

Manitoba mbudsman

REPORT WITH RECOMMENDATION ISSUED ON FEBRUARY 1, 2012

AND

RESPONSE TO THE RECOMMENDATION ISSUED ON APRIL 11, 2012

UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASES 2008-0001 and 2008-0481

MANITOBA HEALTH

ACCESS COMPLAINTS: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 18(1)(c)(i), 23(1)(a) and (b) and 28(1)(c)(iii)

PUBLICLY RELEASED ON APRIL 26, 2012

SUMMARY OF REPORT WITH RECOMMENDATION AND RESPONSE

The complainants requested access to *The Report of the Manitoba Chiropractic Health Care Commission*. Complaints were made to the Ombudsman after Manitoba Health refused access to the entire report. The Ombudsman found that the exceptions did not apply to all of the information in the report and he recommended that portions of the report be released to the complainants.

Manitoba Health initially accepted the recommendation in part. After further communication with our office, Manitoba Health subsequently agreed to the release of all of the information to which the recommendation was applicable.

Manitoba Ombudsman

REPORT WITH RECOMMENDATION UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASES 2008-0001 and 2008-0481

MANITOBA HEALTH

ACCESS COMPLAINTS: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 18(1)(c)(i), 23(1)(a) and (b) and 28(1)(c)(iii)

REPORT WITH RECOMMENDATION ISSUED ON February 1, 2012

SUMMARY: The complainants requested access to *The Report of the Manitoba Chiropractic Health Care Commission*. Access to this record was refused on the basis that disclosure would be harmful to a third party's business interests, that disclosure could reveal advice to a public body and that disclosure could harm the economic or financial interests or negotiating position of a public body. During our investigation, the public body agreed to release a severed copy of the report. The Ombudsman found that the exceptions did not apply to all of the remaining withheld information in the report. The Ombudsman recommended release of portions of the information contained in the record.

THE COMPLAINTS

The complainants requested the following information under *The Freedom of Information and Protection of Privacy Act* (FIPPA) on November 29, 2007 and August 12, 2008:

The Report of the Manitoba Health Care Chiropractic Commission - 2004.

Manitoba Health sent the complainants response letters dated December 19, 2007 and September 11, 2008 advising that access was refused under the following exceptions to disclosure:

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.

On January 2, 2008 and October 3, 2008, the complainants filed complaints with the Ombudsman's office regarding Manitoba Health's decision to refuse access.

POSITION OF MANITOBA HEALTH

Manitoba Health's initial position was that the content of the report was used for discussion purposes and that it was not compiled into a final document for dissemination purposes. Disclosure of the report, either in whole or in part, would have negative and unintended impacts on the decision making processes related to chiropractic health care service delivery in Manitoba and the department's relations with the Manitoba Chiropractic Association. Clauses 23(1)(a) and (b) were applied to the opinions, consultations and deliberations.

Additionally, Manitoba Health later advised the complainants that its decision to refuse access was also based on exceptions to disclosure contained in clauses 18(1)(c)(ii) and 28(1)(c)(iii):

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*

(c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to

(i) harm the competitive position of a third party.

Disclosure harmful to economic and other interests of a public body

28(1) *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to harm the economic or financial interests or negotiating position of a public body or the Government of Manitoba, including the following information*

(c) information the disclosure of which could reasonably be expected to

(iii) interfere with or prejudice contractual or other negotiations of,

a public body or the Government of Manitoba.

Relative to the application of clauses 18(1)(c)(i) and 28(1)(c)(iii) regarding harm, Manitoba Health stated that disclosure would result in discord, disruption and damage between itself and the Manitoba Chiropractic Association as well as have a deleterious effect on their negotiation processes and relationship.

ANALYSIS OF ISSUES AND FINDINGS

Do the exceptions to disclosure provided by clauses 18(1)(c)(i), 23(1)(a) and (b) and 28(1)(c)(iii) apply to the withheld information?

The term information, rather than the term record, is used in clauses 18(1), 23(1) and 28(1) to indicate that the exception applies to the information in a record and not necessarily to the whole record. Subsection 7(2) of FIPPA requires that where an exception applies to a portion of the information in a record only that portion is severed and the applicant is entitled to access to the remainder of the record unless an exception in another section of FIPPA applies.

