

Manitoba Ombudsman

REPORT WITH RECOMMENDATIONS ISSUED ON AUGUST 21, 2013

AND

RESPONSE TO THE RECOMMENDATION ISSUED ON SEPTEMBER 19, 2013

UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2013-0024

UNIVERSITY OF MANITOBA

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 18(1)(b), 18(1)(c)(i)(ii)(iii), 18(3)(b), 28(1)(c)(iii)

PUBLICLY RELEASED ON FEBRUARY 26, 2014

SUMMARY OF REPORT WITH RECOMMENDATION AND RESPONSE

The complainant requested access to the Master Services Agreement (MSA) between the University of Manitoba and Xerox Canada for the provision of Managed Print Services. As required under subsection 33(1) of *The Freedom of Information and Protection of Privacy Act* (FIPPA), Xerox was advised that the university was considering providing partial access to the requested information. Subsequently the university refused access to the entire record, citing the mandatory exceptions to access allowed under subsection 18(1) of FIPPA. Following discussions with our office regarding information from the MSA that was publicly available, the university released the requested record in part. The university continued to withhold portions of the MSA citing the mandatory exceptions to access allowed under clause 18(1)(b) and subclauses 18(1)(c)(i)(ii)(iii) of FIPPA and the additional discretionary exception allowed under subclause 28(1)(c)(iii). The ombudsman found that portions of the MSA were subject to clause 18(1)(b) and subclauses 18(1)(c)(i)(ii)(iii) but could not conclude that the application of subclause 28(1)(c)(iii) was supported. The ombudsman also found that the university did not establish that the cited provisions applied to other information in the MSA and made a recommendation for the release of this information to the complainant.

On September 6, 2013 the University of Manitoba provided its response to the ombudsman, accepting the recommendation. On September 19, 2013 the university issued a revised decision to the complainant, providing access to the requested record in part with severing as recommended by the ombudsman.

Manitoba mbudsman

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REPORT ISSUED ON AUGUST 21, 2013

SUMMARY: The complainant requested access to the Master Services Agreement (MSA) between the University of Manitoba (the university) and Xerox Canada (Xerox) for the provision of Managed Print Services. As required under subsection 33(1) of *The Freedom of Information and Protection of Privacy Act* (FIPPA or the act), Xerox was advised that the university was considering providing partial access to the requested information. Subsequently the university refused access to the entire record, citing the mandatory exceptions to access allowed under subsection 18(1) of FIPPA. Following discussions with our office regarding information from the MSA that was publicly available, the university released the requested record in part. The university continued to withhold portions of the MSA citing the mandatory exceptions to access allowed under clause 18(1)(b) and subclauses 18(1)(c)(i)(ii)(iii) of FIPPA and the additional discretionary exception allowed under subclause 28(1)(c)(iii). The ombudsman found that portions of the MSA were subject to clause 18(1)(b) and subclauses 18(1)(c)(i)(ii)(iii) but could not conclude that the application of subclause 28(1)(c)(iii) was supported. The ombudsman also found that the university did not establish that the cited provisions applied to other information in the MSA and made a recommendation for the release of this information to the complainant.

THE COMPLAINT

On October 10, 2012 the complainant made a request to the University of Manitoba (the university) under Part 2 of *The Freedom of Information and Protection of Privacy Act* (FIPPA) for access to the following record:

The contract between the University of Manitoba and Xerox for printer services to the University. This includes details on the terms and conditions, length of contract, the number of printers to be installed, minimum/maximum copy/print quotas, all fees tied to print quotas, details on what will happen to the shared printers and individual office printers, and the cost of this contract.

On October 26, 2012 the university informed the complainant that it would be taking an extension of up to 30 days to allow for consultation with Xerox before reaching a decision regarding the release of the requested records. On November 30, 2012 the university made its response to the complainant:

...the University has consulted with Xerox Canada, and as a result of these consultations, access to the record requested is being refused in full as the record falls under the mandatory exceptions to disclosure in Section 18(1)(b)(c)(i)(ii)(iii) (disclosure harmful to third party business interests) of The Freedom of Information and Protection of Privacy Act, and the third party has not provided consent to release the record. The release of the contract would reveal commercial information of Xerox Canada that had been provided to the University explicitly in confidence. Additionally, the contract contains commercial information belonging to Xerox, which if released, would harm their competitive position and future contracts and negotiations. The release would provide competitors, clients and other parties with an unfair advantage in negotiations, which could reasonably be expected to result in significant financial harm.

