Freedom of Information and Protection of Privacy Act Audit Report

Timeliness of Access to Information Responses

Manitoba Finance, Executive Council, Civil Service Commission, Crown Services

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Manitoba Ombudsman

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Available in alternate formats upon request

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Executive Summary

Access to information laws support the fundamental principles of openness, accountability and transparency. In Manitoba, the right of access to information is provided under the Freedom of Information and Protection of Privacy Act (FIPPA or the act), which gives the public the right to request records from government and other public bodies.

The Supreme Court of Canada has recognized the importance of access to information in a democratic society[1]:

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.

Government and other public bodies provide important public services and make decisions that affect the lives of Manitobans. The right of access to information enables citizens to understand and scrutinize decisions of public institutions. The access process serves to enhance transparency and accountability of government and other public bodies.

To enable citizens to meaningfully exercise this right of access, FIPPA requires public bodies to respond to access requests in a timely manner and the act sets out a time limit of 30 days, which may be extended in certain circumstances. Additionally, under FIPPA public bodies have a duty to assist applicants throughout the FIPPA process. Public bodies must make every reasonable effort to clarify requests, search for records and respond without delay to each applicant in an open, accurate and complete manner.

This report sets out the findings and conclusions of an audit conducted of FIPPA responses by four public bodies: Manitoba Finance (FIN), Executive Council (EC), Civil Service Commission (CSC) and Crown Services (CS). FIPPA services for these four public bodies are centralized and the department of Finance coordinates and responds to FIPPA requests on behalf of FIN, EC, CSC and CS.

The audit examined the following:

- The public bodies' compliance in meeting the legislated timelines under FIPPA when responding to requests.
- Whether the public bodies communicated with applicants further to receiving the requests, in keeping with the duty to assist applicants.

[1] *Dagg v. Canada (Minister of Finance)[1997] 2 S.c.r. 403*

Our office reviewed 120 FIPPA application files that were created by the public bodies to process access requests received during a six-month period from December 1, 2017, to May 31, 2018. Overall, we found that the public bodies complied with the time limit in 22 per cent of the files examined (where responses were issued within the 30-day time limit or within an extended time limit of 60 days).

The public bodies responded within the 30-day time limit in 25 of 120 files. In the remaining 95 files, 12 extensions were issued and one extension was met. Therefore, 94 out of 120 requests (78 per cent) did not comply with the time limits. The public bodies did not seek the ombudsman's approval for an extension longer than 60 days.

With respect to the duty to assist, we found that the public bodies communicated with applicants (where documented) in 14 per cent of the FIPPA requests. The public bodies did not send an acknowledgement letter or other types of communication to applicants to confirm the receipt of any of the 120 FIPPA applications reviewed. In most cases, applicants did not receive any contact further to submitting their FIPPA request, until a response letter was sent to them, which on average occurred 72 days after their request was received by the public bodies.

When reviewing the FIPPA application files maintained by the public bodies, we also found that there was not enough documentation about the processing of a request to identify where delays may be occurring in responding to requests. For example, the files did not consistently contain documentation about when responsive records were sought from program areas, when they were received or reviewed, when the response letter was prepared for approval, or when it was approved. There was limited documentation found regarding the processing of the FIPPA requests.

Additionally, the FIPPA file contents (documentation about the processing of a FIPPA request) was stored in various locations (SharePoint, shared network drive, emails, and charts). The lack of documentation regarding the processing of a FIPPA request combined with documentation spread among various locations impacts the efficiency of the FIPPA process, which may contribute to the delays in responding to FIPPA requests.

We made five recommendations that we believe will improve the public bodies' compliance with their obligations for responding to access requests under FIPPA[2]. Implementation of the recommendations will improve compliance with the legislative obligations and assist in improving response times and communication with applicants. In light of these recommendations, FIN, EC, CSC and CS will be subject to a follow-up audit in 2021/22.

[2] Summary of recommendations on pages 23-24

1. Background

1.1 Introduction

The audit was in response to a concern brought forward to our office regarding late Freedom of Information and Protection of Privacy Act (FIPPA) responses and lack of communication from Manitoba Finance (FIN), Executive Council (EC), Civil Service Commission (CSC) and Crown Services (CS). The complainant provided a sample of 16 FIPPA responses that were responded to beyond the 30-day time limit. The complainant also stated that he did not receive any correspondence regarding these FIPPA requests, such as letters to acknowledge receipt of the requests or letters extending the 30-day time limit for responding to the requests.

The complainant has a right of complaint under FIPPA about any decision, act or failure to act that relates to an access application. Given that the complainant had received responses, proceeding to investigate individual complaints would not provide any remedy with respect to those requests. Additionally, investigation of individual complaints would not address any reoccurring patterns of delay or failures to take extensions or to meet the duty to assist, which may be affecting the rights of other applicants.

Based on our assessment of the evidence provided by the complainant and consideration of approaches that our office can take under FIPPA, it was determined an audit under Part 4 would effectively assess timeliness and identify the issues that have resulted in delays.

Our office notified the four public bodies that we would be conducting an audit in October 2018.

1.2 Overview of the Freedom of Information and Protection of Privacy Act Provisions Relevant to the Audit

Ombudsman's Duties

The ombudsman has broad powers and duties under FIPPA. In addition to the investigation of access to information and privacy complaints, the ombudsman may conduct audits and make recommendations to monitor and ensure compliance with FIPPA (section 49 of FIPPA)[3].

