

Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2011-0520

TOWN OF NEEPAWA

ACCESS COMPLAINT: DECISION TO DISREGARD REQUESTS

PROVISIONS CONSIDERED: 13(1)(a) and (b)

REPORT ISSUED ON APRIL 20, 2012

SUMMARY: The applicant submitted 161 access applications to the Town of Neepawa on one day. The Town relied on clauses 13(1)(a) and (b) under *The Freedom of Information and Protection of Privacy Act* to disregard these requests. The Ombudsman determined that 22 of the applications were repetitious and all 161 were systematic in nature. The Ombudsman also determined that responding to these 161 applications would interfere unreasonably with the operations of the public body. The Ombudsman found that the Town's decision to disregard the requests was authorized under clause 13(1)(b) of the Act.

THE COMPLAINT

On September 7, 2011, the applicant sent the Town of Neepawa 161 separate applications for access to information.

In its response letter dated November 1, 2011, the Town relied on subsection 13(1) under FIPPA to disregard the requests.

A complaint about the Town's decision was received by our office on November 8, 2011.

POSITION OF THE TOWN OF NEEPAWA

The Town determined that the 161 access applications received on September 7, 2011 were repetitious in nature. In notifying the applicant of its decision on November 1, 2011 to disregard these access requests under subsection 13(1) of FIPPA, the Town did not provide the specific provision of section 13, but reminded the applicant that it had previously provided him with fee estimates to process similar requests. The Town advised our office that the applicant had not responded to the fee estimates and he abandoned the previous requests.

As subsection 13(1) of FIPPA has three clauses that set out different circumstances on which a public body may disregard requests, we asked the Town to inform the applicant of the basis for its decision. The Town sent the applicant a revised response on December 2, 2011, informing him that it was relying on clauses 13(1)(a) and (b) of FIPPA to disregard the 161 requests.

During our investigation, the Town provided information about its decision to disregard these requests. The Town advised that the submission of 161 applications was the third group in a series of similar applications made by the applicant. The Town provided us with information concerning the previous applications and the outcome of those applications, as this was relevant to its decision to disregard the 161 applications.

The applicant sent a total of 226 applications to the Town between July 22 and September 7, 2011. The first group of three applications was received on July 22, the second group of 62 applications was received on August 30 and the 161 applications were received on September 7.

JULY 22, 2011 REQUESTS

The Town provided three separate responses to the applicant regarding the three applications it received on July 22, 2011.

Concerning one request, the Town refused access to the records on the basis that they did not exist. The second access request was for copies of all telephone records and all email transmissions which pertained to a specific Town employee. In its response, the Town advised the applicant that it had determined that fees were payable in order to process the request because search and preparation of the records would exceed the two free hours provided under FIPPA. The Town determined that it would take an additional 8 hours of search and preparation time at the rate of \$15.00 for each half hour, as prescribed under FIPPA. An *Estimate of Costs* of \$240.00 was provided to the applicant. In its response, the Town notified the applicant that he had 30 days from the date of the estimate to accept it, modify his request or request a fee waiver. The Town stated that the applicant did not respond to the estimate and therefore it considered the application to have been abandoned.

The third request on July 22 was for copies of all email transmissions during a specific period of time which pertained to two Town employees. The Town advised that search and preparation of the records would exceed the first two free hours. The Town determined that it would take an additional 28 hours at \$15.00 for each half hour. An *Estimate of Costs* of \$840.00 was provided to the applicant. In its response, the Town advised the applicant that he had 30 days from the date of the estimate to accept it, modify his request or request a fee waiver. The applicant submitted a complaint to the Ombudsman about the fee estimate. Subsequently, the complaint was discontinued by the applicant.

AUGUST 30, 2011 REQUESTS

The Town stated that on August 30, 2011, it received 62 separate applications for access. Each request was for copies of all email transmissions for specific dates which pertained to two Town employees. The Town notified the applicant that it was relying on subsection 13(1) of FIPPA to

disregard the requests on the basis that they were repetitious in nature. In its response, the Town reminded the applicant that it had previously provided him with fee estimates to process similar requests and that he had not responded to the estimates.

SEPTEMBER 7, 2011 REQUESTS

The Town advised our office that the 161 applications received on September 7 are repetitious in that they seek emails to and from Town employees. In the first group of applications on July 22, 2011, the applicant requested emails sent to and from a specific Town employee for a period of time. For the applicant's next group of 62 applications on August 30, 2011, he made a separate application for each day, requesting emails sent or received by employees on that day. The group of 161 applications on September 7, 2011 followed a similar pattern. The Town described the volume and pattern of requests as vexatious.

