

# Manitoba mbudsman

## REPORT UNDER

### THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2018-0279

#### MANITOBA INFRASTRUCTURE

#### ACCESS COMPLAINT: REFUSAL OF ACCESS

**PROVISIONS CONSIDERED: 19(1)(b) and (c); 23(1)(a), (b) and (f)**

**REPORT ISSUED ON OCTOBER 29, 2018**

**SUMMARY:** Manitoba Infrastructure received a request made under the Freedom of information and Protection of Privacy Act (FIPPA or the act) for access to records relating to the valuation of the Province of Manitoba's transportation and flood infrastructure investment deficit. Access was given in part and a refused access complaint was made to our office about the information that was withheld. Our office investigated and found that the mandatory exceptions to access under clauses 19(1)(b) and (c) of FIPPA (cabinet confidences) applied to two records withheld in full. Our office also found that the discretionary exceptions under clauses 23(1)(a), (b) and (f) of FIPPA (advice to a public body) applied to information which was severed from those records to which partial access was given. The complaint was not supported.

#### COMPLAINT

On April 24, 2018 Manitoba Infrastructure (the public body) received a request under the Freedom of information and Protection of Privacy Act (FIPPA or the act) for access to information as follows:

*All records (memos, correspondence, reports, analyses, advice briefings, decisions and any/all documents) relating to the valuation of the Province of Manitoba's transportation and flood infrastructure investment deficit.*

*The infrastructure investment deficit is the valuation of the cost (construction, maintenance, repair) to bring infrastructure (transportation and flood protection) assets to good condition, and to construct the new infrastructure assets required in the province in future years to accommodate population and economic growth/needs.*

Manitoba Infrastructure issued its access decision on May 24, 2018, and gave access in part. The public body advised that information had been withheld under clauses 23(1)(a), (b) and (f) (advice to a public body) and clauses 19(1)(b), (c), (d) and (e) (cabinet confidences) of FIPPA.

A complaint of refused access relating to the information that was withheld was received by our office on June 8, 2018.

## **POSITION OF THE PUBLIC BODY**

In responding to the complainant's access request, Manitoba Infrastructure searched for and identified the following responsive items:

- Internal email correspondence between Manitoba Infrastructure staff dating between November 30, 2016 and February 14, 2018;
- A submission to Treasury Board; and
- A PowerPoint presentation prepared for Treasury Board.

The submission to Treasury Board and the PowerPoint presentation were withheld in full. Access to the email correspondence was provided in part, with some information severed. In withholding information from access (as noted on the records themselves), the public body relied on the following provisions of FIPPA:

### ***Cabinet confidences***

**19(1)** *The head of a public body shall refuse to disclose to an applicant information that would reveal the substance of deliberations of Cabinet, including*

- (b) discussion papers, policy analyses, proposals, advice or similar briefing material submitted or prepared for submission to Cabinet;*
- (c) a proposal or recommendation prepared for, or reviewed and approved by, a minister for submission to Cabinet;*
- (d) a record that reflects communications among ministers relating directly to the making of a government decision or the formulation of government policy; and*

*(e) a record prepared to brief a minister about a matter that is before, or is proposed to be brought before, Cabinet or that is the subject of communications among ministers relating directly to government decisions or the formulation of government policy.*

***Advice to a public body***

**23(1)** *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal*

*(a) advice, opinions, proposals, recommendations, analyses or policy options developed by or for the public body or a minister;*

*(b) consultations or deliberations involving officers or employees of the public body or a minister;*

*(f) information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.*

In its access decision letter, Manitoba Infrastructure explained to the complainant that information which would reveal advice, opinions and analysis developed by public body staff concerning infrastructure investment deficits (financial estimations and projections) was withheld under clauses 23(1)(a) and (b) of FIPPA. The public body applied clause 23(1)(f) of FIPPA to sever financial information, the disclosure of which could reveal information about future policy and budgetary decisions. The public body also explained that the submission to Treasury Board was withheld in full under clauses 19(1)(c) and (d) of FIPPA and the PowerPoint presentation prepared for Treasury Board was withheld in full under clauses 19(1)(b) and (e) of FIPPA.

In reviewing the severed records to which access was provided in part (departmental emails), our office observed that clauses 19(1)(b) and (e) appeared to have also been applied to some of the information which was withheld; however, this was not evident from the decision letter provided to the complainant. During the course of our investigation this was clarified with the public body and the application of 19(1)(b) and (e) to the information withheld from departmental emails is discussed later in this report.

## **POSITION OF THE COMPLAINANT**

In making the complaint, the complainant specifically objected to the public body's decision to refuse access to information in internal emails, which she assumed to be figures or facts relating to Manitoba's transportation and flood protection infrastructure deficits. It was the complainant's view that any advice derived from the analysis of figures or facts could be severed and the figures themselves could be disclosed. It was also the view of the complainant that the public

body erred in concluding that the release of factual information (such as figures giving a valuation of the infrastructure investment deficit) could reasonably be expected to result in the disclosure of future policy and budgetary decisions of Manitoba Infrastructure and the Manitoba government. The complainant stressed that she was not seeking information about future policy/budgetary decisions, advice to ministers, recommendations or analyses but rather the disclosure of factual information (such as figures giving total amounts) relating to the transportation and flood protection infrastructure investment deficit.

