Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASES 2015-0178 and -0179

MANITOBA EXECUTIVE COUNCIL

ACCESS COMPLAINTS: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 17(1)(2)(e)(g), 18(1)(c)(i)(ii)(v), 23(1)(a)(b), 27(1)(a), and 27(2)

REPORT ISSUED ON APRIL 28, 2016

SUMMARY: The complainant submitted two applications for access under *The Freedom of Information and Protection of Privacy Act*, seeking information related to the departure of specific former employees of the public body, as well as the severance payment made to the employees. Manitoba Executive Council responded by refusing access, but provided an aggregate figure encompassing payments made to a number of former employees (including the individuals identified in the access requests). During our investigation, the public body identified additional responsive records and advised the complainant and our office that access was refused to these records as well. Our office determined that the public body was required to refuse access to the specific payment amount made to these individuals, and was authorized to withhold additional records related to the former employees' departure. As such, the complaints are not supported.

THE COMPLAINT

On March 17, 2015, Manitoba Executive Council received two applications for access under *The Freedom of Information and Protection of Privacy Act* (FIPPA or the Act) which were worded as follows:

> *Please provide a copy of all records that indicate the amount of severance paid to [third party name removed]. As well please provide a copy of all records related to [third party name removed]'s departure.*

After issuing a 30-day extension to respond to both access requests on April 16, 2015, Manitoba Executive Council (Executive Council or the public body) provided its access decision on May 7, 2015. The public body stated that it was prohibited from releasing personal information of a

third party, and referred to subsection 17(1), clauses 17(2)(e)(g), and clauses 17(3)(d)(e)(f)(h)(i) to support its decision to refuse access. Executive Council advised that it considered the release of information that relates to the third parties' employment or occupational history and describes their income or financial circumstances to be an unreasonable invasion of third party privacy.

Along with this response, the public body provided an aggregate amount of severance paid to a number of staff who had recently departed Manitoba Executive Council and Manitoba Finance.

Two complaints of refused access was received by our office on June 17, 2015. Accompanying the complaint forms was a letter in which the complainant outlined his reasons for disputing the public body's decision to refuse access. The complainant was concerned that the public body's response did not indicate the number of responsive records that were located and to which access was refused. The complainant also questioned how the Act could allow the amount of severance paid to an individual to be disclosed in response to a request made in December 2014, while the current request (which is worded quite similarly but referenced other individuals) resulted in the public body responding that it was prohibited from releasing similar information. The complainant also referred to a debate in the Legislative Assembly that refers to the "non-disclosure aspect" of the mutual separation agreements with these employees, but stated that there was no reference to the "non-disclosure agreement" being a component of the mutual separation agreement in the response to the FIPPA access requests.

The complainant also questioned whether subsection 17(4) of FIPPA, which is a limitation to the exception under which certain personal information may be withheld, would apply in this case, and made specific reference to clauses 17(4)(e)(f)(g) of the Act.

POSITION OF MANITOBA EXECUTIVE COUNCIL

Our office contacted Executive Council on July 7, 2015, to notify the public body of the complaints and to request clarification regarding the public body's access decision.

During our investigation, on July 21, 2015, the public body wrote to the complainant to advise that additional records responsive to these access requests had been located. In this letter Executive Council advised that it was refusing access to these additional records, and that it was also relying on the following provisions of FIPPA: clauses 18(1)(c)(i)(ii) and (v); clauses 23(1)(a)(b)(c); clause 27(1)(a); and subsection 27(2).

Executive Council provided our office with clarification of its access decision by way of a letter dated September 9, 2015. The public body acknowledged the apparent inconsistency between these access decisions and the decision made in response to a similar request made in December 2014. The public body explained that based on its earlier consideration of clause 17(4)(e) of FIPPA, it felt that disclosure of the other individual's severance was authorized. Clause 17(4)(e) details a limitation to the exception to disclosure where it is not considered an unreasonable invasion of a third party's privacy to release certain personal information, such as the salary range of a (former) employee of a public body. Executive Council also indicated that it believed that the previously released severance amount would, at some point, be available to the public under *The Public Sector Compensation Disclosure Act*.

