

# Manitoba Ombudsman

## REPORT UNDER

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

CASE 2013-0309

[name of public body removed to protect the privacy of individuals involved]

### **PRIVACY COMPLAINT: COLLECTION AND DISCLOSURE OF PERSONAL INFORMATION**

### **ISSUE CONSIDERED: CUSTODY OR CONTROL OF A RECORD**

### **PROVISION CONSIDERED: 4**

**REPORT ISSUED ON DECEMBER 16, 2013**

**SUMMARY:** A complaint was made to our office under *The Freedom of Information and Protection of Privacy Act* (FIPPA) that an employee of a public body had inappropriately collected and disclosed the personal information of the complainant. The complaint related to personal emails sent by an employee using the public body's email service. Our office found that, while the public body had possession of the emails by virtue of their presence on its email servers, these records were not in the custody or control of the public body. Therefore FIPPA did not apply to the emails.

### **THE COMPLAINT**

In his complaint under *The Freedom of Information and Protection of Privacy Act* (FIPPA), the complainant explained to our office that his ex-spouse, a current employee of a public body, corresponded with the Maintenance Enforcement Program (MEP) of Manitoba Justice using her work email account. It was his belief that his ex-spouse included personal information about him in this email communication with MEP, thus allowing his personal information to be 'collected' by the public body by virtue of its capture on the public body's email servers. The complainant also alleged his personal information was inappropriately disclosed by the public body as his ex-

spouse, a public body employee, disclosed his personal information to MEP. Under subsection 59(3) of FIPPA an individual who believes that his or her personal information has been collected, used or disclosed in violation of FIPPA may make a complaint to the ombudsman.

## **INVESTIGATION**

In conversations with our office the complainant explained that, before making his complaint to us, he had already contacted the public body and it had initiated an investigation of his allegations that his ex-spouse had inappropriately disclosed his personal information. As part of our investigation, we contacted the public body and obtained the results of its investigation.

The public body explained to us that it responded to the complainant's concerns by conducting an audit of its employee's access to the complainant's personal information held by the public body. The public body collects and retains information about Manitobans as authorized by its enabling legislation. This includes personal information maintained in two large databases. An 'audit by user access' of those databases was conducted for a period of one year backwards from the date of the complaint to the public body. This audit showed that, during the audit period, there was no access (inappropriate or otherwise) by the ex-spouse to the personal information the public body holds about the complainant.

In conversations with our office, the complainant also stated that it was his understanding that his ex-spouse had sent hundreds of emails to MEP and that they filled boxes under the desk of the MEP officer assigned to his ex-spouse's MEP file. Further to these allegations, we requested that the public body investigate the ex-spouse's communication with MEP using her work email account. The ex-spouse acknowledged using work email to communicate with MEP. She explained that she had referred to her own case number and asked her worker to look into the payment of arrears on her case and that at no point had she included her ex-spouse's name in the emails. When asked how many times she had communicated with MEP, the ex-spouse was able to locate eleven messages sent to MEP during 2013.

Our office also contacted MEP, which examined the email records of the ex-spouse's designated MEP officer at our request. Between January 1, 2013 and September 26, 2013 MEP received eighteen emails from the ex-spouse and twenty-four were sent by MEP to her through the 'General Inquiries' email system. The topics of the emails were confined to the matter at hand (i.e. that the ex-spouse was not receiving her court ordered support payments) which is a personal matter unrelated to her employment duties. Our office also requested that MEP ask the designated officer if there were any emails received directly to the officer's government email in the numbers that the complainant alleges took place and if they included more information than

was present in the 'General Inquiries' messages. MEP reported to us that there had been no communication outside of the MEP 'General Inquiries' email system.

A sample communication between the complainant's ex-spouse and MEP was provided to our office for review. The emails sent by the public body employee (complainant's ex-spouse) contain the employee's personal information (name, work phone number, MEP file number). The emails also contained information concerning the financial circumstances of an unnamed individual (connected by inference with a specified MEP file number) to the effect that a garnishment order was issued on a particular date and arrears were outstanding. Contextual information (the knowledge that MEP stands for 'Maintenance Enforcement Program') might allow a knowledgeable reader to conclude that the unnamed individual is the ex-spouse of the writer of the email, thus rendering the unnamed individual identifiable. Our office determined that the emails contained the personal information of the complainant and the public body employee. By virtue of the fact that the public body employee sent these emails using her employer's email service, our office concludes that copies of this communication would be captured and retained by the public body's email servers until deleted as part of normal server maintenance.

The public body in this case explained to our office that its employees are permitted limited personal use of its computer system (including email). The public body further explained that employees have an expectation of privacy in their personal email communication and personal email is not considered part of the 'official' communication of the public body. A copy of the public body's *Acceptable Use Policy* was provided to our office for review. Consistent with the *Electronic Networks Usage Policy* of the Manitoba government and standard business practices, the public body allows limited personal use of its 'information assets' as long as that use does not violate the public body's *Information Security Directive* or any other policy, interfere with work performance or compromise the performance or operation of the public body's computer systems. Unless there is reason to believe an employee has used the electronic communications system for a purpose inconsistent with the *Acceptable Use Policy*, the public body would not normally access an employee's personal email.

