Chapter 4

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Chapter 4 ACCESS TO RECORDS

THE RIGHT OF ACCESS - [SECS. 4, 6 AND 7]

> ***Right of access***
> ***7(1)*** *Subject to this Act, an applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.*
>
> ***Severing information***
> ***7(2)*** *The right of access to a record does not extend to information that is excepted from disclosure under Division 3 or 4 of this Part, but if that information can reasonably be severed from the record, an applicant has a right of access to the remainder of the record.*
>
> ***Fee***
> ***7(3)*** *The right of access to a record is subject to the payment of any fee required by the regulations.*

Part 2 of FIPPA – Access to Information – is 'access to information' legislation, and reflects two of the stated purposes in Sec. 2 of FIPPA:

- to allow any person a right of access to records in the custody or under the control of public bodies, subject to the limited and specific exceptions set out in FIPPA

- to allow individuals a right of access to records containing personal information about them in the custody or under the control of public bodies, subject to the limited and specific exceptions set out in FIPPA.[1]

Specifically, subsection 7(1) of FIPPA states that any person has the right to access a record, or part of a record, in the custody or under the control of a public body,

[1] The principles of access to information legislation, and the purposes of FIPPA, are discussed in chapter 1 of this manual.

including a record containing personal information about the person requesting access (the applicant).[2]

This right to access does not extend to the limited types of records excluded from FIPPA by clauses 4(a) to 4(k):[3]

- information that is available to the public free-of-charge or for purchase [Sec. 6.1][4]
- records or information specifically excluded from the access to information provisions of FIPPA by another act or regulation
- information in a record that falls within an exception to disclosure in Secs. 17 to 32 of FIPPA [subsection 7(2)][5]

The right to access includes an applicant's right to access a record containing their own personal information, other than personal health information [subsection 7(1)].

An individual seeking access to a record containing their own personal health information must request access under The Personal Health Information Act (PHIA), not under Part 2 of FIPPA [subsection 6(1)].[6]

When an individual makes a request for access to a record under Part 2 of FIPPA but that record includes their own personal health information, subsection 6(1.1) says the request is actually under PHIA, related to the parts of the record consisting of the applicant's personal health information. PHIA then applies to the portions of the record that consist of the personal health information. Requests for records containing the applicant's own personal health information are discussed later in

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2 The definition record in subsection 1(1) of FIPPA, and the terms custody and control are discussed in chapter 2, under Records That Fall under FIPPA.

3 Sec. 4 is discussed in chapter 2, under Records That Do Not Fall under FIPPA.

4 Sec. 6.1 is discussed in chapter 2, under Records That Do Not Fall under FIPPA.

5 The exceptions to disclosure in Divisions 3 and 4 of FIPPA are discussed in chapter 5.

6 Part 2 of PHIA sets out an individual's right to access their own personal health information in the custody or under the control of trustees, including public bodies.

this chapter, under Where a Request for Access Includes Personal Health Information.

An individual's right to access under Part 2 of FIPPA can be exercised by another person authorized to act on their behalf, under specific circumstances.[7]

The right to access is subject to the payment of fees as required by the Access and Privacy Regulation.[8]

Any person has a right of access under Part 2 of FIPPA. The term person, when used in legislation such as FIPPA, means an individual (that is, a human being) and also "includes a corporation and the heirs, executors, administrators or other legal representatives of a person."[9] That is, the right to access under FIPPA is not restricted by residency or citizenship, and applies to corporations, businesses and other organizations, as well as to individuals.

[7] Sec. 79, and who can exercise rights on behalf of another under FIPPA, is discussed in chapter 3, under *Exercising Rights on Behalf of Another*.

[8] Fees are discussed later in this chapter, under *Fees, Fee Estimates and Fee Waivers*.

[9] The Interpretation Act of Manitoba, Sec. 17 and the Schedule of Definitions.

THE DUTY TO ASSIST AN APPLICANT - [SEC. 9]

> ***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.*

Sec. 9 of FIPPA requires **public bodies** to make "every reasonable effort":

- to assist an applicant for access
- to respond to the access request quickly, openly, accurately and fully

The duty to assist the applicant is an important requirement in FIPPA. The duty applies throughout the access request process, but it is particularly important during the applicant's initial contact with the public body.

The public body, through its access and privacy coordinator, should attempt to develop a cooperative working relationship with the applicant to better understand the applicant's wishes or needs, and to ensure the applicant understands the access to information process under FIPPA. Both the applicant and the public body will benefit from a cooperative, respectful relationship.

Also see ombudsman practice note: The Duty to Assist under FIPPA and PHIA.

THE DUTY TO PROTECT THE PRIVACY OF AN APPLICANT - [SECS. 41 AND 42]

> ***Protection of personal information***
> ***41*** *The head of a public body shall, in accordance with any requirements set out in the regulations, protect personal information by adopting reasonable administrative, technical and physical safeguards against such risks as unauthorized access, use, disclosure or destruction.*

Sec. 41 in Part 3 of FIPPA – Protection of Privacy – requires that a public body protect all personal information in its custody or under its control by "adopting reasonable administrative, technical and physical safeguards against such risks as unauthorized access, use, disclosure or destruction."

Sec. 42 requires that a public body:

- limit use and disclosure of personal information to the minimum amount of information necessary to accomplish the purpose it is used or disclosed for [subsection 42(2)]

- limit use of personal information to those of its employees – its officers, staff, contractors and agents – who need to know the information to carry out the purpose the information was collected or received for, or for a purpose authorized under sec. 43 of FIPPA [subsection 42(3)][10]

Subsection 42(4) specifies that these duties apply to personal information about an applicant or any other individual in connection with an access request under Part 2. This is personal information that the public body obtains or collects in the course of receiving and responding to the request.

For example, the name, home address, home phone number, or other personal information provided by an individual making an access request is personal

[10] Secs. 41 and 42, and unauthorized access, use and disclosure, are discussed in chapter 6 of this manual.

information that the public body must protect and handle, in accordance with Part 3 of FIPPA.

This means that:

(i) When sharing information about the access request with other officers and staff in the public body:

- The identity and other personal information about the applicant must only be shared with those who need to know it to process, respond to or make a decision about the access request

- Any sharing of the identity of, and other personal information about, the applicant must be limited to the minimum amount necessary to process, respond to or make a decision about the access request

(ii) The identity and other personal information about the applicant must not be disclosed to an affected third party or to another public body (for example, in the context of consultations about the access request) unless:

- the disclosure is necessary to process, respond to or make a decision about the access request

- the disclosure is limited to the minimum amount of personal information necessary to process, respond to or make a decision about the access request

Sometimes, a public body transfers an access request to another public body, under Sec. 16 of FIPPA. This might be because, for example, the other public body has custody or control of the records requested. In this case, it is appropriate to transfer the whole access request, including the name, contact information and other personal information the applicant provided to the other public body. Disclosing this personal information is appropriate, because this is information the other public body needs to process, respond to and make decisions about the access request.

Also see ombudsman practice note: Protecting the Privacy of Access Requesters.

MAKING AN ACCESS REQUEST - [SEC. 8; ACCESS AND PRIVACY REGULATION: SEC. 3]

How to make a request
8(1) *To obtain access to a record, a person must make a request to the public body that the person believes has custody or control of the record.*

Content of request
8(2) *A request must be made in writing and must provide enough detail to enable an experienced officer or employee of the public body to identify the record with a reasonable effort.*

Oral request
8(3) *Despite subsection (2), an applicant may make an oral request for access to a record if the applicant*
(a) has a limited ability to read or write English or French; or
(b) has a disability or condition that impairs his or her ability to make a written request.

■ How to Apply for Access

To apply for access to a record under Part 2 of FIPPA, a person must make a request to the public body that they believe has custody or control of the record [subsection 8(1)]. Where possible, the applicant must submit the access request to the public body's access and privacy coordinator, at the location of the public body listed on the FIPPA Website [subsection 3(1) of the Access and Privacy Regulation].

> ***Request for access***
> ***3(1)*** *If practicable, a person making a request for access under section 8 of the Act must submit the request to the public body's access and privacy coordinator using the public body's address specified at: www.gov.mb.ca/fippa.*

> ***3(2)*** *A public body must ensure that a request for access is date stamped on the day it is received by the public body.*
>
> ***3(3)*** *A public body may require an applicant to provide suitable identification if the public body considers it necessary to verify the applicant's identity, or that of a third party, to respond to the request.*

An access request must be made in writing and must provide enough detail to enable an experienced officer or employee of the public body to find the record with reasonable effort [subsection 8(2)].

If an applicant sends an access request to another office of the public body, it should be accepted, date-stamped and forwarded immediately to the access and privacy coordinator.

As of Jan. 1, 2022, there is no longer a specific application form that an applicant must use. However, a public body may create a form for an applicant to complete. This may be beneficial to ensure the applicant provides the necessary information that the public body needs to contact the applicant, locate the requested records and respond to the access request.

Note that the personal information collected on a form must comply with Part 3 of FIPPA – Protection of Privacy – particularly subsection 36(2), which limits the amount of personal information collected to only as much as is needed for the access request purpose. [See chapter 6, under Collection of Personal Information.]

Where a Request for Access Includes Personal Health Information

Every public body that falls under FIPPA is also a trustee of personal health information under PHIA.

If a public body receives an access request from an applicant seeking access to a record that includes both information that falls under FIPPA and personal health information about the applicant, the personal health information in the record must be dealt with under PHIA, not under FIPPA [Sec. 6].

The coordinator must treat the access request as a request under both FIPPA and PHIA [subsection 6(1.1)].

Subsection 6(1) of PHIA provides the time limits for responding to a request by an individual for access to their own personal health information. Time limits are discussed later in this chapter, under Time Limit for Responding to an Access Request.

The only reasons for refusing an individual who wants access to their personal health information are those set out in Secs. 11 and 11.1 of PHIA.[11]

When Oral Requests Are Permitted - [Subsection 8(3)]

Subsection 8(3) of FIPPA allows an applicant to make an oral request for access to a record if the applicant:

- has a limited ability to read or write English or French
- has a disability or condition that impairs their ability to make a written request

In this situation, the access and privacy coordinator or a senior staff member should prepare the written request as directed by the individual, date-stamp the request and proceed with the process for responding.

[11] PHIA is briefly discussed in chapter 2, under Relationship of FIPPA to Other Legislation.

WHAT TO DO WHEN AN ACCESS REQUEST IS RECEIVED – INITIAL STEPS

■ Date Stamp Is Required

Subsection 3(2) of the Access and Privacy Regulation requires that an access request be date-stamped on the day it is received by the public body.

This means that the officer or staff member of the public body who first receives an access request must date-stamp the application on the day they received it – whether that officer or staff member is the access and privacy coordinator.

If an officer or staff member other than the access and privacy coordinator is the first to receive the request, after date-stamping it, they should immediately forward it to the coordinator. This is because the time limit for responding to the access request runs from the date it is received by the public body.

After receiving an access request, the access and privacy coordinator should record the access request and the date it was received by the public body in an access request tracking log.

While the Access and Privacy Regulation requires a public body to date-stamp a request for access on the day the public body receives it, the Regulation does not further define what that term means. With the convenience of technology, requests for access can be submitted through email or other electronic methods, at any time, including outside of the public body's normal business hours. Therefore, the public body should establish a consistent process for determining when a request for access is considered to be received by the public body.

