

Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2015-0045

THE WINNIPEG SCHOOL DIVISION

ACCESS COMPLAINT: ADEQUACY OF SEARCH

PROVISIONS CONSIDERED: 3(a), 6(2), 9

REPORT ISSUED ON JUNE 17, 2015

SUMMARY: The complainant requested access to a copy of Winnipeg School Division By-law No. 1018 as well as any other documentation relating to the establishment and adjudication of the Disability Income Plan for Officers and Employees (Other Than Teachers) of the Winnipeg School Division (WSD). WSD provided a copy of By-law No. 1018 but did not initially provide the other items requested or provide information as to how they may be obtained. The complaint is partly supported.

THE COMPLAINT

The complainant made a request to the Winnipeg School Division for access to the following information under *The Freedom of Information and Protection of Privacy Act* (FIPPA):

Please provide a copy of By-law No. 1018 and any other documentation that establishes the disability plan and the method of adjudicating the disability plan. Specifically, I need to know if this is a trust fund and, if so, how it is styled i.e. is it the Trustees of the disability income plan?

The Winnipeg School Division (WSD or the public body) responded as set out in FIPPA and issued a decision regarding access. The WSD stated in its decision letter that access was granted in full to WSD By-law No. 1018 and 'Schedule A' of By-law No. 1018 and copies of these items were provided along with the letter.

A complaint of refusal of access was received in our office on March 9, 2015. Our office noted that the WSD did not refuse access to the record it identified as responsive to the complainant's request; therefore, the decision complained about was not a refusal of access. Our office opened an investigation into this matter to determine whether the public body conducted a reasonable search for any other potentially relevant records and whether the public body met its duty to assist the complainant as required by section 9 of FIPPA.

PRELIMINARY MATTERS

As part of the complaint investigation process, our office was provided with a copy of the WSD access decision letter. It stated that, in addition to receiving a copy of By-law No. 1018, the complainant was also provided with copies of correspondence between the complainant's legal counsel and the WSD. Our office notes that the complainant retained legal counsel to act on her behalf in an appeal of a decision of the Disability Income Plan (the plan). Further to our investigation of the complainant, our office requested copies of this correspondence as well as a copy of By-law No. 1018 and 'Schedule A' from WSD for our review.

The correspondence in question related to counsel's request to WSD for "a complete copy of the Disability Income Plan document." Counsel was provided with a copy of 'Schedule A' of By-law No. 1018. Titled 'The Winnipeg School Division Disability Income Plan for Officers and Employees (Other Than Teachers) of the Winnipeg School Division,' Schedule 'A' sets out how the plan will operate including eligibility for membership, application for benefits, payment of benefits, termination and so on. We note this request was made outside the FIPPA process.

On being provided with a copy of 'Schedule A', counsel then requested further information. Counsel noted that 'Schedule A' made reference to a Disability Income Committee and asked if there was an appeal to that committee and how it would proceed. Counsel also asked how the plan was styled (whether it was a trust or not). The WSD made a further written response to the complainant's legal counsel. The process for appealing a decision of the plan was described and the WSD also stated that this information had been provided to the complainant by letter. There was no further communication between the WSD and the complainant's counsel but information provided to our office by the complainant made clear that counsel still required further information in order to completely understand how the plan was administered.

In making her complaint to our office, the complainant provided supplemental information explaining the context for her access request. This information drew attention to the fact that By-law No. 1018 referenced WSD By-Laws Nos. 1015 and 1017 with regard to the establishment of the Disability Income Fund (No. 1015) and to duties, responsibilities and authority of the Disability Income Committee (No. 1017). It was pointed out that these items are required to interpret By-law no. 1018 and 'Schedule A'. Our office noted that while the complainant had not requested copies of WSD By-laws Nos. 1015 and 1017 by name as part of her access to

information request these records are nonetheless within the scope of the complainant's request. In our view they would be considered "other documentation that establishes the disability plan and the method of adjudicating the disability plan" (as stated in her access request). Our office contacted the WSD and requested the WSD to forward copies of these by-laws to the complainant, which it did on March 24, 2015.

Our investigation then turned to identifying what other documentation (in addition to the by-laws already provided), if any, "establishes the disability plan and the method of adjudicating the disability plan" and would be responsive to the complainant's access request. While the WSD did not identify other records which could be considered responsive to the complainant's access request, based on a review of the by-laws and the WSD web site our office identified the following additional items as likely to be responsive:

- 1) Policy of the WSD "GCBDA Sick Leave/Disability Coverage" including Administrative Rules/Procedures and Exhibits;
- 2) "Long Term Disability Income Benefit Employee's Guide";
- 3) Service Agreement between the WSD and [Named Third Party Disability Plan Administrator] for the provision of disability management services (the Service Agreement).

