

# Manitoba Ombudsman

## REPORT UNDER

## THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2017-0416

### WINNIPEG REGIONAL HEALTH AUTHORITY

### ACCESS COMPLAINT: REFUSAL TO WAIVE FEES

**PROVISIONS CONSIDERED: 82(5)  
ACCESS AND PRIVACY REGULATION 64/98: 9(1)(c)**

**REPORT ISSUED ON JULY 6, 2018**

**SUMMARY:** An individual made a request for access to information under the Freedom of Information and Protection of Privacy Act (FIPPA or the act) to the Winnipeg Regional Health Authority (the WRHA or the public body). The WRHA issued an estimate of fees payable for responding to the access application. The individual requested a fee waiver, citing clause 9(1)(c) of the Access and Privacy Regulation (the record relates to a matter of public interest). The public body was not satisfied that clause 9(1)(c) applied to the requested information and decided not to waive the fee. The ombudsman found that the WRHA reasonably considered whether the requirements for a fee waiver under clause 9(1)(c) were fulfilled. The complaint was not supported.

### COMPLAINT

On August 18, 2017 the Winnipeg Regional Health Authority (the WRHA or the public body) received a request made under the Freedom of Information and Protection of Privacy Act (FIPPA or the act) for access to the following information:

*...a copy of communication to and from the Winnipeg Regional Health Authority's communication staff that specially communicate with media outlets, including but not*

*limited to [named WRHA employee] and [named WRHA employee] – concerning implementation of the WRHA’s Healing Our Health System plan.*

*Specifically, correspondence between May 1, 2017 and the date this request is received that discuss the best way to announce changes, and how to handle information about the changes that the public becomes aware of prior to the WRHA officially announcing it.*

An Estimate of Costs payable in order for the WRHA to respond to the request was issued on August 31, 2018 in the amount of \$814.50.

On September 25, 2017 the WRHA received a request to waive the fees. The WRHA’s decision to refuse the request for a fee waiver was issued by letter on September 29, 2017.

A complaint about the WRHA’s decision not to grant a fee waiver was received in our office on October 23, 2017.

## **POSITION OF THE COMPLAINANT**

The complainant made the request for a fee waiver to the WRHA in writing, explaining that her access request was for communications between the WRHA’s two key spokespersons discussing the best way to make announcements concerning the WRHA’s ‘Healing Our Health System’ plan. The complainant further explained that she was particularly interested in communication discussing the best way to handle public announcements of changes about which the public had already become aware prior to an official announcement being made between May 1, 2017, and August 1, 2017. The complainant also explained that, as the two spokespersons were the main conduit for public announcements, their communications were particularly newsworthy. The complainant related that it was her view that the public had a right to see how the process of delivering public announcements of significant health care changes unfolded in an unscripted and authentic manner.

The complainant shared with the WRHA that it was her view that information about the delivery of health care was of current interest to the public in light of rapid changes to the health-care system underway at the time the complainant’s access request was made. The complainant further advised that the information requested was in the public interest as it would contribute to public understanding of the operations of the WRHA during a tumultuous period. The complainant stated her view that her request for a fee waiver met the criteria set out in clause 9(1)(c) (record relates to a matter of public interest concerning public health) of the Access and Privacy Regulation (the regulation).

## **POSITION OF THE PUBLIC BODY**

The WRHA advised the complainant by letter that her request for a fee waiver was refused. The public body explained that the fees estimated to respond to the complainant's access request represented a cost recovery for the public body and would offset the expense incurred as a result of responding to the request. The WRHA stated that, after considering her waiver request, the WRHA had determined that the fees estimated complied with the scope of the access request and the waiver was, therefore, refused.

## **ANALYSIS OF ISSUES AND FINDINGS**

FIPPA states that a public body may require an applicant to pay fees for search, preparation, copying and delivery services as provided for in the regulations. The regulation states that a public body shall give an applicant an estimate of fees when it reasonably considers that, in responding to the request, search and preparation is likely to take longer than two hours or computer programming or data processing costs will be incurred. FIPPA further states that, if a fee will be charged, the public body shall issue an estimate before providing the services. Under subsection 82(5) of FIPPA, a public body may waive the payment of all or part of a fee. The provision states:

### ***Waiver of fees***

**82(5)** *The head of a public body may waive the payment of all or part of a fee in accordance with the regulations.*

Subsection 9(1) of the regulation sets out three circumstances under which a public body may waive fees:

### ***Waiver of fees***

**9(1)** *At the applicant's request, the head of a public body may waive all or part of the fees payable under this regulation if the head is satisfied that*

- (a) payment would impose an unreasonable financial hardship on the applicant;*
- (b) the request for access relates to the applicant's own personal information and waiving the fees would be reasonable and fair in the circumstances; or*
- (c) the record relates to a matter of public interest concerning public health or safety or the environment.*

If the public body is satisfied that one of the circumstances set out in subsection 9(1) of the regulation applies, the public body may (it is within its discretion to) waive all or part of the fees payable.

