

# Manitoba mbudsman

## REPORT UNDER

### THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2017-0469

#### MANITOBA JUSTICE - CONSUMER PROTECTION DIVISION

#### ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 4(e), 19(1)(e), 23(1)(a), 23(1)(b), 26 and 27(1)(a)

REPORT ISSUED ON August 16, 2018

**SUMMARY:** The complainant made an application for access to Manitoba Justice - Consumer Protection Division (CPD) for copies of all records regarding Bill 27, the Elections Amendment Act from the deputy minister's office. The CPD granted access to some of the responsive records and refused access in whole or in part to others. The CPD also determined that some records were not subject to the Freedom of Information and Protection of Privacy Act (FIPPA). A complaint was made to our office about the public body's access decision. Our review determined that some records were excluded from FIPPA. We also determined that while some of the exceptions to access under FIPPA applied to the responsive records, other cited exceptions did not apply to the responsive records. Therefore, the complaint was partly supported.

#### THE COMPLAINT

On October 4, 2017, the complainant made a request under the Freedom of Information and Protection of Privacy Act (FIPPA) to Manitoba Justice - Consumer Protection Division (the CPD or the public body) for access to the following:

*2017-129: Since January 1, 2017: all records, including but not limited to briefing notes, advisory notes, and housebook notes, regarding Bill 27, The Elections Amendment Act from the Deputy Minister of Justice's office.*

On October 31, 2017, the CPD refused access in part or in full to 90 pages of records citing various sections of FIPPA. The public body also advised that access was not being provided to three pages of records on the basis that they were not subject to FIPPA under clause 4(b). Under

subsection 59(1) of FIPPA an applicant may make a complaint to the ombudsman about any decision, act or failure to act that relates to his or her request for access.

On November 29, 2017, our office received a complaint about the public body's decision that some records were not subject to FIPPA, and about the decision to refuse access on the basis that the information was subject to exceptions to access under FIPPA. The complainant noted that the public body had cited clause 4(b) as the basis for determining that one three-page record was excluded from FIPPA, but the complainant could not see how this provision would be relevant to this particular record.

## **POSITION OF MANITOBA JUSTICE - CONSUMER PROTECTION DIVISION**

The CPD originally determined that three pages of records were excluded from FIPPA, under clause 4(b) of FIPPA, which states that a note made by or for, or a communication or draft decision of, a person who is acting in a judicial or quasi-judicial capacity is not subject to FIPPA. However, the CPD acknowledged in its correspondence to our office, that 4(b) was cited in error and that the decision not to provide access to the records was based on clause 4(e) of FIPPA, which states that a record that was made by or for an officer of the legislative assembly is not subject to FIPPA.

The remaining 90 pages of records were withheld under clauses 19(1)(e), 23(1)(a), 23(1)(b), and 27(1)(a) and section 26 of FIPPA. Our office reviewed copies of the responsive records, which were provided to us by the public body. Subsequent to this review, our office discussed with the public body various concerns we had with the application of certain exceptions to the responsive records. The public body noted our concerns and issued a revised access decision on June 12, 2018, and released one record, with severing, which had previously been refused in full.

## **ANALYSIS OF THE ISSUES AND FINDINGS**

### **Does FIPPA apply to the information not provided on the basis of clause 4(e) of the act?**

Section 4 of FIPPA sets out the types of records which are not subject to the act. Clause 4(e) of FIPPA states that the act does not apply to records made by or for an officer of the legislative assembly:

***Records to which this Act applies***

***4 This Act applies to all records in the custody or under the control of a public body but does not apply to***

***(e) a record made by or for an officer of the Legislative Assembly;***

Subsection 1(1) of FIPPA defines the term "Officer of the Legislative Assembly" as follows:

***"officer of the Legislative Assembly" means the Speaker of the Legislative Assembly, the Clerk of the Legislative Assembly, the Chief Electoral Officer, the Ombudsman, the***

*Children's Advocate, the Auditor General, the registrar appointed under The Lobbyists Registration Act, the Information and Privacy Adjudicator appointed under this Act, and the commissioner appointed under The Legislative Assembly and Executive Council Conflict of Interest Act; (emphasis added)*

The chief electoral officer is an officer of the legislative assembly, as defined under FIPPA. Therefore, any records prepared by or for the chief electoral officer are not subject to FIPPA, despite that the records are held by a public body.