In light of this information, our office asked that the WSD issue a revised decision in response to the complainant's request for access to information taking into consideration the records described above. The WSD issued a revised decision regarding access on April 24, 2015. Access was granted to a copy of the Service Agreement (the agreement or Item #3) with some information severed as allowed under subclauses 18(1)(c)(i), (ii) and (iii) of FIPPA, which provides:

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,*

Copies of items #1 and #2 were not provided to the complainant nor did the WSD explain in its decision letter if, how or where they could be obtained.

POSITION OF THE COMPLAINANT

The complainant, an employee of the WSD, wished to appeal a decision of the WSD Disability Income Plan with regard to a denial of disability benefits. Further to pursuing her appeal of this decision, the complainant has represented to our office that she has been attempting to obtain information from the WSD explaining the administration of its Disability Income Plan by making verbal requests to various division employees over an extended period. As noted, the complainant's legal counsel has also requested information. While some items have been provided, the complainant maintains that the information provided by WSD has been incomplete and she resorted to an access to information request under FIPPA in order to obtain the needed information.

POSITION OF THE PUBLIC BODY

In conversations during our complaint investigation the WSD explained that it understood the complainant's request for "any other documentation that establishes the disability plan and the method of adjudicating the disability plan" to reference only 'Schedule A' of By-Law 1018 and that this had been provided to the complainant as well as to the complainant's legal counsel previously. Thus the WSD believed it had complied with the complainant's access to information request. In written representations made to our office the WSD stated that it was important to note that it had complied with all requests for information made by the complainant and her lawyer. The WSD also maintained that all of the information requested by the complainant was available publicly or on request.

The WSD also explained to our office that the complainant belonged to the Winnipeg Association of Non-Teaching Employees Union (the union) and that information regarding employee benefits was "posted on the union's web pages in detail" along with a contact number for more information. In addition, the WSD explained that division employees are provided with a pension booklet explaining plan benefits. The WSD further explained that WSD policies are available through the staff website portal as well as on public web pages. The WSD also noted in its representations that sick leave disability benefits are outlined in the employee collective agreement, also available on the WSD web site or through the union web pages. Further, WSD represented that in the fall of 2002 and in November of 2006 the complainant was provided with benefit packages containing information on employee benefits and pension.

The WSD also observed in its representations that as all information requested by the complainant was publicly available it did not, therefore, fall under FIPPA. When our office asked why the WSD did not advise the complainant about the public availability of this other information or how it could be obtained, the WSD explained that it will usually try to accommodate requests for information rather than directing a requester to WSD or union web pages. In the case of the complainant, the WSD explained that it was always the intention to

assist the complainant as fully as possible. The WSD noted that when informed of this complaint, the WSD provided copies of By-laws Nos. 1015 and 1017 to the complainant, even though these are available for the asking and an access to information request under FIPPA is not required to obtain them. The WSD acknowledged that the Service Agreement would not normally be publicly available and a copy was provided to the complainant with minimal severing on April 24, 2015.

Our investigation then turned to an analysis of the issues raised by this complaint. As the complainant did not object to the severing of information from the Service Agreement under the exceptions allowed by subclauses 18(1)(c)(i), (ii) and (iii) of FIPPA, our office did not investigate this matter.

ISSUES CONSIDERED

Is the information requested by the complainant publicly available? If so, does the FIPPA access process apply to the information requested by the complainant?

Clause 3(a) and subsection 6(2) together describe the scope of FIPPA and the availability of the access process for records that are publicly available.

Clause 3(a) of FIPPA speaks to the scope of the legislation, and indicates as follows:

Scope of this Act

3 This Act

(a) is in addition to and does not replace existing procedures for access to records or information normally available to the public, including any requirement to pay fees;

In the context of the access to information process (Part 2 of FIPPA), subsection 6(2) expands on clause 3(a). It reads:

Part does not apply to publicly available information

6(2) *This Part does not apply to information that is available to the public free of charge or for purchase.*

The public body did not identify the relevance of subsection 6(2) of FIPPA (information available to the public) in its dealings with the complainant or in its access decision letters, therefore this issue was not before our office at the outset of our investigation. However, in the course of our investigation, the WSD represented that all information requested by the complainant was publicly available and, therefore, did not fall under FIPPA.

In light of the public body's representations, our investigation then reviewed the availability of information relating to the establishment of the Disability Income Plan and the adjudication of benefits and the manner in which this information may be accessed.