Our office received a complaint of refused access on January 24, 2013. In correspondence that accompanied her complaint, the complainant acknowledged the possibility that some commercial and financial information in the MSA would be excepted from access. However, the complainant expected this could be severed and the remaining information released.

INITIAL POSITION OF THE UNIVERSITY OF MANITOBA

As required under subsection 33(1) of FIPPA when a public body is considering giving access to a record, the disclosure of which might affect a third party's interests as described in subsection

18(1) or (2), the university gave written notice to Xerox. On November 23, the university received a response from Xerox. Xerox objected to the disclosure of any portion of the contract, writing:

...we have considered your request for the disclosure of our Master Services Agreement ('MSA') with the U of M and object to the disclosure of any portion thereof. We are of the view that the disclosure of our MSA, even if the business terms are redacted from it, will give an unfair advantage to competitors, clients and other parties who negotiate with Xerox Canada.

Following these initial consultations with Xerox the university issued its response on November 30, 2012 and refused access to the MSA in its entirety relying on clause 18(1)(b) and subclauses 18(1)(c)(i)(ii)(iii) of FIPPA which read 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,

The exceptions to access to information that was received from or is about a third party as set out in subsection 18(1) are mandatory. If the information requested can be shown to be subject to those exceptions, then a public body is statutorily prohibited from disclosing the information. However, subsection 18(3) of FIPPA limits the application of subsection 18(1). As clauses 18(3)(a) and (b) of FIPPA state:

Exceptions

- 18(3) Subsections (1) and (2) do not apply if
- (a) the third party consents to the disclosure;
 - (b) the information is publicly available;

Following the receipt of the complaint of refused access, our office was provided with an unsevered copy of the Master Services Agreement between the university and Xerox (the record at issue) for our review. We also conducted an online search and determined that information that

appeared to have come from the Xerox MSA was available on University of Manitoba web pages. The information we found included contract terms and conditions such as the numbers of printer and or scanner units that would be supplied over the life of the MSA and service delivery milestones as well as the price per impression to be charged under the MSA.

Since information from the MSA appeared on the university web pages (and was publicly available), we asked the university to reconsider their reliance on clause 18(1)(b) and subclauses 18(1)(c)(i)(ii)(iii) to withhold the entire record. We also asked the university to clarify their reliance on these exceptions with specific reference to identifying which information in the agreement was 'supplied' by or originated with Xerox and which portions of the agreement serve to document the results of negotiation between the university and Xerox. Additionally we asked the university to identify which information in the agreement falls under each subclause named in clause 18(1)(c) and explain how the specified harm is reasonably to be expected to occur by demonstrating a clear and direct connection between the information in the agreement and the anticipated harm. Xerox had stated that release "will give an unfair advantage to our competitors...", however, no explanation or evidence to this effect was provided. The university agreed to consult once again with Xerox and revisit its decision concerning access.

SUBSEQUENT POSITION OF THE UNIVERSITY OF MANITOBA AND PARTIAL RELEASE OF INFORMATION

Following further consultations with Xerox the university issued a revised decision letter on April 23, 2013. The record released consisted of a severed version of the Master Services Agreement between Xerox and the university (along with the accompanying Schedules A, B and C). The university advised the complainant:

Subsection [sic] 18(1)(b)(c)(i)(ii)(iii) has been applied to information that would reveal financial and technical information supplied by Xerox to the University on a confidential basis...we are withholding information that is negotiated with the University as well as methodology, terminology and processes that are unique to Xerox. The disclosure of this information could affect the negotiating position of Xerox [in relation to] other vendors, which could cause significant financial harm to Xerox as the managed print services industry is a highly competitive industry currently facing tremendous pressure as a result of fast changing printing habits.

