

# Manitoba mbudsman

## REPORT UNDER

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

CASE 2013-0245

## MANITOBA JUSTICE

### ACCESS COMPLAINT: REFUSAL OF ACCESS

**PROVISIONS CONSIDERED: 9, 17(1), 17(2)(e), 23(1)(a) and (c)**

**REPORT ISSUED ON OCTOBER 15, 2014**

**SUMMARY:** The complainant requested access to any records related to the quality of Gladue reports in Manitoba Courts, or the creation of a Gladue court in Manitoba. The public body advised the complainant that it does not categorize records by subject matter and that the work involved in responding to her request would be cost prohibitive and could not be performed without substantial impairment to normal operations. The public body further advised that, even if it was possible to locate responsive records, it was likely access would be refused or information would be severed. The ombudsman requested that the public body fulfill its duty to assist the complainant by making every “reasonable effort” to search for responsive records. The public body ultimately released some records to the complainant, with severing. The ombudsman found that the exceptions cited by the public body applied to the information withheld and at issue.

## THE COMPLAINT

On May 28, 2013 Manitoba Justice received the complainant’s application for access under *The Freedom of Information and Protection of Privacy Act* (FIPPA). The complainant requested access to the following records:

*Any reports, memos or emails related to the quality of Gladue reports in Manitoba courts, or the creation of a Gladue court in Manitoba.*

Manitoba Justice is a department of the executive government of Manitoba government and a public body subject to the application of FIPPA.

The public body responded to the application by letter dated June 27, 2013, citing subsection 82(1) and clause 10(1)(b) of FIPPA and informing the applicant that her application for access was refused.

A complaint about refused access was received by our office on July 19, 2013. The complainant took the position that the public body's response amounted to an "*abdication*" of its duty to assist.

## **POSITION OF MANITOBA JUSTICE**

In its initial response, the public body advised the applicant that it did not segregate or categorize documents based on subject matter and that in order to identify those documents responsive to her request it would have to review every document from various divisions within the department. The public body further advised the complainant that the volume of records it would have to review would necessitate her paying a fee pursuant to subsection 82(1) of FIPPA. The public body went on to indicate that determining an appropriate fee and undertaking the project was impossible with the current staff it had in place.

The public body concluded that it could not undertake such a project as the necessary work would be cost prohibitive and could not be performed without substantial impairment to normal operations. The public body cited clause 10(1)(b) of FIPPA and advised the complainant that her application for access was refused. The public body went on to advise the applicant that, even if it was possible to locate all records responsive to her request, it was likely that access would be refused or information severed from the records on the basis of subsections 17(1), 23(1), 20(1), 21(1) and 27(1) of FIPPA.

## **INVESTIGATION**

At the outset of our investigation, the public body confirmed that no effort had been made to assist the complainant, either by providing access to easy-to-find records or by contacting the complainant to determine whether her request could be clarified or modified in some way (limited by date, time, division within the public body, type of record, etc...) so that the public body could focus on certain key records and avoid unnecessary costs. The public body further indicated that no sampling of records had been done prior to concluding that "determining an appropriate fee" and "undertaking this project" was impossible given the staff in place within the public body.

As it appeared likely that some responsive records did exist and because the public body had not indicated it was relying on subsection 13(1) of FIPPA to disregard the request, our office reminded the public body that it was obliged to make every reasonable effort to search for records responsive to the complainant's request. We further indicated that making every reasonable effort to search for records required the public body to develop a logical, realistic and practical strategy to identify and locate responsive records within the public body's custody or

control. It did not require the public body to rule out or prove beyond a reasonable doubt that there were no other records responsive to the request within its custody or control.

At our request, the public body contacted the complainant and discussed the scope of the information she was seeking in an effort to clarify her request in some manner. The public body subsequently advised our office that the complainant had clarified her request and restated it to be for:

*any evaluation of the effectiveness of Gladue reports and if there were concerns raised, any change made to improve Gladue reports as well as any briefing notes on the creation of a Gladue court in Manitoba.*

The public body then issued a revised response to the complainant on November 19, 2013 wherein it advised that it had undertaken a manual search for responsive records of each division within the department for the period from October 1, 2012 to October 1, 2013. The public body further advised that the manual search was for all briefing notes, including all advisory notes for the minister of Manitoba Justice and for the deputy minister of Manitoba Justice, including federal/provincial/territorial meetings, and house book notes that contained the word(s) “Gladue” and /or “Ipeelee” within the content of the document(s). The public body informed the complainant that the search had produced the following responsive records:

1. Advisory Note for the Minister of Justice dated October 31, 2012;
2. House Note dated April 2, 2013; and
3. Advisory Note for the Minister of Justice dated May 28, 2013.

