

Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2018-0112

MANITOBA GROWTH, ENTERPRISE AND TRADE

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISION CONSIDERED: 18(1)(b)

REPORT ISSUED ON OCTOBER 31, 2019

SUMMARY: The complainant requested access to a copy of an advisory note to the minister of Manitoba Growth, Enterprise and Trade (GET or the public body). GET refused access to part of the record under clause 18(1)(b) of the Freedom of Information and Protection of Privacy Act, on the basis that it would reveal labour relations information supplied by a third party on a confidential basis and treated consistently as confidential by the third party. Our office found that the provision relied on by GET did not apply to the withheld information and therefore the complaint was supported. The public body agreed to release all of the previously withheld information.

THE COMPLAINT

Manitoba Growth, Enterprise and Trade¹ (GET or the public body) received an access request from the complainant on December 18, 2017, for the following record:

Advisory Note for the Minister of Growth, Enterprise and Trade – AIMS Log Number GETM16-01267

In its response letter dated February 28, 2018, GET indicated that access was being granted in part and that access to some of the information in the record was refused under clause 18(1)(b) of the Freedom of Information and Protection of Privacy Act (FIPPA). On March 6, 2018, a complaint about the refusal of access was made to our office.

INVESTIGATION AND ANALYSIS

GET refused access to part of the record under clause 18(1)(b) of FIPPA. In representations to our office, the public body indicated that the record at issue is an advisory note that was created by the public body as a result of a discussion paper submitted in December 2016 by a third-party organization.

¹ Note, as of October 23, 2019, Manitoba Growth, Enterprise and Trade is now Manitoba Economic Development and Training and legislation related to labour practices (and therefore records of the type reviewed in this report) are now the responsibility of the minister of finance.

The public body indicated that information in the advisory note had either been received from, or would reveal information provided by, the third-party organization, as it referenced information or positions discussed in the paper.

The public body advised the withheld information was labour relations information of the third-party organization, which was supplied to the public body in confidence and was kept confidential by the third-party organization. The refusal of access was based on clause 18(1)(b) of FIPPA:

Disclosure harmful to a third party's business interests

18(1) *The head of a public body shall refuse to disclose to an applicant information that would reveal*

(b) commercial, financial, labour relations, scientific or technical information supplied to the public body by a third party, explicitly or implicitly, on a confidential basis and treated consistently as confidential information by the third party;

In order to refuse access under clause 18(1)(b) the withheld information must meet all of the following requirements:

- The information must reveal commercial, financial, labour relations, scientific or technical information.
- The information must have been supplied to the public body by the third party who would be affected by the disclosure.
- The information must have been supplied, explicitly or implicitly, on a confidential basis.
- The information must be treated consistently as confidential information by the third party.

For the purposes of our investigation, we obtained and reviewed both the advisory note and the third-party organization's discussion paper that prompted the creation of the advisory note. Our consideration of the requirements of clause 18(1)(b), in relation to our review of the withheld information in the advisory note, is set out below.

1) Does the withheld information reveal commercial, financial, labour relations, scientific or technical information?

Our office reviewed the withheld information contained in the advisory note to determine whether it reveals one of the types described in clause 18(1)(b). The public body had stated that the withheld information was labour relations information.

In considering the meaning of “labour relations information,” our office referred to the *FIPPA Resource Manual*², which defines “labour relations information” as “information respecting the “relations between management and labour, especially as involved in collective bargaining and maintenance of contract.”

In this case, the third-party organization’s discussion paper sets out its views about various aspects of Manitoba labour law, but does not reveal specific labour relations information about particular employers or employer groups. Effectively, the discussion paper amounts to an expression of opinions about general labour relations topics, and in particular, about Manitoba labour legislation, which applies to all provincially regulated employers, not just to specific employers and groups.

Similarly, the advisory note that speaks to the discussion paper addresses the current state of the law in Manitoba and in other jurisdictions, and does not address specifics of labour relations between specific employers or groups and their employees. Our office has not, in the past, considered opinions about general labour relations topics to be the labour relations information of a third party as contemplated under section 18 of FIPPA.

We reviewed case law, as well as investigation reports and orders made under similar access to information laws in other jurisdictions, that referenced the term “labour relations.” We were unable to find any cases where opinions about labour relations (rather than information about actual interactions between management and employees) were referenced or discussed in relation to provisions similar to section 18 of FIPPA.

All the material reviewed by our office seems to operate on the basis that the term “labour relations” refers to real world interactions between employees and management and not to opinions about general labour relations issues or laws.