[3] See Appendix 1 for FIPPA provisions

Public Body’s Roles and Responsibilities Under the Freedom of Information and Protection of Privacy Act

Under FIPPA, each department of the provincial government is a separate public body. The minister who presides over the department is the head of that public body under FIPPA. The head is responsible for all of the public body’s decisions and actions taken about access requests and for the privacy protection of personal information.

The head may delegate any of their powers and duties to any person who is referred to as the access and privacy officer (section 81 of FIPPA and section 1 of the Access and Privacy Regulation under FIPPA). Delegations are generally made to senior level officials (for example, assistant deputy ministers, executive directors) in a department given that the officer will be making access and privacy decisions on behalf of the minister. A public body may have more than one access and privacy officer.

Each public body is required to have an access and privacy coordinator appointed to administer FIPPA (section 2 of the Access and Privacy Regulation under FIPPA). The access and privacy coordinator has an administrative responsibility for managing access requests under FIPPA. This also includes assisting all areas of the public body in complying with the privacy requirements of FIPPA for the protection of personal information.

A large public body that receives a high volume of FIPPA requests and/or maintains large amounts of personal information may have more than one dedicated full-time access and privacy coordinator. The access and privacy officer(s) in a public body work very closely with the access and privacy coordinator(s).

Duty to Assist

FIPPA imposes upon public bodies the duty to assist an applicant. This requires a public body to “make every reasonable effort to assist an applicant and to respond without delay, openly, accurately and completely” (section 9 of FIPPA).

As a best practice, the duty to assist would include making every reasonable effort to assist an applicant by communicating with them to confirm receipt of the request and, in some cases, to clarify the intended scope or the specific records sought in the request. Public bodies must respond in a timely manner as required by FIPPA. In the event of a delay in responding, public bodies should communicate the delay to an applicant and advise them of the status. Responses to applicants providing the access decision must be accurate, complete and based on an adequate search for records.

Time Requirements

The access to information process is time-sensitive and requires a public body to make every reasonable effort to respond in writing to an access application within 30 calendar days of receiving it unless the time limit for responding has been extended (section 11 of FIPPA). The public body's written response must inform the applicant whether access is granted or refused and include specific information about the access decision.

FIPPA enables a public body to extend the 30-day time limit for responding for up to an additional 30 days, in certain circumstances. This includes circumstances when a large number of records is requested or must be searched and responding within 30 days would interfere unreasonably with the operations of the public body, or when time is needed to consult with a third party or another public body before deciding whether to give access to a record (section 15 of FIPPA). If the public body has determined that responding to the request will require more than a total of 60 days, the public body may request approval from the ombudsman for a longer extension based on the same circumstances set out in section 15.

When a public body extends the time limit, it must notify the applicant of the extension in writing and indicate when the response can be expected.

A failure of a public body to respond to an applicant within the 30-day period or an extended period is considered to be a decision to refuse access.

2. The Purpose of the Audit

The purpose of this audit was to assess the four public bodies – Manitoba Finance (FIN), Executive Council (EC), Civil Service Commission (CSC) and Crown Services (CS) – for compliance with the mandatory time requirements for responding to FIPPA applications and whether the public bodies are upholding their duty to assist applicants.

The main objectives were to:

- Assess the public bodies' compliance in meeting the time limit under FIPPA.
- Identify where delays commonly occur during the processing of a FIPPA application.
- Identify factors that contribute to delays in responding to FIPPA applications.
- Identify gaps or challenges involved in managing access to information applications.
- Evaluate whether the public bodies are upholding their duty to assist applicants in relation to communicating with applicants during the FIPPA process.
- Make recommendations to strengthen the public bodies' practices and improve compliance with FIPPA.

3. The Audit Process

The audit process included:

- interviews with access and privacy coordinators
- onsite reviews of their FIPPA application files to gather and analyze data about the timeliness of processing access to information requests and the duty to assist
- a review of the FIPPA statistics prepared by the public bodies to determine whether our sample findings is representative of previous years

3.1 Interviews

We met with the access and privacy officer and access and privacy coordinators responsible for the four public bodies to discuss the scope of the audit and our audit process. Interviews were also conducted with the access and privacy coordinators to discuss the FIPPA process and some of the challenges they encounter when processing applications[4].

3.2 Review of FIPPA Application Files

An onsite review of FIPPA application files was conducted to gather and analyze data about the processing of access requests. We reviewed all FIPPA application files that were received by the public bodies during a six-month period from December 1, 2017, to May 31, 2018, which encompasses the requests made by the applicant who brought forward concerns to our office about systemic delays.

We gathered and analyzed information on timeliness and whether communication with applicants occurred between the dates of receipt of requests and when response letters were sent to applicants.

Further to gathering data from the FIPPA files, we assessed the following:

- percentage of requests responded to on time (compliant)
- whether the time limit for responding was extended when responses were made beyond 30 days
- average number of days to respond to a request
- the type of applicant in relation to response time
- whether communication had taken place with the applicant

[4] Appendix 2 Access and Privacy Coordinator Interview Questions

3.3 Analysis of FIPPA Statistics Prepared by the Public Bodies

We conducted a review of the FIPPA statistics prepared by the public bodies and submitted to Manitoba Sport, Culture and Heritage (SCH). The minister of SCH was responsible for the administration of FIPPA[5]. SCH, and specifically the Information and Privacy Policy Secretariat (IPPS)[6] of the department, is responsible for central administration and coordination of FIPPA. IPPS collects statistical information from departments, government agencies and local public bodies about the processing of requests for access.

At the end of each quarter, the access and privacy coordinator provides a quarterly report to IPPS. The quarterly report[7] is used to collect statistical information about activity under FIPPA for administrative purposes of the Manitoba government. The quarterly report is also used to provide information for the annual FIPPA report of the minister of SCH.

