

TABLE OF CONTENTS

TABLE OF CONTENTS	1
SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA	4
Overview	4
A word about definitions	4
Public Bodies that Fall under FIPPA [Subsection 1(1)]	5
Overview of the Definition "Public Body"	5
Departments, Ministers' Offices and the Executive Council Office	7
Departments of the government.....	7
Ministers' offices.....	8
The Executive Council Office.....	8
"Government Agencies"	9
Government agencies 'by definition' [clause (a)].....	9
Government Agencies Brought under FIPPA by the FIPPA Regulation [Clause (b)]	11
"Local Public Bodies"	12
Educational bodies.....	12
Health care bodies	13
Local government bodies.....	14
Bodies that are Not Public Bodies under FIPPA	15
A Note on Establishing a New Board or Other Body.....	17
Records that fall under FIPPA [definition of "record" in subsection 1(1); section 4]	18
Definition of "Record" [Subsection 1(1)]	18
Custody or Control of a Record [Section 4].....	20
"Custody or Control"	20
Custody	20
Control	21
A note about "control" and contracts	22
Records from outside organizations, etc.	23
Records created, received or obtained before FIPPA came into effect	23
Records that Do Not Fall under FIPPA [Clauses 4(a) to 4(k); Subsection 6(2); Records Excluded By Other Legislation]	24
Records Excluded from FIPPA by Clauses 4(a) to 4(k)	24
1. Clause 4(a) - Court records	24
2. Clause 4(b) - Notes, etc. of Persons Acting in a Judicial or Quasi-Judicial Capacity...25	
3. Clause 4(c) - MLA Records.....	27
4. Clause 4(d) - Minister's Personal or Constituency Records	28
5. Clause 4(e) - Records of an Officer of the Legislative Assembly	28
6. Clause 4(f) – Local Public Body Constituency Records	29
7. Clause 4(g) – Educational Institution Teaching Materials or Research Information.....	30
8. Clause 4(h) - Examination or Test Questions.....	30
9. Clause 4(i) - Records about an Ongoing Prosecution or Inquest.....	31

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

10. Clause 4(j) - Archival Records Acquired from a Person other than a Public Body.....	32
11. Clause 4(k) - Record Originating from a Credit Union.....	32
Access Provisions Do Not Apply to Publicly Available Information [Subsection 6(2)]	33
Records Excluded by Other Legislation [Section 5]	34
Procedures Not Affected by FIPPA [Section 3].....	35
1. Clause 3(a) - Records Normally Available to the Public.....	35
2. Clause 3(b) - Transfer, Storage or Destruction of Records	37
3. Clause 3(c) - Information Available to Parties to Legal Proceedings	38
4. Clause 3(d) - Power of a Court or Tribunal to Compel Testimony or Production of Documents.....	38
Key Definitions: Personal Information, Personal Health Information, Law Enforcement, Third Party [Subsection 1(1)]	39
Personal Information [Subsection 1(1)]	40
1. Overview of the Definition "Personal Information"	42
2. Opening Words: "Recorded Information about an Identifiable Individual"	43
(i) The information must be "recorded"	43
(ii) The information must be about an "individual"	44
(iii) The information must be about an "identifiable" individual (that is, about an individual who can be identified)	45
3. The Examples of Personal Information in Clauses (a) to (n)	46
Clause (a) - individual's name	47
Clause (b) - home address, telephone, facsimile or e-mail	47
Clause (c) – age, sex, sexual orientation, marital or family status	48
Clause (d) - ancestry, race, colour, nationality or national or ethnic origin	48
Clause (e) - religion or creed, or religious belief, association or activity.....	48
Clause (f) - personal health information.....	49
Clause (g) – blood type, fingerprints or other hereditary.....	49
characteristics.....	49
Clause (h) – political belief, association or activity.....	49
Clause (i) - education, employment or occupation, or educational, employment or occupational history	49
Clause (j) - source of income or financial circumstances, activities or history	50
Clause (k) - criminal history, including regulatory offences	51
Clauses (l) and (m) - personal views or opinions	51
Clause (n) - identifying number, symbol or other particular assigned to the individual..	52
Personal Health Information [Subsections 1(1) and 1(2)]	53
Law Enforcement.....	57
1. Opening Words: "Any Action Taken for the Purpose of Enforcing an Enactment"	58
2. Clause (a) - Policing.....	58
3. Clause (b) - Investigations or Inspections that Lead or Could lead to a Penalty or Sanction Being Imposed, or that are Otherwise Conducted for the Purpose of Enforcing an Enactment.....	59

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

4. Clause (c) - Proceedings that Lead or Could lead to a Penalty or Sanction Being Imposed, or that are Otherwise Conducted for the Purpose of Enforcing an Enactment ...60	
Third Party [Subsection 1(1)].....	62
Relationship of FIPPA to other Legislation [Section 5].....	64
Acts that Prevail Over FIPPA	66
<i>The Personal Health Information Act</i> (CCSM c. P33.5)	67
1. <i>Personal Health Information</i>	67
2. <i>Trustees under The Personal Health Information Act</i>	68
3. <i>Requests for Access to One's Own Personal Health Information</i>	69
4. <i>Protection of Personal Health Information</i>	70
5. <i>Independent Review and Resolving Complaints</i>	71
6. <i>Offences and Penalties</i>	72
7. <i>Relationship with other Acts</i>	72
<i>The Adoption Act</i> (CCSM c. A2)	73
<i>The Child and Family Services Act</i> (CCSM c. C80)	73
<i>The Correctional Services Act</i> (CCSM c. C230)	74
<i>The Manitoba Evidence Act</i> (CCSM c. E150)	74
<i>The Legislative Assembly Act</i> (CCSM c. L110).....	75
<i>The Mental Health Act</i> (CCSM c. M110)	75
<i>The Regional Health Authorities Act</i> (CCSM c. R34)	76
<i>The Safer Communities and Neighbourhoods Act</i> (CCSM c. S5).....	77
<i>The Securities Act</i> (CCSM c. S50)	77
<i>The Statistics Act</i> (CCSM c. S205).....	78
<i>The Tax Administration and Miscellaneous Taxes Act</i> (CCSM c. T2)	78
<i>The Testing of Bodily Fluids and Disclosure Act</i> (CCSM c. T55).....	79
<i>The Vital Statistics Act</i> (CCSM c. V60).....	79
<i>The Witness Security Act</i> (CCSM c. W167)	80
<i>The Workers Compensation Act</i> (CCSM c. W200)	80
<i>The Youth Drug Stabilization (Support to Parents) Act</i>	81
(C.C.S.M. c. Y50).....	81
Examples of Federal Legislation that Prevails Over FIPPA	82
Youth Criminal Justice Act (Canada)	82
Copyright Act (Canada)	82

Chapter
2

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

OVERVIEW

- the **public bodies** that fall under FIPPA,
- the **records** that fall under FIPPA,
- the **records** that do not fall under FIPPA,
- procedures that are not affected by FIPPA,
- the definitions of **personal information**, **personal health information**, **law enforcement** and **third party**; and
- the relationship of FIPPA to other legislation.

A word about definitions

Certain terms are defined in subsection 1(1) of FIPPA. In this Manual, these defined terms are identified by **bold** type – e.g. **public body**, **record**, etc.

A few terms are defined in the *Access and Privacy Regulation* made under FIPPA.¹

Appendix 1 is a *Glossary of Terms* that includes terms defined in subsection 1(1) of FIPPA, as well as some other terms used in FIPPA or in this Manual.

¹ Manitoba Regulation 64/98, as amended. A consolidated version of this Regulation can be found at: <http://web2.gov.mb.ca/laws/regs/pdf/f175-064.98.pdf>.

PUBLIC BODIES THAT FALL UNDER FIPPA [SUBSECTION 1(1)]

FIPPA applies to Manitoba **public bodies**. The term **public body** is defined in subsection 1(1) of FIPPA.

■ Overview of the Definition "Public Body"

Public bodies that fall under FIPPA have statutory duties with respect to access to information and protection of privacy.

The definition of **public body** in subsection 1(1) of FIPPA sets out the bodies that fall under FIPPA.

This definition also sets out bodies that are not **public bodies** and that do not fall under FIPPA.

1(1) "public body" means

- (a) a **department**,
- (b) a **government agency**,
- (c) the Executive Council Office,
- (d) the office of a **minister**, and
- (e) a **local public body**,

but does not include

- (f) the office of a Member of the Legislative Assembly who is not a **minister**,
- (g) the office of an **officer of the Legislative Assembly**, or
- (h) the Court of Appeal, the Court of Queen's Bench or the Provincial Court;²

² The terms in bold are also defined in subsection 1(1) of FIPPA.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

Clauses (a) to (e) of the definition of **public body** set out five types of bodies that are **public bodies** that fall under FIPPA:

- a **department** of the government of Manitoba;
- the office of a **minister** of the government of Manitoba;
- the Executive Council Office of the government of Manitoba;
- a **government agency**; and
- a **local public body**.

Clauses (f), (g) and (h) of the definition of **public body** set out three types of bodies that are not **public bodies**. These bodies do not fall under FIPPA:

- the office of a Member of the Legislative Assembly who is not a **minister** of the government of Manitoba;
- the office of an **officer of the Legislative Assembly**;
- the Court of Appeal of Manitoba, the Manitoba Court of Queen's Bench and the Provincial Court of Manitoba.

Note:

Every **public body** that falls under FIPPA is also a trustee of **personal health information** under *The Personal Health Information Act*.³

If you have any questions as to whether a body is a **public body** that falls under FIPPA, contact legal counsel.

³ See the definition of "trustee" in subsection 1(1) of *The Personal Health Information Act*. This Act can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/p033-5e.php>.

■ Departments, Ministers' Offices and the Executive Council Office

FIPPA applies to the *executive branch* of the Government of Manitoba. The executive branch includes:

- the **departments** of the Government of Manitoba,
- the offices of the **ministers** of the Government, and
- the Executive Council Office.

That is, all Manitoba government **departments**, ministers' offices and the Executive Council Office are **public bodies** that fall under FIPPA.

Departments of the government

A **department** is defined in subsection 1(1) of FIPPA as “a department, branch or office of the executive government of the province”. All Manitoba government **departments**, and their branches and offices, are **public bodies** that fall under FIPPA.

Example:

Special operating agencies, established under *The Special Operating Agencies Financing Authority Act*, are branches or offices of a **department** and fall under FIPPA. For example, the Companies Office is a special operating agency, and is an office of the Department of Jobs and the Economy. It falls under FIPPA.

The term “office” is not limited to a physical office, but applies to the duties and functions associated with that office.⁴

⁴ See Alberta Information and Privacy Commissioner Order 2001-014 and Order 2001-029:
<http://www.oipc.ab.ca/downloads/documentloader.ashx?id=1842>
<http://www.oipc.ab.ca/ims/client/upload/2001-029.pdf>.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

Ministers' offices

The offices of the **ministers** of the government of Manitoba all fall under FIPPA.

“**Minister**” is defined in subsection 1(1) of FIPPA to mean a member of **Cabinet**. **Cabinet** means the Executive Council appointed under *The Executive Government Organization Act*.⁵

The Executive Council Office

The Executive Council Office of the government of Manitoba falls under FIPPA.

“Executive Council Office” means the office of the Executive Council of the province – commonly called “**Cabinet**” – which is established under *The Executive Government Organization Act*.⁶

⁵ “Minister” and “Cabinet” are defined in subsection 1(1) of FIPPA.

⁶ *The Executive Government Organization Act*, CCSM c.E170, can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/e170e.php>.

■ “Government Agencies”

Manitoba **government agencies**, as defined in subsection 1(1) of FIPPA, are also **public bodies** that fall under FIPPA.

- 1(1) **"government agency"** means
- (a) any board, commission, association, agency, or similar body, whether incorporated or unincorporated, all the members of which, or all the members of the board of management or board of directors or governing board of which, are appointed by an Act of the Legislature or by the Lieutenant Governor in Council, and
 - (b) any other body designated as a **government agency** in the regulations;

Government agencies 'by definition' [clause (a)]

Under clause (a) of the definition, the following are “**government agencies**” and are therefore “**public bodies**” under FIPPA:

- (i) any incorporated or unincorporated board, commission, association, agency or similar body, where all the members of the body are appointed by an Order in Council made by the Lieutenant Governor in Council.

Examples include:

- the Council on Post-Secondary Education established under *The Council on Post-Secondary Education Act*;
- the Manitoba Labour Board established under *The Labour Relations Act*.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

- (ii) any incorporated or unincorporated board, commission, association, agency, or similar body where all of the members of the board of directors, board of management or governing board are appointed by an Order in Council made by the Lieutenant Governor in Council.

Examples include:

- Manitoba Hydro, established under *The Manitoba Hydro Act*;
- the Workers Compensation Board established under *The Workers Compensation Act*.

- (iii) any incorporated or unincorporated board, commission, association, agency or similar body where all the members of the body, or all the members of its board of directors, board of management or governing board, are appointed by an Act of the Legislature.

A hypothetical example:

A body is created by a statute (that is, by an "Act of the Legislature"), and the statute itself states that its members are:

- The Attorney General,
- the Mayor of the City of Winnipeg, and
- the Chief of Police for the City of Winnipeg.