In its revised response, the public body provided the complainant with access to the above-referenced records after first severing some information from the records pursuant to the following mandatory and discretionary exceptions to disclosure:

***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;*

***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*

*(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,

**Information provided by another government to department or government agency**

**20(1)** The head of a department or government agency shall refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal information provided, explicitly or implicitly, in confidence by any of the following or their agencies:

- (c.1) the council of a band as defined in the Indian Act (Canada), or an organization performing government functions on behalf of one or more bands;

**Disclosure harmful to relations between Manitoba and other governments**

**21(1)** The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to harm relations between the Government of Manitoba or a government agency and any of the following or their agencies:

- (c.1) the council of a band as defined in the Indian Act (Canada), or an organization performing government functions on behalf of one or more bands;

**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;
- (c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Manitoba or the public body, or considerations that relate to those negotiations;

The public body also provided the complainant with a copy of an informative document titled *Gladue Considerations*, without severing. The public body noted that the document set out some considerations that could be used as key components in the preparation of a Gladue report.

Our office reviewed the public body's revised response to the complainant and copies of the responsive records, with and without severing. Based upon our review, we requested that the public body provide the complainant and our office with reasons for refusing access to some of the information in the records as required pursuant to clause 12(1)(c)(ii) of FIPPA which provides as follows:

**Contents of response**

**12(1)** In a response under section 11, the head of the public body shall inform the applicant

- (c) if access to the record or part of the record is refused,
  - (ii) in the case of a record that exists and can be located, the reasons for the refusal and the specific provision of this Act on which the refusal is based,

We advised the public body that the reasons should clearly indicate why each specific provision cited applied to the particular information withheld from the records and noted that it was not sufficient to just list the provisions of FIPPA on which the refusal was based. We further advised the public body that, where the exception relied on was of a discretionary nature, the department should provide an explanation of why it exercised its discretion to withhold rather than release the information.

The public body reviewed its revised response to the complainant in detail and informed our office that it had once again reconsidered its decision to withhold certain information and/or its reasons for doing so. The public body advised our office that it was no longer relying on clauses 20(1)(c.1) and 21(1)(c.1) to withhold any information in the records and that some of the information it had previously withheld under a specific provision of FIPPA was actually “out of scope” or simply not responsive to the complainant’s request.

The public body confirmed that it continued to rely on subsection 17(1), clause 17(2)(e), sub-clause 18(1)(c)(ii) and clauses 23(1)(a) and (c) of FIPPA to withhold certain information from the records. The public body provided our office with reasons for its decision to withhold particular information in the records and to explain its exercise of discretion.

Finally, the public body advised that it was providing the complainant with access to another responsive record which had not yet been finalized at the time of its previous response. The record is from the Corrections Division and is a community policy titled *Gladue Pre-Sentence Report – Adult*. Portions of the record were withheld as they were determined to be “out of scope” or not responsive to the request. On June 23, 2014 the public body issued a revised response to the complainant.

## **ANALYSIS OF ISSUES AND FINDINGS**

### **1. Do subsection 17(1) and clause 17(2)(e) of FIPPA apply to the information withheld on page 1 of the advisory note dated May 28, 2013?**

Subsection 17(1) of FIPPA is a mandatory exception to disclosure that protects the personal information of a third party. The exception applies when an applicant makes a request under FIPPA for access to personal information about someone else (a third party). Where the information in question is subject to this exception, a public body is prohibited by statute from disclosing the information. In order for this exception to apply, disclosure of the personal information must be expected to be an unreasonable invasion of a third party's privacy.

FIPPA defines "personal information" as "recorded information about an identifiable individual". Subsection 17(2) of FIPPA sets out circumstances where the disclosure of personal information about a third party is deemed to be an unreasonable invasion of privacy. Personal information listed in subsection 17(2) must not be disclosed to an applicant unless a circumstance in subsection 17(4) applies.

In circumstances where the information requested is found to fall under one of the exceptions listed in subsection 17(2), disclosure is *deemed* to be an unreasonable invasion of the third

party's privacy and must not be disclosed. Under subsection 17(2)(e), information related to the third party's *employment, occupational or educational history* is one type of personal information deemed to be an unreasonable invasion of the privacy of the individual the information is about.

