Manitoba Ombudsman

REPORT WITH RECOMMENDATION ISSUED ON AUGUST 31, 2015
AND
REPORT ON COMPLIANCE WITH RECOMMENDATION UNDER
THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2014-0499

MANITOBA INFRASTRUCTURE AND TRANSPORTATION

ACCESS COMPLAINT: FEE ESTIMATE

PROVISIONS CONSIDERED: 13(1)(b), 82(1), and 82(2)
ACCESS AND PRIVACY REGULATION 64/98: 4(1), 4(2), 4(3), 7, 8(1), and 8(3)

PUBLICLY RELEASED ON DECEMBER 10, 2015

SUMMARY OF REPORT WITH RECOMMENDATION AND RESPONSE:

A series of applications were made under *The Freedom of Information and Protection of Privacy Act* (FIPPA or the act) to Manitoba Infrastructure and Transportation (MIT or the public body) for records about 46 different contracts awarded without tender under the Winter Roads Program. The public body responded by issuing a fee estimate to process the collection of requests, stating that it would require two hours to process each of the 46 applications for access. MIT provided a total of two free hours of search and preparation time, but issued an Estimate of Costs totaling $2700 for the remaining 90 hours. During the course of our investigation we determined that each application was attempting to access different records pertaining to different contracts and projects and, as such, each access request was a separate request entitled to two free hours of search and preparation time. The ombudsman found that MIT did not appropriately provide the two free hours per request as required under FIPPA. Based on our findings, the ombudsman recommended that the public body withdraw its Estimate of Costs.

On September 16, 2015, Manitoba Infrastructure and Transportation provided its response to the ombudsman's report accepting the recommendation. On September 30, 2015, MIT notified the complainant and the ombudsman that the Estimate of Costs was withdrawn. The complainant was advised that the processing of his requests would resume and that the public body would respond to the applications within 14 days. On October 14, 2015, MIT notified the complainant that it was withdrawing its fee estimate and provided its access decision, advising that it was disregarding the 46 access requests in accordance with subsection 13(1) of FIPPA. MIT reported its decision to disregard the requests to the ombudsman on November 17, 2015.

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REPORT ISSUED ON AUGUST 31, 2015

SUMMARY: The complainant submitted 46 simultaneous access requests to Manitoba Infrastructure and Transportation (MIT). MIT viewed the volume of requests to be unreasonable and issued a fee estimate to process the requests, but did not provide the two free hours per application as required under the legislation. Our office found that the fee estimate was not calculated in accordance with FIPPA and, as such, the complaint was supported. The ombudsman recommended that the public body withdraw its fee estimate and render access decisions in accordance with FIPPA.

THE COMPLAINT

On September 10, 2014, Manitoba Infrastructure and Transportation (MIT) received 46 access requests from the complainant acting on behalf of his organization, requesting information related to untendered contracts awarded under the Winter Roads Program. The requested information spanned from 2009 until 2014, and pertained to 46 different untendered contracts.

The list of requests is too voluminous to include here. However, the basic wording of each request reads as follows:

> *Please provide a copy of the contract and copies of all records of the rationale for awarding a contract without tender including but not limited to the Record of Procurement for that contract described in the Manitoba Untendered Contracts Database available at the Legislative Library for* [company name] *from* [date] – *Value* [dollar amount].

On October 3, 2014, MIT extended the time period for responding by an additional thirty days. MIT subsequently issued an Estimate of Costs to the complainant on October 27, 2014. The Estimate of Costs included 90 hours of search and preparation time for which fees were charged and two free hours of processing time, for a total estimated fee of $2700. MIT estimated that each of the 46 requests would require approximately two hours of search and preparation time to enable MIT to respond.

A complaint disputing the fee estimate was received by our office on October 30, 2014. The complainant indicated that each of the 46 applications, despite being submitted at the same time, were separate requests and each individual application ought to be entitled to the two free hours as required by the legislation.

POSITION OF MANITOBA INFRASTRUCTURE AND TRANSPORTATION

In its decision letter to the complainant dated October 27, 2014, MIT stated that due to the systematic and repetitive nature of searching for and preparing the responsive documents, MIT determined it would be reasonable to "bundle" the requests for access.