In this example, the statute itself identifies all three members of the body (by the offices that they hold). These members would be "appointed by an Act of the Legislature", and the body would be a **public body** that falls under FIPPA.

Government Agencies Brought under FIPPA by the FIPPA Regulation [Clause (b)]

Under clause (b) of the definition of **government agency**, the meaning of “**government agency**” has been extended to include the additional agencies set out in Schedule B to the *Access and Privacy Regulation* under FIPPA.⁷ These additional agencies are “**government agencies**” and “**public bodies**” under FIPPA, and FIPPA applies to them.

Examples:

Government agencies that have been brought under FIPPA by regulation include: child and family services agencies, community justice committees, the Manitoba Health Research Council, etc.

If you have any questions as to whether a body is a **government agency** that falls under FIPPA, contact legal counsel.

⁷ Manitoba Regulation 64/98, as amended. A consolidated version of the *Access and Privacy Regulation*, including Schedule B – the list of additional government agencies that have been brought under FIPPA by regulation – can be found at: <http://web2.gov.mb.ca/laws/regs/pdf/f175-064.98.pdf>.

■ “Local Public Bodies”

Local public bodies are also **public bodies** that fall under FIPPA.

Subsection 1(1) of FIPPA sets out three kinds of **local public bodies**:

- **educational bodies,**
- **health care bodies,** and
- **local government bodies.**

These three terms are also defined in subsection 1(1) of FIPPA.

Educational bodies

The **educational bodies** described in the definition of this term in subsection 1(1) of FIPPA (set out below) are **local public bodies** and are **public bodies** under FIPPA. This means that FIPPA applies to them.

- | |
|--|
| <p>1(1) "educational body" means</p> <p>(a) a school division or school district established under <i>The Public Schools Act</i>,</p> <p>(b) The University of Manitoba,</p> <p>(c) The University of Winnipeg,</p> <p>(c.1) Brandon University,</p> <p>(c.2) University College of the North,</p> <p>(c.3) L'Université de Saint-Boniface,</p> <p>(c.4) St. Paul's College,</p> <p>(c.5) St. John's College,</p> <p>(d) a college established under <i>The Colleges Act</i>, and</p> <p>(e) any other body designated as an educational body in the regulations;</p> |
|--|

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

With respect to clause (d) of this definition, there are currently two colleges established under *The Colleges Act*: Red River College and Assiniboine Community College.

Under clause (e) of this definition, the meaning of "**educational body**" can be extended by a regulation under FIPPA to bring additional educational institutions under FIPPA.

Health care bodies

The **health care bodies** described in the definition of this term in subsection 1(1) of FIPPA (set out below) are **local public bodies** and are **public bodies** under FIPPA. This means that FIPPA applies to them.

- 1(1)** **"health care body"** means
- (a) a hospital designated under *The Health Services Insurance Act*,
 - (b) a regional health authority established under *The Regional Health Authorities Act*,
 - (c) the board of a health and social services district established under *The District Health and Social Services Act*,
 - (d) the board of a hospital district established under *The Health Services Act*, and
 - (e) any other body designated as a **health care body** in the regulations;

Under clause (e) of this definition, the meaning of "**health care body**" has been extended to include the additional bodies identified in Schedule E to the *Access and Privacy Regulation* under FIPPA.⁸

⁸ Manitoba Regulation 64/98, as amended. A consolidated version of the *Access and Privacy Regulation*, including Schedule E – the list of additional health care bodies that fall under

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

These additional bodies are "**health care bodies**" and "**public bodies**" under FIPPA, and FIPPA applies to them.

Examples:

Health care bodies that have been brought under FIPPA by regulation include: CancerCare Manitoba, Diagnostic Services of Manitoba Inc. and Regional Health Authorities of Manitoba, Inc.

Local government bodies

The **local government bodies** described in the definition of this term in subsection 1(1) of FIPPA (set out below) are **local public bodies** and are **public bodies** under FIPPA. That is, FIPPA applies to them.

1(1) "local government body" means

- (a) The City of Winnipeg,
- (b) a municipality,
- (c) a local government district,
- (d) a council of a community under *The Northern Affairs Act*,
- (e) a planning district established under *The Planning Act*,
- (f) a conservation district established under *The Conservation Districts Act*, and
- (g) any other body designated as a **local government body** in the regulations;

FIPPA – can be found at: <http://web2.gov.mb.ca/laws/regs/pdf/f175-064.98.pdf>.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

Under clause (g) of this definition, the meaning of "**local government body**" can be extended by regulation to bring additional local government entities under FIPPA.

■ Bodies that are Not Public Bodies under FIPPA

FIPPA does not apply to the legislative or judicial branches of the government of Manitoba – that is, it does not apply to the Legislative Assembly of Manitoba or to Manitoba courts. These bodies have their own legislation and rules about access to records and protection of privacy.

Specifically, the definition of "**public body**" in subsection 1(1) of FIPPA states that the following offices or bodies are not "**public bodies**", and FIPPA does not apply to them:

- (i) *the office of a Member of the Legislative Assembly who is not a **minister** of the Government of Manitoba.*

The term "office" is not limited to a physical office, but applies to the duties and functions associated with that office.⁹

- (ii) *the office of an **officer of the Legislative Assembly**.*

"**Officer of the Legislative Assembly**" is defined in subsection 1(1) of FIPPA, and means:

- the Speaker of the Legislative Assembly (elected by the members of the Assembly under *The Legislative Assembly Act*);
- the Clerk of the Legislative Assembly (appointed under *The Legislative Assembly Management Commission Act*);
- the Chief Electoral Officer (appointed under *The Elections Act*);
- the **Ombudsman** (appointed under *The Ombudsman Act*);
- the Children's Advocate (appointed under *The Child and Family Services Act*);

⁹ See Alberta Information and Privacy Commissioner Order 2001-014 and Order 2001-029:
<http://www.oipc.ab.ca/downloads/documentloader.ashx?id=1842>
<http://www.oipc.ab.ca/ims/client/upload/2001-029.pdf>.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

- the Auditor General (appointed under *The Auditor General Act*);
- the Information and Privacy **Adjudicator** (appointed under Part 4.1 of FIPPA);¹⁰ and
- the commissioner appointed under *The Legislative Assembly and Executive Council Conflict of Interest Act*.

The term “office” is not limited to a physical office, but applies to the duties and functions associated with that office.¹¹

- (iii) *the Manitoba Court of Appeal, the Manitoba Court of Queen’s Bench and the Provincial Court of Manitoba.*

Note:

Federal government departments and agencies are not **public bodies** that fall under Manitoba's FIPPA. Federal government departments and some federal government agencies are “government institutions” that fall under the federal government’s *Access to Information Act* and the federal government's *Privacy Act*.

¹⁰ The appointment of the Information and Privacy Adjudicator, and the Adjudicator's role under FIPPA, are discussed in Chapter 8 of this Manual.

¹¹ See Alberta Information and Privacy Commissioner Order 2001-014 and Order 2001-029:
<http://www.oipc.ab.ca/downloads/documentloader.ashx?id=1842>
<http://www.oipc.ab.ca/ims/client/upload/2001-029.pdf>.

■ A Note on Establishing a New Board or Other Body

When a government **department** is developing legislation that will establish a new board, commission, agency, corporation or other entity,

- (i) the **department** should consider whether the entity will fall within the definition of "**government agency**", "**educational body**", "**health care body**" or "**local government body**" in subsection 1(1) of FIPPA. If it does, the entity will be a **public body** under FIPPA, and the access to information and protection of privacy requirements of FIPPA will apply to it.
- (ii) if the entity does not fall within any of these definitions, the **department** should consider whether the entity should be brought under FIPPA by regulation. There are many factors that need to be considered when making this determination. It is strongly recommended that the **department** consult with legal counsel and with the Information and Privacy Policy Secretariat of Manitoba Sport, Culture and Heritage.

Remember:

An entity that is a **public body** under FIPPA is also a trustee of **personal health information** under *The Personal Health Information Act*.

RECORDS THAT FALL UNDER FIPPA [DEFINITION OF “RECORD” IN SUBSECTION 1(1); SECTION 4]

FIPPA applies to “all **records** in the custody or under the control of a **public body**” except those **records** described in clauses 4(a) to 4(k) of FIPPA.¹²

■ Definition of “Record” [Subsection 1(1)]

“Record” is defined very broadly in FIPPA.

1(1) “**record**” means a record of information in any form, and includes information that is written, photographed, recorded or stored in any manner, on any storage medium or by any means including by graphic, electronic or mechanical means, but does not include electronic software or any mechanism that produces records;

The opening words of the definition of “**record**” are particularly important: a **record** is “a record of information in any form”.

The definition also includes examples of **records**, but these examples are not a complete list of what is a “**record**”, as the word “includes” is used. A “**record**” for the purposes of FIPPA includes:

- a copy of a **record**,
- a draft and other working materials,
- handwritten notes,
- photographs and diagrams,
- audio and video tapes,
- electronic correspondence and messages (e.g. e-mail),

¹² Section 4 of FIPPA.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

- information recorded or stored by electronic means, and
- any other “record of information in any form” in the custody or under the control of a **public body**.

In looking at a similar definition of “**record**” in the 1985 *Freedom of Information Act*, the Manitoba Court of Queen’s Bench found that the following handwritten, undated and unsigned notes were “**records**” for the purposes of FIPPA:

The fourth document consists of ten pages of what appear to be notes. The pages are handwritten. They are neither signed nor dated. There are two different types of paper included in the ten pages. Six pages are yellow, 8 ½" by 11", and four pages are white, 8 ½" by 14". I am unable to discern whether all of the writing is by one person or by more than one person.¹³

¹³ *Marchand v. Minister of Government Services of Manitoba* (1991), 74 D. L. R. (4th) 186 (Man. Court of Queen’s Bench), at page 194.

■ Custody or Control of a Record [Section 4]

FIPPA applies to all **records** “in the custody or under the control of” a **public body**, except those **records** described in clauses 4(a) to 4(k) of FIPPA.

“Custody or Control”

For a **record** to fall under FIPPA, a **public body** need only have either “custody” or “control” of the **record**.

In determining whether a **public body** has “custody” or “control” of a **record**, it is necessary to consider all aspects of the creation, maintenance or use of the **record**.¹⁴

Custody

In most cases, a **public body** has “custody” of a **record** for the purposes of FIPPA when it has physical possession of the **record**.

Where more than one copy of a **record** exists, more than one entity may have custody of it.

Only in rare cases could it be successfully argued that a **public body** does not have “custody” of a record in its actual possession.¹⁵

¹⁴ Ontario Information and Privacy Commissioner Order P-120 (Re Ministry of Government Services, June 27, 1989): http://www.ipc.on.ca/images/Findings/Attached_PDF/P-120.pdf.

Also see Ontario Information and Privacy Commissioner Order PO-2523: http://www.ipc.on.ca/images/Findings/up-po_2523.pdf, which considered Order P-120.

¹⁵ Ontario Information and Privacy Commissioner Order P-120 (Re Ministry of Government Services, June 27, 1989): http://www.ipc.on.ca/images/Findings/Attached_PDF/P-120.pdf.

Also see Alberta Information and Privacy Commissioner Order 2000-083 and Order 2000-005: <http://www.oipc.ab.ca/downloads/documentloader.ashx?id=1792>; <http://www.oipc.ab.ca/downloads/documentloader.ashx?id=1794>.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

Example:

Subsection 52.1(1) of *The Legislative Assembly Act* states that "notwithstanding" FIPPA, every record relating to a Member of the Legislative Assembly, or to the administration of the Assembly, that is in the possession of a department or branch of the government or of a Crown agency is deemed to be in the sole custody and under the sole control of the Assembly.

This means that the Assembly record is, by law, not in the custody (or under the control) of a **department** or **government agency** for the purposes of FIPPA, even if the **department** or **government agency** has possession of it. That is, these Assembly records do not fall under FIPPA, no matter where they are located or who holds them.

Control

"Control" of a **record** usually means the power or authority to make decisions about the **record**; to manage the **record**, including restricting, regulating and administering its use, disclosure or disposition.

Some factors indicating that a **record** may be under the control of a **public body** are:

- the **record** was created, received or obtained by an officer, **employee** or member of the **public body** in the course of his or her duties;
- the **record** was created by an outside contractor for the **public body**;
- a contract or agreement states that the **record** is owned by, belongs to, or is under the control of the **public body**;
- the **record** is closely integrated with other **records** of the **public body**;
- the content of the **record** relates to the **public body's** mandate and functions;

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

- the **public body** has the authority to regulate the use and disposition of the **record**;
- the **public body** has relied on the **record** to a substantial extent; or
- a contract or agreement permits the **public body** to inspect, review, possess or copy **records** produced, received or acquired by the contractor as a result of the contract or agreement.¹⁶

Records stored by the Government Records Office¹⁷ for a government **department** or **government agency** are under the control of that government **department** or **government agency**.

Similarly, **records** that are stored on behalf of a **public body** by a contractor in an off-site records centre are under the control of that **public body**.

