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## OVERVIEW

This Chapter outlines how a **public body** is to handle and respond to a request for access to **records** made by an **applicant** under Part 2 of FIPPA – Access to Information.

This Chapter covers:

- the right of access to **records**;
- the duty to assist an access **applicant**;
- the duty to protect **personal information** about an access **applicant**;
- making an access request;
- what to do when an access request is received;
- transferring an access request to another **public body**;
- the time limit for responding to an access request, and extending the time limit;
- the limited authority of a **public body** to disregard certain access requests;
- the steps in processing an access request;
- the response to an access applicant;
- refusal to confirm or deny the existence of a **record**;
- the manner in which access is given;
- fees, fee estimates and fee waivers;
- **third party** notices and intervention.

The exceptions to disclosure – that is, the reasons for refusing to give an **applicant** access to a **record** in sections 17 to 32 of FIPPA – are discussed in Chapter 5 of this Manual.

## THE RIGHT OF ACCESS - [SECTION 7, SECTIONS 4 AND 6]

### 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 fees required by the regulations.

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

- (a) 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;
- (b) to allow individuals a right of access to **records** containing **personal information** about themselves in the custody or under the control of **public bodies**, subject to the limited and specific exceptions set out in FIPPA.<sup>1</sup>

Specifically, subsection 7(1) of FIPPA states that any person has a right of access to a **record**, or part of a **record**, in the custody or under the control of a **public body**, including a **record** containing **personal information** about the person requesting access (the **applicant**).<sup>2</sup>

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<sup>1</sup> The principles of access to information legislation, and the purposes of FIPPA, are discussed in Chapter 1 of this Manual.

<sup>2</sup> 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*.

## ACCESS TO RECORDS

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This right of access does not extend to:

- the limited types of **records** excluded from FIPPA by clauses 4(a) to 4(k);<sup>3</sup>
- information that is available to the public free of charge or for purchase [subsection 6(2)]<sup>4</sup>;
- **records** or information specifically excluded from the access to information provisions of FIPPA by another Act or regulation;<sup>5</sup> or
- information in a **record** that falls within an exception to disclosure in sections 17 to 32 of FIPPA [subsection 7(2)].<sup>6</sup>

The right of access includes an **applicant's** right of access to a **record** containing **personal information**, other than **personal health information**, about himself or herself [subsection 7(1)].

An individual seeking access to a **record** containing *his or her own* **personal health information** must request access under *The Personal Health Information Act*, not under Part 2 of FIPPA [subsection 6(1)].<sup>7</sup>

An individual's right of access under Part 2 of FIPPA can be exercised by another person authorized to act on his or her behalf, under specific circumstances.<sup>8</sup>

The right of access is subject to the payment of fees as required by the *Access and Privacy Regulation*.<sup>9</sup>

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<sup>3</sup> Section 4 is discussed in Chapter 2, under *Records That Do Not Fall Under FIPPA*.

<sup>4</sup> Subsection 6(2) is discussed in Chapter 2, under *Records That Do Not Fall Under FIPPA*.

<sup>5</sup> Subsection 5(2) and the statutes and regulations that prevail over FIPPA are discussed in Chapter 2, under *Records Excluded by Other Legislation* and under *Relationship to FIPPA - Acts that prevail over FIPPA*.

<sup>6</sup> The exceptions to disclosure in Divisions 3 and 4 of FIPPA are discussed in Chapter 5 of this Manual.

<sup>7</sup> Part 2 of *The Personal Health Information Act* sets out an individual's right of access to his or her own **personal health information** in the custody or under the control of trustees, including **public bodies**. *The Personal Health Information Act*, C.C.S.M. c. P33.5, can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/p033-5e.php>.

<sup>8</sup> Section 79, and who can exercise rights on behalf of another under FIPPA, is discussed in Chapter 3, under *Exercising Rights on Behalf of Another*.

<sup>9</sup> Fees are discussed later in this Chapter, under *Fees, Fee Estimates and Fee Waivers*.

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"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".<sup>10</sup> That is, the right of access under FIPPA is not restricted by residency or citizenship, and applies to corporations, businesses and other organizations, as well as to individuals.

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<sup>10</sup> *The Interpretation Act* of Manitoba, section 17 and the Schedule of Definitions. *The Interpretation Act*, C.C.S.M. c. 180, can be found at:  
<http://web2.gov.mb.ca/laws/statutes/ccsm/i080e.php>.

## THE DUTY TO ASSIST AN ACCESS APPLICANT - [SECTION 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.

FIPPA requires **public bodies** to make "every reasonable effort":

- to assist an applicant for access; and
- to respond to the access request quickly, openly, accurately, and fully.<sup>11</sup>

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** in order to better understand the **applicant's** wishes or needs, and to ensure that he or she 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*.<sup>12</sup>

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<sup>11</sup> Trustees of personal health information, including public bodies, have a similar duty to assist individuals requesting access to their own personal health information under subsection 6(2) of *The Personal Health Information Act*. *The Personal Health Information Act*, C.C.S.M. c. P33.5, can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/p033-5e.php>.

<sup>12</sup> This Practice Note can be found on the Ombudsman's website at: [http://www.ombudsman.mb.ca/documents\\_and\\_files/practice-notes.html](http://www.ombudsman.mb.ca/documents_and_files/practice-notes.html)

# THE DUTY TO PROTECT THE PRIVACY OF AN ACCESS APPLICANT - [SECTIONS 41 AND 42]

Section 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 "making reasonable security arrangements against such risks as unauthorized access, use, disclosure or destruction".

Section 42 requires that a **public body**:

- limit use and disclosure of **personal information** to the minimum amount of information necessary to accomplish the purpose for which it is used or disclosed; and
- 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 for which the information was collected or received, or for a purpose authorized under section 43 of FIPPA.<sup>13</sup>

These duties apply to any **personal information** about an individual who is making an access request under Part 2 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, and other **personal information** provided by an individual making an access request is **personal information** that the **public body** must protect and deal with 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 access **applicant** must only be shared with those who need to know it to process, respond to or make a decision about the access request; and
  - any sharing of the identity of, and other **personal information** about, the access **applicant** must be limited to the minimum amount necessary to process, respond to or make a decision about the access request.

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<sup>13</sup> Sections 41 and 42, and unauthorized access, use and disclosure, are discussed in Chapter 6 of this Manual.

## ACCESS TO RECORDS

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- (ii) The identity and other **personal information** about the access **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; and
  - the disclosure is limited to the minimum amount of **personal information** necessary to process, respond to or make a decision about the access request.

But, when a **public body** transfers an access request to another **public body** under section 16 of FIPPA – because, for example, the other **public body** has custody or control of the **records** requested – it is appropriate to transfer the whole access request, including the name and contact information and other **personal information** provided by the access **applicant** to the other **public body**. This disclosure of **personal information** is appropriate, as 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*.<sup>14</sup>

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<sup>14</sup> This Practice Note can be found on the Ombudsman's website at:  
[http://www.ombudsman.mb.ca/documents\\_and\\_files/practice-notes.html](http://www.ombudsman.mb.ca/documents_and_files/practice-notes.html)

## MAKING AN ACCESS REQUEST - [SUBSECTIONS 8(1) AND 8(2); ACCESS AND PRIVACY REGULATION: SECTION 3]

### ■ How to Apply for Access

1(1) "**applicant**" means a person who makes a request for access to a **record** under section 8;

#### **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**.

#### **Prescribed form**

8(2) A request must be in the prescribed form and must provide enough detail to enable an experienced officer or **employee** of the **public body** to identify the **record**.

#### **Oral request**

8(3) 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.

