

# Manitoba Ombudsman

## REPORT UNDER

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

CASE 2013-0086 (web version)

#### MANITOBA INFRASTRUCTURE AND TRANSPORTATION

#### ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 23(1)(a), 23(2)(f) and 23(2)(h)

REPORT ISSUED ON JULY 3, 2013

**SUMMARY:** The complainant requested inspection reports for the St. Jean Baptiste Bridge from Manitoba Infrastructure and Transportation (MIT or the public body). MIT refused access to some of the information contained in the reports, taking the position that it constituted advice and opinions developed for the public body. The ombudsman determined that MIT was authorized under *The Freedom of Information and Protection of Privacy Act (FIPPA)* to withhold the information and therefore the complaint is not supported.

#### THE COMPLAINT

On December 19, 2012, MIT received an access request under FIPPA for the following records:

Please provide the date and time of the last 7 inspections for the St. Jean Baptiste bridge. Please also provide the inspection reports associated with each inspection.

In its response letter dated January 30, 2013, MIT provided access to some of the requested records while other information was withheld. The public body relied on section 17 of FIPPA to sever the names of inspectors while recommendations contained in the reports were withheld under clause 23(1)(a) of FIPPA. On March 4, 2013, our office received a refusal of access complaint from the complainant.

#### POSITION OF THE COMPLAINANT

The complainant believed that the provision relied on by the public body to withhold the recommendations, that being clause 23(1)(a) of FIPPA, did not apply given the limits to the

exceptions in subsection 23(2) of the act. With respect to the names of the inspectors, the complainant advised our office that he was not interested in this information and therefore it was not necessary for our office to consider the applicability of section 17 of FIPPA.

## **POSITION OF MANITOBA INFRASTRUCTURE AND TRANSPORTATION**

MIT contracts with inspectors from third parties to conduct inspections of most bridges in Manitoba. MIT indicated that the severed information in the requested records contained advice and opinions of third party inspectors with respect to the St. Jean Baptiste Bridge. The information in these site specific reports, in addition to the collection and analysis of other data, is used by the public body to develop an asset management strategy with respect to the 1,800 bridge sites in Manitoba. MIT noted that site specific reports do not consider the overall bridge network and the need to prioritize resources with respect to maintenance or other potential actions.

## **ANALYSIS**

Inspections are done on an annual basis (Level 1 bridge inspection) and in more detail on a bi-annual basis (Level 2 bridge inspections). In response to the complainant's request, MIT provided the complainant with five Level 1 inspection reports and two Level 2 inspection reports for the St. Jean Baptiste Bridge.

With regard to the Level 1 reports, the public body redacted the name of the inspector and information it says constitutes advice or recommendations. The Level 2 reports, as already noted, are more detailed and therefore more information is severed, including the section headlined "recommended work". However the comments of the inspectors – which typically included observations noting corrosion, cracking or evidence of leakage – were not redacted.

**Does the discretionary exception to disclosure provided by 23(1)(a) of FIPPA apply as claimed and, if so, did the public body exercise its discretion in a reasonable manner?**

### **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;

The purpose of subsection 23(1) of FIPPA is to protect the free flow of advice and the deliberative process within a public body. The need for confidentiality with respect to various aspects of decision making is not limited to cabinet or municipal council. The exceptions in subsection 23(1) are intended to ensure that full and frank discussion of issues takes place among officials, employees and others advising a public body.

In considering this provision, the public body must first determine whether the information falls within the exception. In this matter, the information withheld includes recommendations and opinions with respect to the condition of the bridge that were generated for the public body. It is also clear that the information will be used by the public body to make infrastructure decisions and therefore it would be our view that this information falls within clause 23(1)(a) of FIPPA.

The next question is whether the public body exercised its discretion in a reasonable manner when deciding to withhold this information. The exercise of discretion is not simply a formality. The public body must consider whether or not to exercise its discretion to disclose information with respect to each access request, taking into consideration the information requested and the particular circumstances of the case. Access to information should not be refused simply because the records can be withheld under one of the discretionary exceptions. Some guidance can be found in *Administrative Law* (Evans, Janisch, Mullan and Risk, 1980) which notes the following:

The authority must act in good faith, must have regard to all relevant considerations, must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation which gives it power to act, and must not act arbitrarily or capriciously. [623]

Evidence provided to our office by the public body indicates that it weighed and considered relevant factors in exercising its discretion not to disclose the information. We note that although MIT did not disclose the recommendations from the inspection reports, it has over the past five years publicly released the actual maintenance activities and associated costs for the St. Jean Baptiste Bridge.

**Do any of the limits identified in subsection 23(2) of FIPPA apply the exception to disclosure?**

Subsection 23(2) of FIPPA sets out limits on the exceptions to disclosure in subsection 23(1). If information falls within one of the clauses in 23(2), the exception to disclosure in subsection 23(1) does not apply to the information.

The complainant indicated that he believed clauses 23(2)(f) and 23(2)(h) of FIPPA were applicable and as a result the information requested should be released.

**Exceptions**

23(2) Subsection (1) does not apply if the information

- (f) is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal;
- (h) is a final report or final audit on the performance or efficiency of the public body or of any of its programs or policies, except where the information is a report or appraisal of the performance of an individual who is or was an officer or employee of the public body.

With respect to clause 23(2)(f) of FIPPA, the Oxford Dictionary defines research as, “the systematic investigation into and study of materials and sources in order to establish facts and reach new conclusions”. The inspection of a bridge, in our view, would not be considered the type of scientific or technical inquiry that would necessarily result in or be intended to draw new inferences, confirm hypotheses, or identify causal relationships. Instead, it is more aptly characterized as a routine practice required at periodic intervals once construction of the bridge is complete to identify areas of wear or erosion.

As for clause 23(2)(h) of FIPPA, it refers to a final report or audit on the performance of the public body or any of its programs or policies. In this case the inspection reports are concerned with the condition of the bridge and are not evaluating or assessing the efficiency of MIT in carrying out its responsibilities.

As a result, we would be of the position that clauses 23(2)(f) and 23(2)(h) of FIPPA are not applicable and therefore do not limit the exception to disclosure relied on by the public body in subsection 23(1).

## **CONCLUSION**

Based on the finding of the ombudsman, the complaint is not supported.

In accordance with subsection 67(3) of *The Freedom of Information and Protection of Privacy Act*, the complainant may file an appeal of the refusal of access decision by MIT to the Court of Queen’s Bench within 30 days after receipt of this report.

July 3, 2013  
Manitoba Ombudsman