

Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2016-0067, 2016-0068

MANITOBA TOURISM, CULTURE, HERITAGE, SPORT AND CONSUMER PROTECTION – ARCHIVES OF MANITOBA

PRIVACY COMPLAINTS: COLLECTION AND USE OF PERSONAL INFORMATION

PROVISIONS CONSIDERED: 36(1)(a)(b)(c), 37(2), 42(2)

REPORT ISSUED ON JUNE 16, 2016

SUMMARY: In response to two complaints made under the Freedom of Information and Protection of Privacy Act (FIPPA or the Act) relating to the collection and use of personal information on the Archives of Manitoba Registration Form, our office investigated the collection and use (retention) of personal information by Manitoba Tourism, Culture, Heritage, Sport and Consumer Protection – Archives of Manitoba (the archives). Our office found that the collection of personal information by the archives was authorized and limited to that which was reasonably necessary. Following changes made during our investigation, the ombudsman found the archives' collection notice was compliant with FIPPA. Our office also found that the use (retention) of the complainant's personal information is now limited to the minimum amount necessary to accomplish the purpose for which it is used. The complaint is partly supported.

BACKGROUND AND COMPLAINT

On February 10, 2016 the complainant attended the Archives of Manitoba (the archives) for the purpose of conducting research using archival materials housed there. The complainant was asked to complete the Archives of Manitoba Registration Form (the registration form) and to provide photo identification. The complainant explained that he was given to understand that

photo identification would be required before gaining access to the archival collections and this requirement was to ensure the security of the collections. The complainant explained to our office that, as not everyone carries photo identification, he believed the request to be unreasonable. Nonetheless, the complainant presented his Manitoba driver's license and he noted the particulars on his registration form. The complainant expressed concern that archives' staff did not seem to confirm that the particulars he noted on the registration form were accurate or that he was the person depicted in the photo on the driver's license he presented.¹ The complainant also questioned the need for photo identification when he only wished to consult the microfilm collection, not original documents.

The complainant advised our office that he asked about the retention of registration forms and he understood from archives' staff that registration forms would be retained indefinitely. Further, the information obtained from the forms would be entered into an electronic database which was also maintained indefinitely. The complainant advised our office that he also considered an indefinite retention period for the registration forms and the information they contained to be unreasonable.

Subsection 59(3) allows that a person who believes that their personal information was collected and used contrary to FIPPA may make a complaint to the ombudsman. Complaints made under the Freedom of Information and Protection of Privacy Act (FIPPA or the Act) relating to the collection and use of personal information by Manitoba Tourism, Culture, Heritage, Sport and Consumer Protection² – Archives of Manitoba (the archives), a public body under the Act, were received in our office on February 17, 2016.

ISSUES AND ANALYSIS

On receiving these complaints, our office contacted the archives. We requested and received information concerning the personal information required on patron registration forms and representations on the archives' compliance with the requirements for public bodies with regard to the collection and use of personal information.

¹ Some of the matters raised by the complainant relate to security concerns which are outside the purview of our investigation. However, we mention them to provide context to the complainant's view that the collection of his personal information was unreasonable.

² On May 3, 2016 the name of Manitoba Tourism, Culture, Heritage, Sport and Consumer Protection was changed to Manitoba Sport, Culture and Heritage.

Did the Archives of Manitoba collect the personal information of the complainant as described in the complaint?

Under FIPPA:

"personal information" means recorded information about an identifiable individual, including

- (a) the individual's name,*
- (b) the individual's home address, or home telephone, facsimile or e-mail number,*
- (c) information about the individual's age, sex, sexual orientation, marital or family status,*
- (d) information about the individual's ancestry, race, colour, nationality, or national or ethnic origin,*
- (e) information about the individual's religion or creed, or religious belief, association or activity,*
- (f) personal health information about the individual,*
- (g) the individual's blood type, fingerprints or other hereditary characteristics,*
- (h) information about the individual's political belief, association or activity,*
- (i) information about the individual's education, employment or occupation, or educational, employment or occupational history,*
- (j) information about the individual's source of income or financial circumstances, activities or history,*
- (k) information about the individual's criminal history, including regulatory offences,*
- (l) the individual's own personal views or opinions, except if they are about another person,*
- (m) the views or opinions expressed about the individual by another person, and*
- (n) an identifying number, symbol or other particular assigned to the individual;*

At our request, the archives provided our office with a copy of the registration form³ in use at the time of the complainant's visit to the archives. The registration form asked for the following information:

Surname

Given name and initial

Complete home or office address and temporary Winnipeg address if from out of province

Home or Cell telephone

Office telephone

Fax number

Temporary telephone

E-mail address

Name of university, institution or business

One piece of identification

³ A copy of the registration form was also provided to our office by the complainant.

