

Manitoba mbudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2010-0404

CITY OF WINNIPEG WINNIPEG POLICE SERVICE

ACCESS COMPLAINT: REFUSED ACCESS

PROVISIONS CONSIDERED: 4(i) and 12(1)(c)(i)

REPORT ISSUED ON JANUARY 26, 2011

SUMMARY: The complainant applied to the Winnipeg Police Service for access to all records containing information concerning the death of a third party. Access to the records was refused on the basis that the records relate to an inquest under *The Fatality Inquiries Act* and the proceedings concerning the inquest have not been completed and that a part of the requested records did not exist.

THE COMPLAINT

The complainant requested the following records under *The Freedom of Information and Protection of Privacy Act* (FIPPA) on August 27, 2010:

1. *The Winnipeg Police Service's complete record concerning the death of [name of third party], deceased September 21, 2008;*
2. *All correspondence and other records of communications with any third party concerning [name of third party] since his death including:*
 - a. *the Winnipeg Regional Health Authority or any of its officers, agents or employees;*
 - b. *the Inquest into the death of [name of third party] or its legal counsel or staff;*
 - c. *the office of the Chief Medical Examiner;*
 - d. *the Government of Manitoba or any Minister, ministry, department, employee, or agent thereof;*

3. *All internal communications and other records concerning any actions taken or considered in relation to the death of [name of third party], including any consideration given by the Winnipeg Police Service into whether or not to undertake a criminal investigation into the death of [name of third party]:*
 - a. *In the months immediately following [third party's] death; and*
 - b. *Since March 30, 2010 when the [third party's] Estate and Family provided the Winnipeg Police Service with the legal opinion of [name of lawyer] and the endorsements thereto and requested that a criminal investigation be undertaken;*
4. *The news release and public statement made by Chief Keith McCaskill concerning the [name of third party] matter on March 31, 2010 and all related speaking notes and briefing materials, the press conference transcript or recording(s), and all notes and briefing memoranda, correspondence and other records concerning the conceptualization, development and implementation of the news release, public statement and related materials;*
5. *All rules, policies, procedures or guidelines concerning when to conduct a "review" as opposed to an "investigation" into possible crimes, the legal status of a "review", and how to conduct such a "review", and any records concerning the application of such rules, policies, procedures or guidelines in relation to the death of [name of third party];*
6. *All other Winnipeg Police Service memoranda, reports, emails, minutes of meetings, notes, and other records concerning [name of third party] and the Winnipeg Police Services' actions, or decision(s) not to act relating to his death.*

The Winnipeg Police Service sent the complainant a response letter, dated September 27, 2010, advising that access to the requested information was being refused in accordance with clause 4(i) of FIPPA, which states that the Act does not apply to records relating to an inquest under *The Fatality Inquiries Act* if all proceedings concerning the inquest have not been completed. In addition, the Winnipeg Police Service further advised that the records requested in item 5 of the complainant's application for access were refused in accordance with clause 12(1)(c)(i) of the Act as the records did not exist.

The complainant filed a complaint with the Ombudsman's office on October 20, 2010 regarding the Winnipeg Police Services' decision to refuse access to the requested information.

POSITION OF WINNIPEG POLICE SERVICE

The position of the Winnipeg Police Service was that the records containing the information requested in item 5 of the complainant's application for access did not exist. Specifically, the Winnipeg Police Service advised as follows:

With respect to your request for rules, policies, etc. concerning when and how to conduct a review, these records do not exist. A Sergeant in our Research and Development Unit was consulted and indicated that we do not have written policies or procedures in place. Access is refused pursuant to subsection 12(1)(c)(i) of The Act.

Clause 12(1)(c)(i) of FIPPA provides as follows:

Contents of response

12(1) *In a response under section 11, the head of the public body shall inform the applicant*

(c) if access to the record or part of the record is refused

(i) in the case of a record that does not exist or cannot be located, that the record does not exist or cannot be located.