Upon receiving the complaint about the fee estimate, our office requested representations from MIT in relation to its position.

In its representations dated November 27, 2014, MIT stated that it had contacted the complainant on September 12, 2014, in an attempt to refine the information requests. The complainant did not agree to refine or withdraw any of the requests he had submitted.

MIT indicated that it had been working with its Engineering and Operations Division, Contract Services Branch (CSB) to determine the amount of time required for one person to respond to the requests. In order to estimate the amount of time required to respond, the director of contract services chose a sample of records, and from this sample, it was determined that approximately two hours would be required to search for the records responsive to each request. Based on the 46 individual requests, MIT estimated that a single staff member would require approximately 92 hours (or 12.5 days of full-time work) to process the collection of requests.

MIT determined that "given the magnitude and repetitive nature of the requests" its only course of action was to provide a fee estimate. MIT indicated that its decision with respect to these 46 access applications was influenced by the fact that other similar access applications were made around the same time. Shortly after receiving these 46 applications, MIT went on to receive a further 118 applications from the complainant or his organization that requested access to information on untendered contracts. This resulted in a total of 164 access requests, from a single organization, received within a period of less than two months.

According to MIT, processing the requests would unreasonably interfere with its operations and the ability of its employees to perform their regular job duties. As such, MIT stated that any fees assessed in relation to these applications would be used to hire casual staff to allow the department to complete the work in a timely manner.

On December 16, 2014, our office requested further clarification from MIT in regard to the specific provisions of FIPPA it was relying upon in its decision to not provide the required two free hours per application by "bundling" the 46 applications together in a single fee estimate, and an explanation of how this course of action was authorized under the legislation.

In representations dated January 14, 2015, MIT indicated that the Estimate of Costs it prepared only included search time for locating responsive records and did not include time for preparation of those records. MIT determined that its Contract Services Branch would require at least two hours to search for and pull the responsive records for each request. MIT advised, however, that this estimate did not include preparation time required for creating working copies of the records, severing information in the records based on exceptions in the legislation, or contacting third parties referred to in the responsive records.

MIT stated that the original estimate was actually three hours per request, which included preparation time. However, due to the volume of requests for untendered contracts (totaling 164 requests from the same organization), paired with past experiences in preparing Estimates of Costs, MIT decided to exercise caution and limited this to two hours per request for a total Estimate of Costs of 92 hours for these particular requests.

MIT indicated that it was administratively efficient to bundle the requests to limit chargeable time, as a systematic approach to retrieving responsive records was more efficient than processing each request individually.

MIT also made reference to what it believed to be the underlying intent of the legislation. MIT indicated that from its perspective, it was clear that the legislature intended that the "user pay" principle should apply with respect to services related to the handling of access requests, in order to achieve some balance between the exercise of the right of access and the cost to the public purse (and the taxpayers of Manitoba) in providing this service. MIT pointed out that subsection 7(3) of FIPPA clearly states that the right of access to records is subject to the payment of any fees required, but that any fees are not to exceed the actual cost of the services as per subsections 82(1) and (6) of FIPPA.

In MIT's view, the provision of two free hours under subsection 4(1) of the regulation is not intended to undercut the "user pay" principle, but is a recognition that the typical applicant is entitled to free processing of a request that could be handled in a sufficiently short time. MIT further explained that beyond the required two free hours, the legislature included the "user pay" principle with the intention that certain costs of providing access services would be borne, at least in part, by the recipient of these services and not the public generally. In MIT's view, shifting costs of services from an extremely heavy user of the act, in this case, to the public generally, would be contrary to what MIT perceived to be the intent of the legislature. MIT felt that the act and regulation should not be interpreted in a manner that would prevent MIT from recovering some of the costs relating to this significant number of requests, as this would lead to an unreasonable use of resources.

The complainant's 46 applications requested not only contracts but also documentation on the rationale for awarding untendered contracts within the Winter Roads Program from 2009 until 2014. In MIT's view, the volume, timing, nature, and wording of the access requests lead to the conclusion that they are "few requests structured as many". MIT interpreted these access requests as part of the overarching theme of the 164 requests submitted by the complainant's organization, all of which were requests for access to information about the rationale for awarding contracts without tender.

