

# Manitoba Ombudsman

**REPORT WITH RECOMMENDATION ISSUED ON JULY 26, 2011**

**AND**

**RESPONSE TO THE RECOMMENDATION ISSUED ON SEPTEMBER 13, 2011**

**UNDER**

***THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT***

**CASE 2011-0025**

**CROWN CORPORATIONS COUNCIL**

**ACCESS COMPLAINT: CONTESTS DECISION THAT FIPPA DOES NOT APPLY TO  
THE RECORD(S)**

**PROVISION CONSIDERED: 4(b)**

**PUBLICLY RELEASED ON SEPTEMBER 26, 2011**

## **SUMMARY OF REPORT WITH RECOMMENDATION AND RESPONSE**

The complainant applied for access to records in the custody or under the control of the Crown Corporations Council (CCC) related to his inquiries and issues and made a complaint when the CCC advised that the records requested were excluded from the scope of *The Freedom of Information and Protection of Privacy Act* (FIPPA) pursuant to clause 4(b). Our investigation determined that clause 4(b) did not apply and that the records requested were subject to FIPPA. The investigation report contained one recommendation made to the public body.

The public body responded to the Ombudsman's investigation report in accordance with the requirements of FIPPA and accepted the recommendation made. The public body demonstrated that it had complied with the recommendation within the time specified in FIPPA.

# Manitoba Ombudsman

## REPORT WITH RECOMMENDATIONS UNDER

### *THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*

CASE 2011-0025

CROWN CORPORATIONS COUNCIL

**ACCESS COMPLAINT: CONTESTS DECISION THAT FIPPA DOES NOT APPLY TO THE RECORD(S)**

**PROVISIONS CONSIDERED: 4(b)**

**REPORT ISSUED ON JULY 26, 2011**

**SUMMARY:** The complainant requested access to records relating to his inquiries and issues in the custody or under the control of the Crown Corporations Council (CCC). The CCC advised the complainant that the records requested were excluded from the scope of *The Freedom of Information and Protection of Privacy Act* (FIPPA) as they are the type of records specified in clause 4(b) of the Act. The Ombudsman found that clause 4(b) did not apply and that the records requested were subject to FIPPA. The Ombudsman recommended that the CCC review the complainant's request for access under FIPPA and provide the complainant with a decision on access.

## THE COMPLAINT

The complainant requested access to the following records under *The Freedom of Information and Protection of Privacy Act* (FIPPA) on November 9, 2010:

- (1) *All documents obtained from [name of crown corporation] in regards to my enquiries since and including the year 2001*
- (2) *All documents showing that [name of crown corporation] was still in the process of changing the interpretation and enacting policy regarding "would have held employment", at the time of [name of individual] appearance on CBC Manitoba*
- (3) *All notes taken by CCC in regards to all my enquiries and issues*

The Crown Corporations Council (CCC) sent the complainant a response letter dated November 30, 2010 wherein it advised the complainant that access to the requested records was refused as the information in the records was excluded under clause 4(b) of FIPPA which provides that FIPPA does not apply to "a note made by or for, or a communication or draft decision of, a

person who is acting in a judicial or quasi-judicial capacity". A complaint about this decision was received by our office on January 17, 2011.

## **POSITION OF CROWN CORPORATIONS COUNCIL**

The position of the CCC is that FIPPA does not apply to "the three different types of records requested" by the complainant and to "the work of the council".

The CCC advised that it acts in a quasi-judicial capacity when it receives and hears submissions under clause 6(1)(d) of *The Crown Corporations Public Review and Accountability Act (the CCPRA Act)*. In this regard, clause 6(1)(d) of the CCPRA Act provides as follows:

### ***Duties of council***

*6(1) The council shall*

*(d) receive and hear submissions from any person who, in the opinion of the council, has knowledge respecting any aspect of a corporation's activities regarding alleged failures by the corporation to comply with any Act or any policy of the council.*

The CCC further advised that it had reviewed the definition of "judicial or quasi-judicial" contained in the online FIPPA Resource Manual for Public Bodies, published by the department of Culture, Heritage and Tourism, and is of the view that the definition applies to it when receiving and hearing submissions under clause 6(1)(d) of the CCPRA Act. The CCC noted that, although it does not have a formal hearing process, it met with the complainant after being apprised of his concerns in order to provide him with an opportunity to be "heard". The CCC further noted that it also met with a representative of the crown corporation involved in order to further investigate the facts and "hear" all parties before coming to its decision. In this way, the CCC felt it had ensured a fair process in performing its function under 6(1)(d).