Within the group of 161 applications, the first 16 do not relate to emails and the majority of these request a copy of the package of information provided to council in advance of council meetings on specific dates. The Town had advised the applicant that these requests were not comprehensible. During our investigation, the Town acknowledged that not all of these requests could be considered to be incomprehensible.

The Town stated that responding to this significant volume of 161 applications would interfere unreasonably with the operations of its municipal office. The Town also noted that FIPPA only allows a public body to charge fees to an applicant for a small portion of the activities required to process a request.

ANALYSIS OF THE ISSUE AND FINDINGS

Was the public body's decision to disregard the requests in accordance with the Act?

One of the purposes of FIPPA is to allow any person a right of access to records held by public bodies, subject to limited and specific exceptions to disclosure. The Act imposes duties on public bodies in responding to access applications, including a time limit of 30 days for responding in writing to every application received.

The amendments to section 13 of FIPPA, which were proclaimed in effect on January 1, 2011, balance the right of access with the responsible exercise of that right. Subsection 13(1) permits a public body to disregard an application in specific circumstances. This complaint represents the first time that our office has investigated and made findings about a decision to disregard requests.

The Town had relied on clauses 13(1)(a) and (b), which state:

Public body may disregard certain requests

13(1) The head of a public body may disregard a request for access if he or she is of the opinion that

(a) the request is incomprehensible, frivolous or vexatious;

(b) because of their repetitious or systematic nature, the requests would unreasonably interfere with the operations of the public body or amount to an abuse of the right to make those requests.

Clause 13(1)(a) provides discretion for a public body to disregard a request that is incomprehensible, frivolous or vexatious. An incomprehensible request is one that cannot be understood. A frivolous request is one that is trivial or of little importance. Vexatious suggests malicious intent and includes requests that are made in bad faith or for a purpose other than obtaining access, such as harassment of a public body or to grind its operations to a halt.

The focus of clause 13(1)(b) is on the nature of the requests and the effect of those requests. In terms of the nature of the requests, a request that is repetitious is one that seeks the same information as requested previously. Requests may be of a systematic nature where they reflect a pattern of conduct that is regular or deliberate.

Under clause 13(1)(b), the effect of repetitious or systematic requests must be that the requests would unreasonably interfere with the operations of the public body, or that they would amount to an abuse of the right to make those requests. Repetitious and systematic requests can overburden a public body and interfere with its other operations, including providing services to other members of the public. Such requests may unnecessarily add to the public body's time and costs to comply with FIPPA, and can infringe on the access rights of other applicants by consuming a disproportionate amount of resources available to process requests.

During the course of our investigation, we reviewed all of the applications submitted to the Town by the applicant. The first of three applications submitted by the applicant on July 22, 2011, was for the following records:

1. *All records relating to the negotiations, offers, planning and subsequent decision to not proceed on the [name of project] project. To include handwritten notes, emails, proposals, etc.*

The Town refused access to the records on the basis that they did not exist. The applicant did not make a complaint to the Ombudsman about this decision.

The second request was for copies of all telephone records and all email transmissions from July 1 to July 22, 2011 which pertained to a specific Town employee:

2. *Copies of all telephone records relating to the position of [Town employee A] for a period July 1, 2011 to July 22, 2011.
Copies of all email messages to or from [Town employee A] for a period July 1, 2011 to July 22, 2011.*

The Town estimated that a fee of \$240.00 was payable in order to process the request. The Town prepared an *Estimate of Costs* and provided it to the applicant. As the applicant requested all emails on specific dates, the scope of the request would encompass every email regardless of subject matter. The Town provided the applicant an opportunity to modify his request. The

applicant chose not to narrow the scope of his request. We note that the applicant did not respond to the fee estimate and he abandoned this access request.

The third request was for copies of all email transmissions from July 1 to July 22, 2011 which pertained to two Town employees:

3. *Copies of all emails to or from [Town employee B] for a period July 1, 2011 to July 22, 2011.*
Copies of all emails to or from [Town employee C] for a period July 1, 2011 to July 22, 2011.

The Town estimated a fee of \$840.00 for search and preparation of the requested records. As with the previous request, the applicant requested all emails regardless of subject matter. The applicant chose not to narrow the scope of his request. We note that the applicant submitted a complaint to our office about the *Estimate of Costs*. He subsequently withdrew his complaint. As a result, we did not make findings about the fee estimate.

