Manitoba Ombudsman

Title	Report with recommendation under FIPPA and report on compliance with recommendation
Case number	2018-0424
Act	Freedom of Information and Protection of Privacy Act
Public body	City of Winnipeg
Type of access complaint	Refused access
Provisions considered	27(1)(a) and 27(1)(b)
Date of public release	May 18, 2021

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Summary

A request was made under the Freedom of Information and Protection of Privacy Act (FIPPA) to the City of Winnipeg (the city) for records relating to the applicant's claim for sewer back-up damage. The city refused access, in part. The exceptions cited were advice to a public body (23(1)(a) and (b)), unreasonable invasion of an individual's privacy (17(1) and 17(3)(i)), disclosure harmful to law enforcement or legal proceedings (25(1)(n)) and solicitor-client privilege (27(1)(a) and (b)).

The city refused to provide records for review by our office on the basis of its claim of solicitor-client privilege. The city took the position that the records were made in anticipation of litigation on the basis that it considers all claims made through its administrative process to be in anticipation of litigation regardless of whether the claimant has indicated a wish to file a lawsuit.

Our office considered the city's representations regarding the application of clauses 27(1)(a) and (b) and we found that the city had not established that these exceptions applied. In the absence of records for review, our office was unable to conclude that the other exceptions relied on by the city applied to the withheld information. The ombudsman recommended that the city provide the complainant with a copy of the withheld information, with the exception of any information withheld under section 17 of FIPPA.

FIPPA required that the city provide our office with its response to our report by March 31, 2021, to indicate whether it accepted the recommendation. We received the response from the city on March 31, 2021, indicating that it was not accepting the recommendation. As the city refused to take action to implement the recommendation, on April 12, 2021, the ombudsman requested a review by the information and privacy adjudicator of the city's decision to refuse access.

Manitoba Ombudsman

REPORT WITH RECOMMENDATION UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2018-0424

CITY OF WINNIPEG

ACCESS COMPLAINT: REFUSED ACCESS

PROVISIONS CONSIDERED: 27(1)(a) and (b)

REPORT ISSUED ON MARCH 16, 2021

SUMMARY: An applicant made a request for access to the City of Winnipeg (the city or the public body) under the Freedom of Information and Protection of Privacy Act (FIPPA or the act) for records relating to the applicant's claim against the city for damage to property. Responsive records were identified and access was provided in part with some information severed under clauses 23(1)(a) and (b) (advice to a public body) of FIPPA. A complaint was made to our office about this decision to refuse access. On receiving notification of the complaint from our office, the city located additional responsive records and revised its access decision. The city applied subsection 17(1) in conjunction with clause 17(3)(i) (unreasonable invasion of an individual's privacy) and clauses 25(1)(n) (disclosure harmful to law enforcement or legal proceedings) and 27(1)(a) and (b) (solicitor-client privilege) of FIPPA to withhold information. Further to the city's application of clauses 27(1)(a) and (b), the city refused to provide records for review by our office. Our office considered the city's representations regarding the application of clauses 27(1)(a) and (b) and we found that the city had not established that these exceptions applied. In the absence of records for review, our office is unable to conclude that the other exceptions relied on by the city applied to the withheld information. This report contains a recommendation to the public body to provide the complainant with a copy of the withheld information with the exception of the personal information of a third party to which the city refused access under section 17.

ACCESS REQUEST AND INITIAL ACCESS DECISION

The City of Winnipeg (the city or the public body) received a request on August 10, 2018, under the Freedom of Information and Protection of Privacy Act (FIPPA or the act) for access to the following:

> *I would like to receive all internal City of Winnipeg correspondence regarding my Claim [claim number removed] and any discussions referencing sewer and [street name removed] Avenue or [street name removed] Street.*

The city responded with its access decision on September 10, 2018, stating that it had located responsive records in both the Water and Waste Department and Corporate Finance Risk Management Branch. Access to 11 pages of responsive records was provided in part with the majority of information severed from the records on the basis that it would reveal advice to the public body. The city relied on clauses 23(1)(a) and (b) of FIPPA to refuse access to this information. The provision reads:

> ***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;*

COMPLAINT AND REVISED ACCESS DECISION

A complaint concerning this decision to refuse access to part of the information was received by our office on November 9, 2018. On receiving this complaint, our office contacted the city and requested information explaining how the withheld information would reveal the type of information described under clauses 23(1)(a) and (b) of FIPPA. We also asked for an unsevered copy of the records for our review of the application of the exceptions to the information to which the city had refused access.

