

Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2015-0041

MANITOBA HEALTH, HEALTHY LIVING AND SENIORS

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 18(1)(c)(i)(ii), 18(3), 18(4)

REPORT ISSUED ON MAY 14, 2015

SUMMARY: The complainant requested access to a copy of an agreement including any tariff schedules between the Manitoba government and the Manitoba Chiropractors Association (MCA). Manitoba Health, Healthy Living and Seniors (MHHS) consulted with the MCA as required under FIPPA subsection 33(1) (notice to third party) and initially refused access in full. In the course of our investigation, MHHS provided partial access to the agreement with some information continuing to be severed under the exceptions described in sub-clauses 18(1)(c)(i) and (ii) of FIPPA (disclosure harmful to a third party's business interests). The ombudsman found that MHHS appropriately applied the exception allowed under subclause 18(1)(c)(ii) to the information that continued to be severed. The complaint of refused access was not supported. (After this investigation concluded, the Manitoba government amended the *Chiropractic Services Insurance Regulation*, making the amount of the benefit for insured chiropractic services publicly available.)

THE COMPLAINT

On January 20, 2015 the complainant made a request to Manitoba Health, Healthy Living and Seniors (MHHS or the public body) for access to the following information under *The Freedom of Information and Protection of Privacy Act* (FIPPA):

A copy of the agreement between the province and the Manitoba Chiropractors Association that takes effect April 1, 2015 and a copy of any summaries of rate/tariff changes for specific chiropractic services contained in the new agreement.

MHLS identified a responsive record. As required under subsection 33(1) of FIPPA when a public body is considering giving access to a record the disclosure of which might affect the business interests of a third party as described in subsections 18(1) or 18(2), MHLS consulted with the Manitoba Chiropractors Association (MCA). The MCA submitted written representations objecting to the disclosure of any part of the responsive record.

A decision regarding access to this information was issued on February 19, 2015. MHLS refused access to the requested information in full, citing the exceptions allowed under sub-clauses 18(1)(c)(i) and (ii) of FIPPA (disclosure harmful to a third party's business interests). In order to assist the complainant, MHLS did provide a brief overview of the agreement between MHLS and the MCA, explaining that the term of the requested agreement was five years and the purpose was to establish the rates and conditions of payment for insured chiropractic services in Manitoba.

A complaint of refused access with regard to this information was received in our office on February 26, 2015.

POSITION OF MANITOBA HEALTH, HEALTHY LIVING AND SENIORS

In its decision letter to the complainant MHLS explained that the information contained in the responsive record relates to the rates paid for services and this information is financial in nature. It was also explained that the disclosure of this information could compromise the competitive position of the MCA by interfering with the MCA's contractual negotiations with other parties, thus having a direct impact on the MCA's membership.

MHLS also explained that it had considered whether the information requested would fall under the limitation to the exceptions set out in subsection 18(4) (disclosure in the public interest). On deliberation Manitoba Health was of the view that the possible harm that could come to the MCA outweighed any of the considerations for disclosure set out in subsection 18(4).

POSITION OF THE COMPLAINANT

In making his complaint, the complainant explained that he rejected the public body's explanation for refusing access to a copy of the new agreement between Manitoba and the MCA regarding payments for chiropractic services. The complainant stated he did not believe that harm would result to the MCA membership if details of their five year agreement with the province were released. In making this assertion, the complainant reasoned that the agreement applied to all Manitoba chiropractors so no one chiropractor would benefit over the others if the terms of the agreement became known. The complainant also noted that Manitoba is the only

province that covers a portion of patient fees for chiropractic services. The complainant asserted that it was in the public interest to know the details of the province's new agreement with the MCA just as it is in the public interest to know the details of payment contracts with doctors, nurses and civil servants.

The complainant acknowledged that the MCA also negotiates service agreements with Manitoba Public Insurance and the Workers Compensation Board of Manitoba; however, he could not see the harm that would result to the MCA membership if details of their agreement with the province were made public.

PRELIMINARY MATTERS

In the course of our investigation of this complaint, MHHLS advised our office that the MCA had withdrawn its objections to disclosure of the agreement, with the exception of portions of that section dealing with benefit amounts to be paid in respect of chiropractic services. As a result MHHLS was authorized to give the complainant access to a copy of the agreement between Manitoba and the MCA, with some information continuing to be severed. Accordingly, on May 7, 2015 MHHLS issued a revised decision in response to the complainant's request for access to information.