To assist us in drawing conclusions from our audit, we compared timeliness data between our audit findings to previously reported statistics. We reviewed both the FIPPA annual report statistics for the two most recent years available (2016 and 2017) as well as the quarterly reports compiled by the four public bodies for a two-year period (2017 and 2018).

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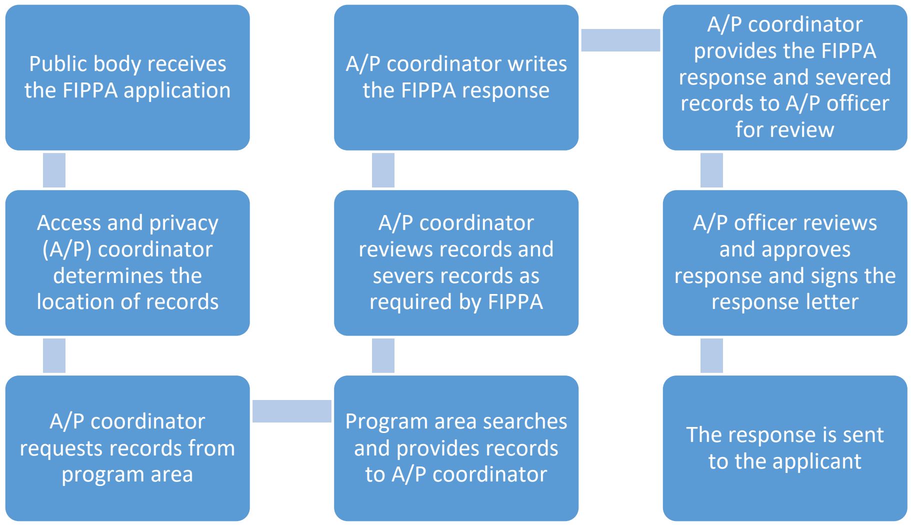
[5] As of November 2019, the minister of finance is responsible for the administration of FIPPA

[6] The Information and Privacy Policy Secretariat provides leadership and expertise in the Manitoba government on information accessibility, confidentiality and privacy policy issues, as well as support services to other public bodies under FIPPA.

[7] Manitoba FIPPA Resource Manual, chapter 9, page 4

4. The FIPPA Process

Many public bodies process their FIPPA applications in the following way:



4.1 Centralized FIPPA Services for FIN, EC, CSC and CS

Over time, the four public bodies have centralized the provision of their FIPPA services within the department of Finance. Currently, Finance's Corporate Policy Branch is responsible for processing FIPPA applications on behalf of FIN, EC, CSC and CS. The FIPPA team in the Corporate Policy Branch currently is as follows:

- one access and privacy officer (the assistant deputy minister of Manitoba Finance)
- two full-time access and privacy coordinators (one for EC and CS and the other for FIN and CSC)
- two part-time STEP students (the Manitoba government's "Student Temporary Employment Program" or STEP) – full-time during school breaks

4.2 General FIPPA Process for FIN, CSC and CS

We interviewed the access and privacy coordinators to learn about their FIPPA process.

The FIPPA process for FIN, EC, CSC and CS is very similar to the general process noted above with a few exceptions.

The application comes through email or mail and the STEP student logs receipt of the application. The STEP student then sends an email to the access and privacy coordinator to advise that a request has come in.

The search for records begins by notifying employees that would know where to locate the requested records. FIN, EC, CSC and CS each have specific FIPPA panels that are made up of employees that know where to locate the requested records and the nature and scope of the records held by the public body. The composition of the panel for each public body depends on the type of records requested. The panel is typically made up of a deputy minister, assistant deputy minister, executive director and employees familiar with the records requested. The role of the panel is to determine the location of the records, whether there may be any concerns related to the release of particular records and to aid in the decision-making process.

The coordinator determines the panel to send the access request to and the STEP student sends an email to the panel to notify them of the access request. The panel then contacts the area(s) of the public body to search for responsive records.

The panel sends the records to the coordinator, who provides them to the STEP student. The STEP student saves the records to the shared network drive.

The coordinator reviews the records and redacts information if required according to FIPPA. The coordinator may consult with legal counsel or third parties prior to drafting a response. A draft response is sent to the access and privacy officer for approval. Once the access and privacy officer approves the draft response, an email is sent to the panel for their information.

The panel will advise of any objections or suggestions, but otherwise their approval is not required. If no feedback (objections, suggestions, etc.) is received, then the access decision is sent out to the applicant. The STEP student saves the records and response to SharePoint and sends the response to the applicant.

4.3 FIPPA Process for Executive Council

Finance advised our office that due to the confidentiality of EC's records (for example, Treasury Board documents), processing a request including the review of records is limited to the access and privacy coordinators. As such, the STEP students have less involvement with processing FIPPA requests to EC than with the other public bodies.

A meeting occurs with the EC panel on a regular basis (including the access and privacy officer and coordinators) to discuss the FIPPA requests, outstanding issues and the approach that should be taken to address the requests.

5. Audit of FIPPA Files

A FIPPA file is created by a public body when each access request is received. The file is a repository of all relevant information about the processing of a FIPPA request. FIPPA files may be paper files, electronic files or a combination of both.

The four public bodies maintain documents related to FIPPA applications both electronically and in hard copy files. We gathered information from a variety of sources that included a SharePoint database, emails, charts, paper files and a shared network drive.

We reviewed 186 FIPPA files. However, of those 186 files, 66 files were either abandoned, withdrawn by the applicant, transferred to another public body, or still pending at the time of the audit. These 66 files were removed from our analysis because the processing of the requests had not been completed. 120 completed FIPPA application files were reviewed in this audit.