The city responded to our office on January 7, 2019. The city stated that the severed information comprised confidential advice and consultations between Risk Management and Wastewater Services employees pertaining to the city's position on the complainant's claim for damage to property and, if disclosed, the severed information would reveal the opinions and analyses obtained by Risk Management from Wastewater Services. The city, therefore, continued to maintain that clauses 23(1)(a) and (b) of FIPPA applied to the severed information.

In addition to the two exceptions claimed in its access decision, the city advised our office that it had subsequently determined that additional exceptions applied. The city stated that, upon further review, it had determined that clauses 27(1)(a) and (b) of FIPPA also applied to the severed information. These additional provisions read:

> ***Solicitor-client privilege***
> ***27(1)*** *The head of a public body may refuse to disclose to an applicant*
> *(a) information that is subject to solicitor-client privilege;*
> *(b) information prepared by or for an agent or lawyer of the Minister of Justice and Attorney-General or the public body in relation to a matter involving the provision of legal advice or legal services or in relation to the investigation or prosecution of an offence;*

The city explained to our office that it considers the process of making a claim against the city as the opening phase in litigation against the city. As such, any records created as part of the claim adjudication process are done so in anticipation of litigation and are, therefore, subject to solicitor-client privilege. Additionally, as the records at issue were subject to solicitor-client privilege, the city stated it would not be providing copies of information withheld under section 27 for our review.

The city further explained that, on reviewing its initial access decision, it had identified more responsive records. Responsive items now totalled 24 pages. The city provided our office with copies of the severed records and a document index which included brief descriptions of each withheld record.

Our office observed that (although not stated in its January 7 letter to our office) the city had also applied clause 25(1)(n) of FIPPA to withhold information according to a notation made to one of the severed pages. This provision reads:

> ***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*
> *(n) be injurious to the conduct of existing or anticipated legal proceedings.*

Our office responded to the city regarding its reliance on clauses 27(1)(a) and (b) of FIPPA and requested a copy of the responsive records for our review. We also explained that if the city now wished to rely on clauses 27(1)(a) and (b) and clause 25(1)(n) of FIPPA to refuse access, it must make a revised access decision to the complainant explaining its reliance on additional exceptions.

On April 23, 2019, the city provided the complainant with a revised access decision. The decision stated that additional responsive records had been located and the city was giving access in part to 24 pages of records. The records included email communication between the City of Winnipeg Corporate Finance Department (Claims Branch) and the Water and Waste Department (Wastewater Services Division). The records naturally divide into two groups by date. The first group includes records dating from between August 14, 2017, and October 30, 2017. The second group includes records dating between April 3, 2018, and August 31, 2018. These include a copy of a letter dated April 3, 2018, written by the complainant to the City of Winnipeg corporate risk manager (claims appeal). The letter was written by the complainant on being made aware that their claim for damages had been disallowed (an itemized list of damages and expenses was attached). Also included was a copy of another letter dated August 31, 2018, written by the complainant to the City of Winnipeg chief financial officer appealing the decision on their claim (an itemized list of damages and expenses was attached) and adjuster notes dating from April 23, 2018. With the exception of the complainant's own letters to the city, all other records were severed either in whole or in part and no substantive information was released to the complainant. The email communication also referenced several attachments, including service requests and work orders found in an online records management system. These attachments were not part of the 24 pages of records and were not at issue in this complaint because they were previously provided to the complainant in response to another request for access to information.

