

MANITOBA OMBUDSMAN

**2010 Timeliness Audit of
Manitoba Public Insurance**

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

February 2011

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OMBUDSMAN'S MESSAGE

This report is an assessment of Manitoba Public Insurance's (MPI) performance or timeliness in meeting the time requirements under *The Freedom of Information and Protection of Privacy Act* (FIPPA) to respond to applications for access.

Timely access to information is a cornerstone of FIPPA. But meeting FIPPA's mandatory time frames creates pressures that are well-understood and experienced by public bodies, some on a daily basis. The timely processing of a FIPPA application for a public body can be challenging at times especially since FIPPA workloads are largely unpredictable. Spikes in volume can occur at any time and seemingly straight-forward applications can in actuality be complex, involving voluminous records. This can be compounded by staffing changes and shortages, and other unanticipated demands which ultimately can result in delays in responding to FIPPA applicants. These delays can then result in complaints to the Ombudsman because the Act enshrines a right of complaint by an applicant about a public body's failure to respond to a request.

Despite the difficulties that meeting time requirements can cause, public bodies are required to comply with the times frames set out in the Act. Having some flexibility built into the FIPPA process can better equip a public body to play the FIPPA hand it is dealt. This may mean having secondary plans and deploying resources for backup as necessary when there are clear indicators that timeliness may be of concern.

Our investigations related to the timeliness of responses suggest that it is a significant and ongoing issue. For example, our statistics on "failure to respond" complaints (complaints that are made to the Ombudsman about delayed responses from public bodies to applicants) have on average, constituted slightly more than 40% of all FIPPA access complaints received by my office over the past 5 years. Of these failure to respond complaints, on average, about 75% were supported. The challenges faced by public bodies in providing timely responses was also demonstrated in 5 audits done by my office in 2010 under our FIPPA Access Practices Assessment audit. In those audits the overall average compliance rate for the timeliness of the 5 public bodies that were audited was 65%.

My office will continue to conduct timeliness audits on an occasional basis and the results will be released in a report to the public. It is my hope that these audits will contribute to improving the timeliness of processing FIPPA applications for access. These audits can also help to bring into sharper focus broader systemic issues, as this audit has, such as issues about how FIPPA statistics regarding timeliness are publicly reported by government. I have raised these issues with Manitoba Culture, Heritage and Tourism, (the department responsible for the administration of FIPPA) and look forward to discussions about how response time statistics can be more meaningfully captured in the department's *Freedom of Information and Protection of Privacy Act Annual Report*.

With respect to this timeliness audit, we gratefully acknowledge the full cooperation and excellent assistance provided by MPI.



PURPOSE OF THE AUDIT

The purpose of this type of audit is to assess the public body's performance in relation to the mandatory time requirements of responding to an applicant as set out in FIPPA.

The access to information process is time-sensitive and requires a public body to make every reasonable effort to respond in writing to an access application within 30 (calendar) days of receiving it unless the time for responding is extended.

The time requirements that a public body must follow are set out in sections 11 and 15 of FIPPA. There is also a duty to respond without delay under section 9 of FIPPA.

Section 11 of FIPPA states:

Time limit for responding

11(1) *The head of a public body shall make every reasonable effort to respond to a request in writing within 30 days after receiving it unless*

- (a) the time limit for responding is extended under section 15; or*
- (b) the request has been transferred under section 16 to another public body.*

Failure to respond

11(2) *The failure of the head of a public body to respond to a request within the 30 day period or any extended period is to be treated as a decision to refuse access to the record.*

The time limit may be extended where one of the circumstances in section 15 applies to permit an extension. Section 15 of FIPPA states:

Extending the time limit for responding

15(1) *The head of a public body may extend the time for responding to a request for up to an additional 30 days, or for a longer period if the Ombudsman agrees, if*

- (a) the applicant does not give enough detail to enable the public body to identify a requested record;*
- (b) a large number of records is requested or must be searched, and responding within the time period set out in section 11 would interfere unreasonably with the operations of the public body;*
- (c) time is needed to consult with a third party or another public body before deciding whether or not to grant access to a record; or*
- (d) a third party makes a complaint under subsection 59(2).*

Notice of extension to applicant

15(2) *If the time is extended under subsection (1), the head of the public body shall send a written notice to the applicant setting out*

- (a) the reason for the extension;*
- (b) when a response can be expected; and*
- (c) that the applicant may make a complaint to the Ombudsman about the extension.*

Public bodies also have a duty under the legislation to assist applicants. This includes a responsibility to respond without delay, as prescribed in section 9 of FIPPA, which states:

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.*

Time requirements are mandatory provisions under the Act, therefore recommendations from the Ombudsman are made if compliance is not 100%.