The university also relied on an additional exception allowed under subclause 28(1)(c)(iii) of FIPPA for some of the information severed. Subclause 28(1)(c)(iii) is a discretionary exception that applies to information the disclosure of which would be harmful to the economic and other interests of a public body. The cited provision reads:

Disclosure harmful to economic and other interests of a public body

28(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to harm the economic or financial interests or negotiating position of a public body or the Government of Manitoba, including the following information:

- (c) information the disclosure of which could reasonably be expected to
 - (iii) interfere with or prejudice contractual or other negotiations of, a public body or the Government of Manitoba;

The university explained:

...The University's financial information and specific details included in the contract that have been deemed harmful to the negotiating position of the University have been removed...The disclosure of this information could reasonably be expected to harm the negotiating position of the University and interfere with the ongoing and future position of the University.

RECORDS REMAINING AT ISSUE

The Xerox MSA and attached schedules describe an agreement for the supply of printing, scanning and photocopying equipment and services (i.e. 'Managed Print Services') by Xerox to the University of Manitoba. The MSA consists of 4 parts:

- 1.) The "Master Services Agreement" ('MSA') - which sets out the conditions under which the agreed upon services and equipment will be provided to the university over the life of the MSA.
- 2.) Schedule A "Print Management Transformation Program: A University of Manitoba ROSE Project Initiative" – Initiated in October 2009, the ROSE program is the university-wide review of both administrative and academic support services designed to reduce costs and enhance service to the University of Manitoba (from 'Welcome to ROSE' on the University Administration web pages). The schedule includes information on program intentions and objectives, Xerox investments (information on the value of Xerox contributions to the project), the nature of the partnership between Xerox and the university (information on fees and print volume commitments), project timelines and phases, and two appendices (a list of customer owned and leased devices and financial models projecting annual payments to Xerox).

- 3.) Schedule B “University of Manitoba Managed Print Services – Xerox Office Services Statement of Work” – Describes characteristics of the Xerox Managed Print Services program in detail. Includes definitions of program concepts and comprehensive provisions for all aspects of service delivery.
- 4.) Schedule C “Optional Accessories” – A list of standard and optional accessories with associated onetime costs to the University.

After the university revised its decision and released information which was shown to be publicly available, information Xerox consented to disclose and information deemed by the university not to cause harm to Xerox or the university, these items were no longer at issue in the complaint. However, the complainant continued to question the extent of the information severed from the MSA. The complainant specifically asked about Schedule B of the document which was blacked out entirely including page headings. The complainant also asked about Section 4 (“U. Of Manitoba and Xerox Partnership”) of Schedule A which was heavily severed as well. While accepting that the right of access to a record does not extend to information that is appropriately excepted from disclosure, the complainant did not consider her request for access to information to have been answered openly and completely as required by section 9 of FIPPA and requested that our office continue with the investigation of her complaint.

DISCUSSION OF ISSUES AND FINDINGS

Our investigation then turned to the information which continued to be withheld under clause 18(1)(b) and subclauses 18(1)(c)(i)(ii)(iii) and 28(1)(c)(iii) of FIPPA. In a complaint about a refusal of access, the onus is on the public body to support its decision by demonstrating how the claimed exceptions apply. With regard to its continued reliance on clause 18(1)(b), we requested the university to clarify specifically which portions of the MSA contain confidential information supplied by and unique to Xerox that was provided to the university in confidence and with regard to subclauses 18(1)(c)(i)(ii)(iii), information that if revealed could reasonably be expected to affect the negotiating position of Xerox [in relation to] other vendors and thereby cause significant financial harm to Xerox. In response to our request, the university provided our office with a copy of the MSA with the exceptions applied recorded next to each severed portion. Also provided were brief notes speaking to some of the exceptions claimed. Our office reviewed the responsive record taking the university’s severing decisions and their notes into consideration. Our review of the record concentrated on the following questions with regard to the information that continued to be severed from the Xerox MSA:

1) Does the mandatory exception to disclosure in clause 18(1)(b) apply to the information that continues to be withheld?

