

# Manitoba Ombudsman

## REPORT UNDER

### *THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*

CASE 2011-0538 (web version)

#### CITY OF WINNIPEG WINNIPEG POLICE SERVICE

#### ACCESS COMPLAINT: REFUSAL OF ACCESS

**PROVISIONS CONSIDERED: 6(2), 7(2), 12(1)(c)(i), 13(1)(c), 17(1), 17(2)(e), 18(1)(b), 18(1)(c)(i), 19(1)(c), 20(2)(b), 23(1)(a) and (b), 26**

**REPORT ISSUED ON AUGUST 30, 2013**

**SUMMARY:** The complainant requested access to records of all communications between the City of Winnipeg and the Traffic Injury Research Foundation for a specified time period. The City of Winnipeg refused access in full to some records, while for other records, access was refused to only selected information in the records. The ombudsman found that the exceptions relied on to refuse access did not apply to some of the withheld information, and asked the City of Winnipeg to reconsider its decision to withhold this information. The public body released additional information to the complainant in August 2012. The ombudsman found that the public body was required to refuse access to some of the remaining information, and that it was authorized to refuse access to the other information that continued to be withheld. The complaint is supported in part.

#### **THE COMPLAINT**

The complainant requested access to the following records under *The Freedom of Information and Protection of Privacy Act* (FIPPA) on August 25, 2011.

I wish to receive copy of all communication between the City of Winnipeg (including the Departments of Public Works, Police Service and Mayors [sic] Office) and the Traffic Injury Research Foundation. The request pertains to communication between the City of Winnipeg and TIRF between the dates of November 1, 2010 and July 30, 2011.

The City of Winnipeg ultimately responded to the request on November 23, 2011, granting access in part, resulting in a complaint being made to our office on November 25, 2011 about the partial refusal of access.

## **BACKGROUND**

For a decade now, the City of Winnipeg has relied on the use of photo-radar traffic enforcement in addition to traditional enforcement measures used by police. The photo-radar system, commonly known to Winnipeggers as the “red-light cameras,” includes mobile units as well as units that are permanently installed at selected intersections. The City of Winnipeg commissioned the Traffic Injury Research Foundation (TIRF), an independent road safety institute, to conduct an evaluation of the impacts of the photo-radar enforcement program. The project began in 2008, and resulted in the public release of TIRF’s report on July 5, 2011.

The photo-radar enforcement program had been the subject of other FIPPA applications in the first half of 2011. One application dated May 16, 2011, asking for a copy of the “early release of the unofficial TIRF report” received by the City of Winnipeg in March 2011 or earlier. After consulting with TIRF, the city responded to that request on June 15, 2011, refusing access in full under subsection 18(1), on the basis that the draft report had been supplied in confidence, and that its disclosure would harm the competitive position of TIRF. An earlier application dated March 15, 2011, from the complainant himself, had requested other communications about photo-enforcement for the period of September 15, 2010 and March 15, 2011.

The complainant’s August 25, 2011 FIPPA request, which is the subject of this report, encompassed communications between the City of Winnipeg and TIRF not only about the draft report, but also about the city’s response to another applicant’s May 16, 2011 FIPPA request. The August 25, 2011 request also encompassed records that were responsive to the complainant’s own March 15, 2011 request.

Our office generally does not identify third parties (organizations or individuals) in our reports, both to protect the privacy of third parties who are individuals, and because identifying third parties is not usually necessary to establish the basis for our findings. However, our report in this case refers to TIRF by name in order to clearly explain our findings, and in recognition of the fact that TIRF is identified as the author of the publicly available photo-radar report.

## **THE PUBLIC BODY**

The City of Winnipeg, is designated a “local government body” (also a “local public body”) under FIPPA, and is a public body to which FIPPA applies. The head of each department of the city is delegated the authority to respond to FIPPA requests. For requests pertaining to records of multiple departments, a response might be issued by each department, or a single department might respond if it has all or most of the records at issue. In this case the Winnipeg Police Service department (the WPS) responded on behalf of itself and the other two city departments named in the request. For purposes of this report, we use the terms “the city”, “the WPS” and “the public body” interchangeably to refer to the public body.

