

Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2012-0315 (web version)

MANITOBA HYDRO

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 12(2)(a) and (b), 25(1), 55(3)(b)

REPORT ISSUED ON AUGUST 30, 2013

SUMMARY: The complainant requested records from Manitoba Hydro regarding the termination of a First Nation employee for allegedly altering invoices payable to the corporation. Manitoba Hydro refused to confirm or deny the existence of the requested records in accordance with subsection 12(2) of FIPPA. We found that Manitoba Hydro was authorized under FIPPA to make this decision and did not act unreasonably in exercising its discretion to refuse to confirm or deny the existence of records.

THE COMPLAINT

The complainant requested the following documentation under *The Freedom of Information and Protection of Privacy Act* (FIPPA) on or about July/August 2012:

Please provide documentation on the First Nation employee that was terminated for altering invoices payable to Manitoba Hydro. See the Integrity Program item disclosed in Manitoba Hydro's 2010-11 Annual Report on page 49. Please ensure memos, briefing notes and emails related to this matter are disclosed.

Manitoba Hydro sent the complainant a response letter dated August 28, 2012 advising that it was refusing to confirm or deny the existence of the requested records. On September 28, 2012, the complainant filed a complaint with our office regarding Manitoba Hydro's decision to refuse access to the information.

POSITION OF MANITOBA HYDRO

Manitoba Hydro's response letter identified subsection 12(2)(a) of FIPPA as the basis for refusing to confirm or deny the existence of the requested records, stating that:

We note that this particular subsection [12(2)(a)] refers to matters further set out in sections 24 and 25 of the Act which speak to individual or public safety and law enforcement and legal proceedings.

These sections (24 and 25) address the issue of a reasonable expectation of harm resulting from disclosure of the requested records.

In its response letter to this application, Manitoba Hydro also observed that, hypothetically speaking, requests for records of this nature would raise not only issues relating to law enforcement, but also issues surrounding: third party privacy (protected by section 17 of FIPPA); solicitor-client privilege (protected by section 27 of FIPPA); and advice to a public body (protected by section 23 of FIPPA).

PURPOSES OF FIPPA

One of the purposes of FIPPA is to allow any person a right of access to records in the custody or under the control of public bodies, subject to the limited and specific exceptions set out in the act. By providing this right of access to records, freedom-of-information legislation, such as Manitoba's FIPPA, seeks to promote the public interest in accountability and transparency in government decision making. The right of access is subject to exceptions set out in the legislation, which serve to protect other important public interests, including but not limited to public and individual health and safety, the privacy of individuals, the preservation of heritage resources and endangered species, and the integrity of the justice system. These exceptions recognize that, in certain circumstances, the public interest is best served by withholding rather than releasing records.

The right of access is exercised by making an application, under part 2 of FIPPA, for access to records in the custody or control of a public body, such as Manitoba Hydro. To ensure the purposes of the legislation are met, FIPPA imposes several obligations on public bodies, including a duty to assist an applicant (under section 9), a requirement to observe a time limit for responding (under section 11) and a requirement to provide certain information to an applicant in responding to an application (under section 12). The requirements of section 12 of FIPPA are relevant to this complaint and are discussed in further detail below.

FRAMEWORK OF THE OMBUDSMAN'S REVIEW

Clause 12(1)(c) of FIPPA requires, among other things, that a public body that refuses access to a requested record shall advise the applicant whether the record in question does not exist or cannot be found, or, in the case of a record that does exist, the reasons for the refusal and the provisions of FIPPA under which access is refused.

However, subsection 12(2) of FIPPA excuses public bodies from these requirements in certain circumstances, in recognition of the fact that sometimes even the act of acknowledging that records exist (or confirming that they do not) would communicate information that could cause significant harm. This provision gives public bodies the discretion to refuse to confirm or deny

the existence of records in certain circumstances. Subsection 12(2) of FIPPA provides as follows:

Refusal to confirm or deny existence of record

12(2) Despite clause (1)(c), the head of a public body may, in a response, refuse to confirm or deny the existence of

- (a) a record containing information described in section 24 or 25; or
- (b) a record containing personal information about a third party if disclosing the existence of the record would be an unreasonable invasion of the third party's privacy.

