

Manitoba OmbudsNews

Ombudsman, Access and Privacy Newsletter

Welcome to our first ever special edition of *Manitoba OmbudsNews!*

Prepared for the 2014 Association of Manitoba Municipalities Annual Convention



EDITORIAL *We need to talk...*

About our relationship.

Maybe it's because people are more technology-savvy and connected to municipal issues, or maybe it's because people have higher expectations of their elected officials these days. Whatever the cause, we're seeing an increasing number of complaints about municipal matters. It's clear that people care about what's happening in their communities, and they are letting us know it. When they complain, they want answers more quickly and in more detail. That's the new reality.

We have a statutory mandate to investigate citizen complaints under *The Ombudsman Act*, *The Freedom of Information and Protection of Privacy Act* (FIPPA) and *The Personal Health Information Act* (PHIA). While the complaints investigation process does not need to be adversarial, we understand that some officials and administrators may find the experience unwelcome and intrusive, especially when we start asking for the production of sensitive information or documents. But instead of thinking about the complaint process in a negative light, try looking at the other side of the coin, because there is one.

We have a job to do. We have the statutory authority and obligation to investigate and report on citizen complaints. That isn't going to change. But how we do our job, and the kind of

relationship we have with municipalities, is up to you. While meeting our obligation to be thorough and impartial, our approach has always been collaborative and constructive. We look not to find fault, but to identify administrative improvements that can help municipal governments meet their obligations and improve their relationship with the public. We don't want that to change.

Lately, we are seeing more of what has been described as "push back" during complaints investigations. That's making it harder for us to do our job the way we would like to. It has the potential to undermine the collaborative approach we have adopted and employed with your support over the years. Before we are forced to go down that road I'm asking you, and in particular I'm asking new councillors and heads of council, to take the time to understand the relationship we have had and to think about the relationship you want to have with my office.

Think about complaints as an opportunity to have someone revisit an issue with fresh and impartial eyes. Complaints can provide an opportunity to improve policies, procedures or practices. At the very least, complaints might provide an opportunity to communicate the municipality's decisions and actions in an open and transparent way.

We can help in other ways, too. We've developed a number of tools that you

Most complained-about issues

Local improvement plans for large infrastructure projects (sewer/wastewater/water and others)
Subdivisions
Conditional use decisions
Conflict of interest
Council meeting procedures (for example, in-camera meetings)
Development plans
By-law enforcement
Tendering processes
Municipal road and ditch maintenance

will find useful – *Understanding Fairness: A Handbook on Fairness for Manitoba Municipal Leaders* and over 50 "practice notes" to assist people in using and applying FIPPA and PHIA, for example. We've also got a growing collection of investigation reports on our website. These reports form a body of knowledge about local government administration that can benefit everyone. Whether you're a municipal government official or an administrator, you'll find that these reports are an excellent source of administrative best practices that can be adapted and incorporated for your own use.

To find out more, attend the breakout session *Changing Times – Changing Tools* by Mel Holley at 1:00 p.m. on Tuesday, November 25, 2015 in room 2E.

Giving reasons for your decisions

Municipal councils and council committees make hundreds of decisions annually that affect individual rights. The reasons for those decisions are sometimes at issue.

Understanding the reasons – the “why” – for which certain decisions were made can go a long way in creating positive relationships between residents and their municipal governments. Reasons are always important, but people especially want to know the reasons behind those decisions when they don’t get what they want or ask for.

Why do we believe that municipal councils and administrators have a duty to explain their decisions? For a number of reasons:

- It demonstrates that decision makers have listened and understood
- It demonstrates that decision makers have considered the evidence and criteria that are the basis for the decision
- It reduces the possibility of speculation about why decision makers have accepted one position over another
- It helps to demonstrate that councils and administrators know what it means to make fair decisions

Although the benefits of explaining reasons for decisions seem straightforward, it doesn’t always happen. We sometimes hear that a decision maker is not “legally required” to provide reasons. While that can be true, we see it as a best practice and as a critical piece in demonstrating transparency and accountability, both of which are important to maintaining

Ask yourself... If you can explain your decision. Would you feel comfortable explaining it to the person affected by it? If you are afraid to explain your decision, or cannot explain it, then you know that the decision is probably flawed.
(*Understanding Fairness*, p. 18)

confidence in the decisions that government make.

