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**AVOIDING ACCESS PITFALLS:
ADVICE FROM
THE OMBUDSMAN**

**MANITOBA ACCESS & PRIVACY CONFERENCE
MAY 2008**

**ACCESS AND PRIVACY DIVISION
MANITOBA OMBUDSMAN**



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PRESENTATION OUTLINE

- Overview of the role and jurisdiction of the Ombudsman
- Avoiding pitfalls when:
 - communicating with applicants
 - searching for records
 - documenting access decisions
 - taking extensions
 - preparing fee estimates
 - applying exceptions
 - severing
 - preparing complete responses
- Resources available to help you

ROLE OF MANITOBA OMBUDSMAN



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MANITOBA OMBUDSMAN

Manitoba Ombudsman is an independent office of the Legislative Assembly established in 1970 to support and promote principles of fairness, equity and accountability

The Ombudsman has broad powers of investigation, the ability to recommend corrective action and to report publicly



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OVERSIGHT RESPONSIBILITIES

The Ombudsman has oversight responsibilities under three Acts:

The Ombudsman Act (1970) concerning administrative acts, decisions or omissions by any department or agency of the provincial government or a municipal government

The Personal Health Information Act (1997) concerning access to one's own personal health information and privacy of that information held by trustees

The Freedom of Information and Protection of Privacy Act (1998) concerning access to general or personal information and privacy of personal information held by public bodies



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ROLE OF THE OMBUDSMAN UNDER FIPPA AND PHIA

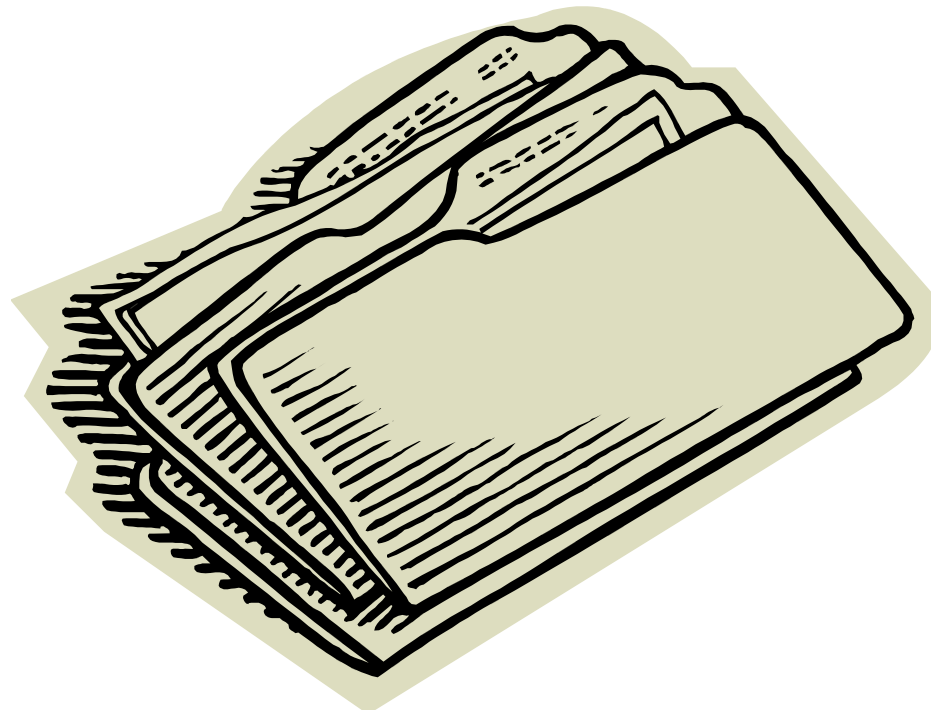
- Investigation of access and privacy complaints received from the public or initiated by the Ombudsman (under Part 5 of the Acts)
- Other powers and duties (under Part 4 of the Acts)



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ACCESS MATTERS





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ACCESS UNDER FIPPA AND PHIA

FIPPA and PHIA provide a framework for access:

- **Part 2** of FIPPA and PHIA sets out requirements for applicants making access requests and public bodies/trustees in responding to these requests
- Access and Privacy Regulation under FIPPA



TYPES OF ACCESS COMPLAINTS

A person who has requested access to a record under Part 2 of FIPPA or PHIA may make a complaint to the Ombudsman about **any**:

- decision
- act
- failure to act

that relates to the request.

