

Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE: 2020-0645

WINNIPEG REGIONAL HEALTH AUTHORITY

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 18(1)(b), 18(3) and 18(4)(a)

REPORT ISSUED ON DECEMBER 16, 2020

SUMMARY: The complainant requested access to copies of unannounced personal care home standards inspection reports for a five-year period. The Winnipeg Regional Health Authority (the WRHA or the public body) refused access to some of the records under clause 18(1)(b) of the Freedom of Information and Protection of Privacy Act, on the basis that disclosure would harm the business interests of third parties. Our investigation found that the withheld information was not subject to this exception because it would not reveal commercial information supplied by a third party on a confidential basis and treated consistently as confidential by the third party.

We provided our analysis and conclusion to the WRHA to review and consider. Manitoba Health, Seniors and Active Living decided to publicly post personal care home standards inspection reports online by proactive disclosure, and the WRHA advised it was giving access to the seven reports at issue in this complaint on the basis that these reports will be publicly available within 90 days. As we found that the personal care home standards inspection reports were not subject to the exception in clause 18(1)(b), the complaint is supported. Given that the WRHA has released the remaining reports in full to the complainant as these reports will now all be made publicly available, no further action is required.

THE COMPLAINT

The Winnipeg Regional Health Authority (WRHA) received an access request under the Freedom of Information and Protection of Privacy Act (FIPPA) from the complainant on February 11, 2020, for the following records:

Please provide a copy of the report for every unannounced personal care home standards inspection completed from Jan. 1, 2015 to date of receipt.

In its response letter dated April 14, 2020, the WRHA indicated that access was being granted to some of the records requested but that access to a small number of reports was refused under clause 18(1)(b) of FIPPA to protect the business interests of third parties. On June 10, 2020, a complaint about the refusal of access was made to our office.

INVESTIGATION AND ANALYSIS

Our office investigated the decision by the WRHA to refuse access to seven unannounced personal care home standards reports. At issue in the investigation was whether the information in the records is subject to clause 18(1)(b) of FIPPA. Clause 18(1)(b) is a mandatory exception to disclosure, meaning that if it applies to information in records, the public body must refuse access to that information, unless one of the limits described in subsection 18(3) applies, or if disclosure can be shown to be in the public interest, for reasons specified in subsection 18(4).

At the outset of our investigation, we clarified the roles of the WRHA and Manitoba Health, Seniors and Active Living (HSAL) in relation to personal care homes. HSAL has, among other key responsibilities, regulatory responsibility for consultation, compliance and inspection of personal care homes in relation to the standards set out under the Personal Care Homes Standards Regulation. As the primary owner of the reports along with the third-party owners/operators, HSAL told the WRHA it consented to the release of the reports dependent on whether the specific personal care home owners/operators consented. The WRHA, which has operational responsibility for personal care homes in its region, considered the representations of the third parties and HSAL, subsequently granting full access to reports from thirty personal care homes and withheld access to seven reports relating to four personal care homes. The decision to refuse access to seven reports was based on the objections of the four owner/operators to disclosure of the reports.

In making the decision to refuse access to these reports, the WRHA advised our office that the withheld information was commercial information of the third-party personal care home operators or owners, which was supplied to the public body in confidence and was kept confidential by the third-party organization. The refusal of access was based on the following exception of FIPPA:

Disclosure harmful to a third party's business interests

18(1) *The head of a public body shall refuse to disclose to an applicant information that would reveal*

(b) commercial, financial, labour relations, scientific or technical information supplied to the public body by a third party, explicitly or implicitly, on a confidential basis and treated consistently as confidential information by the third party;

In order to refuse access under clause 18(1)(b) the withheld information must meet all of the following requirements:

- The information must reveal commercial, financial, labour relations, scientific or technical information;
- The information must have been supplied to the public body by the third party who would be affected by the disclosure;
- The information must have been supplied, explicitly or implicitly, on a confidential basis;
- The information must be treated consistently as confidential information by the third party.

For the purposes of our investigation, we obtained and reviewed the withheld records, and considered the representations of the public body and the third parties. Our consideration of the requirements of clause 18(1)(b), in relation to our review of the information in the withheld personal care home standards inspection reports (“the inspection reports”), is set out below.

1) Does the withheld information reveal commercial, financial, labour relations, scientific or technical information?

Our office reviewed the information contained in the withheld inspection reports to determine whether it reveals one of the types described in clause 18(1)(b). The public body had stated that the withheld information was commercial information.

In considering the meaning of “commercial”, our office referred to the FIPPA Resource Manual¹, which defines “commercial” information as follows:

¹ *The FIPPA Resource Manual*, Manitoba Finance, p. 5-87, online: https://www.gov.mb.ca/fippa/public_bodies/resource_manual/index.html *While the FIPPA Resource Manual is not binding on our office, we took note of it because it is a reference prepared by the government to assist public bodies in complying with FIPPA.

