

Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2018-0252

CITY OF BRANDON

ACCESS COMPLAINT: REFUSED ACCESS

PROVISIONS CONSIDERED: 17(1), 17(2)(c), 17(3)(d), 17(3)(e), 17(4)

REPORT ISSUED ON AUGUST 21, 2018

SUMMARY: The complainant requested access to the record of a complaint submitted about his property to the City of Brandon. Access was provided to a copy of the record, with some information withheld. A complaint was made to our office about this refusal of access. Our office found that the withheld information was personal information and the public body was required to refuse access in accordance with provisions 17(1) and 17(2)(c) of the Freedom of Information and Protection of Privacy Act. Therefore, the complaint was not supported.

COMPLAINT

On May 15, 2018, the City of Brandon (the public body) received the following application for access under the Freedom of Information and Protection of Privacy Act (FIPPA or the act):

*The complaint that was filed against myself and my property [property name removed.]
In Brandon, Mb [sic].*

The City of Brandon responded on May 22, 2018, advising that access had been granted in part. The public body advised that the name of the person who made the complaint (the informant) was removed, under provisions 17(1), 17(3)(d), and 17(3)(e) of FIPPA.¹

¹ For clarity, this report uses the term “informant” when referring to the person who made the by-law complaint described in the records at issue and associated City of Brandon information. The term “complainant” is used to describe the person who made the FIPPA complaint to our office.

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.*

Determining unreasonable invasion of privacy

17(3) *In determining under subsection (1) whether a disclosure of personal information not described in subsection (2) would unreasonably invade a third party's privacy, the head of a public body shall consider all the relevant circumstances including, but not limited to, whether*

(d) the disclosure may unfairly expose the third party to harm;

(e) the personal information has been provided, explicitly or implicitly, in confidence;

In its response letter, the City of Brandon also noted:

The City's long-standing internal practice has been to keep the names of complainants anonymous so as to shield them from potential retaliation, harassment or other retribution.

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 May 28, 2018, our office received a complaint about the public body's decision to refuse access in part under FIPPA.

PRELIMINARY MATTER

Our office contacted the City of Brandon on May 31, 2018, to notify the public body of the complaint and to request clarification regarding the public body's access decision. We asked the public body to provide written representations to our office to explain its position.

On June 7, 2018, the public body issued a revised access decision, advising that in addition to the provisions previously cited, access was also refused under provision 17(1) in conjunction with 17(2)(c) 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*

(c) disclosure could reasonably be expected to reveal the identity of a third party who has provided information in confidence to a public body for the purposes of law enforcement or the administration of an enactment

This report is based on our review of the provisions cited in the public body's initial access decision, dated May 22, 2018, and in its revised access decision, dated June 7, 2018.

POSITION OF THE CITY OF BRANDON

The City of Brandon provided written representations to our office, dated June 13, 2018, with respect to the application of provisions 17(1), 17(2)(c), 17(3)(d), and 17(3)(e) of FIPPA.

The public body advised that, with respect to clause 17(2)(c) of FIPPA, the identity of the informant to the city was collected to facilitate the administration of the City of Brandon Zoning By-Law No. 7142. The public body stated that as its by-laws obtain their legal force through the Brandon Charter Act, which is a statute passed by the Legislative Assembly of Manitoba, the by-laws meet the definition of an enactment provided by the *Manitoba FIPPA Resource Manual*.²

With respect to its reliance on clause 17(3)(d) of FIPPA, the City of Brandon provided additional contextual information regarding its experience about the potential harms to informants in by-law enforcement matters.

Regarding clause 17(3)(e) of FIPPA, the public body noted its longstanding practice has been to keep informant names confidential. Further, that internal policy states if there is concern from an informant, employees should explain that disclosure of information filed with the city is subject to compliance with FIPPA. A copy of the policy was provided to our office.

In addition, the public body noted that, while not cited in the revised access decision, 17(3)(c) was also considered. Clause 17(3)(c) is as follows:

17(3) In determining under subsection (1) whether a disclosure of personal information not described in subsection (2) would unreasonably invade a third party's privacy, the head of a public body shall consider all the relevant circumstances including, but not limited to, whether
(c) the disclosure will assist in a fair determination of the applicant's rights

The public body advised that an "order to remedy contravention" was issued, and that it contained no mention of who complained to the city. The city further advised that the identity of the informant has no bearing on the requirements for property owners to adhere to city by-laws and, that even if the complaint was withdrawn, the applicant would still be required to bring their property into compliance with the zoning by-law. The public body noted that for these reasons, it determined that disclosure of the informant's identity would not assist in determination of the applicant's rights.

