed to waive the fees payable for both applications for access.

2. Provide the Ombudsman with a copy of the response.

A copy of the written response letter to the complainant dated April 1, 2011 was received by our office.

As required under subsection 66(5), our office notified the complainant about the head's response on April 8, 2011.

Due to the volume of records responsive to both applications, Manitoba Conservation granted the complainant access to records in four separate installments.

Irene A. Hamilton
Manitoba Ombudsman