■ A Note about Documentation

The handling of an access request, and decisions related to it, need to be well documented. Thorough documentation will be important:

- for discussions with legal counsel

- in the final decision-making stages
- in explaining decisions to the ombudsman if a complaint is made
- in preparing affidavit evidence for court if an appeal about a refusal of access happens
- if the ombudsman audits the public body's access to information practices
- in other similar situations

The public body should document when the access request is received and create a file for it. The file should include:

- the access request, with date-stamp
- all internal and external correspondence, including email
- records of discussions with the applicant
- details relating to the search for relevant records, including copies of relevant record schedules and file lists, and a summary of the locations that were searched
- a record of consultations with the public body, and with third parties, other public bodies and legal counsel
- a record of all decisions related to the access request, including:
    - if fees are being charged, a record of how they were calculated, a copy of the Estimate of Costs, etc.
    - if the time for responding to the access request is being extended under subsection 15(1) of FIPPA, the basis for the extension
    - the exceptions to disclosure to be relied on, actions to be taken, reasons for each decision and recommendations for responding to the access

request [see the discussion later in this chapter under Line-by-Line Review]

- an unmarked copy of the relevant records, and a copy of the severed documents released to the applicant (A third copy of the records, to be used as a working copy, is also useful.)

Also see ombudsman practice note: Documentation about Processing Access Requests under The Freedom of Information and Protection of Privacy Act.

■ Initial Review of the Access Request

On the day it is received, or as soon after as possible, the access and privacy coordinator should review the access request to determine:

- whether the application is understandable and complete
- whether it has been sent to the appropriate public body
- whether the information is available to the public without an access request

1. The request is unclear, provides insufficient information, or is overly broad.

An access request "must provide enough detail to enable an experienced officer or employee of the public body to identify the record with a reasonable effort." [subsection 8(2)].

If the request is unclear, provides insufficient information, or is overly broad, the access and privacy coordinator should contact the applicant as quickly as possible to clarify their information needs. Vague or overly general applications are usually the result of a lack of understanding of the functions of the public body, its records or how to best state the request.

Under subsection 12.1(1) of FIPPA, the head of a public body may require an applicant to provide more information related to an access request, including information that is necessary to find a requested record.

Subsection 12.1(2) of FIPPA requires that the request for more information from the head of the public body to the applicant be made in writing.

When this kind of request is made, the time frame during which the head is required to respond under subsection 11(1) of FIPPA is suspended until the applicant provides the additional information [subsection 12.1(4)].

The applicant has up to 30 days from the date of the request to provide the additional information. If the additional information is not provided within that 30-day time frame, the head of the public body may determine that the applicant has abandoned the access request [subsection 12.1(3)]. When this determination is made, the head must notify the applicant in writing of the determination and of the applicant's right to make a complaint about the determination to the ombudsman under Part 5 of FIPPA [subsection 12.1(5)].

Samples of the request for additional information and the notice of an abandoned access request are included in the Model Response Letters and Forms, on the FIPPA website.

Note: Requesting more information in accordance with sec. 12.1 of FIPPA should primarily be done when the public body needs to clarify the applicant's request because the information initially provided by the applicant is not clear enough to enable an experienced officer or employee of the public body to find the requested record with reasonable effort. Coordinators may want to consider whether they can obtain the additional information informally instead of relying on Sec. 12.1.

Furthermore, when relying on Sec. 12.1, subsection 12.1(3) permits the head of a public body to determine that the request for access has been abandoned if the applicant does not provide the additional information within 30 days. The process for making that determination should include considering all relevant factors.

2. **The request should have been sent to another public body.**

When an access request has been sent to the wrong public body, the access and privacy coordinator should transfer the application as soon as possible,

and no later than 10 days after receiving it, to the appropriate public body [Sec. 16]. Sec. 16, and transferring access requests, is discussed later in this chapter, under Transferring an Access Request to Another Public Body.

3. **The information is available to the public without an access request.**

   If an applicant submits an access request for information that is available to the public free-of-charge or for purchase, Part 2 of FIPPA does not apply. [Sec. 6.1] Therefore, when an applicant submits a request for this type of information, the public body should notify the applicant right away and advise them of the process for obtaining the information. For example, if the applicant requests access to records governed by The Vital Statistics Act, such as a birth certificate, they will have to complete the appropriate form of the Vital Statistics Branch and submit the required fee. If the information is publicly available, for example, on the public body's website, the coordinator should contact the applicant and provide the link to the requested information. The coordinator should ensure that the applicant understands that their access request will not be processed under FIPPA and ensure the applicant understands what is required or who to contact for further information.

TRANSFERRING AN ACCESS REQUEST TO ANOTHER PUBLIC BODY - [SEC. 16]

> ***Transferring a request***
> ***16(1)*** *Within 10 days after a public body receives a request for access to a record, the head of the public body may transfer it to another public body if*
> *(a) the record was produced by or for the other public body;*
> *(b) the other public body was the first to obtain the record; or*
> *(c) the record is in the custody or under the control of the other public body.*
>
> ***Response within 45 days after transfer***
> ***16(2)*** *If a request is transferred under subsection (1),*
> *(a) the head of the public body who transferred the request shall notify the applicant of the transfer in writing as soon as possible; and*
> *(b) the head of the public body to which the request is transferred shall make every reasonable effort to respond to the request within 45 days after receiving it unless that time limit is extended under section 15.*

Subsection 16(1) of FIPPA states that the head of a public body may transfer a request for access to a record to another public body in three situations:

- if the record was produced by or for the other public body, or
- if the other public body was the first to obtain the record
- the record is in the custody or control of the other public body

The transfer must take place within 10 days after the public body received the access request.

Before an access request is transferred, the access and privacy coordinator must confirm that the second public body has custody or control of the requested record and that it agrees to the transfer.

Clause 16(2)(a) of FIPPA requires that, if an access request is transferred to another public body, the head of the public body that transfers the request must notify the applicant about the transfer in writing as soon as possible. A sample letter notifying an applicant that their access request has been transferred can be found in the Model Response Letters and Forms, on the FIPPA website.

Clause 16(2)(b) requires that the public body the access request is transferred to make every reasonable effort to respond to the request within 45 days after receiving it, unless the time limit is extended under Sec. 15.[12]

Examples: Manitoba Education receives a request for access to a student's records. Because the Winnipeg School Division has custody and control of the records, Manitoba Education may transfer the request to the school division.

Executive Council receives a request for access to a cabinet submission about a farm support program. Because the record was prepared by Manitoba Agriculture, the Executive Council may transfer the application to that department.

[12] Sec. 15 is discussed later in this chapter, under Time Limit for Responding to an Access Request.

TIME LIMIT FOR RESPONDING TO AN ACCESS REQUEST - [SECS. 11 AND 15]

■ Time Limit for Responding - [Sec. 11]

Subsection 11(1) requires a public body to make every reasonable effort to respond to a request for access in writing within 45 days after receiving it, unless:

- the time limit is extended under Sec. 15 of FIPPA
- the request has been transferred to another public body under Sec. 16 of FIPPA[13]

The time limit for responding to an individual's request for access to their own personal health information under PHIA varies, depending on the circumstances. But unlike FIPPA, the time limits cannot be extended. When dealing with a request for access to a record containing personal health information about the applicant, as well as other information, a public body must be aware of the difference in the time limits. Also, the only grounds for refusing an individual access to their own personal health information are those set out in subsections 11(1) and 11.1(1) of PHIA.

The 45-day time limit is based on calendar days, not working days. The 45 days start on the day after the date the access request is received by any officer or employee of the public body.[14] For this reason, it is essential that the access and privacy coordinator have a back-up person to take over FIPPA responsibilities when the coordinator is on leave.

If the 45-day period ends on a Sunday or other statutory holiday, the time for responding is extended to the next business day.[15] Subsection 23(1) of The

[13] Sec. 16, and transferring an access request, are dealt with earlier in this chapter, under Transferring an Access Request to Another Public Body.

[14] The Interpretation Act of Manitoba, subsection 22(2).

[15] The Interpretation Act of Manitoba, subsection 24(1).

Interpretation Act of Manitoba states that the following days are 'statutory' holidays:

- Sundays
- New Year's Day
- The third Monday in February, known as Louis Riel Day
- Good Friday
- Victoria Day
- July 1
- Labour Day
- Thanksgiving Day
- Remembrance Day
- Christmas Day
- The day after Christmas known as Boxing Day
- Any day declared a holiday by proclamation of the Governor-General of Canada or the Lieutenant-Governor of Manitoba

  Note:
  Saturday is not a holiday under The Interpretation Act.

Under subsection 23(2) of The Interpretation Act, when a holiday other than Sunday or Remembrance Day falls on a Sunday, the next day is a holiday, and when Christmas Day falls on a Sunday, Dec. 27th is a holiday.

When a time limit for responding falls on a day when an office is closed that is not a holiday, subsection 24(2) of The Interpretation Act of Manitoba should be considered.

If you have any questions about when the time limit for responding to an access request begins or ends, contact legal counsel.

If an access request is incomplete and more information is required from the applicant, the access and privacy coordinator should seek this information right away. The date the public body received the access request cannot be changed. But, if the public body chooses to seek more information, as permitted by sec. 12.1 of FIPPA, the response time frame will be suspended until the additional information is provided [subsection 12.1(4)]. (See the discussion earlier in this chapter under What to Do When an Access Request is Received – Initial Steps, Initial Review of the Access Request.).

Note: Public bodies should try to respond to requests as quickly as possible, and before the end of the 45-day time limit whenever possible. Sec. 9 of FIPPA requires that the head of a public body make every reasonable effort to respond to an applicant without delay.[16]

■ Extending the Time Limit for Responding - [Sec. 15]

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) [repealed] S.M. 2021, c. 43, s. 9;
(b) responding within the time period set out in section 11 is unreasonable because of
(i) the large number of records requested or that must be searched, or
(ii) the number of requests made by the applicant or by two or more applicants who are associated within the meaning of the regulations;
(c) time is needed to consult with a third party or another public body, or to obtain legal advice, before deciding whether or not to grant access to a record;
(d) a third party makes a complaint under subsection 59(2);

[16] Section 9 is discussed earlier in this chapter, under The Duty to Assist an Applicant.

(e) the applicant consents to the extension; or
(f) exceptional circumstances warrant the extension.

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.

Subsection 15(1) of FIPPA indicates that the head of a public body may extend the 45-day time period for responding to an access request for up to an additional 30 days, only if:

(i) the large number of records that are requested, must be searched, or the number of requests made by the applicant or by two or more applicants who are associated, make responding within the time period set out in Sec. 11 unreasonable [clause 15(1)(b)]

In accordance with Sec. 1.2 of the Access and Privacy Regulation, a public body may consider two or more applicants to be associated if the public body reasonably believes they have acted in concert in making one or more requests for access [Regulation, subsection 1.2(1)].

To assess whether two or more applicants are acting in concert, a public body must consider the common interests shared by the applicants in the requested information, by looking at the following:

- the identity of the applicants and any known relationship between them
- any employment shared by the applicants
- any interests shared by the applicants, including memberships in or affiliations with the same or similar organizations or entities [Regulation, subsection 1.2(2)].

Public bodies are not authorized to take an extension simply because an applicant or two or more associated applicants have submitted a large number of requests. A public body must be able to demonstrate that the number of requests and the work in processing the requests would place an unreasonable burden on them to respond within 45 days. An unreasonable burden may be demonstrated by illustrating how the public body must divert a significant amount of resources to respond to the requests within 45 days. This would be to the detriment of other applicants or the public body's core services. A public body is still required under sec. 9 to respond to an applicant without delay.