## **INITIAL PROCESSING OF THE REQUEST BY THE WINNIPEG POLICE SERVICE**

The initial application was made on August 25, 2011. On September 7, 2011, the WPS advised the complainant that fees of \$271 were applicable to processing his request. Having received

payment of the fee, the WPS continued processing the application, and on October 19, 2011, the WPS notified the complainant that the time for responding to his request was being extended to November 23, 2011, as provided for under clauses 15(1)(b) and (c) of FIPPA. The basis for the extension was that a large number of records was requested or needed to be searched and that the public body needed to consult with a third party business as well as other public bodies before deciding whether to grant access.

On November 23, 2011, the WPS issued its access decision, advising the complainant that access would be refused under the following provisions of FIPPA to these records and information:

- Clause 13(1)(c) - records previously provided to the complainant
- Subsection 17(1) & clause 17(2)(e) - personal information (employment, occupational or educational histories) of third party individuals
- Clause 18(1)(b) & subclauses 18(1)(c)(i) and (ii) – business information of TIRF
- Clause 19(1)(c) – information that would reveal a proposal or recommendation to Cabinet
- Clauses 23(1)(a) & (b) - information consisting of advice, opinions, proposals etc. developed by or for the public body, as well as consultations or deliberations involving employees of the public body
- Subclause 12(1)(c)(i) - records of communications involving the Mayor's Office did not exist or could not be found.

The complainant was advised that the WPS had consulted the third party business, in accordance with the process described in section 33 of FIPPA, and that the WPS intended to give access to certain information to which TIRF objected, and that TIRF had the right, under subsection 34(4) of FIPPA to complain to the ombudsman about the decision to give access. The complainant was also advised of his right to complain to the ombudsman about the decision to refuse access. Both the complainant and TIRF would have 21 days to make a complaint, and access to any records of information pertaining to TIRF would be given once the 21 days had elapsed and only if TIRF had not made a complaint to the ombudsman about the decision to give access.

A complaint about the refusal of access was received by our office, from the complainant, on November 25, 2011. We requested that the WPS provide our office with severed and unsevered versions of the records at issue, as well as written representations explaining how the provisions applied to the information in question.

As TIRF did not make a complaint to our office, the Winnipeg Police Service, on December 16, 2011, released copies of records to the complainant, with certain information withheld, as contemplated by the November 23, 2011 decision letter. The WPS continued to rely on the provisions originally cited, and certain information was also now being withheld under the following exceptions:

- Subsection 17(1) & clause 17(3)(i) - personal information
- Subclause 18(1)(c)(iii) - third party business information
- Clause 20(2)(b) - information provided in confidence by a government agency
- Clauses 25(1)(c) and (e) - non-public contact information for police officers
- Clause 28(1)(b) – information in which the WPS had a proprietary interest

Coinciding with the release of the records to the applicant on December 16, 2011, our office was also provided with the copies of the records and written representations we had requested on December 1, 2011. Altogether, between the two decision letters, there appeared to be 15 provisions at issue for purposes of our investigation.

## **RESPONSIVE RECORDS**

The responsive records in this case consist of a large number of email and other communications, drafts of the report, references relied on in the report as well as the project outline (work plan) and the work order/receipt for the project. The emails and other communications are between employees of the public body and TIRF, with a smaller number of communications involving Manitoba Public Insurance (MPI), Manitoba Justice and Manitoba Infrastructure and Transportation. These communications, as a whole, pertain to various parts of the project, including the TIRF report, as well as other aspects of the photo-radar program and road safety initiatives. One group of emails/communications actually relate to formal consultations the WPS undertook with TIRF (as authorized by section 33 of FIPPA) about records that were the subject of two earlier access requests, one of which was the complainant's. Many email records consist of conversational threads between multiple individuals and there is thus a significant amount of overlap or duplication between copies of the emails. The WPS made note of this on the records, where applicable, rather than reproduce multiple copies of the same pieces of emails. Many emails also attach conversations about issues outside the topic of the request and/or outside the timeframe specified in the request, and these parts have simply been removed and marked by the WPS as being non-responsive to this request.

It is important to note that the publicly available TIRF report includes an overview of the workings of the photo-radar enforcement program, including the role of the police, the courts and the legislative branch of the government. The latter two aspects of the program fall under the authority of Manitoba Justice and Manitoba Infrastructure and Transportation. Manitoba Public Insurance also plays a role in the program as it is the Registrar of Motor Vehicles in Manitoba and maintains the Driver and Vehicle Licensing Database, the source of information used to issue "red-light camera" offence notices. MPI is also the source of claims collision data referred to in the TIRF report. Without revealing the detailed contents of withheld communications, we would observe that for such data and information to appear in the report, it would have been provided by and/or verified by MPI, Manitoba Justice and Manitoba Infrastructure and Transportation.

