

Manitoba mbudsman

REPORT WITH RECOMMENDATION ISSUED ON FEBRUARY 8, 2019

AND

REPORT ON COMPLIANCE WITH RECOMMENDATION

UNDER THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2018-0016

**MANITOBA INTERGOVERNMENTAL AFFAIRS
AND INTERNATIONAL RELATIONS**

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 21(1)(a), 25(1)(n) and 28(1)(c)(iii)

PUBLICLY RELEASED ON MARCH 8, 2019

SUMMARY OF REPORT WITH RECOMMENDATION AND RESPONSE:

A request was made under the Freedom of Information and Protection of Privacy Act (FIPPA) to Manitoba Finance (Finance)¹ for access to records. Finance refused access to the records under 21(1)(a) and 25(1)(n) and subclause 28(1)(c)(iii) of FIPPA on the basis that disclosure of the records could harm Manitoba's relationship with the federal government, legal proceedings or negotiations.

Based on the results of the investigation, our office found that the cited sections of FIPPA did not apply to one of the responsive records. Our office therefore recommended that Manitoba Intergovernmental Affairs and International Relations (IAIR) issue a revised access decision granting access to that record.

On February 22, 2019, IAIR provided its response to our report, accepted the recommendation and indicated that it had complied with the recommendation. On February 25, 2019, the complainant confirmed that he had received the record referenced in the recommendation.

¹ The access request was originally made to Manitoba Finance. During our investigation, the delegated authority for records held by Federal-Provincial Relations and the Manitoba Strategic Infrastructure Secretariat was transferred from Finance to Manitoba Intergovernmental Affairs and International Relations.

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PROVISIONS CONSIDERED: 21(1)(a), 25(1)(n) and 28(1)(c)(iii)

REPORT ISSUED ON FEBRUARY 8, 2019

SUMMARY: The complainant made an application for access to Manitoba Intergovernmental Affairs and International Relations (IAIR) for copies of any correspondence between the deputy minister and a third-party business and/or the federal government. IAIR refused access to the records in full on the basis that disclosure could harm relations with the Government of Canada, interfere with negotiations and harm legal proceedings. A complaint was made to our office about this refusal of access. Our office found that the claimed exceptions under the Freedom of Information and Protection of Privacy Act (FIPPA) applied to the records except for one record, to which none of the exceptions were found to apply. Therefore, the complaint is partly supported and the ombudsman recommended that the record be released to the complainant.

THE COMPLAINT

On July 26, 2017, the complainant made a request under the Freedom of Information and Protection of Privacy Act (FIPPA) to Manitoba Finance (Finance)² for access to the following:

All correspondence from [name] (Deputy Cabinet Secretary and Deputy Minister of Intergovernmental Affairs) to [third-party business] and/or the federal government regarding the Port of Churchill and Hudson Bay Railway, dated May 20 to July 26, 2017.

² The access request was originally made to Manitoba Finance. During our investigation, the delegated authority for records held by Federal-Provincial Relations and the Manitoba Strategic Infrastructure Secretariat was transferred from Finance to Manitoba Intergovernmental Affairs and International Relations.

On December 18, 2017, Finance refused access to the responsive records. 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 January 3, 2018, our office received a complaint about the public body's decision to refuse access under FIPPA.

POSITION OF THE PUBLIC BODY

Manitoba Finance refused access to all information contained in the records responsive to the request. Finance advised the complainant that access was refused under clause 20(1)(a) on the basis that disclosure of the information could reasonably be expected to reveal information provided in confidence by the Government of Canada.

Additionally, Finance refused access under clause 21(1)(a) on the basis that the disclosure could be harmful to the relationship between the government of Manitoba and the Government of Canada. Access was also refused under clause 25(1)(n) on the basis that disclosure could harm current or future legal proceedings. Lastly, the public body refused access under subclause 28(1)(c)(iii) on the basis that disclosure could interfere with negotiations of the government of Manitoba.

Our office requested written representations from Finance to provide a further explanation of its position and copies of the responsive records. Finance responded to our office on May 4, 2018, and maintained its position that clauses 21(1)(a) and 25(1)(n) and subclause 28(1)(c)(iii) applied to the responsive records, but did not reference clause 20(1)(a).

A copy of the withheld records was provided to our office and consisted of three email chains and various attachments (referred to in this report as records a, b and c). Records a and b were refused under clauses 25(1)(n) and 28(1)(c)(iii) and record c was refused under clause 21(1)(a) and subclause 28(1)(c)(iii).