The intent of subsection 18(1) is to keep confidential third party information of particular types that would not normally be known outside the third party except that this information has been provided to a public body in confidence as part of a business relationship. Generally FIPPA provides an applicant with a right to access any record in the custody or under the control of a public body. However, the exceptions to access allowed by subsection 18(1) recognize that third party business information may be a unique and valuable business asset, the disclosure of which would harm the third party's business interests. The exception allowed by clause 18(1)(b) has four requirements, all of which must be met for the exception to apply:

- 1) The information must reveal commercial, financial, labour relations, scientific or technical information;
- 2) The information must have been supplied to the public body by the third party who would be affected by the disclosure;
- 3) The information must have been supplied, explicitly or implicitly, on a confidential basis;
- 4) The information must be treated consistently as confidential information by the third party.

With regard to the first requirement, clause 18(1)(b) is a 'class exception' in that it excepts certain types of information from access. Commercial information is related to the buying, selling or exchange of merchandise or services. This information may include client contact lists or information about *products or service delivery conditions unique to the third party*. Financial information is information relating to the monetary resources of a company and may include *pricing practices*, profit and loss data, and overhead and operating expenses. Technical information may include plans and drawings, schematics or *unique product specifications* (such as software code) that the third party will wish to keep confidential from actual or potential business rivals.

Our review of the MSA (and attached schedules) determined that it contains commercial information in that it is related to or connected with trade or commerce. The MSA also includes financial information relating to Xerox's pricing practices and expected remuneration as well as technical information relating to Xerox's service delivery and Managed Print Services product specifications. Our office has concluded that the information that continues to be severed from the Xerox MSA is commercial, financial and/or technical information.

The second requirement for the application of clause 18(1)(b) of FIPPA is that the information must have been supplied to the public body by the third party who would be affected by the disclosure. The information must have been 'supplied' by the third party and not have been

created jointly by the third party and the public body. The terms of a contractual agreement, as the product of negotiation or ‘give and take’ between the contracting parties, will not normally meet the ‘supplied’ part of the test for the application of clause 18(1)(b).

However, where disclosure of information in the contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information (inferred disclosure), this information may be considered to be supplied by the third party. Further, information that is received intact and is not changeable through negotiation (immutable) may also be considered to be supplied by the third party. Most contracts and agreements will contain information created jointly as well as information that has been supplied by each party to the contract or agreement.

The language of the MSA itself supports the conclusion that the university and Xerox engaged in a negotiating process and co-operated in the creation of some parts of the MSA. As the preamble states [all emphasis ours]:

Whereas Xerox and Customer **have developed together** a Print Management Transformation Program...a copy of which is attached hereto as Schedule A...

The MSA also states (paragraph 23) that, “all changes to this Agreement must be made in writing *signed by both parties*...[emphasis ours]” indicating that the terms of the MSA are not ‘supplied’ to the university by Xerox but rather a product of understandings agreed to by both parties. Many sentences begin with the words “Customer agrees...” and “Customer acknowledges...” suggesting that these items were a topic of discussion during the negotiation process.

Review by our office of the MSA and attached schedules has determined that the responsive record includes both jointly created information (the terms and conditions of the MSA which are the product of negotiation between Xerox and the university) and supplied information (a description of the goods and services to be provided, some of which may be unique to Xerox). The university has severed both types of information from the responsive record. As stated by the university in its access decision of April 23, “we are withholding information *that is negotiated with the University* [emphasis ours] as well as methodology, terminology and processes that are unique to Xerox.” Although our office specifically requested the university to provide representations which spoke to this question, the university’s representations did not indicate which information in the MSA was supplied by Xerox and which documented the negotiation process.

In the absence of representations that clearly indicate which portions of the MSA documented negotiation and which were supplied by Xerox, our office is unable to conclude that the contractual terms and conditions found in the main body of the Xerox MSA (and which

document the process of negotiation between the university and Xerox) as well as the attached Schedule A “Print Management Transformation Program: A University of Manitoba ROSE Project Initiative” meet the test for the application of 18(1)(b). We are not satisfied that this information should continue to be severed under clause 18(1)(b) from the record released to the complainant.

Our investigation then turned to the description of the goods and services to be provided to the university by Xerox as described in Schedules B and C. As this information has been found to meet the first and second requirements for the exception allowed under clause 18(1)(b), our investigation considered the third and fourth requirements as they applied to this information; that the information was supplied explicitly or implicitly on a confidential basis and that it was treated consistently as confidential information by the third party.

