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# INDEPENDENT REVIEW: COMPLAINTS

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## OVERVIEW

A fundamental right under FIPPA is the right to complain to the Manitoba **Ombudsman** about the decisions of **public bodies** about:

- requests for access to **records** under Part 2 of FIPPA; and
- the collection, use or disclosure of **personal information** under Part 3 of FIPPA.

The **complaint** process is set out in Part 5 of FIPPA (in sections 59 to 74).

The **complaint** process in FIPPA has been amended to include an additional level of independent review and **complaint** resolution. Where a **public body** has not acted on a recommendation made by the **Ombudsman** in an access or privacy **complaint**, the **Ombudsman** may refer the matter to the Information and Privacy **Adjudicator** for review, and the **Adjudicator** has the power to make an order against the **public body**. An application can be made to the Manitoba Court of Queen's Bench for judicial review of an order made by the **Adjudicator**.<sup>1</sup> How the **Adjudicator** is appointed is dealt with in Part 4.1 of FIPPA.

*The Personal Health Information Act* contains similar amendments to its complaint provisions about access to, and the collection, use and disclosure of, **personal health information** maintained by trustees.<sup>2</sup>

When the **head** of a **public body** refuses access to a **record** or a part of a **record**, or notifies a **third party** under section 34 of FIPPA of a decision to give access to information that would affect the **third party's** privacy or business interests, the affected person may appeal the **head's** decision to the Manitoba Court of Queen's Bench. But, the affected person can only appeal the **head's** decision about access to Court if:

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<sup>1</sup> These amendments to the FIPPA complaint process were made by *The Freedom of Information and Protection of Privacy Amendment Act*, S.M. 2008 c. 40. The amendments are in effect as of January 1, 2011. The amending Act can be found at: <http://web2.gov.mb.ca/laws/statutes/2008/c04008e.php>.

<sup>2</sup> Part 5 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>. The amendments can be found at: <http://web2.gov.mb.ca/laws/statutes/2008/c04108e.php>.

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- the person has first made a **complaint** to the **Ombudsman**;
- the **Ombudsman** has provided a report about the **complaint**; and
- the **Ombudsman** has not asked the Information and Privacy **Adjudicator** to review the **complaint**.<sup>3</sup>

Under *The Personal Health Information Act*, an individual has the right to appeal a refusal of access to his or her personal health information by a trustee to the Manitoba Court of Queen's Bench in similar circumstances.<sup>4</sup>

This Chapter deals with:

- the appointment and role of the Information and Privacy **Adjudicator**;
- complaints to the **Ombudsman** about access and privacy;
- reviews of access and privacy **complaints** by the Information and Privacy **Adjudicator** at the request of the **Ombudsman**; and
- appeals to court about access.

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<sup>3</sup> The right to appeal an access decision to court is dealt with in sections 67 to 74 of FIPPA, and is discussed later in this Chapter, under *Appeals to Court about Access*.

<sup>4</sup> The right to appeal a refusal of access to one's own personal health information under *The Personal Health Information Act* is dealt with in sections 49 to 56 of that Act.

## THE INFORMATION AND PRIVACY ADJUDICATOR [PART 4.1, SECTIONS 58.1 TO 58.8]

FIPPA and *The Personal Health Information Act* have been amended to give the **Ombudsman** a new power with respect to **complaints**: where a **public body** has not acted on a recommendation of the **Ombudsman** in an access or privacy **complaint**, the **Ombudsman** may refer the matter to the Information and Privacy **Adjudicator** for review.<sup>5</sup>

### ■ The Role of the Adjudicator - [Subsections 58.1(2) and 66.8(7), and Section 58.5]

The role of the Information and Privacy **Adjudicator** under FIPPA is very specific and focused. Where a **public body** has not acted on a recommendation of the **Ombudsman** in an access or privacy **complaint**, at the request of the **Ombudsman**, the **Adjudicator** must review a decision, act or failure to act of the **head** of the **public body** respecting access to information or privacy.<sup>6</sup> The **Adjudicator** has the power to make an order against a **public body** that has not acted on a recommendation of the **Ombudsman** respecting access or privacy.

The **Adjudicator** has a similar role and powers under *The Personal Health Information Act*.<sup>7</sup>

The **Adjudicator's** role is much narrower than the **Ombudsman's** role under FIPPA and *The Personal Health Information Act*. In addition to investigating and dealing with **complaints** about access and privacy, the **Ombudsman's** responsibilities include monitoring and promoting compliance with, and promoting public awareness of, FIPPA and *The Personal Health Information Act*. See Chapter 7 of this Manual for a discussion of the **Ombudsman's** powers and duties under FIPPA.

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<sup>5</sup> This new power was added to FIPPA 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>6</sup> Subsection 58.1(2) of FIPPA.

<sup>7</sup> These new powers were added to *The Personal Health Information Act* by *The Personal Health Information Amendment Act (2)*, S.M. 2008 c. 41. The amending Act can be found at: <http://web2.gov.mb.ca/laws/statutes/2008/c04108e.php>.

## INDEPENDENT REVIEW: COMPLAINTS

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The **Adjudicator** must make his or her orders under FIPPA available to the public – for example, by publishing them on a website.<sup>8</sup>

The **Adjudicator** must also make an annual report to the Legislative Assembly about the exercise of the **Adjudicator's** responsibilities under FIPPA.<sup>9</sup>

### ■ **Appointment of the Adjudicator - [Part 4.1, Sections 58.1, 58.2, 58.3 and 58.7]**

Manitoba's Information and Privacy **Adjudicator** is an **officer of the Legislative Assembly** who is appointed under FIPPA. As an **officer of the Legislative Assembly**, the **Adjudicator** is independent of the Government of Manitoba.<sup>10</sup>

The **Adjudicator** is appointed by the Lieutenant Governor in Council on the recommendation of the Standing Committee of the Assembly on Legislative Affairs – the same body that recommends the appointment of the **Ombudsman**.<sup>11</sup>

Like the **Ombudsman**, the **Adjudicator** can only be removed or suspended from office on a resolution of the Legislative Assembly by a vote of 2/3 of the members of the Legislative Assembly voting.<sup>12</sup> If the Legislative Assembly is not sitting, the Lieutenant Governor in Council may suspend the **Adjudicator** for "cause or incapacity", but the suspension cannot be for longer than 30 sitting days of the Legislative Assembly after the suspension came into effect. The Legislative Assembly must determine if the suspension is to continue or if the **Adjudicator** is to be removed from office.<sup>13</sup> In other words, like the **Ombudsman**, the **Adjudicator** cannot be removed from office by the Government of Manitoba acting on its own.

If the office of the **Adjudicator** is vacant, or if the **Adjudicator** has been suspended from office or is unable to act, the Lieutenant Governor in Council may appoint an acting **Adjudicator** to hold office until another **Adjudicator** is appointed.<sup>14</sup>

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<sup>8</sup> Subsection 66.8(7) of FIPPA. The Adjudicator has a similar duty to make orders made under *The Personal Health Information Act* available to the public (subsection 48.8(6)).

<sup>9</sup> Section 58.8 of FIPPA. The Adjudicator has a similar duty under *The Personal Health Information Act* (section 48.14).

<sup>10</sup> Subsection 58.1(1) of FIPPA.

<sup>11</sup> Subsection 58.1(1) of FIPPA.

<sup>12</sup> Subsection 58.2(1) of FIPPA.

<sup>13</sup> Subsection 58.2(2) of FIPPA.

<sup>14</sup> Subsection 58.2(3) of FIPPA.

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On the **Adjudicator's** recommendation, the Lieutenant Governor in Council may appoint a deputy adjudicator.<sup>15</sup>

*The Civil Service Act* of Manitoba applies to persons employed under the **Adjudicator**.<sup>16</sup>

The **Adjudicator**, the deputy adjudicator, and any person acting for them or under their direction, are protected from legal proceedings for "anything done, reported or said in good faith in the exercise or performance or intended exercise or performance of a duty or power" under FIPPA.<sup>17</sup> This means that, as long as the **Adjudicator** and his or her deputy and staff act honestly and with the intention of complying with FIPPA, no legal proceedings can be brought against them.<sup>18</sup>

### ■ **The Adjudicator is Not a Public Body under FIPPA - [Subsection 1(1) and Clause 4(e)]**

The office of the **Adjudicator** is not a **public body** as defined in subsection 1(1) of FIPPA, and the access to information and protection of **personal information** provisions of FIPPA do not apply to the **Adjudicator**, the deputy adjudicator or the **Adjudicator's** staff or office.<sup>19</sup>

In addition, as the **Adjudicator** is an **officer of the Legislative Assembly**, FIPPA does not apply to a **record** made by or for the **Adjudicator**.<sup>20</sup>

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<sup>15</sup> Subsection 58.3(1) of FIPPA.