Patrons were also asked to generally indicate the area/purpose of their research (for example: genealogical/community, government administration or school/university). As well, the registration form included a line for a patron signature and date.

On reviewing the registration form our office noted that, in order to gain access to the archives collections, patrons are asked to provide several types of personal information as defined by FIPPA. In addition to demographic information (name, individual's home address, or home telephone, facsimile or email number), patrons are also asked for information about educational and employment status (name of university, institution or business). Information relating to the area or purpose of research may also say something personal about the patron's ancestry, employment, occupation or associations. Also, by providing particulars of the identification presented on registration (such as a driver's license), patrons will usually be providing an identifying number, symbol or other unique particular assigned to the individual.

The complainant in this matter completed the registration form (including providing particulars of the identification presented on registration) and submitted it to archives staff. The ombudsman found that the Archives of Manitoba collected the personal information of the complainant.

Was the collection of the complainant's personal information for a purpose authorized under FIPPA?

One of the purposes of FIPPA, as set out in clause 2(d) is to control the manner in which public bodies may collect personal information. A public body must find its lawful authority to collect personal information in subsection 36(1) of FIPPA. Subsection 36(1) reads:

Purpose of collection of information

- 36(1)** *No personal information may be collected by or for a public body unless*
- (a) collection of the information is authorized by or under an enactment of Manitoba or of Canada;*
 - (b) the information relates directly to and is necessary for an existing service, program or activity of the public body; or*
 - (c) the information is collected for law enforcement purposes or crime prevention.*

At least one of these circumstances must apply for the collection of personal information by a public body to be authorized under FIPPA. Our consideration of the application of these provisions follows.

Clause 36(1)(a) - Collection authorized under an enactment of Manitoba:

The archives explained to our office that, under the Archives and Recordkeeping Act, it has an exclusive mandate to preserve the archival records of the Manitoba government, its agencies, the courts and the legislature. It may also enter into agreements for the preservation and protection of the records of the ombudsman, the children's advocate or the auditor general as well as the records of municipalities, local authorities, child and family services agencies, and private organizations and persons. Further, the archives is also the home of the Hudson's Bay Company Archives and access to items from this collection is also administered through the archives' researcher registration process.

The archives explained that a high degree of security is essential to the protection of the archival records in its custody and represented that section 7 and clauses 8 (a), (c), and (g) of the Archives and Recordkeeping Act are relevant to this matter:

Responsibilities of archivist

7 *The archivist is responsible*

- (a) for the care and management of all archival records and all other records that are in the custody or under the control of the archivist; and*
- (b) for facilitating access to archival records in accordance with any rights of access provided by law, in legislation or by the terms or conditions of an agreement.*

Archivist's duties re government records

8 *With respect to government records, the archivist must*

- (a) establish policies, standards and guidelines for recordkeeping, including for the creation, identification, maintenance, retention, disposition, custody and protection of records;*
- (c) designate records of archival value, in consultation with the government body by or for which the records were created or received;*
- and*
- (g) preserve and protect archival records by*
 - (i) taking them into the archivist's physical custody,*
 - (ii) making arrangements with the government body by or for which the records were created or received, to retain custody, preserve and protect them in accordance with standards and requirements set by the archivist, or*
 - (iii) making any other arrangements that the archivist considers appropriate to preserve and protect the records.*

Clause 8(a) of the the Archives and Recordkeeping Act requires that the archives be under the direction of the archivist of Manitoba, who will establish policies for the preservation of archival records. These policies include the "Archives of Manitoba Policy for Security of Holdings" in effect at the time this complaint was made. This policy mandates that archives staff will invigilate the use of records by archives clients. To this end "Procedures for entry into the

Archives of Manitoba's Research Room" (the procedures) were developed. These procedures include the requirement to present photo identification and complete the Archives Registration Form. Our office concluded that in creating policies and access procedures the archives is fulfilling the requirements of the Archives and Recordkeeping Act to establish policies for the preservation and protection of its records holdings. The collection of personal information in connection with these activities is, therefore, authorized under clause 36(1)(a) of FIPPA.

