

Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2017-0181

MANITOBA HEALTH, SENIORS AND ACTIVE LIVING

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 19(1)(b)(c) and 23(1)(a)(d)(f)

REPORT ISSUED ON SEPTEMBER 21, 2017

SUMMARY: The complainant submitted an application under the Freedom of Information and Protection of Privacy Act seeking access to the Health Sustainability and Innovation Review undertaken by the Manitoba government. Manitoba Health, Seniors and Active Living (MHSAL) refused access to the report on the basis that the report had been created for submission to cabinet and it contained advice, recommendations, and policy options created for the public body. Based on our review, we determined that the report's disclosure would reveal the substance of deliberations of cabinet as well as advice to a public body. However, as we found that mandatory exceptions to disclosure under section 19 applied, we did not give further consideration to all aspects of the discretionary exceptions under section 23. As such, the complaint is not supported.

THE COMPLAINT

On March 8, 2017, Manitoba Health, Seniors and Active Living (MHSAL or the public body) received the following application for access under the Freedom of Information and Protection of Privacy Act (FIPPA or the act):

Please provide a full copy of the province's Health Sustainability and Innovation Review.

MHSAL responded on April 7, 2017, advising that access had been refused. The public body advised that access was refused in accordance with clauses 19(1)(b) and (c) as a significant portion of the document forms part of the policy analysis or proposals that were prepared with the expectation that they would be submitted to Treasury Board, a committee of cabinet, for its review. The public body stated that disclosure of this information would reveal the deliberations of cabinet.

In addition, MHSAL advised that access was being refused in accordance with clauses 23(1)(a)(d) and (f) of the act. The public body advised that disclosure of the requested record would reveal advice, opinions, proposals, analyses, and recommendations developed for both the department and the minister; that the disclosure would reveal proposed plans related to the management of personnel and the administration of the public body that have not yet been implemented; and, as the proposed plans have not yet been finalized and put into operation, disclosure of the requested record would result in the disclosure of pending policy decisions.

A complaint disputing the refusal of access decision was received by our office on May 2, 2017.

PRELIMINARY MATTER

The Health Sustainability and Innovation Review (HSIR) report was produced by a third party consultant under contract with the government of Manitoba. This contract was tendered via a Request for Proposals, which included timelines specifying when reports were to be produced.

We note that the HSIR contains two phases, and that a report on each phase was delivered to the public body on two separate dates. The report for Phase 1 of the HSIR was received by the public body on January 31, 2017, while the report for Phase 2 was received on March 31, 2017. The access request at issue in this complaint was received by the public body on March 8, 2017.

The report for Phase 2 would typically not be considered a responsive record because the public body did not possess a copy of the report for Phase 2 at the time the access request had been received. Because the report on Phase 2 of HSIR was not responsive to the access request, the access decision issued by MHSAL did not address this record. However, MHSAL advised our office that even though Phase 2 was not referenced in the access decision, the content of this record was contemplated by the public body in its access decision. MHSAL confirmed to our office its position that the report on Phase 2 was subject to the same exceptions it relied upon to refuse access to the report on Phase 1.

Although our office agrees that Phase 2 was clearly not responsive to the access request, we recognize that this record was part of the HSIR review process and that the complainant's access request had been worded in such a way as to capture the reports generated from both phases of the HSIR review. As such, for the purposes of our review in this case, and with the agreement of MHSAL, our office will be addressing both reports for Phases 1 and 2 of the Health Sustainability and Innovation Review as being subject to this access request.

POSITION OF THE PUBLIC BODY

Our office contacted MHSAL on May 5, 2017, to notify the public body of the complaint and to request clarification regarding the public body's access decision.

Our office received the public body's representations on June 20, 2017. In providing some general background, MHSAL advised that the HSIR was part of an election commitment aimed at controlling government spending. The public body advised that the origin of this fiscal review was part of a process that commenced prior to the 2016 provincial election and referred to a

commitment made by the then leader of the Opposition in a speech made at the Winnipeg Chamber of Commerce on November 17, 2015. The public body advised that MHSAL was participating in a separate review from the government wide “Value for Money” review, and that this separate process was the HSIR.

With regard to its reliance on clauses 19(1)(b) and (c), the public body advised that the purpose of the HSIR was to provide confidential advice and recommendations to both the minister of health, seniors and active living and to the minister of finance. MHSAL stated that the HSIR was prepared with the expectation that it would be used to identify opportunities, be the basis for the development of discussion papers and proposals for submission to cabinet, and that the disclosure of this document, even in part, would permit inferences to be drawn about the substance of deliberations of cabinet.

MHSAL also advised that the HSIR review relates to long term planning and it can be expected that the information taken from various parts of the HSIR will be used to inform the development of discussion papers and proposals for submission to cabinet going forward given the nature and scope of the recommendations.

