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INDEPENDENT REVIEW: THE ROLE OF THE OMBUDSMAN

OVERVIEW

One of the purposes of FIPPA is to provide for the independent review of the decisions of **public bodies** respecting access to information and protection of **personal information** under FIPPA, and for the resolution of **complaints** under FIPPA.¹ The right to an independent review and resolution of **complaints** is fundamental to ensuring access to information and protection of privacy.

Parts 4 and 5 of FIPPA assign this independent review and complaint resolution function to the Manitoba **Ombudsman**. The **Ombudsman** is responsible for:

- monitoring and promoting compliance with FIPPA by **public bodies**;
- promoting public awareness of access to information and protection of privacy under FIPPA; and
- investigating, dealing with and resolving **complaints** about access to information and protection of **personal information** under FIPPA.

The **Ombudsman** carries out similar responsibilities with respect to **personal health information** and the trustees of **personal health information** under *The Personal Health Information Act*.²

In keeping with the usual powers of an ombudsman, the Manitoba **Ombudsman** cannot order a **public body** to comply with FIPPA. But, the broad powers of the **Ombudsman** to monitor and promote compliance with FIPPA, to audit, to mediate, investigate and make recommendations respecting **complaints**, and the **Ombudsman's** new duty to make his or her recommendations public, have a significant persuasive effect on the actions of **public bodies**.

¹ Clause 2(e) of FIPPA. Section 2 and the purposes of FIPPA are discussed in Chapter 1, under *Purposes of FIPPA*.

² See Parts 4 and 5 of *The Personal Health Information Act*. *The Personal Health Information Act* can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/p033-5e.php>.

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Also, FIPPA has 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.³ The **Adjudicator** has the power to make an order against a **public body** that has not acted on the **Ombudsman's** recommendations.⁴

This Chapter discusses the general powers and duties of the **Ombudsman** under FIPPA, which are found in Part 4 of FIPPA (sections 49 to 58).

Specifically, this Chapter deals with:

- the Ombudsman as an independent officer of the Legislative Assembly;
- the Ombudsman's powers and duties under FIPPA;
- the Ombudsman's powers when carrying out an investigation; and
- the protection given to information provided to the Ombudsman.

Chapter 8 discusses the **complaint** process and the roles of the **Ombudsman**, the Information and Privacy **Adjudicator** and the court in the **complaint** process (Part 4.1 and Part 5 of FIPPA).

³ ***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>.

⁴ Similar amendments have been made to *The Personal Health Information Act* by *The Personal Health Information Amendment Act (2)*. The amending Act can be found at: <http://web2.gov.mb.ca/laws/statutes/2008/c04108e.php>.

THE OMBUDSMAN

The Manitoba **Ombudsman** is an **officer of the Legislative Assembly** who is appointed under *The Ombudsman Act*.⁵ As an **officer of the Legislative Assembly**, the **Ombudsman** is independent of the Government of Manitoba.

Appointment of the Ombudsman

The **Ombudsman** is appointed by the Lieutenant Governor in Council on the recommendation of the Standing Committee of the Legislative Assembly on Legislative Affairs for a term of six years.⁶ A person may be reappointed as **Ombudsman** for a second term of six years, but cannot be appointed for any further term.⁷

The **Ombudsman** can only be removed or suspended from office by the Lieutenant Governor in Council on a resolution of the Legislative Assembly carried by a vote of 2/3 of the members of the Assembly voting. If the Legislative Assembly is not sitting, the Lieutenant Governor in Council may suspend the **Ombudsman** for disability, neglect of duty, misconduct or bankruptcy, but the suspension does not continue beyond the end of the next session of the Legislative Assembly. The Legislative Assembly must determine if the suspension is to continue or if the **Ombudsman** should be removed from office.⁸ In other words, the **Ombudsman** cannot be removed from office by the Government of Manitoba acting on its own.

⁵ Subsection 3(1) of *The Ombudsman Act*. *The Ombudsman Act*, C.C.S.M. c. O45, can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/o045e.php>.

⁶ Subsection 2(1) of *The Ombudsman Act*.

⁷ Subsection 4(1) of *The Ombudsman Act*.

⁸ Section 5 and subsection 6(1) of *The Ombudsman Act*.