Our office reviewed the information to which the CPD applied this provision and confirmed that the records consisted of correspondence to and from the chief electoral officer. Based on this, our office found that the CPD appropriately determined that these records are not subject to FIPPA and therefore access was not provided to them.

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

Clause 19(1)(e) is a mandatory exception to the right of access under FIPPA. 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. Clause 19(1)(e) 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*

*(e) a record prepared to brief a minister about a matter that is before, or is proposed to be brought before, Cabinet or that is the subject of communications among ministers relating directly to government decisions or the formulation of government policy.*

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 exception to disclosure in clause 19(1)(e) applies to records prepared to brief a minister about a matter that is or proposed to be brought before cabinet or a committee of cabinet or is the subject of communications among ministers.

Our office reviewed the responsive records and we agree that clause 19(1)(e) applies to the withheld information. The withheld information contained within the record consists of an update to minister on a matter that was being discussed by cabinet and the minister at a subsequent cabinet meeting. The records contain information that if released could reveal the substance of deliberations or decisions of cabinet.

**Does the discretionary exception to disclosure specified in section 26 of FIPPA apply to the withheld information?**

Section 26 provides the head of a public body with the discretion to refuse to disclose information, which could reasonably be expected to harm or threaten the security of any property or electronic information systems. The CPD applied this section to withhold information, which if disclosed could harm or threaten the security of an electronic information system.

Our review of the records confirmed that they contained information, which could reasonably be expected to compromise the security of an electronic information system. We found that the discretionary exception to disclosure in section 26 applied to the small amount of information being severed from the responsive records. In addition, we concluded that the exercise of discretion on the part of the CPD to refuse access to this information was reasonable.

**Does the exception allowed under clause 27(1)(a) of FIPPA apply to the information withheld by the CPD?**

Clause 27(1)(a) of FIPPA may be applied by a public body to withhold information that is subject to solicitor-client privilege. Solicitor-client privilege includes all communication of a confidential character between a solicitor and a client related to the seeking, formulating or giving of legal advice and includes both legal advice privilege and litigation privilege.

Our office reviewed the information refused under clause 27(1)(a) of FIPPA and found that it was communication between a lawyer and the lawyer's client; the communication entailed the giving or seeking of legal advice; and the communication was intended to be confidential. Therefore, our office found that the exception was appropriately applied.

**Do the discretionary exceptions to disclosure under clauses 23(1)(a) and (b) apply to the withheld information?**

The discretionary exceptions set out in section 23 of FIPPA are intended to protect the advisory and decision-making processes of a public body. Preserving the confidential relationship between a public body and its advisors ensures that full and frank discussions can take place among officers, employees and others who may be advising a public body. These exceptions protect a type of information contained in a record and may not apply to the all of the information in a record.

The exceptions in subsection 23(1) are discretionary, meaning that a public body may refuse access, but it is not required to do so. Accordingly, a public body must exercise its discretion about whether to refuse or give access to information to which a discretionary exception applies. Subsection 23(2) sets out limits to the exceptions in subsection 23(1), meaning that if the information is subject to one of the limits, the exception in subsection 23(1) does not apply to that information.

The intent of clause 23(1)(a) is to maintain and encourage candour in the provision of advice in order to assist the public body in making decisions about courses of action to follow or approaches to take. This exception allows a public body to refuse to disclose information that could reasonably be expected to reveal advice, opinions, proposals, recommendations, analysis, or policy options developed by or for the public body. It would not generally apply to background information or facts that are already known.

The information must reveal a suggested course of action which the public body was in a position to ultimately accept or reject. As a result, this exception protects the free flow of advice involved in the decision and policy making process of a public body. The intent of clause 23(1)(b) is to maintain and encourage candour in consultations or deliberations involving officers or employees of the public body.