A note about "control" and contracts

The most common situation where a **public body** may have control, but not custody, of a **record** is where the **public body** has entered into a contract for services. The **record** may be created by, and may be in the possession of, the contractor, but the **public body** will ordinarily be considered to have control over the **record** because it relates to a service provided by the contractor for the **public body**.

A **public body** cannot 'contract out' of its responsibilities under FIPPA to provide access to or to protect **records** that would ordinarily be under its control.

This means that, where a contractor will be creating, obtaining, maintaining or storing information for a **public body**, the **public body** needs to take its obligations under FIPPA into account in the contract. To ensure that the **public body's** obligations under FIPPA, and that matters such as custody and control over **records**, are properly dealt with in contracts and agreements, it is strongly recommended that **public bodies** consult with legal counsel.

¹⁶ See Alberta Information and Privacy Commissioner Order 99-032: <http://www.oipc.ab.ca/downloads/documentloader.ashx?id=1976>.

¹⁷ The Government Records Office is an office of the Department of Sport, Culture and Heritage.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

Example:

A **public body** enters into a contract for services without legal advice. The contract states that the contractor is the sole owner of the records produced for the **public body** by the contractor, and that the **public body** cannot disclose the **records** without the consent of the contractor, even if disclosure is required by law.

But, the **public body** cannot contract out of its legal obligations respecting access to information or protection of privacy under FIPPA.

If there should be a request for access to these **records** under Part 2 of FIPPA, the **public body** could be in a very awkward position.

It is important to avoid situations where complying with a requirement under FIPPA to produce or provide a **record** could give rise to an argument by a contractor that a **public body** is in breach of a contract or an agreement.

Records from outside organizations, etc.

FIPPA applies to all **records** – such as correspondence, reports and other documents, and other recorded information – received or obtained by the **public body** from an outside organization or individual, not just to those generated by the staff and officials and members of the **public body** in the course of their duties.

Records created, received or obtained before FIPPA came into effect

FIPPA applies to **records** created, received or obtained before FIPPA came into effect, as well as to **records** created, received or obtained after FIPPA came into effect.

RECORDS THAT DO NOT FALL UNDER FIPPA [CLAUSES 4(A) TO 4(K); SUBSECTION 6(2); RECORDS EXCLUDED BY OTHER LEGISLATION]

■ Records Excluded from FIPPA by Clauses 4(a) to 4(k)

FIPPA does not apply to the limited number of **records** specified in clauses 4(a) to 4(k) of FIPPA, even if these records are in the custody or under the control of a public body.

1. Clause 4(a) - Court records

FIPPA does not apply to:

- (i) information in a court **record**;
- (ii) a **record** of a judge, master, or justice of the peace;
- (iii) a **record** relating to support services provided to a judge or judicial officer of a court; or
- (iv) a **judicial administration record** defined in subsection 1(1) of FIPPA as follows:

- 1(1)** "**judicial administration record**" means a **record** containing information relating to a judge, master, magistrate or justice of the peace, including information relating to

 - (a) the scheduling of judges, hearings and trials,
 - (b) the content of judicial training programs,
 - (c) statistics of judicial activity prepared by or for a judge,
 - (d) a judicial directive, and
 - (e) any **record** of the Judicial Inquiry Board, the Judicial Council established under *The Provincial Court Act* or the Masters Judicial Council or a hearing judge under *The Court of Queen's Bench Act*.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

The courts are not **public bodies** that fall under FIPPA; they are excluded from FIPPA.¹⁸ Similarly, the **records** of the courts, even if there are held by a **public body**, are excluded from FIPPA.

2. Clause 4(b) - Notes, etc. of Persons Acting in a Judicial or Quasi-Judicial Capacity

FIPPA does not apply to:

- (i) a note made by a person who is acting in a judicial or quasi-judicial capacity;
- (ii) a note made for a person who is acting in a judicial or quasi-judicial capacity;

A **record** is made “for” a person when it is made by another person acting on his or her behalf.

- (iii) a communication of a person who is acting in a judicial or quasi-judicial capacity;

This exclusion applies to communications received by a member of a judicial or quasi-judicial body, between the members of the body and between the members and support staff, when these communications relate to the judicial or quasi-judicial functions of the body.

- (iv) a draft decision of a person who is acting in a judicial or quasi-judicial capacity.

A person is acting in a judicial or quasi-judicial capacity if he or she is carrying out a function that is judicial or partly administrative and partly judicial, and he or she is required to:

- investigate facts, hear all the parties to a matter at issue and weigh evidence or draw conclusions as a basis for his or her action;
- exercise discretion of a judicial nature; and

¹⁸ See the definition “public body” in subsection 1(1) of FIPPA and the discussion under *Public Bodies That Fall Under FIPPA* earlier in this Chapter.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

- make a decision after considering the issues, rather than simply making a recommendation.¹⁹

A person acting in a judicial or quasi-judicial capacity is generally under a duty to act in accordance with the rules of natural justice.

The following factors – though not a complete list – have been used to determine whether a person or body is acting in a “judicial or quasi-judicial” capacity:

- Is there anything in the language in which the function is conferred or in the general context in which it is exercised that suggests that a hearing is contemplated before a decision is reached?
- Does the decision directly or indirectly affect the rights and obligations of persons?
- Is the adversarial process involved?
- Is there an obligation to apply substantive rules to many individual cases rather than, for example, an obligation to implement social and economic policy in a broad sense?²⁰

No one factor is decisive, and the legislation under which the decision is made needs to be carefully examined to determine whether a person or body is acting in a “judicial or quasi-judicial” capacity. Legal counsel should be contacted for assistance.

Example

A member of a panel of the Municipal Board established under *The Municipal Board Act* that is hearing an appeal about a property tax assessment is an example of a person acting in a quasi-judicial capacity.

¹⁹ Based on the *Dictionary of Canadian Law* and *Black’s Law Dictionary*, 6th edition.

²⁰ For example, see Alberta Information and Privacy Commissioner Order 99-025: <http://www.oipc.ab.ca/downloads/documentloader.ashx?id=1814>.
Also see B.C. Information and Privacy Commissioner Order 02-01: <http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/156693/2002/order02-01.pdf>.

3. Clause 4(c) - MLA Records

FIPPA does not apply to “a **record** of a Member of the Legislative Assembly of Manitoba who is not a **minister**”.

The Legislative Assembly is not a **public body** that falls under FIPPA; the Assembly is excluded from FIPPA.²¹ Similarly, the **records** created, received or obtained by the Members of the Legislative Assembly are excluded from FIPPA.

These **records** deal with the duties and functions of the MLA as the representative of his or her constituents, and are excluded from FIPPA because they relate to Legislative Assembly matters, not to executive government matters.

Note:

Subsection 52.1(1) of *The Legislative Assembly Act* states that "notwithstanding" FIPPA, every record relating to a Member of the Legislative Assembly, or to the administration of the Assembly, that is in the possession of a department or branch of the government or of a Crown agency is deemed to be in the sole custody and under the sole control of the Assembly. That is, these Assembly records do not fall under FIPPA, no matter where they are located or who holds them.

²¹ See the definition "public body" in subsection 1(1) of FIPPA and the discussion under *Public Bodies That Fall Under FIPPA* earlier in this Chapter.

4. Clause 4(d) - Minister's Personal or Constituency Records

FIPPA does not apply to “a personal or constituency **record** of a **minister**” of the Government of Manitoba.

Personal records are records that relate to a **minister** as a private individual, rather than as an elected official. Constituency records are records that relate to a **minister's** constituency business, persons who may have worked on an election campaign and details about the campaign.²²

But, the records of a **minister** relating to his or her functions as a government **minister** do fall under FIPPA.

5. Clause 4(e) - Records of an Officer of the Legislative Assembly

FIPPA does not apply to “a record made by or for an **officer of the Legislative Assembly**”.

A “**record** made for an officer” includes:

- a **record** that has been provided or sent to the officer (for example, a letter from a member of the public); and
- a **record** that has been made by another person acting on the officer's behalf.

“**Officer of the Legislative Assembly**” is defined in subsection 1(1) of FIPPA to mean:

- the Speaker of the Legislative Assembly,
- the Clerk of the Legislative Assembly,
- the Chief Electoral Officer,
- the **Ombudsman**,
- the Children's Advocate,

²² Alberta Information and Privacy Commissioner Order 2005-010:
<http://www.oipc.ab.ca/downloads/documentloader.ashx?id=2129>.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

- the Auditor General,
- the Information and Privacy **Adjudicator** (appointed under FIPPA),²³ and
- the commissioner appointed under *The Legislative Assembly and Executive Council Conflict of Interest Act*.

Examples of records created by or for an **officer of the Legislative Assembly** that are excluded from FIPPA include:

- the officer's administrative and operational **records** and correspondence;
- correspondence, draft reports, etc., to and from the officer or his or her office;
- **records** created by employees and contractors for these officers.²⁴

These **records** are excluded from, and do not fall under, FIPPA – wherever they are located, and whoever holds them. For example, even if a draft report created by the **Ombudsman** is in the custody of a government **department**, the draft report does not fall under FIPPA.

6. Clause 4(f) – Local Public Body Constituency Records

FIPPA does not apply to “a **record** made by or for an elected official of a **local public body** relating to constituency matters”.

A “**record** made for an elected official” includes:

- a **record** that has been provided or sent to the official (for example, a letter from a member of the public); and
- a **record** that has been made by another person acting on the official's behalf.

²³ The appointment of the Information and Privacy Adjudicator, and the Adjudicator's role under FIPPA, are discussed in Chapter 8 of this Manual.

²⁴ For example, see Alberta Information and Privacy Commissioner Order 97-008: <http://www.oipc.ab.ca/downloads/documentloader.ashx?id=1904>.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

Constituency **records** are **records** that relate to the elected official's constituency business, persons who may have worked on an election campaign and details about the campaign.²⁵

7. Clause 4(g) – Educational Institution Teaching Materials or Research Information

FIPPA does not apply to “teaching materials or research information of an **employee** of an educational institution”.

“Teach” means to give systematic information to a person or about a subject or skill.²⁶

“Teaching materials” includes any **record** produced or compiled to distribute to students, to aid the teacher in relating information to students, or otherwise used to teach.

“The term “**employee**” is defined in subsection 1(1) of FIPPA to include “a person who performs services for the **public body** under a contract or agency relationship with the **public body**”.²⁷

The term “educational institution” is not defined in FIPPA, but would include a school, community college, university, college, etc. The University of Manitoba and the Manitoba School for the Deaf are examples of “educational institutions”.

8. Clause 4(h) - Examination or Test Questions

FIPPA does not apply to “a question that is to be used on an examination or test”.

This exclusion applies to questions to be used now, or that are intended to be used in the future, on an examination or test.

²⁵ For example, see Alberta Information and Privacy Commissioner Order 2005-010: <http://www.oipc.ab.ca/downloads/documentloader.ashx?id=2129>.

²⁶ *The Concise Oxford Dictionary*, 9th edition.

²⁷ The definition of “employee” 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>.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

The exclusion applies, but is not limited, to questions to be used on examinations or tests given by educational institutions.

Examples:

Questions on a driver's licence test or on a government employment competition test would be excluded from FIPPA under clause 4(h), if the questions are currently being used or will be used in the future.

9. Clause 4(i) - Records about an Ongoing Prosecution or Inquest

- (i) FIPPA does not apply to a **record** relating to a prosecution, if all proceedings concerning the prosecution have not been completed.

A prosecution is completed once the trial is finished, a decision has been made, all appeal periods have expired and all appeals have been completed.

- (ii) FIPPA does not apply to a **record** relating to an inquest under *The Fatality Inquiries Act*, if all proceedings concerning the inquest have not been completed.

Once all proceedings have been completed, the **records** relating to a prosecution or an inquest fall under FIPPA.

Note:

Even though a **record** relating to a completed prosecution or inquest falls under FIPPA, if access to it is requested under FIPPA, the **record**, or information in it, may fall within an exception to disclosure in Part 2 of FIPPA.²⁸

²⁸ The exceptions to disclosure in Part 2 of FIPPA are discussed in Chapter 5 of this Manual.

10. Clause 4(j) - Archival Records Acquired from a Person other than a Public Body

FIPPA does not apply to “**records** acquired by the Archives of Manitoba, or the archives of a **public body**, from a person or entity, if that person or entity is not a **public body**”.²⁹

11. Clause 4(k) - Record Originating from a Credit Union

FIPPA does not apply to “a **record** originating from a credit union that is in the custody or under the control of the Deposit Guarantee Corporation of Manitoba under *The Credit Unions and Caisses Populaires Act*”.

Only a **record** “originating from” a credit union is excluded from FIPPA. The other **records** of the Deposit Guarantee Corporation fall under FIPPA.

²⁹ Bodies that are, and are not, public bodies that fall under FIPPA are discussed earlier in this Chapter, under *Public Bodies that Fall Under FIPPA*.

■ Access Provisions Do Not Apply to Publicly Available Information [Subsection 6(2)]

Subsection 6(2) of FIPPA creates a partial exclusion from FIPPA for publicly available **records**.