The CCC went on to advise that clause 8(2)(a) of the CCPRA Act gives further support to its position that it acts in a quasi-judicial capacity when receiving and hearing submissions under clause 6(1)(d). Clause 8(2)(a) of the CCPRA Act provides as follows:

### ***Information in certain cases***

*8(2) The report required pursuant to subsection (1) shall include*

*(a) with respect to matters reviewed under clause 6(1)(d)*

*(i) a full description of each submission made,*

*(ii) a full report of investigations made by the council respecting the matter, and*

*(iii) the decision of the council and the reasons for that decision; and ...*

The CCC maintains that clause 8(2)(a) gives meaning to its responsibilities and powers as it ensures that "not only are submissions to be received, but they are to be investigated, a decision made, supported by reasons, and the thrust of all that is to be contained within a report which is available to any person on request" under subsection 8(3) of the CCPRA Act. The CCC also maintains that its decisions under clause 6(1)(d) can affect the rights and obligations of persons as a result of the powers given to council under subsection 6(2) of the CCPRA Act.

In terms of the three types of records requested by the complainant, the CCC maintains that all three types fall outside the scope of the Act pursuant to clause 4(b). In this regard, the CCC advised that it considered all of the records to be either "notes made by or for" or "a communication or draft decision of" a person acting in a quasi-judicial capacity as all of the records were either obtained or generated:

- in the course of the CCC's duty to "receive and hear submissions from any person" pursuant to clause 6(1)(d) of the CCPRA Act; or
- in the course of following-up on or providing further clarification regarding a submission made under 6(1)(d).

The CCC maintains that all three types of records requested by the complainant relate to the exercise of its quasi-judicial function under clause 6(1)(d) and that all of the records fall outside the scope of FIPPA as a result.

## **ANALYSIS OF ISSUES AND FINDINGS**

### **1. Does FIPPA apply to the records?**

FIPPA applies to all records in the custody or control of a public body except those records described in section 4. In particular, clause 4(b) states:

***Records to which this Act applies***

***4 This Act applies to all records in the custody or under the control of a public body but does not apply to***

***(b) a note made by or for, or a communication or draft decision of, a person who is acting in a judicial or quasi-judicial capacity;***

During the course of our investigation we met with the CCC to review the records responsive to the request for access. We also received additional representations from the CCC with respect to:

- the nature of its duties under clause 6(1)(d) of the CCPRA Act; and
- its position that the records requested by the complainant fell outside the scope of FIPPA pursuant to clause 4(b) of the Act.

In its representations to our office the CCC noted that the Glossary contained in the online FIPPA Resource Manual for Public Bodies defines "judicial or quasi-judicial" as follows:

*A person is acting in a judicial or quasi-judicial capacity if he or she is carrying out a function that is judicial, or partly administrative and partly judicial, and he or she is required to:*

- *investigate facts, hear all the parties to a matter at issue and weigh evidence or draw conclusions as a basis for his or her action;*
- *exercise discretion of a judicial nature; and*
- *make a decision after considering the issues, rather than simply making a recommendation.*

*A person acting in a judicial or quasi-judicial capacity is generally under a duty to act in accordance with the rules of natural justice.*

The CCC was of the opinion that this definition applies to it when it performs its duty under clause 6(1)(d) of the CCPRA Act. We considered the CCC's position that it acts in a "quasi-judicial capacity" when performing its duty under clause 6(1)(d) of the CCPRA Act and, based upon our review, we do not agree.