The Ombudsman's Staff, and Protection from Liability

The **Ombudsman** may delegate any of his or her duties or powers under FIPPA to any person on the **Ombudsman's** staff.⁹

The Civil Service Act of Manitoba applies to persons employed under the **Ombudsman**.¹⁰

The **Ombudsman**, and any person acting for or under the direction of the **Ombudsman**, is protected from proceedings for “anything done, reported or said in good faith in the exercise or performance or the intended exercise or performance of a duty or power under” FIPPA.¹¹

This means that, as long as the **Ombudsman** and his or her staff act honestly and with the intention of complying with FIPPA, no legal proceedings can be brought against them.¹²

The Ombudsman is Not a Public Body under FIPPA

The office of the **Ombudsman** 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 **Ombudsman**, or his or her staff or office.¹³

In addition, as the **Ombudsman** is an **officer of the Legislative Assembly**, FIPPA does not apply to a **record** made “by or for” the **Ombudsman** – wherever the **record** is located. For example:

- **records** made by the **Ombudsman** or the **Ombudsman's** staff under FIPPA, *The Personal Health Information Act* or *The Ombudsman Act* do not fall under FIPPA;
- **records** made for the **Ombudsman** by a government **department** under FIPPA or *The Personal Health Information Act* or *The Ombudsman Act* do not fall under FIPPA;
- even if a **record** made by or for the **Ombudsman** (or a copy of it) is in the custody of a **department** of the government or of some other **public body** that falls under FIPPA, the **record** (or copy) does not fall under FIPPA.¹⁴

⁹ Section 56 of FIPPA.

¹⁰ Subsection 9(3) of *The Ombudsman Act*. *The Ombudsman Act*, C.C.S.M. c. O45, can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/o045e.php>.

¹¹ Section 57 of FIPPA.

¹² The Ombudsman and his or her staff have similar protection from liability under *The Personal Health Information Act* (section 36). *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>.

¹³ 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*.

¹⁴ 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*.

As a result, the **Ombudsman's records** are not accessible under FIPPA, and the privacy protections in Part 3 of FIPPA – Protection of Privacy – do not apply to the **Ombudsman's records**. Instead, the **Ombudsman's** duty to protect confidentiality (and privacy) is found elsewhere in FIPPA and in *The Ombudsman Act*.

The Ombudsman's Duty of Confidentiality

The **Ombudsman's** general duty to keep information confidential is set out in *The Ombudsman Act*. The **Ombudsman** and his or her staff:

- must take an oath not to divulge any information received under *The Ombudsman Act*, except as provided in that Act; and
- must “maintain secrecy in respect of all matters that come to their knowledge in the exercise of their duties or functions under” *The Ombudsman Act*.¹⁵

The **Ombudsman's** specific duty to avoid disclosure of information obtained in the course of exercising powers and carrying out duties under FIPPA is set out in section 55 of FIPPA and is discussed later in this Chapter, under “*Protection of Information Provided to the Ombudsman*”.

Annual and Special Reports, and the Duty to Make Recommendations Public

Under FIPPA, the **Ombudsman** must make an annual report to the Legislative Assembly on:

- the work of the **Ombudsman's** office in relation to FIPPA;
- the **Ombudsman's** recommendations and whether **public bodies** have complied with them;
- any **complaints** or investigations resulting from a decision, act or failure to act of **public bodies**; and
- any other matters about access to information and protection of privacy that the **Ombudsman** considers appropriate.¹⁶

¹⁵ Sections 10 and 11 of *The Ombudsman Act*. *The Ombudsman Act*, C.C.S.M. c. O45, can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/o045e.php>.

¹⁶ Subsection 58(1) of FIPPA.

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In addition to the **Ombudsman's** annual report, if it is in the public interest the **Ombudsman** may publish special reports relating to any matter within the scope of the **Ombudsman's** powers and duties under FIPPA. For example, the **Ombudsman** may publish a special report about a particular matter investigated by the **Ombudsman**.¹⁷

Also, FIPPA has been amended to require the **Ombudsman** to make his or her recommendations about **complaints** available to the public – for example, by publishing them on the **Ombudsman's** website.¹⁸ A similar amendment has been made to *The Personal Health Information Act*.¹⁹

¹⁷ Subsection 58(3) of FIPPA. The Ombudsman has a similar duty to make an annual report to the Legislative Assembly and a similar power to publish special reports in the public interest under section 37 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>.

¹⁸ Subsection 66(7) of FIPPA. 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>.