MIT indicated that it considered the possible application of clauses 13(1)(a) and (b) of FIPPA to these 46 requests (as well as the subsequent 118), on the basis that the requests were vexatious and unreasonable. It was the position of MIT that responding to these requests as submitted could be viewed as interfering unreasonably with the operations of the department and in making such voluminous requests it further amounted to an abuse of the right of access contemplated by the act. MIT advised that issuing a fee estimate was undertaken in light of its responsibility to make every reasonable effort to assist an applicant under section 9 of FIPPA.

Our office was advised that, given the large volume of requests, MIT spoke with the complainant's organization about refining the requests. MIT stated that during verbal conversations with the complainant and his organization, MIT was given to understand that the organization intended to submit similar requests for all entries within the Manitoba Untendered Contract Database. MIT estimated that there are approximately 9,500 untendered contracts from MIT alone in the Untendered Contracts Database, and approximately 26,500 from the Manitoba government as a whole.

MIT also advised that the complainant's organization has gone on to resubmit a number of these requests for which MIT had earlier issued fee estimates. These resubmitted requests were worded identically to the original requests but included the instructions: "Please do not bundle this request with any other FIPPA requests and respond to this one exclusively, allotting 2 hours to the search and preparation of records as outlined by the FIPPA Act." MIT stated that it views this tactic as abusive and vexatious.

Our office requested further clarification from MIT in regards to how the responsive records are stored and maintained, in order to determine whether in fact it would take less time and be more efficient to process the requests together, rather than separately. On January 22, 2015, MIT responded and advised that the Contract Services Branch confirmed that the files in question are stored in boxes by records schedule and year. Within the boxes, the responsive files are organized numerically. The majority of boxes are housed at one location in Winnipeg. However, MIT indicated that its staff described the storage as "wall to wall boxes… so retrieving the files would necessitate shifting and opening a multitude of boxes to find relevant files." Due to this method of storage, MIT felt that "It would therefore be expedient to do all of the requests together at one time."

It made sense to our office that it would be more efficient to search for the records altogether, rather than one at a time, and we acknowledged MIT's desire to balance fulfilling its operational responsibilities with fulfilling the complainant's right of access by charging fees to fund the cost of retaining temporary help to do the work. However, we were unable to identify provisions of

FIPPA that would authorize MIT to dispense with the requirement to provide two free hours of search and preparation time per application. Our office contacted MIT on April 10, 2015, to share these preliminary findings, and to invite MIT to provide any additional information, clarification, or representations it may have on this matter.

In its further submission, dated April 23, 2015, MIT reiterated its view that despite the fact that the requests were for different contracts pertaining to different projects at different times and in different communities, the 46 requests were united by a single overarching theme of "a request for access to the rationale for awarding a contract without tender" under the Winter Roads Program. This interpretation informed MIT's decision that the 46 requests should be viewed as one large request for the purposes of computing a fee estimate.

In order to better understand whether the single rationale might result in duplication of the records at issue, our office contacted the Procurement Services Branch (PSB) of MIT on April 30, 2015, to obtain information about contract tendering and procurement. We asked what information would be subject to the term "record of procurement", as stated in the complainant's access requests. PSB advised that, although it does not use that specific term, a "record of procurement" would refer to the record of purchase of a contract, or the record of the contract. This would include specific pieces of data, including: the contracting government department, the date on which the contract was signed, the vendor name, the dollar value of the contract, and a brief description of the contract (including what the project is and what it is for). PSB confirmed that this information would be unique for each contract.

Our office also requested a copy of the sample of records previously retrieved by MIT (on or about September 22, 2014) as part of its efforts to compile a fee estimate. On May 5, 2015, MIT instead provided our office with a copy of its response to one of the other 118 access requests (MIT file 14-236) submitted by the complainant's organization that attempted to access similar information to the 46 access requests (i.e. untendered contracts under the Winter Roads Program) that are the subject of this investigation.

