

Manitoba mbudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2018-0302

MANITOBA HYDRO

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 9, 12(1)(c)(i), 32(1)

REPORT ISSUED ON DECEMBER 12, 2018

SUMMARY: Manitoba Hydro received a request made under the Freedom of Information and Protection of Privacy Act (FIPPA or the act) for access to a copy of its mandate letter[s] for 2017/18 and 2018/19. The public body responded that it had identified a record but it had concluded that, as the requested letter was a draft, it was not in the custody or control of Manitoba Hydro for the purposes of FIPPA. As required by subclause 12(1)(c)(i) of the act, the public body advised the applicant that the request for access was, therefore, refused on those grounds. In the course of our investigation, it was determined that Manitoba Hydro had mistakenly identified a draft framework letter as the responsive record; however, the basis for refusal still pertained as it was confirmed that the mandate letter requested by the complainant did not exist. As the initial response from Manitoba Hydro was based on a mistaken identification of the responsive record, the complaint was partly supported.

INVESTIGATION

Access Request and Public Body Decision

On April 23, 2018 Manitoba Hydro (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:

A copy of your mandate letter for 2017/18 and 2018/19

The public body issued its access decision on May 8, 2018 stating that it had located a record which it identified as:

...a mandate letter in accordance with subsection 6(1) of The Crown Corporations Governance and Accountability Act.

The public body explained that, as the record which had been located had not been made public by the minister in accordance with clause 6(4)(c) of the Crown Corporation Governance and Accountability Act (the CCGA Act) the letter was not yet in effect. The public body further explained that, for this reason, it had determined that the record located by Manitoba Hydro was not in the custody or control of the public body for the purposes of FIPPA. Therefore, the request for access was refused in accordance with the requirements of subclause 12(1)(c)(i) of FIPPA, which reads:

Contents of response

12(1) *In a response under section 11, the head of the public body shall inform the applicant*

(c) if access to the record or part of the record is refused,

(i) in the case of a record that does not exist or cannot be located, that the record does not exist or cannot be located,

Manitoba Hydro went on to explain that, pursuant to clause 9(1)(b) of the CCGA Act, a minister is required to make a mandate letter public within 30 days of it being signed. Accordingly, access to the responsive record may also be refused under subsection 32(1) of FIPPA as the information is expected to be made public within 90 of the access request. Subsection 32(1) of FIPPA reads:

Information that will be available to the public

32(1) *The head of a public body may refuse to disclose to an applicant information that will be made available to the public within 90 days after the applicant's request is received.*

A complaint concerning the Manitoba Hydro's access decision was received in our office on July 5, 2018.

The Crown Corporation Governance and Accountability Act (the CCGA Act)

Manitoba Hydro is a Crown corporation, which has been established under the Manitoba Hydro Act (Manitoba) and which is governed by the Crown Corporation Governance and Accountability Act (the CCGA Act). According to the Manitoba government's Crown Services Secretariat web pages the other Crown corporations governed by the CCGA Act are Manitoba Public Insurance, Manitoba Liquor and Lotteries, Manitoba Centennial Centre Corporation, and Efficiency Manitoba. The CCGA Act places certain governance obligations on the Crown corporations to which it applies. A Crown corporation must create a roles and responsibilities letter with specified contents and it may create a mandate letter as described under subsection 6(1) of the CCGA Act. When created and signed (or otherwise approved) by the minister, these documents must be made public within 30 days. The requirements of the CCGA Act are as follows:

Roles and responsibilities record

4(1) *A corporation must, within three months of becoming subject to this section, have a roles and responsibilities record that is jointly developed by the corporation and the responsible minister.*

Content

4(2) *A roles and responsibilities record must include a description of the following:*

- (a) the corporation's objects, mandate or purposes, as set out in the Act or instrument creating or continuing it;*
- (b) the roles and responsibilities of*
 - (i) the corporation,*
 - (ii) its board and its individual directors, including the chair,*
 - (iii) its chief executive officer, or the person who is responsible for performing functions that are similar to those normally performed by the chief executive officer of a corporation,*
 - (iv) the responsible minister,*
 - (v) any department of government or statutory officer that provides support or services to the corporation, and*
 - (vi) any subsidiaries of the corporation;*
- (c) the corporation's accountability relationships, including its duty to account to the responsible minister;*
- (d) the committee structure of the corporation's board, including the committees required under this Act, and the role and responsibility of any other committee established by the board;*
- (e) the corporation's planning and reporting requirements;*
- (f) the mutual expectations of the corporation and the responsible minister in respect of communications, collaboration and consultations with each other;*

(g) any other prescribed matter.

Amendment

4(3) A roles and responsibilities record may be amended at any time by the corporation and the responsible minister.

Corporation and responsible minister must sign record

4(4) A roles and responsibilities record and any amendment made to it must be

- (a) signed on behalf of the corporation by the chair of the corporation's board, the corporation's chief executive officer and the responsible minister; and
- (b) made public in accordance with section 9.

