

Manitoba Ombudsman Practice Note

Practice notes are prepared by Manitoba Ombudsman to assist persons using the legislation. They are intended as advice only and are not a substitute for the legislation.

RESPONDING TO A COMPLAINT ABOUT A REFUSAL OF ACCESS UNDER THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT (FIPPA)

Under FIPPA (subsection 59(1)), an applicant has a right to make an access complaint to the ombudsman about any decision, act or failure to act by a public body that relates to the request. This includes a complaint about a decision to refuse access to all or part of the requested records. This practice note has been prepared to assist public bodies in responding to this type of complaint.

When Manitoba Ombudsman investigates a complaint concerning a refusal of access, a public body would be asked to provide our office with a copy of the records containing withheld information and representations to explain the decision to rely on the exceptions cited to refuse access. There could be other information relevant to a particular complaint that our office may also request from a public body.

Under the act, the ombudsman is entitled to have access to any records relevant to an investigation, either by obtaining a copy or by examining the originals or a copy on site at the public body's office (section 50). The act provides the ombudsman with authority to obtain and examine any records despite any other act or privilege of the law of evidence (subsection 50(3)). The ombudsman does not release information from withheld records to the applicant and such disclosure is prohibited under subsection 55(3).

The investigation process is more efficient if the records are readily available to review at our office. There may be special circumstances, such as in the case of voluminous or fragile records, where an on-site review may be requested by the public body. This can be discussed when the investigator contacts the access and privacy coordinator at the outset of an investigation.

Preparing the Records

A well-organized records package is essential to ensure that our review can fully consider the public body's decision to refuse access and to facilitate any discussions that may take place



between our offices concerning particular records. It is not necessary to send records that have been released in full, unless there is a particular reason for doing this.

In a case where no records were released with severing and records were fully withheld, our office would need only one copy of the records, with the exceptions indicated in the margin beside the information to which they apply.

If records have been released with severing, our office would require two sets of copies of the records that are at issue: one set being the unsevered records and the second set being records with the severed parts blacked or whited out.

- All pages should be numbered consecutively and the page numbers on the first set should match those on the second set.
- Each exception on the severed set of records should be noted with a complete citation, for example “18(1)(c)(i).” The citation should be placed adjacent to the severed information either in the whited-out space or in the margin nearby. If more than one exception applies to the same piece of information, all of the exceptions should be clearly noted near the withheld information.
- If a page is withheld in full, this should be represented in the severed set by inserting a copy of the unsevered page, indicating on the page that it was withheld in full. The exception(s) being relied upon should be noted using the process described in the point above.
- Copies should be legible and complete, and can be provided in electronic format or in hardcopy on a standard paper size.

Example of a Prepared Record

| | |
|---|---|
| <p>March 5, 2021</p> <p>██████████ 17(1), 17(2)(c)</p> <p>Dear ██████████: 17(1), 17(2)(c)</p> <p>Thank you for your letter of February 28, 2021, regarding the project to develop ██████████ 18(1)(c)(i) ██████████. In your letter you advised that you have concerns about the project. 18(1)(c)(i)</p> <p>We will be reviewing your concerns, specifically, ██████████ and how this would affect your property located at ██████████.</p> <p>17(1), 17(2)(c)</p> <p>I have enclosed a copy of the report that was mentioned in our news release. Should you have any further questions, please contact me at 123-4567.</p> <p>Sincerely,</p> <p>Enclosure</p> | 8 |
|---|---|

Preparing an Index

In some circumstances, such as with voluminous records or where multiple exceptions have been applied to records with significant severing, an index would be helpful in providing an overview of the records at issue. If an index of the records has been prepared in the course of processing the access request, it could be provided to our office to assist in our review of the records.

In situations where it may be helpful to prepare an index to accompany a records package, please consider including the following headings: Page Number, Description and Exception (including the section/subsection/clause/paragraph). Depending on the complexity of the severing, this may involve numbering the lines on the page and indicating the exceptions by line number on the page.

The following is a sample index that could be used to prepare an index for a records package.

| Page # | Description | Exception |
|---------------|--------------------------------|--|
| 1-2 3 4 | Memo to file about third party | 17(1), 17(2)(c) 17(1), 17(3)(e) 23(1)(a) |
| 5-6 | Letter from federal department | 20(1)(a) |
| 7-8 | Briefing note | 23(1)(a), 19(1)(e) |
| 9-13 | Letter to legal counsel | 27(1)(a) |
| 14 | Letter from ABC company | 18(1)(b), 18(1)(c)(i) & (iii) |
| 15-20 | Report (withheld in full) | 23(1)(a), 28(1)(c)(ii) |

Providing Representations to Explain the Refusal of Access

Each exception under the act has certain requirements that must be satisfied. It is important that a public body addresses each component of these requirements.

If representations are too general or if the necessary connections between the exception and the withheld information are not clearly made, the representations will not establish that the exception applies.

Generally, providing written representations is a more efficient process for explaining the public body's decision to our office. Providing written representations enables a public body to describe in its own words, the basis for its decision.

Regardless of how representations are provided, the following should be considered by a public body in providing full representations:

- For both mandatory and discretionary exceptions, a full explanation should be provided to clearly demonstrate how all of the required elements of each exception apply to the withheld information.
- Where an exception states that the information or record must be one of the types listed in the exception, identify the particular type of information or record and provide reasons to explain why it fits into this category. Some examples are clause 18(1)(b) which requires the information to fall within the categories of commercial, financial, labour relations, scientific, or technical information, and clause 23(1)(a) which requires the information to fall within the categories of advice, opinions, proposals, recommendations, analyses, or policy options.
- Where an exception states that a particular consequence would result from disclosure of the information, describe the consequence in detail and provide an explanation to establish a reasonable expectation of the harm described in the exception. Some examples are section 24 where disclosure would be harmful to individual or public safety and subsection 25(1) which sets out exceptions where disclosure would be harmful to law enforcement or legal proceedings.
- Where an exception states that a record was prepared for a particular purpose, provide facts to support this claim. Some examples are cabinet confidences under subsection 19(1) and legal privilege under subsection 27(1).
- Where an exception states that the information was provided in confidence, supply details of the circumstances in which the information was provided and explain the basis for the expectation of confidentiality. Some examples relate to third party privacy under clauses 17(2)(c) and 18(1)(b) and information provided by another government under subsection 20(1).
- For discretionary exceptions, a public body has the discretion to give access rather than refuse access to the information. Therefore, a public body should provide an explanation of the reasons for refusing access in order to demonstrate that its exercise of discretion was reasonable.
- For both mandatory and discretionary exceptions, where there are also exceptions that limit the application of the exception to disclosure, we need to consider whether any such exceptions could apply, thereby providing for the release of the information. An explanation of the public body's consideration of whether any would apply should be provided. For example, if the public body has cited 18(1)(c)(i) the public body's consideration of the applicability of subsection 18(3) should be explained.

Revised January 2022

