

Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2018-0127

MANITOBA AGRICULTURE

ACCESS COMPLAINT: REFUSED ACCESS

PROVISIONS CONSIDERED: 17(1), 17(2)(b), 18(1)(c)(i), 25(1)a)(c)

REPORT ISSUED ON SEPTEMBER 20, 2018

SUMMARY: An individual requested access to information under the Freedom of Information and Protection of Privacy Act (FIPPA or the act) from Manitoba Agriculture (the public body) about an investigation initiated under the Animal Care Act. The public body refused access in full relying on subsection 17(1) in conjunction with clause 17(2)(b) of FIPPA (disclosure harmful to a third party's privacy) and subclause 18(1)(c)(i) of FIPPA (disclosure harmful to a third party's business interests). The individual complained about Manitoba Agriculture's access decision and in the course of our investigation the public body issued a revised access decision stating that, additionally, it was also relying on clauses 25(1)(a) and (c) of FIPPA (disclosure harmful to law enforcement or legal proceedings). Following our investigation we found that Manitoba Agriculture's decision to refuse access was authorized under the act. Therefore, the complaint of refused access was not supported.

COMPLAINT

On January 24, 2018 Manitoba Agriculture (the department or the public body) received a request under the Freedom of Information and Protection of Privacy Act (FIPPA or the act) for access to the following information:

All records regarding the Chief Veterinary Office's [CVO] investigation into [name removed] Farms from October 2017 and up to, and including January 2018. In particular, we are seeking notes taken by veterinarians and investigators of any and all witness interviews, investigation reports, any video or photographs taken at the facility, and notes and documents regarding any and all remedies the CVO is seeking or plans to seek against [name removed] Farms, its owner(s), and employees."

Manitoba Agriculture issued an access decision on February 14, 2018 stating that access to the requested information was refused in full. In refusing access the department relied on subsection 17(1) in conjunction with clause 17(2)(b) of FIPPA (disclosure harmful to a third party's privacy) as well as subclause 18(1)(c)(i) of FIPPA (disclosure harmful to a third party's business interests).

A complaint about the public body's access decision was received in our office on March 9, 2018.

POSITION OF THE COMPLAINANT

In making the complaint, the complainant stated that the exceptions relied on by the public body in its access decision were not a valid basis to refuse access. The complainant noted that the requested information was withheld in full and no attempt had been made to sever the information subject to access exceptions and to give access to the remainder. The complainant believed, for example, that personal information subject to subsection 17(1) in conjunction with clause 17(2)(b) of FIPPA could be severed allowing access to some information. The complainant also disputed that the release of severed information could harm the business of the farm operation as the business practices which were the subject of the investigation had been made public by the media. The complainant raised the possible application of subsection 18(4) of FIPPA. This provision allows for the release of business information that may be subject to subsection 18(1) if the private interests of a third party business are clearly outweighed by the public interest in disclosure for the purposes of public health or safety or protection of the environment, improved competition or government regulation of undesirable trade practices. Particularly, the complainant noted the public interest in providing access to information regarding the production of consumer products.

POSITION OF THE PUBLIC BODY AND PRELIMINARY MATTERS

In making its initial access decision, Manitoba Agriculture relied on the following provisions of FIPPA:

Disclosure harmful to a third party's privacy

17(1) *The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's privacy.*

Disclosures deemed to be an unreasonable invasion of privacy

17(2) *A disclosure of personal information about a third party is deemed to be an unreasonable invasion of the third party's privacy if*

(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of a law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

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*

(c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to

(i) harm the competitive position of a third party,

In relying on subsection 17(1) in conjunction with clause 17(2)(b) of FIPPA, the public body explained that the records requested contained information about identifiable individuals that was collected during the course of an investigation into a possible violation under the Animal Care Act and disclosure of the information contained in the records would be deemed an unreasonable invasion of a third party's privacy.

