

Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2012-0316

MANITOBA HYDRO

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 18(1)(b) and 21(1)(c.1)

REPORT ISSUED ON JANUARY 24, 2013

SUMMARY: The complainant requested access to records from Manitoba Hydro seeking a breakdown of the reimbursement of community costs of the Cree Nation Partners. Access to the requested information was refused by the public body on the basis that disclosure would reveal financial information supplied to it by a third party explicitly in confidence. Our office found that disclosure of the withheld information would be harmful to a third party's business interests and that disclosure could harm relations between the public body and the council of a band as defined by the *Indian Act*.

THE COMPLAINT

The complainant requested the following information under *The Freedom of Information and Protection of Privacy Act* (FIPPA) in July/August 2012:

A breakdown of \$4.28 million in community costs reimbursed to the Cree Nation Partners, including copies of actual receipts/invoices and any related memos/summaries.

Manitoba Hydro sent the complainant a response letter dated August 23, 2012 advising that in accordance with clause 18(1)(b) of FIPPA it was refusing to disclose financial information supplied to it by a third party explicitly or implicitly on a confidential basis and treated consistently as confidential information by the third party. In addition, Manitoba Hydro chose to exercise its discretion under clause 21(1)(c.1) to refuse to disclose the information expected to harm relations between itself and the bands of the Cree Nation Partners. On September 28, 2012, the complainant filed a complaint with our office regarding Manitoba Hydro's decision to refuse access to the withheld information.

POSITION OF MANITOBA HYDRO

Manitoba Hydro took the position that the withheld information constituted commercial and financial information, which had been explicitly supplied to it by a third party on a confidential basis. The public body advised our office as follows:

Manitoba Hydro and Tataskweyak Cree Nation entered into a process Agreement covering all aspects of negotiation and discussions pertaining to the Keeyask Project in 2002. This Agreement contained a clause which governs the handling and use of documentation submitted in respect of reimbursement claims claimed by the First Nation from Manitoba Hydro. This documentation includes personal expense accounts, personal time sheets of members and consultants and details of arrangements made between the First Nation and its various advisors.

The Agreement clause in question specified the following:

29(e) All accountings submitted to Hydro must be approved by a respective Cree Nation representative with authority for such purpose. Financial reports submitted to Hydro are exclusively for the purposes of Hydro and the Cree Nation assessing the reasonability of inclusion of the expenditures within the capital cost base of the project, and otherwise will be accepted and used by all parties as the confidential business information of the submitting party and except as Hydro may be required by law will not be released without that party's consent.

Manitoba Hydro did enquire as to whether or not Tataskweyak Cree Nation consented to the release of the detailed financial information. The manager of Future Development reconfirmed the consistent stance of Tataskweyak Cree Nation that the supporting documents forming part of the accountings was confidential information of Tataskweyak Cree Nation and therefore did not consent to its release.

Manitoba Hydro considered itself to be bound by clause 18(1)(b) of FIPPA and therefore refused to disclose the requested information. Additionally, Manitoba Hydro was concerned that disclosure would necessarily result in a breach of its contractual obligations and thereby harming its relations with the Band.

In support of its position, Manitoba Hydro cited the following FIPPA clauses:

Disclosure harmful to a third party's business interests

18(1) *The head of a public body shall refuse to disclose to an applicant information that would reveal*

(b) commercial, financial, labour relations, scientific or technical information supplied to the public body by a third party, explicitly or implicitly, on a confidential basis and treated consistently as confidential information by the third party.

Disclosure harmful to relations between Manitoba and other governments

21(1) *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to harm relations between the Government of Manitoba or a government agency and any one of the following or their agencies:*

(c.1) the council of a band as defined in the Indian Act (Canada), or an organization performing government functions on behalf of one or more bands.

ANALYSIS OF ISSUES AND FINDINGS

1. Would disclosure of the information withheld under clause 18(1)(b) be harmful to a third party's business interests?

Subsection 18(1) sets out mandatory exceptions to disclosure and in those instances where the information in question is subject to these exceptions, then a public body is statutorily prohibited from disclosing the information.

The exception in clause 18(1)(b) focuses on the confidential nature of the information and has four requirements which must be satisfied in order for it to apply: the information must reveal commercial, financial, labour relations, scientific or technical information; the information must have been supplied to the public body by the third party, who would be affected by the disclosure; the information must have been supplied, explicitly or implicitly, on a confidential basis; and the information must be treated consistently as confidential information by the third party.

The term information rather than the term record is used in subsection 18(1) to indicate that the exceptions apply to the information in a record and not necessarily to the whole record. Subsection 7(2) of FIPPA requires that where an exception applies to a portion of the information in a record, only that portion is severed and the applicant is entitled to access to the remainder of the record unless an exception in another section of FIPPA applies.

Commercial information is information related to or connected with trade or commerce and can include amongst other things lists of suppliers and customers. Financial information is information relating to finance, money and the monetary resources of a person, corporation etc.

In the course of our investigation, we asked Manitoba Hydro for written representations to support its reliance on clause 18(1)(b). Specifically, we asked for a detailed explanation as to how the required conditions of clause 18(1)(b) had been met. We were informed that the commercial and financial information furnished by the third party to Manitoba Hydro was explicitly done on a confidential basis and that the parties consistently treated this information as confidential information.

Our review determined that the withheld information consisted of commercial and financial information that was explicitly supplied to Manitoba Hydro by a third party on a confidential basis.

We found pursuant to clause 18(1)(b) that disclosure of the requested information would reveal confidential commercial and financial information, which would be harmful to a third party's business interests.

2. Would disclosure of information withheld under clause 21(1)(c.1) be harmful to relations between Manitoba Hydro and the council of a band?

In accordance with clause 21(1)(c.1), the head of a public body has the discretion to refuse to disclose information, which, if disclosed, could reasonably be expected to harm relations between a government agency and the council of a band as defined in the *Indian Act* (Canada).

We note that Article 24.2.2 of the Joint Keeyask Development Agreement (JKDA) provides as follows:

Hydro acknowledges that it has accepted, and will continue to accept, from time to time, information from a Keeyask Cree Nation of a confidential nature. Hydro agrees that where it has accepted information from a Keeyask Cree Nation expressed to be of a confidential nature, Hydro shall keep such information confidential, except where such information is released into the public domain or otherwise is now or subsequently becomes available to the public through no fault or breach of this IKDA on the part of Hydro and as required by law.

Our investigation confirmed that Manitoba Hydro received Band information on a confidential basis and that breaching its contractual obligations would reasonably be expected to harm relations with the Band.

We found that the exception to disclosure contained in clause 21(1)(c.1) applied to the withheld information and that Manitoba Hydro's exercise of its discretion to refuse access was not unreasonable.

CONCLUSION

Based on our findings, the complaint is not supported.

In accordance with subsection 67(3) of *The Freedom of Information and Protection of Privacy Act*, the complainant may file an appeal of the Manitoba Hydro's decision to refuse access to the Court of Queen's Bench within 30 days following the receipt of this report.

January 24, 2013
Manitoba Ombudsman