

Manitoba mbudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2015-0019

MANITOBA JUSTICE

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 12(2)(a) and 25(1)(n)

REPORT ISSUED ON MAY 8, 2015

SUMMARY: The complainant requested records from Manitoba Justice regarding the place of birth of a deceased individual whose estate had escheated (transferred) to the Manitoba government. Manitoba Justice refused to confirm or deny the existence of records regarding the place of birth of the deceased, specifically the name of the city in which the deceased was born, in accordance with subsection 12(2) of *The Freedom of Information and Protection of Privacy Act*. Our office found that Manitoba Justice was authorized to make this decision and that it did not act unreasonably in exercising its discretion to refuse to confirm or deny the existence of records.

THE COMPLAINT

On December 10, 2014 Manitoba Justice received the complainant's request for access to the following records under *The Freedom of Information and Protection of Privacy Act* (FIPPA):

I write to request information from the Office of the Public Guardian and Trustee/Civil Legal Services for the Province of Manitoba for the purposes of advancing and administering the estate of [name of the deceased] who resided in the city of Winnipeg, Manitoba and died on [date of death].

This request is specifically to receive the following information, which includes:

- Marital status of the deceased*
- The name of the deceased's spouse*
- The names of the deceased's parents*
- Occupation of the deceased*
- Date of birth of the deceased*
- Place of Birth of the deceased*

*-Age of the deceased at the date of death
-Last known address of the deceased*

*Thank you in advance for your efforts.
Sincerely yours, [name of complainant]*

Manitoba Justice is a department of the Manitoba government and, as such, is a public body subject to the application of FIPPA.

The public body responded to the application by letter dated January 6, 2015. In its response, the public body advised the complainant that his request for access was granted, in part, and provided the complainant with access to the information he requested where it was contained in the public body's records. The public body further advised the complainant that, pursuant to clause 12(2)(a) of FIPPA, it was refusing to confirm or deny the existence of records containing the name of the city the deceased was born in and his request for access was refused to that extent.

The public body went on to advise the complainant that, if records containing the name of the city the deceased was born in existed, the information in them would fall within the exception to disclosure in clause 25(1)(n) of FIPPA. Finally, the public body advised that the information in the records, if they existed, would also fall within the exception to disclosure in clause 28(1)(e) of FIPPA.

A complaint about the public body's decision, to refuse to confirm or deny the existence of records containing the name of the city the deceased was born in, was received by our office on February 2, 2015.

POSITION OF MANITOBA JUSTICE

The public body relied on clauses 12(2)(a), 25(1)(n) and 28(1)(e) of FIPPA which provide as follows:

Refusal to confirm or deny existence of record

12(2) *Despite clause (1)(c), the head of a public body may, in a response, refuse to confirm or deny the existence of*

(a) a record containing information described in section 24 or 25; or

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.

Disclosure harmful to economic and other interests of a public body

28(1) *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to harm the economic or financial interests or*

negotiating position of a public body or the Government of Manitoba, including the following information:

...

(e) information the disclosure of which could reasonably be expected to result in an undue loss or benefit to a person, or premature disclosure of a pending policy decision, including but not limited to,

(i) a contemplated change in taxes or other source of revenue,

(ii) a contemplated change in government borrowing,

(iii) a contemplated change in the conditions of operation of a financial institution, stock exchange, or commodities exchange, or of any self-regulating association recognized by The Manitoba Securities

Commission under an enactment of Manitoba, or

(iv) a contemplated sale or purchase of securities, bonds or foreign or Canadian currency.

The public body advised the complainant that it had elected to refuse to confirm or deny the existence of records containing the name of the deceased's city of birth "in order to maintain its ability to determine the legitimacy of a future claim for the reversal of the escheated estate" and "to ensure that any payments resulting from escheat reversal be made to actual heirs." The public body further advised the complainant that the "only way for it to ensure that any payment is made to an actual heir is for independent evidence, not gleaned from Manitoba's records, supporting the entitlement to the estate, be provided to Manitoba from a potential heir."