The *Manitoba FIPPA Resource Manual* states that “occupational history” refers to information about an individual’s profession, business or calling, and can include accomplishments and how an individual spent his or her time.

Our office reviewed the information withheld on page 1 of the advisory note dated May 28, 2013 pursuant to subsection 17(1) and clause 17(2)(e) of FIPPA. The public body severed the names of two individual described as representatives of the University of Manitoba, a public body. Given that these persons were identified in the context of performing their job responsibilities as employees, our office is of the view that their identities should not have been withheld under section 17 as sub-clause 17(4)(e)(i) would permit their disclosure.

***When disclosure not unreasonable***

*Despite subsection (2), disclosure of personal information is not is not an unreasonable invasion of a third party's privacy if*

*(e) the information is about the third party's job classification, salary range, benefits, employment responsibilities or travel expenses*

*(i) as an officer or employee of a public body.*

Although we do not agree these two names should have been severed, we did not pursue the matter further as the complainant advised our office that she did not consider it to be significant for her purposes.

Finally, the public body severed the names of two other individuals said to be defense bar representatives. As these individuals are not officers or employees of a public body, our office found that clause 17(2)(e) applied to the information withheld on the basis that disclosing the names would reveal information about their *employment, occupational or educational history* and would be an unreasonable invasion of their privacy.

**2. Do clauses 23(1)(a) and (c) apply to the information withheld in the advisory notes dated October 31, 2012 and May 28, 2013 and the house note dated April 2, 2013?**

The exceptions contained in clauses 23(1)(a) and (c) of FIPPA protect the advisory and deliberative processes involving a public body or a minister of the government of Manitoba. The exceptions 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;*

*(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government*

*of Manitoba or the public body, or considerations that relate to those negotiations;*

The exceptions in subsection 23(1) are class exceptions in that they protect a certain type or kind of information in a record from being disclosed. Limits to the exceptions contained in subsection 23(1) can be found in subsection 23(2).

In our system of government it may sometimes be in the public interest to maintain confidentiality with respect to various aspects of decision making. Preserving confidentiality between a minister or public body and their advisors may foster critical thinking and ensure that full and frank discussion of issues takes place among officials, employees and others advising ministers or a public body.

The exceptions in subsection 23(1) of FIPPA promote this interest by allowing those entrusted with the responsibility to make decisions, formulate plans and develop policy to freely discuss or deliberate the issues before them in order to ensure they reach well-reasoned decisions. Pursuant to section 23, a public body has discretion to give rather than refuse access to information requested by an applicant. Accordingly, a public body must provide reasons for its decision to refuse access that demonstrate it exercised its discretion and that it did so in a reasonable manner.

Our office reviewed the particular information withheld from the records pursuant to clauses 23(1)(a) and (c) of FIPPA. Based on our review and the representation made by the public body, we are satisfied that the two advisory notes and the house note were prepared by departmental employees to support the minister in his interaction with other government officials, private sector representatives and other stakeholders. We are also satisfied that, if disclosed, the information withheld could reasonably be expected to reveal:

- advice, opinions, analyses or policy options developed for the minister by his staff.
- recommended positions, plans or instructions developed for the purpose of negotiations by or on behalf of the government of Manitoba or the public body, or considerations that relate to those negotiations.

The ombudsman found that the exceptions to disclosure in clauses 23(1)(a) and (c) applied to the withheld information and that none of the exceptions to disclosure in subsection 23(2) applied. The ombudsman found that the public body's decision to exercise its discretion to withhold, rather than release, the information was reasonable in the circumstances.

### **3. Does sub-clause 18(1)(c)(ii) of FIPPA apply to the information withheld on page 2 of the House Note dated April 2, 2013?**

Our office found that the exception to disclosure found in clause 23(1)(a) applied to the information withheld on page 2 of the house note dated April 2, 2014 and that disclosure would reveal analyses developed for the minister of the public body and we therefore did not consider

sub-clause 18(1)(c)(ii) which was also relied on by the public body when withholding the information.

## **CONCLUSION**

Based on the ombudsman's findings, the complaint is partly supported.

In accordance with subsection 67(3) of *The Freedom of Information and Protection of Privacy Act*, the complainant may appeal Manitoba Justice's decision to refuse access to the Court of Queen's Bench within 30 days of receiving this report.

October 15, 2014  
Manitoba Ombudsman