

Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASES 2014-0250, 2014-0251

CITY OF BRANDON

ACCESS COMPLAINTS: REFUSALS OF ACCESS

PROVISIONS CONSIDERED: 9, 12(1)(c)(i)

REPORT ISSUED ON AUGUST 26, 2014

SUMMARY: An applicant requested access to information under *The Freedom of Information and Protection of Privacy Act* (FIPPA or the act) to records of two calls to the City of Brandon 911 Emergency Service. The city provided a response refusing access under subclause 12(1)(c)(i) of FIPPA (records did not exist or could not be located) explaining the recordings could not be accessed as they were made on an obsolete recording system that was no longer in use. The city later determined that the CD containing the recordings in question had been lost or misplaced. The ombudsman found that the decision to refuse access under subclause 12(1)(c)(i) was in compliance with FIPPA. However, the ombudsman also found that the city had not met its duty to assist the applicant by responding openly, accurately and completely as required under section 9 of FIPPA.

THE COMPLAINT

On April 3, 2014 the complainant made two requests to the City of Brandon (the city or the public body) under *The Freedom of Information and Protection of Privacy Act* (FIPPA or the act) for access for the following records:

- 1) *Transcript record of 911 Emergency Telephone calls made as per on my detailed phone bill [date in 2009- name of caller] [time] [and] seek a copy of telephone call – either recording or written transcript format.*
- 2) *Transcript record of 911 Emergency Telephone calls made as per on my detailed phone bill [date in 2009- name of caller] [time] and seek a copy of telephone call – either recording or written transcript format.*

Along with the requests, the complainant provided photocopies of an itemized phone bill clearly showing charges for two calls to 911 Emergency at the times specified. The calls took place 40 minutes apart on the same date in 2009.

The city made two responses to the complainant on April 28, 2014 refusing access to the requested information under subclause 12(1)(c)(i) of FIPPA (record does not exist or cannot be located).

A complaint of refused access was received in our office on May 26, 2014.

POSITION OF THE CITY OF BRANDON

The city issued a decision to the complainant which stated that access to the requested recordings was refused under subclause 12(1)(c)(i) of FIPPA, which reads:

Contents of response

12(1) *In a response under section 11, the head of the public body shall inform the applicant*

(c) if access to the record or part of the record is refused,

(i) in the case of a record that does not exist or cannot be located, that the record does not exist or cannot be located,

In its decision letter to the complainant, the city explained that the specific records requested could not be accessed as recordings from 2009 were stored in a call recording system that was no longer in use. The city explained that efforts had been made to retrieve the requested recordings but technological obsolescence had made them impossible to access.

The city also explained that its E911 Call Centre operates under *The Emergency 911 Public Safety Answering Point Act* and that retention of recordings is governed by *Regulation 60/2005 of The Emergency 911 Public Safety Answering Point Act* which states that audio logging of

recordings must be securely retained by the Public Safety Answering Point service for at least two years after they are made. The city further explained:

Considering the retention time identified in the regulation, and the costs associated with converting old records to be accessible [sic] the new call centre system, a migration of calls more than two years old has not occurred. Consequently, these records are no longer accessible.

MATTERS RAISED BY THE COMPLAINANT

In correspondence accompanying the complaint, the complainant described unsuccessful efforts taken since 2009 try to prove the existence of the recordings in question. The complainant further related that it was not until November of 2013 that the complainant received a letter from an officer at the local RCMP detachment who offered an explanation for the failure to locate the recordings. The complainant quoted the officer from the letter in question as follows:

I [the officer] further contacted the Manitoba 911 call centre and requested they locate the records for the dates in question and provide them to me so that I might listen to those calls. I was informed that those records were lost during a physical move made by the 911 Call Centre in previous years.

Although this communication stated the recordings could not be located as they had been lost in a move, it was still the first confirmation the complainant had received that the recordings had ever existed. Even though the complainant had been told the recordings had been lost, the complainant made an access to information request to the City of Brandon for the recordings in question. The complainant was confused by the city's response which seemed to indicate that the recordings had apparently not been lost, although they could no longer be accessed.

In the complaint correspondence, the complainant explained that the apparent uncertainty over the whereabouts of the 911 recordings that the complainant had been attempting to locate caused concerns about their general security and accessibility. The complainant also questioned the two year retention requirement for 911 recordings as the complainant was personally aware of instances where 911 recordings had been accessed "for cases dating much farther back than two years."