Finance advised our office that it was working with the federal government to address the issues discussed in the withheld records. The public body also advised that both the government of Manitoba and the Government of Canada were involved in legal proceedings with the third-party business and that there was potential for further legal proceedings to be commenced.

Finance indicated that the government of Manitoba had also entered into negotiations with the third party in June of 2017 and that the release of the records could harm either the legal proceedings or the negotiations.

Our office requested further clarification from Finance about record c. Specifically, we asked the public body to clarify the nature of the harm it believed could occur if record c was released. In its response, Finance indicated that, without the relevant facts, the information in this record could be misinterpreted, which could have a negative impact.

Finance informed our office in June 2018 that Manitoba Intergovernmental Affairs and International Relations (IAIR or the public body) had been delegated authority under FIPPA for records held by Federal-Provincial Relations and the Manitoba Strategic Infrastructure Secretariat. As the responsibility for the records subject to this complaint had been transferred, Finance transferred this complaint to IAIR.

Our office contacted IAIR for further clarification as to the harm that could be caused by the release of the records. IAIR reaffirmed the position of Finance. Specifically with respect to clause 21(1)(a), our office asked IAIR if it had consulted the federal government on this FIPPA matter and whether such consultation resulted in its decision that the release of the information would harm its relationship with the federal government.

IAIR advised our office that it had not consulted the federal government about this matter. The public body provided an explanation about its basis for determining that its communication with the federal government was confidential.

ANALYSIS OF THE ISSUES AND FINDINGS

Does clause 25(1)(n) apply to the withheld information in records a and b?

Subsection 25(1) of FIPPA provides a public body with discretion to refuse to disclose to an applicant information that could harm a range of law enforcement activities, legal proceedings, or other specified investigative, regulatory, adjudicative and protective functions of a public body.

This exception contains a ‘harm test.’ In order for this exception to apply, the public body must determine whether the type of harm described in the clause(s) could reasonably be expected to result from the disclosure of the information. Specifically, clause 25(1)(n) of FIPPA permits a public body to refuse to disclose information in a record that could reasonably be expected to injure (to hurt or harm) the conduct (the management, direction and/or carrying on) of existing or anticipated legal proceedings.

For this purpose, we note that a legal proceeding includes a civil proceeding or inquiry in which evidence may be given and which is brought or instituted for the purpose of acquiring a right. This exception states:

Disclosure harmful to law enforcement or legal proceedings

25(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to

(n) be injurious to the conduct of existing or anticipated legal proceedings.

IAIR maintained that disclosure of records a and b would be injurious to the conduct of existing or anticipated legal proceedings. The withheld correspondence between IAIR and the third-party business discussed specific issues and positions with respect to those issues. The same issues are currently the subject of legal proceedings between the government of Manitoba, the Government of Canada and the third party.

Based on our review of records a and b, we determined that disclosure of the information could reasonably be expected to be injurious to the conduct of existing or anticipated legal proceedings. We found that clause 25(1)(n) applied to these records and that IAIR's exercise of discretion to withhold the records was reasonable, as discretion was exercised in a manner consistent with the purpose of the exception.

Does subclause 28(1)(c)(iii) apply to the withheld information in records a, b and c?

In refusing access to records a, b and c, IAIR also relied on subclause 28(1)(c)(iii) of FIPPA, which reads:

Disclosure harmful to economic and other interests of a public body

28(1) *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to harm the economic or financial interests or negotiating position of a public body or the Government of Manitoba, including the following information:*

(c) information the disclosure of which could reasonably be expected to

(iii) interfere with or prejudice contractual or other negotiations of, a public body or the Government of Manitoba;

With respect to our review of records a and b, we determined that the application of the above exception and the public body's exercise of discretion was similar to that under clause 25(1)(n). The information contained in these records could be used either during the ongoing legal proceedings or for future negotiations with the third-party business or the Government of Canada.

Our office found that information contained in records a and b is of the type described under subclause 28(1)(c)(iii) of FIPPA and the cited exception was appropriately applied to withhold this information. Our office reviewed whether the limit to the exception, contained within subsection 28(2), was applicable to the responsive information, as follows:

Exception

28(2) *Subsection (1) does not apply to the results of a product or environmental test conducted by or for a public body, unless the test was done for the purpose of developing methods of testing or for the purpose of testing products for possible purchase.*

As the limit under 28(2) is specific to the results of a product or environmental test conducted by or for the public body, we concluded this exception does not apply to the records. Accordingly, records a and b remain subject to subclause 28(1)(c)(iii).

