

MANITOBA OMBUDSMAN PRACTICE NOTE

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DEALING WITH ACCESS REQUESTS INVOLVING EMPLOYEE INFORMATION

Introduction

Under *The Freedom of Information and Protection of Privacy Act* (FIPPA), an applicant has a right of access to any record in the custody or under the control of a public body, subject to limited and specific exceptions set out in Part 2 of FIPPA.

Public body records often contain personal information, which the Act defines, in part, as being recorded information about an identifiable individual. Frequently, the personal information may relate to employees of the public body.

This Practice Note will provide guidance to public bodies about the considerations that may arise when records responsive to an access request contain personal information of employees.

General records containing employee information

In some cases, an employee's personal information is incidental to the information being sought, because the record arises out of duties or activities performed by an employee on behalf of the public body. For example, an employee's business contact information may be contained in a letter or a report written by the employee. Or, an employee's activities and views on various work-related matters could be contained in a series of case notes written by the employee in the course of performing the employee's duties on behalf of the public body.

It is our view, generally speaking, that release of this type of personal information would not be an unreasonable invasion of the employee's privacy, as described under section 17 of FIPPA. The information relates to the individual's employment responsibilities as an officer or employee of the public body, and arises out of the performance of these duties.

We note that clause 17(4)(e) of FIPPA provides that it is not an unreasonable invasion of an individual's privacy to release information about job classification, salary range, benefits, employment responsibilities or travel expenses, if the individual is an officer or employee of a public body, a minister, an elected or appointed member of a council of a local government body or a member of the staff of such a local government body. In addition, we note that under *The Public Sector Compensation Disclosure Act*, certain types of information about employees, whose annual compensation exceeds \$50,000, is required to be made available to the public.

Where the personal information simply reveals the fact that the individual is an employee of the public body who performed certain duties in the course of their employment, it would be unlikely that this information would be subject to section 17 of FIPPA. However, other exceptions to access may apply and can be considered by the public body when deciding whether to grant access.

Other records containing employee information

In some cases, an employee's personal information may be integral to the record; the employee may even be the subject of the record. For example, an employee's educational and occupational history (and other personal information) will be contained in the resumé submitted by the employee in application for his or her job. Or, if there was a workplace investigation involving the employee, then personal information about the employee will be found in a report concerning the investigation. These types of records can often be contained in an employee's personnel file(s), although they may also be in a number of other locations. The information contained in these records could reveal, among other things, an employee's home address, age or personal health information. Releasing these types of personal information to third parties would be considered to be an unreasonable invasion of privacy under section 17.

While these types of records may be the subject of a request for access to general information, these records may be more commonly subject to a request by the employee for access to his or her own information, or in some cases, to information about another employee. For example, an individual who was not the successful candidate in a particular competition may seek access to the qualifications and rankings of other candidates. Or, an employee involved in a workplace investigation may seek access to investigation records, containing personal information of not only the employee, but possibly of other employees as well.

Considerations

When determining whether personal information of employees can be released in response to an access request, we suggest the public body include the following in its considerations:

-Who is the requestor? For an employee requesting his or her own personal information, section 17 of FIPPA is unlikely to be a consideration, except as it relates to those portions of a responsive record that contain personal information of other individuals. On the other hand, section 17 may be relevant to requests for general information and to requests by third parties for information about employees.

-Does the information relate to the employee's duties or employment responsibilities on behalf of the public body? If so, it is generally our view that this information cannot be withheld under section 17, although the information may still be subject to another exception to the right of access.

-Do the records include, among other things, information that would describe the employee from a more personal perspective? Section 17 mandatory exceptions to the right of access may still apply in these cases. For example:

- 17(2)(a) may be relevant to information in records about an employee's sick leave, disability, or the accommodation of a disability etc. However, an employee's access to the employee's own records containing this type of information may be governed by PHIA, rather than by FIPPA.

- 17(2)(b) and (c) may be relevant to information in records relating to an investigation of harassment, respectful workplace issues, conflict of interest and other similar issues involving public body employees
- 17(2)(e) may be relevant to information in records such as employee resumés, job applications, qualifications, job interview notes etc.
- 17(2)(h) may be relevant to information in records related to reference checks as well as to information in records relating to the assessment and management of the employee's job performance.

-Do the records include, among other things, information that relates to plans, consultations, deliberations, opinions or advice generated by or for the public body relating to management of public body employees, or negotiations between the public body and its employee(s)? A section 23 exception may apply. For example:

- 23(1)(a) or (b) may apply to information in records generated by public body staff about issues facing the public body in dealing with a particular employee, and the opinions and advice of the public body staff about what steps to take in resolving issues with the employee.
- 23(1)(c) may apply to information in records about how to approach a negotiation of some sort between a public body and one or more of its employees.

-Do the records include information that could give rise to harm to an employee's safety? A section 24 exception may apply in such a situation. For example:

- 24(a) may be relevant to information about an employee, if there is a reasonable expectation that releasing this information will result in the employee being subjected to harassing or stalking behaviour by a third party.

-Do the records include, among other things, information about employees, in a law enforcement context? A section 25 exception may apply to some information in such a situation. For example:

- 25(1)(e) may be relevant to information in records where harm could result if the identities of law enforcement officers, such as police officers and undercover officers were exposed by the disclosure of the information.
- 25(1)(a) and (n) may also be relevant to some employee information in certain records, such as where the employee is the subject of or witness to a law enforcement matter or legal proceeding.

-Do the records include, among other things, information about employees in the context of a legal action or in the context of a legal opinion? A section 27 exception may apply to some of this information, although the public body, if it is the client, can exercise discretion and waive its privilege where appropriate.

-Do the records relate to a job competition? A subsection 30(1) exception may apply to information about the FIPPA applicant if he or she applies for information provided in confidence to the public body about his or her suitability for a job. However, subsection 30(1) does not

apply to information that the public body must provide to the applicant under *The Personal Investigations Act*.

Note, however, that even when exceptions under section 23, 24, 25, 27 or 30 apply, a public body must nonetheless reasonably exercise its discretion, taking into account the principles of FIPPA, when deciding to withhold rather than to grant access to this type of information.

The considerations listed in this Practice Note are not exhaustive, and the public body will need to consider each situation based on its own merits.