Review

5 A roles and responsibilities record must be reviewed and renewed, amended, or replaced within three years after the day on which it was signed, or on which the most recent amendment to it was made.

Mandate letter

6(1) The responsible minister, in consultation with the minister, if different from the responsible minister, may prepare a mandate letter for a corporation that sets out, for the term of the letter,

- (a) the government's goals for the corporation;
- (b) the specific outcomes to be achieved by the corporation during the applicable period;
- (c) the performance measures that are to be used to determine if the specific outcomes have been achieved; and
- (d) any other information that is prescribed or that the minister or responsible minister considers appropriate.

Term

6(2) A mandate letter may be annual, or may apply to the particular fiscal years that are set out in the letter, which must not exceed three fiscal years.

Preparation and consistency of letters

6(3) A mandate letter must be consistent with the applicable corporation's objects, mandate or purposes.

When mandate letter becomes effective

6(4) A mandate letter is effective once it is

- (a) signed by the directors and the responsible minister;
- (b) approved by the Lieutenant Governor in Council; and

(c) made public in accordance with section 9.

Annual business plan

7(1) *For each fiscal year, a corporation must prepare an annual business plan that is acceptable to the responsible minister.*

The records, plans and directives required to be created under the forgoing provisions of the CCGA Act are to be made public as follows:

Records, plans and directives to be public

9(1) *The minister must ensure that the following are made public within 30 days of being signed or approved:*

- (a) a roles and responsibilities record for a corporation, or any amendment to it;*
- (b) a mandate letter given to a corporation;*
- (c) an annual business plan of a corporation.*

Manner of making public

9(2) *For the purpose of subsection (1), a document is made public if it is made available to the public in a reasonable manner, which may include making it available by electronic means.*

Our office notes there is a distinction between a ‘roles and responsibilities record’ described under section 4 of the CCGA Act and a ‘mandate’ letter as described under section 6. Mandate letters (as described by the CCGA Act) have not been publicly posted for any of the Manitoba Crown corporations. Crown Services ‘framework letters’ for Manitoba Hydro as well as Manitoba Public Insurance and Manitoba Liquor and Lotteries have been posted online and may be accessed by linking from the minister of Crown Services web page.¹

The framework letters that have been posted online are similar to those provided to Manitoba Hydro, Manitoba Public Insurance and Manitoba Liquor and Lotteries by the minister of Crown Services in 2016. As described by the minister in a press release at the time,² these framework letters outlined the terms of engagement for the Crown corporations and how the (then) new government planned to work with those Crown corporations. These framework letters were posted online on the government’s proactive disclosure web pages.³ Our office notes that this was prior to the CCGA Act coming into effect on June 2, 2017. We have also observed that the content of the ‘framework letters’ for Manitoba Hydro which we have reviewed is different from that stipulated for ‘mandate letters’ by subsection 6(1) of the CCGA Act. Therefore, the

¹ Viewed at https://www.gov.mb.ca/minister/min_crown.html on October 24, 2018.

² Issued June 15, 2016 and accessed at <https://news.gov.mb.ca/news/index.html?item=38311&posted=2016-06-15> on November 13, 2018.

³ Viewed at <https://gov.mb.ca/government/proactivedisclosure/ministerials.html> on October 24, 2018.

framework letter located by Manitoba Hydro did not appear to be responsive to the complainant's access request.

Position of the Complainant

On making his complaint, the complainant stated that he believed a 'new' mandate letter had been provided to Manitoba Hydro around September of 2017. The complainant explained to our office that this belief was based on information provided to him by Manitoba Liquor and Lotteries (Liquor and Lotteries) in response to a similar access request in which a copy of the Liquor and Lotteries mandate letters for 2017/18 and 2018/19 had been requested. In support of his position, the complainant provided our office with a copy of the access decision he had received from Liquor and Lotteries for our review.

Our office observed that Liquor and Lotteries had provided the complainant with a copy of the 'Roles and Responsibilities Record for Manitoba Liquor and Lotteries Corporation' as described under subsection 4(1) of the CCGA Act. The copy of this record provided to the complainant was dated November 17, 2017, and signed by the chair of Manitoba Liquor and Lotteries as well as its president and chief executive officer (but not by the minister of Crown Services). Liquor and Lotteries advised the complainant that it did not have a mandate letter for 2018/19 and, therefore, this record did not exist; however, it explained that its current mandate letter (dating from November 2017) was a public document and accessible online at the following URL:

https://news.gov.mb.ca/asset_library/en/newslinks/2017/11/BG-MBLL_letter.pdf

Our office noted that the letter to the chair of Manitoba Liquor and Lotteries (dated November 7, 2017) found at this location is identical to a letter which can be accessed from the minister of Crown Services' web pages under the heading 'Crown Services Framework Letters.' This letter is accessible from the hyperlink titled 'Manitoba Liquor and Lotteries Corporation: Legalization of Cannabis' which opens the same URL as above.