The right of access to **records** in the custody or under the control of a **public body** under Part 2 of FIPPA – Access to Information – does not apply to information that is available to the public free of charge or that can be purchased.³⁰

Part does not apply to publicly available information

6(2) This Part [*Part 2 – Access to Information*] does not apply to information that is available to the public free of charge or for purchase.

But, the requirements of Part 3 of FIPPA – Protection of Privacy – do apply to these records. This means that **public bodies** need to review their practices and procedures for publishing and releasing **records** and information to ensure that **personal information** is protected as required by Part 3 of FIPPA.

³⁰ This exclusion 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>.

■ Records Excluded by Other Legislation [Section 5]

A statute or regulation may provide that FIPPA does not apply to certain **records** – but, it has to do so very specifically.³¹

The following statutes contain specific rules about access to and confidentiality of certain **records** and provide that these specific rules prevail over the more general provisions of FIPPA:

- *The Personal Health Information Act*
- *The Adoption Act*
- *The Child and Family Services Act*
- *The Correctional Services Act*
- *The Manitoba Evidence Act*
- *The Legislative Assembly Act*
- *The Mental Health Act*
- *The Regional Health Authorities Act*
- *The Safer Communities and Neighbourhoods Act*
- *The Securities Act*
- *The Statistics Act*
- *The Tax Administration and Miscellaneous Taxes Act*
- *The Testing of Bodily Fluids and Disclosure Act*
- *The Vital Statistics Act*
- *The Witness Security Act*
- *The Workers Compensation Act*
- *The Youth Drug Stabilization (Support to Parents) Act.*

In addition to these Manitoba statutes, there are some federal statutes that affect provincial record keeping, access to information and **personal information** protection. For example, records held by the courts, police, government departments and social agencies that relate to young persons dealt with under the *Youth Criminal Justice Act (Canada)*, are governed by the *Youth Criminal Justice Act (Canada)*, not FIPPA.

These statutes are discussed in more detail later in this Chapter, under “*Relationship of FIPPA to Other Legislation*”. If you have questions about what legislation applies to certain **records**, contact legal counsel.

³¹ Subsection 5(2) of FIPPA — discussed later in this Chapter, under *Relationship of FIPPA to Other Legislation*.

PROCEDURES NOT AFFECTED BY FIPPA [SECTION 3]

Scope of this Act

3 This Act

- (a) is in addition to and does not replace existing procedures for access to **records** or information normally available to the public, including any requirement to pay fees;
- (b) 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**;
- (c) does not limit the information otherwise available by law to a party to legal proceedings; and
- (d) does not affect the power of a court or tribunal to compel a witness to testify or to compel the production of documents.

1. Clause 3(a) - Records Normally Available to the Public

Public bodies have always provided public access to certain information and **records** in their custody – for example

- by ‘proactive disclosure’ – providing information periodically, without any request, under a communications practice or plan (for example, by posting information on the Internet);
- by ‘routine disclosure’ – providing information without a formal request under Part 2 of FIPPA.

FIPPA is in addition to, and does not replace, existing procedures for gaining access to information or **records** that are normally available to the public, and that do not contain **personal information**. Nor does FIPPA affect any fees that may be charged for such access.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

Example - proactive disclosure:

Section 76.1 of FIPPA requires the government to “make available to the public a summary of the total annual expenses incurred” by each Minister for

- (a) transportation and travel
- (b) accommodation and meals;
- (c) promotion and hospitality; and
- (d) cell phone and personal electronic communications devices.³²

This information is posted on the internet and can be found at:
<http://www.gov.mb.ca/chc/reports/index.html>.

Not all requests for information or **records** need to be made under FIPPA. FIPPA should not be applied to prevent or reduce access to information – other than **personal information** – that is available by custom or practice.

Example – routine disclosure:

Section 76 of FIPPA provides that the **head** of a **public body** may specify **records** or categories of **records** that are available to members of the public without making a formal application under FIPPA. A fee may be charged for a copy of these **records**.

But, **public bodies** need to review their practices and procedures for releasing information to ensure that **personal information** is protected as required by Part 3 of FIPPA.

³² Section 76.1 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>.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

When **records** held by a **public body** are not available by any other means, FIPPA provides members of the public with a right of access to those **records**, subject to limited exceptions.

2. Clause 3(b) - Transfer, Storage or Destruction of Records

FIPPA does not prohibit the transfer, storage or destruction of **records** by a **public body**, provided it is done in accordance with:

- (i) a statute or regulation of Manitoba,
- (ii) a statute or regulation of Canada, or
- (iii) a by-law or resolution of a **government agency** or of a **local public body**.

For Manitoba government **departments** and most **government agencies**, transfer, storage and destruction of **records** is governed by *The Archives and Recordkeeping Act* and the **records** schedules approved under that Act.³³

In some circumstances, destruction of **records** by a **department** or **government agency** is governed by a statute of Canada - for example, the *Youth Criminal Justice Act (Canada)*.

Note:

It is an offence under clause 85(1)(d) of FIPPA to wilfully destroy a **record** or erase information in a **record** that is subject to FIPPA with the intent to evade a request for access to **records**. A person found guilty of such an offence by a court may be fined up to \$50,000.00.

³³ *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>. Retention and destruction of records containing personal information is discussed in Chapter 6, "Retention of Personal Information".

3. Clause 3(c) - Information Available to Parties to Legal Proceedings

FIPPA does not limit the information and **records** otherwise available by law to a party to legal proceedings

“Legal proceedings” include all proceedings authorized or sanctioned by law, that are brought in a court or tribunal to acquire a right or enforce a remedy.³⁴ Legal proceedings are proceedings before a court, tribunal or other body having authority, by law or consent, to make decisions about a person’s rights. Civil court actions, a prosecution in a criminal court and proceedings before a quasi-judicial tribunal such as the Manitoba Labour Board are examples of “legal proceedings”.

Where a **public body** is required to produce records by the rules of court or the rules of a quasi-judicial tribunal, the exceptions to disclosure in FIPPA and the provisions restricting disclosure of personal information **do not apply**. Instead, it is the rules of the court or the tribunal that apply.

If you have any questions about information that is available by law to a party to legal proceedings, contact legal counsel.

4. Clause 3(d) - Power of a Court or Tribunal to Compel Testimony or Production of Documents

FIPPA does not affect the power of a court or tribunal to:

- (i) compel a witness to testify; or
- (ii) compel production of documents.

Where a **public body** is required to produce documents by a subpoena, search warrant or other order of production issued by a court or a tribunal, the exceptions to disclosure in FIPPA and the provisions restricting disclosure of **personal information** do not apply.

If you have any questions about the power of a court or tribunal to compel testimony or production of documents, contact legal counsel.

³⁴ *Black’s Law Dictionary*, 6th edition.

KEY DEFINITIONS: PERSONAL INFORMATION, PERSONAL HEALTH INFORMATION, LAW ENFORCEMENT, THIRD PARTY [SUBSECTION 1(1)]

The following is a discussion of four key definitions in subsection 1(1) of FIPPA:

“**personal information**”,
“**personal health information**”,
“**law enforcement**” and
“**third party**”.

The definition “**public body**” was discussed earlier in this Chapter, under *Public Bodies That Fall Under FIPPA*.

The definition “**record**” was discussed earlier in this Chapter, under *Records That Fall Under FIPPA*.

Also, Appendix 1 of this Manual is a *Glossary of Terms* that includes terms defined in subsection 1(1) of FIPPA, as well as some other terms used in FIPPA or in this Manual.

■ Personal Information [Subsection 1(1)]

"Personal information" is one of the most important terms in FIPPA.

In Part 2 of FIPPA – Access to Information – the following provisions refer to **personal information**:

- clause 12(2)(b) – Refusal to confirm or deny the existence of a **record**;
- section 17 – Exception to disclosure: privacy of a **third party**;
- section 24 – Exception to disclosure: disclosure harmful to individual or public safety;
- section 30 – Exception to disclosure: confidential evaluation about the **applicant**;
- sections 33 & 34 – **Third party** intervention.

Part 3 of FIPPA – Protection of Privacy – is all about **personal information**. Part 3 sets out the requirements **public bodies** must meet when collecting, correcting, retaining, destroying, protecting, using and disclosing **personal information**.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

- 1(1)** “**personal information**” means **recorded** information about an identifiable individual, including
- (a) the individual’s name,
 - (b) the individual’s home address, or home telephone, facsimile or e-mail number,
 - (c) information about the individual’s age, sex, sexual orientation, marital or family status,
 - (d) information about the individual’s ancestry, race, colour, nationality, or national or ethnic origin,
 - (e) information about the individual’s religion or creed, or religious belief, association or activity,
 - (f) **personal health information** about the individual,³⁵
 - (g) the individual’s blood type, fingerprints or other hereditary characteristics,
 - (h) information about the individual’s political belief, association or activity,

- (i) information about the individual’s education, employment or occupation, or educational, employment or occupational history,
- (j) information about the individual’s source of income or financial circumstances, activities or history,
- (k) information about the individual’s criminal history, including regulatory offences,
- (l) the individual’s own personal views or opinions, except if they are about another person,
- (m) the views or opinions expressed about the individual by another person, and
- (n) an identifying number, symbol or other particular assigned to the individual;

³⁵ The term "personal health information" is also defined in subsection 1(1) of FIPPA. It is discussed next in this Chapter.

1. Overview of the Definition "Personal Information"

The statement in the opening two lines of the definition of "**personal information**" is the most important part of the definition:

"personal information" means recorded information about an identifiable individual, including"...

The language used is

"'deliberately broad', and is 'entirely consistent with the great pains that have been taken [*in the legislation*] to safeguard individual identity'. Its intent seems to be to capture any information about a specific person...."³⁶

Clauses (a) to (n) of the definition of "**personal information**" list examples of **personal information**. This list is not complete, as the word "including" is used. That is, clauses (a) to (n) of the definition do not set out the only information that is "**personal information**". If information in a **record** falls within the opening words of the definition – that is, if it is "recorded information about an identifiable individual – it is **personal information** even if it does not fall within any of the specific examples listed in clauses (a) to (n) of the definition.

In looking at a comparable definition of "**personal information**" in the *Privacy Act (Canada)*, the Supreme Court of Canada noted:

On a plain reading, this definition is undeniably expansive. As this Court has recently held, this phraseology indicates that the general opening words are intended to be the primary source of interpretation. The subsequent enumeration merely identifies examples of the type of subject matter encompassed by the general definition. Consequently, if a government record is captured by those opening words, it does not matter that it does not fall within any of the specific examples.³⁷

³⁶ *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 (Supreme Court of Canada), para. 69: <http://tinyurl.com/bvxnv0l>. This decision was made in the context of similar language in the *Access to Information Act (Canada)*.

³⁷ *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 (Supreme Court of Canada), para. 68: <http://tinyurl.com/bvxnv0l>

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

Examples of **personal information** not listed in clauses (a) to (n) include:

- photographic images;
- membership in a charitable organization;
- membership in a labour union; etc.

2. Opening Words: “Recorded Information about an Identifiable Individual”

As noted above, the most important part of the definition of “**personal information**” is the opening wording:

“**personal information**” means recorded information about an identifiable individual, including ...

If information in a **record** falls within these opening words of the definition, it is **personal information** – even if it does not fall within any of the specific examples listed in clauses (a) to (n).

Three requirements must be met for information to be **personal information**:

- (i) the information must be “recorded”.
 - (ii) the information must be “about” an “individual”; and
 - (iii) the information must be about an “identifiable” individual (that is, an individual who can be identified).
- (i) The information must be “recorded”.

Under FIPPA, **personal information** is limited to information that is recorded or retrievable in some physical form. It does not include oral comments that have not been recorded. FIPPA does not impose a duty on a **public body** to transcribe or record oral comments.³⁸

³⁸ Ontario Information and Privacy Commissioner Order P-17 (Re Ministry of the Solicitor General, Oct. 6, 1988).
Also see Ontario Information and Privacy Commissioner Order P-652, April 6, 1994:
http://www.ipc.on.ca/images/Findings/Attached_PDF/P-652.pdf.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

(ii) The information must be about an “individual”.

An “individual” is a natural person, a human being.

When used in legislation, the terms “person” and “individual” have different meanings. “Person” is the broader term, as it means an individual (that is, a human being), and also “includes a corporation and the heirs, executors, administrators or other legal representatives of a person”.³⁹

As the term “individual”, not “person”, is used in the definition, **personal information** is limited to information about a natural person, a human being.⁴⁰ Information about corporations, businesses, groups or organizations is not **personal information** under FIPPA.⁴¹

There may be some situations, where business information and **personal information** are intermingled and the distinction between the two is not obvious. For example, information with respect to a sole proprietorship could be such that it only relates to an identifiable individual. Some of that information might qualify as that individual’s **personal information**.⁴² This would especially be the case if the information is about the individual in a personal capacity, is very closely related to his or her personal affairs or reveals something of a personal nature about the individual. Context is very important here.

Such situations have to be carefully examined to determine whether or not some information should be protected as **personal information** under FIPPA. Legal counsel should be consulted.

³⁹ *The Interpretation Act* of Manitoba, section 17 and the Schedule of Definitions. *The Interpretation Act*, C.C.S.M. c. 180, can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/i080e.php>.