Note: A request that involves a large number of records that cannot reasonably be handled by the public body, even with an extension to the response time limit, may be considered as excessively broad and/or a request that would unreasonably interfere with the public body's operations. If that is the case, the head of the public body may choose to disregard the request under subsection 13(1).

However, before deciding to disregard a request under subsection 13(1), or taking an extension under subclause 15(1)(b)(i), the public body may wish to contact the applicant to get more information about the intended scope of the requested records [subsection 12.1(1)]. The public body may also wish to explain the challenge with fulfilling their access request and/or discuss their information needs, to determine if other ways of meeting them are possible. Doing so is consistent with the public body's duty to assist the applicant [section 9 of FIPPA], which requires every reasonable effort to be made to assist the applicant. See the discussion later in the chapter, under Limited Authority to Disregard Certain Requests [Section 13].

(ii) time is needed to consult with a third party or another public body, or to obtain legal advice, before deciding whether to grant access to a record [clause 15(1)(c)]

If the public body has, despite reasonable efforts, been unable to complete the necessary consultations within the initial 45-day time limit, clause 15(1)(c) may apply to give the public body more time to do so. Note that clause 15(1)(c) applies to consultations with other public bodies, third parties or legal

counsel. It does not apply to consultations among the officers and staff of the public body itself, other than legal counsel. Other public bodies that are consulted about an access request should respond as quickly as possible.

(iii) a third party makes a complaint under subsection 59(2) [clause 15(1)d)]

A third party who has been given notice by the head of a public body under Sec. 34 of FIPPA about the head's decision to give access to a record containing information affecting the third party's privacy interests (under sec. 17 or its business interests under Sec. 18) may complain to the ombudsman about the decision to give access.[17]

(iv) the applicant consents to the extension [clause 15(1)(e)]

When another clause under subsection 15(1) authorizing an extension does not apply, the applicant can be contacted to discuss why the public body requires more time to respond to their access request. Ideally, the extension of time can be discussed with the applicant, but there should be a written record of the applicant's consent. The best practice is to create a written consent that clearly states the new due date. This consent can take the form of a document that the applicant signs and returns, or an email to which the applicant can respond to indicate their agreement.

(v) exceptional circumstances warrant the extension [clause 15(1)(f)]

At times, there are circumstances that present extraordinary challenges for a public body to respond to an access request within the initial 45-day time limit. These exceptional circumstances pose a problem for employees of a public body to search for or access the records necessary to process a request. Examples of exceptional circumstances include:

- a fire or flood in a building
- a public health crisis

[17] Third party notice and intervention, and sections 33 and 34, are discussed later in this chapter, under Third Party Notice and Intervention. Complaints are discussed in chapter 8 of this manual.

- strike action or another workforce disruption

The length of an extension due to an exceptional circumstance can be difficult to determine. Ideally, the extension should only be for time in which it is unreasonable to process the request, but the right to access must still be supported as much as possible during these times.

Note: During the COVID-19 pandemic, Canada's information and privacy regulators issued a joint statement calling on federal, provincial and territorial institutions to uphold the right to access to information during an emergency by ensuring business continuity plans include measures for processing requests for access.

The Manitoba ombudsman's office also included a note on its website during the pandemic about longer extensions under FIPPA. The note explained that public bodies should make an effort to comply with FIPPA as is reasonably possible. However, because of the effect of the pandemic on operations and staff levels, the office recognized that many public bodies may have been unable to meet the response time limit under FIPPA. The office also recognized that this would have an impact on applicants' rights to timely responses to their access requests. Requests to the ombudsman's office for longer extensions were encouraged and, because of the evolving situation, they worked with public bodies on a reasonable approach for determining a longer response time frame, based on an assessment of the current circumstances.

Under subsection 15(1), the head of a public body may extend the time period for responding to an access request for up to an additional 30 days, or for a longer period if the ombudsman agrees. A time extension must take place within the initial 45-day response period.

If a public body requires an extension of longer than 30 days, it should follow the procedures in the ombudsman practice note: Making a Submission to the Ombudsman for an Extension Longer than 30 Days.

If the time for responding is extended under subsection 15(1), the head of the public body must send a written notice to the applicant setting out:

- the reason for the extension of time, which must be at least one of the five reasons set out in subsection 15(1)

- when a response to the access request can be expected

- that the applicant may complain to the ombudsman about the extension of time [subsection 15(2)][18]

A sample letter notifying an applicant about an extension of the period for responding to an access request can be found in the Model Response Letters and Notices, on the FIPPA website.

Also see the following ombudsman practice notes:

- Extending the Time Limit for Responding under The Freedom of Information and Protection of Privacy Act (FIPPA)

- Responding to a Complaint about an Extension of the Time Limit for Responding under The Freedom of Information and Protection of Privacy Act (FIPPA)

■ Time for Responding Suspended If Fee Estimate Given - [Subsection 82(4)]

If a public body gives a written estimate of fees to an applicant under subsection 82(2) of FIPPA, the time frame within which the public body is required to respond to the access request under subsection 11(1) is suspended until the applicant notifies the public body that they wish to proceed with the access request [subsection 82(4)].

If the applicant does not notify the public body that they wish to proceed within 30 days from the date the fee estimate is given, the public body may consider the access request abandoned [subsection 82(3)]. If an access request is considered abandoned, the applicant must be provided with written notice [subsection 82(7)].

[18] Complaints under FIPPA are discussed in chapter 8 of this manual.

Further information about fee estimates is discussed later in this chapter, under Fees, Fee Estimates and Fee Waivers.

■ Time for Responding Suspended If Additional Information Is Sought - [Subsection 12.1(4)]

If a public body gives a written request to an applicant to provide additional information under subsection 12.1(2) of FIPPA, the time within which the public body is required to respond to the access request under subsection 11(1) is suspended until the applicant provides the public body with the additional information necessary to proceed with the request [subsection 12.1(4)].

If the applicant does not provide the public body with the additional information within 30 days from the date the request for additional information is given, the public body may consider the access request abandoned [subsection 12.1(3)]. If an access request is considered abandoned, the applicant must be provided with written notice of the determination and of the applicant's right to make a complaint about the determination to the ombudsman under Part 5 of FIPPA [subsection 12.1(5)].

Note that when Sec. 12.1 is used to request additional information and the applicant provides a response to that request, the public body should not rely on subsection 12.1(3), to consider the request abandoned, solely because the response states that no further information is available, or where the public body is otherwise not satisfied with the response. In those circumstances, the public body must consider whether, in the circumstances, they are able to respond to the request, under subsection 11(1), or disregard the request under sec. 13.[19]

Further information about Requests for Additional Information [Sec. 12.1] is discussed earlier in the chapter, under What to Do When an Access Request is Received – Initial Steps, Initial Review of the Access Request.

[19] Sec. 13 is discussed later in this chapter, under Limited Authority to Disregard Certain Requests [Sec. 13].

■ Failure to Respond in Time is a Deemed Refusal of Access - [Subsection 11(2)]

If the head of a public body does not respond to an access request within the 45-day time limit, or within any extended time limit, this is considered a refusal of access under FIPPA [subsection 11(2)].

The applicant may complain to the ombudsman about both the delay in responding to the request for access and the deemed refusal of access [subsection 59(1)].[20]

[20] Complaints are discussed in chapter 8 of this manual.

LIMITED AUTHORITY TO DISREGARD CERTAIN REQUESTS - [SEC. 13]

Public body may disregard certain requests
13(1) *The head of a public body may disregard a request for access if the head is of the opinion that*
(a) the request is trivial, frivolous or vexatious;
(b) the request is for information already provided to the applicant;
(c) the request amounts to an abuse of the right to make a request because it is
(i) unduly repetitive or systematic,
(ii) excessively broad or incomprehensible, or
(iii) otherwise not made in good faith; or
(d) responding to the request would unreasonably interfere with the operations of the public body.

Considerations
13(1.1) *In making a determination under clause (1)(c) or (d), the head of a public body may take into account*
(a) the number of requests made by the same applicant; or
(b) whether the request is reasonably related to requests that have been made by two or more applicants who are associated within the meaning of the regulations.

Notice
13(2) *In the circumstances mentioned in subsection (1), the head shall state in the response given under section 11*
(a) that the request is refused and the reason why;
(b) the reasons for the head's decision; and
(c) that the applicant may make a complaint to the Ombudsman about the refusal.

In the exceptional situations described in subsection 13(1) of FIPPA, the head of a public body may disregard (in other words, refuse to deal with) an access request made under Part 2 of FIPPA. In making a determination under subsection 13(1), the head must be mindful of the principles of FIPPA and all relevant circumstances.

Under subsection 13(2), the public body's response to the access request must be given to the applicant in writing and must state:

- that the public body is refusing the access request, and the reason why; the reason must be one or more of the reasons set out in subsection 13(1) of FIPPA
- the reasons for the head's decision; that is, an explanation of why subsection 13(1) applies
- that the applicant may make a complaint to the ombudsman under Part 5 of FIPPA about the decision to refuse the request

As noted above, when considering subsection 13(1), the head of a public body must be mindful of the principles of FIPPA and all relevant circumstances. The ability to disregard an access request for any of the reasons in subsection 13(1) must be exercised sparingly, and on strong grounds.

It is strongly recommended that legal counsel be consulted if a public body is considering relying on subsection 13(1).

1. The request is trivial, frivolous or vexatious [clause 13(1)(a)]

Trivial means trifling; inconsiderable; of small worth or importance.[21] But, information that may be trivial from one person's perspective may be of importance from another's.[22]

The *Concise Oxford Dictionary* (8th edition) defines frivolous as "lacking seriousness; given to trifling, silly". Frivolous requests include ones that are trivial or without merit. Frivolous can also mean an access request that is made "for a purpose other than a genuine desire to access information".[23]

Vexatious means without reasonable or probable cause or excuse.[24] Vexatious access requests are often made for a malicious purpose or as a means of

[21] Black's Law Dictionary, 6th edition, sub verbo "trivial".
[22] See, for example, Request to Disregard F2020-RTD-02 from Calgary Police Service.
[23] See, for example, *Glenmore-Ellison Improvement District (Re)*, 2201 (oipc.bc.ca).
[24] Black's Law Dictionary, 6th edition, sub verbo "vexatious".

accomplishing something other than gaining access to the information.[25] For example, an access request may be vexatious if the primary purpose is not to gain access to information, but to harass a public body, pressure the public body into changing a decision or taking action or to criticize the public body's actions.[26]

Whether an access request can be refused because it is trivial, frivolous or vexatious depends on the facts.

- In interpreting the terms trivial, frivolous and vexatious, their statutory context is critical. Considering the underlying principles of access to information legislation – to enhance public body accountability – a public body cannot interpret these terms as applying simply because the public body finds an access request troublesome or annoying.

- Rather, a trivial, frivolous or vexatious request is one that, taking into account all the relevant circumstances, involves an abuse of the right to access included in the legislation.[27] The concept of abuse of the right to access is discussed below, under Requests that amount to an abuse of the right to make a request.

The fact that an access request might result in disclosing information that the public body would rather not disclose would not be grounds for relying on subsection 13(1).[28]

2. Information already provided to the applicant [clause 13(1)(b)]

A public body may disregard an access request if it is for the same information that has already been provided to the applicant in response to a previous access request.