In response to specific questions posed by our office, MHSAL referred to the limits to subsection 19(1) of FIPPA. Specifically, the public body made reference to clause 19(2)(b) which permits disclosure of records submitted to cabinet where cabinet consents to the release of those records. MHSAL confirmed that cabinet did not consent to the release of either Phase 1 or Phase 2 of the report.

With regard to its reliance on clause 23(1)(a), the public body advised that the advice and recommendations contained in the HSIR report are under review. MSHAL advised that the options identified will inform the development of policy over a number of years as these recommendations and options have different scopes and impacts. Based on this, MHSAL stated that the disclosure of the report would reveal advice, proposals, recommendations, and policy options that had been developed for both the department and the minister.

MHSAL advised that it also refused access under clause 23(1)(d) of FIPPA because many of the HSIR options have staffing implications. MHSAL advised that, since the scope of the HSIR was not limited to the department, these staffing implications extend to other entities funded under the Health Services Insurance Fund.

In clarifying its reliance on clause 23(1)(f) of FIPPA, the public body reiterated its position that the recommendations made in the HSIR are under review. MHSAL stated that, based on the information and recommendations in the report, it anticipates a constant flow of pending policy and budgetary decisions going forward.

Overall, the public body noted that because items in the report may not yet have been fully considered or analyzed and may not come to fruition, disclosure of the information in the report could cause unnecessary disruption and negatively impact the functioning of the health system.

Along with the representations, the public body provided our office with the following records: a copy of the Request for Proposal (RFP); a copy of the reporting structure between the consultant and cabinet; copies of news releases issued by the government of Manitoba dated August 11, 2016, and November 1, 2016, which relate to the HSIR; and, a copy of the terms of reference for both Phase 1 and 2 of the HSIR.

We attended the public body's offices on August 2 and 3, 2017, to review the reports on both phases of the Health Sustainability and Innovation Review.

ANALYSIS OF ISSUES AND FINDINGS

Do the mandatory exceptions to disclosure under clauses 19(1)(b) and (c) of FIPPA apply to the information contained in the withheld record?

Clauses 19(1)(b) and (c) are mandatory exceptions to the right of access under FIPPA. The head of a public body is obliged to refuse disclosure of information that would reveal the substance of deliberations of cabinet. Under FIPPA "cabinet" means the Executive Council appointed under the Executive Government Organization Act, and includes a committee of the Executive Council. Subsection 4(1) of the Financial Administration Act establishes the Treasury Board as a committee of the Executive Council. The cited exceptions read as follows:

Cabinet confidences

19(1) *The head of a public body shall refuse to disclose to an applicant information that would reveal the substance of deliberations of Cabinet, including*

(b) discussion papers, policy analyses, proposals, advice or similar briefing material submitted or prepared for submission to Cabinet;

(c) a proposal or recommendation prepared for, or reviewed and approved by, a minister for submission to Cabinet;

Records related to the deliberations or decisions of cabinet have traditionally been kept confidential in order to permit full and frank discussion within cabinet. The capability to discuss and deliberate in confidence facilitates collective decision making and avoids breaches in cabinet unity once decisions have been made. The cabinet confidence exception is a class exception inasmuch as it protects a certain type or kind of information from disclosure.

Although cabinet may consent to the release of any records which have been prepared for or submitted to it, a public body is prohibited from disclosing such records unless cabinet consents to their release.

During our review, we observed that both Phases 1 and 2 of the HSIR contain a number of observations and recommendations that were submitted to cabinet. We found that the information in the records was such that even general factual information would reveal advice, proposals, or recommendations that had been submitted to cabinet. We also determined that

releasing sections or portions (such as subject or chapter headings) of the HSIR would reveal the substance of the deliberations of cabinet.

Based on our review of the records, we found that the exceptions to disclosure found in clauses 19(1)(b) and (c) applied to the information being withheld. We are satisfied that the information contained in the records consisted of discussion papers, policy analyses, proposals, advice, recommendations, or similar briefing material submitted or prepared for submission to cabinet and accordingly the exception in clauses 19(1)(b) and (c) were applicable to the withheld information. Given the mandatory nature of the exception in clause 19(1)(b) of FIPPA, unless a limit to the exception applied, MHSAL had no discretion to release the records once it was determined that an exception in section 19 applied.

We then considered whether the limits to the exceptions to disclosure outlined under subsection 19(2) of the act would apply in this case. Specifically, our office considered clause 19(2)(b) to be potentially relevant in this case.

Exceptions

19(2) Subsection (1) does not apply if

(b) consent to disclosure is given

(i) in the case of a record prepared for or in respect of the current government, by the Executive Council, and

(ii) in the case of a record prepared for or in respect of a previous government, by the President of the Executive Council of that government or, if he or she is absent or unable to act, by the next senior member of that government's Executive Council who is present and able to act.