On several occasions our office requested that Manitoba Health review the record on a line by line basis and identify the information that was subject to the cited exceptions. On each occasion, Manitoba Health responded by saying that it continued to be its view that no part of the record should be disclosed on the basis the record falls within the exceptions to disclosure listed in clauses 18(1), 23(1) and 28(1) of FIPPA.

During the course of carrying out a detailed review of the record, our office ascertained that there was information contained in the record to which the cited exceptions to disclosure definitely applied. However, we advised the department there was a considerable body of information that did not fall within the purview of these exceptions.

Ultimately, the public body did provide the complainants with a severed copy of the draft report together with a concordance of the severed portions indicating what it believed to be the applicable exceptions to disclosure under FIPPA. The public body, however, did not rely on exceptions 23(1)(b) and/or 28(1)(c)(iii).

Subsection 18(1) of FIPPA sets out mandatory exceptions to disclosure and in those instances where the information in question is subject to these exceptions, then a public body is statutorily prohibited from disclosing the information. The exception contained in clause 18(1)(c)(i) involves a reasonable expectation of harm test. The focus of the exception is not the source of the information, but rather, whether or not the specified harm or damage might reasonably be expected to result from disclosure. The term 'harm' suggests that the third party's competitive position would be damaged as a result of the disclosure of the information.

The discretionary exceptions set out in section 23 of FIPPA ensure the protection of full and frank discussions taking place among officers, employees and others who may be advising a public body and preserves the confidential relationship between a public body and its advisors. The exception in clause 23(1)(a) is intended to maintain and encourage candour in the giving of advice and recommendations in order to assist the public body in making decisions about courses of action to follow or approaches to take. It is a class exception in that it protects a certain type or kind of information from being disclosed.

In particular, clause 23(1)(a) 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. Pursuant to the exceptions in section 23, a public body has the discretion to give access to information requested by the complainant. Accordingly, a public body must provide reasons for its decision to refuse access that demonstrate it exercised its discretion in a reasonable fashion.

In reviewing the severed version of the record, we concluded that there was information contained in the record to which clause 23(1)(a) did apply. Specifically, we were in agreement with the public body that the exception applied to the severed information on the following pages: pages ii and iii except headings 4 and 5; Introduction page 2 (analysis and opinion), page 7 (analysis), page 9 (advice and analysis), page 10 in part (advice and analysis); Chapter 2 - page 18 (analysis and opinion), page 19 (analysis and opinion), page 22 last sentence in second paragraph (analysis and opinion), 30 (advice and analysis), page 33 (advice and analysis), page 34 (advice and analysis), page 36 (advice and analysis); Chapter 3 - pages 43 to 72 (advice, opinion, analysis); chapter 4 - pages 73 to 94 (opinion, analysis); chapter 5 - pages 95 to 102 (analysis); and chapter 6 - pages 103 to 109 (recommendations). Page 110 was a blank page.

However, there was a body of information that did not fall within the scope of the exceptions set out in clauses 18(1)(c)(i) and 23(1)(a):

- Title page - the public body severed the names of the three commission members citing clause 18(1)(c)(i) as its authority. Firstly, it should be noted that the names of the commission members do not reveal commercial, financial, labour relations, scientific or technical information. Secondly, the Manitoba Government issued a news release on December 19, 2002 wherein the Health Minister, at the time, announced the names of the members appointed to the Chiropractic Health Care Commission. The Commission was delegated the task of reviewing the cost effectiveness, accessibility and integration of chiropractic services in Manitoba. "The three commission members will provide a comprehensive look at chiropractic services in the province and I know their recommendations will assist government in improving health services to Manitobans." Thirdly, the public body did not sever the names of the commission members, who were listed on page 1 of the severed report provided to the complainants.
- Table of Contents page i - the public body severed the reference to Chiropractic method pursuant to clause 23(1)(a). The withheld information does not reveal advice, opinions, proposals, recommendations, analyses or policy options and should be released.
- Table of Contents pages ii and iii - the public body severed all section headings pursuant to clause 23(1)(a), stating they constituted policy options. Section headings 4 and 5 should be released as this information had been made public by the Minister of Health in a December 19, 2002 news release.