... information related to or connected with trade or commerce, with the buying, selling or exchange of merchandise or services. Examples include price lists, lists of suppliers and customers, market research surveys and other similar information relating to the commercial operation of a business. The term “commercial information” can apply to both profit-making enterprises and non-profit enterprises.

We also considered decisions and reports from other jurisdictions that referenced the term “commercial.” All appear to have adopted a similar definition. The Ontario Information and Privacy Commissioner, for example, defined “commercial” information as follows:

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.²

In our review of the inspection reports, we found that the reports appear to contain observations and conclusions made by Manitoba Health, Seniors and Active Living (HSAL) inspection teams relating to each personal care home’s compliance with the standards required under the Personal Care Home Standards Regulation (“the regulation”). Our review did not identify any information in the reports which meets the definition of commercial information as described above. Based on this, we were of the opinion that the withheld information would not be the third-party organization’s “commercial” information as contemplated by section 18 of FIPPA.

2) Was the information supplied to the public body by the third party who would be affected by the disclosure?

From our review of the inspection reports, we noted they contained HSAL inspector comments and observations about each standard at the time of inspection. Information included anonymous interviews with residents, documents, schedules, and review of requirements. The information we reviewed did not appear to have been *supplied* by the personal care home to the HSAL inspection team but rather the team, led by inspectors/consultants appointed by the minister of HSAL, gathered the information based on their inspection of the personal care homes as required under the Health Services Insurance Act. We confirmed with the public body that the inspection teams then wrote or generated the inspection report based on their findings and observations.

The FIPPA Resource Manual provides the following guidance with respect to the requirement under the exception that the information must have been supplied to the public body by the third party:

² Ontario Information and Privacy Commissioner, <https://decisions.ipc.on.ca/ipc>, Order P-493; Order P-1114

Information created or generated by the public body or provided by someone other than the third party would not fall within the exception to disclosure in clause 18(1)(b). (emphasis added)³

Based on the foregoing, our office was not satisfied that the information in question was specifically supplied to the public body by the third-party owners or operators.

3) Was the information supplied, explicitly or implicitly, on a confidential basis?

The third consideration is whether the information in the inspection reports was supplied in confidence. The response from the public body stated that the information was supplied both explicitly and implicitly in confidence by the personal care homes to the public body, but no additional details were provided to demonstrate how this expectation of confidentiality was communicated by the third parties. We did, as invited by the public body, review the submissions of the third-party organizations who provided comments to the WRHA in response to notification of possible release of the records. While all described that the information in the reports was provided in confidence there was no specific mention of how that understanding was communicated, explicitly or implicitly.

Examples of explicit expectations of confidentiality include written agreements, confidential markings on documents, statements made in policy, guidelines or prescribed in regulation or legislation. The inspection reports we reviewed were not marked as being confidential, and the report format lists the required regulated standards and the inspection team's assessment of compliance with each standard. The requirement for confidentiality of this type of information was not evident.

We observed that the overwhelming majority of personal care homes, notified by the WRHA about possible release of the inspection reports, did not object to the release of the reports, suggesting that for many third-party owner or operators there was no specific concern regarding confidentiality of the information contained in the reports. While some of the third-party organizations objected to the information being disclosed in response to the FIPPA request, this does not establish that the information was provided in confidence at the time it was compiled by the inspection team.

Our review did not find evidence that the information in question was provided implicitly or explicitly on a confidential basis by the third-party organizations.

³ FIPPA Resource Manual

4) Was the information treated consistently as confidential information by the third-party organization?

Our office considered whether there was evidence to establish that the withheld information would reveal information that has been kept strictly confidential by the third party. There is limited information to demonstrate that this requirement has been met. We note that this branch of the provision requires that the *information*, rather than the record, has been kept strictly confidential. We considered the required standards under the Personal Care Home Standards Regulation. The public body has stated that the reports contain observations and conclusions of the expert (the appointed inspectors) based largely on physical inspection of the personal care home site and random interviews with unnamed residents.

There is no evidence in the representations of the public body or in the comments of the third parties which were provided to us for review as to how strict confidentiality of the information observed by the inspection team is maintained by the personal care homes.

5) Do any of the limits to the application of clause 18(1)(b) set out in subsections 18(3) or 18(4) apply?

Where one of the limits described in subsection 18(3) applies, access cannot be refused on the basis on clause 18(1)(b). Also, if disclosure can be shown to be in the public interest for reasons specified in subsection 18(4), a public body is not required by clause 18(1)(b) to refuse access.