A copy of the the four page agreement between Manitoba and the MCA for insurance coverage of chiropractic services (scheduled to take effect April 1, 2015) was provided to the complainant. The majority of the section titled 'Benefit Amounts for Insured Chiropractic Services,' which set out benefit amounts to be paid in respect of insured chiropractic services over the term of the contract, continued to be severed under the exceptions to access allowed by subclauses 18(1)(c)(i) and (ii) of FIPPA.

DISCUSSION OF ISSUES AND FINDINGS

Do the mandatory exceptions to disclosure as set out in subclauses 18(1)(c)(i) and (ii) of FIPPA apply to the information that continues to be withheld?

Following MHHLS's revised decision concerning access, our investigation considered the application of the cited exceptions to only that information which continued to be withheld. In a complaint about a refusal of access, the onus is on the public body to support its decision by demonstrating how the claimed exceptions apply.

In refusing access to the requested information, MHHLS cited the exceptions to access allowed under subclauses 18(1)(c)(i) and (ii) of FIPPA, which read:

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,

The intent of subsection 18(1) is to keep confidential third party information of particular types that would not normally be known outside the third party. The exceptions to access allowed by subsection 18(1) recognize that third party business information may be a unique and valuable business asset, the disclosure of which would harm the third party's business interests.

The exceptions allowed under subsection 18(1) are mandatory. A public body is required to refuse (*shall refuse*) to disclose third party business information if it is shown to be one of the types described under 18(1). However, the application of subsection 18(1) is limited if subsections 18(3) (specific limitations to the application of 18(1) and (2)) or 18(4) (disclosure in the public interest) can be shown to apply.

In applying the exceptions allowed under clause 18(1)(c), the focus is not the source of the information but, rather, whether or not the harm or damage specified in subclauses 18(1)(c)(i) to (v) could reasonably be expected to result from disclosure. The harms must 'reasonably be expected' to occur (harm must be likely, but need not be a certainty). The test for what is 'reasonable' as applied in Manitoba was set out 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*".

Clause 18(1)(c) describes a 'class exception' in that it excepts certain types of information from access. In order for the exception to apply the information must be commercial, financial, labour relations, scientific or technical information. Financial information is information relating to the monetary resources of a company and may include *pricing practices*, profit and loss data, and overhead and operating expenses. Our review of the information severed from the agreement between Manitoba and the MCA confirmed that this information is financial information related to fees for chiropractic services.

Representations provided to our office indicated that the MCA is currently in negotiations with another large public body concerning the renewal of a recently expired agreement in respect of benefits payable for chiropractic services. MHHLS represented that the competitive position of the MCA membership with regard to its negotiations with other third parties would be harmed if the terms of its agreement with Manitoba became known. The loss of a third party's competitive advantage resulting from the disclosure of financial information is the type of harm described in subclause 18(1)(c)(i). With respect to the interpretation of subclause 18(1)(c)(i), our office consulted the 'Manitoba FIPPA Resource Manual' (the manual).¹ While our office is not bound by the information contained in the manual, we frequently consider it as it was created by the Manitoba government as a reference to assist public bodies in meeting the requirements of FIPPA. The manual explains that there can be "harm" to the competitive position of a third party

¹ Found online at http://www.gov.mb.ca/chc/fippa/public_bodies/resource_manual/index.html.

even if there is no immediate loss. However, for the exception in paragraph 18(1)(c)(i) to apply there must be a competitive community or an existing or potential business rival. Thus, harm to the competitive position of a third party would require that there be a competitor with which the third party (the MCA) is currently (or soon will be) competing for business.

Our office notes that under the terms of *The Chiropractic Act* all those persons licensed to practice as chiropractors in Manitoba are members of the Manitoba Chiropractors Association. Thus, in its negotiations with third parties with regard to fees for the provision of chiropractic services there would be no competitors against whom the MCA (representing its membership) competes for business. Our office finds that MHHS has not provided representations which establish that the competitive position of the MCA members would be harmed by the release of the severed information. We therefore concluded that subclause 18(1)(c)(i) does not apply to the financial information that continues to be severed from the agreement between Manitoba and the MCA.