In relying on subclause 18(1)(c)(i) of FIPPA, the public body explained that the records requested contained information about an investigation into the business policies and practices of a farm business that, if disclosed, could cause harm to the business interests of that third party.

On March 19, 2018 our office wrote to Manitoba Agriculture and asked it to provide us with representations further explaining its reliance on the cited exceptions to withhold information as well as copies of the records identified as responsive for our review. Manitoba Agriculture responded as requested on April 18, 2018.

The public body explained that, upon further review of the responsive records, it had determined that additional exceptions to disclosure were applicable. In addition to the foregoing exceptions, the public body was now also relying on the following provisions of FIPPA:

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*

(a) harm a law enforcement matter;

(c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement;

In support of its reliance on these additional exceptions, the department explained that the release of the responsive records could harm an ongoing investigation under the Animal Care Act and, therefore, it had applied clauses 25(1)(a) and (c) to withhold the responsive records in full. On June 11, 2018, our office asked that the public body issue a revised access decision to the complainant explaining the additional exceptions to access it now relied on to withhold the requested information. We also asked the public body to explain the application of subsection 7(2) to the requested information and, if the information could not reasonably be severed, to explain why. With regard to the exception required under 18(1)(c)(i), we asked Manitoba Agriculture to explain how the public body has considered the application of subsection 18(4) of FIPPA (disclosure in the public interest) to the withheld information.

Manitoba Agriculture issued its revised access decision on June 27, 2018. In issuing its access decision, the public body relied on subsection 17(1) in conjunction with clause 17(2)(b) as well as subclause 18(1)(c)(i) and clauses 25(1)(a) and (c) of FIPPA. With regard to the information withheld under the discretionary exceptions described by clauses 25(1)(a) and (c) of FIPPA, the public body explained that it had exercised its discretion in considering whether the responsive records should be disclosed and concluded that it would not disclose that information. Manitoba Agriculture explained that it had also considered whether the information subject to exceptions could be severed and access given to the remainder and concluded that it could not.

UPDATE ON COMPLAINANT'S POSITION

After receiving Manitoba Agriculture's revised access decision the complainant provided our office with additional representations on August 2, 2018.

The complainant noted again that information relating to the business of the farm operation should not be excepted under subclause 18(1)(c)(i) of FIPPA as the business practices which were the subject of the investigation had been made public by the media. The complainant explained her view that the information requested related to a regulatory investigation and subsection 18(4) should apply in this instance as the public is entitled to have information about a company's regulatory compliance. The complainant specifically noted the public interest in government regulation of undesirable trade practices.

The complainant also explained that, in her view, Manitoba Agriculture had not exercised its discretion reasonably in withholding information subject to clauses 25(1)(a) and (c) of FIPPA. The complainant acknowledged that these provisions could apply to certain of the responsive records; however, this exception would not apply with respect to sanctions or determinations issued or other final decisions made or factual information regarding the farm operation that led to such determinations. It was the complainant's view that this information would not expose 'investigative techniques.' Finally, the complainant took the position that the responsive records could be severed by removing the names of witnesses and any description of 'investigative techniques.'

Our office reviewed and considered the complainant's initial and supplemental submissions in conducting our analysis and reaching findings in this matter.

ANALYSIS AND FINDINGS

Our office considered the application of the exceptions relied on by Manitoba Agriculture in withholding the responsive records, following which we addressed the application of subsection 7(2) of FIPPA to the withheld information.

Does the mandatory exception to disclosure under subsection 17(1) in conjunction with clause 17(2)(b) of FIPPA apply to information withheld by Manitoba Agriculture?

Subsection 17(1) of FIPPA sets out a mandatory exception to disclosure which protects individuals from an invasion of their privacy by restricting access to their personal information. Under this mandatory provision a public body must refuse to disclose personal information if the disclosure is shown to be an unreasonable invasion of a third party's privacy. Personal information is defined by FIPPA as recorded information about an identifiable individual. This includes not just an individual's name but also other pieces of information which, alone or in combination, would render an individual identifiable.

