

Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2013-0314

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

PRIVACY COMPLAINT: DISCLOSURE OF PERSONAL INFORMATION

PROVISIONS CONSIDERED: 42, 43, 44(1)

REPORT ISSUED ON JANUARY 24, 2013

SUMMARY: The complainants wrote a letter to the attention of an employee of a public body and the local RCMP detachment requesting assistance concerning a neighbourhood noise issue. The complainants believed that the contents of this letter, including the complainants' personal information, had become known to a neighbour. A complaint of inappropriate disclosure of personal information was made to our office under *The Freedom of Information and Protection of Privacy Act* (FIPPA or the 'act'). The ombudsman found that the public disclosure of the complainants' personal information was not authorized under FIPPA.

THE COMPLAINT

On September 20, 2013 our office received a privacy complaint under *The Freedom of Information and Protection of Privacy Act* (FIPPA or the 'act'). The complainants asked our office to investigate an apparent disclosure of their personal information by the public body which they alleged took place without authorization as required by FIPPA. The public body is a local government body subject to the application of the FIPPA in its collection, use and disclosure of personal information.

The complainants explained to our office that they wrote a letter to the attention of both the public body and the local RCMP detachment in 2011. This letter requested assistance in

addressing ongoing concerns with the complainants' neighbours, whom the complainants alleged were in violation of the local noise by-law. The complainants provided our office with a copy of their letter. The letter describes the behaviour of the complainants' neighbours, which the complainants contend contravened local noise ordinances. The complainants make a plea for help from local authorities asking "to let us know" what could be done as the complainants could no longer enjoy being outside on their property. The complainants ask that the letter be kept confidential as they had previously experienced what the complainants' describe as "quite disrespectful" and "hostile" behaviour from these neighbours and the complainants state they feared retaliation if the contents of their letter were made widely known.

The complainants explained to our office that following a regular meeting of council of the public body shortly after their letter was sent in 2011, the complainants were confronted by the same neighbours who had been described in the complainants' letter. The complainants stated that they were told by the neighbours that the neighbours were aware of the contents of the complainants' letter to the public body and that the neighbours had received this information as a result of attending the council meeting. This led the complainants to suspect that the public body had publicly disclosed their personal information without authorization as required by FIPPA. 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.

POSITION OF THE PUBLIC BODY

Email correspondence provided to our office by the complainants indicated that they contacted an official of the public body about this apparent disclosure of their personal information and received a reply. The official wrote,

You should be aware that when you send us a letter, it becomes part of the [public body meeting] agenda under correspondence. Your letter was item [#] on the [month] meeting Agenda. That puts your letter into the public domain.

The email communication further stated that the complainant's neighbour appeared before the public body meeting "on his own" and was not invited by council to appear. The official further stated in his email, "I did not share any names with anyone in this matter".

In subsequent conversations with our office, the public body continued to maintain that, while the complainants' letter was discussed at the specified meeting the identity of the complainant was not publicly disclosed.

ANALYSIS OF ISSUES AND FINDINGS

Was information contained in the complainants' letter to the public body personal information as defined by FIPPA?

FIPPA defines personal information as recorded information about an identifiable individual. This also includes an individual's own personal views or opinions, except when they are about another individual in which case those views and opinions are the personal information of the other individual.

The relevant clauses of FIPPA are:

"personal information" means recorded information about an identifiable individual, including

- (a) the individual's name,*
- (b) the individual's home address, or home telephone, facsimile or e-mail number,*
- (l) the individual's own personal views or opinions, except if they are about another person,*
- (m) the views or opinions expressed about the individual by another person, and*
- (n) an identifying number, symbol or other particular assigned to the individual;*

A copy of the letter at issue provided to our office includes the name, address and telephone number of the complainants, which is clearly the personal information of the complainants. The letter also contains the address of the neighbours believed to have violated the noise by-law. Although the neighbours' names are not mentioned, personal information as defined by FIPPA also includes an identifying number assigned to an individual (such as an address) so although the neighbours were not named they could still be identified. The letter also described behaviour ascribed to the complainant's neighbours by the complainant and included the complainant's opinions about the neighbours. Therefore, the letter also included the personal information of the complainant's neighbours.