#### *Access and Privacy Regulation*

#### **Application for access**

3(1) A person requesting access to a **record** shall complete an application in Form 1 of Schedule A.

3(2) Where practicable, the application must be submitted to the access and privacy coordinator at the location of the **public body** identified on the FIPPA website at <http://www.gov.mb.ca/chc/fippa/wheretosend/index.html>.

3(3) An application shall be date stamped on the day it is received.

3(4) If the **public body** considers that verification of the **applicant's** identity or that of a **third party** is necessary in order to respond to the **application**, the **public body** may at any time require the **applicant** to provide suitable identification.

To apply for access to a **record** under Part 2 of FIPPA, a person must make a request to the **public body** that the person believes has custody or control of the **record** [subsection 8(1)].

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An access request must be made by completing the "prescribed" application form – that is, Form 1 of Schedule A of the *Access and Privacy Regulation* [subsection 8(2) of FIPPA; subsection 3(1) of the Regulation].<sup>15</sup>

The Application Form includes instructions and can be found on the FIPPA website at: [http://www.gov.mb.ca/chc/fippa/pdfs/fippa\\_appform\\_apr2011.pdf](http://www.gov.mb.ca/chc/fippa/pdfs/fippa_appform_apr2011.pdf).

The **applicant** must provide enough detail to enable an experienced officer or **employee** of the **public body** to identify the **record** [subsection 8(2)].

The **applicant** must submit the Application for Access to the **public body** that the **applicant** believes has custody or control of the **record** being requested [subsection 8(1)]. Where practicable, the **applicant** must submit the Application to that **public body's** Access and Privacy Coordinator at the location of the **public body** identified at:

[http://www.gov.mb.ca/chc/fippa/public\\_bodies/list\\_public\\_bodies.html](http://www.gov.mb.ca/chc/fippa/public_bodies/list_public_bodies.html)  
[subsection 3(2) of the Regulation].

In the case of a **public body** that is a government **department** or **government agency**, if an **applicant** sends an Application for Access to another office of the **department** or **government agency**, including to the **Minister's** office, it should be accepted, date stamped and forwarded immediately to the Access and Privacy Coordinator. If possible, it should be faxed to the Coordinator right away and then sent by mail.

Application forms should be available from all public offices and from the **public body's** Access and Privacy Coordinator. The Application for Access form is available on the FIPPA website at:  
[http://www.gov.mb.ca/chc/fippa/pdfs/fippa\\_appform\\_apr2011.pdf](http://www.gov.mb.ca/chc/fippa/pdfs/fippa_appform_apr2011.pdf).

If a person sends a letter requesting access, instead of using the required Application for Access form, the Coordinator should immediately fax or mail an application form to the person. Depending on the situation, the Coordinator may decide to begin processing the request at once in order to assist the **applicant**. This would be in keeping with the duty in section 9 of FIPPA to assist **applicants**.

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<sup>15</sup> A consolidated version of the *Access and Privacy Regulation*, Man. Reg. 64/98, as amended, can be found at: <http://web2.gov.mb.ca/laws/regs/pdf/f175-064.98.pdf>.

### ■ 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 *The Personal Health Information Act*.

If a **public body** receives an Application for Access 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 *The Personal Health Information Act*, not under FIPPA [section 6].

But, as *The Personal Health Information Act* does not require that a request for access be in writing, the Coordinator may decide to treat the FIPPA application as a request under both FIPPA and *The Personal Health Information Act*. This would also be in keeping with the duty in section 9 of FIPPA and in subsection 6(2) of *The Personal Health Information Act* to assist **applicants**.

The time limit in *The Personal Health Information Act* for responding to a request by an individual for access to his or her own **personal health information** is 30 days, with no extensions.

The only reasons for refusing an individual access to his or her **personal health information** are those set out in section 11 of *The Personal Health Information Act*.<sup>16</sup>

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<sup>16</sup> *The Personal Health Information Act* is briefly discussed in Chapter 2, under *Relationship of FIPPA to Other Legislation*. *The Personal Health Information Act*, C.C.S.M., c. P33.5, can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/p033-5e.php>.

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

FIPPA allows an **applicant** to make an oral request for access to a **record** if he or she:

- has a limited ability to read or write English or French; or
- has a disability or condition that impairs his or her ability to make a written request.

In this situation, a senior staff member should fill out the Application for Access form as directed by the individual and have the individual sign the form, if possible. The staff member should then date stamp the Application and send it immediately to the Access and Privacy Coordinator for the **public body**.

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

### ■ Date Stamp Is Required

Subsection 3(3) of the *Access and Privacy Regulation* requires that, an Application for Access be date stamped "on the day it is received".

This means that the officer or staff member of the **public body** who first receives an Application for Access must date stamp the application on the day he or she received it – whether or not he or she 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 Application for Access, after date stamping the request, he or she should immediately forward it to the Coordinator, as the time limit for responding to the access request runs from the date it is received by the **public body**.

On receiving an Application for Access, the Access and Privacy Coordinator should record the application and the date it was received by the **public body** in an *access request tracking log*.

### ■ 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 in the event of an appeal respecting a refusal of access;
- if the **Ombudsman** undertakes an audit of the **public body's** access to information practices, etc.;

The **public body** should record receipt of the access request and open a file for it. The file should include:

- the Application for Access, with date stamp;
- all internal and external correspondence (including e-mail, etc.);
- a record of discussions with the **applicant**;
- details relating to the search for responsive (relevant) **records**, including staff time spent locating, retrieving, copying and reviewing the **records**, copies of relevant records schedules, file lists, etc. and a summary of locations searched;
- a record of consultations within the **public body**, and with **third parties**, other **public bodies** and legal counsel;
- a record of all decisions respecting 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;

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- 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 responsive **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; etc.

Also see Ombudsman Practice Note: *Documenting Access Decisions under The Freedom of Information and Protection of Privacy Act and The Personal Health Information Act*.<sup>17</sup>

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<sup>17</sup> This Practice Note can be found on the Ombudsman's website at:  
[http://www.ombudsman.mb.ca/documents\\_and\\_files/practice-notes.html](http://www.ombudsman.mb.ca/documents_and_files/practice-notes.html) .

### ■ 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 a formal application under FIPPA is necessary in order for the **applicant** to obtain the information; and
- whether consultation with **third parties** or another **public body** may be required.

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

An access request must be in the required form and "must provide enough detail to enable an experienced officer or **employee** of the **public body** to identify the **record**" requested [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 his or her 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 clause 15(1)(a) of FIPPA, the **head** of the **public body** may extend the time for responding to an access request for up to an additional 30 days, or longer if the **Ombudsman** agrees, if "the **applicant** does not give enough detail to enable the **public body** to identify a requested **record**".<sup>18</sup>

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<sup>18</sup> Clause 15(1)(a) is discussed later in this Chapter, under *Time Limit for Responding to an Access Request*.

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

Where an Application for Access 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 7 days after receipt, to the appropriate **public body** [section 16]. Section 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 outside the FIPPA process

A **public body** may be able to satisfy an **applicant's** information needs by providing records that are already publicly available, or that can be made available through the process of routine disclosure.<sup>19</sup>

The Access and Privacy Coordinator should notify the **applicant** right away and advise him or her of the process for obtaining the information.

In many cases, the **public body** will simply provide the information, subject to any copying charges. In some instances, the **applicant** may be required to fill out a different application form. For example, if the **applicant** wants access to records governed by *The Vital Statistics Act*, he or she will have to complete the appropriate form of the Vital Statistics Agency and submit the required fee. The Coordinator should ensure that the **applicant** understands what is required or who to contact for further information and should then confirm that the **applicant** wishes to withdraw the Application for Access under FIPPA.