Our office reviewed the response provided by MIT, which was dated January 19, 2015. Our review determined that this access request (MIT file 14-236) was seeking identical information to one (MIT file 14-204) of the 46 access requests that are the subject of this investigation. As this request was submitted by the complainant on more than one occasion, our office requested that MIT verify whether there were any other duplicates amongst the 164 applications. MIT responded on May 6, 2015, advising that 11 of the 46 requests at issue in this complaint were duplicated in the other 118 access requests submitted by the complainant or his organization. MIT had issued fee estimates in response to the other duplicate applications, but, having not received a response, considered them to be abandoned.

The access decision in MIT file 14-236 granted access in part to the contract in question, with minor severing to withhold third party information. This access decision also included an explanation of the rationale for awarding these untendered contracts directly to First Nation councils, which was that it was intended to assist in capacity building and community growth. The record from which the rationale was taken was a project submission to Treasury Board Secretariat, a committee of cabinet. The project submission record was not released as MIT was

of the view that it was subject to mandatory exceptions under subsection 19(1) of FIPPA, which protect cabinet confidences.

As we had now verified that the public body was maintaining its position and had also reviewed an example of both the underlying records and an access decision pertaining to the records, we then proceeded to our analysis of the issues raised by the joint fee estimate.

ANALYSIS OF ISSUES AND FINDINGS

1. Was the decision that these requests be processed together as a group reasonable?

A public body has discretion to undertake search and preparation activities in the manner it has determined is most efficient or otherwise appropriate to respond to a FIPPA application. When a public body receives multiple, simultaneous requests from a single applicant for similar records or records that are filed or maintained together, it will often be more efficient and effective to search for and prepare the records as a group. Furthermore, a public body may also achieve administrative efficiencies by preparing an all-encompassing acknowledgment letter or response letter for the group of requests, rather than preparing different letters for each individual request. This is in fact a practice that our office will also use on occasion when dealing with multiple related complaints involving the same public body and the same complainant.

Whether treated as multiple applications or extensions of a single application, a public body that receives multiple, simultaneous requests from the same applicant may also consider issuing a single fee estimate to process the group, provided it has done so in accordance with the relevant provisions of FIPPA. The fact that a public body has issued a single fee estimate for multiple access requests is not necessarily wrong and does not necessarily mean that the public body views a group of requests to be a single application.

Given that the records are located in the same place, and that efficiencies could be achieved if the records are searched for as a group rather than individually, our office finds that it is reasonable for MIT to process the requests together as a group. The next two sections of this report will address whether the estimated search and preparation time, and the allotted free processing time, respectively, were calculated reasonably and in accordance with FIPPA.

2. Was the estimated search and preparation time reasonable, and did it reflect only activities that could be included as chargeable to an applicant?

Under section 82 of FIPPA, a public body may require a person who makes an application for access to pay some of the costs incurred by the public body in responding to the application, such as fees for search, preparation, copying, and delivery services. Section 82 of FIPPA provides for the establishment and estimation of fees as follows:

> ***Fees***
> ***82(1)*** *The head of a public body may require an applicant to pay to the public body fees for making an application, and for search, preparation, copying and delivery services as provided for in the regulations.*

Estimate of fees
82(2) *If an applicant is required to pay fees under subsection (1) other than an application fee, the head of a public body shall give the applicant an estimate of the total fee before providing the services.*

FIPPA requires a public body to issue an Estimate of Costs when it reasonably considers that search and preparation time in responding to a request will likely exceed two hours. The *Access and Privacy Regulation* (the regulation) outlines what actions are chargeable and how fees are to be calculated.

The following provisions of the regulation are relevant in this matter:

Search and preparation fee
4(1) *An applicant shall pay a search and preparation fee to the public body whenever the public body estimates that search and preparation related to the application will take more than two hours.*

4(2) *The fee payable for search and preparation is $15.00 for each half-hour in excess of two hours.*

4(3) *When calculating search and preparation time, a public body shall include time spent in severing any relevant record under subsection 7(2) of the Act, but shall not include time spent*

(a) in connection with transferring an application to another public body under section 16 of the Act;
(b) preparing an estimate of fees under section 7;
(c) reviewing any relevant record to determine whether any of the exceptions to disclosure apply, prior to any severing of the record;
(d) copying a record supplied to the applicant; or
(e) preparing an explanation of a record under subsection 14(2) of the Act.

