Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2016-0316

CITY OF BRANDON – BRANDON POLICE SERVICE

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 17(1), 17(2)(b)(e)(h), 17(4)(a), 17(4)(e)(i), 7(2)

REPORT ISSUED ON APRIL 4, 2017

SUMMARY: **The complainant made a request for access to the City of Brandon – Brandon Police Service (the city) for copies of any disciplinary records and video surveillance related to an incident between a Brandon police officer and a third party. The city refused access to the requested records, in part. A complaint about the refusal of access was made to the ombudsman's office. The ombudsman found that the complaint is not supported.**

COMPLAINT

On July 8, 2016, the complainant sent a request to the City of Brandon (the city), specifically the Brandon Police Service (BPS). The complainant made a request for information under the Freedom of Information and Protection of Privacy Act (FIPPA) as follows:

> "*The* [Complainant] *requests the following records in relation to the investigation of a Brandon Police Service officer's interaction with a complainant on March 16, 2016, as described in the decision of the Independent Investigation Unit released by that body on July 4, 2016:*
>
> - *All file material submitted to the IIU by the Brandon Police Service for the unit's investigation, including a copy of the video of the interaction with the officer and the subject captured by the apartment video camera. We also request a copy of the written statement that the officer provided to the IIU.*
>
> - *In addition, we ask for any records, including emails and other correspondence, created by BPS officers involved in looking into this matter, including BPS Chief* [NAME]*, inspectors and the subject officer. That includes any report written on the matter, and any records related to any discipline or directives given to the subject officer.*

- *We ask for any correspondence, including emails, exchanged between any BPS member or their representative and the IIU.*

- *We do not believe that the above information falls under law enforcement exemptions under the Freedom of Information and Protection of Privacy Act save for, potentially, Subsections 25(1)(m), in which case we would argue the public interest outweighs such a concern, and 25(1)(n), in which case we are willing to wait for the release of the records until the expiration of any time limit for the complainant to file a report with the Law Enforcement Review Agency.*

- *In the public interest, we ask that any fees waived. Otherwise, please keep us apprised of any potential fees. Thanks.*

The city responded to the complainant's request on August 30, 2016 and indicated that access to the records was granted in part. The city provided severed copies of the following records: notes from two officers who attended the incident, Part 7 Notification submitted to the IIU, the statement of the complainant taken by the officer, a supplemental report provided by a BPS member subsequent to the complaint being made against the officer, and the Computer Aided Dispatch report generated for the incident.

All of the above records were redacted under section 17 of FIPPA to remove the personal information of the involved parties. The city refused access to the other records requested under subsection 17(1), and clauses 17(2)(e), 17(2)(h) and 17(2)(b). On October 20, 2016, our office received a complaint about the refusal of access under FIPPA. The complainant's submission made the following arguments:

- That the release of the information is necessary for the public to assess, restore or maintain its confidence in the BPS and the administration of justice

- That the police officer involved is not a "third party" as defined by FIPPA because they are part of the public body and therefore subsections 17(1) and 17(2) do not apply

- That the alleged victim has already revealed their identity to the complainant, therefore subsection 17(1) and 17(2) do not apply

- That the witness does not play a large part in the video evidence, therefore their image should be redactable without rendering the video unwatchable

- That the investigation into the criminal matter has concluded, therefore clause 17(2)(b) does not apply

It is the position of the complainant that access to the information requested from the city should have been granted.

POSITION OF THE CITY OF BRANDON

As indicated earlier, the city refused access to the disciplinary records under subsection 17(1) and clauses 17(2)(e) and 17(2)(h) of FIPPA. Access to the video record and other redacted sections of the records was refused under subsection 17(1) and clause 17(2)(b). The cited provisions protect the privacy of personal information of third parties. The city redacted three types of information from the documents provided, names, contact information and one file number (which the city later acknowledged should not have been redacted). The city also referenced its efforts to balance protecting the privacy of third parties with transparency and the public's interest in having information related to the actions of public bodies.