The public body advised that, subsequent to its release of information about one individual's severance payment, other severance packages were negotiated. Executive Council stated some of these former employees (including the individuals identified in the current requests) were adamant that the settlement amounts constituted sensitive personal financial information, and should not be released to the public. The public body indicated there is merit to this position, and it therefore ultimately concluded that a severance amount is not the same as the "salary range" permitted to be disclosed under clause 17(4)(e) of FIPPA. Executive Council also stated that it was clear that the former employees did not agree to the disclosure of their individual severance amounts and that a provision stipulating that details of the severance packages were not to be disclosed was included in the mutual separation agreements at the instigation of the former employees.

Executive Council stated that it concluded that it does not have the authority to disclose the individual severance amounts paid to the six former staffers, as it is personal information identified under clauses 17(2)(e) and (g) and clause 17(3)(e) of FIPPA. The public body advised that it decided to release the "global amount" of severance in the interests of accountability and it believed there was sufficient individual anonymity regarding "amount" to justify and permit the disclosure of the "global" sum (i.e. it was not personally identifiable information). The public body indicated that it believed this approach balances the legitimate privacy interests of the third parties while providing highly relevant information responsive to the access requests submitted by the complainant.

On November 18, 2015, after reviewing the responsive records and considering the public body's representations, our office requested further clarification on a number of points regarding the access decision. We particularly sought detailed explanations as to how the public body determined that various limits to the exception to access under subsection 17(4) were not relevant to the information at issue. The public body responded in a letter dated January 15, 2016.

With respect to the potential that the information in question may be available to the public from alternate sources or records, Executive Council clarified that the requirement under *The Public Sector Compensation Disclosure Act* is to publish a global figure for yearly compensation, which would be made up of salary, severance, and other payments. The public body acknowledged that all the named individuals were appointed and their salaries set by Orders In Council and that information about these individuals was therefore publicly available to a greater extent than would be the case with other employees of government.

The public body confirmed that in addition to *The Public Sector Compensation Disclosure Act*, there is also *The Financial Administration Act* which pertains to compensation of third parties who are paid from the Consolidated Fund. Executive Council advised that *The Financial Administration Act* does not require that specific payments made to public sector employees be identified separately and made public, but rather that the total amount of compensation for each employee is set out in the "public accounts".

Executive Council advised that what it had referred to as "severance payment" is not information about the third parties' job classification, salary range, benefits, employment responsibilities, or travel expenses. The public body stated that it believed that "severance" does not come within the term "benefits" as referenced under sub-clause 17(4)(e)(i) of FIPPA. Executive Council advised that in its view, "benefits" were those items described under the following link on the public body's website:

https://www.gov.mb.ca/finance/labour/benefits/benefits.html

The public body stated that, in this case, the term "severance" represents payments made following the end of an employment relationship. The public body advised that these payments were negotiated in consideration of third parties' potential entitlements in accordance with the common law and requirements of provincial legislation. According to Executive Council, this meant that there was no set formula upon which the severance payments were calculated, the result of which was that there was no formula that could be released to the complainant.

Executive Council advised that it did not believe that the limitation to the exception to disclosure outlined in clause 17(4)(f), which pertains to financial details of a contract to supply goods or service, applied to the withheld information. The public body explained that the settlement agreement simply facilitated the third parties' cessation of employment, and were therefore not contracts to provide employment services.

The public body advised that the severance payments were not discretionary benefits as contemplated in clause 17(4)(g), as the payments were made based on what the third parties were entitled to in accordance with the common law and requirements of provincial legislation. Executive Council further advised that disclosing these payments would specifically violate the third parties' rights under sub-clauses 18(1)(c)(i)(ii) and (v) of FIPPA. The public body reiterated the position that the third parties have not consented to, and have explicitly objected to, the release of the requested information.

ANALYSIS OF ISSUES AND FINDINGS

1. Do the mandatory exceptions to disclosure under section 17 apply to the information in question?

Subsection 17(1) of FIPPA is a mandatory exception to disclosure that protects the personal information of a third party. Where the information in question is subject to this exception, a public body is prohibited under FIPPA from disclosing the information. Subsection 17(1) of FIPPA reads as follows:

> ***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.*

Subsection 17(2) of FIPPA sets out circumstances in which disclosure of personal information is deemed to be an unreasonable invasion of privacy under subsection 17(1). The public body withheld information based on clauses 17(2)(e) and (g) of FIPPA, which read as follows:

> ***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.*
> *(g) the personal information describes the third party's source of income or financial circumstances, activities or history*

In considering the meaning of the term "employment history", we referred to the Manitoba Government's FIPPA Resource Manual (the Resource Manual), which is the reference prepared by government to assist public bodies in complying with the Act. While our office is not bound by the Resource Manual, we found the following information relevant and helpful in our investigation. The Resource Manual defines the term "employment history" as information about an individual's work record, including the names of employers, length of employment, positions held, employment duties, salary, evaluations of job performance, reasons for leaving employment, etc.

