

Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2018-0292

WORKERS COMPENSATION BOARD OF MANITOBA

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 17(1), 17(2)(d), 23(1)(a)

REPORT ISSUED ON OCTOBER 1, 2018

SUMMARY: The complainant requested access to his personal information from the Workers Compensation Board of Manitoba (WCB) under the Freedom of Information and Protection of Privacy Act (FIPPA). In the WCB's initial access decision to the complainant, it refused access to information under subsection 17(1), clauses 13(1)(c), 17(2)(a), 17(2)(d) and 23(1)(a) of FIPPA. During the course of our investigation, the WCB reconsidered its initial access decision, on its own accord, and provided the complainant with additional information. Our office reviewed the information that continued to be withheld and determined that information in one record did not appear to fall under the provision cited by the WCB. The WCB agreed and provided the record to the complainant. Our office found that subsection 17(1), clauses 17(2)(d) and 23(1)(a) of FIPPA applied to the information that continued to be withheld by the WCB. The complaint is partly supported.

THE COMPLAINT

On April 25, 2018, the complainant requested access to the following records under the Freedom of Information and Protection of Privacy Act (FIPPA or the act):

An updated copy of the personal file that the WCB maintains on this writer from all sources within the WCB.

On June 1, 2018, the Workers Compensation Board of Manitoba (WCB or the public body) advised the complainant that it located 26 records. The WCB granted access in full to six records, access in part to five records and refused access in full to 15 records. In refusing access to records, in full or in part, the WCB relied on subsection 17(1), clauses 13(1)(c), 17(2)(a), 17(2)(d) and 23(1)(a) of FIPPA.

The complainant made a refusal of access complaint to our office on June 20, 2018.

PRELIMINARY MATTERS

Further to receiving the complaint, our office requested that the public body provide us with copies of the responsive records and representations concerning how the cited provisions applied to the withheld information. After receiving our letter, the WCB advised our office that it reconsidered its decision, on its own accord, and indicated that it was providing the complainant with a revised access decision. On July 17, 2018, the WCB sent a revised access decision to the complainant granting access in full to nine records that were previously withheld in part or in full (record numbers 8, 9, 10, 11, 16, 17, 18, 21, 26). The WCB also provided the complainant with a revised severed version of one record (record number 7). The WCB continued to refuse access, in full, to 10 records (record numbers 12, 13, 14, 15, 19, 20, 22, 23, 24, 25).

Our office reviewed the information that continued to be withheld, in full and in part, and noted that one record (record number 20) did not appear to fall under the type of information that is protected under the provision cited by the WCB, clause 23(1)(a) of FIPPA. We requested clarification concerning how the cited provision applied. The WCB indicated that it agreed with our office's analysis and provided this record to the complainant, in full, in a further decision by letter dated September 4, 2018.

As the WCB provided revised access decisions and released information that was previously withheld, the remainder of our report focuses on the WCB's application of subsection 17(1) and clause 17(2)(d) of FIPPA to information withheld in part in one record (record number 7) and its application of clause 23(1)(a) of FIPPA to information withheld in full in nine records (record numbers 12, 13, 14, 15, 19, 22, 23, 24, 25).

ANALYSIS OF ISSUES AND FINDINGS

Does the exception to disclosure under subsection 17(1) in conjunction with clause 17(2)(d) of FIPPA apply to the withheld information?

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.

We note that 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)(d) to the withheld information in the responsive record.

Clause 17(2)(d) of FIPPA sets out the following:

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*

(d) the personal information relates to eligibility for or receipt of income assistance, legal aid benefits, social service benefits or similar benefits, or to the determination of benefit levels;

In this case, the WCB severed information contained in one responsive record. The WCB explained to our office that the severed information identifies WCB claimants. Our review of the information determined that the withheld information consists of third-party personal information that relates to the individual's WCB claims. As such, we found that the WCB was required to refuse access to this information under subsection 17(1) in conjunction with clause 17(2)(d) of FIPPA.

Does the exception to disclosure under clause 23(1)(a) of FIPPA apply to the withheld information?

The discretionary exceptions set out in section 23 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 intent of clause 23(1)(a) is to maintain and encourage candour in the provision of advice in order to assist the public body in making decisions about courses of action to follow or approaches to take. This exception allows a public body to refuse to disclose information that could reasonably be expected to reveal advice, opinions, proposals, recommendations, analysis, or policy options developed by or for the public body. It would not generally apply to background information or facts that are already known.

The information must reveal a suggested course of action which the public body was in a position to ultimately accept or reject. As a result, this exception protects the free flow of advice involved in the decision and policy making process of a public body.

We note that clause 23(1)(a) provides:

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;

The exceptions in subsection 23(1) are discretionary, meaning that a public body may refuse access, 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.

With respect to the records withheld under clause 23(1)(a) of FIPPA, the WCB explained that the information in these records consist of strategies and approaches used and/or being considered by the public body with respect to safety and security issues. The WCB maintained that disclosure of its internal deliberations could harm the WCB's ability to engage in candid discussions and a full exploration of the range of options and strategies. Our review of the records determined that the information contained in these records is of the type described under clause 23(1)(a) of FIPPA and therefore this provision applies to the withheld information in these records.

As the exceptions under subsection 23(1) are discretionary, our office also considered whether the WCB reasonably exercised its discretion in deciding to withhold rather than give access to the information to which the exception under clause 23(1)(a) of FIPPA had been applied. Based on our review, we determined that the exercise of discretion by WCB to withhold this information was reasonable.

CONCLUSION

The WCB originally withheld a record to which the claimed exception did not apply. It subsequently released this record in full and it also released additional information in other records. Our review of the remaining information found that the cited exceptions applied. Based on our findings the complaint is partly 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 refusal of access decision by the Workers Compensation Board of Manitoba to the Court of Queen's Bench within 30 days after receipt of this report.

October 1, 2018
Manitoba Ombudsman