Matters for which no fee is payable
7 *No fee is payable by an applicant for*

(a) making an application for access to a record;
(b) using any file list, file plan or similar record used by a public body to identify, locate or describe records, unless the applicant requires a copy, in which case 20 cents is payable for each page; or
(c) regular mailing costs, other than special courier delivery which shall be charged to the applicant at actual cost.

Estimate of fees
8(1) *In accordance with subsection 82(2) of the Act, a public body shall give an applicant an estimate of fees in Form 2 of Schedule A when it reasonably considers that, in responding to the request,*

(a) search and preparation is likely to take longer than two hours; or
(b) computer programming or data processing fees will be incurred.

> ***8(3)*** *The estimate of fees is binding on the public body, and if the actual cost of search and preparation or computer programming or data processing is less than the estimate, the public body shall refund the difference to the applicant.*

In arriving at its fee estimate, MIT applied only search time and calculated the estimate from a representative sample of files. The use of a representative sample is a practice that our office has consistently supported as a reasonable way to accurately estimate the amount of time necessary to search for and prepare responsive records.

Based on the sample, the public body provided an Estimate of Costs that indicated it would require two hours to process each request. MIT estimated that to process all of the 46 access requests would require a total of 92 hours, as each application would require two hours.

MIT advised our office that the actual estimate of time required to process each request was closer to three hours, after factoring in time spent photocopying and severing the records and consulting with third parties. The former activities are chargeable, however, in our view, time spent consulting with third parties or within the public body, while necessary, is not time that can be charged to an applicant, and this time is properly excluded from the estimate. Subsection 8(3) of the regulation states that a fee estimate is binding on a public body. This means that once an Estimate of Costs is issued, the public body cannot subsequently raise the estimate if it determines that more time is required to process the request. Although MIT may have been able to justify that some amount of additional time would have been necessary, it is nonetheless bound to its estimate of two hours per application.

Overall, having carefully considered the manner in which the records are maintained, and the methodology of a representative sample that was used to develop the estimate, our office finds that MIT reasonably calculated the time required to process the group of applications.

3. Is this group of requests a single application, and if not, was the decision not to provide two free hours of search and preparation time per request in accordance with FIPPA?

The question of whether the group of requests can be considered a single application is the key issue in this complaint. The following provisions of the regulation illustrate why that is the case:

> ***Search and preparation fee***
> ***4(1)*** *An applicant shall pay a search and preparation fee to the public body whenever the public body estimates that search and preparation related to the application will take more than two hours.*
>
> ***4(2)*** *The fee payable for search and preparation is $15.00 for each half-hour in excess of two hours.*

If this is a single application, then MIT is required to provide only two free hours towards the search and preparation of the records responsive to all of the 46 requests, and the Estimate of Costs would be authorized. If, on the other hand, this is indeed a group of 46 individual

applications, then the Estimate of Costs would not be authorized, as subsections 4(1) and 4(2) of the regulation would require MIT to provide two free hours for each of the applications, or 92 hours free in total, which would cancel out all chargeable fees in this case.

MIT believed that the records requested by the complainant could be explained by the single rationale that awarding these untendered contracts directly to First Nation councils was intended to assist in capacity building and community growth. As such, MIT believed that this one rationale inherently linked the multiple access requests together, and that this was therefore a case of a single request structured as many.

There is no question that the requests are similarly worded and are attempting to access similar types of records. However, our review determined that, while MIT would likely provide a similar response for each request, and that administrative efficiencies could be achieved by processing the requests together, the requests themselves were attempting to access different contracts and different project submissions to Treasury Board Secretariat. These submissions would be unique to each project and, thus, each request would not include the same responsive records. The fact that the requests and the underlying records are of a similar nature, and that MIT determined that these records would be withheld for similar reasons, or that the rationale for not tendering the underlying contracts was the same, does not mean that the requests constitute a single application. Our office also observed that the characterization of the group of 46 requests as a single application appeared to be inconsistent with the approach to estimating fees, which was based on time needed to process a single application (2 hours) multiplied by the number of requests (46).

Based on our review, we could not conclude that these access requests constituted a single application. The requests were for different records, and each request was made on its own application form, which is entirely consistent with the instructions on page 2 of the designated form- to "Make only one request on each application form".