With respect to record c, IAIR indicated that the email was a part of the government of Manitoba's negotiations with the federal government. IAIR explained that the negotiations are ongoing and that the disclosure of this record would harm the negotiations with the Government of Canada.

Based on our review of the information in record c, we concluded that it is largely information that has been available to the public. We requested that the public body provide further information on how the disclosure of this information could harm the negotiations between the provincial and federal governments. IAIR indicated that there was a general expectation of confidentiality over all communications between the provincial and federal governments.

IAIR stated that any disclosure of correspondence between the provincial and federal governments would breach this expectation of confidentiality and harm the relationship and negotiations between the parties. We note that although it may be important for governments to have confidential communications, public bodies must still establish the basis on which exceptions under FIPPA apply to the information considered to be confidential.

We considered whether the information at issue is explicitly or implicitly confidential. Implicitly confidential information is information that is sensitive in nature and which a reasonable person would recognize as being intended to be confidential. Explicitly confidential information is information that has been specifically marked as confidential.

The information contained in record c is not explicitly marked as confidential. The information in record c is also not implicitly confidential as the information was previously available to the public through media coverage. Based on our review of the record, we are of the view that it does not contain information, which if disclosed, could reasonably be expected to interfere with or prejudice negotiations with the federal government.

We provided opportunities for the public body to submit additional representations to demonstrate, though consultation with the federal government about the record, that release of the record could harm its negotiations with the federal government.

We did not receive evidence that would demonstrate that the release of the record could reasonably be expected to interfere with or prejudice negotiations. Accordingly, we could not find that subclause 28(1)(c)(iii) applies to record c.

Does clause 21(1)(a) apply to the information withheld in record c?

The exception contained in clause 21(1)(a) of FIPPA protect the relations between the government of Manitoba or a Manitoba government agency and the Government of Canada. The exceptions provide as follows:

Disclosure harmful to relations between Manitoba and other governments

21(1) *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to harm relations between the Government of Manitoba or a government agency and any of the following or their agencies:*

(a) the Government of Canada;

“Government of Manitoba or a government agency” includes a provincial department but is also a broader concept in that the exception protects the interests of the government as a whole as well as the interests of a particular department. For the exception to apply, the disclosure of the requested information must “*reasonably be expected to harm relations between*” the government of Manitoba and the Government of Canada, which also includes a federal department or other agency.

The determination of harm must be carefully assessed and must be based on objective grounds. In the context of the exception, relations refers to both formal negotiations and general ongoing associations and exchanges between the governments of Manitoba and Canada.

Pursuant to section 21, a public body has discretion to give rather than refuse access to information requested by an applicant. Accordingly, a public body must provide reasons for its decision to refuse access that demonstrate it exercised its discretion in a reasonable fashion.

In its response to our office, IAIR indicated that the email chain for which access was refused under clause 21(1)(a) was a part of the government of Manitoba’s negotiations with the federal government. IAIR explained that the negotiations are still ongoing and that the disclosure of this record would harm the province’s relationship with the Government of Canada.

As stated in our analysis in the previous section of this report, our office noted that the information in record c is largely information that has been available to the public. Accordingly, we requested that the public body provide further information on how the disclosure of this information could harm the relationship between the provincial and federal governments.

IAIR indicated that there was a general expectation of confidentiality over all communications between the provincial and federal governments. IAIR stated that any disclosure of correspondence between the provincial and federal governments would breach this expectation of confidentiality and harm the relationship between the parties.

Based on our review of the content of the record, for similar reasons as discussed in the previous section of this report, we could not find that disclosure of the information in this record could reasonably be expected to harm the relationship between the provincial and federal governments, as set out in clause 21(1)(a).

We provided opportunities for the public body to submit additional representations to demonstrate, through consultation with the federal government about the record, that release of the record could harm its relationship with the federal government.

We did not receive evidence that would demonstrate that this harm could reasonably be expected to result from release of the record. Therefore, our office found that clause 21(1)(a) of FIPPA does not apply to record c.

CONCLUSION

Our office found that clause 25(1)(n) and subclause 28(1)(c)(iii) apply to records a and b. However, we found that subclause 28(1)(c)(iii) and clause 21(1)(a) do not apply to record c. Therefore, the complaint is partly supported.