On November 1, 2016, the ombudsman contacted the city and gave it the opportunity to provide representations in relation to the complaint about the refusal of access. On November 22, 2016, our office received a response from the city. The response reiterated the city's initial position in relation to the access request and further cited clauses 17(3)(f) and 25(1)(f) of FIPPA in support of the refusal of access. Our office is unable to address clauses 17(3)(f) and 25(1)(f) in this report as they did not form part of the city's access decision.

ANALYSIS OF THE ISSUES AND FINDINGS

Do the mandatory exceptions to disclosure provided for under section 17 of FIPPA apply to the records withheld by the city?

Subsection 17(1) of FIPPA sets out a mandatory exception to disclosure of records held by a public body, so that if the disclosure of the information contained in the records would constitute an unreasonable invasion of a third party's personal privacy, then access to the records must be refused.

> ***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.*

Subsection 17(2) of FIPPA lists specific types of information that if disclosed are deemed to be an unreasonable invasion of privacy. Therefore, if the information contained in a record is of the type found under subsection 17(2) of FIPPA, then the public body has no choice but to refuse access to the record in question, unless a limit to the exception, under subsection 17(4), applies. Subsection 17(3) of FIPPA sets out factors that can be considered when determining whether the release of information not listed under subsection 17(2) is an unreasonable invasion of privacy, though this list is not exhaustive.

The city cited clauses 17(2)(b), 17(2)(e) and 17(2)(h) as its basis for redacting information from provided records or refusing access to records in full:

> ***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;*
>
> *(e) the personal information relates to the third party's employment, occupational or educational history;*
>
> *(h) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations; or*

The information redacted from the records provided to the complainant included the names of officers, witnesses and other involved parties and contact information. The personal information of the subject officer, the alleged victim, the witnesses and other involved parties was compiled as part of an investigation and is therefore the type of information described under clause 17(2)(b). The city also redacted the names of several other police officers, but did not redact the names of two officers. Our office asked the city why the disclosure of the names of some officers was deemed to be unreasonable but the release of others was not.

The city indicated that the difference was in the seniority and public nature of the officers' roles. The two officers whose names were not redacted often appeared at press conferences and are the public face of the police department, whereas the other officers were not. The city indicated that the other officers' names are never released by the police department and therefore the city determined that disclosing their names in this context would be an unreasonable invasion of privacy. Our office also observed that the records contained personal information of some officers (other than the subject officer), in their personal capacity, related to their roles as potential witnesses, rather than their employment responsibilities as employees of the public body.

Based on our review, we agree that this information is of the type described in clause 17(2)(b), as well as clause 17(2)(e). Our office requested clarification from the city in relation to one redaction made on the record described as Part 7 Notification to the Independent Investigation Unit of Manitoba. On this form there is a section titled "Police Agency Information" and the "Agency Occurrence #" was redacted under clause 17(2)(b) of FIPPA. We asked the city to explain why it considered this information to be personal information about an identifiable individual.

After further consideration, the city indicated that it had revised its decision and had no issue with this information being disclosed. The city refused access to two records in full under section 17, the disciplinary records of the subject officer and the video surveillance of the incident. The disciplinary records are part of the subject officer's employment and occupational history and may also contain recommendations, evaluations or character references.

As such, we agree that the disciplinary records contain information of the type described under clauses 17(2)(e) and 17(2)(h) of FIPPA. Our office received and watched a copy of the video, which contains the personal information (the image) of three parties, the subject officer, the alleged victim and a witness. The information in the video was gathered as part of an investigation, as contemplated by clause 17(2)(b) of FIPPA.

Does clause 17(2)(b) cease to apply to information after an investigation has been concluded?

As noted earlier, clause 17(2)(b) of FIPPA provides that disclosure is a deemed unreasonable invasion of privacy if the record contains personal information of a third party that was collected in the course of an investigation into a possible violation of the law, unless the information is disclosed for the purposes of prosecuting an offence or continuing the investigation:

> ***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;*

The records requested contained the personal information of several different third parties, which was collected by the BPS when investigating the incident in question. Earlier in this report, we found that the information in these records is of the type described in clause 17(2)(b) of FIPPA. The complainant's position is that clause 17(2)(b) should cease to apply once an investigation is concluded. However, the focus of the provision is on the context in which the information was created, and nothing in FIPPA suggests that protections related to personal information gathered during an investigation end when the investigation is finished.