## ■ Blanket Requests

A 'blanket' request occurs when an **applicant** has sent the same, or substantially the same, request for access to two or more government **departments**, at the same time or nearly the same time.

For information about procedures to follow when handling blanket requests, contact the Information and Privacy Policy Secretariat of the Department of Sport, Culture and Heritage.

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<sup>19</sup> Proactive disclosure and routine disclosure are discussed in Chapter 3, under *Proactive Disclosure and Routine Disclosure of Information*.

## TRANSFERRING AN ACCESS REQUEST TO ANOTHER PUBLIC BODY - [SECTION 16]

### Transferring a request

**16(1)** Within seven 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 30 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 30 days after receiving it unless that time limit is extended under section 15 or notice is given to a **third party** under section 33.

Subsection 16(1) 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**, or
- the **record** is in the custody or control of the other **public body**.

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

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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 application must notify the **applicant** of the transfer in writing as soon as possible. A sample letter notifying an **applicant** that his or her access request has been transferred can be found in the *Model Response Letters and Forms*, on the FIPPA website at:  
[http://www.gov.mb.ca/chc/fippa/public\\_bodies/resources\\_public\\_bodies.html](http://www.gov.mb.ca/chc/fippa/public_bodies/resources_public_bodies.html).

Clause 16(2)(b) requires that the **public body** to which the access request is transferred make every reasonable effort to respond to the request within 30 days after receiving it, unless the time limit is extended under section 15<sup>20</sup> or notice is given to an affected **third party** under section 33 of FIPPA.<sup>21</sup>

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<sup>20</sup> Section 15 is discussed later in this Chapter, under *Time Limit for Responding to an Access Request*.

<sup>21</sup> Section 33 is discussed later in this Chapter, under *Third Party Notice and Intervention*.

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**Examples:**

- Manitoba Education and Advanced Learning receives a request for access to a student's records. As Winnipeg School Division No. 1 has custody and control of the records, Manitoba Education and Advanced Learning transfers the request to the School Division.
- Executive Council receives a request for access to a Cabinet Submission about a farm support program. As the **record** was prepared by Manitoba Agriculture, Food and Rural Development, Executive Council transfers the application to that department.

## TIME LIMIT FOR RESPONDING TO AN ACCESS REQUEST - [SECTIONS 11 AND 15]

### ■ Time Limit for Responding - [Section 11]

#### **Time limit for responding**

**11(1)** The **head** of a **public body** shall make every reasonable effort to respond to a request in writing within 30 days after receiving it unless

- (a) the time limit for responding is extended under section 15; or
- (b) the request has been transferred under section 16 to another **public body**.

#### **Failure to respond**

**11(2)** The failure of the **head** of a **public body** to respond to a request within the 30 day period or any extended period is to be treated as a decision to refuse access to the **record**.

Subsection 11(1) requires a **public body** to make every reasonable effort to respond to a request for access **in writing** within **30 days** after receiving it, unless:

- (i) the time limit is extended under section 15 of FIPPA; or
- (ii) the request has been transferred to another **public body** under section 16 of FIPPA.<sup>22</sup>

The time limit for responding to a request by an individual for access to his or her own **personal health information** under *The Personal Health Information Act* is also 30 days, but unlike FIPPA, this time limit cannot be extended. When dealing with a request for access to a **record** that contains **personal health information** about the **applicant** as well as other information, a **public body** must be aware of the difference in the time limits between the two Acts. Also, the only grounds for

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<sup>22</sup> Section 16, and transferring an access request, are dealt with earlier in this Chapter, under *Transferring an Access Request to Another Public Body*.

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refusing an individual access to his or her own **personal health information** are those set out in subsection 11(1) of *The Personal Health Information Act*.<sup>23</sup>

The 30-day time limit is based on calendar days, not working days. The 30 days start to run on the day after the date that the Application for Access is received by any officer or employee of the public body.<sup>24</sup> 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 30-day period ends on a Sunday or other statutory holiday, the time for responding is extended to the next day that is not a Sunday or a statutory holiday.<sup>25</sup> Subsection 23(1) of *The Interpretation Act* of Manitoba states that the following days are 'statutory' holidays:

- Sundays,
- New Year's Day,
- the third Monday in February to be known as "Louis Riel Day",
- Good Friday,
- Victoria Day,
- Canada Day,
- Labour Day,
- Thanksgiving Day,
- Remembrance Day,
- Christmas Day,
- the day after Christmas known as "Boxing Day", and
- any day declared a holiday by proclamation of the Governor-General of Canada or the Lieutenant Governor of Manitoba.

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, December 27th is a holiday.

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<sup>23</sup> *The Personal Health Information Act*, C.C.S.M. c. P33.5, can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/p033-5e.php>.

<sup>24</sup> *The Interpretation Act* of Manitoba, subsection 22(2). *The Interpretation Act*, C.C.S.M. c. 180 can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/i080e.php>.

<sup>25</sup> *The Interpretation Act* of Manitoba, subsection 24(1).

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**Note:**

Saturday is not a statutory holiday. But, subsection 24(2) of *The Interpretation Act* of Manitoba states that where the time limit for doing anything under a statute or regulation falls on a day on which the office in which it is to be done is closed "during its regular hours of business", the time limit is extended to the next day on which the office is open.

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 further information is required from the **applicant**, the Access and Privacy Coordinator should seek this information right away. The date on which the access request was received by the **public body** cannot be changed. But, the need to obtain more information may be grounds for extending the time limit under subsection 15(1) of FIPPA (discussed next).

**Note:**

**Public bodies** should try to respond to requests as quickly as possible, and before the end of the 30 day time limit whenever possible. Section 9 of FIPPA requires that the **head** of a **public body** make every reasonable effort to respond to an applicant "without delay".<sup>26</sup>

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<sup>26</sup> Section 9 is discussed earlier in this Chapter, under *The Duty to Assist an Access Applicant*.

■ **Extending the Time Limit for Responding - [Section 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) the **applicant** does not give enough detail to enable the **public body** to identify a requested **record**;
- (b) a large number of **records** is requested or must be searched, and responding within the time period set out in section 11 would interfere unreasonably with the operations of the **public body**;
- (c) time is needed to consult with a **third party** or another **public body** before deciding whether or not to grant access to a **record**; or
- (d) a **third party** makes a complaint under subsection 59(2).

**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 reasons 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.

The **head** of a **public body** may extend the 30 day time period for responding to an access request for up to an additional 30 days only if:

- (i) the access **applicant** does not give enough detail to enable the **public body** to identify the requested **records**;

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Where the **public body** has, despite reasonable efforts, been unable to obtain the necessary details or clarification during the initial 30 day time limit, this extension may apply to give the **public body** more time to do so.

- (ii) a large number of records is requested or must be searched, and responding within the time period set out in section 11 would interfere unreasonably with the operations of the **public body**;

There are two requirements that must be met before clause 15(1)(b) can be relied on to extend the 30 day time limit:

- a large number of records has been requested or must be searched; and
- responding within the 30 day time limit would unreasonably interfere with the operations of the **public body**.

- (iii) time is needed to consult with a **third party** or another **public body** before deciding whether or not to grant access to a **record**; or

Where the **public body** has, despite reasonable efforts, been unable to complete the necessary consultations within the initial 30 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** or with **third parties**; it does not apply to consultations amongst the officers and staff of the **public body** itself. Other **public bodies** that are consulted about an access request should respond as quickly as possible.

- (iv) a **third party** makes a **complaint** under subsection 59(2).