Our consideration of a complaint concerning a public body's decision to refuse a request for a fee waiver involves two steps. We will first consider whether the complainant has established that one of the provisions of subsection 9(1) of the regulation applies. If so, the next step is to consider whether the public body reasonably exercised its discretion in deciding not to waive the fee. In investigating whether or not a public body has reasonably exercised its discretion our office will consider whether the public body erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

A decision about a fee waiver must be made in consideration of the circumstances set out in subsection 9(1) of the regulation and the discretion to refuse a fee waiver must be exercised on a case by case basis with regard to the particular circumstances of each request. Our office notes that even if the head is satisfied that the required grounds have been established, it is still within the public body's discretion to decide not to grant a fee waiver; however, the public body must provide reasons for its decision that demonstrate it exercised its discretion to do so in a reasonable fashion.

On receiving this complaint our office noted that in notifying the complainant about its decision not to grant a fee waiver, the WRHA did not provide reasons for its determination that the complainant had not satisfied the requirements set out in subsection 9(1) of the regulation. The considerations described by the WRHA in its fee waiver decision letter – that the expenses estimated to respond to the access request accurately reflected the scope of the access request – appeared to us to relate to determining a reasonable fee estimate rather than the reasonable consideration of a request for a fee waiver. Our office contacted the WRHA and asked it to clarify the factors it considered in deciding to refuse a fee waiver in this instance.

In its initial representations provided to our office, the WRHA explained that its primary consideration centered on whether the complainant had provided support for her assertion that the record requested related to a matter of public interest as described in clause 9(1)(c) of the regulation. The WRHA stated that it was not satisfied that “meta-communications about communicating [the] implementation plan (not the implementation plan)” fit the requirements of the provision and, in its view, the complainant had not provided supporting information for how it would.

In investigating this complaint, our office had reviewed the guidelines for the consideration of a fee waiver request as explained in the *Manitoba FIPPA Resource Manual*<sup>1</sup> (the manual). When assessing whether the record relates to a matter of public interest the public body should consider whether there is general interest in the matter, whether the applicant plans to publicly disseminate the information upon gaining access and whether a broad range of people will benefit from the release.

Our office considered the complainant's fee waiver request letter, a copy of which she had provided to us. Our office did not agree that the complainant had not submitted arguments to support her view that the requested information fit the criteria of clause 9(1)(c). In her letter the complainant had stated her belief that the communications of the two WRHA spokespersons were particularly newsworthy and that there was high public interest in the changes to the health-care system which were currently underway. The complainant asserted that the information she had requested would contribute to a better understanding of the operations of a public body during a tumultuous period. Our office notes that, as a member of the media, the complainant also had plans to publicly disseminate the information upon gaining access.

Our office asked the WRHA to more fully explain its reasons for determining that the complainant's submission in support of her fee waiver request did not meet the criteria of the provision which would demonstrate that the public body had reasonably considered the complainant's fee waiver request. The WRHA responded and explained that it agreed that there was a significant level of interest in changes to the health-care system. However, in its view, messages to and from members of the WRHA communication team about how those changes would be announced did not rise to a level of public interest which would warrant that the public body absorb the costs of responding to the request.

Our office considered the WRHA's explanation. Our office notes that the manual states that, for the head of a public body to consider waiving fees under clause 9(1)(c), the applicant must be seeking access to a record that "relates to a matter of public interest" in one of three areas: public health, public safety or the environment. As explained by the manual, public health refers to the well-being of the general public, or of a significant part of the public. Our office accepted that the information requested by the complainant, while tangentially related to a health-care matter (the 'Healing Our Health System' plan), would primarily illustrate the communication strategy of a large public body but would not, in our view, contribute to a better understanding of a public health issue (as for, example, information about the delivery of a vaccination program). Our office also considered that the complainant had stated that she viewed WRHA communication on how to announce changes to the health-care system to be 'particularly newsworthy' and we do not disagree; however, in our view 'newsworthy' does not equate with 'a matter of public interest' as this relates to public health (the well-being of the general public). In our view, the

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<sup>1</sup> 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.

WRHA had reasonably concluded that the complainant had not satisfied the requirements of clause 9(1)(c) of the regulation. As the complainant had not satisfied the requirements of clause 9(1)(c), it was not necessary to consider the WRHA's exercise of discretion.

## **CONCLUSION**

Our office found that the WRHA had reasonably concluded that the requirements for a fee waiver under clause 9(1)(c) were not met. Therefore, the complaint relating to the WRHA's decision to refuse a fee waiver is not supported.

Manitoba Ombudsman  
July 6, 2018