

Manitoba mbudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2017-0081

EXECUTIVE COUNCIL OFFICE

ACCESS COMPLAINT: DECISION THAT FIPPA DOES NOT APPLY TO THE RECORD(S)

PROVISION CONSIDERED: 4(d)

REPORT ISSUED ON AUGUST 3, 2017

SUMMARY: An applicant requested access under the Freedom of Information and Protection of Privacy Act (FIPPA or the act) from Manitoba Executive Council (Executive Council or the public body) to all records of local, national and international phone calls and text messages from the premier's personal cell phone regarding Manitoba government business. The public body responded that clause 4(d) of FIPPA (records to which this act applies) excludes the personal records of a minister from the application of the act and, therefore, records of calls and text messages from the personal cell phone of the premier are outside the scope of FIPPA. Our office observed that the request was for records relating to Manitoba government business and not the personal records of a minister. In communication with the public body, our office explained that, regardless of where or how created, all records relating to government business come within the scope of the act. Subsequently, the Executive Council Office issued a revised decision acknowledging that FIPPA applies and giving access to the requested information in part. The complaint concerning the decision that FIPPA does not apply to the requested records was supported.

THE COMPLAINT

On January 26, 2017 the complainant made a request under the Freedom of Information and Protection of Privacy Act (FIPPA or the act) to Manitoba Executive Council (Executive Council or the public body), a public body under FIPPA, for access to the following information:

All records of local, national and international phone calls and text messages, from the Premier's personal cell phone, regarding Manitoba government business, since May 3, 2016.

The Executive Council Office issued a decision regarding access on February 22, 2017 stating that clause 4(d) of FIPPA excludes the personal records of a minister from the application of the act.

A complaint concerning the public body's decision that FIPPA does not apply to the requested records was received in our office on February 28, 2017.

POSITION OF THE PUBLIC BODY

In making its response to the complainant, the Executive Council Office cited clause 4(d) of FIPPA:

Records to which this Act applies

4 This Act applies to all records in the custody or under the control of a public body but does not apply to

(d) a personal or constituency record of a minister;

The public body explained that, as FIPPA excludes the personal records of a minister from the application of the act, the records of calls and text messages from the personal cell phone of the premier (the first minister) are outside the scope of FIPPA. The access decision letter states that, as the requested records fall outside the scope of FIPPA, the complainant's access request was thereby disregarded.

POSITION OF THE COMPLAINANT

In making the complaint, the complainant provided written representations noting that the request was for records regarding Manitoba government business and not for the personal records of a minister. The complainant explained his view that FIPPA focuses on the content of a record rather than the manner or means of its creation in determining whether or not the record

falls within the scope of the act. The complainant noted that, while it may be that certain discretionary or mandatory exceptions to access would apply to the record under consideration, FIPPA nonetheless applies to all records of government business regardless of whether or not those records are created in a manner that relies of the personal device of an individual.

The complainant also wrote:

As the FIPPA Manual¹ notes, if a record is “created, received or obtained by an officer, employee or member of the public body in the course of his or her duties” then such a record would qualify as being under the control of a public body for the purposes of FIPPA. The First Minister is a member of a public body (specifically the Executive Council of the Government of Manitoba). The records requested...created in the course of conducting Manitoba government business, were created in the course of the Premier’s duties. As such, this information would qualify as being a record under FIPPA as well as being within the control of a public body...As the FIPPA Resource Manual states, “the records of a minister relating to his or her functions as a government minister do fall under FIPPA”.

ANALYSIS OF ISSUES AND FINDINGS

Our office noted that, in citing clause 4(d) of FIPPA and stating that the requested records fell outside the scope of FIPPA, the public body did not refuse access to records which came within the scope of the act or disregard a request for access as may be allowed under subsection 13(1) of FIPPA. On reviewing the public body’s access decision, our office determined that the public body had made a decision that FIPPA does not apply to the requested records and it is this decision that our office investigated.

Does FIPPA apply to the requested records?

On receiving the complaint, our office wrote to the Executive Council Office and noted that the request was for “*All records* of local, national and international phone calls and text messages, from the premier’s personal cell phone *regarding Manitoba government business*” [emphasis added].

In conversations with our office the complainant had confirmed that this included any records, such as a record of phone calls (a record of calls made and received) or texts (sent to or from) the phone in question. We also indicated to the Executive Council Office that under FIPPA, a record

¹ The complainant is referencing ‘FIPPA for Public Bodies – Resource Manual’. This manual is a collaborative work of the staff of Civil Legal Services, Manitoba Justice, and the Information and Privacy Policy Secretariat, Manitoba Sport, Culture and Heritage.

means a record of information in any form, and includes information that is written, photographed, recorded or stored in any manner, on any storage medium or by any means including by graphic, electronic or mechanical means. Our office noted that the request was for records regarding Manitoba government business.

With respect to the interpretation of clause 4(d) of FIPPA to the information requested, our office consulted the *Manitoba FIPPA Resource Manual* (the manual).² The manual explains that personal records in the context of clause 4(d) are records that relate to a minister as a private individual, rather than as an elected official and our office agrees that FIPPA would not apply to that type of record. However, the records of a minister (including the first minister or premier) relating to his or her functions as a government minister and dealing with government business do fall under the application of FIPPA.