In previous investigations our office reviewed complaints about access to information regarding severance payments made to former employees of a public body. Previously, our office has determined that information such as the circumstances of an employee's departure and the amount of severance pay would be considered "employment history" under clause 17(2)(e) of the Act. The amounts paid in severance pay would also be considered "income" under clause 17(2)(g) of the Act, i.e., providing specific amounts of severance pay would reveal personal information describing the source of income for these individuals. For the same reasons, we conclude that clauses 17(2)(e) and (g) apply to the information at issue in this case. Therefore, we find that disclosure of the information would be deemed to be an unreasonable invasion of privacy under subsection 17(1), unless one or more of the limits to the exception, described in subsection 17(4) apply to the information at issue.

2. Do any limits to the exception, as described under subsection 17(4), apply to the information in question?

We next contemplated whether a limitation to the exception under subsection 17(4) would apply. Subsection 17(4) sets out several circumstances in which disclosure of personal information described in subsection 17(2) would not be considered an unreasonable invasion of a third party's privacy. We considered each of the limitations, giving particular attention to the following provisions, which appeared relevant to the circumstances of this case:

> ***When disclosure not unreasonable***
> ***17(4)*** *Despite subsection(2), disclosure of personal information is not an unreasonable invasion of a third party's privacy if*
> *(a) the third party has consented to or requested the disclosure;*

> *(c) an enactment of Manitoba or Canada expressly authorizes or requires the disclosure;*
> *(e) the information is about the third party's job classification, salary range, benefits, employment responsibilities or travel expenses*
> *(i) as an officer or employee of a public body*
> *(f) the disclosure reveals financial or other details of a contract to supply goods or services to or on behalf of a public body;*
> *(g) the disclosure reveals information about a discretionary benefit of a financial nature granted to the third party by a public body, including the granting of a licence or permit*
> *(i) the record requested by the applicant is publicly available.*

Following are our considerations with respect to the applicability of relevant provisions of subsection 17(4).

Does clause 17(4)(a) apply to information about the severance payment in this case?

Clause 17(4)(a) of FIPPA provides that it is not an unreasonable invasion of privacy to disclose personal information of a third party if the third party has consented to or requested the disclosure. In this case, based on our review of the public body's representations and the withheld records including the terms of the mutual separation agreements, it is evident that the employees did not consent to disclosure. The employees, in fact, objected to the disclosure. We therefore concluded that clause 17(4)(a) does not apply to information about the severance payment.

Does clause 17(4)(c) apply to information about the severance payment in this case?

Clause 17(4)(c) of FIPPA provides that it is not an unreasonable invasion of privacy to disclose personal information of a third party if another enactment of Manitoba or Canada expressly authorizes or requires the disclosure.

The third parties in this case were employees of the Government of Manitoba, which is subject to the requirements of *The Public Sector Compensation Disclosure Act*, to disclose the total annual compensation for each employee whose compensation exceeds $50,000. The total annual compensation for these employees would have exceeded $50,000 and would therefore generally be required to be disclosed. However, the disclosure would be limited to a global compensation figure together with each employee's name and job classification.

Furthermore, we concluded that, based on our review of the Government of Manitoba's disclosure for the 2014-15 fiscal year which was contained in the Public Accounts published in the fall of 2015, it did not appear that the severance payment was included in the total compensation figure for these employees. This indicates that the severance payments were not made until after April 1, 2015.

The required disclosure under *The Public Sector Compensation Disclosure Act* does not reflect the specific details of severance that is requested in the FIPPA applications. Our office was not able to identify another enactment that expressly authorized or required disclosure of specific

information about the employees' severance payments. Therefore we concluded that clause 17(4)(c) does not apply to the information about the severance payments.