¹⁹ Subsection 48(7) of *The Personal Health Information Act*.

THE OMBUDSMAN'S POWERS AND DUTIES UNDER FIPPA [PART 4]

Clause 2(e) of FIPPA states that the purposes of FIPPA include providing for an “independent review of the decisions of **public bodies**” respecting access to information and protection of **personal information** under FIPPA and for the resolution of **complaints** under FIPPA. These purposes are carried out through the office of the **Ombudsman**.

The **Ombudsman** has a continuing responsibility to ensure that **public bodies** are complying with the requirements of FIPPA, and has a similar responsibility with respect to **public bodies** and other trustees under *The Personal Health Information Act*.²⁰

The **Ombudsman** cannot make orders that bind a **public body**. However, the broad powers of the **Ombudsman** to monitor compliance with FIPPA, to audit, to investigate, mediate and make recommendations about **complaints**, and the new duty to make his or her recommendations public, have a significant impact on the actions of **public bodies**.

Also, FIPPA has been amended to give the **Ombudsman** a new power with respect to **complaints**: where a **public body** has not acted on the recommendations of the **Ombudsman** in an access or privacy **complaint**, the **Ombudsman** may refer the matter to the Information and Privacy **Adjudicator** for review. The **Adjudicator** has the power to make an order against a **public body** that has not acted on the **Ombudsman's** recommendations.²¹

The **Ombudsman's** powers and duties under FIPPA fall into three broad categories:

- (i) monitoring and promoting compliance with FIPPA by **public bodies**;
- (ii) promoting public awareness of access to information and protection of privacy under FIPPA; and
- (iii) investigating, dealing with and resolving **complaints** about access to information and protection of **personal information** under FIPPA.²²

²⁰ Parts 4 and 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>.

²¹ This 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>. Similar amendments have been made to *The Personal Health Information Act* by *The Personal Health Information Amendment Act (2)*, S.M. 2008 c. 41, found at: <http://web2.gov.mb.ca/laws/statutes/2008/c04108e.php>.

²² The power to investigate, deal with and resolve complaints under FIPPA is dealt with in more detail in Chapter 8 of this Manual.

■ **Monitoring and Promoting Compliance with FIPPA - [Section 49 and Subsection 15(1)]**

Note: The **Ombudsman** is given significant powers under FIPPA to monitor and promote compliance with FIPPA. Wherever possible, the **Ombudsman** promotes compliance with FIPPA, and with *The Personal Health Information Act*, by means of a collaborative approach.

The Ombudsman's General Powers under Section 49 of FIPPA

In addition to the **Ombudsman's** powers and duties respecting **complaints** under Part 5 of FIPPA, the **Ombudsman** has the following powers:

- (i) The **Ombudsman** may conduct investigations and audits and make recommendations to monitor and ensure compliance with FIPPA and the regulations under FIPPA.²³

These broad powers enable the **Ombudsman** to ensure that **public bodies** comply with the access to information requirements in Part 2 of FIPPA and the protection of **personal information** requirements in Part 3 of FIPPA. An investigation under this clause does not have to be triggered by a specific **complaint**.

- (ii) The **Ombudsman** may conduct investigations and audits and make recommendations to monitor and ensure compliance with requirements respecting the security and destruction of **records** that are set out in any other statute or regulation. In the case of a **local public body**, these powers also apply to requirements respecting security and destruction of **records** in a by-law or other legal instrument by which the **local public body** acts.²⁴

Clause 3(b) of FIPPA states that FIPPA “does not prohibit the transfer, storage or destruction of any **record** in accordance with any other **enactment** of Manitoba or Canada or a by-law or resolution of a **government agency** or **local public body**”.²⁵

²³ Clause 49(a)(i) of FIPPA. There is one regulation under FIPPA – the *Access and Privacy Regulation*, Manitoba Regulation 64/98, as amended. It can be found at: <http://web2.gov.mb.ca/laws/regs/pdf/f175-064.98.pdf>.

²⁴ Clause 49(a)(ii) of FIPPA.

²⁵ Clause 3(b) is discussed in Chapter 2, under *Procedures Not Affected by FIPPA*.

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Section 40 of FIPPA deals with retention of **personal information**, and section 41 deals with protection of **personal information**.²⁶ At the present time, there are no regulations under FIPPA respecting destruction or security of **personal information**.