For individuals affected by a decision, understanding the reasons for a decision can help them make a choice about exercising their right of review or appeal. In one recent investigation, the City of Winnipeg’s Board of Adjustment rejected a resident’s variance application without explaining why it believed the resident’s application did not meet the criteria for approving variances, as set out in *The City of Winnipeg Charter*. In this situation, the board was subject to the *Board of Adjustment By-law No. 5894/92*, which requires that it provide written reasons for decisions. The resident, however, received no clarification about which criteria were not met, and did not know how to (or whether to) proceed with a new application or an appeal of the decision. The ombudsman’s findings in this particular case were twofold – that the board should have provided reasons for its decision, but also that in this specific case, that the board based its decision on irrelevant considerations. By the end of the ombudsman investigation, the city advised us that it was changing its process of issuing variance and conditional use orders to include reasons, and for the resident, it waived the application costs associated with submitting a new variance application.

We also recently investigated a refusal of access complaint under FIPPA where an individual felt compelled to seek further information from a municipality about its denial of his water diversion proposal. In this case, the access request was made specifically because the municipality did not provide reasons when it initially denied the water diversion request. The individual, not surprisingly, wanted to understand why his proposal was denied. Upon receipt of the access request, the municipality refused access to the requested records, which precipitated the complaint to the ombudsman. Had the municipality provided reasons



when it denied the request for the water diversion, they could have satisfied the individual’s need to know and prevented both the need for an access request under FIPPA and the complaint to the ombudsman.

It’s not uncommon for the ombudsman to receive complaints about an absence of reasons for certain decisions. It’s one of the reasons we wrote about how issuing written reasons can help municipalities achieve full value in the decision-making process in *Understanding Fairness: A Handbook on Fairness for Manitoba Municipal Leaders*. It’s also one of the reasons we often talk about the importance of issuing reasons in our presentations and other publications, including present and past issues of this newsletter.

Once an ombudsman complaint investigation has concluded, the ombudsman may, under subsection 36(2) of *The Ombudsman Act*, recommend that “reasons should be given for any decision, recommendation, act or omission.” This highlights the significance the legislature has given to the importance of providing reasons for a decision. Which makes us wonder – why wait until the ombudsman undertakes an investigation? Why not give reasons and prevent a complaint from happening in the first place? Based on our experience, we believe that if people know they have been heard and understood, they are more likely to respect a decision and less likely to challenge it.

Balancing openness and transparency with safeguarding individual privacy

We often speak about the importance of openness and transparency when it comes to government decision making. This begins with meetings of council. Council members and the public need enough detail in council meeting agendas to know about the decisions that council will be considering. Meeting minutes, as the official record of municipal business, need to reflect any decisions that were made.

At the same time, municipalities must balance transparency in government with the need to safeguard the privacy of individuals in certain situations. Two FIPPA complaints recently investigated by the ombudsman about disclosure of personal information help to illustrate this point.

In one case, a resident contacted his municipality to express concerns about the process by which the municipality was creating a new by-law. In response to issues raised by the resident, the municipality sought legal advice about the matter in order to confirm that it was following proper procedures. The lawyer's letter and invoice to the municipality contained the name of the resident. The municipality attached the letter and invoice to a meeting agenda, which was made available on the municipality's website. When the resident contacted the municipality about his concern, they removed his name from the agenda materials, but there was a period of time where the resident's personal information would have been publicly available. The resident complained to the ombudsman that his personal information should not have been disclosed by the municipality in such a manner without his consent.

The ombudsman was of the view that disclosure of the resident's personal information was not required for council members and the public to be adequately informed about the expenditure related to obtaining legal advice.

The personal information could have been severed from the records prior to making them available. In this case, disclosing the resident's personal information was not necessary to accomplish the purpose of sharing information about the expenditure.

In another case, residents wrote to both their municipality and the RCMP requesting assistance in addressing ongoing concerns about their neighbours, whom the residents believed were violating a municipal by-law. The residents requested that their letter be kept confidential due to their belief, based on previous experience, that the neighbours would retaliate if the contents of the letter were to be made public. In this case, some personal information was made publicly available by the municipality. As feared, the neighbours – the subject of the concerns – confronted the residents when details of the concerns became known.

Subsection 152(3) of *The Municipal Act* allows council to close a meeting to the public in certain circumstances requiring confidentiality, including if the matter to be discussed relates to enforcement of a by-law. In this case, the matter could have been discussed in camera, and had that decision been made, the residents' correspondence would not have been distributed as part of the public agenda package. It is seldom necessary for municipalities to identify parties in disputes related to by-law infractions, since such disclosures could serve to promote and perpetuate conflict and retaliatory behaviour.