Does sub-clause 17(4)(e)(i) apply to information about the severance payment in this case?

In considering the meaning of the word "benefits", as described in sub-clause 17(4)(e)(i), we again referred to the FIPPA Resource Manual. The Resource Manual defines the term "benefits" as including the entitlements that an employee receives from being employed by or acting for the public body, such as insurance-related benefits and leave entitlements.

Insurance-related benefits include items such as prescription drug, vision, dental, or long-term disability coverage. Leave entitlements, on the other hand, include, but are not limited to the types of benefits agreed to on the commencement of employment, such as entitlement to accrue vacation and sick leave in accordance with terms of employment.

Our office does not agree with the public body's position that the meaning of the term "benefits" in FIPPA is limited to those items listed on the "Benefits" webpage for the Labour Relations Division of Manitoba Finance. In our view, severance is also a benefit as it is a form of leave entitlement that the employee receives from being employed by the public body. It is a form of leave entitlement that the employee may receive upon their departure, and it may flow from retirement, lay-off, or in some cases, termination by the employer or employee.

Sub-clause 17(4)(e)(i) of FIPPA allows for the disclosure of information about the benefits of a public body employee. However, we are of the view that this provision is to be interpreted as permitting disclosure of the formula used to calculate leave entitlement or other types of benefits, rather than the actual monetary value of the benefits received. For example, a public body would not disclose that a particular employee had received reimbursement of $700 for specific prescriptions under the prescription drug plan, but could disclose that an employee is covered for prescription drugs at 80% actual cost, to a maximum of $700 reimbursement. Similarly, a public body would not disclose that an employee had taken $800 sick leave pay, but could disclose that an employee was entitled to accrue sick leave at a specified rate per pay period. Therefore, given our conclusion that severance is a benefit within the meaning of sub-clause 17(4)(e)(i), we would conclude that it would not be an unreasonable invasion of privacy to disclose the formula by which severance is calculated.

For a civil servant, employed by the government of Manitoba, retirement and lay-off severance is typically calculated in accordance with a set formula[1]. In this case, the employees' severance was not paid on the basis of retirement or layoff, and therefore no specific formula applied. And, although the employees had employment contracts, the severance was not based on the terms of the previously existing employment contracts or on the basis of other terms of employment that were applicable to the employees. Instead, the severance payments were lump sum payments that were mutually negotiated at the time of the employees' separation from employment.

[1] For most employees of the government of Manitoba, the formulas are set out in the Conditions of Employment Regulation under *The Civil Service Act*, or under the terms of the applicable collective agreement, such as the Manitoba Government Employees' Master Agreement (GEMA), and are generally based on years of service.

Does clause 17(4)(g) apply to information about the severance payment in this case?

In the preceding section of this report, we concluded that severance is a benefit. We now consider whether it is a *discretionary benefit* granted to a third party within the meaning of clause 17(4)(g) of FIPPA. The Resource Manual provides that a discretionary benefit "is one which the public body may decide to provide or to refuse; social allowances or other benefits which are determined by entitlement formula are not "discretionary benefits" for the purposes of this clause".

As noted earlier, civil servants employed by the government of Manitoba are generally entitled to receive retirement or lay-off severance on the basis of an entitlement formula. Therefore, severance on the basis of retirement or layoff would not be a "discretionary benefit", as it is not a benefit that the public body can decide, unilaterally, to provide or to refuse.

In other circumstances, such as this case, an employee may have negotiated with the public body with respect to the amount of severance. This entitlement to severance may be contained in the terms of the employment contract negotiated at the beginning of employment, or it may be reflected in a settlement agreement negotiated at the conclusion of employment (as was the case here). While the public body may have discretion to negotiate a severance, it is our view that a severance that is mutually negotiated by two parties cannot be described as a discretionary benefit 'granted' by the public body to a third party.

We also considered whether the public body exercised any discretion in *granting* the benefit. Black's Law Dictionary defines 'grant' in part as: *To bestow or confer, with or without compensation, a gift or bestowal by one having control or authority over it, as of land or money… To give or permit as a right or privilege.*

In order to be able to 'grant' something, the public body must have authority to do so. This is simply an action which is analogous to the act of bestowing or conferring. The exercise of discretion is not a requirement with regard to the 'granting' of a benefit.