Our office has seen examples of requests that have been structured as a single application, using a single application form and a multi-page appendix listing all of the requested records. When an application is structured this way, a fee estimate would appropriately provide only two free hours for processing all of the records responsive to the request.

We have also seen other examples of requests that are structured similarly to those made by the complainant in this case, using one application form per item for large numbers of items. An applicant using this approach likely runs a higher risk of having their applications disregarded (and receiving no records), but would be entitled to two free hours for each application, and therefore would end up avoiding fees entirely or paying much less than an applicant using a single application to request the same records. This does not mean that the submission of multiple applications as a proactive means to try to reduce or avoid fees is necessarily contrary to the requirements of FIPPA, or inconsistent with the spirit of the legislation, as the unique circumstances of each case must be taken into account. [1]

[1] For example, consider a situation where an applicant receives a fee estimate for a single application for a large number of items, and abandons that application in favour of making many further applications. This approach would

It may seem inequitable that different approaches to accessing the same records would result in different outcomes as far as fees are concerned. If FIPPA allotted two free hours by applicant rather than by application, or if there was a fee in place for making an application, not just a fee for search and preparation time, it is likely that greater consistency would exist among the outcomes for the two approaches. However, this is simply not what the legislation provides.

In fact, while subsection 82(1) of FIPPA provides for the establishment of fees under the regulation (including a potential application fee), clause 7(a) of the regulation specifically provides that no fee is payable by an applicant for making an application for access to a record.

Based on all of these considerations, our office finds that the 46 requests constitute 46 applications for the purpose of calculating search and preparation fees. As each application is entitled to receive two hours of search and preparation free of charge, regardless of the fact that multiple applications may be submitted by a single applicant, our office finds that the Estimate of Costs was not calculated in accordance with FIPPA as it did not provide two free hours for each application. The fee is not authorized.

4. Does the combined collection of requests amount to an unreasonable interference with the operations of the public body?

MIT advised our office that its decision to treat the 46 access applications as a single request and not provide two free hours of search and preparation time per request was informed by its consideration of section 13 of FIPPA. Although the department issued a fee estimate and has not yet rendered an access decision under either section 12 or section 13, the department's decision to issue a fee estimate was motivated by factors that are described in section 13. As such, our report gives some consideration to these factors.

The provisions of section 13 of FIPPA balance the right of access with the responsible exercise of that right. Subsection 13(1) permits a public body to disregard an application in specific circumstances, and these provisions were the subject of extensive consideration in an earlier report by our office.[2]

Clause 13(1)(b) is relevant in this matter, and reads as follows:

> ***Public body may disregard certain requests***
> ***13(1)*** *The head of a public body may disregard a request for access if he or she is of the opinion that*
>
> *(b) because of their repetitious or systematic nature, the requests would unreasonably interfere with the operations of the public body or amount to an abuse of the right to make those requests*

result in the making of repetitious requests and could possibly be found to amount to misuse of the access rights under FIPPA.

[2] See our investigation report on case 2011-0520, publicly issued on May 30, 2012, available at the following link: https://www.ombudsman.mb.ca/uploads/document/files/case2011-0520-en.pdf

The focus of clause 13(1)(b) relates to the nature of the request and the effect that request has on the operation of the public body or the extent to which it becomes an abuse of the right to make requests. A repetitious request is one that seeks the same information or that which has been requested previously. A request may be of a systematic nature where it reflects a pattern of conduct that is regular or deliberate.

Under clause 13(1)(b), the effect of repetitious or systematic requests must be such that the processing of the requests would unreasonably interfere with the operations of the public body, or that they would amount to an abuse of the right to make those requests. Repetitious and systematic requests can overburden a public body and interfere with its normal everyday operations, including providing services to other members of the public. Such requests may unnecessarily add to the public body's time and costs in complying with FIPPA and can infringe on the access rights of other applicants by consuming a disproportionate amount of resources available to process such requests.