## **PRELIMINARY STEPS IN OUR INVESTIGATION**

After a thorough review of all responsive records, the provisions applied to withhold information, and several discussions with the Winnipeg Police Service, our office wrote to the public body on May 1, 2012, acknowledging that the evidence supported the application of some exceptions to certain information, but indicating that in other instances, we had not been provided with sufficient evidence to be able to conclude that the provisions applied. We identified a number of examples that illustrated the considerations we felt needed to be addressed. For some examples we described having cross-referenced information withheld in this case with information released (rather than withheld) in response to a different application.

Other examples identified that certain information that had been withheld had been found, on our review of public sources, to be publicly available. Among other things, this included information pertaining to employees of TIRF as well as a number of research reports referred to in the TIRF report. We subsequently met with representatives of the Winnipeg Police Service on May 15, 2012, to further discuss these issues, and explain our view that these records could not be withheld under sections 17 and 18, respectively.

## **SECOND RELEASE OF RECORDS BY THE WINNIPEG POLICE SERVICE**

On July 27, 2012, the Winnipeg Police Service issued a further revised response to the complainant, providing access to additional information. On August 1, 2012, our office received a copy of the July 27, 2012 response letter to the complainant, as well as additional copies of the records at issue, showing the revised severing. In its revised decision, the WPS released the names and publicly available contact information of current employees of TIRF, which had been withheld, under section 17 of FIPPA from a large number of emails and communications in the initial decision. The WPS also released two research papers (cited in the TIRF report) from the Insurance Institute for Highway Safety (IIHS) which had previously been withheld under section 18 of FIPPA but which were found to be publicly available. The WPS also provided the names of certain email attachments that had previously been withheld under section 18. Some of these attachments were also now released in part although certain attachments themselves (draft sections of the report) were still withheld. Also now released were some portions of TIRF's views about the release of its business information and draft reports, as expressed in communications to the WPS about responses to earlier FIPPA applications. The WPS explained that it was now relying on section 26 of FIPPA rather than clause 25(1)(c) to withhold non-public contact information for police officers.

The response letter indicated that the public body continued to rely on other provisions of FIPPA that had been identified earlier, including clause 20(2)(b) – for information provided in confidence by a department of the government of Manitoba, as well clause 23(1)(a) – for information consisting of confidential advice developed by or for the public body.

After the revised decision of July 27, 2012, a smaller number of provisions remained at issue for our investigation.

## **ANALYSIS OF ISSUES AND FINDINGS**

### **1) Was the public body authorized by clause 13(1)(c) to disregard part of the complainant's request?**

Subsection 13(1) of FIPPA authorizes a public body to disregard a request for access in certain situations. One of those situations is if the request is for information already provided to the applicant, as follows:

#### **Public body may disregard certain requests**

**13(1)** The head of a public body may disregard a request for access if he or she is of the opinion that

(c) the request is for information already provided to the applicant.

Based on our review, we are satisfied that the WPS was authorized to disregard that portion of the request that consisted of records already provided to the complainant.

**2) Do the cited provisions of section 17 of FIPPA apply to the information withheld under these provisions?**

Subsection 17(1) is a mandatory exception to the right of access that protects the privacy of personal information of third party individuals. The provisions relied on in this case are as follows:

**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

(e) the personal information relates to the third party's employment, occupational or educational history;

As previously noted, information initially withheld under these provisions included the names and contact information for a number of employees of TIRF, most of whom were identified on the TIRF website, along with their contact information. Revealing this information, in our view, would not unreasonably invade the privacy of TIRF employees. On July 27, 2012, at our request, the WPS reconsidered its decision, and withheld only a small amount of information under this provision, information about a former employee of TIRF, who was no longer publicly identified on the TIRF website. In our view, information about the former employee would come within the type of information described in clause 17(2)(e), and its disclosure would be an unreasonable invasion of privacy.

The WPS also applied these provisions to withhold information pertaining to the vacation plans of one WPS officer (referred to in passing in an email). While we observed that subsection 17(4) of FIPPA provides that information pertaining to an individual's employment responsibilities as an employee of a public body may not be withheld under section 17, it was our view that the officer's vacation plans did not come within the category of "job responsibilities." As such, we found that this information was properly withheld under the provisions claimed.