This power permits the **Ombudsman** to investigate whether a **public body** is complying with the requirements of another Act, such as *The Archives and Recordkeeping Act*,²⁷ or with its own by-laws, when it destroys **records**.

- (iii) The **Ombudsman** may receive comments from the public about the administration of FIPPA.²⁸
- (iv) The **Ombudsman** may comment on the implications for access to information or for protection of privacy of proposed legislative schemes or programs of **public bodies**.²⁹

While the **Ombudsman** cannot require the Government to enact laws that comply with the spirit of FIPPA, or to repeal inconsistent laws, the ability to comment on proposed legislative schemes and programs and to inform the public about the implications of these schemes and programs for access to information or protection of privacy helps to ensure that the Government will be held accountable.

- (v) The **Ombudsman** may comment on the implications for protection of privacy of using or disclosing **personal information** for record linkage.³⁰

Record linkage is a form of data matching involving the systematic comparison of sets of information, often personal, to establish relationships among data.

- (vi) The **Ombudsman** may comment on the implications for protection of privacy of using information technology in the collection, storage, use or transfer of **personal information**.³¹

²⁶ Sections 40 and 41 are discussed in Chapter 6 of this Manual.

²⁷ *The Archives and Recordkeeping Act*, C.C.S.M. c. A132, can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/a132e.php>.

²⁸ Clause 49(c) of FIPPA.

²⁹ Clause 49(d) of FIPPA.

³⁰ Clause 49(e)(i) of FIPPA.

³¹ Clause 49(e)(ii) of FIPPA.

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- (vii) The **Ombudsman** may bring to the attention of the **head** of a **public body** any failure to fulfill the duty to assist an **applicant** requesting access to information under Part 2 of FIPPA.³²

The duty to assist **applicants** requesting access to information is set out in section 9 of FIPPA. The **head** of a **public body** is required to make “every reasonable effort to assist” an **applicant** and to “respond without delay, openly, accurately and completely” to a request for access to **records** under Part 2 of FIPPA.³³

- (viii) The **Ombudsman** may recommend to a **public body** that the **public body** cease a specified practice of collecting, using or disclosing information that contravenes FIPPA, after giving the **head** of the **public body** an opportunity to make representations.³⁴

Part 3 of FIPPA deals with the collection, use and disclosure of **personal information**.³⁵

- (ix) The **Ombudsman** may recommend to a **public body** that the **public body** modify a specified practice of collecting, using or disclosing information that contravenes FIPPA, after giving the **head** of the **public body** an opportunity to make representations.³⁶

Part 3 of FIPPA deals with the collection, use and disclosure of **personal information**.³⁷

- (x) The **Ombudsman** may recommend to a **public body** that the **public body** destroy a collection of **personal information** that was not collected in accordance with FIPPA, after giving the **head** of the **public body** an opportunity to make representations.³⁸

³² Clause 49(f) of FIPPA.

³³ The duty to assist applicants seeking access under FIPPA is discussed in Chapter 4, under *The Duty to Assist an Access Applicant*.

³⁴ Clause 49(g)(i) of FIPPA.

³⁵ Part 3 – Protection of Privacy – is discussed in Chapter 6 of this Manual.

³⁶ Clause 49(g)(i) of FIPPA.

³⁷ Part 3 – Protection of Privacy – is discussed in Chapter 6 of this Manual.

³⁸ Clause 49(g)(ii) of FIPPA.

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A **public body** can only collect **personal information** for an authorized purpose set out in subsection 36(1) of FIPPA. A **public body** can only collect as much **personal information** as is reasonably necessary to accomplish the purpose for which it is collected [subsection 36(2)].

Personal information must be collected directly from the individual it is about unless another method of collection is authorized under subsection 37(1) of FIPPA. When a **public body** collects **personal information** directly from the individual it is about, the **public body** must provide certain information to that individual [subsections 37(2) and (3)].³⁹

- (xi) The **Ombudsman** may make recommendations about the administration of FIPPA to the **head** of a **public body** or to the Minister responsible for FIPPA – the Minister of Sport, Culture and Heritage.⁴⁰
- (xii) The **Ombudsman** may consult with any person with experience or expertise in any matter related to the purposes of FIPPA.⁴¹
The purposes of FIPPA are set out in section 2 of FIPPA.⁴²
- (xiii) The **Ombudsman** may engage in or commission research into anything affecting the achievement of the purposes of FIPPA.⁴³

The purposes of FIPPA are set out in section 2 of FIPPA.⁴⁴

³⁹ Collection of personal information is discussed in Chapter 6, under *Collection of Personal Information*.