As we found that the collection of the personal information of archives clients is authorized under clause 36(1)(a), we would not normally consider whether the collection of the complainant's personal information was also authorized under clauses 36(1)(b) and (c). However, our office noted that the archives provided representations which speak to its authority to collect personal information under clauses 36(1)(b) and (c) of FIPPA. These representations provide significant additional context which we feel it is important to include in our report.

Clause 36(1)(b) - The information relates directly to and is necessary for an existing service, program or activity of the public body:

Further to our investigation of this complaint, our office asked the archives about the several types of personal information collected on the registration form (including noting the particulars of the photo identification presented) and how this personal information related to and was necessary for an existing program, service or activity. Our office also considered previous cases in this and other provincial jurisdictions relating to the collection of personal information by public bodies.

The archives explained that it requires detailed contact information as well as proof of identity in the form of photo identification which substantiates the information provided. We observed that this is consistent with the recommendations contained in the Association of College and Research Libraries "Guidelines Regarding Security and Theft in Special Collections" (the ACRL guidelines). The guidelines recommend collecting not only demographic information but also institutional affiliation (if any). The collection of photo identification to establish physical identity is described in the guidelines as "necessary." Based on our investigation of this matter which included a review of articles on the topic,⁴ our office has determined that the threat of theft from special collections (including archives holdings) is more than speculative or anecdotal. It is a real problem that requires an effective response. As noted by the archives in its representations to our office, loss of archives holdings has not only an economic impact. There is greater damage from the loss of cultural heritage as well as unique and historically significant materials.

⁴ Association of College and Research Libraries, "Guidelines Regarding Security and Theft in Special Collections" accessed online at http://www.ala.org/acrl/standards/security_theft on June 8, 2016; Birchard, Karen "RCMP asks archivists to help identify stolen artifacts" accessed online at <http://www.universityaffairs.ca/news/news-article/rcmp-asks-archivists-to-help-identify-stolen-artifacts.aspx/> on June 8, 2016; Shetler, Brian "Guarding the Map Room: Understanding Theft & Increasing Security in Archives" accessed online at <https://msarchivists.org/the-primary-source/volume-31-number-2/guarding-the-map-room-understanding-theft-increasing-security-in-archives/> on June 8, 2016; Foley, Alison "Can One Man Make a Difference?: An Analysis of the Effects of the Crimes of Gilbert Bland..." accessed online at <http://ils.unc.edu/MSPapers/3048.pdf> on June 8, 2016.

Our office noted the complainant's questions concerning the requirement for stringent security procedures when patrons are using microfilm rather than original and irreplaceable material. The archives explained that all first time visitors will be asked to present photo identification. Further, once the registration process is completed, patrons are provided with an Archives of Manitoba Registration Card and a unique patron registration number. On subsequent visits, patrons present their registration card to obtain access to the archives collections without the need to go through the registration process again. Thus, although the complainant did not access original materials on his initial visit, he may have done so on subsequent visits with his registration card, thus making the establishment of his identity necessary on his first visit.

Our office agrees that the collection of personal information from archives patrons relates directly to and is necessary for an existing service, program or activity of the public body as required by clause 36(1)(b) of FIPPA.

Clause 36(1)(c) - The information is collected for law enforcement purposes or crime prevention: FIPPA defines law enforcement as investigations or inspections that lead or could lead to a penalty or sanction being imposed, or *that are otherwise conducted for the purpose of enforcing an enactment.*

The archives has represented to our office that it is necessary not just to view but to record the particulars of the proof of identity. The archives explained that, in the event of a theft or any other security issue (such as vandalism of records), the record of proof of identity would be provided to law enforcement to assist with investigation and follow up. Thus, the purpose for the collection of identification particulars is more than just the verification of identity, although this is important, but also to assist with any subsequent investigation where the use of an alias and false identification can flag a pattern of criminal behavior for law enforcement.

Our office notes that the collection of personal information by the archives for this purpose is more than a "just in case" measure. While all archives materials are historically significant, some have a substantial monetary value and the high risk of theft is actual and ongoing. The collection of the particulars of any identification used is reasonably necessary to the effectiveness of future investigations.

Our office concluded that the collection of personal information in connection with these activities is, therefore, authorized under clause 36(1)(c) of FIPPA.

In view of the forgoing, the ombudsman found that the Archives of Manitoba collected the personal information of the complainant for a purpose authorized under subsection 36(1) of FIPPA.