**3) Was the public body required under section 18 to refuse access to business information of the third party, TIRF?**

Section 18 of FIPPA is a mandatory exception to the right of access, the purpose of which is to protect the business interests of third parties. Public bodies, in the course of their day-to-day operations, can acquire a great deal of information about the inside workings of businesses. The provisions of section 18 restrict the release of this information, in recognition that it can be

valuable to others, such as competitors. A public body does not have discretion to release information to which a mandatory exception applies, as the disclosure is prohibited by FIPPA.

The provisions relied on by the WPS are as follows:

**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; or
- (c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to
  - (i) harm the competitive position of a third party,
  - (ii) interfere with contractual or other negotiations of a third party,
  - (iii) result in significant financial loss or gain to a third party,

For any of these provisions to apply, it must first be shown that the information in question is either commercial, financial, labour relations, scientific and/or technical information of the third party. To establish that clause 18(1)(b) applies, it must also be shown that the information was provided to the public body with the expectation of confidence, and was kept confidential by the third party. To establish that any provisions of clause 18(1)(c) apply, it must be shown that the disclosure of the information would cause one or more of the contemplated harms: to the third party's competitive position, to its contractual or other negotiations, or result in significant financial loss or gain to a third party. Following is our analysis of the application of provisions of section 18 to the records at issue, which we have grouped into four categories.

**Drafts of the Reports**

One category of information/records withheld under section 18 is drafts of sections of the TIRF report produced at various points in time, some of which are incomplete. These records occur as attachments to emails between TIRF and the WPS and are withheld in full. The information in the drafts would, in our view, be considered commercial information of TIRF as it represents the application of TIRF's professional expertise to the subject matter of each section. Some of the information may also be considered scientific and/or technical in nature, to the extent that it includes analyses of scientific research and/or relates to the methodology and results of TIRF's own experiments. Our review of the records showed that as drafts were provided, TIRF clearly expressed to the WPS that it expected that drafts would be kept confidential. TIRF itself kept the various drafts confidential. While the drafts formed the basis of the final report, which is publicly available, we are prepared to accept that the drafts, which contain unproofed, preliminary and in some cases incomplete information, were intended to be confidential and were kept confidential by TIRF.

We then considered whether it would be reasonable, in accordance with subsection 7(2) of FIPPA for the WPS to sever and release any portions of the drafts which may have been included, unaltered, in the final report. Subsection 7(2) of FIPPA provides 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.

We concluded that the drafts cannot reasonably be severed. We considered first the practical difficulty of actually identifying unchanged material between multiple drafts of a report that was ultimately 227 pages long in its final form. We also observed that even if it were reasonably possible to identify unchanged material, the act of releasing this material would reveal confidential business information of TIRF, such as characteristics of how TIRF approached the project, which sections were completed first and which were completed later and/or were the subject of continued research and updates.

As such, we found that clause 18(1)(b) applied to the draft reports (and sections thereof) and that the WPS was required to refuse access to this information. That being the case, we did not consider whether other provisions of section 18 also applied to these records.

**References and Research Sources**

Another category of records/information withheld under section 18 consists of copies of certain references identified in the final TIRF report. Copies of reference literature (research articles and publications) were provided by TIRF to the WPS. Access was initially refused to this type of record, however, the WPS subsequently provided the complainant with copies of those articles that were found to be available to the public free of charge.

Based on our review, the remaining articles also appeared to be publicly available, but had to be purchased individually or by way of a subscription to a publication. Subsection 6(2) of FIPPA provides that the access to information process in FIPPA do not apply to certain records and information:

**Part does not apply to publicly available information**

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

It is our view that subsection 6(2) applies to the research articles and it is most accurate to say that they fall outside the access process of FIPPA. That being the case, we are not making a finding about the application of section 18 to refuse access to these records.



## **Emails and Other Communications**

Another category of information withheld under section 18 consists of portions of emails and other communications, primarily between TIRF and the WPS. In some cases, these communications also involved other public bodies mentioned earlier in this report.

Most of this information was also withheld under section 23 of FIPPA, on the basis that the information was confidential advice to the public body and/or consultations/deliberations involving employees of the public body. Considering the role of TIRF, which was commissioned by the public body to conduct a comprehensive analysis of the program, it stands to reason that provisions of both sections 18 and 23 could apply to information of this nature.