Subsection 18(3) sets out the following limits:

Exceptions

18(3) *Subsections (1) and (2) do not apply if*

(a) the third party consents to the disclosure;

(b) the information is publicly available;

(c) an enactment of Manitoba or Canada expressly authorizes or requires the disclosure; or

(d) the information discloses the final results of a product or environmental test conducted by or for the public body, unless the test was done for a fee paid by the third party.

We considered the above-noted limits. Clause 18(3)(a) states that if a third party consents to the disclosure of the requested information, a public body cannot refuse access to the records in question under clause 18(1)(b). As discussed previously in this report, the WRHA sought representations from all of the personal care homes about which standards inspection reports were completed in the time period requested. The public body granted access in full to all of the reports from those personal care homes that consented to the disclosure. The WRHA denied access to seven reports on the basis of those personal care homes that did not consent to

disclosure and, therefore, clause 18(3)(a) does not apply to these records. None of the remaining exceptions under subsection 18(3) are relevant in this case.

We also considered the applicability of subsection 18(4) of FIPPA, which describes the circumstances in which the private interest of a third party may be outweighed by the public interest in disclosure of the information. If one of the circumstances applies, a public body may disclose the information, even if the information is subject to a mandatory exception in section 18, including clause 18(1)(b).

Subsection 18(4) sets out the following circumstances:

Disclosure in the public interest

18(4) Subject to section 33 and the other exceptions in this Act, a head of a public body may disclose a record that contains information described in subsection (1) or (2) if, in the opinion of the head, the private interest of the third party in non-disclosure is clearly outweighed by the public interest in disclosure for the purposes of

- (a) public health or safety or protection of the environment;*
- (b) improved competition; or*
- (c) government regulation of undesirable trade practices.*

The complainant provided representations to our office with respect to clause 18(4)(a) and advised that it is in the public interest for the WRHA to release the unannounced inspection reports and that the safety and security of personal care home residents is a paramount concern for the public. The complainant stated that significant public funds are expended for the care of the elderly, the personal care home inspections are conducted by the government public service and that it is a disservice to the public and families that a minority of personal care homes opt out of disclosure of the inspection reports, while the majority of personal care homes agree.

We considered the complainant's representations and found them to be compelling. In our view, clause 18(4)(a) is a relevant consideration for the release of personal care home standards inspection reports that may override the requirement to refuse access under clause 18(1)(b), if it were found that clause 18(1)(b) applied to the reports.

CONCLUSION

Our investigation considered whether the information in the personal care home standards inspection reports that were withheld under clause 18(1)(b) of FIPPA would reveal commercial information that was supplied to the public body by a third party, explicitly or implicitly, on a confidential basis and treated consistently as confidential information by the third party. Based on our investigation, our office concluded that the withheld information was not commercial information as contemplated under this exception in FIPPA. We also concluded that the evidence did not establish that the information was supplied in confidence to the public body or that the

information had been treated consistently as confidential. Based on our investigation, we found that clause 18(1)(b) of FIPPA did not apply to the withheld records.

We provided our analysis and conclusions to the Winnipeg Regional Health Authority to review and consider. We advised the WRHA, that if it remained of the view that the information was subject to clause 18(1)(b), it would need to provide information to our office that clearly supported this decision. Our office also asked the public body to explain its considerations regarding the applicability of clause 18(4)(a) of FIPPA in this case and whether in the opinion of the head of the public body, the private interest(s) of the third parties in non-disclosure is clearly outweighed by the public interest in disclosure for the purposes of public health or safety.

As noted previously, HSAL has a regulatory responsibility for conducting inspections of personal care homes. It also has the ability to determine whether to make information available to the public proactively. Proactive disclosure fosters an environment where information is released routinely with the exception of information that the government is required to protect. The intent of proactive disclosure is to release information that is frequently requested and thereby reducing the reliance on making FIPPA requests for obtaining access to information. Each department determines what type information to release proactively by evaluating what information is frequently requested and if there is value in its release.

The WRHA notified our office of the decision by HSAL to publicly release all personal care home inspection reports by posting them online through proactive disclosure. We were informed that this site, <http://www.manitoba.ca/openmb/infomb/departments/pch/index.html> was activated on December 4, 2020. The reports posted online did not include the seven reports at issue in this complaint.

Subsequently, our office was advised by the WRHA that it would revise its access decision relating to the seven withheld personal care home standards inspection reports. On December 11, 2020, the WRHA issued a revised access decision to the complainant, giving access to the remaining withheld inspection reports coming under the request. The WRHA advised that it was now giving access to these seven reports on the basis that these reports will be publicly available within 90 days.

As we found that the personal care home standards inspection reports were not subject to the exception in clause 18(1)(b), the complaint is supported. Given that the WRHA has released the remaining reports in full to the complainant as these reports will now all be made publicly available, no further action is required.

December 16, 2020
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