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REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2012-0388

CITY OF WINNIPEG WINNIPEG POLICE SERVICE

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 17(1), 17(2)(b), 25(1)(c) and (e), 26 and 27(1)(b)

REPORT ISSUED ON JANUARY 24, 2013

SUMMARY: The complainant requested access to a specific Winnipeg Police Service (WPS) incident report. The WPS granted partial access to the responsive records, but withheld personal information of third parties, the names of WPS officers, details of an electronic information system as well as information subject to solicitor-client privilege. Our office found that the cited exceptions applied to the withheld information.

THE COMPLAINT

The complainant requested access to the following records under *The Freedom of Information and Protection of Privacy Act* (FIPPA):

WINNIPEG CITY POLICE INCIDENT NUMBER [Information Removed] REPORT (IN ITS ENTIRETY) ALONG WITH THE DOCUMENTATION FROM THE CROWN PROSECUTOR-[Individual's Name] WHICH GOES WITH THIS REPORT

The WPS sent the complainant a response letter dated October 31st, 2012, granting access to severed copies of the responsive records and relying on section 17(1), clause 17(2)(b), clauses 25(1)(c) and (e), section 26 and clause 27(1)(b) with respect to the information being withheld.

A refusal of access complaint was received by our office on November 15, 2012. The complainant was of the view that the information being withheld by the WPS should have been disclosed.

POSITION OF THE WINNIPEG POLICE SERVICE

The WPS took the position that the records contained information, which if disclosed would: be an unreasonable invasion of a third party's privacy; harm current and future police investigative techniques/procedures; endanger the life or safety of a law enforcement officer; harm or threaten the security of properties and electronic systems; reveal information subject to solicitor-client privilege.

The records at issue were the statements of third parties and law enforcement officers notes containing information about themselves and the complainant. Also being withheld was information prepared by WPS officers concerning contact with the third parties and a crown attorney opinion withheld in full.

The WPS applied subsection 17(1) in conjunction with clause 17(2)(b) of FIPPA to withhold the third-party information. The public body stated that the personal information was compiled and was identifiable as a part of a police investigation into a possible violation of a law. The WPS advised that disclosure of this information was not necessary at this time to investigate or prosecute the violation and therefore the information must be withheld in accordance with the Act. This exception was applied to the statements of the third parties and information in the attending officers narratives and notes.

The WPS has consistently withheld the names of its officers pursuant to clause 25(1)(e) of FIPPA, as the information related to their employment/occupational histories. Only the officers' badge numbers were provided simply as a means of identifying specific officers. Constant safety risks are continually facing police officers and the Winnipeg Police Service's providing the names of its officers could reasonably be expected to increase risks to those officers and their families. Accordingly, the WPS advised that it was also relying on clause 25(1)(e) to withhold the police officers' names.

Information the details of which could reasonably be expected to harm or threaten the security of property or system was being withheld pursuant to section 26.

The WPS severed information that was prepared by a lawyer of the Attorney-General with respect to the provision of legal advice concerning the investigation or prosecution of an offence. The WPS refused access to this information pursuant to clause 27(1)(b) of FIPPA.

In support of its position, the Winnipeg Police Service relied on the following FIPPA provisions in refusing access to the withheld information:

Disclosure harmful to a third party's privacy

17(1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's privacy.

Disclosures deemed to be an unreasonable invasion of privacy

17(2) A disclosure of personal information about a third party is deemed to be an unreasonable invasion of the third party's privacy if

(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of a law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

Disclosure harmful to law enforcement or legal proceedings

25(1) *The head of the public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to*

(c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement;

(e) endanger the life or safety of a law enforcement officer or any other person.

Disclosure harmful to security of property

26 *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to harm or threaten the security of any property or system, including a building, a vehicle, an electronic information system or a communications system.*

Solicitor-client privilege

27(1) *The head of a public body may refuse to disclose to an applicant*

(b) information prepared by or for an agent or lawyer of the Minister of Justice and Attorney-General or the public body in relation to a matter involving the provision of legal advice or legal services or in relation to the investigation or prosecution of an offence.

ANALYSIS OF ISSUES AND FINDINGS

1. Does the mandatory exception to disclosure provided by subsection 17(1) and clause 17(2)(b) of FIPPA apply to the withheld information?

Section 17 is a mandatory exception to disclosure. A public body is bound not to disclose personal information if the disclosure would be an unreasonable invasion of a third party's privacy. Subsection 17(2) describes what an unreasonable invasion of privacy is for the purposes of applying the exception to disclosure in subsection 17(1).

Subsection 17(2) describes various kinds of personal information which are so sensitive that disclosure of same is deemed or considered to be an unreasonable invasion of a third party's privacy, unless one of the circumstances in subsection 17(4) applies.