The applicant did not further pursue these first three access applications.

On August 30, 2011, the applicant submitted 62 access applications to the Town requesting copies of all email transmissions pertaining to two Town employees. Separate applications were submitted for emails sent or received on each day of the month of July by the two employees. The first 31 requests were for emails concerning employee B for each day from July 1 to July 31, 2011 as follows:

Electronic Copies of all emails to or from [Town employee B] on July 1, 2011
...
Electronic Copies of all emails to or from [Town employee B] on July 31, 2011

The next 31 requests were for emails pertaining to another employee for each day from July 1 to July 31, 2011, as follows:

Electronic Copies of all emails to or from [Town employee C] on July 1, 2011
...
Electronic Copies of all emails to or from [Town employee C] on July 31, 2011

The Town wrote to the applicant to inform him that it was relying on subsection 13(1) of FIPPA to disregard the 62 requests. The applicant did not further pursue these 62 applications by making a complaint to the Ombudsman about the Town's decision. Accordingly, there was no investigation of this earlier decision to disregard requests.

On September 7, 2011, the applicant submitted a further 161 applications to the Town, which are the subject of this complaint. The majority of the 161 applications were for copies of email transmissions from July 1 to September 7, 2011 sent or received by Town employees A, B and C. As with the previous 62 applications, the applicant made a separate application for each specific date. Concerning employee A, there are 69 applications for emails from July 1 to

September 7. For employee B there are 38 applications for emails from August 1 to September 7. For employee C there are 38 applications for emails from August 1 to September 7, 2011.

Based on our review of the applications, we determined that 22 of the 161 applications were repetitive. These applications were for emails sent or received by employee A from July 1 to July 22. This was the same information requested previously by the applicant on July 22. Accordingly, we found that these 22 requests were of a repetitious nature.

In consideration of whether these 161 applications were of a systemic nature, we noted that they were part of a total of 226 applications made by the applicant in three batches or groups, within a seven week period. The applicant had recently submitted 65 applications to the public body that he did not pursue further. Then, in one day, the applicant submitted more than double the number of applications he had previously initiated, 161 at one time. Most of these applications were for copies of emails sent to and by employees of the public body. Sixty-two of the previous applications were similar to the 161 applications in that one application was made per specific date. We are of the view that these 161 applications were of a systemic nature.

In considering the effect of the requests, we note that the number of applications submitted by the applicant on one day, 161, is substantial. The impact is amplified when taking into account that the applicant submitted a total of 226 applications within a seven week period. To put this into context, according to the FIPPA statistics produced in Manitoba Culture, Heritage and Tourism's most recent Annual Report under FIPPA (for 2010), which ranks the top 10 highest numbers of FIPPA applications received by a provincial government department or agency in a one year period, Manitoba Health had the highest number, 224 FIPPA applications in 2010. The tenth highest number was Entrepreneurship, Training and Trade which received 81 applications for the year.

To respond to 161 requests submitted at one time would be a significant challenge for any public body, in view of the time needed for the preliminary administrative tasks, for making access decisions and for preparing the records. It is important to bear in mind that FIPPA requires a public body to respond to requests within 30 days, unless an extension is justified under the Act.

For every access application made under FIPPA, a public body must undertake various steps and considerations in processing the request. Upon receipt of an application, a public body must record the date received on the application, and typically, a number is assigned to the application and the details of the application are transcribed. If a public body anticipates that search and preparation of the records will exceed the two free hours allotted under FIPPA, a public body would calculate an estimate of the chargeable time and prepare the prescribed *Estimate of Costs* form. To prepare an estimate, a public body should undertake search and preparation of a sample of the records in order to be able to calculate the time reasonably required to search and prepare all responsive records or otherwise document the basis for its estimate.

A public body must undertake other steps to fulfill its statutory obligations in processing a request. Where records are in an electronic format, generally these records would be printed to facilitate a review of the information, determination of whether exceptions apply and severing, by removing the excepted information. We note that the applicant requested all emails to and

from certain employees, regardless of subject matter, on certain dates. Accordingly, the public body would need to search by date and by employee name and print all emails sent and received by the employee. The scope of these requests would include emails sent to the employee when copied as a recipient.

In considering release of the records responsive to an access request, a public body must perform a careful, line-by-line review of the information in each record to determine whether some, all or none of the information can be released to an applicant. This requires consideration of whether any exceptions to disclosure set out in FIPPA apply to any information contained in the record. This is a time-intensive process requiring consideration of the information in the record in relation to the specific wording of the exceptions to determine if any apply.