The complainant maintained that the last publicly available 'mandate' letter provided to Manitoba Hydro (of which he was aware) dated from around May of 2016. The complainant stated that he believed that Manitoba Hydro had received a subsequent mandate letter (perhaps in draft form) around the same time as the letter provided to Liquor and Lotteries (dating from November, 2017), that it was 'effective' within the meaning of subsection 6(4) of the CCGA Act and that it was being acted on by Manitoba Hydro.

Revised Position of the Public Body

Our office contacted the public body and asked it for more information explaining its response to the complainant's access request. We indicated that the access decision provided to the

complainant by the public body on May 8, 2018, was contradictory in that a potentially responsive record, which was in the possession of Manitoba Hydro, appeared to have been located. It was our view that, if this was the case, subclause 12(1)(c)(i) of FIPPA would not apply and a decision regarding access to this record would have to be made.

On further consideration and following discussions with our office, Manitoba Hydro contacted the complainant and offered an additional explanation. The public body stated that further investigation had determined that a mandate letter (within the requirements of s.6 of the CCGA Act) had not been located nor had the public body received a draft of a mandate letter. Therefore, the public body stated, the explanation provided in its response letter of May 8, 2018, was not correct. Still, access would continue to be refused as a record responsive to the complainant's request did not, in fact, exist. Manitoba Hydro went on to explain that the record referenced in its access decision of May 8, 2018, was actually a draft copy of the framework letter issued by the minister of Crown Services to the chair of the board of Manitoba Hydro on March 26, 2018. The public body noted that a copy of this letter had been provided to the complainant in response to a different, earlier access request. The public body also noted that the March 26 framework letter was publicly available online.⁴

Subsequently, Manitoba Hydro provided the complainant with a revised access decision letter formally explaining the reasons for refusing access. The public body stated that a record responsive to the complainant's request did not exist and, as required subclause 12(1)(c)(i) of FIPPA, it was advising the complainant that access was refused on this basis.

Does Manitoba Hydro's access decision comply with FIPPA?

When a public body determines that requested records do not exist or cannot be located, subclause 12(1)(c)(i) of FIPPA requires the head of the public body to inform the applicant that access is being refused and why. Further, section 9 of FIPPA imposes a duty on the public body to assist an applicant, as follows:

Duty to assist applicant

9 *The head of a public body shall make every reasonable effort to assist an applicant and to respond without delay, openly, accurately and completely.*

The requirements of section 9, in relation to subclause 12(1)(c)(i), to respond openly and completely to an applicant means that a public body's response letter should include a brief description of how and where a search for responsive records had been conducted and/or why the records do not exist or cannot be located. In the course of our investigation, we asked Manitoba

⁴ This letter may be linked from the government's proactive disclosure web pages at <http://www.manitoba.ca/government/proactivedisclosure/ministerials.html> as well as the minister of Crown Service's web pages at https://www.gov.mb.ca/minister/min_crown.html.

Hydro for information about its search for a record responsive to the complainant's access request and, particularly, how the record it had located (which turned out to be the March 26, 2018, framework letter) had been misidentified.

Manitoba Hydro had explained to us and to the complainant that it had initially assumed that 'framework letter' was simply another name for 'mandate letter' and that it had not previously appreciated that these two things were separate and distinct. Our office notes that the term mandate has a generic meaning, for example, a written authorization and/or command by a person, group, or organization to another to take a certain course of action. However, in the context of this complaint the term 'mandate letter' has a specific meaning. It was explained earlier in this report that a mandate letter within the meaning of subsection 6(1) of the CCGA Act will have contents consistent with the requirements of that provision. Our office observed that the March 26, 2018, framework letter (a draft of which was initially identified by Manitoba Hydro as responsive) is not a mandate letter under the CCGA Act.

Having misidentified the draft framework letter as a draft mandate letter, Manitoba Hydro assumed that the requirements of the CCGA Act would be followed and once the letter was signed by the minister and provided to the corporation it would be made public within 30 days, in accordance with clause 9(1)(b) of the CCGA Act. However, as the draft framework letter was not a mandate letter within the meaning of the CCGA Act, Manitoba Hydro also erred in relying on subsection 32(1) of FIPPA in its initial access decision.

We note that the public body acted in accordance with the duty to assist on becoming aware of its error. Manitoba Hydro contacted the complainant to provide an explanation and issued a revised access decision. Although the basis for refusal was still that no record existed, the explanation supporting the application of subclause 12(1)(c)(i) of FIPPA was amended to reflect Manitoba Hydro's new understanding of the nature of the record it had located. Manitoba Hydro apologized to the complainant for any inconvenience caused by the confusion arising from its initial misunderstanding of the nature of the requested record.

CONCLUSION

Based on the foregoing, our office has concluded that a copy of Manitoba Hydro's mandate letter for 2017/18 and 2018/19 (draft or otherwise) as requested by the complainant is not in the custody or control of the public body and the public body was required by subclause 12(1)(c)(i) to inform the complainant that the requested records did not exist or could not be located. As the initial response from Manitoba Hydro was based on a mistaken identification of the responsive record, the complaint is partly supported.

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

Manitoba Ombudsman
December 12, 2018