

Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2017-0182

MANITOBA FINANCE

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 19(1)(b) and 19(2)(b)(i)

REPORT ISSUED ON OCTOBER 2, 2017

SUMMARY: The complainant submitted an application under the Freedom of Information and Protection of Privacy Act seeking access to the Fiscal Performance Review undertaken by the Manitoba government. Manitoba Finance refused access to the report on the basis that the report had been created for submission to cabinet. Based on our review, we determined that the report's disclosure would reveal the substance of deliberations of cabinet and that cabinet did not consent to its release. As such, the complaint is not supported.

THE COMPLAINT

On March 10, 2017, Manitoba Finance (Finance 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 copy of the province's fiscal performance review in its entirety.

Finance responded on April 6, 2017, advising that access had been refused. The public body advised that access was refused in accordance with clause 19(1)(b) as the disclosure of the records would reveal information that could harm the free flow of analysis and advice to cabinet, and undermine its ability to make decisions.

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

POSITION OF THE PUBLIC BODY

Our office contacted Finance on May 5, 2017, to notify the public body of the complaint and to request clarification regarding the public body's access decision. We asked the public body to provide written representations to our office to explain its position.

Our office did not receive written representations and, to avoid further delays in our investigation, we attended the public body's offices on July 19 and 20, 2017, to review the records at issue.

While on-site to review the records, our office met with staff of the Treasury Board Secretariat and Corporate Policy Branch of Finance. Finance advised it did not specifically request whether cabinet would consent to the release of these records in response to this FIPPA access request as it would be administratively burdensome to seek verification on each specific record subject to an access request. However, the public body stated that it was clear from internal discussions that cabinet did not consent to the release of the Fiscal Performance Review (FPR) documents. In addition, Finance explained that it was clear that cabinet did not intend to release these records. The public body advised that summary results of the FPR had been made publicly available as an appendix in the 2017 provincial budget.

The public body provided our office with the Request for Proposals for the audit, which it advised was publicly available. The Request for Proposals states that the FPR was composed of two documents, Phase I and Phase II. Finance advised that Phase I provides an overview of the government's fiscal situation and includes all government departments (we note that the Request for Proposals states the review excludes the department of Health, Healthy Living, and Seniors, which had its own separate review process taking place). Finance indicated that the purpose of Phase I is to broadly outline numerous challenges and opportunities, while Phase II focuses on specific opportunities which will feed into central government decision making.

Finance stated that there was not one specific day on which these records were considered or deliberated upon by cabinet, as the recommendations contained within the FPR were the subject of ongoing as well as future deliberations of cabinet. The public body indicated that because of the broad sweeping nature of this review, the implementation and consideration of any recommendations made will be ongoing, and will likely require further deliberations related to the development of provincial budget processes that will take place over a number of years.

In a letter dated July 27, 2017, our office contacted Finance to request clarification regarding the records at issue. We outlined our understanding of the public body's position with regard to its reliance on clause 19(1)(b) of FIPPA, as was verbally communicated to us during our meeting on July 19, 2017.

In this letter, we also made reference to what appeared to be conflicting statements reported by various news media which have been attributed to some cabinet ministers. In some instances, media outlets reported some cabinet ministers stating that large portions of the review would be made publicly available. In other instances, media outlets have reported some cabinet ministers as claiming that the reason that the report cannot be released is because it contains proprietary material or because there was a legal responsibility to protect the integrity of the review process which precluded cabinet from releasing the report. Because reports from some media sources attributed statements to members of cabinet which potentially indicated the intention to release the FPR report, our office asked the public body to verify whether or not cabinet consented to the release of these records.

Despite subsequent requests from our office, we did not receive any formal written representations from Finance. During a phone conversation on September 27, 2017, Finance advised that we correctly captured the public body's position as outlined in our letter dated July 27, 2017, and it confirmed that no consent from cabinet had been given for the public body to release the requested records.

ANALYSIS OF ISSUES AND FINDINGS

Does the mandatory exception to disclosure under clause 19(1)(b) of FIPPA apply to the information contained in the withheld records?

Clause 19(1)(b) is a mandatory exception 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. Clause 19(1)(b) of FIPPA reads 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;

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.

We attended the public body's office July 19 and 20, 2017, to review a copy of the records at issue. We reviewed both Phases I and II of the FPR. At that time we were also provided with copies of the Request for Proposals (RFP) under which interested parties submitted bids to conduct the FPR, as well as the contract awarded to the successful bidder. Finance advised our office that both the RFP and the contract were publicly available records.¹

Based on our review of these documents, we determined that both the RFP and the contract indicate that the product of the fiscal review was prepared with the expectation that it would be

¹ We note that both the Request for Proposals and the contract can be found online at Manitoba Finance's website. The Request for Proposals is available at: http://www.gov.mb.ca/finance/access/attachments/fin_fippa_46-17_attachment_2.pdf

submitted to cabinet. The RFP states that the purpose of the review is to “provide confidential advice and recommendations to the Minister of Finance for consideration during the development of the next provincial budget.” The RFP also identifies the Treasury Board as a committee of cabinet. The signed contract is between the government of Manitoba, as represented by the minister of finance, and the consultant to whom the contract was awarded.

During our review, we observed that both Phases I and II of the FPR 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 FPR would reveal the substance of the deliberations of cabinet.

Based on our review of the record, we found that the exception to disclosure found in clause 19(1)(b) applied to the information being withheld. We are satisfied that the information contained in the records consisted of discussion papers, policy analyses, proposals, advice, or similar briefing material submitted or prepared for submission to cabinet and accordingly the exception in clause 19(1)(b) was applicable to the withheld information. Given the mandatory nature of the exception in clause 19(1)(b) of FIPPA, unless cabinet consented to the disclosure of these records, Manitoba Finance 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

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 Finance about whether cabinet would consent to the release of the FPR. In responding to our office, Finance confirmed that cabinet did not consent to the release of the FPR. As such, our office determined that the limits to the exception to disclosure under subsection 19(2) do not apply.

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.² We sought clarification from Manitoba Finance as to whether it

² 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>

had received consent from cabinet to release the report in response to the FIPPA access request at issue in this complaint. The public body verified that, as of September 27, 2017, cabinet had not consented to the release of the FPR report. 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 the mandatory exception under clause 19(1)(b) of FIPPA applies and the requirement for Manitoba Finance to refuse access remains.

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 Finance to the Court of Queen's Bench within 30 days after receipt of this report.

October 2, 2017
Manitoba Ombudsman