Was the personal information of the complainants disclosed by the public body?

As a first step in investigating this complaint our office contacted the public body in an effort to determine what information from the complainants' letter, if any, was disclosed at the specified council meeting. We asked the public body if, as the complainants' correspondence appeared on the agenda for the meeting, a copy of the letter would have been attached to the agenda as supporting documentation.

The public body explained that the former staff member, to whom the complainants' correspondence was addressed, is no longer employed by the public body so it is difficult to

know exactly what took place at the time. Also, while the public body's meeting minutes are maintained, copies of attachments as presented to council are not attached to the retained copies. At one point, the public body advised our office that it was able to locate a copy of the agenda with attachments as it would have been made available to attendees at the specified meeting. The public body explained that the complainants' personal information was blacked out on the copy of the letter attached to the agenda copy it had located. A copy of the agenda and attachments as presented to the specified meeting was not provided to our office. The public body did provide our office with a copy of the complainants' letter as found in its 'historic resident files'. The copy that was provided to our office by the public body was identical to the copy provided to our office by the complainants (there was no blacking out in either case).

The public body confirmed that it was usual practice to place all correspondence received by the public body, whether addressed to administrative staff or council, on the agenda for the next meeting. The public body identified a specific by-law that regulates the proceedings and conduct of council and its committees. A provision of the by-law sets out the requirements for council meeting agendas including:

- Agendas for regular meetings of council along with any supporting documentation are made available to members of council prior to the meeting and a copy of the agenda is posted in the municipal office at the same time.
- Items to be placed on the agenda are provided to the [administration] five days in advance of the council meeting.

Correspondence is listed as one of the items of business properly brought before council for consideration. However, the by-law is silent on the type or content of correspondence that may appropriately be addressed to council or how personal information contained in any correspondence shall be treated.

Our office noted that council minutes without attachments are posted to the public body web pages after they have been approved at the following meeting of council. Our office reviewed the minutes for the specified council meeting and we observed that one of the complainants' names appears under a specific agenda topic ('Correspondence') as a numbered item. The subject of the complainant's correspondence is stated as 'Bylaws'.

Even if the complainants' personal information was blacked out on any copy of the complainants' letter attached to the agenda, the surname and first initial of the complainant that appeared on the agenda and council minutes alongside the numbered item (as the source of correspondence received for information) would allow the letter's writers to be identified to meeting attendees in any case. This allowed all those present at the meeting to know not only the identity of one of the senders of the numbered item but those of her neighbours (referred to in the letter). Even if the personal information of the complainants was blacked out on the letter itself,

this would still constitute a disclosure of personal information under FIPPA, as the complainant would still be identifiable as the author of the letter.

Was the public body authorized to disclose the personal information of the complainant under FIPPA?

In investigating a complaint about unauthorized disclosure, the two main considerations are whether the disclosure was for a purpose authorized under FIPPA and, if authorized, whether the disclosure was limited to the minimum amount of information necessary for the purpose for which it was disclosed. As section 42 of FIPPA states:

General duty of public bodies

42(1) A public body shall not use or disclose personal information except as authorized under this Division.

Limit on amount of information used or disclosed

42(2) Every use and disclosure by a public body of personal information must be limited to the minimum amount of information necessary to accomplish the purpose for which it is used or disclosed.

Under FIPPA, disclosure of personal information is only permitted in those circumstances described under subsection 44(1). The public body was invited to make representations to our office concerning any applicable provision under subsection 44(1) of FIPPA that authorized the release of the complainants' personal information at the specified council meeting. The public body declined to make representations. In the absence of representations from the public body we were unable to conclude that disclosure of the complainants' personal information was authorized.