A discretionary benefit of a financial nature can be considered to be any monetary allowance provided at the choice of the public body. Examples of such a benefit provided by a public body to an individual can include a loan, grant, research grant, university bursary, or performance bonus.

In contemplating whether the information at issue can be described as a "discretionary benefit", we also considered the meaning of the word "discretionary". In our view, the word discretionary implies that one is completely free to act in one way or another, to not act, or to choose its own course of action.

As part of its considerations of discretionary benefits in *Sutherland v. Canada*, the Federal Court of Canada stated the following:

> *The word "discretionary" suggests that the benefit contemplated […] is one which the donor of the benefit may confer in his or her discretion, unfettered by a requirement to confer the benefit upon the recipient.*[2]

Based on our review, we were unable to conclude that the severance payments were made "unfettered by a requirement to confer the benefit" as it was clear that the circumstances included certain legal and/or contractual obligations which compelled the public body to act in certain manner; that being to provide the third parties with a financial benefit.

In consideration of the above, we therefore concluded that clause 17(4)(g) does not apply.

Does clause 17(4)(f) apply to information about the severance payment in this case?

Our office also considered the potential application of clause 17(4)(f) of FIPPA, which was specifically referenced by the complainant. Clause 17(4)(f) recognizes that disclosure of information respecting the supply of goods and services to a public body is generally in the public interest, and therefore provides that disclosure of this information is not an unreasonable invasion of privacy. In this case, had the severance payments been determined in accordance with the terms of the existing employment contracts, we would have concluded that clause 17(4)(f) applied and that disclosure would not be an unreasonable invasion of privacy.

However, the severance paid in this case was negotiated as part of the employees' separation from employment. Severance negotiated as part of a mutual separation agreement cannot, in our view, be considered to be "financial or other details" of a contract to "supply services" to or on behalf of the public body. The mutual separation agreements facilitated the third parties' cessation of employment with the public body, and not the provision of a service to or for the public body. We therefore concluded that clause 17(4)(f) does not apply.

Does clause 17(4)(i) apply to the information about the severance payment in this case?

Clause 17(4)(i) provides that disclosure of personal information is not an unreasonable invasion of a third party's privacy if *"the record requested by the applicant is publicly available."*

There is no question that certain personal information about these employees is publicly available to a greater extent than is the case for most other employees of the Government of Manitoba. The employees were appointed to their positions by way of Orders In Council, which set out their job classification, starting salary, and limited additional information regarding their role. Orders In Council are posted on the Government of Manitoba website at: http://oic.gov.mb.ca/oic/

Information about the salary schedule for position classifications in the Executive Excluded group (which includes this employee) is available on Manitoba Finance's website at:

http://www.gov.mb.ca/finance/labour/salary/excluded.html

[2] Sutherland v. Canada (Minister of Indian and Northern Affairs) (T.D.), [1994] 3 F.C. 527. Available at: http://recueil.fja-cmf.gc.ca/eng/1994/1994fca0309.html

Taking into account both sources of information, and comparing it with information from the Public Accounts, where the employees' total annual compensation is published, it is possible to determine with reasonable accuracy, the employees' actual salary at different points in time since they were appointed to their positions.

However, the fact that certain information is publicly available is not enough to conclude that 17(4)(i) applies, as the limit to the exception requires that the actual record (not just information from the record) requested by the applicant is publicly available. Despite the fact that considerable information about the employees was publicly available, the records requested by the applicant were not publicly available. As such, we concluded that clause 17(4)(i) does not apply.

Conclusion as to the application of provisions of section 17

As none of the other limits under subsection 17(4) apply, we find that Executive Council had authority under clauses 17(2)(e)(g) to withhold the particular information as described earlier in this report, as disclosure would be considered an unreasonable invasion of privacy of the third parties under these provisions. We found that these provisions also applied to much of the personal information about the employees' departure and the circumstances thereof.

The public body also relied on clauses 17(3)(d)(e)(f)(h) and (i) of FIPPA. However, subsection 17(3) is only a relevant concern when considering a disclosure of third party information that is not described under subsection 17(2). Therefore, with respect to the information that was required to be withheld under clauses 17(2)(e) and (g), our office did not further consider the cited provisions under subsection 17(3).