<sup>16</sup> Subsection 58.3(2) of FIPPA.

<sup>17</sup> Section 58.7 of FIPPA.

<sup>18</sup> The Adjudicator and his or her deputy and staff have similar protection under *The Personal Health Information Act* (section 48.13).

<sup>19</sup> See the definitions "public body" and "officer of the Legislative Assembly" in subsection 1(1) of FIPPA. For a discussion of the bodies that fall and don't fall under FIPPA, see Chapter 2, under *Public Bodies That Fall Under FIPPA*.

<sup>20</sup> Clause 4(e) of FIPPA states that FIPPA does not apply to "a record made by or for an officer of the Legislative Assembly". For a discussion of records to which FIPPA does not apply, see Chapter 2, under *Records That Do Not Fall Under FIPPA*.

### ■ **Protection of Information Provided to the Adjudicator - [Sections 58.4, 58.5 and 58.6, Subsection 1(1) and Clause 4(e)]**

The **Adjudicator** must take every reasonable precaution to avoid disclosure of:

- any information that the **head** of a **public body** is authorized or required to refuse to disclose in response to a request for access to information under Part 2 of FIPPA;<sup>21</sup> and
- whether information exists, if the **head** of a **public body** is authorized under subsection 12(2) of FIPPA<sup>22</sup> to refuse to confirm or deny that the information exists when responding to a request for access to information under Part 2 of FIPPA.<sup>23</sup>

These precautions to avoid disclosure of information may include:

- receiving representations from one party in the absence of the other parties (that is, receiving representations *ex parte*);
- holding review hearings in private; and
- examining records in private.<sup>24</sup>

Also, a statement made or an answer given by a person during a review by the **Adjudicator** under FIPPA, and evidence of the existence of proceedings before the **Adjudicator**, cannot be introduced or admitted as evidence in court or in any other proceeding, except in the following situations:

- (i) in a prosecution in the criminal courts for perjury in respect of sworn testimony;
- (ii) in a prosecution in the criminal courts for an offence under FIPPA; or

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<sup>21</sup> Clause 58.4(a) of FIPPA.

<sup>22</sup> Subsection 12(2) of FIPPA is discussed in Chapter 4 under *Refusal to Confirm or Deny the Existence of a Record*, and in Chapter 5 as part of the discussion of the exceptions to disclosure in sections 17, 24 and 25 of FIPPA.

<sup>23</sup> Clause 58.4(b) of FIPPA.

<sup>24</sup> Section 58.4 of FIPPA.



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- (iii) in an application to the Manitoba Court of Queen's Bench for judicial review of an order of the **Adjudicator**, or in an appeal from a decision of the Court with respect to that application.<sup>25</sup>

Anything said, any information supplied and any **record** provided by a person during a review by the **Adjudicator** under FIPPA is privileged in the same manner as if it were said, supplied or produced in a proceeding in a court.<sup>26</sup>

As the **Adjudicator** is not a **public body** under FIPPA, the access to information provisions in Part 2 of FIPPA do not apply to the **Adjudicator**, the deputy adjudicator or the **Adjudicator's** staff. In addition, as the **Adjudicator** is an **officer of the Legislative Assembly**, the access to information provisions in FIPPA do not apply to a **record** made by or for the **Adjudicator**.<sup>27</sup>

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<sup>25</sup> Section 58.5 of FIPPA.

<sup>26</sup> Section 58.6 of FIPPA. If you have any questions about the legal privilege that attaches to information and records during a review by the Adjudicator, contact legal counsel.

<sup>27</sup> See the discussion earlier in this Chapter, under *The Adjudicator is not a public body under FIPPA*.

## COMPLAINTS TO THE OMBUDSMAN - [PART 5, SECTIONS 59 TO 66]

The right to an independent review of the decisions and actions of **public bodies** under FIPPA is fundamental to resolving **complaints** and ensuring freedom of information and protection of **personal information**. The right to complain to the Manitoba **Ombudsman** under sections 59 to 66 in Part 5 of FIPPA about the decisions of **public bodies** relating to access to **records** and about the collection, use and disclosure of **personal information** by **public bodies** helps ensure that the purposes of FIPPA, as set out in section 2, are achieved.

The **Ombudsman's** new power to request that the Information and Privacy **Adjudicator** review an access or privacy **complaint**, where a **public body** has not acted on the recommendations of the **Ombudsman**, adds another level of independent review and **complaint** resolution to FIPPA.<sup>28 29</sup>

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<sup>28</sup> This new power was added to FIPPA by *The Freedom of Information and Protection of Privacy Amendment Act*, S.M. 2008 c. 40. The amendments came into effect as of January 1, 2011. The amending Act can be found at: <http://web2.gov.mb.ca/laws/statutes/2008/c04008e.php>.

<sup>29</sup> Note: any complaint made to the Ombudsman before the first Information and Privacy Adjudicator was appointed under FIPPA must be dealt with under the former, un-amended provisions of FIPPA. In practical terms, this means that the Ombudsman cannot refer a complaint that was made before January 1, 2011 – the date the amendments to FIPPA came into effect – to the Adjudicator for review. See section 41 (Transitional) in *The Freedom of Information and Protection of Privacy Amendment Act*, S.M. 2008, c. 40, found at: <http://web2.gov.mb.ca/laws/statutes/2008/c04008e.php>.

### ■ Who May Complain to the Ombudsman under FIPPA - [Sections 59 and 79]

#### 1. Complaints about access to records

- (i) A person who has made a request to a **public body** for access to a **record** under Part 2 of FIPPA may complain to the **Ombudsman** about any decision, act or failure to act of the **head** of the **public body** that relates to the access request.<sup>30</sup>

This can include **complaints** about:

- a decision by the **head** of the **public body** to extend the time period for responding to a request for access to a **record** under subsection 15(1) of FIPPA;<sup>31</sup>
- a refusal to give access to all or part of a **record** on the grounds that information in it is excepted from disclosure under FIPPA;<sup>32</sup>
- a refusal to give access to a **record** on the grounds that the **record** does not exist or cannot be located;<sup>33</sup>
- a refusal to confirm or deny the existence of a **record** under subsection 12(2) of FIPPA;<sup>34</sup>
- the fees charged for access;<sup>35</sup>
- a failure to respond to a request for access;<sup>36</sup> etc.

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<sup>30</sup> Subsection 59(1) of FIPPA.

<sup>31</sup> Subsection 15(1) is discussed in Chapter 4, under *Time Limit for Responding to an Access Request* and *Extending the Time Limit for Responding*.

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

<sup>33</sup> Refusal of access because a record does not exist or cannot be located, and paragraphs 12(1)(c)(i) and (ii) of FIPPA, are discussed in Chapter 4, under *Response to an Access Applicant*.

<sup>34</sup> Subsection 12(2) of FIPPA is discussed in Chapter 4 under *Refusal to Confirm or Deny the Existence of a Record*, and in Chapter 5 as part of the discussion of the exceptions to disclosure in sections 17, 24 and 25 of FIPPA.

<sup>35</sup> Fees for access are discussed in Chapter 4 under *Fees, Fee Estimates and Fee Waivers*.

<sup>36</sup> A failure to respond to a request for access under Part 2 of FIPPA within the required time is treated as a decision by the head of the public body to refuse access (subsection 11(2) of FIPPA). This is discussed in Chapter 4 under *Time Limit for Responding to an Access Request*.