5.1 Timeliness of FIPPA Responses

On Time Responses

There are three criteria for determining compliance with the time limit for responding to requests under FIPPA:

1. When a response was made within the 30-day time limit.
2. When the public body took an extension of up to an additional 30 days under section 15 and met its extended time limit.
3. When a public body asked the ombudsman to authorize a longer extension and it met that extended time limit.

At the time of the audit, there were eight FIPPA requests pending. These requests were pending for an average of 303 days from the date they were received. We note that this is more than 270 days beyond the legislated time limit.

Based on the FIPPA files we reviewed, the public bodies, as a group, complied with the legislative time limit for responding to access requests in 26 (22 per cent) of the 120 FIPPA files. The overall average response time in the audited files was 72 days[8].

[8] This statistic was derived from the total days to respond of 8675 days divided by 120 files = an average of 72 days.

Audited Files Average Response Time by Department

Department	Number of audited files	Within 30 days	30 to 60 days	Over 60 days	Extensions taken	Extensions met	Average days to respond	Median days to respond
Finance	48	8	13	27	7	0	78	66
Executive Council	38	6	17	15	2	0	70	57
Civil Service Commission	14	8	2	4	2	1	65	28
Crown Services	20	3	4	13	1	0	73	68
Total Files	120	25	36	59	12	1	--	--

Percentage of On Time Responses Based on the Public Bodies' Reported Statistics and Audited Files

We compared our audit findings of files between December 1, 2017, to May 31, 2018, with the public bodies' reported statistics from their 2017 and 2018 FIPPA quarterly reports to determine whether our findings were consistent with what has been previously reported by the public bodies. We applied the three criteria to determine whether the responses were on time.

Percentage of On-Time Responses under FIPPA

Department	2017	2018	Audited Files
Finance	52%	30%	22%
Executive Council	54%	16%	16%
Civil Service Commission	53%	29%	64%
Crown Services	70%	16%	15%

The public bodies on average complied with the legislated timelines 57 per cent of the time in 2017 and 23 per cent of the time in 2018. Between 2017 and 2018, the public bodies as a group experienced a significant decrease in complying with the legislated timelines. The results from the audited files were consistent with the reported statistics on timeliness with the exception of CSC which increased their timeliness to 64 per cent.

Extension of the 30-Day Time Limit for Responding

In our audit, we noted that 12 extensions were taken out of 120 FIPPA requests. Only one extension was met. All the extension letters were sent to applicants within the first 30 days of the public body receiving the FIPPA application as required by FIPPA (section 15). The public bodies did not request authorization from the ombudsman for a longer extension.

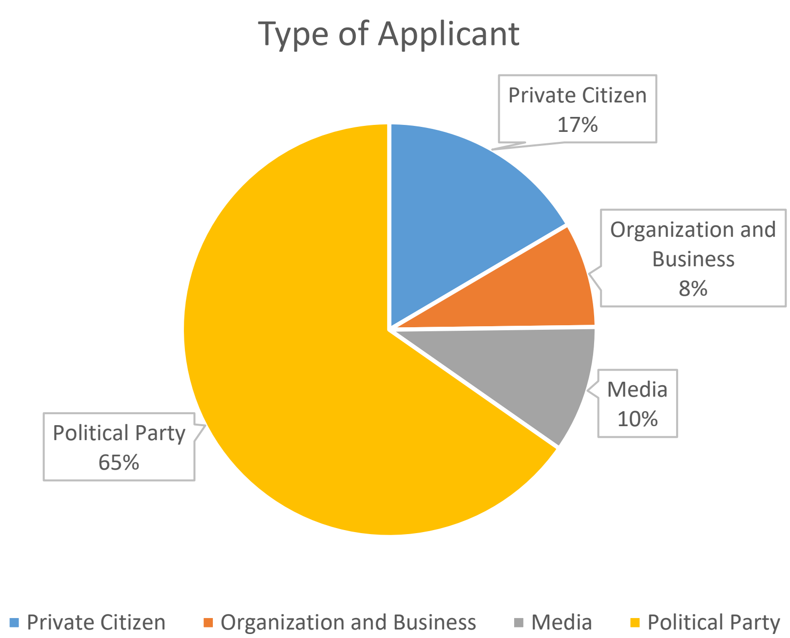
During our interviews, the access and privacy coordinators indicated that due to the volume of applications it was difficult to keep up with the extra step of taking an extension and sending an extension letter to the applicant.

The access and privacy coordinators also noted that in some cases they did not have a basis to extend the time limit under section 15 and as a result, they were late in responding simply due to volume of requests required to be processed.

Type of Applicant

The quarterly reports prepared by provincial departments about FIPPA requests track data about the type of applicant. This is reflected in four categories of applicants: private citizen, organization or business, media, or political party.

Accordingly, the type of applicant is identified in the FIPPA file concerning the request made by the applicant. Each of the 120 FIPPA files that we reviewed indicated the type of applicant. We assessed the timeliness of responses to requests made by each type of applicant.



What we found:

- Organization and business applicants were responded to in an average time of 46 days.
- Citizen applicants were responded to in an average response time of 49 days.
- Political party applicants were responded to in an average of 81 days.
- Media applicants were responded to in an average of 88 days.

During our review, we asked whether the applicant's name was revealed during the processing of FIPPA requests. The public body indicated that when notifying the panel, the type of applicant is revealed and not their name. However, in cases where the applicant is seeking records about themselves, the name of the applicant would be required to search for the requested records. The name of the applicant is considered personal information because it is about an identifiable individual.