In reviewing the definition contained in the Glossary of the online FIPPA Resource Manual we also noted that Part 2 of the Manual, which addresses the "Scope of FIPPA", sets out four factors that are often used to determine whether a person or body is acting in a "judicial or quasi-judicial capacity". The factors listed were first set out by the Supreme Court of Canada in the *Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 S.C.R. 495. In delivering the judgment of the Court, Dickson, J. stated at page 504:

*It is possible, I think, to formulate several criteria for determining whether a decision or order is one required by law to be made on a judicial or quasi-judicial basis. The list is not intended to be exhaustive.*

*(1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?*

*(2) Does the decision or order directly or indirectly affect the rights and obligations of persons?*

*(3) Is the adversary process involved?*

*(4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?*

*These are all factors to be weighed and evaluated, no one or which is necessarily determinative.*

We considered each of the four criteria set out by the Supreme Court in relation to the duty of the CCC under clause 6(1)(d) of the CCPRA Act and concluded as follows:

1. With respect to the first criteria, although clause 6(1)(d) requires the CCC to "receive" and "hear" submissions from any person there is nothing in the wording of the statute that indicates that the CCC is to hold a "hearing". Rather, we are of the view that clause 6(1)(d) requires the CCC to "accept" or "entertain" and to "listen to" or "be made aware" of submissions from any person alleging that a crown corporation under its purview has failed to comply with any Act or any policy of the council. The CCC is charged with investigating alleged failures of crown corporations and is required to report its decision or "conclusion" with respect to the allegations, together with its reasons or "basis" for same, to the Minister. The CCC cannot be said to conduct "hearings" simply because, in the course of carrying out its investigatory or fact-finding role, it ensures that it takes the time necessary to hear from both sides in order to be perceived as thorough and "fair". There is nothing in the legislation that requires the CCC to *hear all the parties to a matter at issue*.
2. With respect to the second criteria, a decision by the CCC under 6(1)(d) of the CCPRA Act does not determine or dispose of anyone's rights. The CCC simply makes a decision or comes to a conclusion as to whether a crown corporation has failed to comply with any Act or any policy of council. The CCC's process under clause 6(1)(d) ends with the issuance of a report under clause 8(2)(a) of the CCPRA Act. The CCC does not make any orders or recommendations and has no power to impose sanctions or to award remedies. It is difficult to see how the CCC's decision under 6(1)(d) or its report under 8(2)(a) could either directly or indirectly affect the rights and obligations of persons. The purpose of the report is to inform and assist the Minister in determining whether to make a further request under 6(2) of the CCPRA Act. In this regard the CCC's decision or conclusion, while influential, is not binding on the Minister and is but one in a series of steps that could lead to a further request by the Minister and to further review.
3. With respect to the third criteria, the CCC is not called upon to resolve disputes between parties under clause 6(1)(d) of the CCPRA Act. While the person making a submission to the CCC will no doubt have a different point of view than the corporation that is alleged to have failed to comply with any Act or any policy of the council, the two are not involved in an adversarial process.
4. Finally, with respect to the fourth criteria, the legislation does not appear to set out any substantive rules to be followed in individual cases or at all and, based upon representations made, the CCC does not appear to have established any policy in this regard.

Based upon the foregoing, we are unable to conclude that the CCC acts in a quasi-judicial capacity when performing its duties under the CCPRA Act and, in particular, under clause 6(1)(d).

In any event, in the circumstances of this complaint, based upon our review of the records and the representations made, it is clear that the CCC did not "receive and hear submissions" from the complainant under clause 6(1)(d) of the CCPRA Act as it did not treat the issues raised by the

complainant in April of 2001 as a "formal complaint" under clause 6(1)(d). In this regard, we note that on page two of its May 2, 2001 correspondence to the complainant, the CCC stated:

*During the course of our discussion, it seemed your concerns did not reflect an alleged failure of [name of crown corporation] to comply with its Act but centered on issues related to the[name] decision. In this regard, we acknowledged that section [number] of the [name of Act] remains unchanged since becoming law in 1994 and unchanged since the [name] decision. Accordingly, I advised that your concerns did not support "alleged failures..." under Section 6(1)(d) of Council's Act ...*