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- (ii) A **third party** who is 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 or business interests may complain to the **Ombudsman** about the decision to give access.<sup>37</sup>

### 2. Complaint about a refusal to correct a record

A person who has been given access to a **record** containing his or her **personal information** by a **public body** under Part 2 of FIPPA may complain to the **Ombudsman** about a refusal by the **head** of the **public body** to correct the **record** under section 39 of FIPPA.<sup>38</sup>

### 3. Complaints about collection, use or disclosure of personal information

- (i) An individual who believes that his or her own **personal information** has been collected, used or disclosed in violation of Part 3 of FIPPA may complain to the **Ombudsman**.<sup>39</sup>
- (ii) A relative of a deceased individual may complain to the **Ombudsman** about the decision of the **head** of a **public body** not to disclose **personal information** about the deceased individual under clause 44(1)(z) of FIPPA.<sup>40</sup>

### 4. Complaints initiated by the Ombudsman

The **Ombudsman** may make his or her own **complaint** about any matter if the **Ombudsman** is satisfied there are reasonable grounds to investigate the matter under FIPPA.<sup>41</sup>

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<sup>37</sup> Sections 33 and 34 are discussed in Chapter 4, under *Third Party Notice and Intervention*.

<sup>38</sup> Subsection 59(1) of FIPPA. Section 39 is discussed in Chapter 6, under *Requests to Correct Personal Information*.

<sup>39</sup> Subsection 59(3) of FIPPA. Part 3 of FIPPA – Protection of Privacy – is discussed in Chapter 6 of this Manual.

<sup>40</sup> Subsection 59(4) of FIPPA. Clause 44(1)(z) of FIPPA is discussed in Chapter 6, under *Authorized Disclosure of Personal Information – Disclosure to a relative of a deceased person*.

<sup>41</sup> Subsection 59(5) of FIPPA.

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The definition of "**complaint**" in subsection 1(1) of FIPPA makes it clear that, wherever the term "**complaint**" is used in FIPPA, it includes a **complaint** initiated by the **Ombudsman**.<sup>42</sup>

### 5. Complaints on behalf of another

Where a person has a right to complain under FIPPA, the **complaint** may be made by another person who is authorized to act on his or her behalf under section 79 of FIPPA.<sup>43</sup>

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<sup>42</sup> The definition of "complaint" was added to FIPPA 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>43</sup> Section 79 is discussed in Chapter 3, under *Exercising Rights on Behalf of Another*.

### ■ How and When a Complaint May Be Made - [Section 60 and Subsection 34(5)]

#### 1. A complaint must be in the prescribed form [section 60]

A complaint to the **Ombudsman** must be made in the form prescribed by the *Access and Privacy Regulation*. That is, a complainant must use Form 3 of Schedule A of the *Access and Privacy Regulation*.<sup>44</sup> The Complaint Form can also be found on the FIPPA website at: <http://www.gov.mb.ca/chc/fippa/pdfs/complaint.pdf>.

#### 2. When a complaint about access must be made [subsections 60(2) and 60(3), and subsection 34(5)]

##### (i) General rule

A **complaint** by a person about his or her request for access to a **record** under Part 2 of FIPPA must be delivered to the **Ombudsman** within 60 days after the person is notified of the decision of the **head** of the **public body** about the access request.<sup>45</sup>

##### (ii) Third party intervention – head decides to refuse access

If the **head** of a **public body** has given notice, under section 34 of FIPPA, of the **head's** decision not to give access to a **record** containing information affecting a **third party's** privacy or business interests, the person requesting access may complain to the **Ombudsman** within 21 days after the **head** gives notice of the refusal of access.<sup>46</sup>

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<sup>44</sup> Manitoba Regulation 64/98, as amended. A consolidated version of the *Access and Privacy Regulation*, including the Complaint Form (Form 3 of Schedule A), can be found at: <http://web2.gov.mb.ca/laws/regs/pdf/f175-064.98.pdf>.

<sup>45</sup> Subsection 60(2) of FIPPA.

<sup>46</sup> Subsection 60(2) and subsection 34(5) of FIPPA.

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(iii) Third party intervention – head decides to give access

If the **head** of a **public body** has given notice, under section 34 of FIPPA, of the **head's** decision to give access to a **record** containing information affecting a **third party's** privacy or business interests, the **third party** may complain to the **Ombudsman** within 21 days after the **head** has given notice of the decision.<sup>47</sup>

(iv) Head fails to respond – deemed refusal of access

If the **head** of a **public body** fails to respond to a request for access to a **record** under Part 2 of FIPPA within the required time, the failure is treated as a decision to refuse access and any **complaint** must be made to the **Ombudsman** within 120 days after the request for access was made.<sup>48</sup>

3. **When a complaint about a refusal to correct personal information in a record must be made [subsection 60(2)]**

A **complaint** about a refusal to correct **personal information** in a **record** under section 39 of FIPPA must be made to the **Ombudsman** within 60 days after the person is notified of the decision by the **head** not to correct the **record**.<sup>49</sup>

4. **When a complaint about collection, use or disclosure of personal information must be made [subsection 59(3) and clause 63(1)(a)]**

There is no time limit in FIPPA for making a **complaint** to the **Ombudsman** about the collection, use or disclosure of **personal information** by a **public body**. But, the **Ombudsman** may decide not to investigate the **complaint** if the **Ombudsman** is of the opinion that the length of time that has passed since the date the subject matter of the privacy **complaint** arose makes an investigation no longer practicable or desirable.<sup>50</sup>

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<sup>47</sup> Subsection 60(2) and subsection 34(5) of FIPPA.

<sup>48</sup> Subsection 60(3) and subsection 11(2) of FIPPA. Subsection 11(2) is discussed in Chapter 4, under *Time Limit for Responding to an Access Request*.

<sup>49</sup> Subsection 60(2) of FIPPA. For a discussion of correction of personal information, see Chapter 6, under *Requests to Correct Personal Information*.

<sup>50</sup> Subsection 59(3) and clause 63(1)(a) of FIPPA.

### ■ Investigation of a Complaint by the Ombudsman - [Sections 61 to 65]

#### 1. The Ombudsman must notify head, etc. of a complaint [section 61]

As soon as practicable after receiving a **complaint**, the **Ombudsman** must notify the **head** of the **public body** concerned and any other person who, in the **Ombudsman's** opinion, is affected by the **complaint**.<sup>51</sup>

#### 2. Duty of the Ombudsman to investigate a complaint [subsection 62(1) and section 63]

On receiving a **complaint** under FIPPA, the **Ombudsman** must investigate it, unless the **Ombudsman** is of the opinion that:

- (i) in the case of a **complaint** about the collection, use or disclosure of **personal information**, the length of time that has passed since the date the subject matter of the **complaint** arose makes an investigation no longer practicable or desirable;<sup>52</sup>
- (ii) the subject matter of the **complaint** is trivial;<sup>53</sup>
- (iii) the **complaint** is not made in good faith;<sup>54</sup>
- (iv) the **complaint** is "frivolous, vexatious or an abuse of process";<sup>55</sup> or
- (v) the circumstances of the **complaint** do not require investigation.<sup>56</sup>

If the **Ombudsman** decides not to investigate a **complaint**, the **Ombudsman** must inform the complainant and the **head** of the **public body** of the decision, in writing, and must give reasons for the decision.<sup>57</sup>

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<sup>51</sup> Section 61 of FIPPA.

<sup>52</sup> Clause 63(1)(a) of FIPPA.

<sup>53</sup> Clause 63(1)(b) of FIPPA.

<sup>54</sup> Clause 63(1)(b) of FIPPA.

<sup>55</sup> Clause 63(1)(b) of FIPPA. This clause 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>56</sup> Clause 63(1)(c) of FIPPA.

<sup>57</sup> Subsection 63(2) of FIPPA.



## INDEPENDENT REVIEW: COMPLAINTS

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### 3. Informal resolution of a complaint [subsection 62(2)]

When investigating a **complaint**, the **Ombudsman** may take any steps the **Ombudsman** considers appropriate to resolve the **complaint** informally to the satisfaction of the parties and in a manner consistent with the purposes of FIPPA. The purposes of FIPPA are set out in section 2 of FIPPA.<sup>58</sup>

### 4. Representations to the Ombudsman [section 64]

During an investigation, the **Ombudsman** must give the complainant and the **head** of the **public body** concerned an opportunity to make representations about the **complaint** (that is, an opportunity to say why they think the **Ombudsman** should find the **complaint** to be justified or not justified).

The **Ombudsman** may, but is not required to, give any other person the **Ombudsman** has notified of the **complaint** an opportunity to make representations about the **complaint**.