3. Requests that amount to an abuse of the right to make a request [clause 13(1)(c)]

[25] See, for example, *Glenmore-Ellison Improvement District (Re)*, 2201 (oipc.bc.ca).
[26] See, for example, *Glenmore-Ellison Improvement District (Re)*, 2201 (oipc.bc.ca).
[27] See, for example, *Glenmore-Ellison Improvement District (Re)*, 2201 (oipc.bc.ca).
[28] See, for example, *Glenmore-Ellison Improvement District (Re)*, 2201 (oipc.bc.ca).

Generally, "abuse" means misuse or improper use;[29] to make "excessive or improper use" of something.[30]

In looking at the concept of abuse of the right to access, the following comments may be helpful:

> ..... *Access to information legislation confers on individuals such as the respondent a significant statutory right, i.e., the right of access to information (including one's own personal 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, including as regards to their own personal information. Such abuse also harms the public interest, since it unnecessarily adds to public bodies' costs of complying with the act.*[31]

In short, clause 13(1)(c) is intended to be applied sparingly to those rare and terrible circumstances where the right to access in FIPPA is being misused.

Note that when deciding about clause 13(1)(c), subsection 13(1.1) permits the head of a public body to take into account the number of requests the same applicant has made, or when related requests have been made by two or more applicants who are associated. Considerations for whether two or more applicants are associated can be found in Sec. 1.2 of the Access and Privacy Regulation.

A public body may consider two or more applicants to be associated if the public body reasonably believes they have acted in concert (together) in making one or more requests for access. [Access and Privacy Regulation, subsection 1.2(1)]

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[29] See *Town of Ponoka (Re),* https://oipc.ab.ca/wp-content/uploads/2022/04/F2015-RTD-01.pdf.

[30] Black's Law Dictionary, 6th edition, sub verbo 'abuse'.

[31] *Law Society of British Columbia (Re)*, https://www.oipc.bc.ca/orders/2230.

To assess whether two or more applicants are acting together, a public body must consider the common interests shared by the applicants in the requested information. It can do this by considering the following:

- the identity of the applicants and any known relationship between them
- any common employment shared by the applicants
- any common interests shared by the applicants, including memberships in or affiliations with the same or similar organizations or entities. [Regulation, subsection 1.2(2)]

Clause 13(1)(c) has three subclauses:

- Subclause (i) – unduly repetitive or systematic

  A request is repetitive when an access request for the same records or information is submitted more than once.[32]

  A request is systematic when it includes a pattern of conduct that is regular or deliberate.[33]

  To disregard an access request under subclause 13(1)(c)(i), it must be unduly repetitive or systemic. Undue means "more than necessary; not proper; illegal".[34]

- Subclause (ii) – excessively broad or incomprehensible

  Excess means "greater than what is usual or proper. A general term for what goes beyond just measure or amount."[35] A request may be excessively broad when the wording is too vague or general or the request is without any

[32] See, for example, *Association of Professional Engineers and Geoscientists of Alberta (Re)*, https://oipc.ab.ca/wp-content/uploads/2022/04/P2021-RTD-01.pdf.
[33] See, for example, *Association of Professional Engineers and Geoscientists of Alberta (Re)*, https://oipc.ab.ca/wp-content/uploads/2022/04/P2021-RTD-01.pdf.
[34] Black's Law Dictionary, 6th edition, sub verbo 'undue'.
[35] Black's Law Dictionary, 6th edition, sub verbo 'excess'.

parameters such as time periods, making the search for relevant records overly difficult, if not impossible.[36]

A request is incomprehensible if it cannot be understood or is unintelligible, making it impossible to process.[37]

Before relying on Sec. 13 to disregard a request for access that is excessively broad or incomprehensible, a public body should consider its duty to assist the applicant as required by sec. 9.

- Subclause (iii) – not made in good faith

  A request that is considered not to be made in good faith can also be considered one that is made in bad faith. Bad faith "is not simply bad judgement or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity".[38]

  Bad faith means "involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfil some duty or other contractual obligations, not prompted by an honest mistake as to one's rights, but by some interested or sinister motive."[39]

4. Responding to the request would unreasonably interfere with the operations of the public body [clause 13(1)(d)]

Unreasonable interference with the public body's operations might be demonstrated by showing the impact that a particular access request would have on the body's resources needed to respond.

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[36] See Information and Privacy Commissioner of Newfoundland and Labrador, *Applying to the Commissioner for Approval to Disregard an Access to Information Request*.

[37] The Compact Edition of the Oxford English Dictionary, sub verbo 'incomprehensible'.

[38] Black's Law Dictionary, 6th edition, sub verbo 'bad faith'.

[39] Black's Law Dictionary, 6th edition, sub verbo 'bad faith'.

Factors that may be considered in determining whether there is an unreasonable interference of resources are having to divert resources away from core duties to fulfil the request and the actual cost of providing a response.[40]

Another example of when an access request may unreasonably interfere with a public body's operations is when giving access to the record(s) is not feasible, because of the information that would need to be redacted, in accordance with subsection 7(2). Another example would be that the relevant record(s) cannot be produced or created under sec. 10.

Note that when making a determination about clause 13(1)(d), subsection 13(1.1) permits the head of a public body to take into account the number of requests the same applicant has made, or when related requests have been made by two or more associated applicants. Consideration for whether two or more applicants are associated can be found in Sec. 1.2 of the Access and Privacy Regulation.

A public body may consider two or more applicants to be associated if the public body reasonably believes they have acted in concert (together) in making one or more requests for access. [Access and Privacy Regulation, subsection 1.2(1)]

To assess whether two or more applicants are acting together, a public body must consider the common interests shared by the applicants in the requested information. The public body must also consider the following:

- the identity of the applicants and any known relationship between them
- any common employment shared by the applicants
- any other common interests shared by the applicants, including memberships in or affiliations with the same or similar organizations or entities [Access and Privacy Regulation, subsection 1.2(2)]

[40] See Information and Privacy Commissioner of Newfoundland and Labrador, Applying to the Commissioner for Approval to Disregard an Access to Information Request.

Note: As noted above, it is strongly recommended that legal counsel be consulted if a public body is considering disregarding a request for access on the basis of subsection 13(1).

Remember, the applicant has the right to make a complaint to the ombudsman about this decision.

PROCESSING AN ACCESS REQUEST

See earlier in this chapter, under What to Do When an Access Request is Received – Initial Steps that should be taken when an access request is first received.

■ Verifying Identity - [Access and Privacy Regulation, Subsection 3(3)]

If the public body considers that verification of an applicant or third party's identity is necessary to respond to a request for access under Part 2 of FIPPA, the public body may at any time require the applicant to provide suitable identification.

■ Searching for Records that Respond to the Access Request

A public body must make "every reasonable effort" to respond "without delay, openly, accurately and completely" to an access request [FIPPA Sec. 9]. This includes reasonable efforts to identify and locate records that respond to (are relevant to) the access request.

A search for relevant records must:

- take into account all records that are relevant to the access request, including all electronic and hard copy records, that are in the custody or under the control of the public body
- include all locations where such records might be found

Remember that the term record is defined broadly in subsection 1(1) of FIPPA to mean a "record of information in any form."

To respond to access requests in an efficient and timely manner, the public body must be able to locate and retrieve records that are relevant to the request quickly. With an effective records management system and trained records officers, this is usually a straightforward task. Losing time searching for records

may make it very difficult to respond to the applicant within the 45-day time period. The ombudsman is not likely to consider a time extension as reasonable if the public body has taken an excessively long time to find the records because of poor recordkeeping.

If the public body is a department or a government agency subject to The Archives and Recordkeeping Act, the hard copies of the requested records should be in one of three locations:

- in the offices of the department or government agency, either in a central filing system or in a staff member's office
- in the Manitoba Government Records Centre
- at the Archives of Manitoba, if the record has been designated as archival through the records scheduling process under The Archives and Recordkeeping Act

By examining current file documentation and records transfer box lists, staff will be able to determine the location, or likely location, of the requested records. Staff should follow established procedures for retrieving and/or viewing the records set by the Government Records Office and/or the Archives of Manitoba.

For more information about records retrieval and access:

- See the General Manual of Administration
- For records in semi-active storage: see Government Records Procedure GRO 3: Retrieving Records or call the Manitoba Government Records Centre at 204-945-6673.
- For records in archival storage, call the Archives of Manitoba at 204-945-3971.

The requested records also may have been destroyed in accordance with a records management policy, such as a records schedule under The Archives and

Recordkeeping Act. In these circumstances, the response to the applicant will indicate that the record no longer exists [subclause 12(1)(c)(i)].[41]

In terms of electronic records, they may be found in any shared drives, accounts or devices used by employees of a public body. It is best practice for employees of public bodies to use equipment and devices issued by their employing office. In many instances, for security and accountability purposes, this is governed by law and/or policy. If an employee of a public body has used their own personal equipment, devices or accounts for public body business, the records created are considered records in the custody or under the control of the public body. This means they are subject to FIPPA.

Employees of public bodies should check with their records managers or officers about the proper management of their records. For public bodies that are departments or government agencies, that are subject to The Archives and Recordkeeping Act, the Government Records Office, Archives of Manitoba can be contacted for further information. (Email GRO@gov.mb.ca, phone 204-945-3971.)

Note: Public bodies must not dispose of (destroy) any records relating to an access request after it has been received, even if the records are scheduled for destruction under an approved policy or, for departments and some government agencies, records schedule under The Archives and Recordkeeping Act.

It is an offence under clause 85(1)(d) of FIPPA to willfully destroy, erase, conceal, alter or falsify a record that is subject to FIPPA, with the intent to evade a request for access to records.

At least two copies of relevant records are necessary for the access request processing file:

- a clean copy

[41] Subsection 12(1) and the required content of responses to an applicant are discussed later in this chapter, under Response to an Applicant.

- one to identify information on that is excluded from FIPPA [Sec. 4] or that is excepted from access under Secs. 17 to 32 of FIPPA.

More copies may be necessary, depending on whether the processing of an access request uses electronic tools (e.g.: electronic redaction software) or manual tools.

When there is a large volume of relevant records, a public body may find it more efficient to prepare an indexed list of them that includes other helpful notes, such as whether access will be granted, granted in part or refused, and the exceptions to disclosure that apply. [For further discussion on this and an example, see later in this chapter, under Documenting the Line-by-Line Review.]

■ Preliminary Assessment

After the records have been located, this preliminary assessment of the records needs to be completed before proceeding further:

- Does it appear that all relevant records have been located and do they appear to respond to the access request?

- Do the records fall under FIPPA, or are they excluded from FIPPA by Sec. 4, subsection 6(1) or Sec. 6.1 of FIPPA, or by another act or regulation that prevails over FIPPA? See chapter 2, under Records that Do Not Fall under FIPPA. If you have any questions about whether records fall under FIPPA, contact legal counsel.

- Can any of the records be released immediately, in whole or in part, without line-by-line review?

- Is consultation needed with other program areas in the public body?

- Is consultation needed with other public bodies or with other levels of government (e.g. the federal government)?

- Do the records contain third party personal information or third party business information that may require consultation with the third party or third party

notification under Sec. 33 of FIPPA? [See Third Party Notice and Intervention later in this chapter.]

- Will the time required to respond to the access request likely exceed the 45-day time limit? Are there grounds in subsection 15(1) of FIPPA to extend the time limit? [See Time Limit for Responding to an Access Request earlier in this chapter.]

- Will search and preparation time likely exceed two hours, in which case an Estimate of Costs must be prepared? [See Fees, Fee Estimates and Fee Waivers later in this chapter.]

■ Line-by-Line Review of the Records - [Subsection 7(2)]

Once the preliminary assessment has been completed, the various administrative matters have been sorted out and any necessary consultations are underway, the information in the requested records will need to be reviewed line-by-line.