Was the collection of the complainant’s personal information limited to only as much as is reasonably necessary to accomplish the purpose for which it was collected?

Having found that the archives was authorized under subsection 36(1) of FIPPA to collect the personal information of the complainant, our analysis then turned to a consideration of whether or not the archives was in compliance with the requirements of subsection 36(2) of FIPPA:

Limit on amount of information collected

36(2) *A public body shall collect only as much personal information about an individual as is reasonably necessary to accomplish the purpose for which it is collected.*

While the collection of personal information by the archives is authorized under *The Archives and Recordkeeping Act*, this act does not specify the type of information that may be collected. The archives has the responsibility to determine what personal information is necessary keeping in mind the requirements of subsection 36(2). As noted above the registration form requires not just basic identifying information (name, address, telephone) but detailed supplementary contact information (home, office and temporary addresses) and particulars of proof of identity. The complainant alleged that collecting and retaining the particulars of his proof of identity (driver’s license number) exceeded that which was reasonably necessary for the purpose and was, therefore, unauthorized.

In determining what and how much personal information to collect, a Manitoba public body must determine what is “reasonably necessary” in the context of fulfilling a purpose authorized by subsection 36(1) of FIPPA. The term “necessary” is commonly understood to describe something that is required. However, in clause 36(2) of FIPPA, the common meaning of “necessary” is altered by the addition of the qualifier “reasonably.” Reasonably necessary information is commonly interpreted to be an amount of information necessary to accomplish the purpose as determined by a reasonable person. In order for a collection of personal information to be reasonably required, our office is of the view that the collection of personal information should be more than possibly helpful and the potential risks which the collection is intended to mitigate more than hypothetical. In the view of our office a reasonable person who was made aware of the risks that thefts and vandalism pose to the integrity of archival collections would acknowledge the benefits of collecting the particulars of photo identification and other relevant personal information.

As the ACRL guidelines note,

The special collections administrator must carefully balance the responsibility of making materials available to researchers against the responsibility of ensuring the security of materials.

Based on our research on this issue and a consideration of the representations made by the archives, our office concluded that the amount of information collected is limited to that which is reasonably necessary for the purpose of protecting the archives' collections and our office found that the archives is in compliance with subsection 36(2) of FIPPA.

Was the complainant informed concerning the purpose for the collection of personal information as required by subsection 37(2) of FIPPA?

Subsection 37(2) of FIPPA requires that when a public body collects personal information directly from an individual a collection notice is required, the contents of which are stipulated under clauses 37(2)(a), (b) and (c) of FIPPA:

Individual must be informed

37(2) A public body that collects personal information directly from the individual the information is about shall inform the individual of

- (a) the purpose for which the information is collected;*
- (b) the legal authority for the collection; and*
- (c) the title, business address and telephone number of an officer or employee of the public body who can answer the individual's questions about the collection.*

The registration form completed by the complainant provided patrons with the following information regarding the purpose for the collection of personal information by the archives:

Personal information collected by the Archives of Manitoba is for statistics and custodial purposes. It will not be disclosed or used for other purposes, unless permitted by The Freedom of Information and Protection of Privacy Act.

During the course of this investigation, our office discussed the contents of this notice with archives staff. We explained that FIPPA does not require that a collection notice be in a particular form; however, in the opinion of our office, the collection notice which appeared on the registration form completed by the complainant and the Archives of Manitoba Research Room Policies and Procedures document provided to archives patrons did not contain sufficient information to satisfy the requirements of subsection 37(2) of FIPPA. Our office was aware that there is limited space on the registration form. Nonetheless we advised that a revised form should be prepared to include, at minimum, the following:

- A purpose statement which gives a clear indication that the purpose for the collection of personal information is to establish researcher identity further to the security of archival materials;
- In compliance with 36(1)(b) of FIPPA, a statement which indicates that the collection of personal information is authorized under the Archives and Recordkeeping Act and subsection 36(1) of the Freedom of Information and Protection of Privacy Act.

- Information about whom to contact with questions.