Access requests made in such excess, to the point that processing those requests becomes a burden to the public body and impedes its ability to respond to access requests from other applicants, may be considered as an abuse of the right to make those requests. In a decision from the information and privacy commissioner for British Columbia, this point is articulated as follows:

> *Access to information legislation confers on individuals … a significant statutory right, i.e., the right of access to information … All rights come with responsibilities. The right of access should only be used in good faith. It must not be abused. By overburdening a public body, misuse by one person of the right of access can threaten or diminish a legitimate exercise of that same right by others ... Such abuse also harms the public interest, since it unnecessarily adds to public bodies' costs of complying with the Act.*[3]

Although FIPPA provides any person with the right to access information held by public bodies, it is a right that must not be exercised to excess. It is common for an applicant with a legitimate and genuine interest in receiving large amounts of information to submit an access request that requires significant time from the public body to process that request. Such requests are permitted and contemplated within the act. An applicant may also seek information that requires multiple access requests over a span of time. However, inundating a public body with waves of access requests, to the point that a staff member would be required to work full-time for multiple consecutive weeks or months exclusively for the purpose of processing the requests of a single applicant, is neither a reasonable nor responsible exercise of the right of access.

In order M-850, the information and privacy commissioner for Ontario defined "pattern of conduct" as "recurring incidents of related or similar requests on the part of the requester (or with which the requester is connected in some material way)."[4] Based on this definition it is clear, in the present case, that the complainant, together with other members of his organization,

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[3] See *Auth. (s.43) 02*-02 issued by the Office of the Information and Privacy Commissioner for British Columbia, Nov. 8, 2002. Available at: https://www.oipc.bc.ca/decisions/172

[4] See *Order M-850* issued by the Office of the Information and Privacy Commissioner for Ontario, Oct. 24, 1996. Available at: https://www.ipc.on.ca/images/Findings/Attached_PDF/M-850.pdf

has demonstrated a pattern of conduct that a public body may argue is making unreasonable demands of the public body.

In this case, a single applicant submitted 46 very similar applications, requesting very similar information, all of which were submitted at the same time. These requests were part of a larger series of requests (contributing to a total of 164 requests) all submitted by the same organization in a systematic manner over a period of less than two months.

Our office reviewed statistics on the administration of FIPPA, taken from the FIPPA annual reports issued by Manitoba Tourism, Culture, Heritage, Sport and Consumer Protection. We noted that MIT received 108 applications in 2010, 173 applications in 2011, 142 applications in 2012, and 98 applications in 2013 (the most recent year for which the annual report has been published).[5] The applicant and his organization submitted substantially more requests in less than two months than MIT would normally receive from all applicants in the course of a year.

In its representations, MIT put forward an argument for how subsection 13(1) of FIPPA would apply in this case. MIT claimed that the volume of requests submitted by the complainant's organization was of a "systematic nature" and would "unreasonably interfere with the operation of the public body" to respond to these requests in a timeframe compliant with FIPPA. We agree that this volume of requests is neither reasonable nor sustainable. Where a public body believes that a repetitious or systematic access request, or series of such access requests, would unreasonably interfere with its operations, its recourse would be to rely on subsection 13(1), which allows the public body to disregard those requests.

Subsection 13(1) is a tool within the act that provides a specific course of action that a public body may consider when encountering similar circumstances as described above. While the volume of the access requests submitted by the complainant (in concert with his organization) could very well be categorized as interfering with the operations of the public body, subsection 13(1) does not authorize a public body to avoid the provision of two free hours of search and preparation time per application on an Estimate of Costs.

5. What are the implications of the duplicate access requests submitted by the complainant's organization?

During our investigation, we determined that one of the 46 access requests that are the subject of this investigation had been processed and responded to by MIT. Considering the public body had already responded to this one access request, the portion of the fee that would have been applicable to this request is no longer at issue.

The complainant and his organization had submitted 11 duplicate access requests, however those had been considered abandoned by MIT. Our office observes that the action of resubmitting one or more identical access requests to the same public body may amount to an unreasonable exercise of the right of access, especially when such large numbers of access requests are being made.

[5] See FIPPA Annual Reports available at: http://www.gov.mb.ca/chc/fippa/annual_reports/index.html

RECOMMENDATION

The ombudsman found that the Estimate of Costs was not authorized, as it did not appropriately provide the two free hours of search and preparation time for each application for access, as required under FIPPA.

