

Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2014-0040

MANITOBA INFRASTRUCTURE AND TRANSPORTATION

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 7(2), 17(1), 17(2)(e), 18(1)(c)(i), (ii), (iii), and 25(1)(n)

REPORT ISSUED ON MARCH 12, 2015

SUMMARY: The complainant submitted an application to Manitoba Infrastructure and Transportation requesting access to construction progress reports. Initially, Manitoba Infrastructure and Transportation (MIT) refused access in full to the records under specific provisions of sections 18 and 25 of FIPPA, on the basis that the disclosure would be harmful to third party business interests and harmful to legal proceedings. As a result of our investigation, the public body issued a revised response to the complainant enclosing the requested records with minimal information redacted. In addition to exceptions previously cited, the public body also relied on exceptions in section 17 to withhold personal information about individuals, on the basis that disclosure would be an unreasonable invasion of privacy. We found that the withheld information was subject to the cited exceptions.

THE COMPLAINT

On November 8, 2013, the complainant requested under *The Freedom of Information and Protection of Privacy Act* (FIPPA), the following records:

The three most recent progress reports on construction of CentrePort Canada Way.

On November 29, 2013, the complainant notified Manitoba Infrastructure and Transportation to narrow her request to the work done by a specific corporate entity. MIT responded to the complainant on December 9, 2013 confirming her instructions as well as advising that access to the requested records had been refused in full in accordance with the exceptions to disclosure set out in subclauses 18(1)(c)(i), (ii), (iii) and clause 25(1)(n). The complainant filed a complaint with our office on February 3, 2014 concerning the public body's decision to refuse access.

INVESTIGATION

During the course of our investigation, based on our review of the withheld records and the public body's initial representations, we enquired of Manitoba Infrastructure and Transportation whether disclosure of the records could be reassessed in accordance with subsection 7(2) of FIPPA, which provides as follows:

Severing information

7(2) The right of access to a record does not extend to information that is excepted from disclosure under Division 3 or 4 of this Part, but if that information can reasonably be severed from the record, an applicant has a right of access to the remainder of the record.

The public body agreed to reconsider its decision, and we were advised in late December that the public body would proceed to sever the records, following which a revised access decision would be issued to the complainant.

POSITION OF MANITOBA INFRASTRUCTURE AND TRANSPORTATION

In its revised response letter of February 25, 2015, the public body took the position that the requested records contained information, which if disclosed, would be considered an unreasonable invasion of a third party's privacy, could reasonably be expected to harm a third party's business interests, and could reasonably be expected to be harmful to legal proceedings. Enclosed in this letter were copies of the three most recent progress reports on the construction of CentrePort Canada Way, providing partial access to the requested information. The body of each construction report was approximately 30 pages, and these were released with minimal severing. Two appendices to each report, comprised of non-conformance report logs (approximately 3 pages each) and detailed construction schedules (approximately 10 pages each) were withheld in full, as were a detailed invoice and a letter of credit attached to each report.

Manitoba Infrastructure and Transportation applied subsection 17(1) in conjunction with clause 17(2)(e) of FIPPA to withhold third party information the disclosure of which would be considered an invasion of privacy as the information related to the individual's employment history.

With respect to the application of clauses 18(1)(c)(i), (ii) and (iii), the public body took the following position:

The disclosure of the requested [i.e., redacted] information could cause them [third parties] a competitive disadvantage since it would alert the market and other competitors to previously negotiated positions. In addition the information requested if disclosed could reasonably be expected to interfere with contractual or other negotiations of the third party and result in significant financial loss to the third party.

Finally, "the Department is exercising its right to refuse to disclose the requested information as the disclosure could be injurious to the conduct of existing or anticipated legal proceedings."

In support of its position, Manitoba Infrastructure and Transportation relied on the following FIPPA provisions in its refusing access to the withheld information:

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,

(iii) result in significant financial loss or gain to a third party.

Disclosure harmful to law enforcement or legal proceedings

25(1) *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to*

(n) be injurious to the conduct of existing or anticipated legal proceedings.

ANALYSIS OF ISSUES AND FINDINGS

1. Do the mandatory exceptions to disclosure provided by subsection 17(1) and clause 17(2)(e) of FIPPA apply to the withheld information?

Section 17 is a mandatory exception to disclosure. A public body is bound not to disclose personal information if the disclosure would be an unreasonable invasion of a third party's privacy. Subsection 17(2) describes what an unreasonable invasion of privacy is for the purposes of applying the exception to disclosure in subsection 17(1).

Subsection 17(2) describes various kinds of personal information which are so sensitive that disclosure of same is deemed or considered to be an unreasonable invasion of a third party's privacy, unless one of the circumstances in subsection 17(4) applies.

As part of our investigation, we requested that Manitoba Infrastructure and Transportation provide us with both severed and unsevered copies of the responsive records for our review. The severed information consisted of a small number of names of employees of contractors, either in the context of safety management meetings, or in the context of describing new hires or departures. Based on our review, we determined that the records contained third party information which related to a third party's employment and was subject to clause 17(2)(e). We assessed the considerations listed in subsection 17(4) and concluded that none of the listed elements were applicable to the information in question.