The **Ombudsman** may decide whether representations are to be made orally or in writing. Representations may be made to the **Ombudsman** through legal counsel or through an agent (that is, through someone acting on a person's behalf).

But, no one is entitled to be present during an investigation by the **Ombudsman** or to have access to or to comment on representations made to the **Ombudsman** by another person.

The Ombudsman has prepared Practice Notes about responding to complaints to the Ombudsman under FIPPA that can be found on the Ombudsman's website.<sup>59</sup>

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<sup>58</sup> Section 2 and the purposes of FIPPA are discussed in Chapter 1, under *Purposes of FIPPA*.

<sup>59</sup> A list of the Ombudsman's Practice Notes, and links to them, can be found at: [http://www.ombudsman.mb.ca/documents\\_and\\_files/practice-notes.html](http://www.ombudsman.mb.ca/documents_and_files/practice-notes.html) . The Practice Notes about responding to complaints under FIPPA are found under the heading "*Responding to Complaints to the Ombudsman*".

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### 5. Time limit for the Ombudsman's investigation [section 65]

The **Ombudsman's** investigation of a **complaint** must be completed, and the **Ombudsman** must make a report about the investigation, within 90 days after a **complaint** is made, unless:

- the **Ombudsman** notifies the complainant, the **head** of the **public body** concerned and any other person who has made representations to the **Ombudsman** that the **Ombudsman** is extending the 90 day period; and
- the **Ombudsman** gives an anticipated date for providing the report.

### ■ Ombudsman's Report about a Complaint - [Section 66]

On completing an investigation of a **complaint**, the **Ombudsman** must prepare a report containing:

- the **Ombudsman's** findings about the **complaint**; and
- any recommendations the **Ombudsman** considers appropriate about the **complaint**.<sup>60</sup>

The **Ombudsman** must give a copy of the report to the complainant and the **head** of the **public body** concerned. The **Ombudsman** may, but is not required to, give a copy of the report to any other person who has made representations to the **Ombudsman** about the **complaint**.<sup>61</sup>

If the **complaint**:

- (i) relates to the refusal of access to a **record** or part of a **record** under Part 2 of FIPPA, or
- (ii) is by a **third party** who has been notified under section 34 of FIPPA of a decision by the **head** of a **public body** to give access to a **record** containing information affecting the privacy or business interests of the **third party**,<sup>62</sup>

and the **Ombudsman** finds the **complaint** to be unjustified, the **Ombudsman's** report must notify the complainant or **third party** of his or her right to appeal the decision of the **head** of the **public body** to the Manitoba Court of Queen's Bench, and of the time limit for making an appeal to court.<sup>63</sup>

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<sup>60</sup> Subsection 66(1) of FIPPA.

<sup>61</sup> Subsection 66(2) of FIPPA.

<sup>62</sup> Sections 33 and 34 and the third party intervention process are discussed in Chapter 4, under *Third Party Notice and Intervention*.

<sup>63</sup> The right to appeal the decision of the head of a public body about access to the Manitoba Court of Queen's Bench is discussed later in this Chapter, under *Appeals to Court about Access*.

### ■ Public Body's Response to the Ombudsman's Report - [Subsections 66(4), 66(5) and 66(6)]

#### 1. Duty of the head of a public body to respond to the Ombudsman's recommendations [subsection 66(4)]

If the **Ombudsman's** report of an investigation of a **complaint** under FIPPA contains recommendations, the **head** of the **public body** concerned must send the **Ombudsman** a written response indicating:

- that the **head** accepts the **Ombudsman's** recommendations and describing any action the **head** has taken or proposes to take to implement them; or
- the reasons why the **head** refuses to take action to implement the **Ombudsman's** recommendations.<sup>64</sup>

The **head's** written response must be sent to the **Ombudsman** within 15 days after receiving the **Ombudsman's** report containing the **Ombudsman's** recommendations.<sup>65</sup>

The **Ombudsman** is required to notify the complainant about the **head's** response "without delay".<sup>66</sup>

Also see Manitoba Ombudsman Practice Note *Responding to Recommendations made by the Ombudsman under The Freedom of Information and Protection of Privacy Act (FIPPA)*.<sup>67</sup>

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<sup>64</sup> Subsection 66(4) of FIPPA.

<sup>65</sup> Subsection 66(4) of FIPPA.

<sup>66</sup> Subsection 66(5) of FIPPA.

<sup>67</sup> This Practice Note can be found at:  
[http://www.ombudsman.mb.ca/documents\\_and\\_files/practice-notes.html](http://www.ombudsman.mb.ca/documents_and_files/practice-notes.html)

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### 2. Time limit for complying if the head accepts the Ombudsman's recommendations [subsection 66(6)]

If the **head** of a **public body** accepts the recommendations in a report of the **Ombudsman** under FIPPA, the **head** must comply with the **Ombudsman's** recommendations:

- (a) within 15 days of acceptance, if the **complaint** is about:
  - (i) access, or
  - (ii) correction of a **record** under section 39 of FIPPA,<sup>68</sup> or
  - (iii) disclosure of **personal information** about a deceased individual to a relative under clause 44(1)(z) of FIPPA;<sup>69</sup>
- (b) within 45 days in any other case;

For example, in the case of a privacy **complaint** that **personal information** has been collected, used or disclosed in violation of Part 3 of FIPPA;<sup>70</sup> or

- (c) within a longer period of time that the **Ombudsman** considers reasonable.<sup>71</sup>

### 3. If the head refuses to act on the Ombudsman's recommendations about access to information – Notice of rights from the Ombudsman [subsection 66(5)]

If the **head** of a **public body** refuses to take action on any of the recommendations in the **Ombudsman's** report about

- a **complaint** about a refusal of access to a **record** or part of a **record**, or

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<sup>68</sup> Section 39 is discussed in Chapter 6, under *Requests to Correct Personal Information*.

<sup>69</sup> Clause 44(1)(z) is discussed in Chapter 6, under *Authorized Disclosure of Personal Information – Disclosure to a relative of a deceased individual*.

<sup>70</sup> Part 3 of FIPPA – Protection of Privacy – is discussed in Chapter 6 of this Manual.

<sup>71</sup> Subsection 66(6) of FIPPA.

## INDEPENDENT REVIEW: COMPLAINTS

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- a **complaint** about the **head's** decision to give access to information affecting a **third party's** privacy or business interests under section 34 of FIPPA,<sup>72</sup>

the **Ombudsman** must inform the complainant:

- (i) as to whether the **Ombudsman** intends to ask the Information and Privacy **Adjudicator** to review the **head's** decision about access; and
- (ii) that, if the **Ombudsman** does not ask the **Adjudicator** to review the **head's** decision about access, the complainant may appeal the **head's** decision to the Manitoba Court of Queen's Bench, and of the time for making the appeal.<sup>73</sup>

### ■ **Ombudsman Must Publish Recommendations - [Subsection 66(7)]**

On January 1, 2011, FIPPA was amended to require the **Ombudsman** to make the recommendations in his or her reports on investigations of **complaints** about access to information or privacy available to the **public**. This may be done by publishing the **Ombudsman's** recommendations on the **Ombudsman's** website.<sup>74</sup>

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<sup>72</sup> Sections 33 and 34 are discussed in Chapter 4, under *Third Party Notice and Intervention*.

<sup>73</sup> Subsection 66(5). This subsection was amended by *The Freedom of Information and Protection of Privacy Amendment Act*, S.M. 2008 c. 40, found at: <http://web2.gov.mb.ca/laws/statutes/2008/c04008e.php>.

<sup>74</sup> This duty was added to FIPPA 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>. There is a similar duty in *The Personal Health Information Act*.

## REVIEW BY THE INFORMATION AND PRIVACY ADJUDICATOR - [SECTIONS 66.1 TO 66.10]

On January 1, 2011, the **complaint** process in FIPPA was amended to include an additional level of independent review and complaint resolution.

Where a **public body** has not acted on a recommendation made by the **Ombudsman** in an access or privacy **complaint**, the **Ombudsman** may refer the matter to the Information and Privacy **Adjudicator** for review, and the **Adjudicator** has the power to make an order against the **public body**. An application can be made to the Manitoba Court of Queen's Bench for judicial review of an order made by the **Adjudicator**.<sup>75</sup>

Similar amendments have been made to *The Personal Health Information Act*.<sup>76</sup>

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<sup>75</sup> These amendments to the complaint process in FIPPA were made by *The Freedom of Information and Protection of Privacy Amendment Act*, S.M. 2008, c. 40. The amendments came into effect as of January 1, 2011. The amending Act can be found at: <http://web2.gov.mb.ca/laws/statutes/2008/c04008e.php>.