² The *Manitoba FIPPA Resource Manual* was created by the Manitoba Government as a reference to assist public bodies in meeting the requirements of FIPPA.

ANALYSIS OF THE ISSUES AND FINDINGS

Does the information withheld contain “personal information” as defined under FIPPA?

Information was withheld from the record, citing provisions under section 17 of FIPPA. Section 17 of FIPPA pertains to mandatory exceptions to disclosure regarding the privacy of a third party. Subsection 17(1) requires a public body to refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party’s privacy.

In order for the exceptions to disclosure under section 17 of FIPPA to apply, the information at issue must be personal information.

FIPPA (subsection 1(1)) defines personal information as follows:

"personal information" means recorded information about an identifiable individual, including

- (a) the individual's name,
- (b) the individual's home address, or home telephone, facsimile or e-mail number,
- (c) information about the individual's age, sex, sexual orientation, marital or family status,
- (d) information about the individual's ancestry, race, colour, nationality, or national or ethnic origin,
- (e) information about the individual's religion or creed, or religious belief, association or activity,
- (f) personal health information about the individual,
- (g) the individual's blood type, fingerprints or other hereditary characteristics,
- (h) information about the individual's political belief, association or activity,
- (i) information about the individual's education, employment or occupation, or educational, employment or occupational history,
- (j) information about the individual's source of income or financial circumstances, activities or history,
- (k) information about the individual's criminal history, including regulatory offences,
- (l) the individual's own personal views or opinions, except if they are about another person,
- (m) the views or opinions expressed about the individual by another person, and
- (n) an identifying number, symbol or other particular assigned to the individual;

The above definition provides a list of characteristics to help explain what is meant by “personal information”; the list is non-exhaustive and does not include all types of information that would be considered personal information. Information may also be considered personal information when the information, on its own or when combined with other available information, is reasonably capable of identifying an individual.

On the zoning complaint form, the name, email, telephone number, and address of the informant are mandatory fields. The public body’s *Planning & Building Safety Department Policy & Procedure* notes that in order to take formal action or investigate a complaint, the complaint

must be submitted in writing and must include the informant's name, address, and contact information. The policy also advises that written complaints must be acknowledged by contacting the informant. The policy notes that any missing information on the written complaint is to be gathered and that documentation or evidence may be required from the informant in order to substantiate the complaint.

Following our review of the withheld information, our office was satisfied that the information is about an identifiable individual and is therefore personal information as defined under FIPPA. Our office then turned to a review of the exceptions in section 17 of FIPPA that the City of Brandon applied in refusing access.

Does the mandatory exception to disclosure provided by subsection 17(1) in conjunction with clause 17(2)(c) of FIPPA apply to the information withheld in the responsive record?

Subsection 17(1) of FIPPA is a mandatory exception to the right of access under FIPPA. The head of a public body is obliged to refuse disclosure of personal information about another individual (a third party) if disclosure would be an unreasonable invasion of privacy. Subsection 17(1) of FIPPA reads as follows:

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.*

Subsection 17(2) of FIPPA lists the specific types of information that, if disclosed, are deemed to be an unreasonable invasion of privacy for the purposes of subsection 17(1). Therefore, if the information contained in a record is of the type found under subsection 17(2) of FIPPA, then the public body is required to refuse access to the information in question. The public body applied clause 17(2)(c) to the withheld information in the responsive record.

Clause 17(2)(c) reads as follows:

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*

(c) disclosure could reasonably be expected to reveal the identity of a third party who has provided information in confidence to a public body for the purposes of law enforcement or the administration of an enactment

In considering the application of clause 17(2)(c), our office considered whether municipal by-laws are captured under "law enforcement," or "administration of an enactment." We note the public body's position is that the city's by-laws meet the definition of enactment provided in the FIPPA manual, because the by-laws obtain their legal force through the Brandon Charter Act, which is a statute passed by the legislative assembly.

FIPPA defines “enactment” to mean an act or regulation. We note that the Interpretation Act defines “act” to mean an act of the legislature or part of an act.