If recommendations are made, the public body will be subject to a follow-up timeliness audit in the following year.

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 November 2010, MPI was notified by letter that it had been selected for our 2010 FIPPA Timeliness Audit. Arrangements were made with the Access and Privacy Coordinator and the audit was conducted on-site at MPI's head office in late November and early December 2010.

The audit consisted of a review of the 65 FIPPA files (i.e. the files that are set up to process applications for access) that MPI completed in 2009 in order to assess the timeliness of responses to applicants. A debriefing meeting with MPI took place in February 2011.

FINDINGS

What is Required

Compliance with the time frames to respond to an applicant as set out in FIPPA is required.

For a request to be processed within the time limit of 30 calendar days, we have devised a *Guideline on Time Frames for Processing a FIPPA Request* (see Appendix A) for public bodies to use as a guide for best practices. The Guideline uses working days, of which there are on average 20 per month, as the average number of days in which to complete the processing of a request. As some requests are more complex than others, any guideline adopted would need to be flexible, including situations where an extension of the time limit is permitted.

For a guideline on time frames to be effective, full cooperation is needed from all staff who may be involved in processing a request, regardless of position in the organization. All staff involved in processing a request have a role and a responsibility to ensure that timelines are met. Any missed deadline in the process, will lead to delay and possibly, complaints. This in turn will then require the Coordinator to expend time in responding to Manitoba Ombudsman inquiries. Ultimately, the applicant could have to wait longer for a response and new access requests coming in will probably be delayed.

What was Assessed

Through a review of the 65 files that MPI completed in 2009, we assessed the timeliness of MPI's responses to FIPPA applicants. If the response from MPI was sent to the applicant within the time limits required by FIPPA (taking into account, for example, any extensions taken or suspension of the time limit for fee estimates), the response was determined to be in compliance with time requirements or "on time".

We assessed performance from different perspectives: the overall percentage of responses that were "on time"; timeliness of responses by type of applicant and by type of record requested; and, by the year in which the file was opened.

We also compared our audit findings with the MPI statistics published in Table 6 - in the three "Response Time" columns, in Manitoba Culture, Heritage and Tourism's (CHT) *Freedom of Information and Protection of Privacy Act Annual Report 2009*. (CHT's annual report on FIPPA provides statistics and analysis on the FIPPA experience of public bodies that have reported statistical information to it. The statistics are submitted by the public body to CHT, usually quarterly, on a specific form.)

What We Found

MPI was faced with significant challenges surrounding 15 applications for access received in 2008 and this resulted in very late responses to the majority of these applications in 2009. Eleven of the responses to these applications were hundreds of days late. However, we also observed positive aspects with respect to MPI's processing of requests such as:

acknowledgement letters are promptly sent out and there appears to be constructive contact with applicants. There also seems to be a positive organization-wide commitment to fostering a culture of access and there is good cooperation across MPI departments in making FIPPA a priority.

Highlights of Findings

- ◆ 68% (44 responses) of responses were in compliance with time requirements;
- ◆ of the 32% (21 responses) of responses that were late, the average number of days late was 150;
- ◆ the average number of days late for the responses in files opened in 2008 and completed in 2009, was 237;
- ◆ the average number of days late for the responses in files opened and completed in 2009, was 9;
- ◆ late responses were somewhat concentrated in 13 files carried over from 2008 but there were 8 files that were opened in 2009 which were also late;
- ◆ 18% (12 responses) of responses took "more than 60 days" and the time taken was without the agreement of the Ombudsman;
- ◆ of the 10 time extensions taken, 1 was determined to be invalid because it was taken after the first 30 days from the day the application was received;
- ◆ of the 9 valid time extensions taken, 2 or 22% of the responses met the extended due date/were on time;
- ◆ although only 2 or 22% of the time extensions taken were met, the reasons for taking the extensions for all of the time extensions taken appeared to be allowed under subsection 15(1) of FIPPA and the content of the extension letters was in compliance with subsection 15(2).
- ◆ it could not be concluded that there were any serious patterns of delay in relation to type of applicant.

Details of What We Found

Chart 1: Audit Findings as Compared to CHT's 2009 Annual Report (in Three Categories)

Response Time	Audit Findings	CHT 2009 Annual Report
Within 30 days	42	46
Within 60 days	11	7
More than 60 days	12	12
Total	65	65

- ◆ The discrepancies between the audit findings and the statistics reported by MPI to CHT were discussed with MPI. MPI reviewed its data and determined that the discrepancies were the result of recording or computer program errors. MPI accepted the audit findings.
- ◆ The audit found that the 11 responses in the category of "within 60 days" consisted of 2 responses for which extensions were taken. That is, no extensions were taken for 9 responses in this category.