<sup>76</sup> Part 5 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>. The amendments can be found at: <http://web2.gov.mb.ca/laws/statutes/2008/c04108e.php>.

### ■ Ombudsman's Power to Request Review by the Information and Privacy Adjudicator - [Section 66.1]

#### 1. In what circumstances may the Ombudsman request a review by the Adjudicator? [Subsection 66.1(1)]

Only the Ombudsman can request that the Information and Privacy **Adjudicator** review a matter under FIPPA (or under *The Personal Health Information Act*). The **Ombudsman** may, but is not required to, request a review.

The **Ombudsman** may ask the Information and Privacy **Adjudicator** to review a **complaint** about access or privacy under FIPPA if:

- (a) the **Ombudsman** has given a report about the **Ombudsman's** investigation of a **complaint**, with recommendations, to the **head** of the **public body** concerned; and
- (b) the **head** of the **public body**:
  - (i) has responded indicating that the **head** refuses to take action to implement any of the **Ombudsman's** recommendations; or
  - (ii) has responded indicating that the **head** has accepted the **Ombudsman's** recommendations, but the action to implement them is not taken within the required time; or
  - (iii) the **head** has failed to respond to the **Ombudsman's** report as required by FIPPA.<sup>77</sup>

#### 2. What matters can the Ombudsman ask the Adjudicator to review? [Subsections 66.1(2) and 66.1(3)]

- (a) Review of access decisions

The **Ombudsman** may ask the Information and Privacy **Adjudicator** to carry out a review of:

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<sup>77</sup> Subsection 66.1(1) of FIPPA.



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- (i) any decision, act or failure by the **head** of a **public body** relating to a request for access to a **record** under Part 2 of FIPPA;<sup>78</sup>
  - (ii) any decision, act or failure by the **head** of a **public body** relating to a request for correction of **personal information** under section 39 of FIPPA;<sup>79</sup> or
  - (iii) any decision by the **head** of a **public body** to give access to a **record** containing information affecting a third party's privacy or business interests, where the **head** has notified the **third party** of the **head's** decision under section 34 of FIPPA.<sup>80</sup>
- (b) Review of privacy matters

If the **Ombudsman** considers that an individual's **personal information** has been collected, used or disclosed in contravention of Part 3 of FIPPA – Protection of Privacy – the **Ombudsman** may ask the Information and Privacy **Adjudicator** to review the matter.<sup>81</sup>

### 3. Time limit for Ombudsman to request review [subsection 66.1(4)]

The **Ombudsman's** request for a review of an access or privacy matter must be made:

- (a) within 15 days after the **Ombudsman** receives the response of the **head** of the **public body** to the **Ombudsman's** report of the investigation of the **complaint**;<sup>82</sup> or
- (b) if the **head** does not respond to the **Ombudsman's** report, within 15 days after the deadline for the **head's** response has expired.<sup>83</sup>

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<sup>78</sup> Clause 66.1(2)(a) of FIPPA.

<sup>79</sup> Clause 66.1(2)(a) of FIPPA. Section 39 of FIPPA is discussed in Chapter 6, under *Requests to Correct Personal Information*.

<sup>80</sup> Clause 66.1(2)(b) of FIPPA. Sections 33 and 34 of FIPPA are discussed in Chapter 4, under *Third Party Intervention*.

<sup>81</sup> Clause 66.1(3) of FIPPA. Part 3 of FIPPA – Protection of Privacy – is discussed in Chapter 6 of this Manual.

<sup>82</sup> Clause 66.1(4)(a) of FIPPA.

<sup>83</sup> Clause 66.1(4)(b) of FIPPA.

### ■ **Conduct of Review by the Information and Privacy Adjudicator - [Sections 66.2 to 66.10]**

1. **The Adjudicator must notify complainant, etc. of the Ombudsman's request [section 66.2]**

On receiving a request for a review from the **Ombudsman**, the **Adjudicator** must notify

- (i) the complainant,
- (ii) the **head** of the **public body** concerned; and
- (iii) any other person who, in the **Adjudicator's** opinion, is affected by the review.

2. **The Adjudicator must conduct a review [section 66.3]**

On receiving a request from the **Ombudsman**, the **Adjudicator** must conduct a review of the matter and decide all questions relating to the facts and the law that arise in the course of the review.

3. **Powers of the Adjudicator when conducting a review [section 66.4 and section 50]**

The **Adjudicator** may make his or her own rules of procedure for conducting a review.<sup>84</sup>

A review may be conducted in private.<sup>85</sup>

The **Adjudicator** may receive and accept any evidence and other information that he or she considers appropriate, on oath or by affidavit or otherwise.<sup>86</sup> The **Adjudicator** may receive and accept evidence and information, even if it would not be admissible in a court.<sup>87</sup>

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<sup>84</sup> Subsection 66.4(1) of FIPPA.

<sup>85</sup> Subsection 66.4(3) of FIPPA.

<sup>86</sup> An affidavit is a written and sworn or affirmed statement of facts to which documents may be attached.

<sup>87</sup> Subsection 66.4(2) of FIPPA.

## INDEPENDENT REVIEW: COMPLAINTS

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For the purposes of conducting a review, the **Adjudicator** has the same powers and protections as the **Ombudsman** has under section 50 of FIPPA.<sup>88</sup> That is, when carrying out a review:

- (a) The **Adjudicator** has all the powers and protections of a commissioner under Part V of *The Manitoba Evidence Act*. These powers include:
  - (i) the power to summon witnesses by subpoena or summons;
  - (ii) the power to require witnesses to produce documents and things necessary to the investigation;
  - (iii) the power to examine witnesses under oath or affirmation;
  - (iv) the power to enter upon or into, and view or inspect, any land, building, works or property, if this will assist in the investigation;
  - (v) the power, where a witness who has been summoned to appear neglects or refuses to do so, to issue a warrant to have the witness brought before the **Adjudicator**;
  - (vi) the power, where a witness who has been summoned to appear refuses to answer questions without lawful excuse, to issue a warrant committing the person to jail for not more than one month, unless in the meantime the person agrees to answer;
  - (vii) the power to search all documents or **records** relating to persons or matters within the scope of the investigation in any public office existing under any Act of the Legislature without having to pay any fees.<sup>89</sup>
  
- (b) The **Adjudicator** also the power:
  - (i) to require any **record** in the custody or under the control of a **public body** that the **Adjudicator** considers relevant to a review to be produced to the **Adjudicator**;<sup>90</sup> and

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<sup>88</sup> Subsection 66.4(4) of FIPPA.

<sup>89</sup> Sections 88, 89, 90, 91 and 94 of *The Manitoba Evidence Act*. *The Manitoba Evidence Act*, C.C.S.M. c.E150, can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/e150e.php>.

<sup>90</sup> Subsection 50(2) of FIPPA.

## INDEPENDENT REVIEW: COMPLAINTS

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- (ii) to examine any information in a **record**, including **personal information**.<sup>91</sup>

4. **Duty of public body to produce records, etc. [subsections 66.4(4), 50(3), 50(4), 86(1) and 86(2)]**

A **public body** and its **officers** and employees must produce a **record** or a copy of a **record** requested by the **Adjudicator** under FIPPA within 14 days. This duty applies despite any other statute or regulation or any privilege of the law of evidence.<sup>92</sup>

If it is not practicable to make a copy of the requested **record**, the **head** of the **public body** may require the **Adjudicator** to examine the original **record** at its site.<sup>93</sup>

No person is guilty of an offence under another statute or regulation because he or she has complied with a request or requirement to produce a **record** or provide information or evidence to the **Adjudicator**, or to a person acting for or under the direction of the **Adjudicator**.<sup>94</sup>

A **public body**, and any person acting on behalf of a **public body**, must not take any negative employment action against an employee, because the employee has complied with a request or requirement to produce a **record** or provide information or evidence to the **Adjudicator**, or a person acting for or under the direction of the **Adjudicator**.<sup>95</sup>

If you have a question about the duty to provide a **record** or information to the **Adjudicator**, contact legal counsel.