A **third party** who has been given notice by the **head** of a **public body** under section 34 of FIPPA of the **head's** decision to give access to a **record** containing information affecting the **third party's** privacy interests under section 17 or its business interests under section 18 may complain to the **Ombudsman** about the decision to give access.<sup>27</sup>

**Note:** A **public body** cannot claim a time extension for the time it spends reviewing **records** or consulting within its own ranks.

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<sup>27</sup> 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.

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Under clause 15(1), the **head** of the **public body**, or the **head's** delegate, 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. An extension of time must take place within the initial 30 day response period.

If a **public body** requires an extension of longer than 30 days, it should follow the procedures in Ombudsman Practice Note: *Making a Submission to the Ombudsman for an Extension Longer than 30 Days*.<sup>28</sup>

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

- the reason for the extension of time, which must be one of the 4 reasons set out in subsection 15(1);
- when a response to the access request can be expected; and
- that the **applicant** may complain to the **Ombudsman** about the extension of time [subsection 15(2)].<sup>29</sup>

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

[http://www.gov.mb.ca/chc/fippa/public\\_bodies/resources\\_public\\_bodies.html](http://www.gov.mb.ca/chc/fippa/public_bodies/resources_public_bodies.html).

Also see the following Ombudsman Practices 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)*.<sup>30</sup>

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<sup>28</sup> This Practice Note can be found on the Ombudsman's website at:  
[http://www.ombudsman.mb.ca/documents\\_and\\_files/practice-notes.html](http://www.ombudsman.mb.ca/documents_and_files/practice-notes.html).

<sup>29</sup> Complaints under FIPPA are discussed in Chapter 8 of this Manual.

<sup>30</sup> These Practice Notes can be found on the Ombudsman's website at:  
[http://www.ombudsman.mb.ca/documents\\_and\\_files/practice-notes.html](http://www.ombudsman.mb.ca/documents_and_files/practice-notes.html).

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

**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.

If a **public body** gives a written estimate of fees to an **applicant** under subsection 82(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** notifies the **public body** that he or she wishes to proceed with the access application [subsection 82(4)].

If the **applicant** does not notify the **public body** that he or she wishes to proceed within 30 days from the date the fee estimate is given, the **public body** may consider the application to have been abandoned [subsection 82(3)].<sup>31</sup>

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<sup>31</sup> Fees and fee estimates are discussed later in this Chapter, under *Fees, Fee Estimates and Fee Waivers*.

### ■ Failure to Respond in Time is a Deemed Refusal of Access - [Subsection 11(1)]

**Failure to respond**

**11(2)** The failure of the **head** of a **public body** to respond to a request within the 30 day period or any extended period is to be treated as a decision to refuse access to the **record**.

If the **head** of a **public body** fails to respond to an access request within the 30 day time limit, or within any extended time limit, this failure is deemed to be a refusal of access under FIPPA [subsection 11(2)],

The access **applicant** may complain to the **Ombudsman** about both the delay in responding to the **application** and the deemed refusal of access [subsection 59(1)].<sup>32</sup>

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<sup>32</sup> Complaints are discussed in Chapter 8 of this Manual.

## LIMITED AUTHORITY TO DISREGARD CERTAIN REQUESTS - [SECTION 13]

### Public body may disregard certain requests

**13(1)** The **head** of a **public body** may disregard a request for access if he or she is of the opinion that

- (a) the request is incomprehensible, frivolous or vexatious;
- (b) because of their repetitious or systematic nature, the requests would unreasonably interfere with the operations of the **public body** or amount to an abuse of the right to make those requests; or
- (c) the request is for information already provided to the **applicant**.

### 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**, or his or her delegate, may refuse to deal with an access request made under Part 2 of FIPPA. In making a decision under subsection 13(1), the **head** must be mindful of the principles of FIPPA and all relevant circumstances.<sup>33</sup>

The **public body's** response to the access request must be given to the **applicant** in writing and must state:

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<sup>33</sup> Subsection 13(1) of FIPPA was amended by *The Freedom of Information and Protection of Privacy Amendment Act*, S.M. 2008 c. 40. The amending Act can be found at: <http://web2.gov.mb.ca/laws/statutes/2008/c04008e.php>.

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- that the **public body** is refusing to deal with the access request, and the reason for the refusal. The reason must be one 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; and
- that the **applicant** may make a **complaint** to the **Ombudsman** about the refusal [subsection 13(2)].

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.<sup>34</sup> The ability to refuse access 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 incomprehensible, frivolous or vexatious [clause 13(1)(a)]

A request is "incomprehensible" if it cannot be understood, if it is unintelligible.<sup>35</sup> But, when considering relying on this as a basis for refusing to deal with an access request, a **public body** must keep in mind its duty under section 9 to make every reasonable effort to assist the access **applicant**.

"Frivolous" means of little weight or importance. But, information that may be trivial from one person's perspective may be of importance from another's.<sup>36</sup> It can also mean an access request that is made "primarily for a purpose other than gaining access to information".<sup>37</sup>

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<sup>34</sup> Subsection 13(1) of FIPPA was amended by *The Freedom of Information and Protection of Privacy Amendment Act*, S.M. 2008 c. 40. The amending Act can be found at: <http://web2.gov.mb.ca/laws/statutes/2008/c04008e.php>.

<sup>35</sup> *The Compact Edition of the Oxford English Dictionary*.

<sup>36</sup> See, for example, Alberta Information and Privacy Commissioner Order dated February 5, 2003 (Southern Alberta Institute of Technology) at: [http://www.oipc.ab.ca/ims/client/upload/Section\\_55\\_SAIT\\_Report.pdf](http://www.oipc.ab.ca/ims/client/upload/Section_55_SAIT_Report.pdf) and Order dated November 4, 2005 (Edmonton Police Service) at: [http://www.oipc.ab.ca/ims/client/upload/Sect55\\_EPS\\_Nov4\\_05.pdf](http://www.oipc.ab.ca/ims/client/upload/Sect55_EPS_Nov4_05.pdf).

<sup>37</sup> See, for example, *B.C. Information and Privacy Commissioner decision respecting the Insurance Corporation of British Columbia*, dated November 8, 2002 (Auth. (s. 43) 02-02) at: <http://www.oipc.bc.ca/rulings/decisions.aspx>

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"Vexatious" means without reasonable or probable cause or excuse.<sup>38</sup> Vexatious access requests are usually requests that are made in 'bad faith' – that is for a malicious or oblique motive.<sup>39</sup> For example, an access request would be "vexatious" if the primary purpose is not to gain access to information, but to continually or repeatedly harass a **public body** in order to obstruct or grind it to a standstill.<sup>40</sup>

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

- In interpreting the terms "frivolous" and "vexatious", their statutory context is critical. In light of the underlying principles of access to information legislation – to enhance **public body** accountability – a **public body** cannot successfully interpret these terms as applying simply because the **public body** finds an access request to be troublesome, annoying or vexing.
- Rather, a "frivolous" or "vexatious" request is one that, taking into account all the relevant circumstances, involves an abuse of the right of access conferred by the legislation.<sup>41</sup>

Generally, "abuse" means misuse or improper use.<sup>42</sup> This concept of 'abuse of the right of access' is discussed below, under *Repetitious or systematic requests*.

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<sup>38</sup> See, for example, Alberta Information and Privacy Commissioner Order dated February 5, 2003 (Southern Alberta Institute of Technology) at: [http://www.oipc.ab.ca/ims/client/upload/Section\\_55\\_SAIT\\_Report.pdf](http://www.oipc.ab.ca/ims/client/upload/Section_55_SAIT_Report.pdf) and Order dated November 4, 2005 (Edmonton Police Service) at: [http://www.oipc.ab.ca/ims/client/upload/Sect55\\_EPS\\_Nov4\\_05.pdf](http://www.oipc.ab.ca/ims/client/upload/Sect55_EPS_Nov4_05.pdf).