A significant distinction exists between the two provisions. A public body may rely on clause 12(2)(b) only when the act of confirming or denying the existence of records would itself be an unreasonable invasion of the privacy of a third party. However, with respect to clause 12(2)(a), a public body is given discretion to rely on this provision in instances where records, if they existed, could simply be withheld under a provision of either section 24 or 25, regardless of whether the act of confirming the existence or non-existence of such records, would, in and of itself, lead to the harm contemplated by that provision.

Clause 12(2)(a) is a discretionary provision. To rely on this provision, the head of a public body must first determine that if records existed, they could be withheld under one or more provisions of section 24 or 25. The head of a public body must then exercise discretion to determine whether, in the circumstances, there should be a refusal to confirm or deny the existence of records, or, in the alternative that there should be a refusal of access either on the basis that the records do not exist or on the basis that they can be withheld under specific provisions of section 24 or 25.

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. As such, when relying on clause 12(2)(a), the head of the public body must weigh the public interest in accountability and increased understanding of government decision making against the public interest in maintaining the integrity of the justice system (protected under section 25) and/or preventing harm to individual or public safety (protected under section 24).

Certain limitations are placed on the ombudsman in reviewing any complaint that might be made about a public body's discretionary decision to refuse to confirm or deny the existence of requested records. Clause 55(3)(b) of FIPPA provides:

Reasonable precautions to avoid disclosure

55(3) In conducting an investigation and in performing any other duty or exercising any power under this Act, the Ombudsman, and anyone acting for or under the direction of the Ombudsman, shall take every reasonable precaution to avoid disclosing and shall not disclose

- (b) whether information exists, if the head of a public body is authorized to refuse to confirm or deny that the information exists under subsection 12(2).

As such, in conducting an investigation and issuing a report about a public body's decision to rely on subsection 12(2), our office is prohibited from disclosing the existence or non-existence of records.

For purposes of our review of a public body's decision to rely on clause 12(2)(a), we consider whether the types of information that would be expected to be contained in such records would be subject to section 24 or 25, and if so, whether a refusal to confirm or deny the existence of requested records would be a reasonable exercise of discretion, consistent with the spirit and intent of FIPPA. No statements in this report should be taken as confirming the existence or non-existence of records.

ANALYSIS OF ISSUES AND FINDINGS

The requested records:

Our office considered the nature of the complainant's request, which was for all records relating to a particular incident described in Manitoba Hydro's 2010-2011 Annual Report. We reviewed the annual report in question, specifically page 49, under the heading of *Integrity Program*. Following is an excerpt:

Manitoba Hydro encourages employees and others to speak up on matters of concern without fear of reprisal, through its Integrity Program. All disclosures under the Integrity Program are protected by strict rules of confidentiality.

Below is a summary of all disclosures received during 2010-11 which allege wrongdoing [...]

Corrective action was taken for each verified incident, as follows:
[...]

*A First Nation terminated an employee for altering invoices payable to the corporation,

The inclusion of this information in the annual report could lead a member of the public reading the report to assume that there are records in existence that document the matter. It is quite reasonable in these circumstances for the complainant to question why Manitoba Hydro would decide to refuse to confirm or deny the existence of such records.

If records exist, what information would they contain?

As noted above, we would expect in this case that requested records would include records generated by or associated with steps taken to investigate and verify the alleged alteration of invoices, and steps taken to terminate an individual's employment. We then considered what types of information could be contained in such records. An investigation would involve gathering evidence, including records such as original and altered invoices, receipts, bank records and statements of witnesses, etc. Records would also be created that would document the analysis of the evidence (such as reports from accountants, police and/or internal investigators)

and identify further avenues of investigation (if applicable) and/or what remedies (criminal and/or civil legal proceedings) can or should be pursued. After these steps, one would expect records to document what remedies were or are being pursued and the rationale for same, as well as ongoing decision making and communications related to the issue. Legal advice might also be contained in such records.