Note: the **Adjudicator** does not have all the powers that the **Ombudsman** has under section 50 of FIPPA, as the **Ombudsman's** role under FIPPA is broader. The **Adjudicator's** role is to review access and privacy **complaints** referred to the **Adjudicator** by the **Ombudsman** where a **public body** has not acted on the recommendations of the **Ombudsman**.

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<sup>91</sup> Subsection 50(2) of FIPPA.

<sup>92</sup> Subsection 50(3) of FIPPA.

<sup>93</sup> Subsection 50(4) of FIPPA.

<sup>94</sup> Subsection 86(1) of FIPPA.

<sup>95</sup> Subsection 86(2) of FIPPA.

## INDEPENDENT REVIEW: COMPLAINTS

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### 5. Representations to the Adjudicator [section 66.5]

The **Adjudicator** must give the complainant, the **head** of the **public body** concerned, and any person given notice of the review by the **Adjudicator**, an opportunity to make representations to the **Adjudicator** during the review (that is, an opportunity to say why they think the **Adjudicator** should find in their favour).<sup>96</sup>

The complainant, **head** and any other person given notice by the **Adjudicator** are entitled to be represented by legal counsel or an agent (that is, by someone acting on the person's behalf).<sup>97</sup>

The **Adjudicator** may decide:

- whether representation are to be made orally or in writing;<sup>98</sup>
- whether a person is entitled to be present during representations made to the **Adjudicator** by another person;<sup>99</sup> and
- whether a person is entitled to have access to representations made to the **Adjudicator** by another person, or to comment on them.<sup>100</sup>

The **Ombudsman** has the right to be a party in any review conducted by the **Adjudicator** if the **Ombudsman** considers that the review raises an issue of public interest.<sup>101</sup>

### 6. Time limit for completing the Adjudicator's review [section 66.6]

A review by the **Adjudicator** must be completed within 90 days after he or she receives the request for a review from the **Ombudsman**, unless the **Adjudicator** extends this time period.<sup>102</sup>

If the **Adjudicator** extends the 90 day time period for completing the review, the **Adjudicator** must:

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<sup>96</sup> Clause 66.5(1)(a) of FIPPA.

<sup>97</sup> Clause 66.5(1)(b) of FIPPA.

<sup>98</sup> Clause 66.5(2)(a) of FIPPA.

<sup>99</sup> Clause 66.5(2)(b) of FIPPA.

<sup>100</sup> Clause 66.5(2)(b) of FIPPA.

<sup>101</sup> Subsection 66.5(3) of FIPPA.

<sup>102</sup> Subsection 66.6(1) of FIPPA.

## INDEPENDENT REVIEW: COMPLAINTS

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- (i) notify the complainant, the **head** of the **public body** concerned, the **Ombudsman** and any other person given notice of the review by the **Adjudicator** under section 66.2 of FIPPA; and
- (ii) inform them of the date by which the review is expected to be completed.<sup>103</sup>

### 7. **Who has the burden of proof in the Adjudicator's review of an access matter? [section 66.7]**

The 'burden of proof' is the obligation of one of the parties to a review to persuade the **Adjudicator** to decide an issue in that party's favour.

#### (a) Where the **head** has refused access

In the **Adjudicator's** review of a decision by the **head** of a **public body** to refuse to give an **applicant** access to all or part of a **record**, it is up to the **head** to prove that the **applicant** has no right of access to the **record** or part of the **record**. That is, the **head** has the "burden of proving" that the refusal of access is justified under FIPPA.<sup>104</sup>

There is an exception to this general rule: If the **head** has refused access to a **record** or part of a **record** that contains **personal information** about a **third party**, it is up to the applicant requesting access to prove that the disclosure of the information would not be an unreasonable invasion of the **third party's** privacy. In this situation, the "burden of proof" is on the **applicant** requesting access under FIPPA.<sup>105</sup>

#### (b) Where the **head** has decided to give access to **third party** information

If the review relates to a decision of the **head** of a **public body** to give access to a **record** or part of a **record** containing **personal information** about a **third party**, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the **third party's** personal privacy. In this situation the

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<sup>103</sup> Subsection 66.6(2) of FIPPA.

<sup>104</sup> Subsection 66.7(1) of FIPPA.

<sup>105</sup> Subsection 66.7(2) of FIPPA.

## INDEPENDENT REVIEW: COMPLAINTS

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“burden of proof” is on the **applicant**.<sup>106</sup>

If the review relates to a decision of the **head** of a **public body** to give access to a **record** or part of a **record** containing information about a **third party** that is not personal information – for example, the record contains a trade secret of **third party** – it is up to the **third party** to prove that the **applicant** does not have a right of access to the **record** or part of the **record** under FIPPA. In this situation the “burden of proof” is on the affected **third party**.<sup>107</sup>

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<sup>106</sup> Subsection 66.7(3)(a) of FIPPA.

<sup>107</sup> Clause 66.7(3)(b) of FIPPA.

### ■ The Information and Privacy Adjudicator's Orders - [Sections 66.8, 66.9 and 66.10]

#### 1. What can the Adjudicator order? [Section 66.8]

On completing a review under FIPPA, the **Adjudicator** must make one of the orders set out below.<sup>108</sup> The **Adjudicator** may specify terms and conditions in an order.<sup>109</sup>

##### (a) Adjudicator's orders respecting access to information decisions

If the review concerns a decision of the **head** of a **public body** to give or refuse access to all or part of a **record**, the **Adjudicator** may, by order:

- (i) require the **head** to give the **applicant** access to all or part of the **record**. To make this order, the **Adjudicator** must determine that the **head** is not authorized or required to refuse access under FIPPA;<sup>110</sup>
- (ii) confirm the decision of the **head** about access, if the **Adjudicator** determines that the **head** is authorized to refuse access under FIPPA;<sup>111</sup>
- (iii) require the **head** to reconsider the **head's** decision, if the **Adjudicator** determines that the **head** is authorized to refuse access.<sup>112</sup>

For example, the discretionary exceptions to disclosure in Part 2 of FIPPA require that the **head** of a **public body** follow a two stage process: First, the **head** must determine whether the exception applies to the information in the requested **record**. If so, the **head** must then exercise his or her discretion by considering whether it is appropriate to release the information in the circumstances, even though the exception to disclosure

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<sup>108</sup> Subsection 66.8(1) of FIPPA

<sup>109</sup> Subsection 66.8(5) of FIPPA.

<sup>110</sup> Clause 66.8(2)(a) of FIPPA.

<sup>111</sup> Clause 66.8(2)(b) of FIPPA.

<sup>112</sup> Clause 66.8(2)(b) of FIPPA.



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applies. If the **Adjudicator** determines that the **head** has not exercised his or her discretion, or has not exercised his or her discretion in a proper manner as required by law, the **Adjudicator** may order the **head** to reconsider the matter.<sup>113</sup>

- (iv) confirm the decision of the **head** to refuse access to all or part of the **record**, if the **Adjudicator** determines that the **head** is required to refuse access under FIPPA.<sup>114</sup>

For example, a mandatory exception to disclosure in Part 2 of FIPPA applies.<sup>115</sup>

- (v) require the **head** to refuse access to all or part of the **record**, if the **Adjudicator** determines that the **head** is required to refuse access.<sup>116</sup>

For example, a mandatory exception to disclosure in Part 2 of FIPPA applies, but the **head** has not applied the exception.<sup>117</sup>

- (b) Adjudicator's orders respecting privacy and other matters

If the review concerns a privacy matter, or any matter other than decision to give or refuse access, the **Adjudicator** may, by order:

- (i) require that a duty imposed by FIPPA be performed;<sup>118</sup>
- (ii) confirm the extension of a time limit for responding to an access request under subsection 15(1) of FIPPA;<sup>119</sup>

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<sup>113</sup> For information about the discretionary exceptions to disclosure and the exercise of a discretion, see Chapter 5, under *Discretionary Exceptions to Disclosure and Exercising a Discretion*.

<sup>114</sup> Clause 66.8(2)(c) of FIPPA.

<sup>115</sup> For a discussion of the mandatory exceptions to disclosure in FIPPA, see Chapter 5, under *Mandatory Exceptions to Disclosure*.

<sup>116</sup> Clause 66.8(2)(c) of FIPPA.