***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;*

The public body refused access in full or in part to the following records under clauses 23(1)(a) and 23(1)(b):

- a record titled “Bill Briefing”, 8 pages, refused in part (Record A)
- a record titled “Register of Voters, 1 pages, refused in part (Record B)
- a record titled “New ID Requirements and Other Changes”, 2 pages, refused in full except for the title (Record C)
- a record titled “*Elections Amendment Act (Establishing the Manitoba Voter Registration and other Amendments)*”, 2 pages, refused in part (Record D)
- a record titled “Bill 27, The Elections Amendment Act”, 3 pages, refused in part (Record E)
- a record titled “*The Elections Amendment Act (Register of Voters and Miscellaneous Amendments)*”, 43 pages, refused in part (Record F)
- several emails between various government employees, 8 pages, refused in part (Record G)

- a record titled “First Reading – Introductory Remarks Bill xx, The Elections Amendment Act”, refused in full except for the title and a line at the bottom of each page (Record H)

Our office reviewed the information withheld by the CPD under section 23 and concluded that the information was of the type described in relation to Record D, Record E and Record G. Accordingly, we found that clauses 23(1)(a) and 23(1)(b) of FIPPA applied to these records.

Our office also considered whether the withheld information was of the type described under subsection 23(2) of FIPPA, which sets out limits to subsection 23(1). If one of the limits described by subsection 23(2) can be shown to apply, the exception to disclosure allowed by subsection 23(1) does not apply to that information. Subsection 23(2) reads:

***Exceptions***

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

- (a) is in a record that is more than 20 years old;*
- (b) is an instruction or guideline issued to officers or employees of the public body;*
- (c) is a substantive rule or statement of policy that has been adopted by the public body for the purpose of interpreting an enactment or administering a service, program or activity of the public body;*
- (d) is the result of a product or environmental test conducted by or for the public body;*
- (e) is a statement of the reasons for a decision made in the exercise of a quasi-judicial function or a discretionary power that affects the applicant;*
- (f) is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal;*
- (f.1) is a public opinion poll;*
- (g) is a statistical survey; or*
- (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.*

Our office found that none of the provisions of subsection 23(2) of FIPPA applied to the withheld information. Therefore, the exception under clauses 23(1)(a) and 23(1)(b) still applied.

In relation to Record A, Record B and Record C, our office found that clauses 23(1)(a) and 23(1)(b) applied to some of the information severed from these records, but not all of the severed information. While some of the information is advice, opinion, analysis or consultations, other

pieces of information are more appropriately classified as factual in nature and would therefore not be subject to clauses 23(1)(a) and 23(1)(b).

In relation to Record F and Record H, our office found that clauses 23(1)(a) and 23(1)(b) do not apply to the severed information. The information severed from Record F is factual in nature and does not contain any analysis or opinion.

As this record lays out the various amendments proposed to be made to the Election Act, our office also considered whether the amendments had been brought before the legislative assembly, in order to determine whether the record simply recounts facts already known at the time of the request, rather than suggestions made about potential future amendments.

If the amendments were not before the legislative assembly when the access request was made the information might still have been considered advisory in nature at the time of the request. Our review of Hansard indicated that the 1<sup>st</sup> reading of the amendments was on March 20, 2017, months prior to the access request, which was made on October 2, 2017. The nature of the amendments was publicly available factual information prior to the access request being made. Therefore, the factual information redacted under clauses 23(1)(a) and 23(1)(b), which simply describes the already proposed amendments, cannot be considered to be advice, opinion, analysis or consultations.

The information severed from Record H is almost identical to comments made before the legislative assembly on March 20, 2017, and October 10, 2017. Given that this information was already public and the records included factual information about what was said before the legislative assembly, it cannot be considered advice, opinion, analysis or consultations. Therefore clauses 23(1)(a) and 23(1)(b) do not apply to this record.

## **CONCLUSION**

Based on our office's findings that some of the provisions under FIPPA cited by the public body apply, while others did not, the complaint is partly supported. Our office spoke with the complainant after he received the public body's revised access decision and explained that we believed that some of the remaining withheld information was not subject to exceptions and that we would be prepared to ask the public body to release additional information. The complainant advised that he did not think it was necessary to further proceed with his complaint, and therefore although the complaint is partly supported, we have not asked the public body to release the information to which we determined the claimed exceptions did not apply.

In accordance with subsection 67(3) of the Freedom of Information and Protection of Privacy Act, the complainant may file an appeal of the decision by Manitoba Justice - Consumer Protection Division to refuse access to the Court of Queen's Bench within 30 days of receipt of this report.

August 16, 2018  
Manitoba Ombudsman