The type of applicant in some circumstances can potentially identify an individual when there are a small number of individuals within the type category. Public bodies are obligated to limit the sharing of an applicant's personal information to only those who need to know the identity of the applicant in order to process the request or make an access decision[9]. Public bodies should exercise discretion based on the circumstances and not reveal the type of applicant if doing so may reveal the identity of the applicant and if the identity of the applicant is not necessary for processing the access request.

> **Recommendation 1**
> We recommended that the public bodies exercise their discretion and not reveal the type of applicant if doing so may reveal the identity of the applicant and if the identity of the applicant is not necessary for processing the access request.

FIPPA Team Workload

To be clear, the following observations are not a comment on the quality of work done by the FIPPA team, but rather the workload of that program area.

The FIPPA team consists of two access and privacy coordinators coordinating the FIPPA work for four public bodies. An accurate reflection of the FIPPA team's workload must also consider the amount of cases carried forward into each of those years. For example, the FIPPA annual report indicates that in 2017, the FIPPA team received 441 requests while also managing the 102 FIPPA files that were carried forward into 2017. This reflects an active caseload of 543 FIPPA files. That is a significantly high number of requests to process for two FIPPA access and privacy coordinators.

There are many factors to consider when trying to determine what the workload should be for an access and privacy coordinator. Factors that would influence this determination may include the amount of time access and privacy coordinators have allocated to FIPPA duties, the efficiency of the existing FIPPA process, the number of access and privacy officers, the resources assigned relative to the volume of requests received and so on.

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[9] Manitoba Ombudsman practice note: *Protecting the Identity of an Access Requester*
www.ombudsman.mb.ca/uploads/document/files/pn-bbt13-protecting-the-privacy-of-access-requesters-en.pdf

As provided in the 2017 FIPPA Annual Report[10] (the most recent report available during the period covered by the audit), the following chart outlines the active caseload for the year (the number of FIPPA requests received and the number of FIPPA requests carried into that year) by the top three departments.

2017 Active Caseloads by Department

Department	2017 Active Caseload
Finance, Executive Council, Civil Service Commission, Crown Services	543
Health, Seniors and Active Living	277
Families	238

Comparing this active workload with other departments, the FIPPA team is ranked as having the highest workload. Manitoba Health, Seniors and Active Living is ranked second and Manitoba Families is third in the Manitoba government (each of those departments has one access and privacy coordinator).

When reviewing the access and privacy coordinator's workloads on a monthly basis, this means that each coordinator is responsible for completing approximately 23 FIPPA applications per month within 20 working days. The amount of time an access and privacy coordinator spends to complete a FIPPA request will depend on the level of complexity of the request, the amount of records requested and whether severing is required.

The two access and privacy coordinators have been delegated authority under FIPPA to act as access and privacy officers. This allows the coordinators to have signing authority under the act, allowing each of them to approve a FIPPA response on their own. However, as the coordinators were new to the role, they required the direction and approval from the assistant deputy minister (ADM), who is also an access and privacy officer. The role of the ADM consists of many responsibilities in addition to approving an active workload of 543 FIPPA requests. In the past, the FIPPA team had a director position that also had delegated authority under FIPPA. Since then, the director position is no longer available leaving only one person available (ADM) to approve FIPPA responses.

We reviewed the delegations of authority for the provincial departments and found that all departments (with the exception of FIN, EC, CSC and CS) had more than one access and privacy officer per department. For example, Health, Seniors and Active Living has seven access and privacy officers, Justice has 12 access and privacy officers and Families has 13 access and privacy officers. Families also identified access and privacy alternates (ex. executive director) that can act as an access and privacy officer when the main access and privacy officer (typically an ADM) is unavailable.

[10] FIPPA Annual Reports reflect data based on calendar year.

Recommendation 2
In order to comply with legislated time limits, we recommended that the public bodies assess their FIPPA processes and the FIPPA team's resource needs, including increasing the number of access and privacy officers.

Challenges

The FIPPA team faced a number of challenges that affected their ability to respond to FIPPA applications on behalf of the four public bodies in a timely manner. Finance informed us that a number of factors contributed to the delays, including:

- volume of requests in relation to staffing
- concurrent requests submitted by applicants
- complexity of the requests
- staff turnover

It is important to note that during the audited time period (December 1, 2017 to May 31, 2018) there was a different structure and challenges faced by the FIPPA team. For example, there was no coordinator in December 2017, the two current coordinators were hired in 2018, an analyst was hired in 2018 for a four-month term to assist the FIPPA team and in 2017 the access and privacy officer left the department. Additionally, prior to the audited period, there were staffing losses that resulted in a significant backlog.

The FIPPA team discussed the challenges of receiving concurrent requests from applicants. Specifically, when a number of FIPPA requests come in at one time, it slows down the processing of the FIPPA responses already in process. This has a significant impact on their ability to meet the legislated timelines. To compound matters, when an applicant submits a complaint to our office, this impacts the resources available to process FIPPA applications as time is required to respond to our office about complaints. Our office recognizes that the timely processing of a FIPPA request for a public body can be challenging as FIPPA workloads are largely unpredictable. Spikes in volume can occur and requests that appear straightforward may actually be complex involving voluminous records. Further time is spent by exercising discretion when applying exceptions to disclosure and severing documents. All of this may be compounded by staffing changes and shortages, which ultimately can result in delays in responding to FIPPA applicants.

Despite the challenges in processing access requests, public bodies are still required to comply with the time limit set out in FIPPA.