On page three of the same correspondence the CCC further stated:

*There is no evidence of an alleged failure that could be considered under section 6(1)(d) of Council's Act.*

Although the CCC appears to have conducted a preliminary investigation of the serious concerns raised by the complainant, it did not receive and hear a submission pursuant to clause 6(1)(d) of the CCPRA Act. This is further confirmed by the fact that there was no quarterly report prepared regarding a 6(1)(d) review of the complainant's concerns as required ("the council shall" and "the report ... shall") by subsections 8(1) and (2) of the CCPRA Act. Even if the view of the CCC that it acts in a quasi-judicial capacity under clause 6(1)(d) were accurate, in this instance, it could not have acted in a "quasi-judicial capacity" with respect to the records at issue as it did not "hear" or consider the complainant's concerns under clause 6(1)(d) of the CCPRA Act.

Based upon our review of this matter, the Ombudsman found that FIPPA applies to the records responsive to the complainant's request for access.

### **RECOMMENDATION:**

Based on the finding, the Ombudsman is recommending that:

1. the Crown Corporations Council process the complainant's request for access under FIPPA and provide an access decision to the complainant in compliance with the requirements of subsection 12(1) of the Act.

### **HEAD'S RESPONSE TO THE RECOMMENDATION**

Under subsection 66(4), the Crown Corporations Council 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 on this date, the head shall respond by August 10, 2011. 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 Crown Corporations Council'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.

Alternatively, if the head believes that an additional period of time is required to comply with the recommendation, 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 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.

July 26, 2011  
Irene A. Hamilton  
Manitoba Ombudsman

# Manitoba Ombudsman

## RESPONSE TO THE RECOMMENDATION UNDER

### *THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*

CASE 2011-0025

#### CROWN CORPORATIONS COUNCIL

#### ACCESS COMPLAINT: CONTESTS DECISION THAT FIPPA DOES NOT APPLY TO THE RECORD(S)

PROVISION CONSIDERED: 4(b)

RESPONSE ISSUED ON SEPTEMBER 13, 2011

**SUMMARY:** On August 10, 2011 the public body responded to the Ombudsman, accepting the recommendation made. On August 25, 2011 the public body complied with the recommendation and provided the complainant with a decision concerning his request for access in accordance with subsection 12(1) of FIPPA.

#### RESPONSE TO THE RECOMMENDATION

Under subsection 66(4) of *The Freedom of Information and Protection of Privacy Act* (FIPPA or the Act), the Crown Corporations Council 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 July 26, 2011 the head had until August 10, 2011 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.*

The Crown Corporations Council provided its response to the Ombudsman on August 10, 2011 and accepted the recommendation as follows:

1. **The Ombudsman recommended that the Crown Corporations Council process the complainant's request for access under FIPPA and provide an access decision to the complainant in compliance with the requirements of subsection 12(1) of the Act.**

*Please be advised that the Crown Corporations Council accepts your recommendation that Council process the complainant's request for access under FIPPA and provide an access decision to the complainant in compliance with the requirements of subsection 12(1) of the Act ... Council will begin immediately to process the complainant's request in accordance with the provisions of Part 2 of FIPPA, and intends to provide its access decision to the complainant in writing within 15 days from the date of this acceptance letter (i.e. by August 25, 2011).*

Our office notified the complainant about the head's response to the recommendation as required under subsection 66(5) by correspondence dated August 11, 2011.

Subsection 66(6) required the head to comply with the recommendation within 15 days of acceptance. On August 25, 2011 the public body complied with the recommendation, providing the complainant with an access decision in compliance with the requirements of subsection 12(1) of the Act. The public body transferred parts 1 and 2 of the complainant's request to another public body and provided full access to the information requested in part 3. Our office received a copy of this correspondence on August 30, 2011.

September 13, 2011

Irene A. Hamilton  
Manitoba Ombudsman