The city explained in its revised access decision that it was relying on clauses 25(1)(n) and 27(1)(a) and (b) of FIPPA to withhold information. Also, the city explained, some information contained in the additional responsive records related to a third party who had made a separate claim to the city for damage to property. In refusing access to this third-party information, the city relied on the mandatory exception for access to personal information under subsection 17(1) in conjunction with subclause 17(3)(i) of FIPPA. The cited provisions read:

> ***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*
>
> > *(i) the disclosure would be inconsistent with the purpose for which the personal information was obtained.*

DISCUSSION OF ISSUES

Following the revised access decision, our office conferred with the complainant who advised our office that they did not wish to pursue access to third-party personal information which the city had severed under subsection 17(1) in conjunction with subclause 17(3)(i) of FIPPA. Our investigation was, therefore, confined to an investigation of the city's reliance on clauses 25(1)(n) and 27(1)(a) and (b) of FIPPA to withhold information, as cited in the city's revised access decision.

In this case, as is usual in access complaint investigations, our office asked for unsevered copies of the responsive records so that we could review any severing for the correct application of exceptions to access. The city had the option to provide for our review the information to which it had applied clauses 27(1)(a) and (b) of FIPPA to refuse access. It is the position of our office that doing so would not constitute a wider waiver of solicitor-client privilege over this material.

Consistent with its view that all information at issue in this complaint was subject to litigation privilege, the city did not provide our office copies of the information at issue as it had concluded that to do so would constitute a waiver of privilege over that information. In doing so, the city referenced *Lizotte* which found that privilege can be asserted against third party investigators, such as our office. *Lizotte* also held that the principle set out in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*[1] that solicitor-client privilege cannot be abrogated absent an express provision is applicable to litigation privilege as well. The city has submitted that FIPPA does not contain the required express provision.

Has the public body established the application of the exception under clauses 27(1)(a) and (b) of FIPPA to withhold information from access?

In Canada, communications between a lawyer and a client related to the seeking, formulating or giving of legal advice are said to be confidential and subject to solicitor-client privilege even to the extent that parties to these communications cannot be compelled to reveal these privileged discussions by the courts. The expectation of protection for communications between a lawyer and a client applies even where the client is a public body, such as the city, and the legal counsel are on the staff of the public body.

Clause 27(1)(a) of FIPPA applies to information that is subject to solicitor-client privilege. For the purposes of the exception, solicitor-client privilege is interpreted as including both legal advice privilege and litigation privilege in that it also applies to background information created or obtained by the client or the lawyer in anticipation of litigation, whether existing or contemplated. As explained by the Information and Privacy Commissioner/Ontario (IPC

[1] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (CanLII), [2008] 2 SCR 574, https://canlii.ca/t/1zhmr, last retrieved on 2021-01-27.

Ontario) in Order 49,[2] litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial litigation and this branch of privilege may only be asserted over information created or obtained especially for the lawyer's brief for litigation. A record can fall under litigation privilege regardless of whether the common law criteria relating to the legal advice branch of privilege are satisfied.

Clause 27(1)(b) applies to information prepared by or for a public body (such as a memorandum) in relation to a matter involving the provision of legal advice or the investigation or prosecution of an offence.

The city provided representations to our office explaining its reasons for relying on clause 27(1)(a) of FIPPA to withhold information. The city referenced the Supreme Court case *Blank v. Canada (Minister of Justice)*[3] as having established that there was no distinction between solicitor-client privilege and litigation privilege in the application of clause 27(1)(a) and similar exceptions found in other Canadian access to information legislation. The city maintains that *Blank* further established that information subject to litigation privilege is not restricted to communications between a lawyer and a client but includes all communications associated with pending or apprehended litigation. While the city acknowledged that the Supreme Court also specified that litigation privilege should attach only to records made for the dominant purpose of litigation, the city asserted that the records at issue in this complaint investigation were prepared for the sole purpose of litigation and no other reason.