OTHER MATTERS: BALANCING PRIVACY AND TRANSPARENCY IN THE CONDUCT OF MUNICIPAL AFFAIRS

In the absence of representations any discussion concerning a possible rationale for disclosure is necessarily speculative. However, the public body's email communication with the complainant and subsequent conversations with our office give some indication that subsection 152(1) of *The Municipal Act* may have been considered by the public body as authorizing disclosure of the complainants' personal information. This is related to clause 44(1)(e) of FIPPA which states:

Disclosure of personal information

44(1) A public body may disclose personal information only

(e) in accordance with an enactment of Manitoba or Canada that authorizes or requires the disclosure;

Subsection 152(1) of *The Municipal Act* reads:

Meetings to be conducted in public

152(1) Every meeting of a council or council committee must be conducted in public.

The Municipal Act sets out the purposes of municipal government and stipulates how municipalities will conduct their affairs. Section 152 states that every meeting of a council or council committee must be conducted in public and anyone has a right to be present at a meeting of a council or a council committee. Municipalities, like all governments, are expected to operate in a transparent manner. However, there is nothing in *The Municipal Act* which requires that the names of correspondents appear on agendas or minutes. The misconception that *The Municipal Act* authorizes disclosure in these instances is outdated and wrong and, in the context of bylaw enforcement especially, it only serves to promote and perpetuate conflict and retaliatory behavior. Furthermore, it is seldom necessary for the proper consideration of council business that parties to disputes over bylaw infractions be identified.

The requirements of FIPPA concerning both access to information and the protection of personal privacy were extended to municipalities in 2000 when FIPPA came into effect for municipalities, planning and conservation districts and community councils. Our office feels it is worth emphasizing that transparency in government is not incompatible with the privacy requirements of FIPPA. For example, subsection 152(3) of *The Municipal Act* allows a council or council committee the discretion to close a meeting to the public in certain circumstances requiring confidentiality, including if the matter to be discussed relates to enforcement of a bylaw (such as the public body's noise by-law).

It is also possible to safeguard the privacy of individuals when dealing with matters that are properly brought before council in an open meeting. The Manitoba government resource *FIPPA for Public Bodies*¹ includes suggested best practices for dealing with letters from residents that may properly become part of council agenda packages. This includes contacting the writer where it is not clear that an individual realized that the letter may be made public. In the case of this complaint, the complainant's correspondence was not addressed to council and it included a statement specifically requesting that the letter be kept confidential making it obvious that the writer did not expect that their letter would be made public. Also, this correspondence dealt with a matter related to bylaw enforcement. *FIPPA for Public Bodies* includes the following suggestions for such situations:

¹ Under 'Frequently Asked Questions: Municipalities' found at http://www.gov.mb.ca/chc/fippa/public_bodies/faq2.html#council.

- *If requested by the writer, and if it would not otherwise jeopardize the intent of the letter, the municipality could sever the sensitive information. Alternatively, the municipality could ask the writer to resubmit the correspondence without the sensitive information.*
- *A letter that relates to a matter which would normally be discussed in-camera, under subsection 152(3)(b) of The Municipal Act, would be referred to the closed portion of the council meeting. In this case, the correspondence would not be distributed as part of the public agenda package.*

As part of our investigation we reviewed the contents of the public body's web pages. We were unable to locate any advice concerning the treatment of correspondence sent to officers of the public body or instructions for placing items on the agenda other than the deadline for receipt by the public body's administrative staff. We also questioned the public body about any information that may have been supplied to correspondents by another method. At the time the complainants sent their letter to the public body, no notice concerning the public nature of correspondence appeared on the public body's website or was available from any other source.

As a result of this investigation, the public body has made changes to the way it will deal with future correspondence. The public body has posted notices concerning their compliance with FIPPA and the public body's new procedures for dealing with correspondence on their web site. While these notices are a good beginning, a public body has the responsibility to ensure that each incidence of contemplated collection, use or disclosure of personal information is reviewed for compliance with FIPPA. Such notices as those posted by the public body in no way relieve a public body of that continuing responsibility.

CONCLUSION

The ombudsman concludes that the personal information of the complainants was disclosed by the public body. Based on the ombudsman's findings in this matter, we cannot conclude the disclosure of the complainants' personal information was authorized, therefore the complaint is supported.

January 24, 2014

Manitoba Ombudsman