The university stated in its access decision and has maintained in subsequent representations that all information severed from the MSA was supplied by Xerox on a confidential basis and consistently treated as confidential. Indeed, paragraph 9 of the MSA speaks to the expectation that the terms and conditions of the agreement will be kept confidential (except if disclosure is required by law). However, during our investigation our office identified numerous pieces of information on Xerox goods and services that continued to be severed from the MSA that were easily discoverable from other sources outside the MSA.

‘Managed Print Services’ (MPS) is a generic term for a (usually) externally provided service to optimize or manage an organization’s document output to achieve certain service and cost objectives. Information on the components of MPS is available from a number of online sources including vendor assessment services such as the *Magic Quadrant for Managed Print Services Worldwide Report* and Quocirca’s *Managed Print Services Landscape, 2013*. These resources describe the common characteristics of MPS services and compare the main providers, including Xerox, on a number of service delivery criteria (linked to Xerox’s own web pages).

Xerox Canada’s web pages also contain a great deal of information on the topic of MPS and Enterprise Print Services (EPS). This includes descriptions of service components such as the assessment of the institutional printing environment, ‘Xerox Change Management’, help desk support and proprietary software solutions. Also found on Xerox web pages are case studies for other post secondary institutions (which describe Xerox’s available services for similar environments) and technical information concerning available Xerox equipment and accessories (such as the equipment and accessories listed in Schedule ‘C’ of the MSA).

Much information that can be identified from a cursory online search of the previously described sources continues to be severed from the responsive record. This includes many common or generic terms as well as compound phrases composed of generic or common words joined

together with have been described as confidential and proprietary to Xerox. Also severed from the MSA are descriptive terms found on Xerox web pages. Other managerial concept terminology not proprietary to Xerox and well known in the business was severed as well.

In our view, this information describing goods and services to be provided by Xerox cannot be said to be treated consistently as confidential information by Xerox and therefore should not continue to be severed from the responsive record under clause 18(1)(b). Also, as previously noted, under clause 18(3)(b) of FIPPA, the exceptions allowed under subsections 18(1) and 18(2) do not apply to information that is shown to be publicly available.

The remaining information to which the exception allowed under clause 18(1)(b) has been applied consists of financial information related to the university's payments to Xerox and a detailed description of the goods and services to be provided by Xerox. This information has not been determined by our investigation to be publicly available and may therefore be considered to have been treated consistently as confidential information by Xerox as required for clause 18(1)(b) to apply. This information is primarily contained in Appendix 2 of Schedule A (financial models projecting annual payments to Xerox), Schedule B "University of Manitoba Managed Print Services – Xerox Office Services Statement of Work" and Schedule C "Standard and Optional Accessories" ('One Time Charge' Column).

2) Do the mandatory exceptions to disclosure in subclauses 18(1)(c)(i)(ii)(iii) apply to the information that continues to be withheld?

Our investigation then turned to the information to which the exceptions allowed under subclauses 18(1)(c)(i)(ii)(iii) of FIPPA have been applied. Clause 18(1)(c) is a mandatory exception which speaks to the harm that could reasonably result from the disclosure of information that would reveal commercial, financial, labour relations, scientific or technical information of a third party. This harm could take the form of the loss of competitive advantage in the market place, prejudice to ongoing or future contractual or other negotiations of the third party or a significant financial loss (or gain) to a third party. If subclauses 18(1)(c)(i)(ii)(iii) are found to apply then the information must be excepted from access unless a limitation to the exception under subsection 18(3) or 18(4) (disclosure in the public interest) is shown to apply.

The specified harm must 'reasonably be expected' to occur (it must be likely, but need not be a certainty). The determination of a likelihood of harm must be based on objective grounds. The evidence of harm should be detailed, convincing and describe a direct link between the disclosure of the specific information and the harm alleged. In its access decision of April 23 and in correspondence to our office, the university asserts that the disclosure of severed information could affect the negotiating position of Xerox in competition with other vendors in the Managed

Print Services industry. The university describes Managed Print Services as “a highly competitive industry currently facing tremendous pressures as a result of fast changing printing habits.” The university indicated to us that Xerox stated the disclosure of the MSA would give an “unfair advantage to competitors, clients and other parties who negotiate with Xerox...” The university stated that this “could reasonably be expected to result in significant financial harm” to Xerox.