5.2 Duty to Assist Applicants

Public bodies have a duty to assist applicants. This includes making every reasonable effort to assist an applicant and responding to an applicant without delay, openly, accurately and completely. For example, the duty to assist may include such actions as clarifying a request or narrowing its scope, identifying where information may be publicly available, diligently conducting a search for records and responding to a FIPPA application in a timely manner.

A core component of a public body's duty to assist also includes communication with the applicant during the FIPPA process. Additionally, the applicant should have the ability to contact the access and privacy coordinator if they have any questions.

Our review examined whether communication had taken place with the applicant from the time the application was submitted until the FIPPA response was issued. Out of 120 FIPPA files reviewed, communication was documented in 17 files or 14 per cent of the time. This means that there was no communication with applicants for 103 of the 120 FIPPA requests, from the time the request was received to the time a FIPPA response was sent, despite that the average response time was 72 days.

The IPPS website[11] includes a section that explains to the public where to send their FIPPA applications. All government departments with the exception of FIN, EC, CSC and CS list their address and a contact phone number. FIN, EC, CSC and CS have an email and mailing address noted as their contact information for FIPPA requests. As applicants are not provided with a telephone number to make inquiries concerning their requests, including the status of their requests, this may limit a citizen's ability to contact FIPPA personnel.

To compound matters, the four public bodies do not send acknowledgement letters, or contact applicants by email or telephone to confirm the receipt of the request. We believe this is an important step to inform the applicant that their application has been received by the office. The FIPPA request number, assigned by the public body for tracking purposes, is generally provided to an applicant at this stage, which can assist in facilitating communication about the specific request. An acknowledgement letter would also indicate how applicants can contact the public body if they have any questions about a specific application.

The four public bodies noted that they receive the majority of their FIPPA applications by email. We observe that such requests could be acknowledged by replying to the email and providing the FIPPA request number assigned by the public body as well as how the applicant can contact the public body about the request.

[11] Where to send your application https://www.gov.mb.ca/fippa/wheretosend/index.html

A sample FIPPA acknowledgement letter is provided by IPPS[12] for public bodies to use. The contents of the sample letter include the FIPPA file number, confirmation of the date the application was received, a description of the records requested, that a response will be forthcoming within 30 days unless there is an extension, and a name and phone number for the access and privacy coordinator if the applicant has any questions.

Including this information in an acknowledgement email, letter or phone call, demonstrates an open process, provides the applicant with clear expectations and enables the public body to easily identify the FIPPA application file if contacted by an applicant.

Recommendation 3
We recommended that the public bodies acknowledge the receipt of a FIPPA application (ex: email, mail or phone call) and provide the applicant with a FIPPA reference number and a point of contact for applicants should they have any questions.

5.3 Documentation in FIPPA Files

The head of a public body is accountable for decisions and actions taken in relation to access requests made under FIPPA. A well-documented FIPPA file supports decision making and accountability under FIPPA. Maintaining good documentation in FIPPA files is essential in order to keep track of the status of processing the request and the steps taken and decisions made about the request. This enables a public body to efficiently process a FIPPA request.

The processing of an access request occurs over the course of up to 30 days (or 60 days if an extension is taken), often incrementally, in the midst of doing other work. During the process, other employees, third parties or other public bodies may be consulted. Documentation specific to the request also enables a public body to accurately recall the details of how, why and by whom decisions were made. Documenting this contact and the determinations made at the time can help to keep track of the decisions and assist in explaining the basis for decisions later.

During our review, we attempted to identify areas in the FIPPA process where there were delays. Specifically, we attempted to assess the amount of time taken to reach the following key stages in the processing of FIPPA applications:

- collection of records responsive to the request
- preparing a copy of records to release/redacting records
- preparing the FIPPA response to the applicant for approval
- approval of the response

We reviewed the documentation available; however, there was not enough documented evidence to accurately identify where the delays were occurring.

[12] https://www.gov.mb.ca/fippa/public_bodies/resources/preliminary_matters.html

In our review of the four public bodies' FIPPA files, we found that there was no central location for information related to the processing of FIPPA requests. The information was spread over a variety of sources including the SharePoint database, the paper file, the electronic file in the shared network drive, as well as spreadsheets used to report FIPPA statistics to the Information Privacy Policy Secretariat.

The public bodies used SharePoint software to manage information related to their FIPPA requests. It was noted by the access and privacy coordinators that the software posed some challenges such as taking a fair amount of time to load and was difficult to navigate.

We also found that the decision-making process was not documented in most cases. The public bodies advised that an issues management meeting occurs regularly where FIPPA matters (for example, scope of the request and the search for records) are discussed with the panel. However, the decisions made during those meetings and actions to be taken are not documented.

With a standardized approach and centralized documentation, the FIPPA file can become a comprehensive source for public bodies to respond to applicant inquiries, ombudsman investigations, appeals to court, reviews by the information and privacy adjudicator and to enhance corporate memory. Although documentation throughout the FIPPA process takes time, in our view it is a necessary investment in decisions that are thorough, accountable and transparent. To assist in documenting access decisions, we have included our practice note, *Documentation about Processing Access Requests under the Freedom of Information and Protection of Privacy Act* (Appendix 3).

> **Recommendation 4**
> We recommended that the public bodies create and maintain documentation in a standardized format about the processing of FIPPA requests (access request communications with the applicant, access decisions, records) in a centralized location.

5.4 Proactive Disclosure

Proactive disclosure is the release of information prior to it being requested. Proactive disclosure fosters an environment where information is released routinely with the exception of information that the government is required to protect. The intent of proactive disclosure is to release information that is frequently requested and thereby reducing the reliance on making FIPPA requests for obtaining access to information.