Certain items of personal information, such as personal contact information and personal views and opinions, did not appear to fall entirely within the types of information listed under subsection 17(2). However, these items of personal information were of the types described in clauses 17(3)(e), (f) and (i) of FIPPA, in that the personal information was provided in confidence, was highly sensitive, and disclosure would have been inconsistent with the purpose for which the personal information was obtained. Therefore, we agreed that these provisions applied to the information at issue where provisions under subsection 17(2) do not apply.

3. Was the public body required to withhold information under section 18 of FIPPA, and did the cited provisions apply?

In its revised access decision to the complainant, Manitoba Executive Council identified clauses 18(1)(c)(i)(ii) and (v) of FIPPA as requiring it to withhold certain information contained within the responsive records. Section 18 includes a number of mandatory exceptions to disclosure which oblige a public body to refuse access to this type of information. The provisions cited by the public body read as follows:

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,

(v) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

The exception in clause 18(1)(c)(i) involves a reasonable expectation of harm test. The head of the public body must determine whether disclosure of the information could "reasonably be expected" to result in the harm described in paragraph 18(1)(c)(i). In this sense, "harm" means that disclosure of the information would hurt or damage the third parties' competitive position. There can be "harm" to the competitive position of a third party 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, and a reasonable expectation that harm could result to a third party from a competitor's knowledge of the information.

Based on our review, there is insufficient evidence to support that the disclosure of this information could reasonably be expected to result in harm to the competitive position of the third parties. We were unable to confirm the existence of a competitive community or business rival with whom the third party individuals were in competition. As such, we found that sub-clause 18(1)(c)(i) of FIPPA did not apply to the responsive information.

Our review then turned to sub-clause 18(1)(c)(ii). This provision is similar to sub-clause 18(1)(c)(i) in that it involves a reasonable expectation of harm test, however, sub-clause 18(1)(c)(ii) contemplates the potential for disclosure of information to hinder or negatively impact the contractual or other negotiations of the third parties. "Negotiations" in this context means discussions and communications where the intent is to arrive at an agreement or a settlement. For example, the "negotiations" referred to in sub-clause 18(1)(c)(ii) can include contractual negotiations, negotiations relating to the settlement of a lawsuit or a dispute, etc.

Based on our review, we were unable to determine how the disclosure of this information could reasonably be expected to impact any potential negotiations of the third parties. While the third party individuals were involved in negotiations with government at the time the FIPPA requests were made, those negotiations were concluded before the response was issued to the applicant, and we are not aware of any other negotiations in which the individuals were involved. As such, we found that sub-clause 18(1)(c)(ii) of FIPPA had not been shown to apply to the responsive information.

We then considered the public body's reliance on sub-clause 18(1)(c)(v) of FIPPA. The exception in sub-clause 18(1)(c)(v) does not contain a 'reasonable expectation of harm' test; it is a 'class exception' as it protects a type or kind of information. For the exception to apply, the information must be "supplied" (provided or furnished by someone else) to an arbitrator,

mediator, labour relations officer, etc. Furthermore, the arbitrator, mediator, or labour relations officer must have been appointed to resolve or inquire into a labour relations dispute. There is no question that there was a labour relations dispute that was the subject of negotiations in this case. However, it is our view that the information in question was not supplied to "someone appointed to resolve or inquire into" the dispute. Other jurisdictions in Canada have found that the appointment of a "neutral" party is typically required for the exception to disclosure to apply in this context.[3] While the Labour Relations Division of Manitoba Finance was supplied with some of the information at issue, they were acting on behalf of government and were representing the government's interests.

4. Is the public body authorized to withhold information under section 23?

The discretionary exceptions set out in section 23 of FIPPA are intended to protect the confidentiality of discussions that take place among officers and employees of a public body in order to encourage more candid exchanges of opinion and advice among public servants. In its revised access decision, the public body refused access to some of the records relying on clauses 23(1)(a) and (b) of FIPPA, which read as follows:

> ***Advice to a public body***
> ***23(1)*** *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal*
> *(a) advice, opinions, proposals, recommendations, analyses or policy options developed by or for the public body or a minister;*
> *(b) consultations or deliberations involving officers or employees of the public body or a minister;*

The exceptions allowed under subsection 23(1) protect the deliberative processes involved in decision making and policy making by a public body. The exception in clause 23(1)(a) protects the giving of advice and recommendations which occurs in public bodies when making decisions about which course of action to follow or approaches to take in a given situation. Clause 23(1)(b) allows a public body to refuse to disclose information that could reasonably be expected to reveal consultations or deliberations involving officers or employees of the public body. These exceptions are class exceptions in that they protect a certain type or kind of information from being disclosed. The exceptions do not contain a reasonable expectation of harm test.