However, the harm described in subclause 18(1)(c)(ii) takes the form of interference with contractual or other negotiations. As noted, MHHS has provided our office with representations which indicate that the MCA is currently in contractual negotiations with another large public body. Our investigation has concluded that the exception to access allowed under subclause 18(1)(c)(ii) would apply to financial information which, if disclosed, would reveal payments to be made in respect of insured chiropractic services as set out in the agreement between Manitoba and the MCA. The ombudsman finds that the release of the information severed from the agreement between the province and the MCA could reasonably be expected to have a negative impact (*interfere with*) those negotiations and this information should continue to be severed from the record released to the complainant.

Do any of the limitations to the application of sub-clause 18(1)(c)(ii) set out in subsection 18(3) apply?

Subsection 18(3) sets out limitations to the application of subsection 18(1) as follows:

Exceptions

18(3) *Subsections (1) and (2) do not apply if*

(a) the third party consents to the disclosure;

(b) the information is publicly available;

(c) an enactment of Manitoba or Canada expressly authorizes or requires the disclosure;

or

(d) the information discloses the final results of a product or environmental test conducted by or for the public body, unless the test was done for a fee paid by the third party.

Our office reviewed the application of the exception allowed under subclause 18(1)(c)(ii) in view of the limitations set out in subsection 18(3) and found that none of the limitations applied in this instance. Under *The Health Services Insurance Act*, the *Chiropractic Services Insurance Regulation* sets out the amount of the benefit to be paid in respect of insured chiropractic services. This regulation would need to be amended in order for the new benefit scale to take

effect at which point the amount of the benefit to be paid in respect of insured chiropractic services would be public. However, although the new agreement for chiropractic services came into effect on April 1, 2015 this amendment has not yet taken place and MHHLS was unable to provide our office with information as to when this would be expected to occur².

Do any of the limitations to the application of sub-clause 18(1)(c)(ii) set out in subsection 18(4) apply?

Subsection 18(4) sets out limitations to the application of subsection 18(1) as follows:

Disclosure in the public interest

18(4) *Subject to section 33 and the other exceptions in this Act, a head of a public body may disclose a record that contains information described in subsection (1) or (2) if, in the opinion of the head, the private interest of the third party in non-disclosure is clearly outweighed by the public interest in disclosure for the purposes of*

- (a) public health or safety or protection of the environment;*
- (b) improved competition; or*
- (c) government regulation of undesirable trade practices.*

The complainant has represented that it is in the public interest to know the details of the province's new agreement with the MCA. Our office considered the application of subsection 18(4) in this instance and we do not find that the circumstances described in clauses (a), (b) and (c) of 18(4), which narrowly define 'public interest' in the application of 18(4), pertain in this case. Therefore, we find that the limitations to the application of subsection sub-clause 18(1)(c)(ii) set out in 18(4) do not apply. Nonetheless, the MHHLS has provided representations which evidence that it considered the application of subsection 18(4) of FIPPA in this case and it was of the view that the possible harm that could come to the MCA outweighed any of the considerations for disclosure set out in subsection 18(4).

Our office notes that public interest in knowing the details of payment contracts with doctors, nurses, civil servants and chiropractors is satisfied, in part, through proactive disclosure under *The Public Sector Compensation Disclosure Act* (the disclosure act). Section 5 of the disclosure act reads:

Payments under Health Services Insurance Act

5 *For each fiscal year of the government ending on or after March 31, 1996, the Minister of Health shall cause to be disclosed in the audited financial statements of the Manitoba Health Services Insurance Plan, or in any other manner authorized in the regulations, the name of every person who receives \$50,000. or more in the fiscal year for providing services to insured persons under The Health Services Insurance Act and the amount paid to each.*

² After this investigation concluded, the Manitoba government amended the *Chiropractic Services Insurance Regulation*, making the amount of the benefit for insured chiropractic services publicly available.

Additionally, the *Chiropractic Services Insurance Regulation* sets out the amount of the benefit to be paid currently (and until the regulation is amended) in respect of insured chiropractic services and is available online.³

CONCLUSION AND FINDINGS

Our office found that subclause 18(1)(c)(ii) applies to the information that continues to be severed from the information provided to the complainant. Therefore, the complaint of refused access 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 the refusal of access by Manitoba Health, Healthy Living and Seniors to the Court of Queen's Bench within 30 days after receipt of this report.

May 14, 2015
Manitoba Ombudsman

³ Found at <http://web2.gov.mb.ca/laws/regs/current/pdf-regs.php?reg=45/93>.