The public body took the position that, if records existed, disclosure could reasonably be expected to be injurious to anticipated legal proceedings should escheatment reversal be pursued in court. The public body further maintained that information in records, if they existed, could be used by an individual who might not otherwise be an heir, to gain an undue benefit, at the expense of an actual heir.

PURPOSES OF FIPPA

One of the purposes of FIPPA, as set out in clause 2(a), is to allow any person a right of access to records in the custody or under the control of a public body, subject to the limited and specific exceptions set out in sections 17 through 32 of the legislation. The right of access to records, contained in freedom of information legislation such as FIPPA, promotes the public interest by ensuring government decision making is accountable and transparent.

The right of access is subject to exceptions set out in the legislation, which serve to protect other important public interests, including but not limited to public and individual health and safety, the privacy of individuals and the integrity of the justice system. These exceptions recognize that, in certain circumstances, the public interest is best served by withholding rather than releasing records.

The right of access is exercised by making an application for access, under Part 2 of FIPPA, to records in the custody or control of a public body such as Manitoba Justice. To ensure the purposes of the legislation are met, FIPPA imposes several obligations on a public body that

receives a request for access. The obligations include the duty to assist an applicant (under section 9), a requirement to respond within a specific time period (under section 11) and a requirement to provide certain information to an applicant in responding to an application (under section 12). The requirements of section 12 of FIPPA are relevant to this complaint. To ensure that these requirements are met, FIPPA provides a means of independent review and redress.

FRAMEWORK OF THE OMBUDSMAN'S REVIEW

Clause 12(1)(c) of FIPPA requires, among other things, that a public body that refuses access to a requested record shall advise the applicant whether the record in question does not exist or cannot be found, or, in the case of a record that does exist, the reasons for the refusal and the provisions of FIPPA under which access is refused.

Subsection 12(2) of FIPPA excuses public bodies from the above referenced requirements in certain circumstances, in recognition of the fact that sometimes even the act of acknowledging that records exist (or confirming that they do not) would communicate information that could cause significant harm. In such circumstances, subsection 12(2) gives public bodies the discretion to refuse to confirm or deny the existence of records.

Clause 12(2)(a) of FIPPA is a discretionary provision and states as follows:

Refusal to confirm or deny existence of record

12(2) *Despite clause (1)(c), the head of a public body may, in a response, refuse to confirm or deny the existence of*

(a) a record containing information described in section 24 or 25; or

To rely on this provision, the head of a public body must first determine that if records existed, they could be withheld under one or more clauses of section 24 or 25 of FIPPA. The head of a public body must then exercise discretion to determine whether, in the circumstances, there should be a refusal to confirm or deny the existence of records or, in the alternative, that there should be a refusal of access either on the basis that the records do not exist or on the basis that they can be withheld under specific provisions of section 24 or 25.

Discretion is to be exercised in good faith, having regard to all relevant considerations in each individual case, and is to be guided by the purposes of the legislation under which the decision maker is empowered to act. As such, in relying on clause 12(2)(a) in this case, the head of the public body must weigh the public interest in accountability and increased understanding of government decision making against the public interest in protecting law enforcement or legal proceedings from harm or injury (under section 25).

Limitations are placed on the ombudsman when reviewing any complaint that might be made about a public body's discretionary decision to refuse to confirm or deny the existence of records that have been requested. In particular, clause 55(3)(b) of FIPPA provides that:

Reasonable precautions to avoid disclosure

55(3) *In conducting an investigation and in performing any other duty or exercising any power under this Act, the Ombudsman, and anyone acting for or under the direction of the Ombudsman, shall take every reasonable precaution to avoid disclosing and shall not disclose*

(b) whether information exists, if the head of a public body is authorized to refuse to confirm or deny that the information exists under subsection 12(2).

As a result, in conducting an investigation and issuing a report about a public body's decision to rely on subsection 12(2), our office is prohibited from disclosing information as to the existence or non-existence of records.

For purposes of our review of a public body's decision to rely on clause 12(2)(a), we consider whether the information contained in the records, if they existed, would be subject to section 24 or 25 and, if so, whether a refusal to confirm or deny the existence of the requested records would be a reasonable exercise of discretion. In accordance with subsection 55(3) of FIPPA, nothing stated in this report should be taken as confirming the existence or non-existence of records containing the requested information.