⁴⁰ Clause 49(h) of FIPPA.

⁴¹ Clause 49(i) of FIPPA.

⁴² Section 2 and the purposes of FIPPA are discussed in Chapter 1, under *Purposes of FIPPA*.

⁴³ Clause 49(j) of FIPPA.

⁴⁴ Section 2 and the purposes of FIPPA are discussed in Chapter 1, under *Purposes of FIPPA*.

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Requests to Extend the Time Limit for Responding to Access Requests [Subsection 15(1)]

Ordinarily, when responding to a request for access to information under Part 2 of FIPPA, the **head** of a **public body** must respond to the **applicant** within 30 days.

The **head** may extend this 30 day time period for up to 30 additional days if one of the circumstances set out in clause 15(1)(a), (b), (c) or (d) apply. This extension of time for responding to the request may be for more than 30 additional days if the **Ombudsman** agrees.

See: Manitoba Ombudsman Practice Note *"Making a submission to the Ombudsman for an extension longer than 30 days under FIPPA"*.⁴⁵

⁴⁵ This Practice Note can be found at:
http://www.ombudsman.mb.ca/documents_and_files/practice-notes.html.

■ Promoting Public Awareness of FIPPA - [Clause 49(b), Subsection 66(7) and Subsections 58(1) and 58(3)]

Under clause 49(b) of FIPPA, the **Ombudsman** has the general power to inform the public about FIPPA.

The **Ombudsman's** website has very useful information about FIPPA and *The Personal Health Information Act*, including Practice Notes and other tools – go to the Access and Privacy Division at: <http://www.ombudsman.mb.ca/info/access-and-privacy-division.html>.

FIPPA has been amended to require the **Ombudsman** to make his or her recommendations respecting access and privacy **complaints** available to the public – for example, by publishing them on the **Ombudsman's** website.⁴⁶

The **Ombudsman** must make annual reports to the Legislative Assembly about FIPPA.⁴⁷

In addition to the requirement to make annual reports, the **Ombudsman** may, if it is in the public interest, publish special reports relating to any matter within the scope of the **Ombudsman's** powers and duties under FIPPA. A special report can include a report referring to and commenting on any particular matter investigated by the **Ombudsman**.⁴⁸

⁴⁶ Subsection 66(7), This new duty has been 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>.

⁴⁷ Subsection 58(1) of FIPPA.

⁴⁸ Subsection 58(3) of FIPPA. The Ombudsman has similar powers and duties to promote public awareness under *The Personal Health Information Act*.

■ **Investigating and Dealing with Complaints - [Part 5, Sections 59 to 74]**

The **Ombudsman's** role in investigating and dealing with **complaints** about access to information and protection of privacy under FIPPA is dealt with in Chapter 8 of this Manual – *"Independent Review: Complaints"*.

The Ombudsman can also initiate his or her own **complaint** about access to information or about protection of privacy under FIPPA.⁴⁹

⁴⁹ Subsection 59(5) and the definition of "complaint" in subsection 1(1) of FIPPA.

THE OMBUDSMAN'S POWERS WHEN CONDUCTING AN INVESTIGATION [SECTIONS 50 AND 51]

■ Powers of a Commissioner under Part 5 of *The Manitoba Evidence Act* [Subsection 50(1)]

In carrying out an investigation under section 49 of FIPPA or an investigation of a **complaint** under Part 5 of FIPPA, the **Ombudsman** has all the powers and protections of a commissioner under Part V of *The Manitoba Evidence Act*.⁵⁰ 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 **Ombudsman**;
- (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.⁵¹

⁵⁰ Subsection 50(1) of FIPPA.

⁵¹ 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>.