Disclosures deemed to be an unreasonable invasion of a third party's privacy are set out in clauses 17(2)(a) to (i) of FIPPA. These clauses list types of personal information that are considered to be so sensitive that the disclosure of this information to someone else is considered to be an unreasonable invasion of the personal privacy of the individual the information is about. If an applicant requests access to personal information that is determined to be of a type listed in clauses 17(2)(a) to (i), a public body is required to refuse to disclose this information unless one of the circumstances in subsection 17(4) applies. It has no discretion to do otherwise.

Manitoba Agriculture applied subsection 17(1) in conjunction with clause 17(2)(b) of FIPPA to withhold third party information about identifiable individuals that was collected during the course of an investigation into a possible violation of the Animal Care Act. The public body explained that this information includes the names and opinions of experts consulted by the department, the names of employees of the farm operation and names and other personal information of witnesses.

With regard to the application of clause 17(2)(b) of FIPPA our office consulted the *Manitoba FIPPA Resource Manual* (the manual).¹ 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. The manual explains that the application of clause 17(2)(b) only requires that there be an investigation into a possible violation of law, not that the violation be certain or proven. Also, the exception continues to apply once the investigation is completed and even if charges are not laid. Clause 17(2)(b) allows the disclosure of this information only to the extent that disclosure is necessary to prosecute the violation or to continue the investigation. As that is not the case in this instance, our office concluded that the release of this information would be an unreasonable invasion of the privacy of third parties; therefore, this information must be withheld by the public body in accordance with the FIPPA.

Subsection 17(4) describes those circumstances where the disclosure of personal information is not considered to be an unreasonable invasion of a third party's privacy. Our office has considered the information provided by the complainant who stated that some of the severed information has already been made public. Accordingly, our office considered that clause 17(4)(i) of FIPPA may be of relevance in this matter. Clause 17(4)(i) reads:

When disclosure not unreasonable

17(4) Despite subsection (2), disclosure of personal information is not an unreasonable invasion of a third party's privacy if

(i) the record requested by the applicant is publicly available.

Our office considered the application of clause 17(4)(i) to this complaint as some of the information contained in the records considered responsive is publicly known. However, our office notes that the exception to the application of clause 17(2)(b) allowed under clause 17(4)(i) references a 'record' that is publicly available. In this matter, while some information from the records has been made public, none of the records considered responsive to the complainant's request are publicly available. Therefore, we have concluded that clause 17(4)(i) was not applicable to the information in question.

¹ The manual may be consulted online at http://www.gov.mb.ca/chc/fippa/public_bodies/resource_manual/index.html.

On reviewing the responsive records, our office found that subsection 17(1) in conjunction with clause 17(2)(b) of FIPPA was applied to withhold the personal information of third parties collected during the course of an investigation into a possible violation of the Animal Care Act.

Does the mandatory exception to disclosure under subclause 18(1)(c)(i) apply to information withheld by Manitoba Agriculture?

Clause 18(1)(c) of FIPPA is a mandatory exception to the right of access under FIPPA. The public body shall (is required to) refuse to disclose third party business information described in clause 18(1)(c) if any of the harms described in subclauses 18(1)(c)(i) to (v) could reasonably be expected to result from disclosure. Where the information in question is subject to any of these exceptions, FIPPA requires that a public body withhold that information.

In order for the exception in clause 18(1)(c) to apply, the information must be commercial, financial, labour relations, scientific or technical information. Commercial information generally involves information related to or connected with trade or commerce and can include, amongst other things, information about suppliers and customers. Financial information is related to finance, money and the monetary resources of a person, corporation etc. The exception in clause 18(1)(c) applies even if the information was not provided or supplied to the public body by the third party. The exception contained in subclause 18(1)(c)(i) involves a reasonable expectation of harm test. The focus of the exception is whether the specified harm or damage might reasonably be expected to result from disclosure. In subclause 18(1)(c)(i), the term 'harm' suggests that the third party's competitive position would be damaged as a result of the disclosure of the information.

