

Manitoba mbudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2018-0098

MANITOBA HYDRO

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 27(1)(a)

REPORT ISSUED ON MAY 21, 2018

SUMMARY: Manitoba Hydro received a request made under the Freedom of information and Protection of Privacy Act (FIPPA) for access to briefing and advisory notes regarding parental leave and EI benefits. One responsive record was identified and access was refused in full under clause 27(1)(a) of FIPPA, with Manitoba Hydro explaining that all the information contained in the record is subject to solicitor-client privilege. Manitoba Hydro did not provide a responsive record for review by our office; however, in the absence of a copy of the record at issue, Manitoba Hydro asserted in writing that the record in question satisfies all the criteria for solicitor-client privilege described in *Solosky v. R.* This assertion, in conjunction with the descriptive metadata provided by Manitoba Hydro was sufficient for our office to conclude that the record identified as responsive was subject to the exception allowed under clause 27(1)(a) of FIPPA.

COMPLAINT

On January 24, 2018 Manitoba Hydro (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:

Since April 1, 2017: all briefing and advisory notes regarding parental leave and EI benefits.

The public body issued its access decision on February 22, 2018. The decision stated that Manitoba Hydro's search resulted in the identification of one responsive record, which it described as an internal memorandum. Manitoba Hydro explained that access to this record was refused in full under clause 27(1)(a) of FIPPA as all the information contained in the record is subject to solicitor-client privilege.

A complaint concerning the public body's access decision was received in our office on March 2, 2018.

INVESTIGATION AND ANALYSIS

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

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.

Further to our investigation of this complaint, our office asked Manitoba Hydro to provide representations which explained its reliance on the cited provision. We noted that the exception under clause 27(1)(a) is discretionary (a public body may refuse to disclose to an applicant). Consequently, our office also asked Manitoba Hydro to provide representations speaking to its exercise of discretion in deciding not to provide access in the particular circumstances of this request even though it had discretion to do so.

In an investigation about a refusal of access, it is the usual procedure of our office to ask that copies of responsive records be made available for our review of the decision to rely on the cited exception. However, mindful of the unique weight given to solicitor-client privilege in law, our office will consider means other than direct examination of the record at issue by which a public body may establish the application of the exception allowed by clause 27(1)(a) of FIPPA. In the absence of records for review, it is our position that the legal advice branch of solicitor-client privilege may be evidenced by applying the criteria prescribed in *Solosky v R*.¹ Accordingly, we explained to Manitoba Hydro, in the absence of a copy of the responsive record for our review, the evidence provided to us by Manitoba Hydro must explicitly address for the record at issue that:

¹ *Solosky v R*, [1980] 1 S.C.R. 821 at 837.

- There is a communication between a lawyer and the lawyer's client; and
- The communication entails the giving or seeking of legal advice; and
- The communication was intended to be confidential.

Manitoba Hydro responded to our office with comprehensive representations. It did not provide a copy of the responsive record for our review. However, Manitoba Hydro did explain that the record identified as responsive consisted of an inter-office memorandum prepared by Manitoba Hydro legal counsel and provided to an internal client in response to a request for legal advice. Manitoba Hydro submitted that a notation at the top of the document "CONFIDENTIAL – SUBJECT TO SOLICITOR-CLIENT PRIVILEGE" was further evidence that the document was clearly intended to be communicated in confidence.

In the absence of a copy of the record at issue, Manitoba Hydro asserted to our office (in writing) that the record in question satisfies all the criteria for solicitor-client privilege described in *Solosky*. This assertion, in conjunction with the descriptive metadata provided by Manitoba Hydro was sufficient for our office to conclude that the record identified as responsive was subject to the exception allowed under clause 27(1)(a) of FIPPA.

As noted above, clause 27(1)(a) is a discretionary exception to disclosure under FIPPA. This means that, even though an exception to access may be shown to apply to the responsive information, FIPPA permits the public body the discretion to give rather than withhold access to the information requested. As such a public body must provide reasons for its decision to refuse access, which demonstrate that it exercised its discretion in a reasonable manner. Our office considered Manitoba Hydro's representations explaining its decision to withhold rather than give access to the information in question. Based on our review, we found that the exercise of discretion by Manitoba Hydro to withhold the responsive information was reasonable and discretion was exercised in a manner consistent with the purpose of the exception.

In view of the foregoing, our office found that the complaint of refused access is not supported.

In accordance with subsection 67(3) of the Freedom of Information and Protection of Privacy Act, the complainant may appeal Manitoba Hydro's decision to refuse access to the Court of Queen's Bench within 30 days of receiving this report.

Manitoba Ombudsman
May 21, 2018