There are a few types of information withheld under section 18 from these emails. One category of information withheld in the emails is discussion about the contents of the draft versions of the reports. The discussion relates largely to sources, accuracy and completeness of data. For the same reasons described in our analysis of the application of clause 18(1)(b) to the draft reports, we found that similar information in emails was also subject to this exception. Other information withheld from the emails is substantive analysis and opinions expressed by TIRF in relation to various aspects of research about photo-enforcement and other road-safety issues. Again, this represents the application of TIRF's professional expertise and would be considered commercial and in some cases technical and/or scientific information of TIRF. The emails make clear that this information is provided in confidence as TIRF expressly places limits on what information can be shared even within the public body. We are prepared to accept that clause 18(1)(b) does apply to this information as well.

The last category of information withheld from the communications is some aspects of information relating to TIRF's views about the release of some of its business information in response to other FIPPA requests. The withheld information contains TIRF's views about what sets its work apart from its competitors and explains how that information, if known to competitors, could cause harm to TIRF. The limited amount of information severed from these records is in our view properly withheld under subclause 18(1)(c)(i) on the basis that its disclosure would harm TIRF's competitive position.

## **Work Plan and Purchase Order**

The "Work Plan for the Evaluation of the Photo Enforcement Safety Program of the City of Winnipeg" (the work plan), dated March 2008, is essentially TIRF's proposal in response to the Request for Proposals (RFP) issued by the WPS for the analysis and report on the photo-radar enforcement system. It was initially withheld in full under section 18. The WPS later released the cover page, table of contents, introduction as well as the list of tasks required for completion of the report, and in some cases, information about how those tasks would be completed. However, most of the details about how tasks would be completed, how work would be divided amongst TIRF's staff, and the proposed budget continued to be withheld under subclauses 18(1)(c)(i) and (ii), on the basis that disclosure of this information would harm TIRF's competitive position. Based on our review, we agree that this information is TIRF's commercial information and its disclosure could cause harm to TIRF's competitive position, as it would

provide competitors with details of how TIRF carries out projects of this nature and how it allocates staff resources. We therefore found that this information was properly withheld under subclause 18(1)(c)(i). The WPS also withheld some portions of the purchase order (associated with payment for this project) under the same provisions. As the purchase order contains information similar to what was withheld from the work plan, we found that subclause 18(1)(c)(i) applies to that information as well.

Overall, where we found that one provision of section 18 applied to withheld information, we did not give further consideration to whether other provisions of section 18 also applied to the same information.

#### **4) Was the WPS authorized to refuse access to the information withheld under section 23 of FIPPA?**

Section 23 of FIPPA provides discretionary exceptions to the right of access that protect the advisory and deliberative processes of a public body. One of the purposes of these exceptions is to maintain the quality and candor of advice and opinions provided by employees and others advising a public body, which could be adversely impacted if such information were routinely disclosed. Clauses 23(1)(a) and (b) provide as follows:

##### **Advice to a public body**

**23(1)** The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal

- (a) advice, opinions, proposals, recommendations, analyses or policy options developed by or for the public body or a minister;
- (b) consultations or deliberations involving officers or employees of the public body or a minister;

These provisions were applied to parts of numerous email discussions between employees of the public body, employees of TIRF, and employees of other public bodies. The information withheld under these provisions consists largely of advice, analyses and consultations relating to the verification and clarification of data and information in drafts of the TIRF report, as well as activities involved in scheduling and bringing the report to completion.

The application of clause 23(1)(a) is determined by the nature of the information and the fact that it is developed by or for the public body. The source of the information is not relevant. The application of clause 23(1)(b) depends not only on the nature of the information in the communication but also the roles of the communicators. The consultations and deliberations described in clause 23(1)(b) must involve officers or employees of the public body, but are not limited to those communications solely between officers and/or employees. Consultations and/or deliberations involving employees of the public body and third parties can also come within this provision. Furthermore, the definition of “employee” under FIPPA, includes third parties, such as contractors, who perform services for a public body under a contract. Thus one or both of these provisions can also apply to information provided by TIRF to the public body and/or to communications involving TIRF and the public body, provided that the information is of the type specified in the provision(s).