ANALYSIS OF ISSUES AND FINDINGS**What records are at issue?**

As part of his December 10, 2014 application for access, the complainant requested information about the deceased's "Place of Birth" from the public body. The public body provided a response wherein it advised the complainant that the deceased was born in [country]. We note that this information was readily available in an obituary notice in the Winnipeg Free Press Archives.

The public body further advised the complainant that it was refusing to confirm or deny the existence of a record or records containing information as to "the name of the city the deceased was born in", as a record or records of this nature would be excepted from disclosure under clause 25(1)(n) of FIPPA.

If a record or records did exist, would information in the record or records be subject to clause 25(1)(n) as claimed?

In certain circumstances, the mere knowledge that a record exists will cause harm. For this reason, subsection 12(2)(a) of FIPPA permits the head of the public body to refuse to confirm or deny the existence of a record containing information described in section 25.

Clause 25(1)(n) of FIPPA permits a public body to refuse to disclose information in a record that could reasonably be expected to injure (to hurt or harm) the conduct (the management, direction and/or carrying on) of existing or anticipated legal proceedings. For this purpose, we note that a legal proceeding includes a civil proceeding or inquiry in which evidence may be given and which is brought or instituted for the purpose of acquiring a right.

In this instance, the public body has refused to confirm or deny the existence of a record or records containing information as to the deceased's city of birth. The public body provided our office with arguments to support its position that the mere knowledge that such a record did or did not exist could reasonably be expected to harm anticipated legal proceedings related to the escheatment of the deceased's estate.

Based upon our investigation, and for the reasons provided to our office by the public body during the course of this investigation, we find that if records containing information as to the deceased's "Place of Birth" or "the name of the city the deceased was born in" existed, which is neither confirmed nor denied, the information would be excepted from disclosure under clause 25(1)(n) of FIPPA.

Did Manitoba Justice reasonably exercise its discretion in relying on clause 12(2)(a)?

Having concluded that records containing information as to the deceased's city of birth, if they existed, would contain information described in section 25, we must also determine if the public body's exercise of discretion under clause 12(2)(a) of FIPPA was reasonable in the circumstances.

Subsection 12(1) of FIPPA sets out the specific information that must be included in a public body's response to an access applicant. For example, if a record containing information as to the deceased's city of birth did not exist, the public body would be required by clause 12(1)(c)(i) of FIPPA to inform the complainant of that fact. On the other hand, if a record containing information as to the deceased's city of birth existed and the public body simply refused access to it under section 25, it would be required by clause 12(1)(c)(ii) of FIPPA to confirm that a record existed and to provide specific reasons why the exception cited applied to specific information within the record. In this case, advising the complainant that a record did not exist could be tantamount to the public body admitting that it did not have any information available against which to "test" a putative heir's claim to the escheated estate.

The public body advised our office that, in this case, it had determined that the public interest protected by section 25 of FIPPA could best be served by simply refusing to confirm or deny the very existence of a record under clause 12(2)(a) of FIPPA. In doing so, the public body reasoned that the mere knowledge that a particular record did or did not exist could, on its own, be sufficient to cause the harms that the public body advised it was seeking to avoid. The public body exercised its discretion to refuse to confirm or deny the existence of records in order to protect the integrity of and avoid injury to anticipated legal proceedings with respect to escheatment reversal.

Having considered the purposes of FIPPA and the interests protected by section 25 and clause 12(2)(a) of FIPPA, we find that the public body exercised its discretion in a reasonable manner when it refused to confirm or deny the existence of records containing information as to "the name of the city the deceased was born in."

Does clause 28(1)(e) apply?

Based upon our findings, it is not necessary to consider the public body's reliance on this exception to disclosure. We note, however, that the discretion to confirm or deny the existence of a record under clause 12(2)(a) of FIPPA is limited to a record which, if it existed, would contain information described in section 24 or 25 of FIPPA.

CONCLUSION

Based upon the above 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 file an appeal of Manitoba Justice's decision to refuse access to the Court of Queen's Bench within 30 days following the receipt of this report.

May 8, 2015
Manitoba Ombudsman