⁴⁰ Ontario Information and Privacy Commissioner Order P-16 (Re Ministry of Agriculture & Food, Sept. 8, 1988).

Also see Ontario Information and Privacy Commissioner Final Order PO-1851-F: http://www.ipc.on.ca/images/Findings/up-PO_1851_F.pdf.

⁴¹ Ontario Information and Privacy Commissioner Order P-300 (Re Ministry of Community & Social Services, May 21, 1992): http://www.ipc.on.ca/images/Findings/Attached_PDF/P-300.pdf.

⁴² Ontario Information and Privacy Commissioner Order P-364: http://www.ipc.on.ca/images/Findings/Attached_PDF/P-364.pdf.
Also see Ontario Information and Privacy Commissioner Order P-113: http://www.ipc.on.ca/images/Findings/Attached_PDF/P-113.pdf.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

Also see Manitoba Ombudsman Practice Note: *Distinguishing Between Personal Information and Business Information under FIPPA*.⁴³

(iii) The information must be about an “identifiable” individual (that is, about an individual who can be identified).

Information is about an "identifiable" individual if:

- the individual can be identified from the information;

For example, an individual can be identified by his or her name, by where he or she lives, by what he or she does, etc.
- or, the information in the **record**, when combined with information otherwise available, could reasonably be expected to allow the individual to be identified. This 'potentially identifying' information is **personal information** under FIPPA.

Public bodies need to consider the context of information in a **record** to determine whether an individual may be potentially identifiable if the information is released. A proper consideration of whether information to be released is potentially identifying requires a **public body** to consider what inferences could be drawn based on a combination of the whole of the information to be released and information otherwise available to the recipient of the information.

In short, when determining whether information is “potentially identifying” information, a **public body** must look at not only the information itself, but also at what could reasonably be expected to be revealed by the information when combined with other information that is being provided or that is otherwise available.

⁴³ This Practice Note can be found at:
http://www.ombudsman.mb.ca/documents_and_files/practice-notes.html

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

Aggregate or statistical information that does not, either by itself or when combined with other information otherwise available, permit individuals to be identified is not **personal information** under FIPPA.

Examples of potentially identifying information:

- An individual may be identifiable, even if his or her name is not given, because the information describes a very small number of people.⁴⁴
- If it is reasonable to expect that an **applicant** for access under Part 2 of FIPPA could identify a particular individual based on a combination of the information in the requested **record** and information otherwise available to the **applicant**, the information in the **record** is information about an ‘identifiable individual’ under FIPPA.⁴⁵

If you have questions as to whether information is **personal information** that falls under FIPPA, contact legal counsel.

3. The Examples of Personal Information in Clauses (a) to (n)

Clauses (a) to (n) of the definition of “**personal information**” list examples of **personal information**. The list is not a complete one, as the word “including” is used. Information that does not fall within any of the specific examples in clauses (a) to (n) will still be **personal information** if it is “recorded information about an identifiable individual”.⁴⁶

Many of the examples of **personal information** in clauses (a) to (n) of the definition are self-explanatory, and this type of information will often be easy to identify.

⁴⁴ See, for example, Alberta Information and Privacy Commissioner Investigation Report F2004-IR-001: <http://www.servicealberta.ca/foip/commissioners-decisions/investigation-report-f2004ir00.cfm>.

⁴⁵ See, for example, Ontario Information and Privacy Commissioner Order P-316 (Re Archives of Ontario, June 16, 1992): http://www.ipc.on.ca/images/Findings/Attached_PDF/P-316.pdf.

⁴⁶ Ontario Information and Privacy Commissioner Order P-61 (Re Ministry of Health, May 26, 1989): http://ipc.on.ca/images/Findings/Attached_PDF/P-61.pdf.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

Clause (a) - individual's name

An individual's name is **personal information**.

But, the name and title of a person writing to a **public body** in an official capacity on behalf of a corporation or an organization would not usually be **personal information**.⁴⁷ Context is important here.

Also see Manitoba Ombudsman Practice Note: *Distinguishing Between Personal Information and Business Information under FIPPA*.⁴⁸

Clause (b) - home address, telephone, facsimile or e-mail

An individual's home address, telephone, facsimile or e-mail number is his or her **personal information**.

But, a business address, telephone, facsimile or e-mail number is not **personal information**.

The provisions in Part 3 of FIPPA – Protection of Privacy – that permit **public bodies** to disclose **personal information** without the consent of the individual the information is about have been clarified to allow **public bodies** to disclose limited business contact information about an individual, where appropriate.⁴⁹

⁴⁷ Ontario Information and Privacy Commissioner Order P-113 (Re Ministry of the Attorney General, Nov. 9, 1989): http://www.ipc.on.ca/images/Findings/Attached_PDF/P-113.pdf.

⁴⁸ This Practice Note can be found at: http://www.ombudsman.mb.ca/documents_and_files/practice-notes.html

⁴⁹ See clause 44.1(1) of FIPPA. This provision 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>.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

Also see Manitoba Ombudsman Practice Note: *Distinguishing Between Personal Information and Business Information under FIPPA*.⁵⁰

Clause (c) – age, sex, sexual orientation, marital or family status

The terms in clause (c) are also used in the Manitoba *Human Rights Code*.⁵¹

Clause (d) - ancestry, race, colour, nationality or national or ethnic origin

“Ancestry” means one’s family descent.⁵²

“Nationality” means the status of belonging to a particular nation.⁵³

“Ethnic origin” refers to a common national or cultural tradition.⁵⁴

The terms in clause (d) are also used in the Manitoba *Human Rights Code*.⁵⁵

Clause (e) - religion or creed, or religious belief, association or activity

The terms in clause (e) are also used in the Manitoba *Human Rights Code*.⁵⁶

⁵⁰ This Practice Note can be found at:

http://www.ombudsman.mb.ca/documents_and_files/practice-notes.html .

⁵¹ *The Manitoba Human Rights Code*, C.C.S.M. c. H175 can be found at:

<http://web2.gov.mb.ca/laws/statutes/ccsm/h175e.php>.

⁵² *The Concise Oxford Dictionary*, 9th Edition.

⁵³ *The Concise Oxford Dictionary*, 9th Edition.

⁵⁴ *The Concise Oxford Dictionary*, 9th Edition.

⁵⁵ *The Manitoba Human Rights Code*, C.C.S.M. c. H175, can be found at:

<http://web2.gov.mb.ca/laws/statutes/ccsm/h175e.php>.

⁵⁶ *The Manitoba Human Rights Code*, C.C.S.M. c. H175, can be found at:

<http://web2.gov.mb.ca/laws/statutes/ccsm/h175e.php>.

Clause (f) - personal health information

See the discussion of the definition “**personal health information**”, next in this Chapter.

Clause (g) – blood type, fingerprints or other hereditary characteristics

Clause (h) – political belief, association or activity

The terms in clause (h) are also used in the Manitoba *Human Rights Code*.⁵⁷

Clause (i) - education, employment or occupation, or educational, employment or occupational history

“Education” and “educational history” refer to information about an individual’s schooling and formal training, past and present, and include names of educational institutions attended, courses taken, results achieved, etc.

“Employment” and “employment history” refer to information about an individual’s work record, past and present, and include the names of employers, length of employment, positions held, employment duties, salary, evaluations of job performance, reasons for leaving employment, etc.⁵⁸

“Occupation” and “occupational history” refer to information about an individual’s profession, business or calling, past and present, and can include accomplishments and how an individual spends his or her time.

⁵⁷ *The Manitoba Human Rights Code*, C.C.S.M. c. H175, can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/h175e.php>.

See, for example, *Nova Scotia (Health) v. Dickie*, 1999 NSCA 62 (C.A.): <http://tinyurl.com/muhrf6f>

Also see *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003] 1 S.C.R. 66, 2003 SCC 8: <http://tinyurl.com/cm98ynh>

Example:

In a **complaint** about a refusal of access under Part 2 of FIPPA to a “current list of names of all persons in possession of a specific trade certification, the **Ombudsman** agreed with the **department** that disclosure of the names would, in and of itself, reveal the individuals’ profession, business or calling – that is, their occupational history.⁵⁹

Clause (j) - source of income or financial circumstances, activities or history

“Income” means money or other assets received.⁶⁰

“Source of income” includes the origins of the income an individual uses to live on – such as employment, social benefits, pension, etc.

“Financial circumstances” refers to the monetary resources of an individual.⁶¹

“Financial history” refers to any past information about an individual’s monetary resources and activities.

There may be some situations where business and **personal information** are intermingled and the distinction between the two is not obvious. For example, financial information with respect to a sole proprietorship could be such that it only relates to an identifiable individual and might reveal that individual’s **personal information**.⁶² Such situations have to be carefully examined to determine whether or

⁵⁹ Manitoba Ombudsman Report under FIPPA re Case 2009-0754 (Manitoba Labour and Immigration, October 4, 2010).

⁶⁰ The *Concise Oxford Dictionary*, 9th Edition.

⁶¹ The *Concise Oxford Dictionary*, 9th Edition.

⁶² Ontario Information and Privacy Commissioner Order P-364: http://www.ipc.on.ca/images/Findings/Attached_PDF/P-364.pdf. Also see Ontario Information and Privacy Commissioner Order P-113: http://www.ipc.on.ca/images/Findings/Attached_PDF/P-113.pdf.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

not some financial information should be protected as **personal information** under FIPPA. Legal counsel should be consulted.

Also see Manitoba Ombudsman Practice Note: *Distinguishing Between Personal Information and Business Information under FIPPA*.⁶³

Clause (k) - criminal history, including regulatory offences

"Criminal history" includes an individual's convictions under criminal laws such as the *Criminal Code (Canada)* and findings of guilt under the *Youth Criminal Justice Act (Canada)* or the former *Young Offenders Act (Canada)*.

"Regulatory offences" are:

- offences under other federal statutes or regulations (for example, the *Immigration and Refugee Protection Act (Canada)*),
- offences under provincial statutes or regulations (for example, *The Highway Traffic Act* of Manitoba); or
- offences under municipal by-laws.

Clauses (l) and (m) - personal views or opinions

The personal views or opinions of an individual are that individual's **personal information**, unless the views or opinions are about someone else.

Views or opinions expressed by a person about another individual are the **personal information** of the individual they are about.

⁶³ This Practice Note can be found at:
http://www.ombudsman.mb.ca/documents_and_files/practice-notes.html

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

Example:

Brown writes a letter to the Manitoba Student Aid Program stating that, in Brown's opinion, Smith is a bad student and is skipping classes, and shouldn't receive student aid. Under FIPPA, Brown's opinion, as it is about Smith, is Smith's **personal information**.

Clause (n) - identifying number, symbol or other particular assigned to the individual

Examples of identifying numbers, symbols or particulars assigned to an individual are an individual's Social Insurance Number, driver's licence number, the Manitoba Education and Training Number, etc.

An identifying number or symbol is, by itself, a piece of **personal information** for the purposes of FIPPA, as it uniquely identifies an individual.

An individual's Personal Health Identification Number (PHIN), which is assigned by the Minister of Health, is **personal health information**.

■ **Personal Health Information [Subsections 1(1) and 1(2)]**

Personal health information is a type of **personal information**. The definition of **personal health information** is the same in FIPPA as it is in *The Personal Health Information Act*.⁶⁴

- 1(1)** "**personal health information**" means recorded information about an identifiable individual that relates to
- (a) the individual's health, or health care history, including genetic information about the individual,
 - (b) the provision of health care to the individual, or
 - (c) payment for health care provided to the individual,
- and includes
- (d) the PHIN as defined in *The Personal Health Information Act* and any other identifying number, symbol or particular assigned to an individual, and
 - (e) any identifying information about the individual that is collected in the course of, and is incidental to, the provision of health care or payment for health care;

Interpretation of "personal health information"

- 1(2)** For the purpose of the definition "**personal health information**", "**health**" and "**health care**" have the same meaning as in *The Personal Health Information Act*.

From *The Personal Health Information Act*:

"health" means the condition of being sound in mind, body and spirit;

"health care" means any care, service or procedure

- (a) provided to diagnose, treat or maintain an individual's health,
 - (b) provided to prevent disease or injury or promote health, or
 - (c) that affects the structure or a function of the body,
- and includes the sale or dispensing of a drug, device, equipment or other item pursuant to a prescription.

⁶⁴ *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>.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

There are four requirements that must be met for information to be **personal health information** under FIPPA:

- (i) The information must be “recorded”.

Personal health information under FIPPA is limited to information that is recorded or retrievable in some physical form. It does not include oral comments that have not been recorded by any means.

- (ii) The information must be about an “individual” – that is, about a natural person, a human being.

- (iii) The information must be about an “identifiable” individual.

Personal health information does not include statistical or health information that does not, either by itself or when combined with other information available to the holder, allow an individual to be readily identified.⁶⁵

If an individual is named in a **record of personal health information**, or it is reasonable to expect that his or her identity can be determined from the context and the contents of the **record** when combined with other information available, the information is ‘potentially’ identifying and is **personal health information** about an ‘identifiable’ individual.

- (iv) The information must relate to the matters described in clauses (a) to (c) of the definition “**personal health information**”.