The exception allowed by subclauses 18(1)(c)(i)(ii)(iii) of FIPPA (in addition to that allowed by clause 18(1)(b)) has been applied to all information severed from the MSA, but although our office asked the university to provide representations which specifically addressed this question it has provided little in the way of written representations and no specific explanatory link between the information excepted from access and the harms alleged. The notations on the severed document provided to our office primarily speak to whether information found in the MSA is publicly available or not. The possession of unique information confers an advantage to a third party that will be lost if that information is made available to competitors. Therefore, the concept of harm is closely linked to the uniqueness of the information. However, significant portions of the severed information has since been discovered by our office to be publicly available and not unique making the link between the release of this information and the likelihood of harm occurring to the third party tenuous as far as the release of that information is concerned.

Also, a significant portion of the information in the MSA has been determined to be the result of negotiation between Xerox and the university. For example, the university asserted that the exact models of Xerox equipment being supplied to the university, the numbers of each equipment model type and the percentage mix of model types is not publicly known. However, the equipment supplied under any service agreement is chosen to meet the specific needs of the client and this would be the product of negotiation. Also, model information for all devices is available on the Xerox website and the maximum number and types of units to be provided to the university under the MSA is discoverable through publicly available information. In the absence of further representations, it is difficult to determine what harm would result to the third party from another client knowing this information, as the product mix for each client would be specific to their needs.

What is unique to this agreement is the combination of specific goods and services delivery and the financial remuneration that Xerox will receive for delivering those goods and services throughout the life of the agreement. Although the product of negotiation between the parties, release of the payments to be made by Xerox to the university could prejudice future negotiations between Xerox and other similar institutions resulting in financial harm to Xerox. Our investigation has determined that the exceptions to access allowed by subclauses 18(1)(c)(i)(ii)(iii) apply to financial information which would reveal payments to be made to

Xerox throughout the life of the MSA. This is primarily contained in the financial models projecting annual payments to Xerox found in the second appendix to Schedule A “Print Management Transformation Program: A University of Manitoba ROSE Project Initiative” and Schedule C “Standard and Optional Accessories” (‘One Time Charge’ Column).

Also arguably unique is the detailed description of the Xerox version of the Managed Print Services program contained in Schedule B “Statement of Work”. While ‘managed print services’ is a generic concept and its broad characteristics are widely known, the specifics of the program as provided by Xerox are not widely available for easy discovery. Our investigation has concluded that the release of the information contained in Schedule B “University of Manitoba Managed Print Services – Xerox Office Services Statement of Work”, especially in conjunction with the project financials found in the second appendix to Schedule A and the charges for accessories appearing in Schedule C, could reasonably be expected to result in the harms to the third party described in subclauses 18(1)(c)(i)(ii)(iii). As such we found that clauses 18(1)(c)(i)(ii)(iii) applied to this information.

3) Does the discretionary exception to disclosure in subclause 28(1)(c)(iii) apply to the records to which this exception has been applied?

Our investigation then turned to the information severed under the exception allowed by subclause 28(1)(c)(iii). In its revised access decision of April 23, 2013 the university stated that it was withholding from access the university’s financial information and other details contained within the MSA that “have been deemed harmful to the negotiating position of the University...” under subclause 28(1)(c)(iii). Subclause 28(1)(c)(iii) is a discretionary exception which allows a public body to refuse to disclose information that could reasonably be expected to harm the negotiating position of a public body. In the case of a discretionary exception, the university must first establish that the exception applies to the information in the requested record, and then must exercise discretion by considering whether it is appropriate to release the information in any case.

Interference with contractual or other negotiations means to obstruct or make much more difficult the negotiation of a contract or other sort of agreement between the public body and a third party. The expectation of interference with negotiations as a result of disclosure must be reasonable and the negotiations have to be specific, not simply possible negotiations of a general kind that may occur in the future. The university has indicated on the MSA to which information this exception has been applied has offered no further specific representations beyond the single statement contained in its decision letter. Furthermore, in subclause 28(1)(c)(iii) the use of the words ‘may refuse’ rather than the word ‘shall refuse’ permits the public body to disclose information in a record, even though the information falls within the exception. However, no

representations were offered that provided evidence of the exercise of discretion by the university.