- The audit found that the 12 responses in the category of "more than 60 days" were responses that were all late. Of these 12 responses, 30-day extensions had been taken for 8 files and not met, and no extensions were taken for 4 files.

Chart 2 - Audit Findings as Compared to CHT's 2009 Annual Report (in Five Categories)

Response Time	Audit Findings	CHT 2009 Annual Report
Within 30 days	42 (on time)	46
Within 60 days with extension	2 (on time)	7 *
Within 60 days without extension	9 (late)	
More than 60 days with agreement from Ombudsman	0	12 **
More than 60 days without agreement from Ombudsman	12 (late)	
Total	65	65

*CHT categorizes "within 60 days" without a further breakdown – see Chart 1

**CHT categorizes "more than 60 days" without a further breakdown – see Chart 1

The purpose of Chart 2 above is to show an expanded level of detail in relative comparison to the three categories traditionally used by CHT. Chart 2 clearly shows whether the responses were "on time" or late within the context of whether or not extensions were taken.

As first shown in Chart 1, we note that CHT reports on the response times of public bodies in three categories: within 30 days; within 60 days; and, more than 60 days. CHT's reporting on the response time in the two categories of "within 60 days" and "more than 60 days" does not tell anything about compliance. Were time extensions taken? If so, were the extended due dates met and the responses done on time? Although these two categories of reporting provide a range of time within which a response was provided, they do not distinguish between responses that were "on time" and responses that were late, both of which are essential elements when evaluating performance.

In general terms, the practice of reporting on response time in the categories of "within 60 days" and "more than 60 days" can lead to false positive or false negative assumptions about a public body's timeliness. For example, responses "within 60 days" may seem to indicate slow or late response times, but if a time extension permitted by the Act under subsection 15(1) were taken, and the response provided by the extended due date, this would be an "on time" response that would be in compliance with the Act. Similarly, if a public body sought and received the agreement of the Ombudsman for a time extension of "more than 60 days" under subsection 15(1) and the response was provided by the extended due date, this would be an "on time" response that would also be in compliance with the Act. Alternatively, the categories of "within

60 days" and "more than 60 days" could include responses for which no extensions were taken, in which case all responses in these categories would be late.

Each of these examples would seem to illustrate and support a need for CHT to change the current required format which reports on a range of time in which the responses were completed to a format that reports on the compliance of a public body with legislated time frames. In our view this would be more meaningful.

Chart 3 - Compliance with Time Requirements by Year the File was Opened

Year File Opened	Number of Files	On Time	Late	Av. # days late
2008	15	2 or 13%	13 or 87%	237
2009	50	42 or 84%	8 or 16%	9
Total	65	44 or 68%	21 or 32%	—

Chart 3 illustrates a vast difference between "on time" versus late responses when responses are categorized by the year in which the file was opened. In fact the percentage of "on time" versus late responses is almost reversed. We also note that the average number of days late for late responses is significantly lower for the 2009 files.

As background to Chart 3, starting in June and continuing into December 2008, 15 complex applications for access involving voluminous records (relating to a mix of general records and personal information) were received by MPI. Through this time frame, MPI indicated that it was faced with staffing changes and shortages compounded by competing priorities. MPI advised that as a result, they were not equipped to handle the situation and that most of these applications for access were not processed within the required time frames. MPI also indicated that as the situation became stabilized over several months, it was able to respond on time, for the most part, to applications for access that came in.

Chart 4 - Response Time by Type of Applicant (Individual, Media, Political Party, Other)

Type of Applicant	Number of Applicants	On Time	Late
Individual	49	33 or 68%	16 or 32%
Media	1	1 or 100%	0 or 0%
Political Party	13	8 or 62%	5 or 38%
Other	2	2 or 100%	0 or 0%
Total	65	44 or 68%	21 or 32%

Chart 4 indicates that the percentage of "on time" responses to applications from political parties was somewhat, but not markedly lower than applications from individuals.

Chart 5 - Response Time by Type of Record Requested

Type of Record	Number of Files	On Time	Late
General Information	31	18 or 58%	13 or 42%
Personal Information	34	26 or 77%	8 or 23%
Total	65	44 or 68%	21 or 32%

Chart 5 shows that the percentage of "on time" responses to applications for personal information was somewhat higher than for applications for general information.

RECOMMENDATIONS

Significant improvement in timeliness was observed for files opened and completed in 2009 as compared with files opened in 2008 and completed in 2009.

However, MPI's overall timeliness compliance rate was 68%. Therefore the following recommendations are made:

Recommendation # 1

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

Recommendation # 2

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

MPI accepted the recommendations.

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