That is, the information must relate to an individual’s health, health care history or to the provision of or payment for health care to the individual.

"Health" is defined in *The Personal Health Information Act* to mean “the condition of being sound in mind, body and spirit”.

"Health care" is defined in *The Personal Health Information Act* as follows:

"health care" means any care, service or procedure

⁶⁵ Section 3 of *The Personal Health Information Act*, C.C.S.M. c. P33.5. This Act can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/p033-5e.php>.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

- (a) provided to diagnose, treat or maintain an individual's health,
 - (b) provided to prevent disease or injury or promote health, or
 - (c) that affects the structure or a function of the body,
- and includes the sale or dispensing of a drug, device, equipment or other item pursuant to a prescription.

These terms – “health” and “health care” – have the same meaning in FIPPA.⁶⁶

Thus, **personal health information** includes information respecting an individual's past or present physical, mental, emotional or spiritual state of health, past or current health care, payments made by or on behalf of the individual respecting health care, etc.

The definition of "**personal health information**" in FIPPA also specifically includes:

- an individual's personal health identification number (PHIN);

The PHIN is defined in *The Personal Health Information Act* as "the personal health identification number assigned to an individual by the minister [*of Health*] to uniquely identify the individual for health care purposes".

- any identifying information about the individual that is collected in the course of, and is incidental to, providing health care or payment for health care.

For example, usually an individual's name, date of birth and address is **personal information** about the individual. But this information – name, birth date and address – becomes **personal health information** when it is collected in the course of providing health care or in the context of payment for health care. Context is very important here.

If you have any questions as to whether information is **personal information** or **personal health information**, contact legal counsel.

⁶⁶ Subsection 1(2) of FIPPA. FIPPA was amended to clarify that these definitions – from *The Personal Health Information Act* – apply in 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>.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

Note:

Access by an individual to his or her own personal health information is dealt with under Part 2 of *The Personal Health Information Act*, not under FIPPA.⁶⁷

The obligations of **public bodies** and other trustees respecting protection of personal health information are set out in Part 3 of *The Personal Health Information Act*, not in FIPPA.⁶⁸

⁶⁷ Subsection 6(1) of FIPPA. Access to one's own personal health information is discussed later in this Chapter, under *Relationship of FIPPA to Other Acts -- The Personal Health Information Act*, and in Chapter 5 of this Manual.

⁶⁸ Section 35 of FIPPA. Protection of personal health information is discussed later in this Chapter, under *Relationship of FIPPA to Other Acts -- The Personal Health Information Act*, and in Chapter 6 of this Manual.

■ Law Enforcement

The term "**law enforcement**" is relevant in the following sections in Part 2 of FIPPA – Access to Information:

- clause 17(2)(c) – Exception to disclosure: identity of **third party** providing **law enforcement** information;
- section 25 – Exceptions to disclosure: **law enforcement** and legal proceedings.

The term "**law enforcement**" is used in the following sections in Part 3 of FIPPA – Protection of Privacy:

- clause 36(1)(c) – Purpose of collection of **personal information**;
- clause 37(1)(g) – Manner of collection: indirect collection;
- clause 44(1)(r) – Disclosure for **law enforcement** purposes;
- clause 44(1)(s) – Disclosure between **law enforcement** agencies.

- | |
|--|
| <p>1(1) "law enforcement" means any action taken for the purpose of enforcing an enactment, including</p> <ul style="list-style-type: none">(a) policing,(b) investigations or inspections that lead or could lead to a penalty or sanction being imposed, or that are otherwise conducted for the purpose of enforcing an enactment, and(c) proceedings that lead or could lead to a penalty or sanction being imposed, or that are otherwise conducted for the purpose of enforcing an enactment; |
|--|

1. Opening Words: “Any Action Taken for the Purpose of Enforcing an Enactment”

The opening words of the definition "**law enforcement**" are particularly important: **law enforcement** means "any action taken for the purpose of enforcing an enactment".

“**Enactment**” means an Act or regulation.⁶⁹ An “Act” is a statute passed by the Legislative Assembly of a province or by the Parliament of Canada. A “regulation” is a law made under the authority of a statute by the Lieutenant Governor in Council (in the case of a province), the Governor General in Council (in the case of Canada), a **minister**, etc.

“Enforcement of an **enactment**” means compelling the observance of a statute or regulation.⁷⁰

Thus, **law enforcement** means activities undertaken by a **public body** to enforce compliance with standards, duties and responsibilities set out in a statute or regulation.

The activities described in clauses (a), (b) and (c) of the definition are examples of “**law enforcement**”. But, it is not a complete list, as the word “including” is used. That is, clauses (a), (b) and (c) do not set out the only activities that are "**law enforcement**". If an action falls within the opening words of the definition, it is **law enforcement** even if it does not fall within one of the examples set out in clauses (a), (b) or (c).

2. Clause (a) - Policing

“Policing” covers the activities of police services and related activities of the Manitoba Department of Justice, such as the investigation and prosecution of offences, prevention of crime, maintenance of law and order, security and protective services, and related collection of intelligence, research and analysis.

⁶⁹ Subsection 1(1) of FIPPA.

⁷⁰ *The Concise Oxford Dictionary*, 9th Edition.

3. Clause (b) - Investigations or Inspections that Lead or Could lead to a Penalty or Sanction Being Imposed, or that are Otherwise Conducted for the Purpose of Enforcing an Enactment

“Investigation” means a systematic inquiry or search;⁷¹ a systematic process of examination, inquiry and observation.⁷²

“Inspection” means to look closely at or into, or to examine.⁷³

An investigation or inspection is a **law enforcement** proceeding as long as it either

- (i) leads or could lead to the imposition of a “penalty” or “sanction”, or
- (ii) is “conducted for the purpose of enforcing an **enactment**”.

Investigation or inspection that leads or could lead to a penalty or sanction

“Penalty” involves the idea of punishment.⁷⁴ A “sanction” is a punishment or penalty used to enforce obedience to a law.⁷⁵ Penalties and sanctions are imposed for a violation of a statute or regulation, and include imprisonment, imposing a fine, revoking a licence or issuing an order requiring a person to stop an activity.

The phrase “could lead” means that an investigation or inspection is **law enforcement** if a penalty or sanction is possible, even if it is not the ultimate result.

Investigation or inspection conducted to enforce a statute or regulation

An investigation or inspection that would not lead to a penalty or sanction is **law enforcement** if it is “conducted for the purpose of

⁷¹ *The Concise Oxford Dictionary*, 9th Edition.

⁷² Alberta Information and Privacy Commissioner Order 96-019 and Order 2002-024:
<http://www.oipc.ab.ca/downloads/documentloader.ashx?id=1893>;
<http://www.oipc.ab.ca/downloads/documentloader.ashx?id=2046>.

⁷³ *The Concise Oxford Dictionary*, 9th Edition.

⁷⁴ *Black’s Law Dictionary*, 6th edition.

⁷⁵ *The Dictionary of Canadian Law*.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

enforcing” a statute or a regulation – that is, it is carried out to compel the observance of a statute or a regulation.

For example, an investigation of a complaint under the Manitoba *Human Rights Code* is **law enforcement**, even where no penalties or sanctions will result.

4. Clause (c) - Proceedings that Lead or Could lead to a Penalty or Sanction Being Imposed, or that are Otherwise Conducted for the Purpose of Enforcing an Enactment

Clause (c) of the definition refers to the conduct of proceedings before a court or a board, tribunal or person acting in a judicial or quasi-judicial capacity.

A person is acting in a judicial or quasi-judicial capacity if he or she is carrying out a function that is judicial, or partly administrative and partly judicial, and he or she is required to:

- investigate facts, hear all the parties to a matter at issue, and weigh evidence or draw conclusions as a basis for his or her action;
- exercise discretion of a judicial nature; and
- make a decision after considering the issues, rather than simply making a recommendation.⁷⁶

A person acting in a judicial or quasi-judicial capacity is generally under a duty to act in accordance with the rules of natural justice.

Proceedings before a court, board or tribunal are **law enforcement** proceedings as long as they either

- (i) lead or could lead to a “penalty” or “sanction” being imposed;

The meaning of “penalty” and “sanction” are discussed above.

The phrase “could lead” means that a proceeding is **law enforcement** if a penalty or sanction is possible, even if it is not the ultimate result.

⁷⁶ Based on the *Dictionary of Canadian Law* and *Black’s Law Dictionary*, 6th edition.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

- (ii) or, are “conducted for the purpose of enforcing an **enactment**” – that is, the proceeding is undertaken to compel the observance of a statute or regulation.

Examples:

Proceedings that are **law enforcement** include:

- the prosecution of an offence under the *Criminal Code (Canada)*;
- the conduct of a hearing before a regulatory tribunal such as the Clean Environment Commission;
- a hearing before a Human Rights Adjudicator under *The Human Rights Code* of Manitoba; etc.

■ Third Party [Subsection 1(1)]

The phrase **third party** is used in the following provisions about access to information:

- clause 12(2)(b) – Refusal to confirm or deny the existence of a **record**;
- clauses 15(1)(c) and (d) – Extending the time limit to respond to an access request;
- section 17 – Exceptions to disclosure: privacy of a **third party**;
- section 18 – Exceptions to disclosure: business interests of **third parties**;
- subsection 27(2) – Exception to disclosure: **third party's** solicitor-client privilege;
- sections 33 and 34 – **Third party** intervention;
- subsection 59(2) – **Complaint to Ombudsman** by **third party** about access;
- clause 66.1(2)(b) and subsections 66.7(2), 66.7(3) & 66.9(2) – **Third party complaint** about access referred by **Ombudsman** to the Information and Privacy **Adjudicator** for review;
- clause 67(1)(b) – Appeal to court by **third party** about access.

1(1) "third party" means a person, group of persons or an organization other than the **applicant** or a **public body**.

"Person", when used in a Manitoba statute or regulation, means not only a natural person (that is, a human being or an individual) but also "a corporation and the heirs, executors, administrators or other legal representatives of a person".⁷⁷

⁷⁷ *The Interpretation Act* of Manitoba, section 17 and the Schedule of Definitions. *The Interpretation Act*, C.C.S.M. c. 180, can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/i080e.php>.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

An “organization” is an organized body, especially a business, charity, etc.⁷⁸ For example, a trade union is an organization.

“**Applicant**” means a person who makes a request for access under Part 2 of FIPPA – Access to Information.⁷⁹

The meaning of “**public body**” is discussed earlier in this Chapter. In FIPPA, **public body** means a **department**, a **government agency**, the Executive Council Office, the office of a **minister** and a **local public body** (that is, an **educational body**, a **health care body** or a **local government body**).⁸⁰

For the purposes of a request for access under Part 2 of FIPPA, a **third party** is any person, group or organization who:

- is not the **applicant** requesting access; and
- is not a **public body**.

“**Third parties**” include individuals, sole proprietorships, partnerships, corporations, unincorporated associations and organizations, non-profit groups, trade unions, syndicates and trusts, etc. An employee of a **public body** can also be a **third party** under FIPPA.⁸¹

A person authorized to exercise the rights of an individual under section 79 of FIPPA is not treated as a **third party** under FIPPA when he or she is acting on behalf of that individual.⁸²

⁷⁸ The *Concise Oxford Dictionary*, 9th edition.

⁷⁹ Subsection 1(1) of FIPPA.

⁸⁰ What bodies are, and are not, **public bodies** is discussed earlier in this Chapter, under “*Public Bodies that Fall Under FIPPA*”.

⁸¹ Alberta Information and Privacy Commissioner Order 96-019:
<http://www.oipc.ab.ca/downloads/documentloader.ashx?id=1893>.

⁸² Section 79 is discussed in Chapter 3, under “*Exercising Rights on Behalf of Another*”.

RELATIONSHIP OF FIPPA TO OTHER LEGISLATION [SECTION 5]

The provisions in FIPPA respecting access to information and protection of **personal information** prevail over the provisions in any other Manitoba statute or regulation, unless that other statute or regulation specifically states otherwise.

Conflict with another Act

5(2) If a provision of this Act is inconsistent or in conflict with a provision of another **enactment**, the provision of this Act prevails unless the other **enactment** expressly provides that the other **enactment** applies despite this Act.⁸³

Generally, the rules that **public bodies** must follow with respect to access to information and protection of privacy are set out in FIPPA.

But, FIPPA also recognizes that:

- another statute or regulation may authorize collection of **personal information**;
- another statute or regulation may provide for use or disclosure of **personal information** without the consent of the individual the information is about; etc.

For example, clause 44(1)(e) of FIPPA permits a **public body** to disclose **personal information** "in accordance with" a statute or regulation of Manitoba (or Canada) that "authorizes or requires the disclosure".⁸⁴

Also, there are a few Manitoba statutes that specifically state that they "prevail over" – that is, apply instead of – FIPPA. These statutes are discussed below.

⁸³ Subsection 5(1) of FIPPA – which provided that the "head of a public body shall refuse to give access to or disclose information under [FIPPA] if the disclosure is prohibited or restricted by another enactment of Manitoba" – was repealed by subsection 5(3) of FIPPA as of May 4, 2001.

