MANITOBA OMBUDSMAN PRACTICE NOTE

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Manitoba Ombudsman
750 – 500 Portage Avenue
Winnipeg, Manitoba R3C 3X1
Phone: (204) 982-9130 Toll free 1-800-665-0531
Fax: (204) 942-7803
Web site: www.ombudsman.mb.ca

PREPARING FEE ESTIMATES UNDER *THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT* (FIPPA)

OVERVIEW OF FEES UNDER FIPPA

The right of access under FIPPA is subject to the payment of any fee required by the Access and Privacy Regulation (subsection 7(3)).

The Regulation sets out the following types of fees:

- search and preparation in excess of two hours (subsection 4(1) of the Regulation)
- copying fees (section 5 of the Regulation)
- computer programming or data processing fees (section 6 of the Regulation)
- actual cost of special courier delivery, if used (clause 7(c) of the Regulation)

FEE ESTIMATES

A fee estimate must be provided to an applicant when a public body, in responding to a request, determines that:

- search and preparation is likely to take longer than two hours, or
- computer programming or data processing fees will be incurred

A public body is required to give the applicant an estimate of the total fee before providing the services (subsection 82(2)). The estimate must be provided on the prescribed Estimate of Costs form, Form 2 of Schedule A of the Regulation (subsection 8(1) of the Regulation).

It is a good practice to send a cover letter with the Estimate of Costs form. A sample letter is available on Culture, Heritage and Tourism's FIPPA web site located at www.gov.mb.ca/chc/fippa/formsletters. The cover letter could also provide an applicant with an explanation of how the costs were determined.

SEARCH AND PREPARATION FEES

An Estimate of Costs should be prepared as soon as a public body believes that search and preparation related to the application will take more than two hours. The fee payable for search

and preparation is $15.00 for each half-hour in excess of the first two hours, which are at no cost to the applicant (subsection 4(2) of the Regulation).
The activities for which search and preparation fees may be charged are not specified in FIPPA.

Activities that are Not Chargeable
Subsection 4(3) of the Regulation states that a fee estimate cannot include time spent on the following activities:

- transferring an application to another public body
- preparing a fee estimate
- reviewing the responsive records to determine whether any exceptions to disclosure apply, prior to any severing of the records
- copying records supplied to the applicant
- preparing an explanation of the records under subsection 14(2)

Additionally, time is not chargeable for consulting about the request within or outside of the public body, including consulting with legal counsel for the public body.

Activities that are Chargeable
In our opinion, time is chargeable for the following search and preparation activities:

Search to locate requested records:

- reviewing file lists or systems to determine the location of responsive records
- gathering records or retrieving records from storage
- examining files to locate responsive records

Preparation of responsive records:

- copying the original records to have a working copy or copies
- severing the records by obscuring the excepted information and noting the specific provisions on the severed records

COMPUTER PROGRAMMING OR DATA PROCESSING FEES

The Estimate of Costs form is also used when a public body needs to use computer programming or incurs data processing costs in responding to an application. Section 6 of the Regulation sets out the amount of these fees, as follows:

- $10.00 for each fifteen minutes of internal programming or data processing
- the actual cost of external programming or data processing incurred by the public body.

In some instances, data processing or computer programming may be required to produce the requested information. This could involve, for example, the inputting of data into an electronic database, creating an electronic record of information, manipulation of information stored in a computer database or writing a computer program so that the particular information requested can be retrieved.

TIPS FOR ESTIMATING TIME

- Ensure that only chargeable activities are included in the estimate.
- Determine the best approach to calculate how much time may be needed (this will need to be determined on a case-by-case basis).
- Whenever possible, estimate time based on a sample of the records.
- A timed trial can be conducted on a sample of the records by timing the chargeable activities for that sample, and then multiplying the time according to the volume of records.

- Document how the fee estimate was calculated in order to be able to respond to any questions from the applicant or a complaint investigated by the Ombudsman.

DEALING WITH FEE ESTIMATES

When an estimate is given to an applicant, the time within which the public body is required to respond under subsection 11(1) is suspended until the applicant notifies the head that s/he wishes to proceed with the application (subsection 82(4)). An applicant has up to 30 days from the day the estimate is given to indicate if it is accepted or to modify the request to change the amount of the fees (subsection 82(3)).

An applicant who wishes to proceed with the application must sign and return a copy of the Estimate of Costs form to the public body along with payment of the estimated fees (subsection 8(2) of the Regulation). When a public body receives this, the time limit for responding is reactivated and a response must be provided within the remaining time. For example, if the fee estimate was issued on day 15 of the 30-day time limit, the public body would have the remaining 15 days to provide a response, unless the time limit for responding is extended under section 15 of the Act.

If an applicant modifies the request to change the amount of the fees, it may be helpful to either ask the applicant to put the modified request in writing or write to the applicant to confirm the wording of the modified request. A revised Estimate of Costs for the modified request should be provided to the applicant.