The release of the severed personal information would be an unreasonable invasion of a third party's privacy. Accordingly, we found that clause 17(2)(e) applied to the withheld information and that MIT was required to refuse access to this information under subsection 17(1).

2. Would disclosure of the information withheld under subclauses 18(1)(c)(i), 18(1)(c)(ii) and 18(1)(c)(iii) be harmful to a third party's business interests?

Public bodies can acquire a considerable amount of information about the business activities of third parties. The exceptions in subsection 18(1) of FIPPA impose a duty on the head of a public body to refuse to disclose specified information about the business interests of a third party. It is recognized that much of this information is a valuable business asset and that disclosure to another could harm the third party's business interests.

Clause 18(1)(c) of FIPPA is a mandatory exception to the right of access under section 7 of FIPPA. The head of a public body is required to (*shall*) refuse to disclose third party business information described in clause 18(1)(c) if any of the harms described in subclauses 18(1)(c)(i) to (v) could reasonably be expected to result from disclosure. In other words, where the information in question is subject to any of these exceptions, then FIPPA prohibits a public body from disclosing that information.

In order for the exception in clause 18(1)(c) to apply, the information must be *commercial, financial, labour relations, scientific or technical information*. Unlike clause 18(1)(b), the exception in clause 18(1)(c) applies even if the information was not provided or supplied to the public body by the third party. In *Kattenburg v. Manitoba (Industry, Trade and Tourism)* (1999), 143 Man. R. (2d) 42 (MB QB), per Steele, J., the court indicated that to be considered reasonable, the likelihood of harm or injury "*must be proven on the balance of probabilities to be a reasonable expectation of probable prejudice or interference as opposed to a possible likelihood*" and then went on to equate possible with "*speculative or fanciful*".

The exceptions contained in subclauses 18(1)(c)(i), 18(1)(c)(ii) and 18(1)(c)(iii) involve a reasonable expectation of harm test. The focus of the exceptions is not the source of the information, but rather, whether or not the specified harm or damage might reasonably be expected to result from disclosure. The term 'harm' suggests that the third party's competitive position would be damaged as a result of the disclosure of the information. The public body was relying on the mandatory exceptions to disclosure set out in subclauses 18(1)(c) (i), (ii) and (iii) of FIPPA to withhold the requested records.

We were advised that the public body had consulted with the third party about release of similar information in the past and that the third party was not prepared to consent to the disclosure of certain information contained in the records on the basis that such disclosure would harm its competitive position, interfere with its contractual or other negotiations and would reasonably be expected to result in financial loss. The third party consistently treated the certain information contained in the requested records as confidential.

We closely scrutinized the information being excepted from disclosure and determined that this body of information constituted commercial and in some cases, financial and/or technical information of the third party, such as detailed item pricing and invoicing, as well as information about non-conformances and the methods by which these were resolved. Clearly, this information would be valuable to a competitor business, and its disclosure could reasonably be expected to harm the third party's competitive position, interfere with its negotiations and/or result in significant financial loss or gain to a third party. Accordingly, we found that disclosure would reasonably be expected to harm the third party's business interests and that Manitoba Infrastructure and Transportation was required to refuse access to this information under clauses 18(1)(c)(i), 18(1)(c)(ii) and 18(1)(c)(iii).

3. Does the discretionary exception to disclosure provided by clause 25(1)(n) apply to the withheld information?

Subsection 25(1) of FIPPA specifies that the head of a public body has the discretion to refuse to disclose to an applicant information which could reasonably be expected to harm a range of law enforcement activities, legal proceedings, or other specified investigative, regulatory, adjudicative and protective functions of a public body.

The exception to disclosure contains a reasonable expectation of harm test. In order for this exception to apply, the head of the public body must determine whether disclosure of the information could reasonably be expected to cause the harm associated with the release of the withheld information.

Both the third party and the public body maintained that disclosure of certain information by the Manitoba government would be injurious to the conduct of existing or anticipated legal proceedings, and would therefore be excepted from access under clause 25(1)(n) of FIPPA. The construction contract between Manitoba (MIT) and the third party contained specific provisions with respect to dispute resolution. The assessment of responsibility and damages with respect to any delays in construction of CentrePort Canada Way are currently being contested by the parties through arbitration, pursuant to the said dispute resolution provisions. Both the public body and the third party were of the view that disclosure of information relating to any unresolved issues would be injurious to the conduct of these legal proceedings.

We found that the exception to disclosure in clause 25(1)(n) applied to portions of the severed information and that its disclosure could reasonably be expected to be injurious to the conduct of existing legal proceedings. We found that the exercise of discretion by Manitoba Infrastructure

and Transportation to withhold the severed information was reasonable, as discretion was exercised in a manner consistent with the purpose of the exception.

CONCLUSION

Based on our findings, the complaint is supported in part.

In accordance with subsection 67(3) of *The Freedom of Information and Protection of Privacy Act*, the complainant may file an appeal of Manitoba Infrastructure and Transportation's decision to refuse access in part to the Court of Queen's Bench within 30 days following receipt of this report.

March 12, 2015
Manitoba Ombudsman