⁸⁴ Disclosure of personal information under clause 44(1)(e) of FIPPA is discussed in Chapter 6, under "*Authorized Disclosure of Personal Information – Disclosure authorized or required by an enactment*".

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

If you have any questions about the relationship between FIPPA and another statute or regulation, contact legal counsel.

Also see Manitoba Ombudsman Practice Note: *Interaction between FIPPA and Other Acts*.⁸⁵

⁸⁵ This Practice Note can be found at:
http://www.ombudsman.mb.ca/documents_and_files/practice-notes.html

■ Acts that Prevail Over FIPPA

The following is a brief discussion of statutes that “expressly provide” that they prevail over FIPPA. Usually, these statutes contain their own 'code' of access or privacy. Sometimes, they prevail over only one aspect of FIPPA – for example, the access to information provisions in FIPPA.

If you have any questions about these statutes, and their relationship with FIPPA, contact legal counsel.

■ ***The Personal Health Information Act (CCSM c. P33.5)***⁸⁶

Subsection 6(1) of FIPPA states that an individual seeking access to his or her own **personal health information** must request access under *The Personal Health Information Act*. Part 2 of FIPPA – Access to Information – does not apply in this situation.

Section 35 of FIPPA states that Part 3 of FIPPA – Protection of Privacy – does not apply to **personal health information** to which *The Personal Health Information Act* applies.

The Personal Health Information Act is companion legislation to FIPPA. It was passed at the same time as FIPPA, and was proclaimed in effect on December 11, 1997. Major amendments were made to *The Personal Health Information Act* at the same time FIPPA was amended.⁸⁷ Some of the changes to *The Personal Health Information Act* came into effect on May 1, 2010, and the remainder came into effect on January 1, 2011 along with the changes to FIPPA.

FIPPA is both an access to information and an information privacy statute. *The Personal Health Information Act*, on the other hand, is exclusively an information privacy statute – it is not a general access to information statute.

The Personal Health Information Act deals with one type of **personal information** – **personal health information** – and is based on the same ‘information privacy’ principles as FIPPA.⁸⁸

1. **Personal Health Information**⁸⁹

Personal health information is defined in *The Personal Health Information Act* as recorded information about an identifiable individual’s health, health care history or the provision of or payment for health care to the individual, and includes the individual’s PHIN (personal health identification number) and any identifying information about the individual

⁸⁶ *The Personal Health Information Act* can be found at:
<http://web2.gov.mb.ca/laws/statutes/ccsm/p033-5e.php>.

⁸⁷ *The Personal Health Information Act* was amended by *The Personal Health Information Amendment Act*, S.M. 2008 c. 41. The amending Act can be found at:
<http://web2.gov.mb.ca/laws/statutes/2008/c04108e.php>.

⁸⁸ The information privacy principles on which FIPPA and *The Personal Health Information Act* are based are discussed in Chapter 1, under *Principles of Access and Privacy Legislation*.

⁸⁹ The definition of "personal health information" is the same in FIPPA and in *The Personal Health Information Act*. This definition is discussed earlier in this Chapter.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

that is collected in the course of, and is incidental to, providing health care to the individual or making payments for health care provided to him or her. *The Personal Health Information Act* also defines “health” and “health care”.

The Personal Health Information Act does not apply to statistical health information, or to health information that does not, either by itself or when combined with other information available to the holder, allow an individual to be readily identified.

The provisions of *The Mental Health Act* prevail over the provisions of *The Personal Health Information Act*.

2. Trustees under *The Personal Health Information Act*

The Personal Health Information Act applies to “trustees” who maintain (have custody or control of) **personal health information**.

“Trustees” under *The Personal Health Information Act* are:

- (i) all **public bodies** that fall under FIPPA (Manitoba **government departments, government agencies and local public bodies**),⁹⁰
- (ii) health professionals (including licensed or registered health professionals such as doctors, nurses, physiotherapists, psychologists, etc. and other health professionals designated in the regulations under *The Personal Health Information Act*);
- (iii) health care facilities (including hospitals, personal care homes, psychiatric facilities, medical clinics, laboratories, CancerCare Manitoba, and community health centres and other health care facilities designated in the regulations under *The Personal Health Information Act*); and
- (iv) health services agencies that provide health care under an agreement with another trustee (such as the Victorian Order of Nurses).

⁹⁰ The definition of “public body” is discussed earlier in this Chapter, under *Public Bodies That Fall Under FIPPA*. The term has the same meaning in FIPPA and *The Personal Health Information Act*.

3. Requests for Access to One's Own Personal Health Information

An individual requesting access to his or her own **personal health information** must do so under Part 2 of *The Personal Health Information Act*, not under FIPPA, even if the trustee maintaining the **personal health information** is a **public body**.⁹¹

Part 2 of *The Personal Health Information Act* sets out an individual's right to examine or receive a copy of his or her **personal health information**. Unlike FIPPA, a request for access under *The Personal Health Information Act* does not have to be in a form prescribed by regulation. But, a trustee may require that a request be made in writing.

The trustee maintaining the **personal health information** is required to assist the applicant and to respond to the request for access promptly, but no later than:

- (a) 24 hours after receiving it, if the trustee is a hospital and the information is about health care currently being provided to an in-patient;
- (b) 72 hours after receiving it, if the information is about health care the trustee is currently providing to a person who is not a hospital in-patient; and
- (c) 30 days after receiving it in any other case.

Unlike FIPPA, this time period for responding to a request for access to one's own **personal health information** cannot be extended.

The grounds for refusing an individual access to his or her own **personal health information** are set out in section 11 of *The Personal Health Information Act*. The exceptions to disclosure in Part 2 of FIPPA do not apply where an individual requests access to his or her **personal health information** under *The Personal Health Information Act*.

An individual may also request a correction of his or her **personal health information** under Part 2 of *The Personal Health Information Act*. If the trustee refuses to correct **personal health information**, a statement of disagreement must be added to the record.

⁹¹ See subsection 6(1) of FIPPA.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

Where someone other than the individual the information is about requests that a trustee that is a **public body** disclose **personal health information** to them:

- if the disclosure is authorized under Part 3 of *The Personal Health Information Act* – Protection of Privacy – the **public body** should deal with the request under Part 3 of *The Personal Health Information Act*;
- if the request is made by a person authorized under section 60 of *The Personal Health Information Act*, and is made on behalf of the individual the **personal health information** is about, the **public body** should deal with the request under Part 2 or Part 3 of *The Personal Health Information Act*;
- any other request to a **public body** for access to **personal health information** about someone else should be dealt with under Part 2 of FIPPA – and access will usually be refused, as disclosure of **personal health information** about someone else without their consent is deemed to be an unreasonable invasion of privacy under FIPPA.⁹²

4. Protection of Personal Health Information

Part 3 of *The Personal Health Information Act* sets out the rules respecting collection, protection, accuracy, retention, destruction, use and disclosure of **personal health information** by trustees, including **public bodies**. Part 3 of FIPPA does not apply to **personal health information** to which *The Personal Health Information Act* applies.⁹³

Due to changes that came into effect on May 1, 2010, Part 3 of *The Personal Health Information Act* contains detailed provisions about consent to use or disclose **personal health information**, including the requirements for a valid consent.

The changes added provisions in Part 3 of *The Personal Health Information Act* to deal with disclosure of **personal health information** to specified computerized health information networks, to specified health research organizations, by the Minister of Health to another government, and to religious organizations and charitable fundraising foundations.

⁹² The exceptions to disclosure protecting third party privacy, in section 17 of FIPPA, are discussed in Chapter 5, under "*Exceptions to Disclosure – Privacy of a third party [section 17]*".

⁹³ Section 35 of FIPPA.

Part 3 of *The Personal Health Information Act* also restricts the sale of **personal health information** by a trustee, regulates **personal health information** in the hands of information managers and governs the disclosure of **personal health information** for health research projects. It includes a requirement that a health research project involving **personal health information** be approved by the Health Information Privacy Committee established by the Minister of Health, in the case of a request to the government or a government agency, or by an institutional research review committee, in the case of a request to other trustees.

Part 3 of *The Personal Health Information Act* restricts the collection and use of the PHIN (the personal health identification number) by any person (not just trustees). No person, other than a trustee, may require the production of another person's PHIN or collect or use another person's PHIN unless it is

- (a) for purposes related to the provision of publicly funded health care to the other person;
- (b) for purposes of a health research project approved under the Act; or
- (c) in circumstances permitted by the regulations under the Act.

5. Independent Review and Resolving Complaints

The Ombudsman has the same role respecting monitoring compliance, promoting public awareness, and investigating, dealing with and resolving complaints under *The Personal Health Information Act* as under FIPPA.

In handling complaints about access or the unauthorized collection, use or disclosure of personal health information, the **Ombudsman** can make recommendations, but not orders.

But, like FIPPA, *The Personal Health Information Act* was amended on January 1, 2011, to provide that, where a trustee 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. The **Adjudicator** has the power to make an order

against a trustee that has not acted on the **Ombudsman's** recommendations.⁹⁴

The Personal Health Information Act also provides that, where a trustee has refused to give an individual access to his or her own **personal health information** and the Ombudsman has not referred the matter to the Information and Privacy **Adjudicator** for review, the individual can appeal the refusal of access to the Manitoba Court of Queen's Bench and to the Manitoba Court of Appeal (with that court's permission).

6. Offences and Penalties

Offences under *The Personal Health Information Act* include collecting, using, selling or disclosing **personal health information** contrary to that Act, and the court can impose a fine of up to \$50,000 for such offences.

7. Relationship with other Acts

Section 4 of *The Personal Health Information Act* provides as follows:

- (i) A trustee shall refuse to permit **personal health information** to be examined or copied by the individual the information is about under Part 2 of *The Personal Health Information Act* to the extent disclosure of the information is prohibited or restricted by another Act or regulation of Manitoba.
- (ii) If a provision of Part 3 of *The Personal Health Information Act* (Protection of Privacy) is inconsistent or in conflict with a provision of another Act or regulation, the provision of *The Personal Health Information Act* prevails unless the other enactment more completely protects the confidentiality of **personal health information**.
- (iii) The provisions of *The Mental Health Act* prevail over *The Personal Health Information Act*.

⁹⁴ This new power was added to *The Personal Health Information Act* by *The Personal Health Information Amendment Act*, S.M. 2008 c.41. The amending Act can be found at: <http://web2.gov.mb.ca/laws/statutes/2008/c04108e.php>.

■ ***The Adoption Act (CCSM c. A2)***⁹⁵

Part 4 of *The Adoption Act* – Confidentiality, Disclosure and the Post-Adoption Registry – contains provisions:

- prohibiting disclosure of identifying information about persons involved in an adoption proceeding in court, and limiting access to court records respecting an order of adoption;
- prohibiting disclosure of records relating to the granting of an order of adoption that are in the custody or under the control of the Director of Child and Family Services, a child and family services agency or an adoption agency, except in very limited circumstances; and
- establishing the post-adoption registry and setting out the rules as to who can have access to information in this registry and in what circumstances.

Section 99 of *The Adoption Act* states that the provisions of Part 4 of *The Adoption Act* prevail over the provisions of the 1985 *Freedom of Information Act* and any Act that replaces it (namely, FIPPA).

■ ***The Child and Family Services Act (CCSM c. C80)***⁹⁶

Part VI of *The Child and Family Services Act* contains access and confidentiality provisions which govern disclosure of records “made under” that Act. Section 86.1 of *The Child and Family Services Act* provides that, if a provision of that Act is inconsistent with or in conflict with a provision of FIPPA, the provision of *The Child and Family Services Act* prevails.

In general, the provisions of *The Child and Family Services Act* respecting access and confidentiality will apply to records “made under” that Act, such as records generated by the Department of Family Services or a child caring agency in the course of providing child protection and other services under the Act. FIPPA will generally apply to other records of the Department or the child caring agency, including general administrative records, personnel records, general policy and program development records.

⁹⁵ *The Adoption Act* can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/a002e.php>.

⁹⁶ *The Child and Family Services Act* can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/c080e.php>.

■ ***The Correctional Services Act (CCSM c. C230)***⁹⁷

This Act provides for the management of custody sentences and supervision orders imposed on persons; the safe, secure and humane accommodation of persons who are in lawful custody; and appropriate programs, services and encouragement to assist offenders to lead law-abiding and useful lives. It contains specific provisions respecting information obtained in administering the Act, including "offender information".

Subsection 56(7) of the Act states that if a provision of the Act is inconsistent with a provision of FIPPA, the provision of *The Correctional Services Act* applies.

■ ***The Manitoba Evidence Act (CCSM c. E150)***⁹⁸

Division VI of *The Manitoba Evidence Act* – Criminal Organizations – allows the Lieutenant Governor in Council to establish, by regulation, a schedule of criminal organizations, and to place an entity on the schedule if satisfied there are reasonable grounds to believe that the entity is a criminal organization. When an entity is listed on the schedule, it is conclusive proof in any proceeding that the entity is a criminal organization.

The Act sets out the process for placing an entity on the schedule, which involves gathering information – most of which is highly sensitive – obtaining submissions, etc.

Subsection 68.16(5) of the Act states that, despite Part 2 of FIPPA (Access to Information), no person may obtain access under FIPPA to "any record or information created, obtained or submitted" under Division VI (the "Criminal Organizations" Division) of *The Manitoba Evidence Act*.