The archives responded, explaining that, although it may have done so in the past, it no longer conducts statistical analysis using the personal information of researchers obtained from the registration form. Further, the archives agreed to a revision of the registration form and the Archives of Manitoba Research Room Policies and Procedures document (a copy of which is provided to archives patrons) to accurately reflect the purpose for its collection of personal information and to make the collection notice compliant with FIPPA. Copies of the new documents currently in use were provided to our office on May 12, 2016. The collection notice now states:

Personal information is collected under the authority of The Archives and Record Keeping Act and subsection 36(1) of The Freedom of Information and Protection of Privacy Act. It is collected by the Archives of Manitoba to confirm an individual's identity and in the event of a theft or any other security issue, to provide identifying information to law enforcement. It is protected by the Protection of Privacy provisions of The Freedom of Information and Protection of Privacy Act. If you have any questions about the collection, contact the Archivist of Manitoba at 204-945-3971 or at archives@gov.mb.ca.

Our office considers this collection notice to be compliant with FIPPA. These changes, along with the explanatory information offered by staff during the registration process, will improve the transparency of the process for researchers and the general public by explaining the reasons for the collection of the particulars of photo identification. This may help to mitigate the type of misunderstanding that led to the complaints which are the subject of this report. In our view patrons are less likely to complain about the collection of personal information if they fully understand the purpose for collection.

Are the Archives' policies concerning the retention of personal information collected by means of the Archives of Manitoba Registration Form reasonable?

One of the issues raised by the complainant in this matter was the indefinite retention of his personal information by the archives. FIPPA gives little guidance concerning the appropriate retention of personal information. FIPPA subsection 40(1) FIPPA requires that:

Retention of personal information

40(1) *A public body that uses personal information about an individual to make a decision that directly affects the individual shall, in the absence of another legal requirement to do so, establish and comply with a written policy concerning the retention of the personal information.*

Content of retention policy

40(2) *A policy under subsection (1) must*

(a) require that personal information be retained for a reasonable period of time so that the individual the information is about has a reasonable opportunity to obtain access to it; and

(b) comply with any additional requirements set out in the regulations.

Protection of personal information

41 *The head of a public body shall, in accordance with any requirements set out in the regulations, protect personal information by making reasonable security arrangements against such risks as unauthorized access, use, disclosure or destruction.*

Our office noted that the archives was in compliance with these provisions, as far as they went. However, we asked the archives for information about the retention of the personal information of archives' patrons, keeping in mind the requirements of subsection 42(2) of FIPPA that any use (retention) of personal information by public bodies must be limited to the minimum necessary to accomplish the purpose for which the information is collected. The cited provision reads:

Limit on amount of information used or disclosed

42(2) *Every use and disclosure by a public body of personal information must be limited to the minimum amount of information necessary to accomplish the purpose for which it is used or disclosed.*

The archives has represented that the purpose for the collection and indefinite retention of the details of patron identification is for that information to be available for the investigation of theft or damage to archives materials which may not be discovered for a number of years. Our office notes that the ACRL guidelines state that registration records should be retained indefinitely in order to be available to law enforcement authorities if thefts or vandalism later come to light. The guidelines note that ID information, which may provide clues even if an alias is used, is indispensable to future investigations.

Our office observed, however, that the reasonable likelihood of a successful investigation and prosecution diminishes with the passage of time. We noted that a successful identification and prosecution would probably be unlikely after 35 years and highly unlikely after 60 years. Our office asked that the archives reconsider the indefinite retention of researcher registration forms. On consideration, the archives decided to change the disposition of this series of records from archival to non-archival. The original records will be destroyed after a period of time yet to be determined. The archives advised our office that it is in the process of consulting with other provincial archives across Canada to ensure that its retention period is consistent with that of other jurisdictions. The archives has confirmed that the retention period is unlikely to exceed 40 years. Further, electronic copies of the registration information will be deleted after five years.

The archives anticipates that the records retention schedule which relates to these materials will be amended to reflect these changes in retention and disposition by June 30, 2016.

In light of these changes, the ombudsman finds that the use of the complainant's personal information will, in the future, be limited to the minimum amount necessary to accomplish the purpose for which it is used.

FINDINGS

The ombudsman found that the Archives of Manitoba collected the personal information of the complainant for a purpose authorized under subsection 36(1) of FIPPA.

The ombudsman concluded that the amount of information collected is limited to that which is reasonably necessary for the purpose of protecting the archives' collections and our office found that the archives is in compliance with subsection 36(2) of FIPPA.

Following changes made during the course of this investigation, the ombudsman found that the archives' collection notice is now compliant with subsection 37(2) of FIPPA.

Following changes to the disposition and retention of registration information, the ombudsman finds that the use of patron personal information is now limited to the minimum amount necessary to accomplish the purpose for which it is used as required by subsection 42(2) of FIPPA.

Manitoba Ombudsman
June 16, 2016