(FIPPA s. 59; PHIA s. 39)



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COMMUNICATING WITH APPLICANTS

Communication with an applicant can be helpful at various stages of processing access requests:

- to clarify the request
- to explain the process to the applicant
- to respond to an applicant's questions about an access decision
- to assist the applicant and to respond without delay, openly, accurately and completely, in keeping with duty to assist an applicant (FIPPA s. 9; PHIA s. 6(2))



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SEARCHING FOR RECORDS

Reasonable searches must be conducted for all responsive records based on:

- clear understanding of the records the applicant is seeking
- good internal communication about these records with employees conducting the searches
- records management systems to identify responsive records and the locations to search
- thorough search of all locations where records would be located



DOCUMENTING ACCESS DECISIONS

Thorough documentation during the decision-making process is critical to keeping track of how, why and by whom a decision was made because of these factors:

- processing the request occurs over a period of time
- receiving input from other employees or decision-makers
- preparing the response letter explaining the decision
- responding to questions from applicants
- responding to the Ombudsman's office about a complaint
- preparing evidence for a court appeal of a refusal of access



TAKING EXTENSIONS

A public body may extend the 30 day time limit for responding for up to an additional 30 days if:

- it is for a purpose authorized under section 15 of FIPPA
- it is for an amount of time that was reasonable based on the circumstances
- notice of extension is provided to the applicant



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REQUIREMENTS OF FIPPA FOR SEARCH AND PREPARATION FEE

When? Whenever the public body determines that search and preparation related to the application will take more than two hours

How? On the prescribed Estimate of Costs form in Schedule A, Form 2 of the FIPPA Regulation

How much? \$15.00 for each half-hour in excess of two hours

For what? Section 4 of the Access and Privacy Regulation states that a fee estimate cannot include time spent on the following activities:

- transferring an application to another public body
- preparing a fee estimate
- reviewing the responsive records to determine whether any exceptions to disclosure apply, prior to any severing of the records
- copying records supplied to the applicant
- preparing an explanation of the records to the applicant



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APPLYING EXCEPTIONS

If, after all responsive records have been compiled and reviewed, it appears exceptions may apply to withhold access, these are some considerations to avoid pitfalls:

- the information must fit clearly within the wording of the exception
- exceptions apply to **information** in the record, which may be some or all of the information in a particular record
- exceptions fall into categories of mandatory or discretionary and
 - if a discretionary exception applies, there is an exercise of discretion to decide whether to give access to the information despite the exception applying
 - there are usually limits to both mandatory and discretionary exceptions (exceptions to the exception) to consider

SEVERING

- Where part of the information in a record is subject to an exception to disclosure, the Acts require that if that information can be **reasonably** severed from the record, an applicant has the right of access to the remainder of the record
- Intent is to release as much information in a record as possible without revealing the information that is subject to an exception

(FIPPA s. 7(2); PHIA s. 11(2))



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DETERMINING WHETHER SEVERING IS REASONABLE

Severing may be unreasonable if:

- the remaining information is meaningless
- it results in providing an applicant with an incomprehensible record consisting of unconnected words or phrases

The Court of Queen's Bench, in an appeal under FIPPA, provided a decision that demonstrated an opinion on severing in *Kattenburg v. The Minister of Industry, Trade and Tourism* (Suit No. CI 98-01-08704)



PREPARING COMPLETE RESPONSES

Section 12 of FIPPA sets out the required contents of a public body's written response to an applicant

Manitoba Ombudsman's evaluation of the contents of response letters where access was refused indicated that 44 (16%) of 268 response letters were fully compliant with section 12

Providing the specific provision and reasons for the refusal of access is particularly problematic

Our process for non-compliant response letters

RESOURCES

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MANITOBA OMBUDSMAN

Ombudsman web site: www.ombudsman.mb.ca

Resources: www.ombudsman.mb.ca/resources.htm
(Practice Notes on various access and privacy issues)

Brown Bag Talks: www.ombudsman.mb.ca/presentations.htm

FAQs-FIPPA: www.ombudsman.mb.ca/fippa-faq.htm

FAQs-PHIA: www.ombudsman.mb.ca/phia-faq.htm



FIPPA RESOURCES

Manitoba Culture, Heritage, Tourism and Sport

FIPPA web site: www.gov.mb.ca/chc/fippa

FIPPA Resource Manual and Guide:

www.gov.mb.ca/chc/fippa/manuals/index.html

Sample letters for dealing with access requests:

www.gov.mb.ca/chc/fippa/formsletters/sampleindex.html

Copy of FIPPA: www.gov.mb.ca/chc/statpub/



PHIA RESOURCES

Manitoba Health

PHIA web site: www.gov.mb.ca/health/phia/index.html

Questions and Answers about PHIA:
www.gov.mb.ca/health/phia/faq.html

PHIA Brief Summaries and Guides:
www.gov.mb.ca/health/phia/brief.html

Copy of PHIA: www.gov.mb.ca/chc/statpub/



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QUESTIONS