<sup>39</sup> See, for example, *B.C. Information and Privacy Commissioner decision respecting the Insurance Corporation of British Columbia*, dated November 8, 2002 (Auth. (s. 43) 02-02) at: <http://www.oipc.bc.ca/rulings/decisions.aspx>

<sup>40</sup> Alberta Information and Privacy Commissioner Order dated February 5, 2003 (Southern Alberta Institute of Technology) at: [http://www.oipc.ab.ca/ims/client/upload/Section\\_55\\_SAIT\\_Report.pdf](http://www.oipc.ab.ca/ims/client/upload/Section_55_SAIT_Report.pdf) and Alberta Information and Privacy Commissioner Order dated November 4, 2005 (Edmonton Police Service) at: [http://www.oipc.ab.ca/ims/client/upload/Sect55\\_EPS\\_Nov4\\_05.pdf](http://www.oipc.ab.ca/ims/client/upload/Sect55_EPS_Nov4_05.pdf).

<sup>41</sup> See, for example, the *B.C. Information and Privacy Commissioner decision respecting the Insurance Corporation of British Columbia*, dated November 8, 2002 (Auth. (s. 43) 02-02) at: <http://www.oipc.bc.ca/rulings/decisions.aspx>.

<sup>42</sup> See, for example, the *B.C. Information and Privacy Commissioner decision respecting the Insurance Corporation of British Columbia*, dated November 8, 2002 (Auth. (s. 43) 02-02) at: <http://www.oipc.bc.ca/rulings/decisions.aspx>.

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The fact that an access request might result in the disclosure of information that the **public body** would rather not disclose would not be grounds for relying on subsection 13(1).<sup>43</sup>

### 2. Repetitious or systematic requests [clause 13(1)(b)]

A request is 'repetitious' when an access request for the same **records** or information is submitted more than once.<sup>44</sup>

The phrase "systematic nature" would include a pattern of conduct that is regular or deliberate.<sup>45</sup>

There are two aspects to clause 13(1)(b):

- (i) A **public body** may disregard a request for access if, because of its repetitious or systematic nature, the request would unreasonably interfere with the operations of the **public body**.

Unreasonable interference with the operations of the **public body** might be demonstrated by showing the impact that particular repetitious or systematic access requests are having on the resources needed to respond within the **public body** and the actual cost of providing a response. Note that the impact must be "unreasonable", taking into account all the circumstances.

- (ii) A **public body** may disregard a request for access if, because of its repetitious or systematic nature, the request amounts to an abuse of the right to make those requests.

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<sup>43</sup> See, for example, Alberta Information and Privacy Commissioner Order dated February 5, 2003 (Southern Alberta Institute of Technology) at: [http://www.oipc.ab.ca/ims/client/upload/Section\\_55\\_SAIT\\_Report.pdf](http://www.oipc.ab.ca/ims/client/upload/Section_55_SAIT_Report.pdf) and Order dated November 4, 2005 (Edmonton Police Service) at: [http://www.oipc.ab.ca/ims/client/upload/Sect55\\_EPS\\_Nov4\\_05.pdf](http://www.oipc.ab.ca/ims/client/upload/Sect55_EPS_Nov4_05.pdf).

<sup>44</sup> See, for example, Alberta Information and Privacy Commissioner Order (Grant MacEwan College) dated March 13, 2007 at: [http://www.oipc.ab.ca/ims/client/upload/RPT\\_Section55\\_F3885.pdf](http://www.oipc.ab.ca/ims/client/upload/RPT_Section55_F3885.pdf).

<sup>45</sup> See, for example, Alberta Information and Privacy Commissioner Order (Grant MacEwan College) dated March 13, 2007 at: [http://www.oipc.ab.ca/ims/client/upload/RPT\\_Section55\\_F3885.pdf](http://www.oipc.ab.ca/ims/client/upload/RPT_Section55_F3885.pdf).

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Generally, "abuse" means misuse or improper use;<sup>46</sup> to make "excessive or improper use" of something.<sup>47</sup> In the concept of 'abuse of process', there is a connotation of "something not legitimate".<sup>48</sup>

To amount to an abuse of the right of access under clause 13(1)(b), a **public body** must establish two things:

- that there have been "repetitious" or "systematic" requests: and
- that because of their repetitious or systematic nature, these requests amount to an abuse of the right of access.

In looking at the concept of 'abuse of the right of 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 their own personal information. Such abuse also harms the public interest, since it unnecessarily adds to **public bodies'** costs of complying with the Act.<sup>49</sup>

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

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<sup>46</sup> See the Alberta Information and Privacy Commissioner's Order 2001-007 (decision on an application by the Town of Ponoka to disregard an access request) April 4, 2001 at: <http://www.oipc.ab.ca/downloads/documentloader.ashx?id=1835> .

<sup>47</sup> Black's Law Dictionary, 6<sup>th</sup> edition.

<sup>48</sup> *Fantino et al. v. Riley, Baptista and the Information and Privacy Commissioner of Ontario* (Ont. Div. Court, Feb. 9, 1995).

<sup>49</sup> *B.C. Information and Privacy Commissioner decision respecting the Insurance Corporation of British Columbia*, dated November 8, 2002 (Auth. (s. 43) 02-02) at: <http://www.oipc.bc.ca/rulings/decisions.aspx> .

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3. **The request is for information already provided to the applicant [clause 13(1)(c)]**

A **public body** may disregard an access request if it is for information that has already been provided to the **applicant**.

**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* for the preliminary steps that should be taken when an access request is first received.

## ■ Verifying Identity - [Subsection 3(4) of the Regulation]

If the **public body** considers that verification of the identity of an access **applicant** or of a **third party** is necessary in order to respond to an application for access to a **record** 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 [section 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 **records**, that are in the custody or under the control of the **public body**; and
- include all locations where such **records** might be found.

Remember: "**record**" is defined broadly in subsection 1(1) of FIPPA to mean a "record of information in any form"<sup>50</sup>

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 access request quickly. With an effective records management system and trained Records Officers, this is usually a straight forward task. Losing time searching for **records** may make it very difficult to respond to the **applicant** within the 30 day time period.

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<sup>50</sup> *B.C. Information and Privacy Commissioner decision respecting the Insurance Corporation of British Columbia*, dated November 8, 2002 (Auth. (s. 43) 02-02) at: <http://www.oipc.bc.ca/rulings/decisions.aspx>.

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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 records-keeping.

Where the **public body** is a government **department** or a **government agency**, 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; or
- at the Archives of Manitoba (if the **record** has been designated as archival through the **records** scheduling process under *The Archives and Recordkeeping Act*<sup>51</sup>).

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**.

- If the **records** are in the Manitoba Government Records Centre, the program area should retrieve them immediately by following the standard procedures.
- If they are in the Archives of Manitoba, the Access and Privacy Coordinator must send a memo to the Government Records Office specifying the **records** to be viewed (including the Archives accession number and the exact storage location) and the name of the staff member (or members) authorized to examine the **records** at the Archives.

The requested **records** also may have been destroyed under an approved Records Schedule under *The Archives and Recordkeeping Act*. In these circumstances, the response to the **applicant** will indicate that the record no longer exists [paragraph 12(1)(c)(i)].<sup>52</sup>

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<sup>51</sup> *The Archives and Recordkeeping Act*, C.C.S.M. c. A132, can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/a132e.php>.

<sup>52</sup> Subsection 12(1) and the required content of responses to an access applicant are discussed later in this Chapter, under *Response to an Access Applicant*.

## ACCESS TO RECORDS

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**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 records schedule under *The Archives and Recordkeeping Act*.