The Manitoba government releases information proactively on its website[13]. Every department (public body) differs in the type of information they hold and what information is frequently

[13] https://www.manitoba.ca/openmb/infomb/index.html

requested. Each department determines what type information to release proactively by evaluating what information is frequently requested and if there is value in its release.

The public bodies should review what requests are common and consider reporting this information to the public proactively.

Recommendation 5

We recommended that the public bodies assess routinely requested records and consider releasing them through proactive disclosures.

6. Response to the Recommendations and Comments

The audit identified the following issues:

- The public bodies responded to applicants within the 30-day time limit in 21 per cent of the audited FIPPA files (25 out of 120 files).
- 79 per cent of the audited files (95 of 120 files) required extensions of the 30-day time limit to be taken; however, applicants were notified of 12 extensions of the time limit and one extension was met.
- Overall, 22 per cent of the audited files complied with legislative time requirements (25 requests were responded to within the 30-day time limit and one request was responded to within the extended time limit).
- The average time taken to respond to applicants was 72 days.
- Communication with applicants, from receipt of the request to the time a response was sent, took place in 14 per cent of the audited files (17 out of 120 files).
- There was insufficient documentation in the FIPPA files about the processing of the requests to be able to identify where delays were occurring.
- FIPPA file documentation that existed was stored in various locations and not in a centralized FIPPA file that would facilitate efficient processing of requests.

Based on the above, the ombudsman made five recommendations to improve the public bodies' compliance with their obligations for responding to access requests and their duty to assist applicants under FIPPA.

Public Bodies' Responses to the Recommendations

The public bodies accepted the recommendations and their responses are included below.

Recommendation 1:
We recommended that the public bodies exercise their discretion and not reveal the type of applicant if doing so may reveal the identity of the applicant and if the identity of the applicant is not necessary for processing the access request.

> Public body response:
> The department will exercise discretion, to ensure the applicant can't be identified.

Recommendation 2:
In order to comply with legislated time limits, we recommended that the public bodies assess their FIPPA process and the FIPPA team's resource needs, including increasing the number of access and privacy officers.

Public body response:
The department of Finance is in the process of assessing the current processes associated with FIPPA requests towards implementing improvements to comply with legislated time limits.

Recommendation 3:
We recommended that the public bodies acknowledge the receipt of a FIPPA application (ex: email, mail or phone call) and provide the applicant with a FIPPA reference number and a point of contact for applicants should they have any questions.

Public body response:
All requests are now acknowledged.

Recommendation 4:
We recommended that the public bodies create and maintain documentation in a standardized format about the processing of FIPPA requests (access request communications with the applicant, access decisions, and records) in a centralized location.

Public body response:
The Government of Manitoba is reviewing the administration of FIPPA. The intent is to review current process and legislation with the aim at improving government's responsiveness in the face of increasing number and complexity of requests. As part of the review, the department is exploring options for electronic case management tools.

Recommendation 5:
We recommended that the public bodies assess routinely requests records and consider releasing them through proactive disclosure.

Public body response:
The Government has been working on just such an approach through our new Open Government portal: https://www.manitoba.ca/openmb/. The intent is to proactively disclose information that is frequently subject to access requests or the disclosure of which is otherwise in the public interest. Releasing records routinely in this way, without waiting for a formal access request, is a significant tool for implementing the principles underlying FIPPA and alleviate operational pressure of public bodies. Routine disclosure makes it easier for citizens to participate in the political process and builds public trust in government's commitment to openness and accountability.

We will continue to make improvements to our process and appreciate the feedback provided throughout the audit process.

Ombudsman's Comments

The objective of the recommendations is to improve compliance of the public bodies with the legislative obligations and to assist in improving response times and communication with access applicants. Implementation of the recommendations is intended to address systemic delays in responding to applicants, as a delay in access has the effect of being denied access.

We note that the response to recommendation 4 referenced an increase in the volume of requests. The government's FIPPA annual reports indicated that the four public bodies had not experienced significant increases in requests in 2016 (357 requests), 2017 (441 requests) and 2018 (359 requests). We were advised that in 2019, the numbers increased considerably (509 requests). As the department of Finance was given responsibility for additional programs in November 2019 that used to be under other public bodies, the department may also expect an increase in the volume of FIPPA request for records associated with those programs.

Finance has committed to assessing their current FIPPA process with the intent of implementing improvements to comply with legislated time limits for the four public bodies for which they have been delegated responsibilities under FIPPA. This is particularly important due to the potential for an increase FIPPA requests resulting from records of other program areas being transferred from other public bodies to Finance.

In light of the recommendations and the public body's commitments, our office will conduct a follow-up audit in 2021/22.

We gratefully acknowledge the cooperation and assistance provided by everyone who participated in the audit, especially the access and privacy coordinators.

Appendix 1: Relevant FIPPA Provisions

Delegation of Authority of the Public Bodies Roles and Responsibilities

1(1) “head”, in relation to a public body, means
(a) in the case of a department, the minister who presides over it,

Delegation by the head of a public body
81 The head of a public body may delegate to any person any duty or power of the head under this Act.

Access and Privacy Officer (Access and Privacy Regulation)

1 In this regulation,
"access and privacy officer" means any employee of a public body to whom the head has delegated a duty or power under section 81 of the Act;

Access and Privacy Coordinator (Access and Privacy Regulation)

Appointment of access and privacy coordinator
2 Every public body shall appoint an employee as an access and privacy coordinator who is responsible for receiving applications for access to records and for the day-to-day administration of the Act.