The WSD explained that some information is posted on its web pages (for example, WSD policies). We observed that the WSD policy "GCBDA Sick Leave/Disability Coverage" can be found on WSD's website, under the "WSD Policies" page. A longer version, containing Administrative Rules and Exhibits (such as forms), is available by linking from the 'Administration and Services' tab on the WSD main page to 'Departments and Services' and then to 'Human Resources' and then through to 'Personnel Policies'. The 'Administrative Rules' include a summary of the General Provisions under By-law 1094 effective April 8, 2002, for disability pensions, and a summary of the conditions affecting any member seeking a disability pension. Our office observed that some information regarding employee benefits was posted on the union web pages; however, this included only minimal information about the Disability Income Fund (little beyond the fact that it existed). Similar minimal information was provided in the employee collective agreement, which was also posted on the union web pages. Our office acknowledges that it may be possible to access information about the Disability Income Fund through the WSD employee web portal; however, this requires a current password which the complainant could not locate and which was not an option available to our office or to the general public.

WSD by-laws are not online; however, the WSD explained that it is its usual practice that any member of the public may ask to view or receive copies of the by-laws (although there may be a fee for photocopying). On reviewing the WSD public facing web pages we were unable to locate any information that would inform the public that these records were available or how to obtain them.

The WSD further explained that information (such as employee benefit guides) related to the Disability Income Fund was available to WSD employees on request at any time. As noted, the WSD had represented that the complainant had been provided with benefit packages containing the benefit guides in 2002 and then again in 2006. Again, we could not locate information on WSD's website about how employees could obtain copies of benefit guides, although such information may have been available on the employee intranet, which the complainant could not access due to her lost password. Whether or not the complainant would have been able to obtain a replacement password or gain access to the employee web portal was uncertain as it was our understanding that she was no longer an active employee of the WSD. Our office does not mean to suggest that the WSD was responsible to provide access to information that the complainant could easily have obtained from an employee web portal with a current password; however, the employee maintains that she was not directed to this source of information on the occasions when she requested information.

People should not be diverted to the access process under FIPPA in place of existing procedures for accessing information. However, like the complainant, people may wind up resorting to FIPPA when they believe they have no other practical means to determine, on their own, what records they are looking for or how to obtain them. In this case, when previous requests by the complainant and her counsel did not elicit the needed information the complainant felt she had no option but to make an access to information request as set out in Part 2 of FIPPA.

Our office notes that one of the items later found to be relevant to the complainant's request was the Service Agreement with the plan administrator. This item is not publicly available and the complainant was granted partial access under FIPPA in the course of our investigation.

Did the Winnipeg School Division meet its duty to assist as required under section 9 of FIPPA?

In our view the WSD's response to the complainant's request for information was not complete and fully accurate as required by section 9 of FIPPA:

Duty to assist applicant

9 *The head of a public body shall make every reasonable effort to assist an applicant and to respond without delay, openly, accurately and completely.*

The duty to assist under section 9 of FIPPA is additional to the other obligations under the Act that a public body must meet in order to satisfy the formal access process. The first element of the duty to assist is to make "every reasonable effort" to assist a requester. This begins at the point where a request is made and includes providing assistance both proactively as well as in response to a specific request for help.

Ideally, on receiving a request of this nature, a public body would communicate the following:

- Advise an applicant what records are believed to be relevant to the request;
- Identify which records are available to the public (and therefore not subject to the FIPPA access process) and explain how to obtain them;
- Identify which records are not publicly available but which may be available to the applicant as an employee of the public body (and therefore not necessary to use the FIPPA access process) and explain how to obtain these records;
- Identify the remainder of the records and the access decision that applies to those records.

Our investigation found that the WSD did not initially identify for the complainant all relevant items which speak to the adjudication of the Disability Income Plan. Further, while the existence and location of information which was publicly available (or available to employees on request) was explained in detail to our office, this was not described or explained to the complainant in the two access decisions issued by the WSD; nor did the WSD contact the complainant by telephone or email to clarify the complainant's information requirements or provide further explanation on how to access publicly available items.

The WSD represented to our office that it is aware that the requirements of administrative fairness would dictate that employees understand what benefits are available to them and how to access those benefits. This would include not only how to apply for a benefit but also how and by whom their claim will be assessed and adjudicated and how to appeal an adjudication decision. However, it is our view that although this documentation may be available to employees of the WSD, it is functionally inaccessible if an employee does not know what it is or where or how to access it or obtain a copy.

CONCLUSION AND FINDINGS

Our office found that some of the information requested by the complainant was publicly available and the FIPPA access to information process does not apply to information which is publicly available. Our office also found that some information was available to employees on request and it was not necessary to use the FIPPA access process to obtain these materials. However, our office also found that the WSD did not make a complete and accurate response to the complainant's request for access to information. Therefore, the WSD did not meet its duty to assist the complainant. The complaint is partly supported.

June 17, 2015
Manitoba Ombudsman