It is an offence under clause 85(1)(d) of FIPPA to wilfully destroy a record or erase information in a record that is subject to FIPPA with the intent to evade a request for access to records.

The following will assist in searching for **records** that are relevant to an access request:

- **Records Schedules** approved under *The Archives and Recordkeeping Act*

These schedules are held by Records Officers and Program Areas. They establish the retention period and final disposition (destruction or archiving) of **records**. The Records Schedules must be prepared by the **departments** and **government agencies**, and submitted for approval by the Archivist of Manitoba under *The Archives and Recordkeeping Act*. The schedules provide information on the functions and content of the record series.

- **Current File Plans, Lists and Indexes**

These records, held in the Program Areas, will be useful when the relevant **record** is still in the offices of the **public body**.

- **Records Transfer Box Lists**

These lists are held by Records Officers and Program Areas. They are prepared when **records** are transferred from the offices of the **public body** to the Manitoba Government Records Centre for semi-active storage and, eventually, destruction or transfer to archival storage. These lists indicate the dates when a specific set of **records will be** destroyed or transferred to archival storage.

## ACCESS TO RECORDS

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### For further information about records retrieval and access:

- see *General Manual of Administration AC-10-01*;
- For records in semi-active storage: see *Government Records Procedure GRO 3: Retrieving Records*. This document can be found on the Government Recordkeeping Homepage [www.gov.mb.ca/chc/archives/gro/recordkeeping/policies\\_standards\\_guidelines\\_procedures.html](http://www.gov.mb.ca/chc/archives/gro/recordkeeping/policies_standards_guidelines_procedures.html).  
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.

Unless the volume of **records** to be reviewed is very large, the next step usually is to make photocopies of the **records** and to prepare a list of them. At least two copies will be needed:

- a clean copy for the FIPPA file; and
- one on which to identify information that is excluded from FIPPA or that is excepted from access under sections 17 to 32 of FIPPA.

### ■ Preliminary Assessment

After the **records** have been located and, where appropriate, copied, a knowledgeable official in the program area or, in a centralized system, the Access and Privacy Coordinator, or both, should make a preliminary assessment of the **records** 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 section 4 or subsection 6(2) 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 as to 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 within 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 section 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 30 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, a knowledgeable officer from the program area or, in centralized systems, the Access and Privacy Coordinator, will need to review the information in the requested records 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; and
- (ii) information that falls within an exception to disclosure in sections 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. Information that does not reasonably relate to the applicant's request for access is "not responsive" to the request and may be (and in the case of **personal information** about another individual, must be) removed from the information provided to the **applicant**.<sup>53</sup>

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 access **applicant**.

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<sup>53</sup> See, for example, Alberta Information and Privacy Commissioner Order 97-020 at: <http://www.oipc.ab.ca/downloads/documentloader.ashx?id=1916>; and Ontario Information and Privacy Commissioner Order P-913 (Re Ministry of Health, April 24, 1995) at: <http://www.ipc.on.ca/English/Decisions-and-Resolutions/Decisions-and-Resolutions-Summary/?id=3359>

## ACCESS TO RECORDS

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### **Example:**

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

Only the information in the minutes about the **applicant's** appeal relates to his 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 his 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 sections 17 to 32 of FIPPA<sup>54</sup>**

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 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**.

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<sup>54</sup> The exceptions to disclosure in sections 17 to 32 of FIPPA are discussed in Chapter 5 of this Manual.

## ACCESS TO RECORDS

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That is, an **applicant** has a right of access to the remainder of a **record** after any information excepted from disclosure under sections 17 to 32 has been severed (removed) from the **record**.<sup>55</sup>

A careful review of the information contained in a **record** is required in order 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 sections 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 the likelihood of harm as a result of release of particular information, and should be able to identify the factors to be taken into consideration when exercising discretion under a discretionary exception to disclosure.<sup>56</sup> During a line-by-line review, the reviewer can also identify additional requirements respecting consultations – for example, with **third parties**, other **public bodies**, legal counsel, etc.

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<sup>55</sup> The duty to sever records is discussed later in this section, under *Severing the Record*.

<sup>56</sup> See, for example, Alberta Information and Privacy Commissioner Order 97-020 at: <http://www.oipc.ab.ca/downloads/documentloader.ashx?id=1916>; and Ontario Information and Privacy Commissioner Order P-913 (Re Ministry of Health, April 24, 1995) at: <http://www.ipc.on.ca/English/Decisions-and-Resolutions/Decisions-and-Resolutions-Summary/?id=3359>.

### ■ Documenting the Line-by-Line Review

The reviewer should document 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; and recommendations to the Access and Privacy Officer for responding to the access request.

On a copy of the **record**, the reviewer should mark (for example, with a pencil or highlighter), the information in the **record** that he or she feels fall within an exception to disclosure in sections 17 to 32. The section, subsection and clause of the applicable exception to disclosure, and whether the exception is mandatory or discretionary, should be noted in the margin on this file copy of the **record**. More than one exception to disclosure may apply to information in a **record**. The reviewer should note all relevant exceptions to disclosure.

It is recommended that the reviewer prepare an Access Request Review Summary of recommendations that identifies:

- 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. With respect to 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; etc.

## ACCESS TO RECORDS

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For example:

Request No.		Name of Reviewing Officer:				
Document No.	No. of Pages	Date	Description	Exceptions (including whether mandatory or discretionary)	Comments (e.g. record or part excluded from FIPPA; non-responsive information; expectation of harm; factors to consider in exercising a discretion, etc.)	Consultations; Third Party Notice

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 in the event of an appeal respecting a refusal of access;
- if the **Ombudsman** undertakes an audit of the **public body's** access to information practices; etc.

## 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 (sections 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 access **applicant** and information that may or must be withheld under the exceptions to disclosure in sections 17 to 32. Where 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. The information that is excepted from disclosure is “severed” (that is, obscured or removed) from the **record**, and the remainder of the information in the **record** 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**:

- use of removable tape or liquid eraser to cover the information that is excepted from disclosure on a photocopy of the **record**, and re-copying to obtain the **record** to be released;
- use of a photocopy machine with editing features suitable for severing;
- use of redaction software to edit the severable information.

## ACCESS TO RECORDS

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Whatever method of severing is selected, it is important to ensure that none of the excepted information remains visible. For this reason, the use of markers is not recommended.

**Note:**

Severing must not be done on the original **record**, as it 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 on which the refusal is based [paragraph 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 information that is excepted from disclosure by doing so.
- 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 would be 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 his or her information needs might be otherwise addressed (this would be in keeping with the duty to assist the **applicant** in section 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.

## ACCESS TO RECORDS

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- 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”.<sup>57</sup> While 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, this is likely to be 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)*.<sup>58</sup>

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<sup>57</sup> *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.

Also see *Murchison v. Export Development Canada*, 2009 FC 77 at: <http://www.canlii.org/en/ca/fct/doc/2009/2009fc77/2009fc77.pdf> and *Ontario (Ministry of Finance) v. Ontario (Assistant Information and Privacy Commissioner)*, [1997] O.J. No. 1465 at 48.

<sup>58</sup> This Practice Note can be found on the Ombudsman's website at: [http://www.ombudsman.mb.ca/documents\\_and\\_files/practice-notes.html](http://www.ombudsman.mb.ca/documents_and_files/practice-notes.html).

## RESPONSE TO AN ACCESS 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 business telephone number 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 access **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**, or the **head's** delegate (usually the Access and Privacy Officer).