FIPPA serves a dual purpose. While we often focus on the law's access provisions, it is also important to remember that the law establishes the right to privacy for personal information collected, stored, used, and disclosed by public bodies, including municipalities.

Want to know more about FIPPA and PHIA? Find over 50 practice notes on our website

FIPPA & PHIA PRACTICE NOTES

ACCESS ISSUES

Duty to Assist

- The Duty to Assist under FIPPA and PHIA, revised August 2010

Legislative Amendments

- Overview of FIPPA Amendments, January 2011
- Overview of PHIA Amendments, revised January 2011

Interaction with Other Acts

- Interaction Between FIPPA and Other Acts, revised January 2011

Distinguishing Between Access to Information Requests and Authorized Disclosures under FIPPA and PHIA

- Distinguishing Between Access to Information Requests and Authorized Disclosures under FIPPA and PHIA, September 2010

Distinguishing Between Personal and Business Information under FIPPA

- Distinguishing Between Personal Information and Business Information under FIPPA, revised January 2011

Documenting Access Decisions

- Documenting Access Decisions under FIPPA and PHIA, revised January 2011

Fees

- Preparing Fee Estimates under FIPPA, October 2006
- Dealing with Fee Waivers under FIPPA, October 2006

Notification under Section 33 of FIPPA

- Providing Notice to a Third Party under Section 33 of FIPPA, revised January 2011

Practice Notes are prepared by Manitoba Ombudsman to assist persons using *The Freedom of Information and Protection of Privacy Act (FIPPA)* and *The Personal Health Information Act (PHIA)*. They are intended as advice only and are not a substitute for the legislation.

Practice Notes are available on Manitoba Ombudsman's website at www.ombudsman.mb.ca.

Extensions

- Extending the Time Limit for Responding under FIPPA, October 2007
- Making a Submission to the Ombudsman for an Extension Longer than 30 Days under FIPPA, December 2006

Refusal of Access Considerations

- Dealing with Access Requests Involving Employee Information, revised January 2011
- Considerations for Applying Exceptions when Refusing Access under FIPPA, revised January 2011
- Considerations for Applying Exceptions when Refusing Access under PHIA, revised January 2011
- The Exercise of Discretion When Applying Discretionary Exceptions to Refuse Access under FIPPA, revised January 2011
- Distinguishing Between Personal and Business Information under FIPPA, revised January 2011
- Severing Information in Records under FIPPA and PHIA, revised January 2011

Complete Responses to Access Requests

- Checklist-Contents of a Complete Response under section 12 of FIPPA, August 2006
- Providing Reasons to an Applicant when Refusing Access under FIPPA, May 2006
- Checklist-Contents of a Complete Response under PHIA, August 2006
- Providing Reasons to an Individual when Refusing Access under PHIA, August 2006

Requests for Correction

- Handling Requests for Correction under FIPPA, July 2007
- Handling Requests for Correction under PHIA, July 2007

MANITOBA OMBUDSMAN
www.ombudsman.mb.ca

750 - 500 Portage Avenue
Winnipeg, MB R2C 9B3
204.982.9130
1.800.665.0531

702 - 1011 Rossner Avenue
Regina, SK S4S 0A5
304.575.5153
1.888.543.8230

Do You Know Where Your Records Are?

An individual made several FIPPA access applications to a municipality for records related to building construction. The municipality refused access on the basis that some of the records did not exist, while others could not be located. In the course of our investigation into a complaint about this matter, it became apparent that records related to building permits and inspections were stored in more than one location. Even after a search of all locations, records pertaining to the building in question were never located. While we were ultimately satisfied with the municipality's efforts at searching for the records, we reminded the municipality that it is responsible for setting clear expectations for employees and/or contractors around retention, maintenance and accessibility of records – not just for fulfilling FIPPA access requests, but for documenting the actions and decisions of the municipality.

New Municipal Issues Series!

Conflict of Interest for Municipalities

Manitoba Ombudsman

What is conflict of interest?

Simply stated, conflict of interest arises when the personal interest of a council member conflicts with the public interest. It is not the interest of the municipality or the public that is at issue, but the interest of the individual council member. Conflict can arise from personal or financial interests, where a council member might benefit financially from a decision or action of council. This could include acting as a contractor or as a consultant to the municipality, or as a shareholder in a business that is a contractor or consultant to the municipality.

Why does conflict of interest matter?