In support of this assertion, the city provided that there was no distinction between investigating the facts of a claim and defending a claim in litigation, or between the work of the city's claims adjusters and its Legal Services Department. Further, the city made no distinction between filing a claim using the 'Notice of Claim' form posted on the city's website and filing a Statement of Claim or Notice of Application with the courts (or initiating a Small Claims Court proceeding). As the city explained, all are assertions made by claimants concerning claims they believe they have against the city. The city further stated that the yardstick for assessing all claims, no matter how made, is the legal validity of the claim and the chances it will be proven in court. In the city's words, "all claims investigation and settlement takes place 'in the shadow of the law'[4]." The city asserts that the intake, investigation and settlement of claims, whether done by Claims Branch or Legal Services, are all part of the litigation process and that the initial investigation of a claim is essential to planning litigation strategy and determining the probable outcome of litigation, in light of which the city determines whether a claim should be settled. The city stated that if it were forced to disclose documents it has protected by litigation privilege, it would harm a public body's ability to conduct litigation and the litigation process as a whole.

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[2] IPC Order 49 (April 10, 1989) found at https://decisions.ipc.on.ca/ipc-cipvp/orders/en/127987/1/document.do accessed on January 27, 2021.
[3] *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII), [2006] 2 SCR 319, <https://canlii.ca/t/1p7qn>, last retrieved on 2021-01-27.
[4] It is our understanding that the concept of 'the shadow of the law' refers to the way laws can affect people's actions even when there is no direct legal involvement.

In support of this argument, the city advised our office that all correspondence with claimants includes the phrase "Without Prejudice."

On receiving these representations from the city, our office also reviewed cases considering the application of litigation privilege, including *Blank* and *Lizotte v. Aviva Insurance Company of Canada*[5]. *Lizotte* clearly sets out the conditions for the application of litigation privilege:

1) The information so excepted must be collected or created for the dominant purpose of litigation; and
2) The litigation is ongoing, pending or may reasonably be apprehended.

Lizotte further states that,

> ... only those documents whose "dominant purpose" is litigation (and not those for which litigation is a "substantial purpose") are covered by the privilege (para 23).

We note that the onus is on the public body to establish that each document was created for the dominant purpose of litigation. As stated in *Canadian Natural Resources Limited v. ShawCor Ltd.*[6] at para 83,

> ...a record will not be protected by litigation privilege simply because litigation was one of several purposes for which the record was created...

Our office considered the city's assertion that use of the phrase 'without prejudice' confers a blanket of litigation privilege on correspondence so designated. We note that this phrase is typically used so that settlement discussions between the parties cannot later be entered into evidence in litigation. In our view, the use of the phrase by the city in all claim correspondence does not automatically create settlement privilege in the context of exchanges that do not involve concessions of some sort meant to move the parties to settlement.

Our office invited further representations from the city. In support if its position, the city notes that case law varies widely in terms of when litigation can be considered as contemplated, however, the courts stress that each case must be considered on its merits within specific circumstances and context. The city asserts it is not possible to make a blanket finding about the applicability of FIPPA in the context of claims filed with the city. By way of illustration the city referenced *Waissman v. Calgary (City)*[7]. In this matter, the court found that an occurrence report

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[5] *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 (CanLII), [2016] 2 SCR 521, <https://canlii.ca/t/gvskp>, last retrieved on 2021-01-27.
[6] *Canadian Natural Resources Limited v ShawCor Ltd.*, 2014 ABCA 289 (CanLII), https://canlii.ca/t/g90h9, last retrieved on 2021-01-28.
[7] *Waissmann v Calgary (City)*, 2018 ABQB 131 (CanLII), https://canlii.ca/t/hqlpr, last retrieved on 2021-02-04.

made shortly after an accident involving a Calgary city bus could be considered to have been created in a circumstance where litigation was reasonably contemplated. The court noted that litigation was common against the City of Calgary for transit related injuries. The city also referenced *Pedersen v. Westfair Foods Ltd*[8], which is similar in that litigation privilege was found to apply to an accident report made shortly after a slip and fall incident in a grocery store. Our office notes that both cases involved personal injury claims where litigation may reasonably be contemplated given the experience of the City of Calgary and Westfair Foods in relation to personal injury claims in the past.