## ACCESS TO RECORDS

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### 1. Response when access is provided

Access is provided if:

- the **record** falls within the scope of FIPPA;<sup>59</sup>
- none of the information in the **record** falls within a mandatory exception to disclosure; and
- none of the information in the **record** falls within a discretionary exception to disclosure, or the Access and Privacy Officer has decided to exercise his or her 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)]; and
- (ii) where, when and how<sup>60</sup> access will be given [clause 12(1)(b)].

### 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;<sup>61</sup>
- some or all of the information in the **record** falls within a mandatory exception to disclosure; or
- some or all of the information in the **record** falls within a discretionary exception to disclosure, and the Access and Privacy Officer, after considering all relevant circumstances, has decided to refuse access.

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<sup>59</sup> Records that fall within the scope of FIPPA are discussed in Chapter 2, under *Records that Fall under FIPPA*.

<sup>60</sup> How access is given is discussed later in this Chapter, under *Giving Access*.

<sup>61</sup> Records that fall outside the scope of FIPPA are discussed in Chapter 2, under *Records that Do Not Fall Under FIPPA*.

## ACCESS TO RECORDS

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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 [paragraph 12(1)(c)(ii)].

That is, the **public body** must:

- provide the number of the section, subsection and clause of the exception to disclosure in FIPPA that is being relied on; and
  - explain the reasons for the refusal – why the exception to disclosure relied on applies to the withheld information.
- (iv) of the title and business number of an officer or **employee** of the **public body** who can answer the **applicant's** questions about the refusal [paragraph 12(1)(c)(iii)]; and
  - (v) that the **applicant** may make a **complaint** to the Ombudsman about the refusal [paragraph 12(1)(c)(iv)]. In keeping with the requirement to assist an **applicant** under section 9 of FIPPA, the response should indicate that **complaints** must be filed in the form prescribed in the *Access and Privacy Regulation* within 60 days after the **applicant** is notified of the decision to refuse access [subsection 60(2)].

## ACCESS TO RECORDS

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

A requested **record** may never have existed, may have been destroyed under a Records Schedule under *The Archives and Recordkeeping Act*,<sup>62</sup> or may be lost.

The written response must inform the **applicant**:

- (i) that access is refused as the **record** does not exist or cannot be located [paragraph 12(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 schedule, the disposal date and the Records Schedule number.

- (ii) of the title and business telephone number of an officer or **employee** of the **public body** who can answer the **applicant's** questions about the refusal [paragraph 12(1)(c)(iii)]; and
- (iii) that the **applicant** may make a **complaint** to the **Ombudsman** about the refusal [paragraph 12(1)(c)(iv)].

In keeping with the requirement to assist an **applicant** under section 9, the response should indicate that **complaints** must be filed in the form prescribed in the *Access and Privacy Regulation* within 60 days after the **applicant** is notified of the decision to refuse access [subsection 60(2)].

Sample response letters to access **applicants** can be found in the *Model Response Letters and Notices*, on the FIPPA website at:

[http://www.gov.mb.ca/chc/fippa/public\\_bodies/resources/model\\_letters\\_index.html](http://www.gov.mb.ca/chc/fippa/public_bodies/resources/model_letters_index.html)

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)*<sup>63</sup>.

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<sup>62</sup> *The Archives and Recordkeeping Act*, C.C.S.M. c. A132, can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/a132e.php>.

<sup>63</sup> This Practice Note can be found on the Ombudsman's website at: [http://www.ombudsman.mb.ca/documents\\_and\\_files/practice-notes.html](http://www.ombudsman.mb.ca/documents_and_files/practice-notes.html).

## 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 access **applicant** the **head** may also refuse to confirm or deny the existence of a **record**

- containing information described in section 24 (Disclosure harmful to individual or public safety) [clause 12(2)(a)];
- containing information described in section 25 (Disclosure harmful to **law enforcement** or legal proceedings) [clause 12(2)(a)]; or
- 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)].

## ACCESS TO RECORDS

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**Example:**

An **applicant** requests access to **records** held by the Public Prosecutions Division of Manitoba Justice concerning a suspected police investigation into his or her 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 he or she is under surveillance, would change his or her behaviour.

Clause 12(2)(a) permits a response to the effect 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.

A **public body** that is considering relying on subsection 12(2) should consult with legal counsel about how to word the response to the access **applicant**.

## GIVING ACCESS - [SECTIONS 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 access **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 of 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 to be given.

#### 1. Where the applicant has asked to examine a record

The **applicant** has the right to examine the **record** unless information in the **record** falls within an exception to disclosure and the **record** must be severed to avoid disclosure of the excepted information [subsection 14(1)(b)]. The right of access does not extend to information that is excepted from disclosure under FIPPA [subsection 7(2)]. Where 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**.

## ACCESS TO RECORDS

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If the **applicant** will be permitted to examine the **record**, the Access and Privacy Officer must, in the response to the **applicant**, inform the **applicant** where and when the **record** can be viewed [clause 12(1)(b)]. The Access and Privacy Officer 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**. 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** by sending a memo that identifies the files to be examined, including their Archives storage location.

### 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 records, very large records, etc.

### 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 section 18 of FIPPA, that protect certain **third party** business interests, apply to the information; and
- 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 of the **record** where it contains information excepted from disclosure).

## ACCESS TO RECORDS

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

**Remember:**

Section 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 *Copyright Act* when using or distributing the **record**. The *Copyright Act* restricts activities such as copying and distributing copies of copyright protected materials.<sup>64</sup>

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<sup>64</sup> Also see Chapter 2, under *Relationship of FIPPA to other legislation - Acts that prevail over FIPPA*.

### ■ 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**. 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 section 9 of FIPPA.<sup>65</sup>

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)].

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<sup>65</sup> Subsection 7(2) of *The Personal Health Information Act* 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 his or her personal health information under that Act. *The Personal Health Information Act*, C.C.S.M. c. P33.5, can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/p033-5e.php>.

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

The definition of “**record**” in subsection 1(1) and the provisions of subsection 10(1) of FIPPA make it clear that **records** in electronic form are subject to FIPPA.

#### **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**.

If information requested by an access **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**; and
- (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 upon them.

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

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**Note:**

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

**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** [section 4 and subsection 7(1)].

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** is of the opinion that to create the **record** in the form requested would be simpler or less costly.

#### **Example:**

A **public body** maintains a database respecting vendors contracting with the **public body**. 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.

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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, section 6].<sup>66</sup>

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<sup>66</sup> A consolidated version of the *Access and Privacy Regulation*, Man. Reg. 64/98, as amended, can be found at: <http://web2.gov.mb.ca/laws/regs/pdf/f175-064.98.pdf>.

## FEES, FEE ESTIMATES AND FEE WAIVERS - [SECTION 82; REGULATION, SECTIONS 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** fees for making an application, and for search, preparation, copying and delivery services as provided for in the regulations.

#### Fee not to exceed actual cost

**82(6)** The search, preparation, copying and delivery 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 a person who makes an application for access under FIPPA to pay some of the costs incurred by the **public body** in responding to the application.

The *Access and Privacy Regulation*<sup>67</sup> provides for four types of fees:

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

Search, preparation, copying and delivery 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.

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<sup>67</sup> A consolidated version of the *Access and Privacy Regulation*, Man. Reg. 64/98, as amended, can be found at: <http://web2.gov.mb.ca/laws/regs/pdf/f175-064.98.pdf>.

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

Subsections 4(1) and 4(2) of the *Access and Privacy Regulation* provide for a fee of \$15.00 for each half hour of search and preparation time in excess of 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 Records Transfer Box Lists 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; and
- examining files to locate responsive (relevant) **records**;

#### *Preparation*

- copying the original **records** to create a working copy or copies;
- severing the **records** by obscuring the information excepted from disclosure [Regulation, subsection 4(3)]; and
- noting on the severed **records** the specific exceptions to disclosure that are being relied on.