## **ANALYSIS AND FINDINGS**

On receiving the complaint our office contacted Manitoba Infrastructure and asked it to explain more fully how the exceptions cited in refusing access applied to the withheld information. We also asked the public body to provide copies of the responsive records for our review. The public body responded with representations making a fuller explanation as well as copies of the withheld information for our review. Our analysis and findings are set out below.

### **Do the exceptions to disclosure under clauses 19(1)(b) and (e) of FIPPA apply to the information withheld under these provisions?**

The exceptions under subsection 19(1) of FIPPA are mandatory, meaning that a public body is required to refuse to disclose information that would reveal the substance of deliberations of cabinet. If a mandatory exception is shown to apply to the information at issue then, under FIPPA, the public body is required to refuse access to this information. It has no discretion to do otherwise. Some types of information which could reveal the substance of cabinet deliberations are described in clauses ‘a’ to ‘e’ of subsection 19(1) of FIPPA. Manitoba Infrastructure applied clauses 19(1)(b) and (e) of FIPPA to refuse access in full to a PowerPoint presentation (which it explained was prepared to brief Treasury Board) as well as to some of the information severed from internal public body email correspondence on the topic “infrastructure deficit report.”

The Manitoba government’s web pages explain that Treasury Board is a sub-committee of cabinet responsible for the overall fiscal management and reporting of the Manitoba government and the establishment of policies required for the effective management of public funds to meet government objectives. FIPPA explains that cabinet means the Executive Council appointed under the Executive Government Organization Act (Manitoba) and cabinet includes a committee of the Executive Council.

Our office notes that the exception under clause 19(1)(b) applies to briefing material submitted or prepared for submission to cabinet. Our office examined the record at issue and we agree that the PowerPoint presentation is the type of information described by clause 19(1)(b) of FIPPA and, therefore, the public body was required to refuse access to this information. As we found

that clause 19(1)(b) applied to withhold the PowerPoint presentation prepared for Treasury Board from access, it was not necessary for our office to consider the application of clause 19(1)(e) to the same information.

The public body also applied clauses 19(1)(b) and (e) of FIPPA to sever information from three departmental emails dated December 5, 2017, and two dated November 30, 2016. Our office reviewed the records at issue and it did not appear to us that information severed from the emails was incorporated into the PowerPoint presentation or the submission prepared for Treasury Board. Based on the information provided to us, we were unable to determine a direct connection between the information severed from the public body emails and the contents of the materials which the public body has explained were prepared for submission to cabinet. We were, therefore, unable to conclude that the information contained in the emails would fall under clauses 19(1)(b) and (e) of FIPPA. However, the public body also applied the exceptions to access described under subsection 23(1) of FIPPA (which apply to advice to a public body) to the same information. The application of exceptions under subsection 23(1) to this information will be considered later in this report.

**Do the exceptions to disclosure under clauses 19(1)(c) and (d) of FIPPA apply to the information withheld under these provisions?**

Manitoba Infrastructure applied clauses 19(1)(c) and (d) of FIPPA to refuse access in full to the submission prepared for Treasury Board. Our office notes that the exception under clause 19(1)(c) applies to a proposal or recommendation prepared for, or reviewed and approved by, a minister for submission to cabinet. Our office reviewed the records at issue and concluded that the submission prepared for Treasury Board and withheld in full was clearly a record prepared to brief a minister and cabinet about a matter that is before, or is proposed to be brought before, Treasury Board and the release of this information would reveal the substance of deliberations of cabinet; therefore, the public body was required to refuse access to this information. As we found that clause 19(1)(c) applied to the submission prepared for Treasury Board, and the public body was required to refused access to this information, it was not necessary for our office to consider the application of 19(1)(d) to the same information.

**Do the exceptions to disclosure set out in clauses 23(1)(a), (b) and (f) of FIPPA apply to the information withheld under those exceptions?**

As explained by the public body in its access decision, records responsive to the complainant's request included a number of internal public body emails on the topic of estimating the cost to bring all provincial infrastructure into good condition. Manitoba Infrastructure has applied the exceptions under clauses 23(1)(a), (b) and (f) of FIPPA to sever some information from these emails while giving the complainant access to the remainder of the information.

The discretionary exceptions set out in subsection 23(1) of FIPPA are intended to protect the advisory and decision-making processes of a public body. Preserving the confidential relationship between a public body and its advisors ensures that full and frank discussions can take place among officers, employees and others who may be advising a public body. These exceptions protect a type of information contained in a record and may not apply to the all of the information in a record.