A line-by-line review of the information in each record is necessary to determine whether it contains:

(i) information that is not relevant to the access request – sometimes referred to as "non-responsive" information

(ii) information that falls within an exception to disclosure in Secs. 17 to 32 of FIPPA.

1. Non-responsive information

A line-by-line review of the information in records to which access has been requested under Part 2 of FIPPA is necessary to identify any non-responsive information in the records.

Responsive information means any information that is reasonably related to the applicant's access request. A liberal interpretation of a request should be adopted, and any ambiguity should be resolved in the requester's favour.

Information that does not reasonably relate to the applicant's request for access, interpreted liberally, is not responsive to the request and may be removed from the information provided to the applicant.[42]

Non-responsive information in a record to which access has been requested under Part 2 of FIPPA should be identified as such, and should be removed from the records provided to the applicant.

Example: An applicant has requested the minutes of a meeting that deals with their licensing appeal. The minutes also discuss appeals brought by other individuals and include personal information about them (e.g., names).

Only the information in the minutes about the applicant's appeal relates to their access request. The information about other appeals is non-responsive to the access request – the applicant has not asked for it, and it is not relevant to their request. The non-responsive information should be identified as non-responsive or not relevant to the access request and should not be provided to the applicant.

If you have any questions about whether information should be removed from a record because it is non-responsive to (not relevant to) an access request, contact legal counsel.

2. Exceptions to disclosure in Secs. 17 to 32 of FIPPA[43]

A line-by-line review of the records is necessary to comply with the requirement to sever in subsection 7(2) of FIPPA.

> ***Severing information***
> ***7(2)*** *The right of access to a record does not extend to information that is excepted from disclosure under Division 3*

[42] See, for example, *Workplace Safety and Insurance Board (Re)*, https://decisions.ipc.on.ca/ipc-cipvp/orders/en/item/514865/index.do.

[43] The exceptions to disclosure in Secs. 17 to 32 of FIPPA are discussed in chapter 5 of this manual.

> *or 4 of this Part, but if that information can reasonably be severed from the record, an applicant has a right of access to the remainder of the record.*

That is, an applicant has a right to access the remainder of a record after any information excepted from disclosure under Secs. 17 to 32 has been severed (removed or redacted) from the record.[44]

A careful review of the information contained in a record is required to determine whether or not an exception to disclosure applies, and whether or not information can be severed out and provided to the applicant as required by subsection 7(2) of FIPPA. Very few of the exceptions to disclosure in Secs. 17 to 32 of FIPPA apply to a category or type of record. (An example of an exception to disclosure that applies to a category of records is clause 19(1)(a), respecting an agenda, minute or other record of the deliberations of Cabinet.) Generally, it is not possible to determine whether an exception to disclosure applies merely on the basis of the title, type, classification or format of a record. That is, a line-by-line review of the information in the record is required to identify information that falls within an exception to disclosure.

More than one exception to disclosure may apply to information in a record. The reviewer should note all relevant exceptions to disclosure.

With input from the program area, the reviewer should be able to form an assessment of the applicable exceptions to disclosure and should be able to identify the factors to be considered when exercising discretion under a discretionary exception to disclosure. During a line-by-line review, the reviewer can also identify additional requirements for consultations – for example, with third parties, other public bodies or legal counsel.

■ Documenting the Line-by-Line Review

The reviewer should document:

[44] The duty to sever records is discussed later in this section, under Severing the Record.

- the applicable exceptions to disclosure to be relied on
  the reasons why they apply
-
- whether any information is non-responsive to the request
- the actions to be taken
- reasons for each decision
- recommendations to the head for responding to the access request

On a working copy of the record, the reviewer should identify the information in the record that may fall within an exception to disclosure in Secs. 17 to 32. The reviewer should be specific by recording the section, subsection and clause of the applicable exception to disclosure. More than one exception to disclosure may apply to information in a record. The reviewer should note all relevant exceptions to disclosure.

The reviewer is expected to document:

- specific records or parts of records that are excluded from the scope of FIPPA, and why
- any records or parts of records that are not responsive (not relevant) to the access request and why
- specific records or parts of records to which mandatory or discretionary exceptions to disclosure apply, with reasons; for discretionary exceptions to disclosure, factors that should be considered in exercising the discretion should be included
- other considerations that may be relevant in deciding how to respond to the request

Thorough documentation – especially at the line-by-line review stage – will be very important:

- for discussions with legal counsel

- in the final decision-making stages
- in explaining decisions to the ombudsman if a complaint is made
- in preparing evidence for a review, if the ombudsman refers a complaint to the information and privacy adjudicator
- in preparing affidavit evidence for court if an appeal of a refusal of access happens
- if the ombudsman does an audit of the public body's access to information practices

SEVERING A RECORD - [SUBSECTION 7(2)]

> ***Severing information***
> ***7(2)*** *The right of access to a record does not extend to information that is excepted from disclosure under Division 3 or 4 of this Part, but if that information can reasonably be severed from the record, an applicant has a right of access to the remainder of the record.*

Divisions 3 and 4 of Part 2 of FIPPA (Secs. 17 to 32) contain the mandatory and discretionary exceptions to disclosure. The exceptions to disclosure are discussed in chapter 5.

Many records contain both information that can be disclosed to an applicant and information that may or must be withheld under the exceptions to disclosure in Secs. 17 to 32. If part of the information in a requested record falls within an exception to disclosure, but other information in the record does not, the head is required to give the applicant access to as much of the record as can reasonably be provided, without releasing or revealing the information that is excepted from disclosure. This information is severed (that is, blacked out, removed or redacted) from the record, and the rest of the information is provided to the applicant [subsection 7(2)].

The objective in severing is to remove from the record only the information that falls within an exception to disclosure. This requires a line-by-line review of the information in the record.

There are several methods of severing a record, and some of those methods depend on whether your public body uses manual or electronic tools to process access requests.

- Severing a record manually can involve using removable white-out tape, white-out liquid eraser or a black marker to cover the information that is excepted from disclosure. This is done on a photocopy of the record, and then the severed record is recopied before it is released to the applicant.

- Severing a record electronically can be done by using a redaction software.

Whatever method of severing is selected, it is important to ensure that none of the excepted information is visible on the applicant's copy of the record.

Note: Severing must not be done on the original record, because the original must not be altered or defaced. Therefore, severing should be done on a copy.

A public body that refuses access to a record or part of a record must tell the applicant the reasons for the refusal and the specific provisions of FIPPA the refusal is based on [subclause 12(1)(c)(ii)].

- The numbers of the sections, subsections and clauses of the applicable exception or exceptions to disclosure should usually be noted on the record in the space left after the severing or in the margin closest to the severed information – as long as there is no danger of revealing the substance of the severed information.

- In some cases – for example, involving law enforcement information or personal information about a third party – placing the section number in the space left after severing may itself reveal or imply information that is excepted from disclosure. In these circumstances, a public body may omit the section numbers on the severed pages and list the relevant exceptions to disclosure in the response letter to the applicant.

- In rare circumstances, severing may not be possible (for example because the record is fragile, or for technical reasons). In this case, the public body may want to consider discussing with the applicant how their information needs might be otherwise addressed (this would be in keeping with the duty to assist the applicant in Sec. 9 of FIPPA).

- When one or more entire pages have been removed, the number of pages severed, along with the number of the section, subsection and clause of the applicable exception or exceptions to disclosure, should be indicated.

- A copy of this severed version of the record should then be made for the applicant to examine or subject to any applicable copying fee, for the applicant to take away. If a copy of the record is requested by and provided to the applicant, a copy of the version provided should be kept on file.

Generally, the smallest unit of information to be disclosed after severing is a sentence. But even where only a sentence remains, some information, such as a name, might be removed and the remainder released.

The requirement to sever a record is a requirement to release all information in a record that can reasonably be disclosed. If, after severing information excepted from disclosure, the remaining information is meaningless, disclosure of the remaining information would not be appropriate. Information is not reasonably severable if it produces nothing more than "disconnected snippets of releasable information."[45] From time to time, releasable information may be so intertwined with excepted information that it is impossible to carry out the severing process and retain any intelligible information. But this is likely rare.

Also see ombudsman practice note: Severing Information in Records under The Freedom of Information and Protection of Privacy Act (FIPPA) and The Personal Health Information Act (PHIA).

[45] *Information Commissioner of Canada* v. *Solicitor General of Canada,* [1988] 3 F. C. 551 (Federal Court, Trial Division) at p. 559. This case, and the comments about severing, were noted by the Manitoba Court of Queen's Bench in *Kattenburg* v. *Manitoba (Minister of Industry, Trade & Tourism)* (1999), 143 Man. R. (2d) 42.

RESPONSE TO AN APPLICANT - [SUBSECTION 12(1)]

> ***Contents of response***
> ***12(1)*** *In a response under section 11, the head of the public body shall inform the applicant*
> *(a) whether access to the record or part of the record is granted or refused;*
> *(b) if access to the record or part of the record is granted, where, when and how access will be given; and*
> *(c) if access to the record or part of the record is refused,*
> *(i) in the case of a record that does not exist or cannot be located, that the record does not exist or cannot be located,*
> *(ii) in the case of a record that exists and can be located, the reasons for the refusal and the specific provision of this Act on which the refusal is based,*
> *(iii) of the title and contact information of an officer or employee of the public body who can answer the applicant's questions about the refusal, and*
> *(iv) that the applicant may make a complaint to the Ombudsman about the refusal.*

The response to an applicant must contain all applicable information required by subsection 12(1) of FIPPA. The response must be provided by the head of the public body.

1. Response when access is provided

Access is provided if:

- the record falls within the scope of FIPPA[46]
- none of the information in the record falls within a mandatory exception to disclosure

[46] Records that fall within the scope of FIPPA are discussed in chapter 2, under Records that Fall under FIPPA.

- none of the information in the record falls within a discretionary exception to disclosure, or the head has decided to exercise their discretion to release the record even though a discretionary exception applies

The response to the applicant must inform the applicant:

(i) that access to the record is granted [clause 12(1)(a)]

(ii) where, when and how access will be given [clause 12(1)(b)][47]

2. Response when access is denied to all or part of a record

Access is denied to all or part of a record if:

- the record falls outside the scope of FIPPA[48]

- some or all of the information in the record falls within a mandatory exception to disclosure

- some or all of the information in the record falls within a discretionary exception to disclosure, and the head after considering all relevant circumstances, has decided to refuse access

The response to the applicant must inform the applicant:

(i) if access is granted to part of the record, where, when and how access to that part will be given [clause 12(1)(b)]

(ii) that access to the record, or part of the record, is refused [clause 12(1)(a)]

(iii) the reasons for the refusal of access and the specific provision of FIPPA that the refusal is based on [subclause 12(1)(c)(ii)]

That is, the public body must:

[47] How access is given is discussed later in this chapter, under Giving Access.
[48] Records that fall outside the scope of FIPPA are discussed in chapter 2, under Records that Do Not Fall under FIPPA.

- provide the number of the section, subsection and clause of the exception to disclosure in FIPPA that is being relied on

- explain the reasons for the refusal – why the exception to disclosure relied on applies to the withheld information

(iv) of the title and contact information of an officer or employee of the public body who can answer the applicant's questions about the refusal [subclause 12(1)c)(iii)]

(v) that the applicant may make a complaint to the ombudsman about the refusal [subclause 12(1)(c)(iv)]. In keeping with the requirement to assist an applicant under Sec. 9 of FIPPA, the response should indicate that complaints must be filed within 60 days after the applicant is notified of the decision to refuse access [subsection 60(2)]

Effective January 1, 2022, there is no longer a prescribed complaint form in the Access and Privacy Regulation. However, the ombudsman's office has a form that applicants should complete.[49] Therefore, contact information for the ombudsman's office, with a link to the complaint form, can also be provided to the applicant.