The nature of the information withheld under section 23 in this case clearly comes within the scope of the exceptions claimed. However, as these exceptions are discretionary in nature, the public body must show that it reasonably exercised discretion to withhold rather than release this information. Discretion is exercised by acting in good faith, having regard to all relevant considerations in each individual case and being guided by the purposes of the legislation under which the decision maker is empowered to act. We observed that much of the information withheld under clauses 23(1)(a) and (b) was also required to be withheld under section 18, a mandatory exception to disclosure that protects third party business interests. To the extent that provisions of section 18 apply to this same information, the public body does not actually have discretion to release the information under section 23. We are satisfied based on our extensive review of the records that the WPS reasonably exercised discretion to withhold rather than release those parts of the information that were not otherwise required to be withheld under section 18.

**5) Was the WPS authorized to withhold non-public police contact information under section 26 of FIPPA?**

The WPS originally withheld selected contact information for WPS officers as well as the location of a WPS storage facility under section 25 of FIPPA, on the basis that disclosing the information could harm law enforcement officers and law enforcement proceedings. In the revised decision issued in July 2012, this information was now being withheld under section 26 of FIPPA, which provides as follows:

**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.

The WPS was of the view that disclosing the location of the storage facility could compromise its security. Likewise, the WPS felt that routine disclosure of non-public police officer contact information could compromise the integrity of the communications systems, as the dissemination of this information could provide multiple phone/fax numbers and email addresses that could be used as targets by someone intent on disrupting (spamming, hacking, phishing etc.) police telecommunications.

Our office notes that the location of the storage facility is not well-known, and on this basis we are prepared to agree that if this information were disclosed, it could increase risks to the security of the facility. With respect to the withholding of non-public contact information, our office would not expect that there is a high likelihood of targeted attacks of the telecommunications systems using this contact information. However, we recognize that the impact of even one such successful attack could be significant. We are therefore prepared to agree that the WPS is authorized to withhold this information under section 26. We are satisfied that the WPS reasonably exercised its discretion to withhold rather than release this information, in furtherance of the protection of its telecommunications resources.

**6) Was the WPS required to refuse access to information withheld under clause 20(2)(b) on the basis that it had been provided in confidence by a department of the government of Manitoba?**

This is a mandatory exception to the right of access, which applies only to local public bodies. If the information in question is of the type described below, the head of the local public body must withhold the information. The provision relied upon is as follows:

**Information provided by another government to a local public body**

**20(2)** The head of a local public body shall refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal information provided, explicitly or implicitly, in confidence by

(b) the Government of Manitoba or a government agency.

As noted on page 2 of this report, the City of Winnipeg is a local public body. The information withheld is information that was provided by departments of the government of Manitoba and by a government agency. Based on our review of the information withheld under this provision, it is clear that it was provided in confidence. As subsection 20(3) provides that this information may still be disclosed with the consent of the other public bodies, the WPS consulted each of these other public bodies about the possibility of releasing this information, and each declined to consent to the release of information it had provided. As such, it is our view that the exception does apply to the information for which it was claimed, and the WPS was required to withhold this information.

**7) Was the WPS required to refuse access to a record, and to references to the record, all of which were withheld under clause 19(1)(c)?**

Section 19 is another mandatory exception to the right of access. This exception arises out of a convention of our parliamentary system, whereby ministers of the government are collectively responsible to the legislature and to the province for cabinet decisions, but deliberations and decision making within cabinet are kept confidential. Confidentiality in this context serves to promote full and frank discussions of issues within cabinet while maintaining unity and collective responsibility for cabinet decisions. Cabinet is also referred to as Executive Council. Subsection 19(1) of FIPPA protects the substance of these deliberations of cabinet, and the following provision is relevant in this case:

**Cabinet confidences**

**19(1)** The head of a public body shall refuse to disclose to an applicant information that would reveal the substance of deliberations of Cabinet, including

(c) a proposal or recommendation prepared for, or reviewed and approved by, a minister for submission to Cabinet;

The WPS withheld one record as well as references to the record under this provision. Based on our review of the record in question, a decade-old report on photo-radar development in

Manitoba, we agree that it constitutes a proposal and recommendations prepared for a minister for submission to cabinet, and it is thus required to be withheld under clause 19(1)(c).

References to the record could also reveal the topic and some of the substance of the record, if disclosed, and are also required to be withheld under clause 19(1)(c).

Subsection 19(2) provides that subsection 19(1) does not apply if the record in question is more than 20 years old, or if Executive Council provides consent for its release, in the case of a record, like this one, that was prepared for the current government. Neither of these provisions apply in this case, and the WPS is required to refuse access to this information.