■ Power to Require Records to be Produced - [Subsections 50(2), (3) and (4)]

The **Ombudsman**:

- may require any **record** in the custody or under the control of a **public body** that the **Ombudsman** considers relevant to an investigation to be produced to the **Ombudsman**; and
- may examine any information in a **record**, including **personal information**.⁵²

A **public body** must produce any **record** or a copy of a **record** required by the **Ombudsman** within 14 days, despite any other statute or regulation or any privilege of the law of evidence.⁵³

If it is not practicable to make a copy of the requested **record**, the **head** of the **public body** may require the **Ombudsman** to examine the original **record** at its site.⁵⁴

■ Right to Enter Offices of Public Bodies, Examine Records, etc. - [Section 51]

Despite any other statute or regulation or any privilege of the law of evidence, when exercising powers and performing duties under FIPPA, the **Ombudsman** has the right:

- to enter any office of a **public body** and examine and make copies of any **record** in the custody of the **public body**; and
- to speak in private with any officer or **employee** of a **public body**.⁵⁵

If you have any questions about the **Ombudsman's** power to require or examine records, contact legal counsel.

⁵² Subsection 50(2) of FIPPA.

⁵³ Subsection 50(3) of FIPPA.

⁵⁴ Subsection 50(4) of FIPPA.

⁵⁵ Subsection 51 of FIPPA. If you have any questions about the Ombudsman's power to enter offices, examine records, etc., contact legal counsel.

■ **Duty of Public Body to Produce Records, etc. - [Subsections 50(3) and 50(4) and Sections 85 and 86]**

A **public body** and its officers and **employees** must produce a **record** or a copy of a **record** requested by the **Ombudsman** under FIPPA within 14 days. This duty applies despite any other statute or regulation or any privilege of the law of evidence.⁵⁶ If you have any questions about the duty to provide a **record** to the **Ombudsman**, contact legal counsel.

If it is not practicable to make a copy of the requested **record**, the **head** of the **public body** may require the **Ombudsman** to examine the original **record** at its site.⁵⁷

No person is guilty of an offence under another statute or regulation because he or she has complied with a request or requirement under FIPPA to produce a **record** or provide information or evidence to the **Ombudsman**, or to a person acting for or under the direction of the **Ombudsman**.⁵⁸

Indeed, it can be an offence under FIPPA not to provide **records** or information to the **Ombudsman**. Any person who wilfully

- makes a false statement to the **Ombudsman** or another person in performing duties or exercising powers under FIPPA;
- misleads or attempts to mislead the **Ombudsman** or another person in performing duties or exercising powers under FIPPA;
- obstructs the **Ombudsman** or another person in performing duties or exercising powers under FIPPA; or
- destroys a **record** or erases information in a **record** that is subject to FIPPA with the intent to evade a request for access to **records**;

commits an offence under FIPPA. If found guilty by a court, that person may be fined up to \$50,000.⁵⁹

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 **Ombudsman**, or a person acting for or under the direction of the **Ombudsman**, under FIPPA.⁶⁰

⁵⁶ Subsection 50(3) of FIPPA.

⁵⁷ Subsection 50(4) of FIPPA.

⁵⁸ Subsection 86(1) of FIPPA.

⁵⁹ Subsection 85(1) of FIPPA.

⁶⁰ Subsection 86(2) of FIPPA.

PROTECTION OF INFORMATION PROVIDED TO THE OMBUDSMAN [SECTIONS 52 TO 55, SUBSECTION 1(1) AND CLAUSE 4(E)]

■ Investigations in Private - [Section 52]

The **Ombudsman** must carry out every investigation under section 49 of FIPPA, and every investigation of a **complaint** under Part 5 of FIPPA, in private.

■ Statements to and Reports of the Ombudsman Not Admissible in Evidence - [Sections 53 and 54]

A statement made or an answer given by a person during an investigation by the **Ombudsman** under FIPPA, and a report or recommendation of the **Ombudsman**, cannot be introduced or admitted as evidence in a court or in any other proceeding, except:

- (i) in a prosecution in the criminal courts for perjury in respect of sworn testimony;⁶¹
- (ii) in a prosecution in the criminal courts for an offence under FIPPA;⁶²
- (iii) in a review by the Information and Privacy **Adjudicator** under FIPPA, where the **Ombudsman** is a party to that review;⁶³ or
- (iv) in an application to the Manitoba Court of Queen's Bench for judicial review of an order of the **Adjudicator** under FIPPA.⁶⁴

The **Ombudsman**, and anyone acting for or under the direction of the **Ombudsman**, cannot be required to give evidence, in a court or in any other proceeding, about information that comes to their knowledge when performing duties or exercising powers under FIPPA.⁶⁵

⁶¹ Clause 53(1)(a) of FIPPA.

