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The Duty to Assist Under FIPPA - Elements of the Duty to Assist

The duty to assist under The Freedom of Information and Protection of Privacy Act (FIPPA) relates to access requests under Part 2 of the act. The act requires public bodies to “make every reasonable effort to assist” a requester and “to respond without delay, openly, accurately and completely” (section 9 of FIPPA).

The duty to assist is a formal obligation that is necessary for public bodies to fulfill throughout the stages of processing an access request.

This duty should always be considered and applied in a manner that is reasonable, on a case-by-case basis.

Make Every Reasonable Effort to Assist

Provide assistance proactively and in response to a requester asking for help

Discuss whether the request can be accommodated informally outside of FIPPA. For example:

- Is this the type of information that would be routinely released by the entity?
- Does the requester really want an answer to a question rather than access to a record?
- Is there another act that provides a right of access?

Explain access to information processes under the act:

- Inform that a FIPPA request must be made in writing and what information needs to be included
- If the public body has a specific form to be used, providing the requester with a copy or link

Assist verbal requests:

- Under FIPPA, a person may make an oral request for access to a record if the requester has a limited ability to read or write English or French or has a disability or condition that impairs their ability to make a written request (subsection 8(3))
- A public body may also assist a requester by accepting a verbal request in other circumstances where it would be reasonable and appropriate
- In either case, the public body should write down the request for documentation

Determine whether the request can be clarified to avoid unnecessary costs and time:

- The objective would be to narrow the request while still meeting the requester's access needs and not dissuade the request
- Ask the requester in writing for additional information related to the request (time for responding is suspended when a public body is clarifying a request with a requester under section 12.1 of FIPPA)
 - If appropriate, speak with the requester before this step is taken as it may make a formal request for clarification unnecessary. The public body may then simply document the clarification in a written acknowledgment to the requester.
 - The requester may not know how the public body labels, keeps or maintains records. The public body should communicate with requester to help identify the true intent of the request, rather than solely relying on the exact terms or identifiers used in the request. A strategy should be developed to search for records consistent with the requester's intent.
- Before deciding to disregard a request, speak with a requester to discuss the processing of the request and gather further information with the objective of arriving at a resolution

Reasonable efforts to assist a requester include explaining various processes under FIPPA, such as how to:

- Modify an access request to reduce the amount of fees
- Make a request for a waiver of access fees under subsection 9(1) of the Access and Privacy Regulation under FIPPA
- Make a request for a correction to personal information

- Explain to the requester what information needs to be provided to demonstrate the requester's authority to exercise the rights of another individual (section 79 of FIPPA)

Respond Without Delay

Ensure a Timely Response

Under FIPPA, a public body must "make every reasonable effort" to respond within the 45-day time limit (subsection 11(1)). A public body should begin to work on processing the request when it is received. This will help public body know early in the process whether further clarification is needed or where other actions such as a transfer of request or fee estimate may be required. In many circumstances, requests can be responded to in advance of the time limit. Extensions of the time limit for responding under FIPPA cannot be made on the basis of a public body's delay in taking action to process the access request.

Respond Openly

Communicate with requesters to explain access decisions

- Explain the basis under FIPPA for an extension of the time limit for responding
- Explain the basis of fees being charged in relation to the access request and, if applicable, identify potential options for reducing fees
- Provide reasons for a decision not to waive fees
- Explain why the requester is being asked to provide additional information (under section 12.1 of FIPPA) and how the information is relevant and necessary for fulfilling their request

Examples of openness:

- Providing information to the requester to explain a record to which access has been given. Under FIPPA, a public body that provides access to a record may give any additional information believed necessary to explain the record (subsection 14(2)).
- Under FIPPA, if a record exists but is not in the form requested by the applicant, the public body may create a record in the form requested if, in its opinion, it would be simpler or less costly to do so (subsection 10(2)). The public body could discuss with the requester whether this approach would meet his or her request.

Respond Accurately

Responding to an access request requires both an adequate search and thorough review of responsive records.

Conduct an adequate search for responsive records:

- It is not sufficient to believe that there are no responsive records
- It is not acceptable to omit doing a search for records, based on the belief that if records existed they would contain information that would be subject to exceptions
- Develop a logical, realistic and practical strategy to identify and locate the responsive records, based on an experienced employee's understanding of the entity's organizational structure, programs, activities and responsibilities and how records are maintained in the organization
- Search all reasonable locations including off-site locations
- Include records in the entity's "control", not just records in its possession - for example records maintained by agents, consultants or other contracted services
- A public body must demonstrate that its search included all the areas where responsive records could reasonably be expected to exist
- If adequate searches have not been conducted, all relevant records would not be identified, resulting in an inaccurate and incomplete response

Thoroughly review records before claiming an exception to refuse access applies:

- It is not sufficient to assume that an exception applies - the information may be different than anticipated or subject to a limit to the exception
- The records must be reviewed on a line-by-line basis, as exceptions apply to information in the records, not necessarily entire records, and the requester has a right to any information that is not subject to an exception, if the excepted information can reasonably be severed from the record (subsection 7(2) of FIPPA)

Respond Completely

The response to an access request must address all records that were requested, particularly where responsive records don't exist or access is not being provided in full.

If requested records do not exist or cannot be located:

- Confirm that some or all the records do not exist or cannot be located, and identify which records fall within these categories
- Explain the searches conducted to attempt to locate the records
- If the records were destroyed, explain the records management processes and destruction policies that were followed

If access to part or all the responsive records is refused:

- Section 12 of FIPPA sets out the required contents of a complete written response, including providing the specific provision and reasons for the refusal

Complaint Investigations by Manitoba Ombudsman About Duty to Assist

Under FIPPA, the Ombudsman investigates complaints that the duty to assist was not met and may bring any failure to fulfill the duty to assist to the attention of public bodies.

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