We determined that the information withheld in the advisory note references information or positions discussed in the third-party organization’s paper. The information is about general labour relations issues and views about various aspects of Manitoba labour law. Based on this, we were of the opinion that the withheld information would not be the third-party organization’s “labour relations” information as contemplated by section 18.

2) Was the information supplied to the public body by the third party who would be affected by the disclosure?

As noted earlier, the information at issue is contained in an advisory note, created by the public body, relating to a discussion paper supplied by the third-party organization (the source information).

² *The FIPPA Resource Manual*, p. 5-87, online:

<https://www.gov.mb.ca/chc/fippa/public_bodies/resource_manual/index.html> *While the *FIPPA Resource Manual* is not binding on our office, we took note of it because it is a reference prepared by the government to assist public bodies in complying with FIPPA.

We considered whether the withheld information contained in the advisory note would reveal information supplied by the third-party organization, either by directly referring to the source information in the discussion paper or permitting inferences to be drawn about the source information.

Based on our review, we determined that the majority of the withheld information in the advisory note is not information supplied by the third-party organization. Although the withheld information would reveal that the third-party organization had opinions about certain labour relations issues, the information does not necessarily allow inferences to be drawn about what those opinions are.

Our office did accept that limited portions of the withheld information in the advisory note could reveal information contained in the third-party organization's discussion paper, which was supplied to the public body by the third-party organization. However, for the information to be excepted under clause 18(1)(b) of FIPPA, it must satisfy all four requirements of the clause. These portions of the information did not meet the first requirement as they did not reveal labour relations information.

3) Was the information supplied, explicitly or implicitly, on a confidential basis?

Another consideration is whether the withheld information in the advisory note reveals information that was supplied in confidence by the third-party organization. In this regard, our office noted that the third-party organization's discussion paper was not marked as being confidential, and there is no evidence that the discussion paper arose from a defined process where submissions were invited to be provided in confidence. Therefore, the evidence did not establish that there was an explicit expectation of confidentiality regarding this information.

The public body advised that there is an implicit expectation of confidentiality with respect to the discussion paper provided by the third-party organization. In support of this position, the public body noted that the discussion paper was not carbon-copied to non-involved parties.

The public body advised that it had consulted the third-party organization about whether access to the information could be granted under FIPPA, and the third-party organization indicated that the discussion paper had not been provided to the public and that the release of the information in the advisory note could impact the third-party organization's reputation.

To determine whether an expectation of confidentiality can be implied, our office would generally consider two factors: 1) the nature of the information; and 2) the circumstances under which it was provided.

In our view, the information was not of the type that implies confidentiality by its very nature. The information in the advisory note discusses the state of labour relations law in Manitoba and in other jurisdictions. This type of information can, in many cases, be gleaned by doing a jurisdictional scan of publicly available sources of information.

Our office also observed that the discussion paper attempts to influence the development or amendment of legislation, and therefore has the appearance of lobbying, an activity which is not, in our view, inherently confidential.

With respect to the circumstances under which the discussion paper was provided, we are not satisfied that a record is implicitly confidential simply because it has not been copied to third parties or posted publicly. A significant amount of correspondence is sent to government, which is not posted and is not copied to anyone else, but is not necessarily confidential. While the third-party organization objected to the information being disclosed in response to the FIPPA request, this does not establish that the information was provided in confidence at the time it was submitted.

4) Was the information treated consistently as confidential information by the third-party organization?

Our office also considered whether there is evidence to establish that the withheld information would reveal information that has been kept strictly confidential by the third party. There is limited information to demonstrate that this requirement has been met. The third-party organization indicated that it has not shared the discussion paper publicly, and our office found no evidence to suggest otherwise. However, no evidence was provided about whether the third-party organization has maintained strict confidentiality about specific aspects of the information in the discussion paper.

CONCLUSION

Our investigation considered whether the information in the advisory note that was withheld under clause 18(1)(b) of FIPPA would reveal labour relations information that was supplied to the public body by a third party, explicitly or implicitly, on a confidential basis and treated consistently as confidential information by the third party. Based on our investigation, our office concluded that the withheld information was not labour relations information as contemplated under this exception in FIPPA. We also concluded that the evidence did not establish that the information was supplied in confidence to the public body or that the information had been treated consistently as confidential.

We provided our analysis to Manitoba Growth, Enterprise and Trade to review and consider. GET advised our office that it agreed with our findings and it issued a revised access decision to the complainant, giving access to the previously withheld information.

As we found that the withheld information was not subject to the exception in clause 18(1)(b), the complaint is supported. However, given the public body agreed to release the record in full, no further action is required.

October 31, 2019
Manitoba Ombudsman