The collection of records which the public body withheld under section 23 of FIPPA are most of those records that Executive Council referred to in its revised access decision in which it identified additional responsive records. Our office reviewed these records which primarily consist of email correspondence between staff of the public body. In these emails there are requests for advice and recommendations, the provision of advice and opinions, requests for and confirmation of information, discussions regarding meetings, as well as draft correspondence.

[3] For examples please see: *Order 04-04* issued by the Office of the Information and Privacy Commissioner for British Columbia, Feb. 16, 2004; *Order F08-10* issued by the Office of the Information and Privacy Commissioner for British Columbia, May 21, 2008; *Order P-653* issued by the Office of the Information and Privacy Commissioner for Ontario, Apr. 8, 1994.

Based on our review of the responsive records and the representations provided by the public body, our office has concluded that the advice, recommendations, and deliberations contained in the correspondence are the type of information captured by the exceptions to access allowed under clauses 23(1)(a) and (b) of FIPPA and the cited exceptions were appropriately applied to withhold this information.

As section 23 is a discretionary exception to the right of access, we then considered whether, in the circumstances, the public body reasonably exercised discretion in this case. We note that the deliberations, recommendations, and advice withheld under section 23 pertain to the employment relationships with identifiable individuals, and that this personal information was required to be withheld under section 17. To the extent that the mandatory provisions of section 17 apply to the same information withheld under section 23, the public body does not actually have discretion to release the information under section 23.

5. Do the exceptions to disclosure provided by section 27 of FIPPA apply to the withheld information?

As discussed in previous investigation reports by our office, solicitor-client privilege protects all communications of a confidential nature between a client and legal advisor that are related to the seeking, formulating or giving of legal advice or legal services. This includes the legal advisor's working papers which are directly related to the legal advice or assistance. Communications between a solicitor and client are acknowledged by our common law system of justice to be privileged to the extent that they are safeguarded from disclosure in court. The solicitor-client relationship is founded on confidentiality and it is held to be in the public interest that all persons have complete and ready access to legal advice and that complete and open communication occurs in such an exchange.

It is important to note that the privilege belongs to the client not the solicitor and that it is not diminished by the fact the client is a public body. Also, in the context of clause 27(1)(a) of FIPPA, solicitor-client privilege is interpreted as including both legal advice privilege and litigation privilege.[4] Legal advice privilege applies whether or not litigation is contemplated. Litigation privilege, on the other hand, covers documents, papers, and other materials created or obtained especially for a lawyer's litigation brief, whether the litigation exists or is merely contemplated. Litigation privilege terminates when the proceeding for which a document was created ends or fails to materialize. The test for determining whether a record falls under litigation privilege is the dominant purpose test.[5] If the dominant purpose for preparing the document was anticipated litigation, it may fall under the privilege.

Subsection 27(1) of FIPPA provides the head of a public body with the discretion to refuse to disclose information in a record if the information is subject to solicitor-client privilege. The exception is a class exception in that it protects a certain type or kind of information in a record. In order for the exception to apply, the information in the record need only fall within one of the clauses listed in subsection 27(1). The head of a public body may refuse to disclose the

[4] *Blank v. Canada (Minister of Justice)*, 2 S.C.R. 319, 2006 SCC 39.
[5] Ibid.

information described in one of the clauses after a determination has been made that it would be appropriate and reasonable to do so.

In refusing access, Manitoba Executive Council relied on clause 27(1)(a) of FIPPA, which provides as follows:

> ***Solicitor-client privilege***
> ***27(1)*** *The head of a public body may refuse to disclose to an applicant*
> *(a) information that is subject to solicitor-client privilege*

In order to determine whether clause 27(1)(a) applied to the information at issue, it was a necessary aspect of our investigation to consider the nature of the requested records, that is, whether they consisted of confidential communications for the purpose of the seeking, formulating, or giving of legal advice. Our office was provided with five groups of responsive records which Executive Council identified as being subject to clause 27(1)(a). Each of these groups of records was a collection of email correspondence involving staff of the public body and a lawyer representing the public body. We confirmed that the correspondence included the seeking and provision of legal advice and, as such, determined that clause 27(1)(a) of FIPPA applies to this information.