Subsection 9(3) of the Brandon Charter Act, speaks specifically to by-laws on private works. Clause 9(3)(e) of the Brandon Charter Act states:

By-laws on private works

9(3) *The city may*

(e) require the owner of private works to comply with the requirements of a designated officer of the city as to the location, construction, materials, workmanship and other matters in connection with the installation, construction, re-installation, reconstruction or maintenance of the private works

Given this wording, the complaint form submitted to the public body can reasonably be interpreted as providing information “for the purposes of administering” clause 9(3)(e) of the Brandon Charter Act. Therefore, we found that the information related to the administration of an act. As we found that the information was provided for the purpose of administering the Brandon Charter Act, it was not necessary to determine whether the City of Brandon’s by-laws would also be considered enactments for the purposes of FIPPA.

We then considered whether the information was provided in confidence to the public body. We note that the city’s online property complaint form contains the following disclaimer:

The information you are about to submit will be stored on City of Brandon servers in order to enable the City of Brandon to respond and resolve the issue. The City of Brandon may keep certain submitted data for statistical and analytical purposes. Personal information will not be used or disclosed for other purposes, unless permitted by FIPPA. This information is protected by the Protection of Privacy provisions of The Freedom of Information and Protection of Privacy Act. If you have any questions about the collection and/or use of your personal information please contact fippa@brandon.ca.

In its initial access decision, the public body informed the complainant that the city had a long-standing practice of keeping informants’ names anonymous to protect them from potential retaliation, harassment, or other harm. In subsequent communication with our office, the city noted that its internal policy states if there is concern from an informant, employees should explain that disclosure of information filed with the city is subject to compliance with FIPPA. A copy of the policy was provided to our office. The city observed that there was an opportunity to more clearly articulate the confidentiality of informant information on the online complaint form. It may be the case that the wording on the form could be modified to indicate explicitly that the information would be kept confidential. However, our office is nonetheless satisfied, based on the nature of these matters and the city’s practice of not disclosing informant information in such matters, that there would be an implicit expectation of confidentiality on the part of an informant.

We concluded that the information was provided for the purposes of administering an enactment and that the information was provided in confidence. As such, we found that the conditions for the application of subsection 17(1) in conjunction with clause 17(2)(c) were met.

The City of Brandon also relied on clauses 17(3)(d) and 17(3)(e) with respect to the same information withheld under clause 17(2)(c). The considerations listed in subsection 17(3) are to be considered only for information that is not of the type described in subsection 17(2). As we determined that a provision of subsection 17(2) did apply to the information, it was not necessary to consider the applications of 17(3)(d) and 17(3)(e) of FIPPA to the same information.

Our office then considered subsection 17(4) of FIPPA. Subsection 17(4) limits what information may be withheld from disclosure, and provides the criteria where it is not unreasonable to disclose information that would otherwise be withheld under subsection 17(2). Clause 17(4) reads as follows:

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

- (a) the third party has consented to or requested the disclosure;*
- (b) there are compelling circumstances affecting the mental or physical health or the safety of the applicant or another person and notice of the disclosure is mailed to the last known address of the third party;*
- (c) an enactment of Manitoba or Canada expressly authorizes or requires the disclosure;*
- (d) the disclosure is for research purposes and is in accordance with section 47;*
- (e) the information is about the third party's job classification, salary range, benefits, employment responsibilities or travel expenses

 - (i) as an officer or employee of a public body,*
 - (ii) as a minister, or*
 - (iii) as an elected or appointed member of the governing council or body of a local public body or as a member of the staff of such a council or body;**
- (f) the disclosure reveals financial or other details of a contract to supply goods or services to or on behalf of a public body;*
- (g) the disclosure reveals information about a discretionary benefit of a financial nature granted to the third party by a public body, including the granting of a licence or permit;*
- (h) the information is about an individual who has been dead for more than 10 years; or*
- (i) the record requested by the applicant is publicly available.*

Our review determined that clauses 17(4)(a) to (i) did not apply to the personal information severed by the public body. Therefore, the City of Brandon was required to refuse access to this information under subsection 17(1) of FIPPA.

Following a review of the evidence provided to our office by the public body, our office is satisfied that the conditions for the application of provisions 17(1) and 17(2)(c) have been met. Therefore, our office has found that the release of the withheld information would be an unreasonable invasion of third party privacy under subsection 17(1) of FIPPA.

CONCLUSION

As our office found that provisions of FIPPA cited by the public body apply, the complaint 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 the decision by the City of Brandon to refuse access under FIPPA to the Court of Queen's Bench within 30 days of receipt of this report.

August 21, 2018
Manitoba Ombudsman