As part of our investigation, we requested the WPS to provide us with both the severed and unsevered copies of the responsive records for our review. We established that the personal information furnished to the WPS was contained in the narratives and statements of the third parties. Based on our review, we determined that the records contained third-party information which was compiled and identified as part of an investigation into a possible violation of law and was subject to clause 17(2)(b). Furthermore, our review confirmed that disclosure of the severed

information to the complainant was not necessary either to prosecute the violation or to continue the investigation. We assessed the considerations listed in subsection 17(4) and concluded that none of the listed elements were applicable to the information in question.

The release of the severed personal information would be an unreasonable invasion of a third party's privacy. Accordingly, we found that clause 17(2)(b) applied to the withheld information and that the WPS was required to refuse access to this information under subsection 17(1).

2. Do the discretionary exceptions to disclosure provided by clauses 25(1)(c) and (e) apply to the withheld information?

Subsection 25(1) of FIPPA specifies that the head of a public body has the discretion to refuse to disclose to an applicant information which could reasonably be expected to harm law enforcement activities, other specified investigative, regulatory, adjudicative and protective functions of a public body as well as possibly endangering the life or safety of a law enforcement officer.

The exceptions to disclosure contain a reasonable expectation of harm test. The head of the public body must determine whether disclosure of the information could reasonably be expected to cause the harm described in each specific exception being applied.

Clause 25(1)(c) permits the head of a public body to refuse to disclose information that could reasonably be expected to harm the effectiveness of investigative techniques used in law enforcement. This exception is limited to investigative techniques or procedures currently in use or which are likely to be used. Clause 25(1)(c) is a discretionary exception to disclosure under FIPPA and as such a public body must provide reasons for its decision to refuse access, which demonstrate that it exercised its discretion in a reasonable fashion.

A WPS investigation is an ongoing exercise until such time as the matter is concluded. Accordingly, premature disclosure of the withheld information could harm the ongoing investigative process and possibly influence the responses of third parties to further inquiries. We examined the particular severed information and determined that its disclosure could reasonably be expected to harm the effectiveness of investigative techniques and procedures.

The WPS applied clause 25(1)(e) to withhold the attending police officers' names in the records it released. In order for this exception to apply, there must be a reasonable expectation of harm associated with the disclosure of the withheld information. The WPS has resolutely maintained that the provision of police officers' names could potentially compromise their safety as well as that of their families. Therefore the names were severed.

However, we note that the public body did provide the badge numbers of the attending officers named in the records in order to ensure that they can be identified should a member of the public make enquiries about them.

We found that the exceptions to disclosure in clauses 25(1)(c) and (e) applied to particular portions of the severed information, that its disclosure could be harmful to law enforcement proceedings, that its disclosure could endanger the life or safety of a law enforcement officer and that the exercise of discretion by the WPS to withhold the severed information was reasonable.

3. Does the discretionary exception to disclosure specified in section 26 of FIPPA apply to the withheld information?

Section 26 provides the head of a public body with the discretion to refuse to disclose information, which could reasonably be expected to harm or threaten the security of any property or system. The WPS applied this section to withhold information, which if disclosed could harm or threaten the security of an electronic information system.

Our review of the records established that they contained information, which could reasonably be expected to compromise the security of an electronic information system. We found that the discretionary exception to disclosure in section 26 applied to the particular information being severed from the responsive records. In addition, we concluded that the exercise of discretion on the part of the WPS to refuse access to this information was reasonable.

4. Does the discretionary exception to disclosure afforded by clause 27(1)(b) of FIPPA apply to the withheld information?

Subsection 27(1) of FIPPA provides the head of a public body with the discretion to refuse to disclose information in a record if the information is subject to solicitor-client privilege. At common-law, solicitor-client privilege protects all communications of a confidential character between a client and legal advisor that are related to the seeking, formulating or giving of legal advice or legal services. It is important to note that the privilege belongs to the client, not the solicitor, and that it is not diminished in any way by the fact that the client is a public body.

In order for the exception to apply, the information in the record need only fall within one of the clauses listed in subsection 27(1). The exception is discretionary. The head of a public body may refuse to disclose the information described in one of the clauses after a determination has been made that it would be appropriate and reasonable to do so.

The WPS chose to exercise its discretion to withhold the information prepared by a lawyer of the Attorney-General's office in relation to the investigation or prosecution of an offence.

We found that the exception to disclosure contained in clause 27(1)(b) applied to the severed information in the records and that the WPS's exercise of its discretion to refuse access to the information 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 City of Winnipeg, Winnipeg Police Service'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