Our office explained to the public body that records of government business are considered to be under the control of the public body for the purposes of FIPPA even when they are housed on a personal device. As observed by the complainant, the manual provides factors to consider in determining whether a record not in the custody of a public body is under the control of a public body for the purposes of FIPPA. These include:

- The record was created, received or obtained by an officer, employee or member of the public body in the course of his or her duties.
- The content of the record relates to the public body's mandate or functions.

We drew the public body's attention to the document, *Managing Ministers' Office Records*, issued by the Government Records Office (Archives of Manitoba).³ This guidance document explains that a minister's office records include all records made or received in the course of carrying out portfolio responsibilities and in the minister's role as a member of cabinet. Ministers' office records whether in paper, electronic or any other form are government records subject to the Archives and Recordkeeping Act. Our office notes that under section 17 of the Archives and Recordkeeping Act government bodies must prepare records schedules for government records in the custody *or* under the control of the government body. Subsection 22(1) of that act states that a government body must retain and dispose of government records in accordance with approved records schedules.

² 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.

³ Most recently accessed online at https://www.gov.mb.ca/chc/archives/gro/recordkeeping/docs/managing_ministers_office_records.pdf on July 31, 2017.

In light of the foregoing information, our office asked the public body to determine whether or not the premier had employed a personal cell phone for communications which could be described as relating to “Manitoba government business.” The Executive Council Office advised our office that it had determined that the personal cell phone of a family member had been used by the premier to make phone calls relating to government business. The Executive Council Office affirmed to our office that it considers records of government business to be under the control of the public body for the purposes of FIPPA even when they are stored on a personal device.

Further to our investigation, the public body issued a revised access decision to the complainant on July 14, 2017. Access was provided to the requested record in part.

For that portion of the request that relates to phone calls, the Executive Council Office advised the complainant that it examined nine months (May 3, 2016 to January 29, 2017⁴) of phone bills from a private cell phone device and located calls made from the device to government employees. The Executive Council Office created a list which identified who the calls were made to, the date of each call and the duration of each call. Eight calls were determined to be out of scope as described in clause 4(d) of FIPPA and not included on the list provided to the complainant. With respect to that portion of the complainant’s request referencing text messages, the public body advised the complainant that a review of phone bills relating to the device in question was unable to locate text messages related to government business as the phone bills do not display recipients of text messages. The public body informed the complainant, in accordance with subclause 12(1)(c)(i) of FIPPA, that access to information relating to text messages was being refused. The cited provision reads:

Contents of response

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

- (c) if access to the record or part of the record is refused,
 - (i) in the case of a record that does not exist or cannot be located, that the record does not exist or cannot be located,

Our office consulted with the complainant concerning the public body’s revised response to his access request. The complainant advised our office that the decision, which acknowledged that the requested records relating to government business were within the scope of FIPPA, addressed his complaint concerning the public body’s initial decision that FIPPA did not apply to the records requested. Our office then considered this complaint to be resolved and our investigation was concluded. Our office did not investigate the provisions cited by the public body in refusing access to information as explained in its revised access decision. Our office advised the

⁴ Three days after the complainant’s initial access request.

complainant that he had a right of complaint regarding the public body's revised access decision as allowed under subsection 59(1) of FIPPA.

OTHER MATTERS

Following our communication with the public body regarding this complaint, the clerk of Executive Council explained to our office that a review would be conducted of existing government information management and security guidelines on the use of IT devices, email accounts and text messaging for government business. The review identified policy gaps in these areas. As a result, an interim policy directive was developed for members of Executive Council and technical officers which addressed the identified gaps, assisted with statutory compliance and reflected best practices related to information management and security.

The directive states:

All Ministers, members of the Executive Council, and all Technical Officers must use their government assigned email accounts, phones, text and messaging applications when conducting government business. This includes while working outside of the workplace.

In exigent circumstances, personal email or other non-government email, IT devices, phones and/or personal text and messaging applications may be used as long as the following conditions are met:

- a) a copy of the email, message or text is sent to their government email account, ensuring that the government information is stored in a protected government system;*
- b) the email, message or text is immediately deleted from their personal or non-governmental email account, personal IT device or phone as soon as possible after dealing with the exigent circumstance; and,*
- c) The amount of confidential information collected, accessed, used or disclosed in the email or text is limited to the least amount necessary to deal with the exigent circumstance.*

Any questions regarding the application of this policy, in general, or in relation to a government record, in particular, should be directed to the Clerk of the Executive Council.

Implementation

This interim policy is effective July 14, 2017 and will remain in effect until superseded by a permanent policy directive from the Office of the Clerk of the Executive Council.

The Executive Council Office further explained that it will be working with the archivist of Manitoba to ensure the responsive records in this instance are scheduled according to the provisions of the Archives and Recordkeeping Act.

Our office acknowledges the cooperation of the Executive Council Office in the investigation of this complaint and supports the measures which have been undertaken by the public body to ensure statutory compliance in the management of records relating to government business.

CONCLUSION

In the course of our investigation, the public body issued a revised access decision with regard to the requested records and our investigation of this matter concluded. The complaint regarding a decision by the Executive Council Office that FIPPA does not apply to the requested records is supported.

August 3, 2017
Manitoba Ombudsman