In its initial decision letter Manitoba Agriculture explained that it had applied subclause 18(1)(c)(i) to information about an investigation into the business policies and practices of the farm business as these relate to the care of animals. In making its representations to our office, the public body explained that if details about Manitoba Agriculture's investigation became known, this could reasonably be expected to harm the public perception of the farm operations and, as a result, have a detrimental impact on the farm's current and potential commercial activities. Our office reviewed the responsive record in light of Manitoba Agriculture's submission and we determined that the public body's conclusions regarding the likelihood of probable harm from the disclosure of business information relating to the business practices of the farm operation were reasonable. In addition, the department noted that any conclusions reached by the public would be based on an investigation that is still ongoing and the findings of Manitoba Agriculture may be subject to change. Accordingly, any possible disclosure would have to be considered in this light.

In making her complaint, the complainant raised the possible application of subsection 18(4) of FIPPA to information severed under subclause 18(1)(c)(i). Subsection 18(4) reads:

Disclosure in the public interest

18(4) *Subject to section 33 and the other exceptions in this Act, a head of a public body may disclose a record that contains information described in subsection (1) or (2) if, in the opinion of the head, the private interest of the third party in non-disclosure is clearly outweighed by the public interest in disclosure for the purposes of*

- (a) public health or safety or protection of the environment;*
- (b) improved competition; or*
- (c) government regulation of undesirable trade practices.*

The complainant particularly noted the public interest in information about the production of consumer products and the entitlement of the public to have information about a company's regulatory compliance when making purchase decisions.

With regard to the application of subsection 18(4) of FIPPA our office again consulted the *Manitoba FIPPA Resource Manual*. The manual provides the following definitions of terms:

- Public health refers to the well-being of the general public, or a significant part of the public.
- Safety means the condition of being safe; freedom from danger or risks. A disclosure of third party business information would promote public safety if it would reduce the exposure of the general public, or a significant part of the public, to risk or danger.
- Environment refers to the physical surroundings, conditions, circumstances, etc. in which a person lives; the area surrounding a place; external conditions as affecting plant and animal life; the totality of the physical conditions on the earth or a part of it, especially as affected by human activity.

Undesirable trade practices are not defined by FIPPA or by the manual. However, this is commonly understood to relate to objectionable or illegal marketplace practices such as intensely pressuring a consumer to buy or taking advantage of a consumer who does not understand the transaction, misrepresentation of the quality of goods or overcharging. In our view, the practices which are the subject of this investigation are not the type of undesirable trade practices contemplated by the provision.

Our office reviewed the responsive record in light of the requirements of subsection 18(4) and we concluded that the requirements for the application of any part of subsection 18(4) had not been met. In our view, while the general public may have a general interest in the outcome of an investigation into animal care, the well-being of the general public or protection of the environment would not be served by the disclosure of the information at issue in this case.

We found that subclause 18(1)(c)(i) of FIPPA was applied to withhold commercial information regarding the business operations of the third party farm business.

Do the discretionary exceptions under clauses 25(1)(a) and (c) of FIPPA apply to the withheld information?

Subsection 25(1) provides a public body with the discretion to refuse to disclose information which could reasonably be expected to cause harm to law enforcement activities or legal proceedings. Law enforcement is defined, in section 1 of FIPPA to mean any action taken for the purpose of enforcing an enactment (including policing), investigations or inspections that lead or could lead to a penalty or sanction being imposed (or that are otherwise conducted for the purpose of enforcing an enactment) and proceedings that lead or could lead to a penalty or sanction being imposed (or that are otherwise conducted for the purpose of enforcing an enactment). Therefore, law enforcement activities include not only policing in the usual sense but investigations and proceedings conducted for the purpose of enforcing an enactment such as the Animal Care Act.

