

Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2017-0357

EXECUTIVE COUNCIL OFFICE

ACCESS COMPLAINT: REFUSED ACCESS

PROVISION CONSIDERED: 12(1)(c)(i)

REPORT ISSUED ON APRIL 6, 2018

SUMMARY: Manitoba Executive Council (Executive Council) issued a decision in response to a request made under the Freedom of Information and Protection of Privacy Act (FIPPA or the act) for access to all records of local, national and international phone calls and text messages from the premier's personal cell phone regarding Manitoba government business. Access was given to the information in part; however, Executive Council advised the complainant that a review of phone bills for the device in question was unable to identify text messages relating to government business as the bills did not display the recipients of text messages. Executive Council refused access to records of text messages stating that these records could not be located. Subsequent to a refused access complaint to the Manitoba Ombudsman, a further search of the cell phone in question was conducted. Some text messages relating to government business were recovered from the device and a revised access decision was issued to the complainant giving access to the recovered information in part. At that point, our office considered the complaint to be addressed. Our office found that the complaint of refused access was supported.

PRELIMINARY MATTERS

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.

On February 22, 2017 Executive Council advised the complainant 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 did not apply to the records requested was made to our office on February 28, 2017. This complaint was investigated by our office as case 2017-0081 and our report was released on August 3, 2017.¹

In the course of our investigation into whether FIPPA applied to the requested records, Executive Council advised our office that it had determined that the personal cell phone of a family member had been used by the premier for communications relating to government business. Executive Council 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.

In light of the foregoing, on July 14, 2017 Executive Council issued a revised access decision to the complainant, on the basis that FIPPA did apply to the requested records. That access decision granted access to the requested records in part. Our office then considered this earlier complaint to be addressed and our investigation was concluded. The complainant was advised that he did have a right of complaint regarding the public body's revised access decision as allowed under subsection 59(1) of FIPPA. This report concerns a complaint made about the revised access decision.

COMPLAINT

In its access decision of July 14, 2017, Executive Council advised the complainant that it had examined 9 months (from May 3, 2016 to January 29, 2017) of usage bills from a private cell phone device and located entries for calls made from the device to government employees. Executive Council 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.

¹ Our report into this investigation is posted on Manitoba Ombudsman's website and may be viewed at <https://www.ombudsman.mb.ca/uploads/document/files/case-2017-0081-en.pdf>

With respect to the portion of the complainant's request referencing text messages, the public body advised the complainant that, based on a review of phone bills relating to the device in question, it was unable to locate text messages related to government business as the phone bills do not display recipients of text messages. In accordance with subclause 12(1)(c)(i) of FIPPA, Executive Council informed the complainant that access to information relating to text messages was being refused as they could not be located.

On September 6, 2017 our office received a complaint concerning Executive Council's access decision that text messages related to government business could not be located.

INVESTIGATION

In its access decision, Executive Council informed the complainant, as required by subclause 12(1)(c)(i) of FIPPA, that access to the portion of the request referencing text messages was refused on the basis that these records could not be located. The 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,

In considering a complaint of refused access under FIPPA where the public body has determined that it cannot locate records, our office will investigate whether the circumstances show that reasonable efforts were made to search for and locate responsive records. We will ask for information regarding the search strategy and the search activities undertaken by the public body which led to the conclusion the requested records did not exist or could not be located. At issue in this case is whether the circumstances show that reasonable efforts were made to search for and locate the responsive records which may be stored on a personal device.

As noted earlier (in the course of the investigation in case 2017-0081), Executive Council acknowledged that it considers all records of government business to be under the control of the public body for the purposes of FIPPA, even when stored on a personal device. Our office wrote to Executive Council on September 12, 2017 and noted that a record under FIPPA includes those records capable of being produced from an electronic device under the control of the public body. We observed that text messages are forms of correspondence and are considered records under FIPPA, regardless of the tool or service used to create them. FIPPA defines a record as follows:

“record” 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, but does not include electronic software or any mechanism that produces records;

Accordingly, in our view, Executive Council could reasonably be expected to provide the complainant with copies of any records responsive to the request which may still be residing on a personal device which was used to conduct government business. We asked the public body to describe how it searched for responsive records in order to demonstrate that its search efforts had been thorough and comprehensive and that it had explored all reasonable avenues to locate responsive records.

Position of the Public Body

Executive Council responded to our office on November 20, 2017. It explained that it had consulted with the device owner and, as a result of that process, it was determined that personal cell phone bills would be the responsive record. Nine months of bills were reviewed to search for phone calls and text messages related to government business. It was determined that the service provider for the device in question displays the total number of texts per billing period but does not display the recipient of specific messages. Based on this search activity it was determined that text messages of government business could not be located.

Executive Council explained that it considered its search activities to be adequate and reasonable. However, following the release of our report in case 2017-0081, Executive Council undertook a technical review of the mobile device in question to ascertain if records of government-related business could be identified. Results were obtained which required further analysis, which Executive Council carried out. Executive Council observed that this type of review was unprecedented in responding to FIPPA applications to access government records.

Search Results

For the purposes of its technical analysis, Executive Council obtained the device owner’s permission to examine the device to determine the existence of records that could be reviewed and to ascertain if any records of government business could be identified. A large number of records (approximately 5000) were retrieved.

As a result of its analysis of search results, Executive Council determined that the overwhelming majority of recovered records related to personal and private matters not connected in any way to government business. The public body identified 29 responsive records (text messages sent between May 3, 2016 and January 26, 2017) from the recovered data relating to government

business. Accordingly, a revised access decision was issued to the complainant on March 27, 2018.

Executive Council granted access in part to the text messages relating to government business recovered from the personal device. Our office then considered the complaint relating to the public body's decision that records relating to text messages could not be located to be addressed.

The public body refused access to some information relating to the text message records that it provided to the complainant. The complainant was advised that he had a right of complaint about the information that was severed from the records provided to him.

OTHER MATTERS

As observed by Executive Council, the type of searches undertaken in this matter were unprecedented in responding to FIPPA applications to access government records. We acknowledge that extraordinary measures were undertaken by the public body to search for and locate responsive records, which was necessitated by the use of a personal device to conduct government business.

In the course of our investigation in case 2017-0081, the clerk of the executive council conducted a review 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, 'The Interim Policy on the Use of Government IT Devices, Email Accounts, and Text Messages' was developed which addressed the identified gaps, assisted with statutory compliance and reflected best practices related to information management and security. This interim policy directive (which became effective on July 14, 2017 for ministers, members of Executive Council and all technical officers) prohibits the use of personal devices and accounts when conducting government business except in urgent circumstances. Executive Council notes that it is the intent of this policy to ensure that any records of government business on personal devices are transferred to government for record keeping purposes.

Our office is satisfied that the public body has implemented appropriate measures to ensure statutory compliance in the management of records relating to government business. Our office acknowledges the cooperation of Executive Council in the investigation of this complaint, including its efforts to search for and identify responsive records.

CONCLUSION

While our office recognizes that the efforts to locate records in this case were unprecedented, ultimately records were located. This being the case, the complaint regarding a decision by Executive Council that records of text messages could not be located is supported. As the public body issued a revised access decision with regard to the requested records of text messages our investigation of this matter is concluded.

April 6, 2018
Manitoba Ombudsman