RECOMMENDATION

Based on our office's finding that clause 21(1)(a) and subclause 28(1)(c)(iii) of FIPPA do not apply to the record c, the following recommendation is made:

The ombudsman recommends that Manitoba Intergovernmental Affairs and International Relations provide a copy of record c to the complainant.

THE PUBLIC BODY'S RESPONSE TO THE RECOMMENDATION

Under subsection 66(4), Manitoba Intergovernmental Affairs and International Relations must respond to the ombudsman's report in writing within 15 days of receiving this report. As this report is being sent by courier to the head of the public body (the deputy minister) on February 8, 2019, the head shall respond by February 22, 2019. The head's response must contain the following information:

Head's response to the report

66(4) *If the report contains recommendations, the head of the public body shall, within 15 days after receiving the report, send the Ombudsman a written response indicating*

(a) that the head accepts the recommendations and describing any action the head has taken or proposes to take to implement them; or

(b) the reasons why the head refuses to take action to implement the recommendations.

OMBUDSMAN TO NOTIFY THE COMPLAINANT OF THE PUBLIC BODY'S RESPONSE

When the ombudsman has received the head's response to his recommendation, he will notify the complainant about the response as required under subsection 66(5).

PUBLIC BODY'S COMPLIANCE WITH RECOMMENDATION

If the head accepts the recommendation, subsection 66(6) requires the head to comply with the recommendation within 15 days of acceptance of the recommendation or within an additional period if the ombudsman considers it to be reasonable. Accordingly, the head should provide written notice to the ombudsman and information to demonstrate that the public body has complied with the recommendation and did so within the specified time period.

Alternatively, if the head believes that an additional period of time is required to comply with the recommendation, the head's response to the ombudsman under subsection 66(4) must include a request that the ombudsman consider an additional period of time for compliance with the recommendation. A request for additional time must include the number of days being requested and the reasons why the additional time is needed.

February 8, 2019
Marc Cormier
Acting Manitoba Ombudsman

Manitoba Ombudsman

REPORT ON COMPLIANCE WITH RECOMMENDATION UNDER *THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*

CASE 2018-0016

MANITOBA INTERGOVERNMENTAL AFFAIRS AND INTERNATIONAL RELATIONS

ACCESS COMPLAINT: REFUSAL OF ACCESS

SUMMARY: In an email dated February 22, 2019, Manitoba Intergovernmental Affairs and International Relations (IAIR) provided its response to the Ombudsman's Report with a Recommendation under *The Freedom of Information and Protection of Privacy Act* accepting the recommendation. IAIP also reported that it had complied with the recommendation on the same day and provided the complainant with an unredacted copy of the record.

COMPLIANCE WITH THE RECOMMENDATION

On February 8, 2019, the Ombudsman issued a report with a recommendation in this case following the investigation of a complaint against Manitoba Intergovernmental Affairs and International Relations (IAIR) about its decision to refuse access to the requested records under *The Freedom of Information and Protection of Privacy Act* (FIPPA). We recommended that IAIR release one of the withheld records to the complainant.

On February 22, 2019, IAIR responded to the Ombudsman and accepted the recommendation, as follows:

[IAIR] confirm[s] the sole recommendation is accepted; and that the single record referenced in the recommendation is being provided to the complainant concurrently.

Under subsection 66(6) of FIPPA, when a public body accepts a recommendation it is required to comply with the recommendation within 15 days or within such additional time as the Ombudsman considers reasonable. In accepting the recommendation, IAIR advised that it was concurrently complying with the recommendation and providing the record to the complainant.

On February 25, 2019, the complainant confirmed that, on February 22, 2019, he had received the record referenced in the recommendation. The complainant provided a copy of the email he received from IAIR, to which the record was attached. The record received by the complainant was unredacted.

Based on this, our office finds that IAIR complied with the recommendation made in our report. As required by subsection 66(5) of *The Freedom of Information and Protection of Privacy Act*, the Ombudsman is advising the complainant by this report that he will not be requesting that the Information and Privacy Adjudicator review this matter.

CONCLUSION

The Ombudsman is satisfied that Manitoba Intergovernmental Affairs and International Relations has complied with the recommendation contained in our report.

Marc Cormier
Acting Manitoba Ombudsman
March 1, 2019