3. Response when the record does not exist or cannot be located

A requested record may:

- never have existed

- have been destroyed under an authorized retention policy, which is called a records schedule for departments and government agencies that are subject to The Archives and Recordkeeping Act

- be lost

The written response must inform the applicant:

[49] How to Complain - Manitoba Ombudsman

(i) that access is refused as the record does not exist or cannot be located [subclause12(1)(c)(i)]

The response letter should explain briefly the steps taken to locate the record or, in the case of a record destroyed under an authorized retention policy or schedule, the disposal date and, when applicable, the records schedule number.

(ii) of the title and contact information of an officer or employee of the public body who can answer the applicant's questions about the refusal [subclause 12(1)(c)(iii)]

(iii) that the applicant may make a complaint to the ombudsman about the refusal [subclause 12(1)(c)(iv)]

In keeping with the requirement to assist an applicant under Sec. 9, the response should indicate that complaints must be filed within 60 days after the applicant is notified of the decision to refuse access [subsection 60(2)].

Effective January 1, 2022, there is no longer a prescribed complaint form in the Access and Privacy Regulation. However, the ombudsman's office has a form that applicants should complete.[50] Therefore, contact information for the ombudsman's office, with a link to the complaint form, can also be provided to the applicant.

See Response Letters and Notices section of the FIPPA website for sample response letters to applicants.

Also see ombudsman practice notes:

- Checklist: Contents of a Complete Response under The Freedom of Information and Protection of Privacy Act (FIPPA)
- Providing Reasons to an Applicant when Refusing Access under The Freedom of Information and Protection of Privacy Act (FIPPA)

[50] How to Complain - Manitoba Ombudsman

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD - [SUBSECTION 12(2)]

> ***Refusal to confirm or deny existence of record***
> ***12(2)*** *Despite clause (1)(c), the head of a public body may, in a response, refuse to confirm or deny the existence of*
> *(a) a record containing information described in section 24 or 25; or*
> *(b) a record containing personal information about a third party if disclosing the existence of the record would be an unreasonable invasion of the third party's privacy.*

In certain circumstances, the mere knowledge that a record exists will cause harm.

Under subsection 12(2) of FIPPA, where the head of the public body decides to refuse access, in the response provided to the applicant, the head may also refuse to confirm or deny the existence of a record:

- containing information described in Sec. 24 (Disclosure harmful to individual or public safety) [clause 12(2)(a)]

- containing information described in Sec. 25 (Disclosure harmful to law enforcement or legal proceedings) [clause 12(2)(a)]

- containing personal information about a third party, if disclosing the existence of the record would be an unreasonable invasion of the third party's privacy [clause 12(2)(b)]

1. A record containing information described in Sec. 24 or 25

To rely on subsection 12(2)(a), the head of a public body must first determine that, if records existed, they could be withheld under Sec. 24 or 25. The head of the public body must then exercise discretion to determine whether, in the circumstances, there should be a refusal to confirm or deny the existence of the records. Alternatively, the head would determine that there should be a refusal of access, on the basis that the records do not exist or that they can be withheld under specific provisions of Sec. 24 or 25.

Discretion is to be exercised in good faith, having regard to all relevant considerations in each individual case, and is to be guided by the purpose of the legislation. As such, in relying on subsection 12(2)(a), the head of the public body must weigh the public interest in accountability and increased understanding of government decision making, against the public interest in protecting law enforcement or legal proceedings from harm or injury.[51]

Before refusing to confirm or deny the existence of a record under clause 12(2)(a), the public body must be satisfied that disclosing the fact that the records exist (or do not exist), on its own, would be sufficient to cause the harm that the public body is seeking to avoid.

Example: An applicant requests access to records held by Manitoba Justice concerning a suspected police investigation into their activities. It is determined that the information in the records falls under the exception to disclosure in clause 25(1)(a) – harm to a law enforcement matter – as investigations are still proceeding and disclosure could reasonably be expected to harm these investigations. A response simply stating that access to these records is refused under clause 25(1)(a) would confirm the existence of the police investigation. This could harm the investigation because the applicant, knowing they are under surveillance, would change their behaviour.

Clause 12(2)(a) permits a response that the existence of such records is neither confirmed nor denied and that records of this nature would be excepted from disclosure under clause 25(1)(a) of FIPPA.

2. A record containing personal information about a third party, if disclosing the existence of the record would be an unreasonable invasion of the third party's privacy

To rely on clause 12(2)(b), the public body must first establish that disclosure of the existence (or non-existence) of a record would in itself convey personal

[51] Report of the Manitoba Ombudsman, Case 2015-0019 (Manitoba Justice), dated May 8, 2015.

information about a third party. It must then establish that the information conveyed would itself be an unreasonable invasion of the third party's privacy.[52]

Because of the complexity of relying on this provision, a public body that is considering relying on subsection 12(2) should consult with legal counsel about how to word the response to the applicant.

[52] See, for example, *British Columbia Coroners Service (Re)*, https://www.oipc.bc.ca/orders/1736.

GIVING ACCESS - [SECS. 14 AND 10]

■ Manner of Giving Access - [Subsection 14(1)]

> ***How access will be given***
> ***14(1)*** *Subject to subsection 7(2), the right of access is met under this Part,*
>
> *(a) if the applicant has asked for a copy and the record can reasonably be reproduced, by giving the applicant a copy of the record; or*
>
> *(b) if the applicant has asked to examine a record or has asked for a copy of a record that cannot reasonably be reproduced, by permitting the applicant to examine the record or a part of it or by giving him or her access in accordance with the regulations.*

An applicant may ask to examine a record or to receive a copy of it. The manner in which access is given under FIPPA is subject to subsection 7(2), which states that the right to access does not extend to information that is excepted from disclosure by FIPPA. This may affect how access is given.

Currently, there are no regulations under FIPPA that deal with how access to records is given.

1. Where the applicant has asked to examine a record

The applicant has the right to examine a record, unless information in the record falls within an exception to disclosure and the record must be severed to avoid disclosing the excepted information [subsection 14(1)(b)]. The right to access does not extend to information that is excepted from disclosure under FIPPA [subsection 7(2)]. If a record must be severed, the applicant is entitled to examine a copy of the severed record, or to receive a copy of it, subject to paying any copying fees, but is not entitled to examine the original record.

If the applicant will be permitted to examine the record, the head must, in the response to the applicant, inform the applicant where and when the record can be viewed [clause 12(1)(b)]. The head should provide the applicant with

the name of an employee, usually the access and privacy coordinator, to contact to make specific arrangements to examine the requested records.

Note: If the records are at the Archives of Manitoba, the public body must authorize the Government Records Office to make the records available to the applicant. Public bodies must contact the Government Records Office to inquire what is needed for the applicant to access the records.

2. Where the applicant has asked for a copy of a record

If the record can reasonably be reproduced, a copy of the record must be provided to the applicant [clause 14(1)(a)]. The applicant will be required to pay the applicable copying fee, unless the head of the public body waives all or part of the fee. [See Fees, Fee Estimates and Fee Waivers, later in this chapter]. A copy of the record, as provided to the applicant, should be made for the access request file.

Examples of records that cannot reasonably be reproduced include fragile or very large records.

3. A note about access to records protected by copyright

When responding to a request for access to a record that contains material protected by the Copyright Act (Canada) – and especially where copyright is held by a third party – the public body should consider:

- whether subsection 6(2) or subsection 32(1) of FIPPA applies – that is, whether the information is, or will be, available for purchase by the public

- whether any of the mandatory exceptions to disclosure in Sec. 18 of FIPPA, that protect certain third party business interests, apply to the information

- whether it is reasonable in the circumstances to provide the applicant with a copy of the record, or whether access should be provided in some other way (for example, by allowing the applicant to examine the record or to examine a severed copy, where it contains information excepted from disclosure)

It is strongly recommended that public bodies consult with legal counsel if a copyright interest is involved.

Remember: Sec. 32.1 of the Copyright Act (Canada) provides that when a public body discloses a record in response to an access request under Part 2 of FIPPA, the public body does not infringe copyright.

But, if an applicant is given access to a record containing material protected by the Copyright Act (Canada), the applicant is bound by the restrictions in the *act* when using or distributing the record. The Copyright Act restricts activities such as copying and distributing copies of copyright protected materials.[53]

■ Providing Additional Information to Explain a Record - [Subsection 14(2)]

Explanation
14(2) *The head of a public body who gives access to a record may give the applicant any additional information that the head believes may be necessary to explain it.*

The head of a public body who gives access to a record may give the applicant any additional information that the head believes may be necessary to explain the record [subsection 14(2)]. This is not a requirement in FIPPA, but providing an explanation may be in keeping with the duty to assist applicants and to respond "openly, accurately and completely" in Sec. 9 of FIPPA.[54]

[53] Also see chapter 2, under Relationship of FIPPA to other Legislation - Acts that Prevail over FIPPA.

[54] Subsection 7(2) of PHIA requires a trustee, including a public body, to "provide an explanation of any term, code or abbreviation used" when providing an individual with access to their personal health information under that Act.

The time spent preparing or giving the applicant an explanation of a record is not an activity for which the applicant can be charged a fee [Regulation, clause 4(3)(e)].

■ Access to Electronic Records - [Subsection 10(1)]

> ***Access to records in electronic form***
> ***10(1)*** *If information requested is in an electronic form in the custody or under the control of a public body, the head of the public body shall produce a record for the applicant if*
> *(a) it can be produced using the normal computer hardware and software and technical expertise of the public body; and*
> *(b) producing it would not interfere unreasonably with the operations of the public body.*

The definition of record in subsection 1(1) and the provisions of subsection 10(1) of FIPPA that records in electronic form are subject to FIPPA.

If information requested by an applicant is in electronic form, the public body must produce a record of the information if the requirements in both clauses 10(1)(a) and 10(1)(b) apply. That is, a record of the electronic information must be produced if:

(a) it can be produced using the normal computer hardware and software and technical expertise of the public body

(b) producing it would not interfere unreasonably with the operations of the public body.

Under clause 10(1)(b), the interference with operations must be unreasonable. At the same time, the intent of the provision is not to put the computers of a public body purely at the service of an applicant who could make considerable demands on them.

A fee can be charged for internal or external computer programming and data processing costs [Regulation, Sec. 6].

Note: Care must be taken with electronic information to ensure that the most current and reliable version is produced for the applicant.

If relevant records or information within records is in electronic form, and producing a record of the electronic information is not possible, when considering clauses 10(1)(a) and 10(1)(b), the request itself may be considered excessively broad and/or one that would unreasonably interfere with the public body's operations. If that is the case, the head of a public body may choose to disregard the request under subsection 13(1). [See the discussion earlier in the chapter, under Limited Authority to Disregard Certain Requests [Sec. 13].]

However, before deciding to disregard a request under subsection 13(1), the public body should contact the applicant to explain the challenge with fulfilling their access request and discuss their informational needs to determine if alternative ways of meeting them are possible. Doing so would be considered the public body's duty to assist the applicant in compliance with Sec. 9 of FIPPA. This section requires every reasonable effort to be made to assist the applicant.

