

Manitoba Ombudsman Practice Note

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CONSIDERING LIMITS TO EXCEPTIONS WHEN MAKING ACCESS DECISIONS UNDER FIPPA

An applicant has a right of access to information under the Freedom of Information and Protection of Privacy Act (FIPPA), subject to the specific exceptions to disclosure set out in the act. Deciding to grant or refuse access requires consideration of all parts of an exception to disclosure, including all subsections and clauses. This necessarily involves considering any provisions which limit the scope of the exception.

Most exceptions to disclosure (both mandatory and discretionary) contain provisions that limit the ability to rely on an exception to refuse access. These limiting provisions, generally referred to as “exceptions” to the exception, state that the exception does not apply if one of the identified circumstances is present. If one of the circumstances is present, access cannot be refused under that exception to disclosure. However, another exception to disclosure may apply to the information.

The following is an example using the discretionary exception for advice to a public body under section 23:

An applicant requested a copy of a report prepared for the public body about the performance of one of its programs. The public body determined that the requirements of clause 23(1)(a) were satisfied. This clause states:

Advice to a public body

23(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal
(a) advice, opinions, proposals, recommendations, analyses or policy options developed by or for the public body or a minister;

The public body decided to exercise its discretion to withhold the information because a decision had not yet been made concerning the program.



Subsection 23(2) limits the scope of subsection 23(1) by setting out circumstances in which subsection (1) does not apply. In considering the limits under subsection 23(2), the public body determined that the requested record is the final report on the performance of a program, as described in clause 23(2)(h). This clause states:

Exceptions

23(2) Subsection (1) does not apply if the information (h) is a final report or final audit on the performance or efficiency of the public body or of any of its programs or policies, except where the information is a report or appraisal of the performance of an individual who is or was an officer or employee of the public body.

Accordingly, the public body was not able to rely on clause 23(1)(a) to refuse access. The information had to be released because another exception to disclosure did not apply.

Examples of Types of Limits

The scope of an exception may be limited in different ways. Below are some examples to illustrate the different types of limits. Please note that the examples are not an exhaustive list of all of the limits to exceptions.

Consent for Disclosure

The scope of some exceptions is limited if the party affected by the disclosure consents to the disclosure.

An example of this is an individual who may be affected by a disclosure of personal information under section 17. Clause 17(4)(a) states that it is not an unreasonable invasion of the individual's privacy if the individual consents to the disclosure.

Also, a third party affected by the disclosure of information that affects business interests under section 18 may consent to the disclosure of information under clause 18(3)(a).

Under section 20, which protects information provided in confidence by another government, there is a limiting provision under subclause 20(3)(b)(i) if the affected party provides consent.

Time Limitation

Some exceptions contain limits based on specific time periods, after which the exception no longer applies.

An example of this is found in clause 19(2)(a), which states that the exceptions for cabinet confidences in subsection 19(1) do not apply if the record is more than 20 years old.

Similarly, clause 20(3)(a) states that the exceptions to disclosure under subsections 20(1) and (2), which pertain to information provided by another government, do not apply if the record is more than 20 years old.

Another example is under clause 23(2)(a), which states that the exceptions to disclosure for advice to a public body under subsection 23(1) do not apply to information in a record that is more than 20 years old.

Type of Information

Some limits to exceptions are based on the type of information described in the limiting provisions.

For example, there is a limit under section 17 for personal information, found under subclause 17(4)(e)(i). It states that it is not an unreasonable invasion of privacy to disclose the job classification, salary range, benefits, employment responsibilities and employment expenses of an employee or officer of a public body.

Another example is clause 23(2)(f.1), which states that advice to a public body in the form of a public opinion poll cannot be withheld under subsection 23(1).

Circumstances

Some limiting provisions set out specific circumstances in which the exception to disclosure does not apply.

An example is clause 17(4)(d) which states that section 17 exceptions do not apply if the disclosure is for research purposes and is in accordance with section 47.

Another example is found under clause 18(3)(c), which states that section 18 exceptions do not apply if an enactment of Manitoba or Canada expressly authorizes or requires the disclosure of the information.

Tips for Considering Limits

- Read through all limits to an exception to consider whether any may apply.
- Document your consideration of whether any apply.
- Some limits will clearly not be applicable; others may require further action, such as research or consultation, to determine if they apply:
 - If an exception is limited when another law expressly authorizes or requires the information to be disclosed, are you familiar with other laws that govern records held by your public body?
 - If a limiting provision relates to consent, consider whether it is reasonable in the circumstances to seek consent:
 - Does another exception apply to the same information? Does the public

body intend to refuse access under the other exception despite obtaining consent? If another exception applies to the same information and the public body is not intending to release the information, it would not be reasonable to seek consent.

- Is there a risk of identifying the applicant when consent is sought? (revealing the nature of the requested records to the third party could identify the applicant)
- Can consent be reasonably sought?
 - Is there a way to contact the affected party or parties?
 - Is the number of affected parties manageable?
- Be able to explain your consideration of the limits and the basis for concluding that none would apply.

Remember that where an exception to disclosure contains limiting provisions, the access decision is not complete until consideration has been given to the limits.

Revised January 2022