In determining whether exceptions apply, a public body may need to consult with other employees of the public body, third parties who may be identifiable in the records, or legal counsel for the public body. Given that these requests encompass all emails regardless of subject matter, it would reasonably be expected that many could contain third-party information as a Town office would be in email communication with members of the public, other organizations and public bodies, as well as businesses.

If a public body decides that exceptions apply to the information, a public body may charge preparation fees for the act of severing the records, for the time it takes to remove the excepted information and note the specific provision of FIPPA on which the refusal is based.

The time required to process these 161 applications would be substantial. We note that the Town's fee estimate for processing the third application received on July 22, 2011 which related to emails, totaled \$840.00. Although a review of this estimate was not completed by our office (because the applicant discontinued this complaint), on the face of it, the estimate does not appear to be unreasonable. That request involved search and preparation related to emails sent or received over a total of 44 days. The time involved was estimated to be 30 hours in total. Accordingly, the Town determined that it would take approximately .7 hours to search and prepare emails sent and received on one day. Taking into consideration the non-chargeable time required to conduct a line-by-line review of the information, consider whether exceptions to disclosure apply, and consult within the public body or with third parties, the time spent would be expected to be approximately 1 hour.

If this calculation were applied to the 161 applications, the time would total at least 161 hours. If the public body worked full-time on these requests for 6 hours per day, it would take nearly 27 days or over 5 weeks of an employee's full-time work dedicated to responding to these applications.

Given the above, we are satisfied that responding to these 161 applications would interfere unreasonably with the operations of the public body.

FIPPA provides a right of access and the exercise of that right should not be infringed upon without justification in limited and specific circumstances. We have carefully considered the circumstances of the Town's decision to disregard these 161 applications. Based on our

investigation, we are satisfied that 22 requests are repetitive and that all 161 requests are systematic in nature. We are of the opinion that responding to these 161 requests would unreasonably interfere with the operations of the Town. Our office therefore found that clause 13(1)(b) of FIPPA applied to the 161 applications.

As we found that clause 13(1)(b) applied, it was not necessary to determine whether these requests were incomprehensible, frivolous or vexatious under clause 13(1)(a). We would note however, that although the Town considered the applications to be vexatious, and some of them to be incomprehensible, we could not have agreed with this position based on the information provided by the Town.

CONCLUSIONS

A decision by a public body to disregard a request pursuant to section 13 must be carefully considered on a case-by-case basis. It is required that public bodies communicate to applicants the specific provision of section 13 that they are relying on when disregarding requests. As with all decisions by public bodies, there should be file documentation supporting the decision and setting out the underlying rationale for the decision to disregard an application for access. Clause 13(2)(b) requires public bodies to communicate to applicants their reasons for disregarding a request.

If a request is to be disregarded under clause 13(1)(a) it is important for public bodies to articulate the basis on which they have concluded that the request is incomprehensible, frivolous or vexatious. While frivolous and vexatious are commonly used terms, in this context they must be viewed as a matter of statutory interpretation rather than solely an exercise of subjective judgment.

If a request is to be disregarded under clause 13(1)(b) public bodies must remember that there are two parts to this decision: first, it must be determined that the request is either repetitious or systematic, **and** second, it must be determined that the request would unreasonably interfere with the operations of the public body or amount to an abuse of the right to make the request.

As well, it is important to remember that while an applicant may have made previous requests under FIPPA that fall within the circumstances of subsection 13(1), this does not mean that every future request by the applicant can automatically be disregarded. We note that section 9 of FIPPA compels a public body to make every reasonable effort to assist an applicant and to respond without delay, openly, accurately and completely. Accordingly, any future requests submitted by the applicant to the Town must be considered in relation to the requirements of FIPPA, including the duty to assist an applicant.

The authority for public bodies to disregard access requests under section 13 increases the obligation on applicants to exercise their access rights responsibly, by requesting access in a manner that does not unreasonably interfere with the operations of a public body. Any failure to do so exposes applicants to the risk of having their applications disregarded. The effect of this balancing of rights and responsibilities should be greater cooperation between applicants seeking access to records and public bodies attempting to meet their statutory obligations.

Based on the finding that the Town's decision to disregard the 161 requests was permitted under clause 13(1)(b), the complaint is not supported.

April 20, 2012
Manitoba Ombudsman