Additional fees cannot be charged for search and preparation, computer programming or data processing in the event that the actual time is greater than the estimated time. If the actual cost of search and preparation, computer programming or data processing is less than the estimate, a public body must refund the difference to the applicant (subsection 8(3) of the Regulation). Also, if access to every record the applicant has requested is refused, a public body must refund the amount of estimated fees paid by an applicant (subsection 8(4) of the Regulation).

An applicant has up to 60 days after being notified of the public body's decision concerning the fee estimate to make a complaint to the Ombudsman. If an applicant has questions or concerns about a fee estimate, it is preferred that the applicant contact the public body first, before making a complaint to the Ombudsman. The public body could explain the basis of the estimate directly to the applicant and would generally be able to advise the applicant how modifications to the request could reduce the estimate.

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DEALING WITH FEE WAIVERS UNDER *THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT* (FIPPA)

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CONSIDERING FEE WAIVERS

A public body has discretion to waive all or part of the fees payable under FIPPA (subsection 82(5)).

The Regulation sets out three circumstances in which a public body may waive fees (subsection 9(1) of the Regulation). If a public body is satisfied that one of the circumstances applies, the public body must decide whether to waive all, part or none of the fees.

The Regulation states the following:

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

THE FEE WAIVER PROCESS

An applicant initiates the fee waiver process by making a request for a fee waiver. FIPPA does not specify how the request is to be made (verbally or in writing) and does not specify what information an applicant should provide to a public body to support the request.

It is important that an applicant is made aware of the three circumstances in which fees may be waived and of information that should be provided to the public body in order to consider waiving the fees. This may be done proactively in a cover letter that accompanies a fee estimate, or when an applicant requests a waiver. An example of a cover letter that would accompany an Estimate of Costs form for search and preparation, computer programming or data processing costs is available on Culture, Heritage and Tourism's FIPPA web site located at www.gov.mb.ca/chc/fippa/formsletters.

If an applicant has not provided the type or extent of information needed by a public body to consider the request for a fee waiver, a public body should follow up to ensure the applicant understands the information the public body is seeking.

The public body must inform the applicant in writing of the decision about waiving the fees, either when access is granted or before it is granted (subsection 9(2) of the Regulation). It is a good practice to explain the basis of a decision to refuse to waive all or part of the fees. For example, if a public body is of the view that none of the circumstances applies, the applicant should be informed of this, or if the public body is satisfied that one of the circumstances applies but has chosen not to grant the fee waiver, an explanation for this decision should be provided.

An applicant has the right of complaint to the Ombudsman about the decision concerning a waiver of fees as it is a decision that relates to the access request. A public body's response to the request for a fee waiver should inform an applicant of the right to make a complaint to the Ombudsman, the 60 day time limit to complaint and the contact information for Manitoba Ombudsman.

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RESPONDING TO A COMPLAINT ABOUT A FEE ESTIMATE UNDER *THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT* (FIPPA)

Under FIPPA (subsection 59(1)), an applicant has a right to make an access complaint to the Ombudsman about any decision, act or failure to act by a public body that relates to the request. This includes a complaint about a decision that certain fees apply to the request. This Practice Note has been prepared to assist public bodies in responding to this type of complaint.

When Manitoba Ombudsman investigates a complaint concerning a fee estimate, information would be requested from the public body about the complaint. There is certain information that would be relevant to any complaint about a fee estimate, which is outlined below. There could be other information relevant to a particular complaint that may also be requested from a public body.

For a complaint about a fee estimate, a public body would be asked by our office to:

1. provide a copy of the application for access
2. indicate the date the application was received
3. provide a copy of the Estimate of Costs and cover letter concerning the estimate
4. describe the search and/or preparation tasks included in the estimate, and or the computer programming or data processing tasks
5. provide a copy of the public body's calculations of time for these tasks
6. explain how the amount of time for these tasks was estimated (Note: the explanation should take into consideration the full amount of time, including the first two hours)

Freedom of Information and Protection of Privacy Act

ESTIMATE OF COSTS

Manitoba

In accordance with subsection 82(2), you are being advised by this estimate that there is a fee payable for responding to your application for access to records. The estimate is as follows, based on charges authorized under sections 4 and 6 of the *Access and Privacy Regulation*:

APPLICATION NUMBER: _____

Search and Preparation Fee:

Time in excess of two hours . . . . . _____ hours

Estimated cost (at $15.00 each half hour) . . . . . $ _____

Computer Programming and Data Processing Fee:

- Internal work

  Time estimate . . . . . _____ minutes

  Estimated cost (at $10.00 each 15 minutes) . . . . . $ _____
- External Work

  Estimated cost (at actual cost) . . . . . $ _____

Total of estimated costs . . . . $ _____

Please note: There is generally an additional charge for obtaining copies.

A refund will be made if access to every record requested is refused, or if the actual cost is less than this estimate.

Signed: _____

(Access and Privacy Officer or Coordinator)

Name of Public Body: _____

Address: _____

Date: _____

Please indicate your willingness to proceed by signing below and returning a copy of this form with a cheque payable to _____. Applicants have up to 30 days from the date the estimate is given to indicate if it is accepted or to modify the request in order to change the amount of the fees. After this period, the application would be considered to be abandoned. We shall notify you when the records are ready.

Applicant's Signature: **Date:**