Our office reviewed the application of litigation privilege in cases involving municipalities, including three decisions made by IPC/Ontario.[9] In these cases, reports examining the causes of damage to property in order to assess liability for possible future litigation were withheld from access under the exception for litigation privilege found in Ontario's access to information legislation.[10] We note that *Halton (Regional Municipality)* related to a severe flooding event where numerous claims had been filed and litigation had already commenced in two cases before the consultant's report at issue was commissioned. Similarly, *Greater Sudbury (City)* related to a catastrophic event where 544 claims had been received before the engineering report at issue was commissioned. In both *Halton* and *Greater Sudbury (City)*, IPC/Ontario found that the reports at issue had appropriately been withheld from access under the exception for solicitor-client privilege. We observed that, in both cases, the records subject to solicitor-client privilege were created at some time after the damage event and, in *Halton*, after litigation had already commenced. In *Toronto (City)*, litigation privilege was found to apply to an engineering report. We observed the report was prepared seven months after the access requester's solicitor sent a letter to the city threatening legal action if the requester's demands were not met. In this circumstance, litigation could reasonably be apprehended at the time the engineering report was prepared. (We note that in the complaint investigated by our office, no threat of litigation was made by the complainant.) Also, in *Toronto (City)*, internal documents not involving counsel and which were in the nature of administrative matters were found not to be used for giving legal advice or in contemplation of litigation. Memoranda prepared by the City of Toronto corporate adjuster were also found not to be subject to the litigation exception as there was no evidence they had been prepared for use in giving legal advice or in the contemplation of litigation.

Our office also reviewed recent Manitoba case law considering litigation privilege, including *Man-Shield Construction Inc. et al. v. Renaissance Station Inc. et al.*, 2014.[11] The court noted

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[8] *Pedersen v. Westfair Foods Ltd*., 1993 CanLII 2381 (BC SC), https://canlii.ca/t/1djrn, last retrieved on 2021-02-04.
[9] *Halton (Regional Municipality) (Re),* 2002 CanLII 46351 (ON IPC), https://canlii.ca/t/1r3gc , last retrieved on 2021-02-04; *Greater Sudbury (City) (Re),* 2011 CanLII 53346 (ON IPC), https://canlii.ca/t/fmvnq, last retrieved on 2021-02-04; *Toronto (City) (Re)*, 2006 CanLII 50776 (ON IPC), <https://canlii.ca/t/1qvvh>, last retrieved on 2021-02-09; *Toronto (City) (Re)*, 2007 CanLII 8392 (ON IPC), https://canlii.ca/t/1qwzh, last retrieved on 2021-02-04.
[10] *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, CHAPTER F.31. While Ontario's legislation is not identical to Manitoba's, the provision under clause 19(a) of Ontario FIPPA for information that is subject to solicitor-client privilege is identical to Manitoba FIPPA clause 27(1)(a).
[11] *Man-Shield Construction Inc. et al. v. Renaissance Station Inc. et al.*, 2014 MBQB 101 (CanLII), https://canlii.ca/t/g711d, last retrieved on 2021-02-04.

that a document will attract litigation privilege if the dominant purpose for which the document was prepared was for use in litigation. However, it is not sufficient that litigation be but one of several purposes for preparation. As such, the Supreme Court of Canada approach set out in Blank and Lizotte is followed in Manitoba.

As stated in *Man-Shield Construction Inc.*, the test for the application of litigation privilege requires an analysis of:

1. whether a document was prepared for use in litigation; and
2. whether there was actual litigation or a reasonable prospect of litigation at the time the record was prepared.