ANALYSIS OF ISSUES AND FINDINGS

Was the City of Brandon's decision to refuse access under subclause 12(1)(c)(i) of FIPPA compliant with FIPPA?

Subclause 12(1)(c)(i) of FIPPA allows a public body to refuse access to information if the requested records do not exist or cannot be located. In considering a complaint of refused access under FIPPA where the public body has cited subclause 12(1)(c)(i), our office will investigate whether the circumstances show that reasonable efforts were made to search for and locate the responsive records. We asked the city for information about its search, the characteristics of its 911 recording system and the records it creates.

The city explained that prior to March 2009 E911 Call Centre conversations were captured by a Dictaphone type recorder and copied onto CDs holding approximately six to eight weeks of calls for playback purposes. (Currently conversations are captured by optical discs using the Nice Focus III Recorder and copied to DVDs.) The city's FIPPA officer explained that he had believed that the obsolete CD format would prevent access. However, on receiving notice of our investigation he consulted with the city's Information Technology department and it was determined that obsolescence should not be an issue. A search for the requested recordings was then made and it was at this point it was discovered that the CD containing the requested records – containing calls received between January 15, 2009 and March 17, 2009 – could not be located.

The changeover to the new system took place around March 4, 2009. The city speculated that as the missing recording was the final recording made on the old system, the disc may have been misplaced when the changeover was made as an E911 Call Centre move also took place around the same time. This confirmed the account of the RCMP officer as related by the complainant. Our office asked if the old machine was still around and if so whether or not the disc could still be in it. We were advised the disc was not in the machine as the machine had since been used for playback purposes supporting the belief that recordings from the old system could still be playable.

Although the reasons for refusing access under subclause 12(1)(c)(i) of FIPPA changed during the course of our investigation, it remains that the requested recordings cannot be located. Our office found that the city was authorized to refuse access under subclause 12(1)(c)(i) of FIPPA.

Did the City of Brandon meet its duty to assist the complainant as required by section 9 of FIPPA?

The duty to respond openly and accurately requires having sufficient information upon which to base the access decision, such as through conducting an adequate search for responsive records. If adequate searches have not been conducted, all relevant records will not be identified and the resulting response will be inaccurate and incomplete, as occurred in this case. The city assumed that, as the requested recordings had been made on a system that was no longer in use, the requested recordings would not be playable. However, after a consultation with its Information Technology department, this assumption was found to be erroneous.

A public body has a duty to go beyond assumptions and take reasonable steps to assure itself by making inquiries and informing itself of the facts early in the access process. For example, with regard to the recordings that were the subject of this complaint, the assumption that they could not be played internally may have been proven true after reasonable investigation; however, it could also have been found that an external service provider may have been able to recover the recordings (albeit for a fee).

Our office found that the city did not meet its duty to assist the complainant when the initial request for access was made resulting in confusion for the complainant and a complaint to our office.

OTHER MATTERS – SECURITY OF RECORDINGS

Section 41 of FIPPA advises that a public body shall protect personal information by making reasonable security arrangements against such risks as unauthorized access, use, disclosure or destruction. Our office asked the City of Brandon about the security of E911 Call Centre recordings and the precautions in place to prevent the loss or destruction of information.

The city explained that the investigation of this complaint led to an examination of E911 Call Centre recording retention and security practices. As a result of this investigation an inventory of City of Brandon E911 Call Centre recordings dating back to 2000 was made. It was found that a disc containing records for part of April 2009 was also missing but all other discs were accounted for. The city explained that inventories of E911 Call Centre recordings were not conducted previously. However, as a result of this complaint, the city records manager will propose that inventories be performed on a periodic basis in the future. Our office asked the city about security procedures currently in place to prevent unauthorized access or loss and safeguard the integrity of E911 Call Centre recordings. These were explained to us and we have found them to be reasonable in the circumstances.

The City of Brandon also explained that the investigation of this complaint “highlighted the need for the City to critically examine and formalize its records retention practices” for all records, not just the E911 Call Centre records that were the subject of this request. The city’s Records and Information Management office has prepared a draft records scheduling program which it hopes will eventually lead to the development of a records management by-law for the City of Brandon. This would lead to a better defined retention time for E911 Call Centre recordings as well as other municipal records.

CONCLUSION

Based upon the ombudsman’s findings, the complaint is partly supported.

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

August 26, 2014
Manitoba Ombudsman