The exceptions in subsection 23(1) are discretionary, meaning that a public body may refuse access to information which falls under these exceptions, but it is not required to do so. Accordingly, a public body must exercise its discretion about whether to refuse or give access to information to which a discretionary exception applies. This being the case, a public body must provide reasons for its decision to refuse access that demonstrate it exercised its discretion in a reasonable fashion.

Subsection 23(2) of FIPPA sets out limits to the exceptions in subsection 23(1), meaning that if the information is subject to one of the limits in subsection 23(2), the exception in subsection 23(1) does not apply to that information.

Clause 23(1)(a) of FIPPA allows a public body to refuse to disclose information that could reasonably be expected to reveal advice, opinions, proposals, recommendations, analyses, or policy options developed by or for the public body. The information must reveal a suggested course of action which the public body was in a position to ultimately accept or reject. The intent of clause 23(1)(a) is to maintain and encourage candour in the provision of advice, which may or may not be acted on. Clause 23(1)(a) requires the information excepted to fall within the categories of information named in the exception and would not generally apply to background information or facts that are already known.

Clause 23(1)(b) of FIPPA allows a public body to refuse to disclose information that could reasonably be expected to reveal consultations or deliberations involving officers or employees of the public body. A consultation is the seeking of information or advice from a person or referral of a matter to a person for advice or an opinion. In the context of clause 23(1)(b), a consultation is the seeking of the views of one or more persons as to the appropriateness of suggested actions, proposals, etc. 'Deliberation' means careful consideration; the discussion of reasons for and against; a debate or discussion.

The exception in clause 23(1)(f) allows a public body to withhold information, the release of which could lead to a premature disclosure of an anticipated policy or budgetary decision. The anticipated policy or budgetary decision should be identified and described in representations to our office and not be merely speculative.

In response to our request for more information about its reasons for applying the foregoing exceptions to sever information from internal emails provided to the complainant, the public body advised our office that the infrastructure deficit estimates are considered as part of the decision making that goes into the creation of the annual budget allocation. The public body explained that the recent estimation to bring provincial infrastructure into good condition was done to advise the deputy minister and the minister and, through them, cabinet as part of annual budget process and to inform the department's multi-year capital plan.

In representations to our office, the public body noted that it had disclosed to the complainant the general methodology related to calculating the highway investment deficit and it had provided road information (categories, kilometers) from the Manitoba Infrastructure highway management system, which was used in the calculations. However, the public body also noted that the provincial estimates of costs for future work are approximations on the part of Manitoba Infrastructure staff, which are provided as advice and opinion to help inform budgetary planning and decision making. Further, the public body stated that the release of this information would reveal pending budget and policy decisions.

On reviewing the severed information, our office has concluded that this information consisted of the type of information described by clauses 23(1)(a), (b) and (f) of FIPPA. Our office then considered whether one of the limits to the exceptions in subsection 23(1) as set out under subsection 23(2) applied, specifically clause 23(2)(f) of FIPPA:

***Exceptions***

**23(2)** *Subsection (1) does not apply if the information (f) is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal;*

Our office notes that clause 23(2)(f) is qualified by subsection 23(3):

***Interpretation of "background research"***

**23(3)** *For the purpose of clause (2)(f), background research of a technical nature does not include economic or financial research undertaken in connection with the formulation of a tax policy or other economic policy of the public body.*

With regard to the application of clause 23(2)(f) and subsection 23(3) of FIPPA our office consulted the *Manitoba FIPPA Resource Manual* (the manual).<sup>1</sup> 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 economic policies relate to the management of financial and

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<sup>1</sup> The Manual may be consulted online at [http://www.gov.mb.ca/chc/fippa/public\\_bodies/resource\\_manual/index.html](http://www.gov.mb.ca/chc/fippa/public_bodies/resource_manual/index.html).

other resources of the government, which in our view, includes budget planning. Our office concluded, therefore, that clause 23(2)(f) does not apply to limit the application of clauses 23(1)(a), (b) and (f) to the information severed under those provisions.

Under subsection 23(1) of FIPPA, a public body has the discretion to give rather than to refuse access to information requested by the applicant. This being the case, a public body must provide reasons for its decision to refuse access that demonstrate it exercised its discretion in a reasonable fashion. We considered whether Manitoba Infrastructure 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 Manitoba Infrastructure to withhold the severed information was reasonable, as discretion was exercised in a manner consistent with the purpose of the exception. Furthermore, we noted that the public body exercised its discretion to release some information that could potentially have been subject to exceptions under subsection 23(1).

## **CONCLUSION**

Our office found that clauses 19(1)(b) and (c) of FIPPA applied to the information withheld under those provisions. Our office also found that clauses 23(1)(a), (b) and (f) of FIPPA applied to the information severed under those provisions. Therefore, the complaint of refused access was 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 Infrastructure's decision to refuse access to the Court of Queen's Bench within 30 days following the receipt of this report.

Manitoba Ombudsman  
October 29, 2018