The decision also states that privilege arises from the nature of, and the circumstances surrounding, the communications in question.

In keeping with *Man-Shield Construction*, the city argued that, in this situation, context is paramount. It maintains that the specific contextual backdrop of sewer back-up incidents is a situation where litigation can be reasonably contemplated when a claim is filed with the city. The city stated that damage to property litigation resulting from sewer back-ups are very commonly filed and submitted that, with this background context in mind, litigation could reasonably be contemplated by the Claims Branch in its assessment of the claim in this case (and all other claims made in similar circumstances). The city explained its view that the contextual backdrop of sewer back-up claims creates a circumstance where the creation of all claim-related documentation is with a view to potential litigation. In support of its view that a context of anticipated litigation surrounded the actions of Claims Branch from the point of initial intake the city also referenced *Manitoba Crop Insurance Corp. v. Wiebe, et al*[12] which states, "if a document's dominant purpose is with a view to potential litigation, it can, in the proper circumstances, still be protected under the umbrella of litigation privilege whether or not litigation has been initiated or, as in this case, authorized."

Our office considered the city's arguments. In our view, the anticipation of litigation in all sewer back-up claims would reasonably be based on a high proportion of sewer back-up claims resulting in litigation. Our office asked the city about the number of sewer back-up claims that proceeded to litigation. The city explained that between January 1, 2016, and December 2, 2019, there were 253 discrete claims for damage resulting from sewer back-ups filed with the city and, of those, six or 2.37 per cent were in litigation at the time our request for litigation numbers was made. Even allowing that there may have been more claims that went into litigation than the six currently in litigation, this does not suggest a contextual circumstance where litigation can reasonably be anticipated whenever a sewer back-up claim is made to the city. Given that the experience of the city is that sewer back-up claims resulted in litigation only 2.37 per cent of the time during the period surveyed, it is not logical or reasonable to anticipate litigation in all such claims.

[12] *Manitoba Crop Insurance Corp. v. Wiebe, et al*., 2006 MBCA 143 (CanLII), https://canlii.ca/t/1q35r, last retrieved on 2021-02-04

It is the position of our office that assessing the merits the complainant's claim for damages is not a legal process but primarily an administrative one, at least in the initial stages. A claims adjuster is not engaged in the practice of law and while they may apply a legal validity yardstick when considering whether to pay a claim, this is not the same as legal counsel preparing for litigation. Further, our office considers it unfair to claimants, most of whom are unfamiliar with the legal process, to characterize completing a 'Notice of Claim' for damage to property on the city's web page as the commencement of legal proceedings against the city. It is our view that, while the possibility of litigation may have been one of the purposes for the creation of the responsive records at the initial, information gathering stage and during an initial assessment of the complainant's problem (for example, those records dating from 2017), the dominant purpose for the creation of these documents was not in contemplation of litigation.

As the cases of IPC/Ontario noted above illustrate, generally within Canada, a triggering event such as a formal demand for damages, the retaining of counsel, a decision to deny liability or provision of statutory notice will trigger the application of litigation privilege from that point on. In our view, even allowing that the mere possibility of litigation is sufficient to establish its likelihood, the city must also provide evidence to support the assertion that litigation was the dominant purpose of the creator of all the information at issue and, in our view, the city failed to do so beyond stating that the making of a claim was sufficient to establish the application of litigation privilege to all records created thereafter. It is our view that, although the decision not to pay a claim may lead to litigation eventually, there is another (and we submit, more dominant) purpose for record creation in the circumstances of this complaint, at least in the early stages of the claim process.

Our office also considered the city's application of clause 27(1)(b) to the withheld information. The city has explained that 27(1)(b) applies as the records were prepared by agents of the public body in relation to a matter involving legal services. The nature of the legal services provided by the Risk Management Branch were not specified nor was evidence provided that they acted at the direction of Legal Services. We note that the exception under 27(1)(b) requires that the information be prepared by or for an agent or lawyer of the public body in relation to a matter involving the provision of legal advice or legal services. In our view, communication between Risk Management Branch and Wastewater Services regarding a damage claim does not involve the provision of legal advice or services and does not meet the plain language requirements of the provision.