■ Creating a Record in the Form Requested - [Subsection 10(2)]

> ***Creating a record in the form requested***
> ***10(2)*** *If a record exists but is not in the form requested by the applicant, the head of the public body may create a record in the form requested if the head is of the opinion that it would be simpler or less costly for the public body to do so.*

Subsection 10(2) is a discretionary provision. If a record exists, but it is not in the form requested by the applicant, the head of the public body may, but is not required to, create a record in the form requested by the applicant. But only if the head believes that to create the record in the form requested would be simpler or less costly.

Note: FIPPA does not require a public body to create a record that does not exist in response to an access request. The right of access is to a record that is in the custody or under the control of a public body [Sec. 4 and subsection 7(1)].

Example: A public body maintains a database of vendors that contract with them. An applicant requests a list of the names of vendors contracting with the public body over a specified period of time. The public body does not normally produce such a list for its own use, but the database has reporting capabilities that could be used to run such a report.

Little or no special programming is needed and little staff time would be required, and the information does not fall within an exception to disclosure. It would be simpler for the public body to create this report in the form requested by the applicant, than to review and sever the individual vendor files to remove information not responsive (relevant) to the request.

A fee can be charged for internal or external computer programming and data processing costs [Regulation, Sec. 6].

FEES, FEE ESTIMATES AND FEE WAIVERS - [SEC. 82; REGULATION, SECS. 4 TO 9]

■ Fees - [Subsections 82(1) and 82(6)]

> ***Fees***
> *82(1) The head of a public body may require an applicant to pay to the public body the fees provided for in the regulations.*
>
> ***Fee not to exceed actual cost***
> *82(6) The fees referred to in subsection (1) must not exceed the actual costs of the services.*

Under subsection 82(1), the head of a public body may require an applicant to pay some of the costs incurred by the public body in responding to the application.

The Access and Privacy Regulation provides for four types of fees:

- search and preparation fees [Regulation, Sec. 4]
- computer programming and data processing fees [Regulation, Sec. 6]
- copying fees [Regulation, Sec. 5]
- delivery fees [Regulation, clause 7(c)]

The fees must not exceed the actual costs of the service [subsection 82(6)].

At present, no fee is charged for making an application for access under FIPPA.

1. Search and Preparation Fees - [Regulation, Sec. 4]

Subsections 4(1) and 4(2) of the Access and Privacy Regulation provide for a fee of $15 for each half-hour of search and preparation time, after two free hours.

A fee may be charged for the time spent carrying out the following search and preparation functions:

Search

- reviewing current file documentation and other file lists, indexes, systems, etc. to locate records that are responsive (relevant) to the access request

- gathering the records or retrieving them from storage (e.g. from the Manitoba Government Records Centre) or arranging to view the records at the Archives of Manitoba

- examining files to locate responsive (relevant) records

Preparation

- copying the original records to create a working copy or copies

- severing the records by blacking out the information excepted from disclosure [Regulation, subsection 4(3)]

- noting on the severed records the specific exceptions to disclosure that are being relied on

Subsection 4(3) of the Access and Privacy Regulation states that time spent performing the following functions is not search and preparation and this time cannot be charged to an applicant:

- transferring an access request to another public body under Sec. 16 of FIPPA

- preparing an estimate of fees

- reviewing any responsive (relevant) record to determine whether any of the exceptions to disclosure apply, before any severing of the record

- copying a record supplied to the applicant

- preparing an explanation of a record under subsection 14(2) of FIPPA

Time spent consulting in the public body, with other public bodies, with third parties and with legal counsel are not search or preparation under the Access and Privacy Regulation and cannot be charged to the applicant.

2. Computer programming and data processing fees

Sec. 6 of the Access and Privacy Regulation sets out the fees that can be charged where a public body needs to use computer programming or incurs data processing costs in responding to a request for access:

- $10 for each fifteen minutes of internal computer programming or data processing
- the actual cost of computer programming or data processing incurred by the public body when this work is done by an external body, including another public body

3. Copying fees - [Regulation, Sec. 5]

Subsection 5(1) of the Access and Privacy Regulation provides that the following copying fees are payable where an applicant is given a copy of a record:

- 20 cents for each page for paper copies made by a photocopier or computer printer
- 50 cents for each page for paper copies made from a micro printer
- the actual costs for any other method of providing copies – for example, photography

Subsection 5(2) of the Regulation provides that an applicant requesting copies of their own personal information is not required to pay a copying charge if the total copying fee is less than $10. For example, if the applicant receives photocopies of their own personal information, the applicant is entitled to 50 pages at no cost. If the copying fee is more than $10, the total amount is chargeable.

4. **Delivery fees - [Regulation, clause 7(c)]**

   Clause 7(c) of the Access and Privacy Regulation states that an applicant may be charged the actual costs of special courier delivery.

   No fees can be charged for regular mailing costs.

5. **Matters for which no fees can be charged - [Regulation, Sec. 7]**

   No fees can be charged for:

   - submitting an access request
   - using any file list, file plan or similar record used by a public body to identify, locate or describe records; the applicant may be charged a copying fee of 20 cents for each page, if they want a copy of the file list, file plan or similar record
   - regular mailing costs

■ Fee Estimates - [Subsections 82(2), (3), (4) and (7); Regulation, Sec. 8]

> ***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.*
>
> ***Acceptance of estimate within 30 days***
> ***82(3)*** *The applicant has up to 30 days from the day the estimate is given to indicate if it is accepted or to modify the request in order to change the amount of the fees, after which the application is considered abandoned.*
>
> ***Effect of estimate on time limits***
> ***82(4)*** *When an estimate is given to an applicant under this*

> *section, the time within which the head is required to respond under subsection 11(1) is suspended until the applicant notifies the head that the applicant wishes to proceed with the application.*
>
> ***Notice***
> ***82(7)*** *The head of a public body must give the applicant written notice if their application is considered abandoned under subsection (3).*

A public body must give an applicant an *Estimate of Costs* in Form 2 of Schedule A to the Access and Privacy Regulation when it reasonably considers that, in responding to the access request,

(a) search and preparation is likely to take longer than 2 hours; or

(b) computer programming or data processing fees will be incurred [subsection 82(2) and Regulation, subsection 8(1)].

When estimating time and fees, the public body:

- must ensure that only activities that a fee can be charged for are included
- must determine, on a case-by-case basis, the best approach to estimating how much time will be needed to respond; estimating time on the basis of a sample of the **records** requested is a good practice
- must carefully document how the time and estimated fees were calculated

A fee estimate is binding for the public body [Regulation, subsection 8(3)]. If the public body has under-estimated the costs, it cannot charge the applicant for the difference. But, if the public body over-estimates the costs, it must refund the difference to the applicant [Regulation, subsection 8(3)].

Also, a fee estimate can be the subject of a complaint to the ombudsman [subsection 59(1)].

It is good practice to send a cover letter to the applicant with the Estimate of Costs, explaining how the costs were determined. A sample cover letter is included in the Response Letters and Forms section on the FIPPA website.

The applicant has up to 30 days from the date the estimate is given to advise the public body if the estimate is accepted or to modify the request to reduce the fee [subsection 82(3)].

If, after receiving the Estimate of Costs, the applicant still wishes to proceed with the original access request, they must sign and return a copy of the *Estimate of Costs* form along with payment of the estimated fees [Regulation, subsection 8(2)].

When an Estimate of Costs is given to an applicant, the time within which the head is required to respond to the access request under subsection 11(1) of FIPPA is suspended until the applicant notifies the head that they wish to proceed with the request [subsection 82(4)].

If the applicant does not notify the public body that they wish to proceed with or modify the request within 30 days from the date the *Estimate of Costs* is given, the public body may consider the request abandoned [subsection 82(3)]. When the request has been considered as abandoned, the head must notify the applicant in writing [subsection 87(7)]. A sample letter of an access request that has been considered abandoned is included in the Response Letters and Form section on the FIPPA website.

Remember: The fee estimate in the Estimate of Costs is binding for the public body. No additional search and preparation or computer programming and data processing costs may be charged [Regulation, subsection 8(3)].

Also see ombudsman practice notes:

- Preparing Fee Estimates under The Freedom of Information and Protection of Privacy Act (FIPPA)
- Responding to a Complaint about a Fee Estimate under The Freedom of Information and Protection of Privacy Act (FIPPA)

■ Refunds - [Subsection 82(6); Regulation, Subsections 8(3) and 8(4)]

The estimate of fees that the public body provides in its Estimate of Costs is binding for the public body [Regulation, subsection 8(3)]. Also, fees charged must not exceed the actual costs of the service [subsection 82(6)].

Subsections 8(3) and 8(4) of the Access and Privacy Regulation require the public body to pay a refund to an applicant in the following situations:

- if the actual cost of search and preparation, computer programming or data processing is less than the amount estimated by the public body in the Estimate of Costs, the difference must be refunded to the applicant [Regulation, subsection 8(3)]

- if access to every record requested by an applicant is refused, the amount of estimated fees paid by the applicant must be refunded by the public body [Regulation, subsection 8(4)]

■ Fee Waivers - [Subsection 82(5); Regulation, Sec. 9]

> ***Waiver of fees***
> ***82(5)*** *The head of a public body may waive the payment of all or part of a fee in accordance with the regulations.*
>
> ***Waiver of fees***
> ***9(1)*** *At the applicant's request, the head of a public body may waive all or part of the fees payable under this regulation if the head is satisfied that*
> *(a) payment would impose an unreasonable financial hardship on the applicant;*
> *(b) the request for access relates to the applicant's own personal information and waiving the fees would be reasonable and fair in the circumstances; or*
> *(c) the record relates to a matter of public interest concerning public health or safety or the environment.*

> ***9(2)*** *Either when access is granted or before it is granted, the head of the public body must inform the applicant in writing as to the head's decision about waiving the fees.*

Subsection 82(5) of FIPPA gives the head of a public body the discretion to waive the payment of all or part of a fee in accordance with the Access and Privacy Regulation. The grounds on which the head may waive all or part of a fee are set out in subsection 9(1) of the Access and Privacy Regulation.

The head of the public body must inform the applicant in writing of the head's decision about the request for a waiver of fees, either when access is granted or before it is granted [Access and Privacy Regulation, subsection 9(2)].

The applicant must request a waiver of fees. This request may be made when the applicant receives the Estimate of Costs from the public body. The applicant must provide the public body with reasons why the fees should be waived.

Before all or part of the fees can be waived, the head of the public body must be satisfied that the grounds in one of clauses 9(1)(a), (b) or (c) of the Access and Privacy Regulation have been met. Even if the head is satisfied that the required grounds have been established, the head still has the discretion to decide whether or not to grant a fee waiver in the circumstances. The applicant may complain about the head's decision to the ombudsman [subsection 59(1)].

The head of the public body may waive all or part of the fees payable. For example, the head may decide to reduce the fee or to not charge for certain services (e.g. for search and preparation).

When making a decision about a fee waiver request, the head of the public body must make the decision on a case-by-case basis. The head will not have properly exercised their discretion if a fee waiver request is denied on the grounds of a standing policy, rather than on consideration of the merits of the individual case.[55]

[55] See *Alberta Solicitor General and Public Security (Re),* https://oipc.ab.ca/wp-content/uploads/2022/01/Order-F2006-01.pdf.

Subsection 9(3) of the Access and Privacy Regulation states that, for the purposes of a fee waiver, the head of a public body that is a government department is the deputy minister of the department or a person holding an equivalent office.

