

# Manitoba Ombudsman

## REPORT UNDER

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

CASE 2014-0025

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

#### ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISION CONSIDERED: 27(1)(a)

REPORT ISSUED ON JUNE 16, 2014

**SUMMARY:** The complainant made an application for access to the rural municipality for documents related to a proposed water diversion. In particular, the complainant sought access to documents related to the diversion, dated prior to [specified date], 2013 and containing the questions the rural municipality posed to its lawyer and the answers it received from the lawyer. The rural municipality refused access to the records requested under subsection 27(1) of *The Freedom of Information and Protection of Privacy Act* and clause 27(1)(a) in particular. Based upon our review, we found that clause 27(1)(a) applied to the records withheld. The complaint is therefore not supported.

#### THE COMPLAINT

On December 18, 2013 the rural municipality [name removed] (the public body) received an application for access under *The Freedom of Information and Protection of Privacy Act* (FIPPA) from the complainant for access to the following:

*I am requesting documents pertaining to the proposed diversion of water down municipal road allowance located south of sections [section number] and [section number]. In particular, I would like the documents related to the questions asked by the RM and the answers received from the RM's lawyer regarding the diversion. These documents would date prior to [specified date], 2013 when our application and project was denied.*

The public body responded to the request by letter dated January 15, 2014 and advised the complainant that his request for access had been refused under section 27 of FIPPA.

A complaint about refused access was received by our office on January 21, 2014.

## **POSITION OF THE RURAL MUNICIPALITY**

The public body's position is that documentation forwarded by the public body to its legal counsel posing questions or seeking a legal opinion, and documentation received back from the lawyer in response, are subject to solicitor client privilege. The public body takes the position that the records fall under the exception to disclosure contained in section 27 of FIPPA and clause 27(1)(a) in particular.

## **ANALYSIS OF ISSUES AND FINDINGS**

The public body has claimed clause 27(1)(a) of FIPPA to refuse access to the records sought in relation to the water diversion.

Subsection 27(1) of FIPPA provides the head of a public body with the discretion to refuse to disclose information in a record if the information is subject to solicitor-client privilege. The exceptions in subsection 27(1) of FIPPA are class exceptions in that they protect a certain type or kind of information in a record. This exception to disclosure does not contain a reasonable expectation of harm test.

In order for the exception to apply, the information in the record need only fall within one of the clauses listed in subsection 27(1). The exception is discretionary. The head of a public body may refuse to disclose the information described in one of the clauses after a determination has been made that it would be appropriate and reasonable to do so.

### **Does clause 27(1)(a) of FIPPA apply to the record(s) withheld by the public body?**

The exception to disclosure in clause 27(1)(a) of FIPPA gives the head of a public body the discretion to refuse to disclose information that is subject to the common law solicitor-client privilege. Solicitor-client privilege protects all communications of a confidential character between a client and legal advisor that are related to the seeking, formulating or giving of legal advice or legal services.

It is important to note that the privilege belongs to the client, not the solicitor, and that it is not diminished in any way by the fact that the client is a public body. In the context of subsection 27(1)(a) of FIPPA, solicitor-client privilege is interpreted as including both legal advice privilege and litigation privilege.<sup>1</sup>

Legal advice privilege encompasses all confidential communications, verbal or written, between a client and a legal advisor directly related to the seeking, formulating or giving of legal advice or legal assistance, including the legal advisor's working papers which are directly related to the legal advice or assistance. Legal advice privilege applies whether or not litigation is contemplated. To establish that legal advice privilege applies, there must be:

- a communication between solicitor and client;
- which entails the seeking or giving of legal advice; and

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<sup>1</sup> *Blank v. Canada (Minister of Justice)*, [2006] 2 (SCC)

- which is intended to be confidential by the parties.<sup>2</sup>

The policy rationale behind legal advice privilege is that it is intended to facilitate full and frank consideration and discussion of the circumstances in which legal advice is sought, in order that the advice might be informed and effective.

Based on our review of the records at issue and the representations provided by the public body, we are satisfied that the particular records are subject to legal advice privilege. The records consist of communications between solicitor and client regarding the seeking and giving of legal advice. Both the client (the public body) and the solicitor have indicated that they intended the communications to be confidential at all times. The mere fact that the public body acknowledged having sought and received legal advice did not amount to a waiver of privilege in the circumstances. Accordingly, we determined that the information in the records was properly withheld as being subject to solicitor-client privilege under clause 27(1)(a) of FIPPA.

### **SUMMARY OF FINDINGS**

The ombudsman found that the exception in clause 27(1)(a) of FIPPA applied to the withheld information in the records.

### **CONCLUSION**

Based on the ombudsman's findings, the complaint is not supported.

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

June 16, 2014  
Manitoba Ombudsman

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<sup>2</sup> *Solosky v. The Queen*, [1980] 1 SCR 821 (at page 837)

**NOTE:**

In a cover letter to this report, our office shared the following information with the RM:

As a result of communications with the complainant throughout our investigation, it became apparent that the complainant's application for access under FIPPA initially arose out of his desire to understand council's reasons for defeating his water diversion proposal. In a letter to the complainant the RM had simply advised him that "the motion was defeated" and did not provide any further explanation.

The complainant only received clear and comprehensive reasons for the decision after engaging in a statutory appeal process. Our office noted that if the complainant had been provided with clear and comprehensive reasons for council's decision to defeat the motion, he may have been less likely to speculate about and question council's motives, and in this way, his application for access and subsequent complaint may have been avoided.

We provided the RM with a copy of our office's publication, *Understanding Fairness: A Handbook on Fairness for Manitoba Municipal Leaders*, which is intended to assist municipal leaders in achieving fairness in their important and challenging work and to provide them with the tools to help promote fairness in decision making. We suggested that implementing the ideas found on page 18, "Getting Full Value for Your Decisions" would help the RM communicate the reasons for its future decisions in a matter that better demonstrates that the decision makers in fact carefully considered the various relevant factors and made decisions for appropriate and sufficient reasons (as was the case here).