For decision-making: All decision-making bodies, including municipal councils, are required to make procedural decisions that are not affected by their decisions (see the table for standards of procedural fairness). When making a procedural decision, a council member must be impartial, unbiased and without a personal interest in the matter under consideration. If a council member has a personal interest in the matter under consideration by council, and that council member participates in the decision-making process, it could be determined that such a decision was made in a procedurally unfair manner or the decision itself was unfair or unreasonable by the courts or the ombudsman.

or personally influencing council to make a decision. Conflict of interest can also arise from relationships with other council members. For example, a council member is seen to be biased if they are perceived to be biased in favour of or against another council member. This could include acting as a contractor or as a consultant to the municipality, or as a shareholder in a business that is a contractor or consultant to the municipality.

Procedural fairness relates to the process by which a decision is made, not the substance of the decision itself. Procedural fairness requires that:

- a decision will be affected by the information that is available to the decision-maker;
- the person affected by a decision is given a meaningful opportunity to make or present his or her case;
- a decision-maker is required to disclose any information that might be relevant to the decision-making process.

Procedural fairness requires that:

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- a decision-maker is required to disclose any information that might be relevant to the decision-making process.

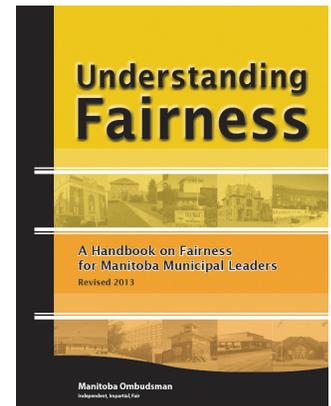
Conflict of Interest for Municipalities – the first in our new Municipal Issues Series is hot off the press. Pick up your copy at the Manitoba Ombudsman exhibitor booth at the AMM convention, contact our office to request a copy, or read it on our website.

Increasingly, we're receiving complaints that allege conflict of interest. In one case, it

At Manitoba Ombudsman, we encourage municipal councils to view legal requirements as the *minimum* standard that must be met. We promote a best practice model where decisions reflect the highest standards of integrity, transparency and accountability. Our experience tells us that this is the best way to maintain public confidence in elected officials.

Ombudsman investigations are often focused on whether the decision-making process has been fair, and whether the decision itself is fair. One of the standards of procedural fairness is that the decision maker be impartial – in other words, unbiased and without a personal interest in the outcome of the decision. If a council member has a personal interest in a matter under consideration by council, and that council member participates in the decision-making process, it could be determined that such a decision was made in a procedurally unfair manner or the decision itself is unfair, if scrutinized by the courts or the ombudsman.

Please see the *Conflict of Interest for Municipalities* fact sheet for more information. For more information on fair decision making, pick up a copy of *Understanding Fairness: A Handbook on Fairness for Manitoba Municipal Leaders*.



was alleged that a council member had placed himself in a conflict of interest situation by being present at two council meetings that included discussions of an item in which the council member had a personal interest. In another case, it was alleged that two council members owned land that would benefit from a proposed local improvement, and that a brother of one of the council members stood to gain financially from the local improvement. And there are more cases that involve similar allegations.

In Manitoba, *The Municipal Council Conflict of Interest Act* deals primarily with conflict arising from financial interests, and provides some definitions of the relationships and issues often raised in conflict of interest cases.

www.ombudsman.mb.ca Municipal Issues Series Fact Sheet 1 (November 2014)

For more FIPPA and PHIA information:

Our office's practice notes, guides and reports are not the only resources available to help municipalities in their efforts to comply with FIPPA. The Information and Privacy Policy Secretariat (IPPS) provides a FIPPA Resource Manual, model (template) letters for many types of FIPPA decisions, and has an FAQ page dedicated to access and privacy considerations for municipal records, available at http://www.gov.mb.ca/chc/fippa/public_bodies/. IPPS also provides a "FIPPA help desk" service, available by calling toll-free 1-800-617-3588.

In addition, Manitoba Health, Healthy Living and Seniors provides resources to help public bodies comply with PHIA, including brief summaries and guides and a PHIA Orientation/Training PowerPoint presentation, all of which are available through the following link: <http://www.gov.mb.ca/health/phia/index.html>

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Winnipeg Office
 750 - 500 Portage Ave.
 Winnipeg, MB R3C 3X1
 Phone: 204-982-9130
 Fax: 204-942-7803
 Toll Free in MB: 1-800-665-0531

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Brandon Office
 202- 1011 Rosser Ave.
 Brandon, MB R7A 0L5
 Phone: 204-571-5151
 Fax: 204-571-5157
 Toll Free in MB 1-888-543-8230