The exceptions allowed under clause 25(1)(a) and (c) of FIPPA contain a reasonable expectation of harm test. A public body must determine whether disclosure of the information could "reasonably be expected" to cause the harm described in the provisions.

Unlike the exceptions described under sections 17 and 18, clause 25(1)(a) is a discretionary exception. The public body must first determine if the exception applies to the requested information and then consider whether it is appropriate to release the requested information even though an exception applies.

In making its representations, Manitoba Agriculture explained that the investigation under the Animal Care Act was still open at the time the complainant's access request was made. The public body stated that the release of the information contained in the responsive records could harm an ongoing law enforcement action taken for the purpose of enforcing an enactment and could also harm future investigations under the Animal Care Act by revealing information about how Manitoba Agriculture conducts such investigations. The public body explained that one way the release of the requested information could harm law enforcement would be through hampering the ability of the public body to collect evidence. As related by the public body, the farm operation in this instance and other operations under investigation currently and in the future could gain insider knowledge about how Manitoba Agriculture conducts its investigations and the factors considered in making findings and/or imposing sanctions. This could impact the way the subjects of investigations answer questions, thus influencing the outcome, and make it more difficult to obtain reliable witness statements. The public body stressed that it is important

that the analysis and recommendations contained in the responsive records regarding Manitoba Agriculture's conclusions whether to pursue sanctions against the farm operation be withheld so that future subjects of investigations do not use the information to avoid prosecution or a director's order. Further, as this investigation is ongoing, the department's ability to continue to work effectively with the third party could be harmed. Manitoba Agriculture stated that its ability to use techniques to improve practices outside of formal charges under the Animal Care Act could be compromised by the release of the responsive records.

Our office considered the withheld information and determined that its disclosure could reasonably be expected to harm an ongoing law enforcement matter as well as cause harm to the future effectiveness of investigative techniques and procedures. In our view it is desirable that the subjects of similar investigations under the Animal Care Act continue to voluntarily provide information and cooperate fully with the department. In this instance, the department's role in enforcement and compliance is contingent on maintaining the cooperation of the farm operation under investigation.

Accordingly, we found that the exceptions to disclosure in clauses 25(1)(a) and (c) of FIPPA applied to information about an ongoing investigation and investigative techniques which had been withheld from access.

As noted, clauses 25(1)(a) and (c) of FIPPA are discretionary exceptions. Our office considered whether Manitoba Agriculture reasonably exercised its discretion in deciding to withhold rather than release the information in question. Based on our review, we found that the exercise of discretion by the public body to withhold information subject to the exceptions was reasonable and discretion was exercised in a manner consistent with the purpose of the exception.

Was it possible to sever information subject to exceptions?

The complainant has observed that the public body applied exceptions to withhold the entire responsive record and it has not attempted to sever information to which exceptions apply and give the complainant access to the remainder. Under subsection 7(2) of FIPPA, if a record contains any information that is not subject to an exception to disclosure, the public body is required to consider whether or not the excepted information can reasonably be severed from the responsive record and access given to the remainder. Subsection 7(2) of FIPPA reads:

Severing information

7(2) The right of access to a record does not extend to information that is excepted from disclosure under Division 3 or 4 of this Part, but if that information can reasonably be severed from the record, an applicant has a right of access to the remainder of the record.

Our office considered the requirements of subsection 7(2) of FIPPA. As noted by the complainant, the incident which prompted the investigation of the farm operation has been covered by the media. This, however, renders individuals identifiable even if their names are severed from the record. As some of the details of this incident are publicly known, even factual background would reveal information that could allow the identification of the farm business, employees and witnesses and would also cause harm to an ongoing investigation. Our office has determined that the exceptions apply to the entire record. Accordingly, we concluded that the responsive record could not reasonably be severed.

CONCLUSION

Based on our findings, the complaint of refused access made against Manitoba Agriculture is not supported.

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

September 20, 2018
Manitoba Ombudsman