- Acknowledgements pages v and vi - names and titles of two individuals severed pursuant to clause 18(1)(c)(i). This information should be released as an individual's name does not reveal commercial information as suggested. In addition, the individuals are public body officials whose contributions to the report arose out of and in the course of their employment.
- Chapter 2 page 22 - with the exception of the last sentence in the second paragraph on page 22 the severed information pursuant to clause 23(1)(a) should be released as it is merely background to the information on page 23, which was released to the complainants.
- References (bibliography) pages 111 to and including 119 - all 154 citations of books, articles, reports, commentaries, studies, guidelines, scientific briefs, reviews, surveys and journals were severed pursuant to clause 23(1)(a) stating the information amounted to opinion and analysis exhibiting selection bias. Several of these references were disclosed in the severed version of the report that was provided to the complainant. The public body did not describe or indicate precisely which of the 154 references were either pro or con in establishing an analysis/opinion of selection bias and therefore should be released.

Accordingly, the Ombudsman found that clauses 18(1)(c)(i) and 23(1)(a) do not apply to all of the information contained in the requested record.

RECOMMENDATION

Based on this finding, the Ombudsman is recommending:

That Manitoba Health release to the applicants the information outlined above which is not subject to the cited exceptions.

HEAD'S RESPONSE TO THE RECOMMENDATION

Under subsection 66(4), Manitoba Health must respond to the Ombudsman's report in writing within 15 days of receiving this report. As this report is being sent by courier to the head of the public body on this date and the head of the public body shall respond by February 16, 2012. The head of the public body'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 COMPLAINANTS OF THE HEAD'S RESPONSE

After the Ombudsman has received Manitoba Health's response to his recommendation, he will then notify the complainants about the head's response as required under subsection 66(5).

HEAD'S COMPLIANCE WITH RECOMMENDATION

If the head accepts the recommendation, clause 66(6)(a) 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 together with information demonstrating that the public body has complied with the recommendation and did so within the specified time period.

Alternatively, if the head believes that an additional period of time is required to comply with the recommendation, then the head's response to the Ombudsman under subsection 66(4) must include a request that the Ombudsman consider an additional period of time for its compliance with the recommendation. A request for additional time must include the number of days being requested and the reasons why the additional time is needed.

Mel Holley
A/Manitoba Ombudsman
February 1, 2012

Manitoba Ombudsman

RESPONSE TO THE RECOMMENDATION UNDER

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CASES 2008-0001 and 2008-0481

MANITOBA HEALTH

ACCESS COMPLAINTS: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 18(1)(c)(i), 23(1)(a) and (b) and 28(1)(c)(iii)

RESPONSE ISSUED ON APRIL 11, 2012

SUMMARY: On February 15 and 29 and March 27, 2012, the public body responded to the Ombudsman. At the outset, Manitoba Health accepted the recommendation in part. It subsequently agreed to the release of all of the information to which the recommendation was applicable.

RESPONSE TO THE RECOMMENDATION

Under subsection 66(4) of *The Freedom of Information and Protection of Privacy Act* (FIPPA), Manitoba Health was required to respond to the Ombudsman's report in writing within 15 days of receiving the report. As the report was sent by courier on February 1, 2012, the head had until February 16, 2012 to respond. The head's response was to 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.*

Manitoba Health provided its response to the Ombudsman on February 15, February 29 and March 27, 2012, to the following recommendation:

The Ombudsman recommended that Manitoba Health release to the complainants the information which was not subject to the cited exceptions.

On February 15, 2012, Manitoba Health requested an extension of time for responding until February 29, 2012. The Ombudsman agreed. By letter dated February 29, 2012, the public body advised that it was only prepared to accept the recommendation in part. Manitoba Health indicated that it did not agree to the release of some of the withheld information as was

recommended and provided reasons to explain the public body's view.

The Ombudsman wrote to the public body on March 5, 2012 to provide information addressing issues raised by the public body. We restated our view that the contested information is releasable under FIPPA.

Subsequently on March 27, 2012, Manitoba Health informed the Ombudsman of the following:

In light of the issues raised in your March 5, 2012 letter and our further consultations, Manitoba Health is prepared to release the additional information.

Subsection 66(6) required the head to comply with the recommendation within 15 days of acceptance. Complete copies of all of the releasable parts of the record were forwarded to the complainants.

April 11, 2012

Mel Holley
A/Manitoba Ombudsman