We note that when the university's revised decision was issued on April 23, 2013 negotiations for university wide managed print services were concluded. The contract had been signed on December 23, 2011 and had been in effect since April 2012. In the absence of representations from the university, it is unclear what negotiations would be damaged and what harm would result from the release of the information as the specific anticipated harm is never described. Based on our review of the records and in the absence of representations which would better explain the university's position, we are unable to determine that the university has a reasonable basis for relying on subclause 28(1)(c)(iii) to refuse access. Our office cannot find that this information should continue to be excepted from access unless the exceptions allowed under clause 18(1)(b) and/or subclauses 18(1)(c)(i)(ii)(iii) also applies to the information in question.

SUMMARY OF FINDINGS

The ombudsman found that:

- 1) The contractual terms and conditions found in the main body of the MSA and in the attached Schedule A were not 'supplied' by the third party within the meaning of clause 18(1)(b) of FIPPA. Therefore, clause 18(1)(b) of FIPPA cannot be applied to these portions of the MSA. Clause 18(1)(b) does apply to that information which consists of descriptions of goods and services to be provided to the university by Xerox and which are unique to Xerox and kept confidential by them.
- 2) Clause 18(1)(b) and subclauses 18(1)(c)(i)(ii)(iii) of FIPPA cannot be applied to information or classes of information that have been determined to be publicly available and, therefore, fall under clause 18(3)(b) of FIPPA.
- 3) Subclauses 18(1)(c)(i)(ii)(iii) apply to financial information in the MSA which would reveal payments made to Xerox by the university.
- 4) Subclauses 18(1)(c)(i)(ii)(iii) apply to the detailed description of the Xerox Managed Print Services program contained in MSA Schedule B "Statement of Work".
- 5) The university has not established that subclause 28(1)(c)(iii) of FIPPA applies to any information in the MSA. Therefore, the university's decision to withhold from access information in the MSA under subclause 28(1)(c)(iii) of FIPPA was not reasonable in the circumstances.

RECOMMENDATION

The ombudsman found that the cited exception to disclosure under clause 18(1)(b) applies only to those portions of the record that contain descriptions of goods and services to be provided by Xerox and which are unique and confidential to Xerox and which have not been determined to be publically available. The ombudsman also found that subclauses 18(1)(c)(i)(ii)(iii) apply only to financial information concerning payments to be made to Xerox and the detailed description of the Xerox Managed Print Services program found in the MSA Schedule B “Statement of Work”.

Subsection 7(2) of FIPPA requires that where an exception applies to a portion of the information in a record, only that portion is severed and the applicant is entitled to access to the remainder of the record unless another exception to disclosure applies.

Based on our findings, the ombudsman is recommending that the University of Manitoba release to the applicant all information contained in the Xerox MSA except financial information concerning payments to be made to Xerox by the university that has not already been found to be publicly available (price per impression) and the detailed description of the Xerox Managed Print Services program found in the MSA Schedule B “Statement of Work”.

HEAD'S RESPONSE TO THE RECOMMENDATION

Under subsection 66(4), the University of Manitoba must respond to the ombudsman's report in writing within 15 days of receiving this report. As this report is being sent by courier to the head on this date, the head shall respond by September 5, 2013.

Head's response to the report

66(4) If the report contains recommendations, the head of the public body shall, within 15 days after receiving the report, send the Ombudsman a written response indicating

- (a) that the head accepts the recommendations and describing any action the head has taken or proposes to take to implement them; or
- (b) the reasons why the head refuses to take action to implement the recommendations.

OMBUDSMAN TO NOTIFY THE COMPLAINANT OF THE HEAD'S RESPONSE

After the ombudsman has received the University of Manitoba's response to his recommendation, he will notify the complainant about the head's response as required under subsection 66(5) of FIPPA.

HEAD'S COMPLIANCE WITH RECOMMENDATION

If the head accepts the recommendation, subsection 66(6)(a) requires the head to comply with the recommendation within 15 days of acceptance of the recommendation or within an additional period if the ombudsman considers it to be reasonable. Accordingly, the head should provide written notice to the ombudsman and information to demonstrate that the public body has complied with the recommendation and did so within the specified time period.

