

Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2017-0371

PRAIRIE MOUNTAIN HEALTH

ACCESS COMPLAINT: REFUSAL OF ACCESS

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

REPORT ISSUED ON FEBRUARY 23, 2018

SUMMARY: The complainant submitted an application under the Freedom of Information and Protection of Privacy Act seeking access to a fiscal sustainability report created by the regional health authority. The regional health authority refused access to the report on the basis that its disclosure would reveal the substance of deliberations of cabinet and advice within the public body. Based on our review, we determined that the regional health authority was required to refuse access to this record because the report's disclosure would reveal the substance of deliberations of cabinet and that cabinet did not consent to its release.

THE COMPLAINT

On August 24, 2017, Prairie Mountain Health (PMH or the public body) received the following application for access under the Freedom of Information and Protection of Privacy Act (FIPPA or the act):

A copy of the Financial Sustainability Plan as originally submitted to MHSAL as well as any subsequent records of deletions, alterations or additions of said Plan.

PMH responded on September 1, 2017, advising that access had been refused in accordance with clauses 19(1)(b) and (c) as well as clauses 23(1)(a)(b)(d) and (f) of the act.

A complaint disputing the refusal of access decision was received by our office on September 15, 2017. In submitting the complaint to our office, the complainant designated a representative who they authorized to act on their behalf.

POSITION OF THE PUBLIC BODY

Our office contacted PMH on September 22, 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 our office with written representations explaining its position.

On October 16, 2017, we received the public body's response. PMH advised that the records created in relation to the Financial Sustainability Plan were prepared as confidential advice, briefings, and impact statements submitted to the minister and cabinet for the purposes of consideration and approval. The public body stated that disclosure of these records would reveal the deliberations of cabinet. PMH also stated that the records include confidential recommendations and proposals that were prepared for the consideration of the minister and cabinet, as it relates to the financial, administrative, and operational changes to the public body.

The public body advised that it applied clause 23(1)(a) to records that included analysis, opinions, advice, and recommendations by the PMH board of directors and executive management team for the minister of health's consideration and approval as it relates to financial and administrative operations. PMH stated that the creation of these records were for purposes of ministerial deliberations and would require, once approval is received, further analysis and planning as it relates to operationalization before disclosing.

With regard to clause 23(1)(b), PMH stated that this provision was applicable because the responsive records include details related to analysis and considerations regarding potential changes to specific programs. PMH stated that the disclosure of this information would identify employees who may be impacted and, at the time of responding to this request, no approvals had been received by the minister regarding the analysis and considerations proposed.

The public body indicated that a similar rationale applied to clause 23(1)(d) as the plans proposed to the minister of health would impact the management of PMH employees and administrative operations of PMH. The public body reiterated that at the time of responding to this request, approvals had not yet been received from MHSAL and therefore have not been implemented.

PMH advised that it applied clause 23(1)(f) as the responsive records included information on proposed plans/recommendations which would disclose pending policy and budgetary decisions. The public body again advised that, at the time of responding to this request, it was awaiting approvals from MHSAL and that those approvals would have a direct impact to PMH's further policy and budgetary decisions.

PMH also stated that the information contained within the responsive records had not been fully analyzed and approved for further implementation. These records contain advice, briefings, opinions, and recommendations that remain very fluid and are not considered a final document. PMH advised that as it moves forward, the recommendations made may be implemented or an alternate approach may be considered in collaboration with MHSAL. As a result, disclosure of this information could result in unnecessary disruption and/or negatively impact PMH operations until fully approved and implemented.

Subsequently, our office contacted the public body to request further clarification. On November 22, 2017, we met with staff of PMH to discuss the Financial Sustainability Plan.

In response to questions posed by our office, the public body confirmed that it had not received consent from cabinet to release the report. PMH stated that the report was submitted on March 30, 2017, but also stated that it was aware the report was still under review by cabinet and that it had not yet received approval on the proposed plan.

The public body reiterated its position that disclosure of the plan would reveal the substance of deliberations of cabinet with regard to potential restructuring within the regional health authority, and that these deliberations were ongoing and had not yet concluded. PMH stated that although it had provided a plan to cabinet which related to this, the public body's recommendations had not yet been approved, there was the potential that they could be modified, and practical steps for implementation were still pending. PMH stated that it had asked about the release of the Financial Sustainability Plan, but confirmed that cabinet had not consented to its release.

During the meeting on November 22, PMH provided our office with a copy of the Financial Sustainability Plan.