Clearly, if records exist, they would relate to law enforcement matters, as well as to existing or anticipated civil and/or criminal legal proceedings, the type of information that would be described in section 25. It is not clear, in this scenario, whether, if records exist, they would contain information giving rise to concerns for individual or public safety, such that the provisions of section 24 would be engaged.

If records exist, would they be subject to section 25?

Our office then considered the various provisions of section 25, which is meant to protect law enforcement matters and legal proceedings, and otherwise maintain the integrity of the justice system. Subsection 25(1) contains a reasonable expectation of harm test. It provides 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 and other specified investigative, regulatory, adjudicative and protective functions of a public body described in clauses 25(1)(a), (b), (c), (e), (f), (h), (i), (k) or (m);
- disclose specified records or information respecting law enforcement and related matters described in clauses 25(1)(d), (g), (j) and (l); or
- be injurious to legal proceedings (clause 25(1)(n)).

Based on our considerations as described in this report, we are satisfied that the requested records, if they existed, would contain information of the type described in section 25.

Did Manitoba Hydro reasonably exercise its discretion in relying on clause 12(2)(a)?

Having concluded that records, if they existed, would contain information described in section 25, we then gave consideration to how Manitoba Hydro exercised its discretion in deciding to refuse to confirm or deny the existence of records under clause 12(2)(a). The exercise of discretion is a crucial issue in this case, since Manitoba Hydro's own annual report seems to imply the existence of some type of record(s). What residual interest would be served by exercising discretion to refuse to confirm or deny the existence of records under FIPPA?

The answer to that question is inherent in the public interest protected by section 25, the interest in maintaining the integrity of the justice system and protecting law enforcement matters and legal proceedings. As noted earlier, if a public body were to simply refuse access to records under section 25, the public body would be required by clause 12(1)(c) of FIPPA to identify not only the specific provisions, but to provide reasons why they apply to the record(s) in question.

To illustrate, we note that for a public body to establish that it was authorized to refuse access to a record under clause 25(1)(n), on the basis that disclosure could be injurious to the conduct of existing or anticipated legal proceedings, the public body would need to describe the nature and status of the legal proceedings in question, and then explain how disclosure at that point in time could adversely affect the proceedings. In the case of clause 25(1)(f), a provision which allows information to be withheld if its disclosure could deprive a person of the right to a fair trial or impartial adjudication, the public body would need to describe the nature of the adjudication or trial, and establish how disclosure of the information in question would be prejudicial. One can see that where records exist and would be subject to multiple exceptions in subsection 25(1), the simple step of refusing access under these exceptions would on its own communicate a great deal of information about the legal proceedings and/or law enforcement investigations that are the subject of the request.

Conversely, if an application were to be made to the police, for example, for any records of an applicant's phone conversations recorded by wiretap, a decision by the police to refuse access on the basis that the records did not exist would confirm for the applicant that the police had not conducted a wiretap of his communications.

Clause 12(2)(a) of FIPPA, however, provides the head of a public body with discretion to decide whether, in these types of circumstances, the public interest protected by section 25 would be best served by simply refusing to confirm or deny the existence of records.

As such, in considering all of the factors, including the purposes of FIPPA and the public interest in maintaining the integrity of the justice system protected by section 25 and further reinforced by clause 12(2)(a), we are satisfied that Manitoba Hydro reasonably exercised its discretion to refuse to confirm or deny the existence of records.

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 Manitoba Hydro's decision to refuse access to the Court of Queen's Bench within 30 days following the receipt of this report.

August 30, 2013
Manitoba Ombudsman