However, we note that some of the contents of this record are paraphrased at various locations in the publicly available TIRF report. The record (the “Steering Committee Report”) is referred to briefly on pages 28, 38, 40 and 62 of the TIRF report, while pages 42 and 43 of the TIRF report contain more extensive discussion of information from the record. As these references are available to the public, they fall outside the access process of FIPPA, in accordance with subsection 6(2) of the act. Please refer to page 8 of our report for the full text of this provision.

**8) Was the public body required to refuse access to certain records on the basis that they did not exist or could not be found?**

In responding to an application for access, FIPPA requires a public body to inform an applicant if access to a requested record is granted or refused. If the record in question does not exist or cannot be found, then subclause 12(1)(c)(i) requires the public body to refuse access on that basis. In this case, the complainant sought records of communications involving not only the Winnipeg Police Service, but also the Public Works Department and the Mayor’s Office. The public body searched for records in each of these departments, and the majority of the records were found to be located within the Winnipeg Police Service. A small number of responsive records were found in the Public Works Department, and were identified as duplicates of records that had also been found within the Winnipeg Police Service. Responsive records could not be located in the Mayor’s Office. Access to records from the Mayor’s Office was therefore refused under subclause 12(1)(c)(i) of FIPPA.

Based on our extensive review of all of the responsive records, we saw no indication that the Mayor’s Office was involved, at any point, in the communications that are the subject of this request, meaning that such records likely do not exist. Our office was also provided with a description of the steps taken to try to locate records in the Mayor’s Office and we are satisfied that even if responsive records existed (which did not appear to be the case), they could not be found despite all reasonable search efforts by the public body. As such, we found that subclause 12(1)(c)(i) of FIPPA required the public body to refuse access on the basis that the records did not exist or could not be found.

## SUMMARY OF FINDINGS

- 1) We found that the public body was authorized to disregard that portion of the complainant's request that pertained to records already provided to him.
- 2) We found that provisions of section 17 did not apply to some of the personal information withheld under these provisions, and the WPS released this information to the complainant. We found that the WPS was required to refuse access to the remainder of the personal information withheld under section 17.
- 3) We found that the provisions of section 18 did not apply to some information withheld under these provisions. Some records were publicly available while other records that were withheld in full or in part could be released with only certain information severed to protect the third party's business interests. The WPS released this information to the complainant. We found that clause 18(1)(b) applied as claimed to drafts of the report and that the drafts could not reasonably be severed. We found that clause 18(1)(b) also applied to portions of email and other communications that would reveal information about the draft reports, and to other portions of communications where the third party provided its professional opinion on other traffic-safety issues. Subclause 18(1)(c)(i) applied to the information that continued to be withheld from the "work plan" and the purchase order, and to the third party's views about the release of its commercial information in the context of an earlier FIPPA application. We did not make findings about the application of additional provisions of section 18 to the same information.
- 4) We found that the provisions of section 23 applied as claimed to advice, opinions, analyses, consultations and deliberations, although the WPS did not have discretion to release much of this information as it was also required to be withheld under section 18. Where provisions of section 18 did not apply and the WPS did have discretion to release rather than withhold the information, we are satisfied that discretion was exercised reasonably.
- 5) We found that the WPS was authorized under section 26 to refuse access to certain non-public police contact information, as its disclosure could compromise integrity of police telecommunications and the security of a police facility. We are satisfied that discretion was exercised reasonably.
- 6) Clause 20(2)(b) applied, as claimed, to information provided in confidence by departments of the government of Manitoba and/or by a government agency. As consent for release of information could not be obtained from the other public bodies, we found that the WPS was required to refuse access to this information.
- 7) We found that the WPS was required, by clause 19(1)(c) to refuse access to a record that would reveal the substance of deliberations of cabinet, and that this provision also applied to references to the record that would reveal certain information from the record. We found that some information from the record was publicly available (in the final TIRF report), however this does not limit the application of subsection 19(1) to the information as a whole. The access process in FIPPA does not apply to the information that was publicly available.

8) We found that the public body was required to refuse access to communications involving the Mayor's Office on the basis that they did not exist or could not be located. Furthermore, we found no evidence to suggest that such communications had taken place.

## CONCLUSION

The ombudsman found that the public body's decision to refuse access to most of the information in the records was compliant with the act. The ombudsman further found that certain exceptions did not apply to some of the withheld information, which the public body agreed to release. Based on our investigation, the complaint is partly 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 after receipt of this report.

August 30, 2013  
Manitoba Ombudsman