On December 13, 2017, our office spoke with the complainant's representative who referred to a publicly available news article which made reference to one issue that related to cost savings within a number of regional health authorities.¹ The complainant's representative alleged that this issue (which relates to reducing the number of management staff) was a part of the Financial Sustainability Plan and the complainant therefore perceived that at least a portion of the plan had been approved and implemented. Our office reviewed the news article which refers to this issue as being mandated by the provincial government, however, it does not indicate whether this issue is part of the regional health authority's Financial Sustainability Plan.

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. Clauses 19(1)(b) and (c) of FIPPA 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*

¹ For reference, this news article can be found at the following link: <http://www.cbc.ca/news/canada/manitoba/wrha-management-cuts-1.4147950>

(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 cabinet confidence exception is a class exception inasmuch as it protects a certain type or kind of information from disclosure.

The exception to disclosure in clause 19(1)(b) only applies to material “submitted to” or “prepared for submission to” cabinet or a committee of cabinet. Briefing material is “submitted” to cabinet if it is presented to cabinet or a committee of cabinet for consideration or decision. Information is “prepared for submission” to cabinet if it is prepared with the reasonable expectation that it will be presented to cabinet or a committee of cabinet.

Similarly, in order for clause 19(1)(c) to apply the proposal or recommendation must have been:

- (i) prepared for a minister for submission to cabinet or a committee of cabinet, or
- (ii) reviewed and approved by a minister for submission to cabinet or a committee of cabinet.

A proposal or recommendation is “prepared for submission” to cabinet or is “reviewed and approved for submission” to cabinet if it is prepared, reviewed, or approved with the intent that it be presented to cabinet or a committee of cabinet for consideration or decision.

Our office reviewed the responsive record and we agree that clauses 19(1)(b) and (c) apply to the withheld information as the Financial Sustainability Plan was prepared for submission to cabinet and was submitted to cabinet. The withheld information contained within the record consists of analysis, proposals, similar briefing material which was prepared for submission to cabinet. We note that this information was submitted to cabinet.

As established by recent provincial government news releases, the provincial government has undertaken a number of initiatives related to the health-care system which includes contemplation of various issues that will impact regional health authorities. PMH’s Financial Sustainability Plan was created and submitted to the provincial cabinet in an effort to provide advice which will assist in these ongoing contemplations. The Financial Sustainability Plan includes proposals that could have both health-care service as well as budgetary implications. As our office was advised that this matter is still before cabinet and is being discussed, we are satisfied that the disclosure of the Financial Sustainability Plan would reveal the substance of deliberations of cabinet.

Based on our review of the record, we found that the exceptions to disclosure set out in clauses 19(1)(b) and (c) apply to the information being withheld. We are satisfied that the information contained in the record was prepared for the purpose of being submitted to cabinet, was submitted to cabinet, and accordingly the exceptions in clauses 19(1)(b) and (c) are applicable to the withheld information. Given the mandatory nature of the exceptions in clauses 19(1)(b) and (c) of FIPPA,

unless cabinet consented to the disclosure of these records, PMH had no discretion to release the records once it was determined that an exception in section 19 applied.

Do the discretionary exceptions to disclosure under clauses 23(1)(a), (b), (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;

(b) consultations or deliberations involving officers or employees of 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) 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.

Clause 23(1)(b) of FIPPA allows a public body to refuse to disclose information that would reveal consultations or deliberations involving employees of a public body. In the context of this clause, a consultation is the seeking of the views of one or more persons as to the appropriateness of suggested actions, proposals, etc. Deliberation is defined as careful consideration, the discussion of reasons for and against, or a debate or discussion. Information excepted from access under clause 23(1)(b) must reveal an account of the consultations or deliberations between employees of the public body and not just the decisions that were taken.

With respect to the interpretation of clause 23(1)(d) of FIPPA our office consulted the *Manitoba FIPPA Resource Manual* (the manual).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. 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 large portions of the information contained within the withheld Financial Sustainability Plan. 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, as was the case with the type of information contained within the Financial Sustainability Plan, our office would also consider whether the public body reasonably exercised its discretion in deciding to withhold rather than give access to the information. However, we did not give further consideration to the extent to which these provisions apply because we found that the mandatory exception to disclosure under clause 19(1)(b) and (c) applied.

² The FIPPA Resource Manual is publicly available and can be found online at the following link:
https://www.gov.mb.ca/chc/fippa/public_bodies/resource_manual/index.html

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

February 23, 2018
Manitoba Ombudsman