Additionally, the Winnipeg Police Services' position regarding refusal of access pursuant to clause 4(i) of FIPPA was as follows:

There is a pending inquest under the Fatality Inquiries Act concerning the death of [named of third party]. These proceedings are not complete. Therefore The Act does not currently apply to records held by the Winnipeg Police Service relating to the review into his passing. Access is refused pursuant to subsection 4(1)(i) [sic] of The Act.

Clause 4(i) of FIPPA 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*

(i) a record relating to a prosecution or an inquest under The Fatality Inquiries Act if all proceedings concerning the prosecution or inquest have not been completed.

ANALYSIS OF ISSUES AND FINDINGS

1. Was the public body's decision to refuse access under 12(c)(i) compliant with the Act?

A public body is required, in its written response, to inform an applicant that access is being refused as the requested record does not either exist or cannot be located. In addition, a public body is responsible for providing an explanation that briefly outlines the steps taken to locate the responsive record.

Based on our investigation, the Ombudsman found that the Winnipeg Police Service had conducted a reasonable search in its attempt to locate those records requested in item #5 of his

application for access. Accordingly, the Winnipeg Police Service's decision to refuse access was appropriate considering the records did not exist.

2. Does FIPPA apply to the requested records?

Pursuant to *The Fatality Inquiries Act*, an inquest was called into the death of the third party by the Province's Chief Medical Examiner on February 4, 2009.

The Freedom of Information and Protection of Privacy Act applies to all records in the custody or under the control of a public body except those records described clauses 4(a) to 4(k), even if the records described are in the custody or under the control of a public body.

In particular, clause 4(i) provides that FIPPA does not apply to a record relating to a prosecution or an inquest under *The Fatality Inquiries Act* if all proceedings concerning the prosecution or inquest have not been completed. Once all proceedings have been completed, then the records relating to the prosecution or inquest are once again subject to FIPPA.

The Winnipeg Police Service advised the complainant that the inquest concerning the death of the third party was currently pending and as such the proceedings were therefore not complete.

The Winnipeg Police Service advised our office that it had commenced a criminal investigation into whether any criminal charges surrounding the death of the third party should be laid. The Winnipeg Police Service further advised that its investigation was presently in the initial stages and that it would take some time to complete.

Our office then contacted the Inquest Counsel appointed to the inquiry by the Manitoba Department of Justice and enquired as to the up-to-date status of the inquest into the death of the third party. Counsel advised that the inquest was on hold until such time as the Winnipeg Police Service completed its investigation as to whether or not it would be laying any criminal charges. Once their investigation is complete and if it is determined that there is no basis to lay any criminal charges, then the inquiry process will resume at that time. However, should criminal charges be laid, then these charges will have to be disposed of by the courts prior to the commencement of the inquiry.

According to the Inquest Counsel, once the Winnipeg Police Service's investigation has been completed and the inquest process is back on track, a production order will most likely be issued at some point in time thereafter.

In light of the foregoing, it became apparent that until such time as the production order is issued, there will be no possibility for the public body to determine with any degree of certainty what records, information and documents in its possession concerning the death of the third party might be relevant to the inquest and what might not be. Under these circumstances, it was reasonable for the Winnipeg Police Service to conclude that the requested records with the exception of item #5 were not subject to FIPPA at the present time.

The Ombudsman found that clause 4(i) of FIPPA applied to the requested records, excepting item #5, as all proceedings relating to the inquest of the third party under *The Fatality Inquiries Act* have not been completed. Therefore, the records requested by the complainant are not subject to FIPPA at this time.

CONCLUSION

Based upon the Ombudsman's findings in this matter, the complaint is not supported.

In accordance with subsection 67(3) of *The Freedom of Information and Protection of Privacy Act*, the applicant may appeal the City of Winnipeg's Winnipeg Police Service's decision to refuse access (to item#5) to the Court of Queen's Bench within 30 days after receipt of this report.

January 26, 2011
Manitoba Ombudsman