Of the five groups of responsive records which Executive Council withheld in accordance with clause 27(1)(a), three of those groups were also identified as subject to clause 27(2) of FIPPA.

Subsection 27(2) is a mandatory exception to the right of access. To the extent that public bodies have custody or control of such records, subsection 27(2) requires public bodies to refuse to disclose information of others that is subject to solicitor-client privilege. This provision reads as follows:

> ***Third party's solicitor-client privilege***
> ***27(2)*** *The head of a public body shall refuse to disclose to an applicant information that is subject to a solicitor-client privilege of a person other than the public body.*

Manitoba Executive Council was of the view that this exception applied to the information contained in the communications it received from the third parties' legal counsel. However, our office is not persuaded that subsection 27(2) of FIPPA applied to these records.

In each instance where subsection 27(2) was referenced, it was applied to a single record of communications between the third parties' legal counsel and the public body's legal counsel. Generally, the act of intentionally disclosing information to those outside the solicitor-client relationship (as was done here, when the lawyers exchanged communications) would constitute a waiver of the legal advice branch of solicitor-client privilege.[6] And, the fact that matters between the public body and the third parties have been settled means that litigation privilege would no longer apply.

[6] *Reid v. Manitoba (Minister of Justice)* (7 October 1993), Winnipeg 93-01-73072 (MBQB).

Beyond legal advice and litigation privilege, there are other privileges recognized in Canadian law, including, but not limited to settlement privilege, case-by-case privilege, and parliamentary privilege. While the communications between the two legal counsels would come within the ambit of settlement privilege, this type of privilege has not been, to our knowledge, recognized as being part of "solicitor-client privilege" for the purposes of FIPPA (or other similarly worded access to information legislation).[7]

In this case, the records withheld under subsection 27(2) were also withheld under clause 27(1)(a) of the Act. These records came into the possession of the public body when the legal representative for the public body included them as an attachment in his communication to his client (i.e. the public body). The information contained in these records formed the basis of the legal advice offered to the public body, and the advice directly references the information in these records. These records were also used by the legal representative to seek instructions from his client. As such, our office is satisfied that clause 27(1)(a) applies to these records.

As section 27 is a discretionary exception to the right of access, we then considered whether, in the circumstances, the public body reasonably exercised discretion in this case. We note that the information withheld under section 27 also consists of sensitive personal information of third party individuals, to which section 17 of FIPPA would apply. As such, there was limited, if any, scope for the public body to exercise discretion to release such information.

OBSERVATION

Our office believes that compensation paid to public servants should be subject to public scrutiny. Government employees are paid from tax dollars, and the public has an interest in knowing how those funds are spent. Although we consider the circumstances in this particular case to be an exception (specifically considering the complexity of factors reflected in the negotiated severance), our office feels that senior public servants paid through public funds should have a limited expectation of privacy when it comes to the disclosure of aspects of the compensation they receive through their role with the public body.

For certain public servants whose compensation exceeds $50,000, this information is typically made publicly available in the *Public Accounts* in accordance with *The Public Sector Compensation Disclosure Act*. It is our understanding that the overall compensation received by the individuals in this case, including amounts subject to the settlement agreement, will be disclosed when the *Public Accounts* for the previous fiscal year are released in the fall of 2016. We would urge public bodies to conduct similar future negotiations with a view to achieving a balancing of interests in privacy and transparency.

[7] This is distinguishable from Alberta's Freedom of Information and Protection of Privacy Act (FOIP Act), which provides an exception for information that is subject to any type of legal privilege. The Alberta Court of Appeal has determined that "any type of legal privilege" as described in Alberta's FOIP Act does include settlement privilege. See: *Imperial Oil Limited v Alberta (Information and Privacy Commissioner), 2014 ABCA 231 (CanLII)*.

CONCLUSION

Based on the findings of the Ombudsman 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 the refusal of access decision by Manitoba Executive Council to the Court of Queen's Bench within 30 days after receipt of this report.

April 28, 2016
Manitoba Ombudsman