Alternatively, if the head believes that an additional period of time is required to comply with the recommendations, the head's response to the ombudsman under subsection 66(4) must include a request that the ombudsman consider an additional period of time for compliance with the recommendations. A request for additional time must include the number of days being requested and the reasons why the additional time is needed.

August 21, 2013
Manitoba Ombudsman

Manitoba Ombudsman

RESPONSE TO THE RECOMMENDATIONS UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2013-0024

UNIVERSITY OF MANITOBA

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 18(1)(b), 18(1)(c)(i)(ii)(iii), 18(3)(b), 28(1)(c)(iii)

RESPONSE ISSUED ON SEPTEMBER 19, 2013

SUMMARY: On September 6, 2013 the University of Manitoba provided its response to the ombudsman, accepting the recommendation. On September 19, 2013 the university issued a revised decision to the complainant, providing access to the requested record in part with severing as recommended by the ombudsman.

RESPONSE TO THE RECOMMENDATIONS

The ombudsman's report with recommendation in this matter was sent to the university by courier on August 21, 2013. Under subsection 66(4) of *The Freedom of Information and Protection of Privacy Act* (FIPPA), the University of Manitoba (the university) was required to respond to the ombudsman's report in writing within 15 days of receiving the report. The university had until September 5, 2013 to respond.

Under FIPPA, the university's response was to contain the following:

Head's response to the report

66(4) If the report contains recommendations, the head of the public body shall, within 15 days after receiving the report, send the Ombudsman a written response indicating

- (a) that the head accepts the recommendations and describing any action the head has taken or proposes to take to implement them; or
- (b) the reasons why the head refuses to take action to implement the recommendations.

The University of Manitoba responded to the ombudsman on September 6, 2013 accepting the recommendation made in our report:

The ombudsman found that the cited exception to disclosure under clause 18(1)(b) applies only to those portions of the record that contain descriptions of goods and services to be provided by Xerox and which are unique and confidential to Xerox and which have not been determined to be publicly available. The ombudsman also found that subclauses 18(1)(c)(i)(ii)(iii) apply only to financial information concerning payments to be made to Xerox and the detailed description of the Xerox Managed Print Services program found in the MSA Schedule B “Statement of Work”.

Subsection 7(2) of FIPPA requires that where an exception applies to a portion of the information in a record, only that portion is severed and the applicant is entitled to access to the remainder of the record unless another exception to disclosure applies.

Based on our findings, the ombudsman is recommending that the University of Manitoba release to the applicant all information contained in the Xerox MSA except financial information concerning payments to be made to Xerox by the university that has not already been found to be publically available (price per impression) and the detailed description of the Xerox Managed Print Services program found in the MSA Schedule B “Statement of Work”.

Under clause 66(6)(a) of FIPPA, the university was required to comply with the recommendation within 15 days of acceptance of the recommendation and notify you of the compliance. Accordingly, the university issued a decision letter on September 19, 2013 providing access to the record requested in part with severing as recommended by the ombudsman. Our office has reviewed the severing applied to the record released by the university on September 19, 2013 and we have concluded that the severing complies with the recommendation contained in our report.

COMPLAINANT MAY APPEAL TO THE COURT

Under subsection 67(1), the complainant may appeal the decision to the court.

Appeal to court

67(1) Subject to subsection (2), a person who

(a) has been refused access to a record or part of a record requested under subsection 8(1); or

(b) is a third party notified under section 33 of a decision by the head of a public body to give access;

may appeal the decision to the court.

Limit on appeal right

67(2) An appeal may be made under subsection (1) only if

- (a) the person has made a complaint to the Ombudsman about the decision and the Ombudsman has provided a report under section 66; and
- (b) the deadline set out in subsection 66.1(4) for the Ombudsman to request the adjudicator to review the matter has expired, and the Ombudsman did not request a review.

Appeal within 30 days

67(3) An appeal is to be made by filing an application with the court within 30 days after the deadline set out in subsection 66.1(2) expires, or within any longer period that the court may allow in special circumstances.

Mel Holley,
Acting Manitoba Ombudsman
October 11, 2013