⁶² Clause 53(1)(b) of FIPPA.

⁶³ Clause 53(1)(c) of FIPPA (new). The review process and the role of the Information and Privacy Adjudicator are discussed in Chapter 8 of this Manual.

⁶⁴ Clause 53(1)(c) of FIPPA (new). The right to apply to court for judicial review of an order made by the Information and Privacy Adjudicator is discussed in Chapter 8 of this Manual.

⁶⁵ Subsection 53(2) of FIPPA.

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Anything said, any information supplied and any **record** produced by a person during an investigation by the **Ombudsman** under FIPPA is privileged in the same manner as if it were said, supplied or produced in a proceeding in a court.⁶⁶

■ **Restrictions on Disclosure of Information by the Ombudsman - [Section 55]**

Section 55 of FIPPA restricts disclosure by the **Ombudsman**, and by the **Ombudsman's** staff, of information they obtain when performing duties or exercising powers under FIPPA.

Specifically, the **Ombudsman** may only disclose, or authorize anyone acting for or under the direction of the **Ombudsman**, to disclose:

- (a) information that is necessary to perform a duty or to exercise a power of the **Ombudsman** under FIPPA,⁶⁷
- (b) information that is necessary to establish the grounds for findings and recommendations contained in a report by the Ombudsman under FIPPA,⁶⁸
- (c) information for the purpose of:
 - (i) a prosecution in the criminal courts for perjury in respect of sworn testimony;
 - (ii) a prosecution in the criminal courts for an offence under FIPPA;

⁶⁶ Section 54 of FIPPA. If you have any questions about the legal privilege that attaches to information and records during these proceedings, contact legal counsel.

⁶⁷ Clause 55(2)(a) of FIPPA.

⁶⁸ Clause 55(2)(b) of FIPPA.

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- (iii) a review by the Information and Privacy **Adjudicator** under FIPPA, where the **Ombudsman** is a party to that review; or
- (iv) an application to the Manitoba Court of Queen's Bench for judicial review of an order of the **Adjudicator** under FIPPA.⁶⁹

In addition, the **Ombudsman** may disclose to the Manitoba Minister of Justice and Attorney General information relating to the commission of an offence under FIPPA or under any other statute or regulation of Manitoba or Canada if the **Ombudsman** considers there is reason to believe an offence has been committed.⁷⁰

When carrying out an investigation and when performing any other duty or exercising any power under FIPPA, the **Ombudsman**, and anyone acting for or under the direction of the **Ombudsman**, must take “every reasonable precaution” to avoid disclosing, and must not disclose:

- any information 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;⁷¹ and
- whether information exists, if the **head** of a **public body** is authorized under subsection 12(2) of FIPPA to refuse to confirm or deny that the information exists when responding to a request for access to information under Part 2 of FIPPA.⁷²

⁶⁹ ***Subsection 55(5) of FIPPA (amended). The review process, the role of the Information and Privacy Adjudicator and the right to apply to court for judicial review of an order made by the Information and Privacy Adjudicator are discussed in Chapter 8 of this Manual.

⁷⁰ Subsection 55(4) of FIPPA.

⁷¹ Clause 55(3)(a) of FIPPA. The grounds on which the head of a public body is authorized or required to refuse to disclose information in response to an access request under Part 2 of FIPPA are discussed in detail in Chapter 5 of this Manual.

⁷² Clause 55(3)(b) of FIPPA. Subsection 12(2) 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.

■ **Ombudsman's Records Not Accessible under FIPPA - [Subsection 1(1) and Clause 4(e)]**

The office of the **Ombudsman** 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 **Ombudsman**, or to the **Ombudsman's** staff or office.⁷³

In addition, as the **Ombudsman** is an **officer of the Legislative Assembly**, FIPPA does not apply to a **record** made by or for the **Ombudsman**. For example:

- **records** made by the **Ombudsman** or the **Ombudsman's** staff under FIPPA do not fall under FIPPA;
- **records** made for the **Ombudsman** by a government **department** under FIPPA do not fall under FIPPA;
- even if a **record** that was made by or for the **Ombudsman** (or a copy of it) is in the custody of a **department** of the government or of some other **public body** that falls under FIPPA, the **record** (or copy) does not fall under FIPPA.⁷⁴

As a result, the **Ombudsman's** records are not accessible under FIPPA.

⁷³ 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*.

⁷⁴ 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*.