## **ANALYSIS OF ISSUES AND FINDINGS**

### **Does FIPPA apply to the emails that are the subject of this complaint and which were sent and received by the public body employee (the ex-spouse of the complainant)?**

Section 4 of FIPPA states that the act applies to all records that are in the custody or under the control of a public body. Some records that are in the custody or control of a public body are specifically excluded from the application of the act, as follows:

***Records to which this Act applies***

**4** *This Act applies to all records in the custody or under the control of a public body but does not apply to*

- (a) information in a court record, a record of a judge, master or justice of the peace, a judicial administration record or a record relating to support services provided to a judge or judicial officer of a court;*
- (b) a note made by or for, or a communication or draft decision of, a person who is acting in a judicial or quasi-judicial capacity;*
- (c) a record of a Member of the Legislative Assembly who is not a minister;*
- (d) a personal or constituency record of a minister;*
- (e) a record made by or for an officer of the Legislative Assembly;*
- (f) a record made by or for an elected official of a local public body relating to constituency matters;*
- (g) teaching materials or research information of an employee of an educational institution;*
- (h) a question that is to be used on an examination or test;*
- (i) a record relating to a prosecution or an inquest under The Fatality Inquiries Act if all proceedings concerning the prosecution or inquest have not been completed;*
- (j) records acquired by the Archives of Manitoba or the archives of a public body from a person or entity other than a public body; and*
- (k) a record originating from a credit union that is in the custody or under the control of the Deposit Guarantee Corporation of Manitoba under The Credit Unions and Caisses Populaires Act.*

The question of whether or not emails of the type at the center of this complaint are in the custody or under the control of a public body is one that has been much debated by access and privacy authorities in several Canadian provinces. Generally it is accepted that records are in the custody of a public body if it has ‘charge and control’ of the records, “including some legal responsibility for their safekeeping, care, protection and preservation.”<sup>1</sup> These requirements have been shown not to apply to the personal communications of employees that are unrelated to their work responsibilities.<sup>2</sup> The Supreme Court of Canada has ruled that to be considered in the control of a government institution the contents of an email will relate to a departmental matter.<sup>3</sup>

Physical possession of a record is usually considered to equate with having custody of that record. However, the purpose for which the record was created, maintained and used must be taken into account in making that determination. The Information and Privacy

<sup>1</sup> See *Use of Personal Email Accounts for Public Business* issued by the Office of the Information & Privacy Commissioner for British Columbia.

<sup>2</sup> See *City of Ottawa v. Ontario (Information and Privacy Commissioner) and John Dunn*, 2010 ONSC 6835.

<sup>3</sup> See *Canada (Information Commissioner) v. Canada (Minister of National Defense)*, 2011 SCC 25.

Commissioner/Ontario considered this question in its Order P-120, which is frequently cited in this regard. The order sets out ten criteria as relevant considerations for determining whether the requirements of custody or control are met:

- 1) Was the record created by an officer or employee of the institution?
- 2) What use did the creator intend to make of the record?
- 3) Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
- 4) If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?
- 5) Does the institution have a right to possession of the record?
- 6) Does the content of the record relate to the institution's mandate and functions?
- 7) Does the institution have the authority to regulate the record's use?
- 8) To what extent has the record been relied upon by the institution?
- 9) How closely is the record integrated with other records held by the institution?
- 10) Does the institution have the authority to dispose of the record?

In considering whether a public body has custody or control of a record, it may be helpful to consider any requirements for records management and retention that may apply, such as *The Archives and Recordkeeping Act* or *The City of Winnipeg Records Management By-law*, which would contain information relevant to the application of the above-mentioned criteria.

In this case, while the emails were created by a public body employee, they were unrelated to her employment with the public body and were of an entirely personal nature. The public body did not have possession of the communication because of an employment requirement and the subject matter of the communication did not relate to a business function of the public body. It is clear that the information contained in the emails sent by the complainant's ex-spouse relates to the personal concerns of the ex-spouse and would not be relied upon by the public body in fulfilling its mandate and function. The employee's personal emails were not integrated with the business records of the public body and would not be relied upon by the public body for its business purposes. The employee herself has control over the disposal of her personal email communication in that she may delete it whenever she wishes, unlike official public body records which must not be destroyed unless authorized by the public body's records disposal schedule.

The public body had bare possession of the employee's personal email because she used her employer's email service for personal communication as a matter of convenience. This was a use that she was allowed under the public body's *Acceptable Use Policy*. The public body's possession of the ex-spouse's communication with MEP occurred by chance. The records in

question were not created by the public body employee in the course of her work-related duties and the contents of the records do not relate to the public body's function or business operations. Based on this evidence, our office finds that the public body did not have custody or control of the employee's personal emails. As a result, the emails are not subject to the application of FIPPA. Therefore, the complaint of collection and disclosure of the complainant's personal information by a public body in contravention of FIPPA is not supported.

Manitoba Ombudsman  
December 16, 2013