It is our view that the city has failed to establish the application of clauses 27(1)(a) and (b) of FIPPA to the information withheld from access.

FINDINGS

Based on our consideration of the requirements of clauses 27(1)(a) and (b) and the city's representations, we find that these exceptions do not apply.

The city also relied on clause 25(1)(n) to refuse access to some information in the records. However, the city claimed that solicitor-client privilege exceptions also applied to that information and refused to provide the withheld information for our review. Therefore, we are unable to find that clause 25(1)(n) applies.

RECOMMENDATION

Based on the findings, the ombudsman makes the following recommendation:

1. The ombudsman recommends that the public body release the records at issue without severing to the applicant, except for the personal information of a third party to which the city refused access under section 17.

HEAD'S RESPONSE TO THE RECOMMENDATION

Under subsection 66(4), the City of Winnipeg must respond to the ombudsman's report in writing within 15 days of receiving this report. As this report is being sent by email to the head on this date, the head would be required to respond by March 31, 2021. The head's response must contain the following information:

> ***Head's response to the report***
> ***66(4)*** *If the report contains recommendations, the head of the public body shall, within 15 days after receiving the report, send the Ombudsman a written response indicating*
> *(a) that the head accepts the recommendations and describing any action the head has taken or proposes to take to implement them; or*
> *(b) the reasons why the head refuses to take action to implement the recommendations.*

OMBUDSMAN TO NOTIFY THE COMPLAINANT OF THE HEAD'S RESPONSE

When the ombudsman has received the City of Winnipeg's response to her recommendation, she will notify the complainant about the head's response as required under subsection 66(5).

HEAD'S COMPLIANCE WITH RECOMMENDATION

If the head accepts the recommendation, subsection 66(6) requires the head to comply with the recommendation within 15 days of acceptance of the recommendation or within an additional period if the ombudsman considers it to be reasonable. Accordingly, the head should provide written notice to the ombudsman and information to demonstrate that the public body has complied with the recommendation and did so within the specified time period.

March 16, 2021
Manitoba Ombudsman

Manitoba Ombudsman

REPORT ON COMPLIANCE WITH RECOMMENDATION UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2018-0424

CITY OF WINNIPEG

ACCESS COMPLAINT: REFUSED ACCESS

SUMMARY: In a letter dated March 30, 2021, the City of Winnipeg (the city) provided its response to the ombudsman's report with recommendation under the Freedom of Information and Protection of Privacy Act advising that it did not accept the recommendation. As the city did not accept the recommendation, our office has decided to refer this matter to the information and privacy adjudicator.

COMPLIANCE WITH THE RECOMMENDATION

On March, 16, 2021, the ombudsman issued a report with a recommendation in this case following the investigation of a complaint against the City of Winnipeg (the city) about its decision to refuse access to the requested records under section 27 of the Freedom of Information and Protection of Privacy Act (FIPPA).

Specifically, our office made the following recommendation:

1. The ombudsman recommends that the public body release the records at issue without severing to the applicant, except for the personal information of a third party to which the city refused access under section 17.

On March 30, 2021, the city responded to the ombudsman, indicating that it did not accept the recommendation:

> *We have reviewed and considered the report in full; however, we do not agree with the counterarguments presented and cannot accept the recommendation to release the records at issue without severing to the applicant.*

CONCLUSION

As required by subsection 66(5) of the Freedom of Information and Protection of Privacy Act, the ombudsman is advising the complainant by this report that the city has refused to take action to implement the recommendation. On April 12, 2021, in accordance with subsections 66.1(1) and 66.1(2) the ombudsman referred the matter to the information and privacy adjudicator and notified the complainant and the public body of the request for review.

Jill Perron
Manitoba Ombudsman
April 13, 2021