Do any of the limits to the exceptions under subsection 17(4) apply?

Subsection 17(4) sets out the situations where the disclosure of information is not considered an unreasonable invasion of privacy, despite subsection 17(2). Based on the complainant's submissions and our own review, we identified the following provisions as being potentially relevant to this matter:

When disclosure not unreasonable

17(4) *Despite subsection (2), disclosure of personal information is not an unreasonable invasion of a third party's privacy if*

(a) the third party has consented to or requested the disclosure;

(e) the information is about the third party's job classification, salary range, benefits, employment responsibilities or travel expenses

(i) as an officer or employee of a public body,

The complainant put forth the position that the police officer involved in the incident is not a "third party" as defined by FIPPA. FIPPA defines a "third party" as "a person, group of persons or an organization other than the applicant or a public body." The complainant stated that because the officer is an employee of the public body, they cannot be a "third party" under this definition. However, our office does not agree with the complainant's position. While employees are part of a public body and may produce records in the course of acting on behalf of the public body, they are nonetheless still third parties, as defined under the act.

The wording of subclause 17(4)(e)(i) supports the conclusion that public body employees are third parties, as this provision only applies to an individual who is both a third party and an employee of a public body. While the provision does permit disclosure of certain personal information about third parties employed by public bodies, that disclosure is limited to information about the individual's job responsibilities, salary range, benefits, travel expenses or job classification as a public body employee.

The provision does not extend to permit disclosure of other personal information about employees, such as their personal contact information, medical information, or disciplinary information, for example. The public body must protect the privacy of this personal information in the same manner as it protects the personal information of individuals who are not employed by the public body.

After a review of the personal information of the subject officer to which access was refused, our office determined that clause 17(4)(e)(i) does not apply as the information is not personal information related to the subject officer's job classification, salary range, benefits, employment responsibilities or travel expenses. We therefore concluded that the personal information was appropriately withheld under subsection 17(2) of FIPPA.

The complainant also put forth the argument that the fact that the alleged victim had chosen to share their name with the complainant meant that the alleged victim had consented to the release of their personal information by the city, as described in clause 17(4)(a). However, the fact that an individual has shared certain personal information with another person does not amount to giving knowledgeable and informed consent for a public body to disclose any and all information about the individual. Based on the information available to us, we are unable to conclude that the alleged victim gave consent for the City of Brandon to disclose their personal information to the complainant.

Could the video have reasonably been severed, as required under subsection 7(2) of FIPPA?

Under FIPPA, when a public body determines that an exception to disclosure applies, the public body is still required to consider whether or not the excepted information can reasonably be severed from the responsive record.

Subsection 7(2) of FIPPA provides for the severing of information and allows the applicant access to the remainder of the record, and reads as follows:

> ***Severing information***
>
> ***7(2)*** *The right of access to a record does not extend to information that is excepted from disclosure under Division 3 or 4 of this Part, but if that information can reasonably be severed from the record, an applicant has a right of access to the remainder of the record.*

After the excepted information has been severed by the public body, the applicant maintains a right of access to the record provided that the remaining information (if any) is still meaningful and not merely "disconnected snippets" of information. The city advised that the technology available to it to obscure the images of the subject officer, the alleged victim and the witness is limited. The city indicated that doing so would involve "*placing solid-colored boxes over the identifying features of the people in the video.*"

The city also considered, given the detailed description of the incident in the IIU report, whether any additional information could be provided by the video beyond the identities of the involved parties and determined that little additional information would be gleaned by releasing a severed version of the video.

Our office reviewed the video surveillance to determine whether the record could reasonably be severed, using the above-noted method, to allow for partial access. If the records were severed then all of the relevant information, such as the images of witnesses, would be severed from the records as they would disclose personal information. As this would leave only disconnected snippets of information, we agree with the city's conclusion that the records could not reasonably be severed, and that the records were required to be withheld in full.

CONCLUSION

Based on the ombudsman's findings in this matter, 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 decision by the City of Brandon to refuse access to the responsive records to the Court of Queen's Bench within 30 days of receipt of this report.

April 4, 2017
Manitoba Ombudsman