Duty to Assist

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.

Time Limit

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.

Extension of the Time Limit

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 reason for the extension;

(b) when a response can be expected; and

(c) that the applicant may make a complaint to the Ombudsman about the extension.

Authority to Conduct the Audit

General powers and duties

49 In addition to the Ombudsman's powers and duties under Part 5 respecting complaints, the Ombudsman may

(a) conduct investigations and audits and make recommendations to monitor and ensure compliance

(i) with this Act and the regulations

Appendix 2: Access and Privacy Coordinator Interview Questions

1. Do you work full time as an access and privacy coordinator? For which departments?

2. Do you have any other tasks that you are responsible for outside of FIPPA?

3. A request may come in via email and/or mail. Do you have many requests come in via mail?

4. Can you walk me through the application lifecycle for each department: Specifically?
   - Who by position title is involved in the processing of the request,
   - Do they have signing authority and
   - Describe the tasks completed at that level

5. Who reviews the records and decides if and which exceptions will apply?

6. What is the FIPPA approval process (how many approvals are required)? Do they differ between departments?

7. Does the interpretation/scope of a FIPPA request change during the approval levels? (ex: Director interprets it one way and DM interprets it another way resulting in having to work on the request over again).

8. How do you manage your FIPPA caseload during times of high volume?

9. Where do you find delays occurring in FIPPA the process? Are there areas in the organization that can be bottlenecks for processing FIPPA requests?

10. In your opinion, what works well in the processing of requests?

11. In your opinion, what does not work well?

12. What further resources do you think would be helpful to ensure timely responses to FIPPA applications?

13. Do you have any suggestions that would make the processing of FIPPA applications more efficient?

14. In your opinion, are there FIPPA requests that contain records that can be proactively disclosed by the department?

Appendix 3: Ombudsman Practice Note
DOCUMENTATION ABOUT PROCESSING ACCESS REQUESTS UNDER THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT (FIPPA)

Adequate documentation in a public body's FIPPA file about the processing of an access request is important for effectively managing the request, including addressing any issues that arise during or after the process.

Public bodies typically create a FIPPA file and assign an identification number to track the request from start to finish. The processing of an access request occurs over the course of 30 days (or 60 days if an extension is taken). This work is often done incrementally, in the midst of other work, and may involve various consultations and decision points.

Having a well-documented FIPPA file enables a public body to:

- Manage and track the status of all the activities involved in processing the request.
- Continue processing the request in the event of absences (vacation or illness, for example) by the access and privacy coordinator or other key staff.
- Support the internal decision-making process about the request, such as the search for responsive records, decisions about fees and fee waivers, the application of exceptions, the exercise of discretion, etc.
- Efficiently communicate the basis for its decisions externally:
    - to explain the basis for decisions to the applicant
    - provide information to explain and support its decisions when responding to complaints being investigated by Manitoba Ombudsman
    - prepare for a review by the information and privacy adjudicator, if requested by the ombudsman
    - prepare evidence for court if the applicant appeals a refusal of access decision

Thorough documentation of access decisions can also assist a public body in developing standard practices that can be useful for future decisions. For example, documented decisions can provide internal guidance on how the public body has interpreted provisions of FIPPA. This helps to promote consistency and efficiency when processing future access requests.

CHECKLIST FOR STANDARD CONTENTS OF A FIPPA FILE

This checklist can be used to ensure that FIPPA files contain all relevant documentation about the processing of a request.

- ❑ The access request and date the request was received.
- ❑ The public body's identification number for the access request.
- ❑ A tracking document, tracking actions taken and the date they occurred.
- ❑ Detailed records of any consultations – including the date, type of contact, and

substance of the consultation – with the applicant (including any clarification of the access request), employees of the public body, legal counsel, third parties or other public bodies.

- ❑ All correspondence (including attachments) that are sent or received relating to the request. This includes all letters, emails, fax cover sheets and transmission reports, and legal advice or opinions.
- ❑ When fees are applied, a record of how the fees were calculated including the activities for which a fee was charged, the time estimated for each chargeable activity, the basis for determining that the estimated time was reasonable in relation to the request, and the estimate of costs form.[14]
- ❑ When an extension of the time for responding is taken, the reasons why a specific provision under section 15 of FIPPA applies to the request and a copy of the extension letter.
- ❑ With respect to the search for responsive records:
  - ❑ copies of file lists or indexes, records schedules, and other documentation used to identify potential locations of responsive records
  - ❑ details about the search for responsive records, including instructions and decisions about search parameters and locations searched, as well as search results
  - ❑ when another employee or division is performing the search, the name, position and contact information of the individual(s) conducting the search
- ❑ The number of responsive records and/or the number of pages of each record. It may be helpful to create an index of records.
- ❑ When access is refused, a record of:
  - ❑ the reasons why each exception was applied
  - ❑ the consideration given to the applicability of any limits to the exception
  - ❑ for discretionary ("may") exceptions, the reasons why the public body chose not to release the information
  - ❑ who made the decisions (in the event that further explanation is required)
- ❑ A copy of the responsive records.
- ❑ If needed, a working copy of the record with any severing and applicable exceptions noted on the record. Working with digital copies cuts down on the number of paper copies required.
- ❑ A copy of the response letter to the applicant. If access is refused to any information in the records, maintain a copy of the record as released to the applicant with severing applied and exceptions noted.
- ❑ For any information (about processing the application and decisions made) that is not on the FIPPA file, the nature of the information and where the information can be located.

[14] See our practice note *Preparing fee estimates under FIPPA* accessible from our website at www.ombudsman.mb.ca.