⁹⁷ *The Correctional Services Act* can be found at:
<http://web2.gov.mb.ca/laws/statutes/ccsm/c230e.php>.

⁹⁸ *The Manitoba Evidence Act* can be found at:
<http://web2.gov.mb.ca/laws/statutes/ccsm/e150e.php>.

■ ***The Legislative Assembly Act (CCSM c. L110)***⁹⁹

The Legislative Assembly Act deals with matters such as the composition, duration, powers and privileges of the Manitoba Legislative Assembly and the qualifications of Members of the Legislative Assembly and their remuneration and benefits,

Subsection 52.1(1) of the Act states that "notwithstanding" FIPPA, every record relating to a Member of the Legislative Assembly, or to the administration of the Assembly, that is in the possession of a department or branch of the government or of a Crown agency is deemed to be in the sole custody and under the sole control of the Assembly.

This provision makes it clear that, for the purposes of FIPPA, these Assembly records are not in the custody or under the control of a government department or agency that may have possession of them – and, therefore, FIPPA does not apply to these records.

■ ***The Mental Health Act (CCSM c. M110)***¹⁰⁰

The Mental Health Act contains provisions about a patient's access to his or her clinical record that has been compiled and maintained in a psychiatric facility, and prohibiting disclosure of these clinical records except in very limited circumstances.

Section 39 of *The Mental Health Act* states that FIPPA does not apply to a "clinical record" to which *The Mental Health Act* applies.

The information in these records is **personal health information** to which *The Personal Health Information Act*, rather than FIPPA, would ordinarily apply. But, subsection 4(3) of *The Personal Health Information Act* states that the provisions of *The Mental Health Act* prevail over the provisions of *The Personal Health Information Act*.

In effect, the more protective provisions in *The Mental Health Act* respecting clinical **records** compiled in a psychiatric facility apply to these **records**; neither FIPPA nor *The Personal Health Information Act* apply to these clinical records.

⁹⁹ *The Legislative Assembly Act* can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/l110e.php>.

¹⁰⁰ *The Mental Health Act* can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/m110e.php>.

■ ***The Regional Health Authorities Act (CCSM c. R34)***¹⁰¹

Part 4.1 of *The Regional Health Authorities Act* deals with patient safety and establishes a process for investigating and dealing with "critical incidents". A critical incident is an unintended event that harms a person while he or she is receiving health services. Regional health authorities, health corporations and certain health care organizations are required to report and investigate critical incidents, to keep records about them, and to keep the people affected fully informed.

Subsection 53.10(1) of the Act states that no person – including an individual information is about – has a right of access under any Act or regulation, including under Part 2 of FIPPA – Access to Information – to specified **records** relating to the investigation of the critical incident.

But, subsection 53.2(2) of the Act also imposes a duty on the regional health authority, health corporation or health care organization to fully inform the patient affected by the incident of what has occurred, the consequences for the patient, what actions are being taken to address these consequences, etc.

¹⁰¹ *The Regional Health Authorities Act* can be found at:
<http://web2.gov.mb.ca/laws/statutes/ccsm/r034e.php>.

■ ***The Safer Communities and Neighbourhoods Act (CCSM c. S5)***¹⁰²

This Act establishes a complaint process for people who believe that property in their community or neighbourhood is being used for such things as prostitution, the unlicensed sale of alcohol, the sale or use of illegal drugs, or the illegal sale or use of other intoxicating substances. The complaint is made to the Director of Public Safety, Manitoba Justice, who investigates it.

The Act protects the identity of the complainant and the confidentiality of the complaint. Specifically, subsections 31(1) and 31(2) state that, despite FIPPA, no person, including the Director, shall

- disclose the identity of, or identifying information about, a complainant without the complainant's consent; or
- disclose, provide access to or produce the complaint or any document or thing by which the complainant may be identified, without first removing any information that would identify the complainant.

■ ***The Securities Act (CCSM c. S50)***¹⁰³

The Securities Act establishes the Manitoba Securities Commission and sets out a comprehensive scheme for the regulation of securities. This Act contains provisions requiring the filing of sensitive third party financial and commercial information with the Commission, and governing access to and confidentiality of this and other sensitive information.

Section 154.1 of *The Securities Act* states that its provisions prevail over the provisions of FIPPA where there is an inconsistency or conflict. In general, where *The Securities Act* contains provisions respecting access to records and confidentiality, those provisions (and not FIPPA) will apply.

¹⁰² *The Safer Communities and Neighbourhoods Act* can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/s005e.php>.

¹⁰³ *The Securities Act* can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/s050e.php>.

■ ***The Statistics Act (CCSM c. S205)***¹⁰⁴

The Statistics Act establishes the Manitoba Bureau of Statistics. The purposes of the Bureau include planning, promoting and developing integrated social and economic statistics relating to Manitoba or the government.

The Act now contains provisions protecting privacy and confidentiality of information collected, maintained or disclosed by the Bureau. For example, the Act limits collection and disclosure of personal information by the Bureau to the minimum amount necessary.

Section 9 of *The Statistics Act* contains restrictions respecting access to and disclosure of information about an identifiable person, business or organization. Subsection 9(4) states that, if a provision of section 9 is inconsistent or in conflict with a provision of FIPPA, the provision of section 9 of *The Statistics Act* prevails over FIPPA.

■ ***The Tax Administration and Miscellaneous Taxes Act (CCSM c. T2)***¹⁰⁵

The Tax Administration and Miscellaneous Taxes Act consolidates and streamlines the procedures for administering and enforcing provincial taxes Acts.

Subsection 6(1) limits the disclosure of personal and confidential information obtained under a tax Act, and subsection 6(2) permits the Minister of Finance to share information, including personal information, obtained under a tax Act with the federal government, or the government of another province, territory, state or country, subject to certain conditions.

Subsection 6(4) of the Act states:

- in the event of a conflict between section 6 and a provision of FIPPA, section 6 of *The Tax Administration and Miscellaneous Taxes Act* prevails;

¹⁰⁴ *The Statistics Act* can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/s205e.php>.

¹⁰⁵ *The Tax Administration and Miscellaneous Taxes Act* can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/t002e.php>.

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

- but, nothing in section 6 shall be construed to limit or deny a person's right to access his or her own personal information.

■ ***The Testing of Bodily Fluids and Disclosure Act (CCSM c. T55)***¹⁰⁶

The Testing of Bodily Fluids and Disclosure Act enables a person who has come into contact with a bodily fluid of another person to get a court order requiring the other person to provide a sample of the fluid. The sample will be tested to determine if the 'source person' is infected with certain communicable diseases. The test results are to be provided to the person applying for the court order and to the 'source person' who is the subject of the testing order.

Subsection 23(1) of the Act states that, if a provision of the Act is inconsistent or in conflict with a provision of FIPPA, *The Personal Health Information Act* or any other Act or regulation, the provision of *The Testing of Bodily Fluids and Disclosure Act* prevails.

Subsection 23(2) of the Act also restricts access – it states that no person has a right of access under Part 2 of FIPPA (Access to Information) to any record or information created, obtained or maintained under *The Testing of Bodily Fluids and Disclosure Act*.

■ ***The Vital Statistics Act (CCSM c. V60)***¹⁰⁷

The Vital Statistics Act deals with the registration of 'vital events' such as birth, adoption, marriage and death. The Act also contains provisions respecting access to and disclosure of the records of these vital events that are created or held by the Office of Vital Statistics. The Act provides that certain specified information can be provided upon application and payment of a fee. Regulations under the Act deal with disclosure of certain information, on conditions.

Section 49.1 of *The Vital Statistics Act* states that if a provision of that Act is inconsistent with or in conflict with a provision of FIPPA, the provision of *The Vital Statistics Act* prevails.

¹⁰⁶ *The Testing of Bodily Fluids and Disclosure Act* can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/t055e.php>.

¹⁰⁷ *The Vital Statistics Act* can be found at: <http://web2.gov.mb.ca/laws/statutes/ccsm/v060e.php>.

■ ***The Witness Security Act (CCSM c. W167)***¹⁰⁸

The purpose of *The Witness Security Act* is to promote the administration of justice and public safety by providing services to witnesses, and persons associated with them, who may be at risk because of the witnesses' involvement in the prosecution of a criminal offence. The Act establishes Manitoba's Witness Security Program – a highly confidential program.

Subsection 15(2) of the Act states that, despite Part 2 of FIPPA (Access to Information), no person may obtain access under FIPPA to information about a person admitted into the Program (a 'protected person'), or to information that might compromise the security of a protected person or of a person providing services under the Program.

Subsection 16(1) of the Act prohibits the disclosure of information that might reveal the identity or location of a protected person, or that might otherwise compromise the security of a protected person, by the director of the Program and others, unless the disclosure is permitted under *The Witness Security Act*. This prohibition respecting disclosure applies despite any other statute or regulation, including FIPPA.

■ ***The Workers Compensation Act (CCSM c. W200)***¹⁰⁹

Provisions of *The Workers Compensation Act* require compensation claimants, health care professionals attending compensation claimants, and employers to provide information to the Workers Compensation Board. The Board is also given the authority to examine an employer's records and to collect information in connection with the Board's employer assessment duties.

Section 116 of *The Workers Compensation Act* states that, if a provision of that Act is inconsistent or in conflict with a provision of FIPPA, the provision of *The Workers Compensation Act* prevails over FIPPA. In general, where *The Workers Compensation Act* contains provisions respecting access to records and confidentiality, those provisions (and not FIPPA) will apply.

¹⁰⁸ *The Witness Security Act* can be found at:
<http://web2.gov.mb.ca/laws/statutes/ccsm/w167e.php>.

¹⁰⁹ *The Workers Compensation Act* can be found at:
<http://web2.gov.mb.ca/laws/statutes/ccsm/w200e.php>.

■ ***The Youth Drug Stabilization (Support to Parents) Act (C.C.S.M. c. Y50)***¹¹⁰

The Youth Drug Stabilization (Support to Parents) Act provides that the parent or legal guardian of a child who has a serious drug problem may apply to a justice for an order to have their child apprehended by a peace officer and taken to a safe and secure facility for up to seven days, where the child's condition will be assessed (by an addictions specialist) and stabilized, and a plan for treating the drug problem will be developed.

Subsections 21(1) and 21(2) deal with confidentiality – they state that personal health information collected or maintained for the purpose of the Act must be collected, used, disclosed, retained and destroyed in accordance with *The Personal Health Information Act*, except where the personal health information is contained in a clinical record under *The Mental Health Act*, in which case that Act applies.

Subsection 21(3) states that FIPPA does not apply to information or records prepared, maintained or disclosed for the purpose of *The Youth Drug Stabilization (Support to Parents) Act*.

¹¹⁰ *The Youth Drug Stabilization (Support to Parents) Act* can be found at:
<http://web2.gov.mb.ca/laws/statutes/ccsm/y050e.php>.

■ Examples of Federal Legislation that Prevails Over FIPPA

Youth Criminal Justice Act (Canada)

In addition to the Manitoba statutes discussed above, there are some federal statutes that affect provincial record keeping, access to information and personal information protection.

Perhaps most important is the *Youth Criminal Justice Act (Canada)* (which replaced the former *Young Offenders Act (Canada)*). This Act governs the retention and disclosure of records relating to young persons who have been dealt with under that Act, where the records are held by the courts, police, government departments and social agencies. These records must be dealt with in accordance with the *Youth Criminal Justice Act (Canada)*, not FIPPA.

If you have any questions about the relationship between the *Youth Criminal Justice Act (Canada)* and FIPPA, contact legal counsel.

Copyright Act (Canada)

Section 32.1 of the *Copyright Act (Canada)* states that disclosure of a record pursuant to the federal *Access to Information Act*, or pursuant to any similar Act of a province, does not constitute an infringement of copyright.

That is, a **public body** does not infringe a **third party's** copyright by providing access, in response to an access request under Part 2 of FIPPA, to a record that contains material protected by the *Copyright Act*.

But, the *Copyright Act* may apply to the subsequent use or disclosure of that record by the person receiving access.

When responding to a request for access to a **record** that contains material protected by the *Copyright Act (Canada)*, the **public body** should consider:

- whether subsection 6(2) or subsection 32(1) of FIPPA applies – that is, whether the information is, or will be, available for purchase by the public;
- whether any of the exceptions to disclosure in subsection 18(1) of FIPPA that protect certain **third party** business interests apply to the information; and

SCOPE OF FIPPA – WHO AND WHAT FALLS UNDER FIPPA

- how access will be given under subsection 14(1) of FIPPA, especially where copyright is held by a **third party**. For example, in the circumstances, should the **applicant** be given the opportunity to examine the record, rather than a copy of the record?

Remember:

If an **applicant** is given access to a **record** containing material protected by the *Copyright Act (Canada)*, the **applicant** is bound by the restrictions in the *Copyright Act* when using or distributing the **record**. The *Copyright Act* restricts activities such as copying and distributing copies of copyright protected materials.

If you have any questions about the relationship between the *Copyright Act (Canada)* and FIPPA, contact legal counsel.