1. Based on our finding, and as MIT had estimated that each application would take two hours to process and as each application is entitled to two free hours, which would cancel out the entire Estimate of Costs, Manitoba Ombudsman is recommending that the public body withdraw its Estimate of Costs.

HEAD'S RESPONSE TO THE RECOMMENDATION

Under subsection 66(4), Manitoba Infrastructure and Transportation must respond to the ombudsman's report in writing within 15 days of receiving this report. As this report is being sent by courier to the head on this date, the head shall respond by September 16, 2015. The head's 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.*

Our office notes that if the Estimate of Costs is withdrawn, time would resume accumulating towards the public body's extended time limit of 60 days for responding to the request.

OMBUDSMAN TO NOTIFY THE COMPLAINANT OF THE HEAD'S RESPONSE

When the ombudsman has received Manitoba Infrastructure and Transportation's response to her recommendation, she will notify the complainant about the head's response as required under subsection 66(5).

HEAD'S COMPLIANCE WITH THE RECOMMENDATION

If the head accepts the recommendation, subsection 66(6) requires the head to comply with the recommendation within 15 days of acceptance of the recommendations 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 recommendation 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 recommendation, 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.

August 31, 2015
Manitoba Ombudsman

Manitoba Ombudsman

REPORT ON COMPLIANCE WITH RECOMMENDATION UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2014-0499

MANITOBA INFRASTRUCTURE AND TRANSPORTATION

ACCESS COMPLAINT: FEE ESTIMATE

ISSUED ON NOVEMBER 23, 2015

SUMMARY:

On September 16, 2015, Manitoba Infrastructure and Transportation (MIT) provided its response to the ombudsman's report with recommendation under *The Freedom of Information and Protection of Privacy Act* accepting the recommendation. MIT advised that it accepted our findings and provided a timeline to comply with the recommendation. On September 30, 2015, MIT complied with the recommendation by advising the complainant that it would be withdrawing its Estimate of Costs. On October 14, 2015, MIT provided its access decision to the complainant. A copy of the access decision letter was provided to our office on November 17, 2015.

COMPLIANCE WITH THE RECOMMENDATION

On August 31, 2015, the ombudsman issued a report with recommendation in this case following an investigation of a complaint regarding an Estimate of Costs issued by Manitoba Infrastructure and Transportation (MIT or the public body) under *The Freedom of Information and Protection of Privacy Act* (FIPPA or the act). On September 16, 2015, the public body responded to the ombudsman accepting the recommendation. The recommendation was as follows:

> *Based on our finding, and as MIT had estimated that each application would take two hours to process and as each application is entitled to two free hours, which would cancel out the entire Estimate of Costs, the Manitoba Ombudsman is recommending that the public body withdraw its Estimate of Costs.*

Under subsection 66(6) of FIPPA, when a public body accepts a recommendation it is required to comply with the recommendation within 15 days or within such additional time as the ombudsman considers reasonable. In accepting the recommendation, MIT advised that it would endeavor to respond to the complainant within 14 days. On September 30, 2015, MIT advised the complainant that it would be withdrawing its fee estimate. As required under subsection

66(5) of FIPPA, the complainant was notified regarding the public body's response to the recommendation in this matter.

The withdrawal of the fee estimate meant that MIT would have to issue its access decision within 14 days as the time limit for responding was no longer suspended.

On October 14, 2015, MIT provided the complainant with its access decision. The public body advised that to process the collection of access requests would unreasonably interfere with its operations. As such, MIT's access decision was to disregard the 46 access requests in accordance with subsection 13(1)(b) of FIPPA. The cited provision reads as follows:

> ***Public body may disregard certain requests***
> ***13(1)*** *The head of a public body may disregard a request for access if he or she is of the opinion that*
>
> > *(b) because of their repetitious or systematic nature, the requests would unreasonably interfere with the operations of the public body or amount to an abuse of the right to make those requests*

The ombudsman has not investigated the public body's access decision as a complaint has not been made about the decision.

SUMMARY

The ombudsman is satisfied that Manitoba Infrastructure and Transportation has complied with the recommendation contained in our report.

Charlene Paquin
Manitoba Ombudsman
November 23, 2015