

# Manitoba Ombudsman

## REPORT UNDER

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

CASE 2013-0407

#### MANITOBA INFRASTRUCTURE AND TRANSPORTATION

#### ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISION CONSIDERED: 23(1)(a)

REPORT ISSUED ON MAY 1, 2014

**SUMMARY:** The complainant requested access to records about the St. Jean Baptiste Bridge project. Manitoba Infrastructure and Transportation granted partial access to the records responsive to the request, severing information under clause 23(1)(a) of FIPPA. During our investigation, the public body disclosed some information to the complainant that had previously been severed. The public body also located an additional responsive record while our investigation was underway, and provided the complainant with partial access to that record. After discussions with our office, the public body made a further disclosure of information from that record. This information had previously been severed under clause 23(1)(a) of FIPPA. The complaint is partly supported.

#### THE COMPLAINT

On September 10, 2013 the complainant requested access to records under *The Freedom of Information and Protection of Privacy Act* (FIPPA) from Manitoba Infrastructure and Transportation (MIT or the public body) as follows:

*I would like to access information, recommendations or any other available documents on the St-Jean-Baptiste Bridge project that were made after the demolition. [name] worked on this project.*

The complainant revised her request on September 30, 2013 to read:

*Records that would tell you what MIT is doing now concerning this project and what is to happen next and what the time line is.*

MIT responded to the complainant's request by letter dated October 10, 2013, advising that there were two records responsive to her request: a briefing note and a terms-of-reference for a consultant study. Access was granted in part – some of the information in the briefing note was severed under clause 23(1)(a) of FIPPA; the entire terms of reference was withheld under clause 23(1)(a) as it was considered a draft that had yet to be finalized.

A refusal of access complaint was received by our office from the complainant on December 4, 2013.

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

The public body's October 10, 2013 response letter had advised the complainant that some of the information in the briefing note was being severed as it was information that included opinions, proposals, recommendations, analyses and options developed for MIT. The response letter also indicated that the *Terms-of-Reference: Southern Red River Valley Transportation Master Plan* was in draft form and included information that would fall into the category of advice, opinions, proposals and recommendations. This draft document had not been accepted by MIT's senior officials. At the time of the request, the terms of reference was in the process of being completely re-drafted. Information from the responsive records was severed/withheld under clause 23(1)(a) of FIPPA.

## **ANALYSIS OF ISSUES AND FINDINGS**

### **Does the discretionary exception to disclosure provided in clause 23(1)(a) of FIPPA apply to the information severed/withheld?**

The discretionary exception found in clause 23(1)(a) of FIPPA is intended to protect the advisory and deliberative processes involved in decision making by a public body and to ensure that full and frank discussion of issues takes place among officials, employees and others advising a public body. The exception in clause 23(1)(a) is a class exception as it protects a type or kind of information in a record, such as advice, opinions, proposals, recommendations.

In considering this provision, a public body must first determine whether the information in a record falls within the exception which provides 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***

MIT advised that the information severed from the briefing note was information that could reasonably be expected to reveal advice, opinions, proposals, recommendations, analyses and options developed for the public body. It also indicated that some of the severed portions were factual in nature, but that they were interwoven with advice, opinions and recommendations in such a way that they could not reasonably be considered separate and distinct. Finally, the public body advised that the draft *Terms-of-Reference: Southern Red River Transportation Master Plan* dated August 13, 2013, was a preliminary draft that was not accepted by its officials and in the process of being re-drafted. We note that this record was intended to identify the improvements required to meet current and future transportation service/system needs.

FIPPA provides an applicant with a right of access to records in the custody or under the control of a public body, subject to the limited exceptions set out in the act. In particular, subsection 7(2) of FIPPA provides that the right of access does not extend to information that is excepted from disclosure, or to the remainder of the information in the record, unless the excepted information **can reasonably be severed from the record** [emphasis added].

Having reviewed the records, we found that most of the information in the briefing note could reasonably be expected to reveal advice, opinions, analyses and recommendations developed by or for the public body; this information could be severed under the exception to disclosure provided in clause 23(1)(a) of FIPPA. However, we noted that two of the bullets appeared to contain information that was publicly available and/or was factual in nature. As such, we asked the public body whether it would consider releasing that information to the complainant. On March 5, 2014 the public body provided the complainant with a copy of the revised briefing note in which the additional information was disclosed.

At that time, MIT also provided the complainant with partial access to another briefing note found to be responsive to her request, and originating from another office, dated November 30, 2012. Information from that record was severed under clause 23(1)(a) of FIPPA for the same reasons as originally cited in its October 10, 2013 response letter to the complainant. After reviewing the November 30, 2012 briefing note, we determined that some of the information severed under clause 23(1)(a) was information that again appeared to be publicly available and/or factual in nature. Subsequently, we asked the public body whether it would consider a further release of information to the complainant. On April 16, 2014, MIT issued the complainant a revised response letter, to which was attached the newly-severed version of the November 30, 2012 briefing note. We determined that the public body had disclosed, at that time, additional information as per our recent discussion and that the public body had authority under 23(1)(a) to sever the information that continued to be severed from that record.

Regarding the draft *Terms-of-Reference: Southern Red River Transportation Master Plan*, we note that, just because this record was in draft form, that did not necessarily preclude it from being disclosed. A public body must still make the determination that the information/record would reveal advice, recommendation, etc. within the meaning of clause 23(1)(a).

After reviewing the record, and discussing with the public body its representations in support of its reliance on clause 23(1)(a), we were able to verify that the draft terms of reference was provided for a decision to be made by the decision maker(s) of the public body. The information, if disclosed, would reveal advice, opinions, proposals, recommendations, analyses or policy options developed for the public body as to possible courses of action. We found, therefore, that the public body had discretion under this provision to withhold this record.

### **Did the public body exercise its discretion in a reasonable manner?**

Discretionary exceptions, such as clause 23(1)(a), provide the head of a public body with discretion to disclose information in a record even though it falls within the exception. Although there is no “reasonable expectation of harm test” associated with clause 23(1)(a) of FIPPA, consideration of harm from the release of the information in a record may be a factor in a public body's exercise of discretion.

MIT indicated to our office that, as a matter of policy, it discloses as much information as possible in fulfillment of its obligation under FIPPA. Regarding the records at issue, MIT advised that it conducted a thorough deliberation of the information contained in the records, i.e., it exercised discretion in applying clause 23(1)(a) to the information that continued to be severed from the briefing notes.

In terms of the draft *Terms-of-Reference: Southern Red River Valley Transportation Master Plan*, the public body provided our office with a reasonable explanation as to why it believed it was necessary to withhold the whole record in its entirety. We are of the opinion that MIT considered all of the relevant circumstances in its decision and that it acted in a reasonable manner in exercising its discretion.

Finally, the public body confirmed with our office that it had considered the limits to the exception, as listed under subsection 23(2), and found none to apply.

### **CONCLUSION**

Based on the findings of the ombudsman, and in consideration that the public body initially severed some information later found not to be excepted from disclosure, the complaint is partly 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 Manitoba Infrastructure and Transportation within 30 days after receipt of this report.

May 1, 2014  
Manitoba Ombudsman