<sup>117</sup> For a discussion of the mandatory exceptions to disclosure in FIPPA, see Chapter 5, under *Mandatory Exceptions to Disclosure*.

<sup>118</sup> Clause 66.8(3)(a) of FIPPA.

<sup>119</sup> Clause 66.8(3)(b) of FIPPA. Subsection 15(1) is discussed in Chapter 4, under *Time Limit for Responding to an Access Request and Extending the Time Limit for Responding*.

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- (iii) reduce the extension of a time limit for responding to an access request under subsection 15(1) of FIPPA;<sup>120</sup>
- (iv) confirm the amount of a fee charged by a **public body** for access;<sup>121</sup>
- (v) reduce a fee charged by a **public body** for providing access, in the appropriate circumstances;<sup>122</sup>
- (vi) order a refund of a fee charged by a **public body** for providing access, in the appropriate circumstances;<sup>123</sup>
- (vii) confirm a decision not to correct **personal information** under section 39 of FIPPA;<sup>124</sup>
- (vii) specify how **personal information** is to be corrected under section 39 of FIPPA;<sup>125</sup>
- (viii) require a **public body** to cease a specified practice of collecting, using or disclosing **personal information** in contravention of Part 3 of FIPPA;<sup>126</sup>
- (ix) require a **public body** to modify a specified practice of collecting, using or disclosing **personal information** in contravention of Part 3 of FIPPA;<sup>127</sup>

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<sup>120</sup> Clause 68.8(3)(b) of FIPPA. Subsection 15(1) is discussed in Chapter 4, under *Time Limit for Responding to an Access Request* and *Extending the Time Limit for Responding*.

<sup>121</sup> Clause 66.8(3)(c) of FIPPA. Access fees are discussed in Chapter 4, under *Fees, Fee Estimates and Fee Waivers*.

<sup>122</sup> Clause 66.8(3)(c) of FIPPA. Access fees are discussed in Chapter 4, under *Fees, Fee Estimates and Fee Waivers*.

<sup>123</sup> Clause 66.8(3)(c) of FIPPA. Access fees are discussed in Chapter 4, under *Fees, Fee Estimates and Fee Waivers*.

<sup>124</sup> Clause 66.8(3)(d) of FIPPA. Section 39 is discussed in Chapter 6, under *Requests to Correct Personal Information*.

<sup>125</sup> Clause 66.8(3)(d) of FIPPA. Section 39 is discussed in Chapter 6, under *Requests to Correct Personal Information*.

<sup>126</sup> Clause 66.8(3)(e) of FIPPA. Part 3 of FIPPA – Protection of Privacy – is discussed in Chapter 6 of this Manual.

<sup>127</sup> Clause 66.8(3)(e) of FIPPA. Part 3 of FIPPA – Protection of Privacy – is discussed in Chapter 6 of this Manual.

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- (x) require the **head** of a **public body** to destroy personal information collected in contravention of FIPPA.<sup>128</sup>
- (c) Limit re Adjudicator's orders about access to information

There is a limit on the **Adjudicator's** ability to make orders in access to information matters. If the **Adjudicator** determines that the **head** of a **public body** is authorized or required to refuse access to a **record** or part of a **record** under FIPPA, the **Adjudicator** must not order the **head** to disclose the **record** or part.<sup>129</sup> That is, if a mandatory or discretionary exception to disclosure in FIPPA applies to the **record** or part of the **record**, the **Adjudicator** cannot order the **head** of the **public body** to disclose the **record**.

But, if the **head** of a **public body** is authorized to refuse access under a discretionary exception to disclosure, the **Adjudicator** has the power to order the **head** to reconsider his or her exercise of discretion if the **head** did not exercise his or her discretion, or did not do so in a proper manner as required by law.<sup>130</sup>

### 2. **Adjudicator's orders must be given to the parties and must be published [subsections 66.8(6) and 66.8(7)]**

The **Adjudicator** must give a copy of his or her order to:

- (i) the complainant;
- (ii) the **head** of the **public body** concerned;
- (iii) the **Ombudsman**;
- (iv) any other person given notice of the review by the **Adjudicator**; and
- (v) the Minister of the Government responsible for FIPPA (that is, the Minister of Sport, Culture and Heritage).<sup>131</sup>

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<sup>128</sup> Clause 66.8(3)(f) of FIPPA. Collection of personal information is discussed in Chapter 6, under *Collection of Personal Information*.

<sup>129</sup> Subsection 66.8(4) of FIPPA.

<sup>130</sup> Clause 66.8(2)(b) of FIPPA, discussed above.

<sup>131</sup> Subsection 66.8(6) of FIPPA.

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The **Adjudicator** must also make his or her orders under FIPPA (and under *The Personal Health Information Act*) available to the public. This may be done by publishing them on a website.<sup>132</sup>

### 3. Duty of public bodies to comply with the Adjudicator's orders [section 66.9]

The **head** of the **public body** concerned in a review must comply with an order made by the **Adjudicator**:

- within 30 days after being given a copy of the order; or
- within any longer period specified in the order;

unless an application for a judicial review of the order by the Manitoba Court of Queen's Bench is brought before that period ends.<sup>133</sup>

There is an exception to this requirement: if the **Adjudicator's** order requires the **head** to give access to a **record** affecting a **third party's** privacy or business interests, and the **head** has given notice to the **third party** under section 34 of FIPPA, the **head** must not take steps to comply with the **Adjudicator's** order until the deadline for bringing an application for judicial review has passed.<sup>134</sup>

### 4. Judicial review of the Adjudicator's orders [section 66.10]

An application may be made to the Manitoba Court of Queen's Bench for judicial review of an order of the Information and Privacy **Adjudicator** by:

- (i) the complainant,
- (ii) the **head** of the **public body** concerned,
- (iii) the **Ombudsman**, or
- (iv) any other person who was given notice of the review by the **Adjudicator**.

An application for judicial review of an order of the **Adjudicator** must be

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<sup>132</sup> Subsection 66.8(7) of FIPPA.

<sup>133</sup> Subsection 66.9(1) of FIPPA.

<sup>134</sup> Subsection 66.9(2) of FIPPA.

## INDEPENDENT REVIEW: COMPLAINTS

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made within 25 days after the person who is making the application is given a copy of the order, unless the Manitoba Court of Queen's Bench extends this period.<sup>135</sup>

Once an application for judicial review of an order of the **Adjudicator** is filed with the court, the **Adjudicator's** order is stayed – that is, the order is postponed – until the court deals with the application.<sup>136</sup>

'Judicial review' is a formal court process, but it is not the same as an appeal. Under the judicial review process, the court does not re-visit the facts and decide the matter. Instead, the court decides whether the **Adjudicator** has acted strictly within the powers that have been given to him or her and has done his or her job properly. The court may look at whether the **Adjudicator** had the legal authority to make the decision in question, whether he or she applied the law properly, whether the process he or she used was sufficiently fair, etc. If the court finds a problem with the way in which the decision was made, it has several options. A common option is for the court to send the matter back to the **Adjudicator** to be decided again, using the correct approach. Another option is to simply cancel the order made by the **Adjudicator**.

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<sup>135</sup> Subsection 66.10(1) of FIPPA.

<sup>136</sup> Subsection 66.10(2) of FIPPA.

## APPEALS TO COURT ABOUT ACCESS - [SECTIONS 67 TO 74]

### ■ Who May Appeal to Court about Access and in What Circumstances

The following persons may appeal a decision of the **head** of a **public body** about access to the Manitoba Court of Queen's Bench:

- (i) an **applicant** for access who has been refused access to a **record** or part of a **record** requested under subsection 8(1) in Part 2 of FIPPA,<sup>137</sup> or
- (ii) a **third party** who has been notified by the **head** of the **public body**, under section 34 of FIPPA, of a decision to give access to information which, if disclosed, would affect the **third party's** privacy or business interests;<sup>138</sup>

However, a person listed above may not appeal such a decision unless:

- (i) the person has first made a **complaint** to the **Ombudsman** about the decision and the **Ombudsman** has provided a report under FIPPA; and
- (ii) the **Ombudsman** has not requested that the Information and Privacy **Adjudicator** review the matter, and the deadline for the **Ombudsman** to request a review has expired.<sup>139</sup>

The **Ombudsman** no longer has the power to appeal an access decision to court under FIPPA. Instead, where a **public body** has not complied with the recommendations of the **Ombudsman** in an access **complaint**, the **Ombudsman** may refer the matter to the Information and Privacy **Adjudicator**, and the **Adjudicator** may make an order against the **public body**.<sup>140</sup>

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<sup>137</sup> Clause 67(1)(a) of FIPPA.