This provision means that if cabinet agrees to the release of a record which has been submitted to it, the exceptions to disclosure contained under subsection 19(1) do not apply. In this case, our office sought clarification from MHSAL about whether cabinet would consent to the release of the HSIR. In responding to our office, MHSAL confirmed that cabinet did not consent to the release of the HSIR. As such, our office determined that the limits to the exception to disclosure under subsection 19(2) do not apply.

Do the discretionary exceptions to disclosure under clauses 23(1)(a)(d) and (f) of FIPPA apply to the information contained in the withheld record?

Subsection 23(1) contains discretionary exceptions to the right of access under FIPPA and as such the public body may refuse to disclose information to an applicant if an exception in section 23 applies. The discretionary exceptions set out in section 23 of FIPPA are intended to ensure that full and frank discussions take place among officers, employees, and others who may be advising a public body and that the confidential relationship between a public body and its advisors is preserved. The term information rather than the term record is employed in

subsection 23(1) to indicate that the exceptions apply to the information contained in a record and not to the record as a whole. The relevant provisions are 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;

(d) plans relating to the management of personnel or the administration of the public body that have not yet been implemented;

(f) information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.

Clause 23(1)(a) is intended to maintain and encourage candour in the giving of advice and recommendations in order to assist the public body in making decisions about courses of action to follow or approaches to take. It allows a public body to refuse to disclose information that could reasonably be expected to reveal advice, opinions, proposals, recommendations, analyses, or policy options developed by or for the public body. Consequently, the exception in clause 23(1)(a) protects the free flow of advice etc. involved in the decision and policy making process of a public body.

With respect to the interpretation of clause 23(1)(d) of FIPPA our office consulted the *Manitoba FIPPA Resource Manual*. 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's definition of “plan” and “management of personnel” are as follows:

A “plan” is a formulated and especially detailed method by which a thing is to be done; a design or scheme; an intention or proposed proceeding.

“Management of personnel” includes all aspects of the management of the human resources of the public body, including staffing requirements; job classification; recruitments and selection; salary and benefits; hours and conditions of work; leave management; performance review; training; termination of employment; management of personal service contracts; etc.

The exception in clause 23(1)(d) is temporary; once a plan for the management of personnel or the administration of the public body has been "implemented," access to the information can no longer be refused under the exception in clause 23(1)(d).

The exception in clause 23(1)(f) provides protection to information where the disclosure of such information could possibly result in a premature disclosure of a forthcoming policy or budgetary

decision. The exception in clause 23(1)(f) no longer applies once the policy or budgetary decision has been made and put into effect.

Based on our review, we determined that these exceptions to disclosure apply to the information contained within the withheld records. We then considered whether any of the limits to the exceptions to disclosure contained under subsection 23(2) of the act would apply.

Where an exception to disclosure is determined to apply, a public body must also consider whether one of the limits to the exception to disclosure also applies. We note that the limit to disclosure under clause 23(2)(h) of the act may be applicable in this case. This provision reads as follows:

Exceptions

23(2) *Subsection (1) does not apply if the information*

(h) is a final report or final audit on the performance or efficiency of the public body or of any of its programs or policies, except where the information is a report or appraisal of the performance of an individual who is or was an officer or employee of the public body.

We note that the reports for both Phases 1 and 2 are considered to be final reports and therefore clause 23(2)(h) may be a relevant consideration. However, we determined that further representations from the public body regarding this provision were not necessary because we found that the mandatory exception to disclosure under clauses 19(1)(b) and (c) applied. Therefore the public body was unable to release the records even if the limit under clause 23(2)(h) applied.

ADDITIONAL CONSIDERATION

Prior to the issuance of this report, we note that a news article dated September 14, 2017, reported that the government was considering the release of a performance audit report undertaken by the consultant.¹ We followed up with the province to get further clarification about the possible release of information in the HSIR report. We acknowledge that the province has indicated its intent to release information from the HSIR report, in addition to another audit report that is not subject to this access request. We were advised that the HSIR report and the other report were currently being reviewed with respect to whether consent would be given to release information to the public.

However, as our investigation is complete, and no consent for release of information in the records at issue has been provided to date, we have determined that mandatory exceptions under clauses 19(1)(b) and (c) of FIPPA apply and the requirement for MHSAL to refuse access remains.

¹ CBC News. Article accessed on September 18, 2017. Available online at: <http://www.cbc.ca/news/canada/manitoba/pallister-audit-kpmg-trying-to-release-1.4290718>

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 Health, Seniors and Active Living to the Court of Queen's Bench within 30 days after receipt of this report.

September 21, 2017
Manitoba Ombudsman