Subsection 4(3) of the *Access and Privacy Regulation* provides 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 section 16 of FIPPA;
- preparing an estimate of fees;

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- reviewing any responsive (relevant) **record** to determine whether any of the exceptions to disclosure apply, prior to any severing of the **record**;
- copying a **record** supplied to the **applicant**; or
- preparing an explanation of a **record** under subsection 14(2) of FIPPA.

In addition, time spent consulting within the **public body**, with other **public bodies**, with **third parties** and with legal counsel are not "search and preparation" under the *Access and Privacy Regulation* and cannot be charged to the **applicant**.

### 2. **Computer programming and data processing fees - [Regulation, section 6]**

Section 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:

- \$10.00 for each fifteen minutes of internal computer programming or data processing; or
- 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, section 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.

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Subsection 5(2) of the Regulation provides that an **applicant** requesting copies of his or her own **personal information** is not required to pay a copying charge if the total copying fee is less than \$10.00. For example, if the **applicant** receives photocopies of his or her 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* provides 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, section 7]**

No fees can be charged for:

- making an application for access;
- using any file list, file plan or similar **record** used by a **public body** to identify, locate or describe records. But, the **applicant** may be charged a copying fee of 20 cents for each page, if he or she wants a copy of the file list, file plan or similar **record**; or
- regular mailing costs.

■ **Fee Estimates - [Subsections 82(2), (3) and (4); Regulation, Section 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.

A **public body** must give an **applicant** an *Estimate of Costs* in Form 2 of Schedule A to the Access and Privacy Regulation<sup>68</sup> 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)].

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<sup>68</sup> A consolidated version of the *Access and Privacy Regulation* Man. Reg. 64/98, as amended, with the Estimate of Costs form, can be found at:  
<http://web2.gov.mb.ca/laws/regs/pdf/f175-064.98.pdf>.

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When estimating time and fees, the **public body**:

- must ensure that only activities for which a fee can be charged 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 on 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 *Model Response Letters and Forms*, on the FIPPA website at: [http://www.gov.mb.ca/chc/fippa/public\\_bodies/resources\\_public\\_bodies.html](http://www.gov.mb.ca/chc/fippa/public_bodies/resources_public_bodies.html).

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 in order 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, he or she 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 the **applicant** wishes to proceed with the application [subsection 82(4)].

If the **applicant** does not notify the **public body** that he or she wishes to proceed with or modify the application within 30 days from the date the Estimate of Costs is given, the **public body** may consider the application to have been abandoned [subsection 82(3)].

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**Remember:**

The fee estimate in the Estimate of Costs is binding on 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)*; and
- *Responding to a Complaint about a Fee Estimate under The Freedom of Information and Protection of Privacy Act (FIPPA)*<sup>69</sup>

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<sup>69</sup> These Practice Notes can be found on the Ombudsman's website at:  
[http://www.ombudsman.mb.ca/documents\\_and\\_files/practice-notes.html](http://www.ombudsman.mb.ca/documents_and_files/practice-notes.html) .

### ■ 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 on the **public body** [Regulation, subsection 8(3)]. Also, fees charged for search and preparation, copying and delivery 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 access **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, Section 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.

#### *Access and Privacy Regulation*

#### 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** shall 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 upon which the **head** may waive all or part of a fee are set out in subsection 9(1) of the Regulation.<sup>70</sup>

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 [Regulation, subsection 9(2)].

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<sup>70</sup> A consolidated version of the *Access and Privacy Regulation*, Man. Reg. 64/98, as amended, can be found at: <http://web2.gov.mb.ca/laws/regs/pdf/f175-064.98.pdf>.

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The **applicant** must request a waiver of fees. This request may be made either when the request for access is made to the **public body** or 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 his or her 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.<sup>71</sup>

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 [Regulation, clause 9(1)(a)]

Clause 9(1)(a) of the 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 his or her financial circumstances.<sup>72</sup>

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<sup>71</sup> See Alberta Information and Privacy Commissioner Order F2006-001: <http://www.oipc.ab.ca/downloads/documentloader.ashx?id=2149>.

<sup>72</sup> See Alberta Information and Privacy Commissioner Order 96-002: <http://www.oipc.ab.ca/downloads/documentloader.ashx?id=2021> and see Order 2000-011: <http://www.oipc.ab.ca/downloads/documentloader.ashx?id=1800>.

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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 the **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.<sup>73</sup>

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

Clause 9(1)(b) of the 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 documentation, and all other relevant circumstances in making his or her decision.

3. **Matter of public interest concerning public health or safety or the environment [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.

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<sup>73</sup> See Service Alberta's FOIPP Bulletin No. 2: *Fee Waivers*:  
<http://foip.alberta.ca/resources/publications/pdf/bulletin2.pdf>  
Also see Alberta Information and Privacy Commissioner Order 2007-016:  
<http://www.oipc.ab.ca/downloads/documentloader.ashx?id=2199>.

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“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.<sup>74</sup>

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 his or her plan for disseminating 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:

- whether there is a general interest in the matter;
- whether the **applicant** plans to publicly disseminate the information upon being given access; and
- whether a broad range of people will benefit from its release; etc.

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)*.<sup>75</sup>

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<sup>74</sup> The Concise Oxford Dictionary, 9th ed.

<sup>75</sup> This Practice Note can be found on the Ombudsman's website at:  
[http://www.ombudsman.mb.ca/documents\\_and\\_files/practice-notes.html](http://www.ombudsman.mb.ca/documents_and_files/practice-notes.html).

## THIRD PARTY NOTICE AND INTERVENTION - [SECTIONS 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 sections 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".<sup>76</sup>

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<sup>76</sup> *The Interpretation Act* of Manitoba, section 17 and the Schedule of Definitions. *The Interpretation Act*, C.C.S.M. c. 180, can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/i080e.php>. The term "third party" is also discussed in Chapter 2, under *Key Definitions*.

### ■ 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
- (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 section 17 (disclosure harmful to a **third party's** privacy) or section 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 section 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:**

The formal notice and intervention process in sections 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 sections 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 section 33 "as soon as practicable" within the original 30 day period for responding to the application for access under subsection 11(1), or within the extended time period for responding under subsection 15(1).<sup>77</sup> "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 section 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**; and
- (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.

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<sup>77</sup> 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*.

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

### 2. Content of the notice to the access applicant

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

- the **record** requested by the **applicant** may contain information the disclosure of which might invade the privacy or affect the interests of a **third party**;
- the **third party** is being given an opportunity to make representations about the disclosure; and
- 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 section 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 - [Section 34]

The **head** of the **public body** has 30 days after the **third party** notice was given to reach a decision on whether or not 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).

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.

The **head** must give written notice of his or her decision respecting access, with reasons, to both the **third party** and the **applicant** [subsection 34(2)].

### ■ Decision to Give Access

If, after considering the representations of the **third party**, 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** and the **applicant** must state that the **applicant** will be given access unless the **third party** makes a **complaint** to the **Ombudsman** within 21 days after the notice is given [subsection 34(4)].

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

If the **third party** does not complain to the **Ombudsman** within this 21 day period, the **applicant** will be given access to 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 is 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

## ACCESS TO RECORDS

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review by the Information and Privacy **Adjudicator** or appeal to court is completed.<sup>78</sup>

### ■ **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 access **applicant** must state that the **applicant** may make a **complaint** to the **Ombudsman** within 21 days after the notice is given [subsection 34(5)].

The **applicant** has 21 days from the date on which the notice of the **head's** decision is given to make a **complaint** to the **Ombudsman**.<sup>79</sup>

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<sup>78</sup> 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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