<sup>138</sup> Clause 67(1)(b) of FIPPA. Sections 33 and 34 of FIPPA are discussed in Chapter 4, under *Third Party Notice and Intervention*.

<sup>139</sup> Subsection 67(2) of FIPPA. The appeal sections in FIPPA were amended by *The Freedom of Information and Protection of Privacy Amendment Act*, S.M. 2008 c. 40, found at: <http://web2.gov.mb.ca/laws/statutes/2008/c04008e.php>.

<sup>140</sup> See the discussion earlier in this Chapter, under *Review by the Information and Privacy Adjudicator*.

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Also, the **Ombudsman** has the right to be a party in any review conducted by the **Adjudicator**, if the **Ombudsman** considers that the review raises an issue of public interest.<sup>141</sup>

There is no appeal to court respecting a **complaint** about the collection, use or disclosure of **personal information** by a **public body** under FIPPA. But, FIPPA now provides that, if a **public body** has not complied with the recommendations of the **Ombudsman** in a privacy **complaint**, the **Ombudsman** may refer the matter to the Information and Privacy **Adjudicator**, and the **Adjudicator** may make an order against the **public body**.<sup>142</sup>

### ■ **When and How an Appeal to Court is made - [Subsections 67(3), 67(4) and 67(5)]**

If a person has the right to appeal a decision under FIPPA to the Manitoba Court of Queen's Bench, the appeal is to be made by filing an application with the court in the way the rules of the court require.

There is a time limit for making an appeal about access to the court. The appeal must be filed

- (a) within 30 days after the deadline has expired for the **Ombudsman** to request that the matter be reviewed by the Information and Privacy **Adjudicator** (provided the **Ombudsman** has not asked for such a review); or
- (b) within any longer period of time that the court may allow in special circumstances.<sup>143</sup>

The application to court must name the **head** of the **public body** involved in the **complaint** as the respondent to the appeal. For example, if the **complaint** involves an access decision of the Manitoba Department of Justice, the "Minister of Justice and Attorney General", and not the Government of Manitoba, would be named as the respondent in the appeal.<sup>144</sup>

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<sup>141</sup> Subsection 66.5(3) of FIPPA.

<sup>142</sup> See the discussion earlier in this Chapter, under *Review by the Information and Privacy Adjudicator*.

<sup>143</sup> Subsection 67(3) of FIPPA.

<sup>144</sup> Subsection 67(4) of FIPPA.

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The person appealing must serve a copy of the application (in the way the law requires), within 15 days of filing it in court:

- (a) on the **head** of the **public body** concerned in the appeal;
- (b) on the **Ombudsman**; and
- (c) where the person appealing is a **third party** who was notified by the **head** of a **public body** under section 34 of FIPPA of a decision to give access to a **record** affecting the **third party's** privacy or business interests, on the person requesting access under FIPPA.<sup>145</sup>

### ■ The Hearing of the Access Appeal - [Sections 69 and 70]

#### 1. Access appeal considered as a new matter

The Manitoba Court of Queen's Bench will consider an access appeal under FIPPA as a new matter. This means that the court will hear evidence, and is not restricted to the evidence that was provided to the **Ombudsman**. The court may hear evidence by way of affidavit (a written and sworn or affirmed statement of facts to which documents may be attached).<sup>146</sup>

#### 2. Burden of proof

The 'burden of proof' is the obligation of one of the parties to an appeal to persuade the court to decide an issue in that party's favour.

In general, if an appeal relates to a decision by the **head** of a **public body** to refuse to give an **applicant** access to all or part of a **record**, it is up to the **head** to prove that the **applicant** has no right of access to the **record** or part of the **record**. That is, the **head** has the "burden of proving" that the refusal of access is justified under FIPPA.<sup>147</sup>

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<sup>145</sup> Subsection 67(5) of FIPPA. Sections 33 and 34 are discussed in Chapter 4, under *Third Party Notice and Intervention*.

<sup>146</sup> Section 69 of FIPPA.

<sup>147</sup> Subsection 70(1) of FIPPA.



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There are exceptions to this general rule:

- (i) If the appeal relates to a decision to give or refuse access to a **record** or part of a **record** containing **personal information** about a **third party**, it is up to the **applicant** requesting access to prove that disclosure of the information would not be an unreasonable invasion of the **third party's** privacy under FIPPA. In this situation, the “burden of proof” is on the **applicant** requesting access.<sup>148</sup>
- (ii) If the appeal relates to a decision to give or refuse access to a **record** or part of a **record** containing information about a **third party** that is **not personal information** (for example, information that is a trade secret of a **third party**), it is up to the **third party** to prove that the **applicant** does not have a right of access to the **record** or part of the **record** under FIPPA. In this situation, the “burden of proof” is on the affected **third party**.<sup>149</sup>

### ■ The Court May Order Records to be produced for Examination - [Sections 71 and 72]

Despite any other statute or regulation, or any privilege of the law of evidence, for the purposes of an access appeal under FIPPA, the court may order that a **public body** produce any **record** in its custody or under its control for examination by the court.<sup>150</sup>

But, on an appeal under FIPPA, the court is required to take every reasonable precaution:

- to avoid disclosure of any information the **head** of a **public body** is authorized or required to refuse to disclose under Part 2 of FIPPA;<sup>151</sup> and

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<sup>148</sup> Subsection 70(2) of FIPPA.

<sup>149</sup> Subsection 70(3) of FIPPA.

<sup>150</sup> Section 71 of FIPPA.

<sup>151</sup> Clause 72(a) of FIPPA.

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- to avoid disclosure as to whether information exists, if the **head** of a **public body** is authorized to refuse to confirm or deny that the information exists under subsection 12(2) of FIPPA.<sup>152</sup>

Reasonable precautions that the court can take to avoid disclosure of such information include:

- receiving representations from one party to the appeal in the absence of the other parties (receiving representations “*ex parte*”);
- conducting hearings in private;
- examining **records** in private; etc.<sup>153</sup>

### ■ Powers of the Court on Appeal - [Sections 73 and 74]

On hearing an appeal under FIPPA, the court may:

- (a) dismiss the appeal, if the court determines that the **head** of the **public body** is authorized or required to refuse access to a **record** under Part 2 of FIPPA;<sup>154</sup> or
- (b) if the court determines that the **head** of the **public body** is not authorized or required to refuse access to all or part of a **record** under Part 2 of FIPPA,
  - (i) order the **head** to give the **applicant** access to all or part of the **record**, and
  - (ii) make any other order that the court considers appropriate.<sup>155</sup>

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<sup>152</sup> Clause 72(b) of FIPPA. Clause 12(2) of FIPPA is discussed in Chapter 4, under *Refusal to Confirm or Deny the Existence of a Record* and in Chapter 5, in the discussions about the exceptions to disclosure in sections 17, 24 and 25.

<sup>153</sup> Section 72 of FIPPA.

<sup>154</sup> Clause 73(1)(a) of FIPPA.

<sup>155</sup> Clause 73(1)(b) of FIPPA.

## INDEPENDENT REVIEW: COMPLAINTS

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If the court finds that a **record** or part of a **record** falls within an exception to disclosure under Part 2, the court can not order the **head** to give the **applicant** access to that **record** or that part of the **record**, regardless of whether the exception requires or merely authorizes the **head** to refuse access.<sup>156</sup> For example, where the **record** falls within a discretionary exception to disclosure and the **head** has exercised his or her discretion to refuse access in a proper manner as required by law, the court cannot order the **head** to give the **applicant** access to the **record**.

A decision of the Manitoba Court of Queen's Bench on an appeal under Part 5 of FIPPA is final and binding and there is no appeal from this decision.<sup>157</sup>

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<sup>156</sup> Subsection 73(2) of FIPPA.

<sup>157</sup> Section 74 of FIPPA. (Under *The Personal Health Information Act*, there is a further appeal respecting a refusal of access to one's own **personal health information** to the Manitoba Court of Appeal.)