1. **Unreasonable financial hardship [Access and Privacy Regulation, clause 9(1)(a)]**

   Clause 9(1)(a) of the Access and Privacy Regulation will usually be relevant where an applicant has limited financial resources. The onus is on the applicant to provide the head of the public body with satisfactory evidence of financial hardship, including documentation about their financial circumstances.[56]

   The discretion to waive all or part of the fees payable because payment would impose an unreasonable financial hardship on the applicant does not give an applicant an unlimited right of access to government records at no cost. When considering a request for a fee waiver because of financial hardship, the head of a public body may consider a range of factors, including the scope of the access request; the amount of the estimated fees; whether the applicant is open to either narrowing the request or considering other ways to reduce the fees payable; whether the applicant is prepared to pay a portion of the fee; etc.[57]

3. **The request relates to one's own personal information and waiving the fees would be reasonable and fair in the circumstances - [Access and Privacy Regulation, clause 9(1)(b)]**

   Clause 9(1)(b) of the Access and Privacy Regulation only applies when the access request relates to the applicant's own personal information.
   It gives the head of a public body the discretion to waive all or part of a fee if the head believes that it is reasonable and fair to do so in all the circumstances.

   The head of the public body should consider the applicant's explanation as to why a waiver would be reasonable and fair, including any supporting

[56] See Alberta Information and Privacy Commissioner Order 96-002: ORDER (oipc.ab.ca) and see Solicitor General and Public Security (Re), https://oipc.ab.ca/wp-content/uploads/2022/01/Order-F2005-22.pdf.

[57] See Service Alberta's FOIP Bulletin No. 2: Fee Waivers (servicealberta.ca).

documentation, and all other relevant circumstances in making their decision.[58]

3. Matter of public interest concerning public health or safety or the environment [Access and Privacy Regulation, clause 9(1)(c)]

For the head of a public body to consider waiving fees under clause 9(1)(c), the applicant must be seeking access to a record that "relates to a matter of public interest" in one of three areas: public health, public safety or the environment.

Public health refers to the well-being of the general public, or of a significant part of the public.

Public safety refers to the safety of the general public, or of a significant part of the public.

Environment refers to "the physical surroundings, conditions, circumstances, etc. in which a person lives; the area surrounding a place; external conditions as affecting plant and animal life; the totality of the physical conditions on the earth or a part of it, especially as affected by human activity."[59]

The onus is on the applicant to provide the head of the public body with satisfactory evidence that the requested record relates to a matter of public interest concerning public health, safety or the environment. The applicant should provide the public body with their plan for distributing the information and a description of the nature of the public interest concerned.

In assessing whether a requested record relates to a matter of public interest in one of these areas, the head should consider the following, among other things:

- whether there is a general interest in the matter

[58] Also see Alberta Information and Privacy Commissioner Order F2007-016.
[59] The Concise Oxford Dictionary, 9th ed., sub verso 'environment'.

- whether the applicant plans to publicly disseminate the information after they are given access

- whether a broad range of people will benefit from its release

A person who has requested access to a record under Part 2 of FIPPA may make a complaint to the ombudsman about a decision not to grant a fee waiver, or a decision to grant only a partial fee waiver [subsection 59(1)].

Also see ombudsman practice note: Dealing with Fee Waivers under The Freedom of Information and Protection of Privacy Act (FIPPA).

THIRD PARTY NOTICE AND INTERVENTION - [SECS. 33 AND 34]

■ The Purpose of the Third Party Notice and Intervention Provisions

Public bodies hold large quantities of information about individuals, corporations, groups and non-profit organizations that, if disclosed to others, might result in harm to these third parties.

The third party notice and intervention provisions in Secs. 33 and 34 of FIPPA are intended to protect the interests of third parties who would be affected by disclosure of a record to an applicant for access under Part 2 of FIPPA, because the third party is the subject of the record or has provided the record.

A third party is defined in subsection 1(1) of FIPPA to mean a person, group of persons or an organization other than the applicant or a public body. The word person means a natural person (an individual) and includes "a corporation and the heirs, executors, administrators or other legal representatives of a person."[60]

Secs. 33 and 34 set out a number of requirements for the public body, including who must be notified and when, and how and when decisions are made when a public body engages in Third Party Intervention. To ensure this process is necessary and implemented correctly within the legislated timelines, it is strongly recommended that legal counsel be consulted if a public body is considering providing a third party notice under subsection 33(1).

■ Notice to Third Party - [Subsection 33(1)]

> ***Notice to third party***
> ***33(1)*** *When the head of a public body is considering giving access to a record the disclosure of which might*
> *(a) result in an unreasonable invasion of a third party's privacy under section 17; or*

[60] The Interpretation Act of Manitoba, Sec. 17 and the Schedule of Definitions. The term 'third party' is also discussed in Chapter 2, under *Key Definitions*.

> *(b) affect a third party's interests described in subsection 18(1) or (2);*
> *the head shall, where practicable and as soon as practicable, give written notice to the third party in accordance with subsection (3).*

When an applicant has requested access to a record containing information about the third party that might be withheld under Sec. 17 (disclosure harmful to a third party's privacy) or Sec. 18 (disclosure harmful to a third party's business interests), and the head of the public body is considering giving access to the record, the head is required to give written notice to the third party "where practicable and as soon as practicable." If more than one third party may be affected by the disclosure of information in the record, the head of the public body must give notice to each affected third party.

Where practicable means that the third party must be given notice except where, after reasonable attempts to locate and notify the third party, it is not possible to do so.

If the head intends to refuse to give the applicant access to the information about the third party, the head is not required to give notice to the third party under Sec. 33. Also, the head is not required to give notice to a third party who has consented to or requested the disclosure [subsection 33(2)].

Note: When a public body gives notice to a third party under subsection 33(1), the public body is required to respond to the access request within the time limits set out in Sec. 11. Responding to the request within the initial 45 days may be difficult as the public body must allow up to 20 days for the third party to make representations and the head must make an access decision within 30 days of giving notice. Public bodies who provide notice to third parties under subsection 33(1) may need to take an authorized extension under subsection 15(1) to respond to the request for access on time.

For more information on the effect third party intervention has on a request, see Decision by the Head - [Sec. 34] later in this chapter.

Note: The formal notice and intervention process in Secs. 33 and 34 does not prevent informal consultations with third parties who may be affected by the disclosure of a record to an applicant.

Indeed, such consultations are advisable when a public body is trying to determine whether the exceptions to disclosure in Secs. 17 or 18, that protect the interests of third parties, apply.

When and How Notice must be Given

The public body must give notice to a third party under Sec. 33 "as soon as practicable" within the original 45-day period for responding to the request for access under subsection 11(1), or within the extended time period for responding under subsection 15(1).[61] As soon as practicable means that the notice must be given as promptly as possible.

The manner in which notice is to be given is addressed in Sec. 78 of FIPPA, which is discussed in chapter 2, under Giving Notice Under FIPPA.

Content of Notice to Third Party and Applicant - [Subsection 33(3)]

1. Content of the notice to the third party

The content of the notice to a third party is governed by subsection 33(3) of FIPPA.

The notice must:

(a) state that a request has been made for access to a record containing information that, if disclosed, might invade the privacy or affect the interests of the third party

(b) include a copy of the record or part of it containing the information in question or describe the contents of the record

[61] The time period for responding to an access request, and extension of this time period, are discussed earlier in this chapter, under Time Period for Responding to an Access Request.

(c) state that, within 20 days after the notice is given, the third party may, in writing:

(i) consent to the disclosure; or

(ii) make representations to the head of the public body explaining why the information should not be disclosed.

The notice should provide sufficient information, including an explanation of the grounds on which records can be withheld under FIPPA, to enable the third party to make an informed decision.

Note: The identity of the applicant should not be included in the notice to the third party.

2. Content of the notice to the applicant

When notice is given to a third party under Sec. 33, subsection 33(4) requires that the head of the public body also give the applicant a written notice, stating that:

- the record the applicant requested may contain information that, if disclosed, might invade a third party's privacy or affect their interests
- the third party is being given an opportunity to make representations about the disclosure
- a decision about access will be made within 30 days after the day the notice is given to the third party, under subsection 33(1), unless the time limit for responding to the access request is extended under Sec. 15 of FIPPA

Note: The identity of the third party should not be included in the notice to the applicant.

■ Representations by Third Party - [Clause 33(3)(c) and Subsection 33(5)]

The third party has 20 days after the notice is given to consent to disclosure to the applicant or to make representations to the head of the public body explaining why, based on the provisions of FIPPA, the information should not be disclosed.

Representations must be in writing unless the head permits them to be made orally.

■ Decision by the Head - [Sec. 34]

The head of the public body has 30 days after the third party notice is given to reach a decision on whether to give the applicant access to the record. But, the head's decision cannot be made before the earlier of:

(a) 21 days after the notice was given; and
(b) the day a response is received from the third party [subsection 34(1)]

The head may extend the time for making a decision for up to an additional 30 days on the grounds set out in subsection 15(1), or for a longer period if the ombudsman agrees. [See Time Limit for Responding to an Access Request, earlier in this chapter.]

For example, if third party notice is given fifteen days after receiving the access request, and considering the third party consultation and head's decision-making processes must be completed within 30 days, the initial 45-day response time limit may be difficult, if not impossible, to meet.

In making a decision about access, the head of the public body must consider any representations made by the third party in response to the notice [subsection 34(1.1)].

If the third party does not provide any representations, the head of the public body must make an access decision based on the existing information.

The head must give written notice of their decision about access, with reasons, to both the third party and the applicant [subsection 34(2)].

Decision to Give Access

If the head decides to give access to the record or part of the record and the third party consents to the disclosure, providing the applicant with the record or parts of the records should be arranged without delay [subsection 34(3.1)]. The notice to the applicant under subsection 34(2) must include the access decision and where, when and how access will be given.

If, however, after considering the representations of the third party explaining why the record or part of the record should not be disclosed, the head decides to give access to the record or part of the record to the applicant:

- The head's notice of decision to the third party must state that the third party can make a complaint to the ombudsman, under Part 5, within 21 days after the notice is given [clause 34(3)(a)].

- The head's notice of decision to the applicant must state that the applicant will be given access to the record upon completion of the 21-day period after notice is given, unless the third party makes a complaint to the ombudsman, under Part 5, and gives the public body notice of the complaint being made [clause 34(4)(b)].

The third party has 21 days from the date on which the head's notice of decision is given to make a complaint to the ombudsman under Part 5.

If the third party does not make a complaint to the ombudsman within this 21-day period, the applicant will be given access to the record.

In accordance with subclause (b)(ii) under subsection 34(4), the third party must notify the public body if they are making a complaint to the ombudsman under Part 5. However, in case the third party does not notify the public body about its complaint, the public body should contact the ombudsman's office to ensure a complaint has not been made before giving the applicant access to the record, or any part of the record.
If the third party complains to the ombudsman within the 21-day time period, the time limit for the head of the public body to respond to the access request will need to be extended under clause 15(1)(d) of FIPPA.

The applicant must not be given access to any record that is the subject of a complaint until the complaint is dealt with by the ombudsman, and any review by the information and privacy adjudicator or appeal to court is completed.[62]

■ Decision to Refuse Access

If the head decides not to give access to the record, or part of the record, the head's notice of decision to the third party and the applicant must state that the applicant may make a complaint to the ombudsman within 60 days after the notice is given [subsection 34(5)].

The applicant has 60 days from the date on which the notice of the head's decision is given to make a complaint to the ombudsman.[63]

[62] Complaints to the ombudsman, and reviews by the information and privacy adjudicator and appeals to court are discussed in chapter 8 of this manual.

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