

Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2009-0602

WINNIPEG REGIONAL HEALTH AUTHORITY

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 18(1)(b), 18(1)(c)(i), (ii) and (iii), 27(1)(b) and (c)

REPORT ISSUED ON MAY 25, 2010

SUMMARY: An application was made to the Winnipeg Regional Health Authority for records containing information regarding legal fees in relation to a particular inquest. The Winnipeg Regional Health Authority advised that some of the records did not exist and refused access to the remaining records on the basis that they would affect the business interests of a third party. During the course of our investigation, the Winnipeg Regional Health Authority further advised that it was also refusing access to the remaining records on the basis that they were subject to solicitor-client privilege. The Ombudsman found that the exceptions cited were applicable to the requested records.

THE COMPLAINT

On August 19, 2009 a request for access was made under *The Freedom of Information and Protection of Privacy Act* (FIPPA) to the following records:

As further described in the letter to [name of individual] dated August 19, 2009 accompanying this Application, I wish to obtain access to records containing information regarding the following items in connection with the death of [name of individual] and the upcoming inquest:

- 1. Hourly rates that WRHA pays to retain external legal counsel;*
- 2. Amount that WRHA has paid to external legal counsel to date;*
- 3. Number of hours of legal work performed by in-house legal counsel to date;*
- 4. Number of hours of legal work performed by external legal counsel to date;*
- 5. Best estimate of what proportion of the total legal work to date has been performed by external legal counsel as compared to in-house legal counsel;*
- 6. Number of lawyers and law students who have provided services to WRHA to date;*
- 7. Best estimate of the daily and/or monthly costs of WRHA participation in the [name of individual] inquest;*

8. *The anticipated or estimated number of lawyers and law students that will be providing services to WRHA during the [name of individual] inquest; and*
9. *Limits or caps if any on work and disbursements undertaken, or to be undertaken, for WRHA by external counsel during the [name of individual] inquest.*

The Winnipeg Regional Health Authority (WRHA) initially responded to the request by letter dated September 2, 2009. Pursuant to clause 12(1)(c)(i) of FIPPA the WRHA advised that access was refused to items 3, 5, 7, 8 and 9 of the application as no responsive records exist which contain this information.

The WRHA further advised that the records described in items 1, 2, 4 and 6 of the application contained information which, if disclosed, could be harmful to the business interests of a third party as described in section 18 of FIPPA. The WRHA advised that, as required by subsection 33(1) of FIPPA, it had provided written notice to the third party that a request for access had been made. The WRHA indicated that it would make a decision respecting access within 30 days of notice being given to the third party as set out in FIPPA.

On September 15, 2009 the WRHA advised the complainant that the third party had objected to the disclosure of the records containing the information described in items 1, 2, 4 and 6 of the application for access. The WRHA further advised the complainant that it was refusing access to records containing the information described in items 1, 2, 4 and 6 of the application as the information in the records fell within the mandatory exception to disclosure contained in subclauses 18(1)(c)(i), (ii) and (iii) of FIPPA.

The WRHA advised that the requested records contain information, of both a commercial and financial nature, that was provided to the WRHA on the basis that it would be kept confidential and has been consistently treated as confidential by the third party. The WRHA further indicated that disclosure of the information in the records may also harm the competitive position and/or interfere with contractual negotiations by the third party with its other and prospective clients potentially resulting in significant financial loss to the third party.

A complaint about refused access to the requested records was received by our office on September 23, 2009. The complainant took issue with the WRHA's position that the information in the records fell within the mandatory exception to disclosure contained in subclauses 18(1)(c)(i), (ii) and (iii) of FIPPA.

POSITION OF THE WINNIPEG REGIONAL HEALTH AUTHORITY

The position of the WRHA is that records containing the information requested in items 3, 5, 7, 8 and 9 of the complainant's application do not exist. In particular, the WRHA advised that:

- with respect to item 3, records containing information as to the *number of hours of legal work performed by in-house legal counsel to date* do not exist. The WRHA advised that individuals who serve as in-house legal counsel are salaried employees and are not paid on a fee-for-service basis. In-house legal counsel are required to work a minimum 7.75

hour day and do not document the number of hours of legal work performed in relation to specific issues (they do not keep time sheets like private practitioners might).

- with respect to items 5, 7 and 8, the complainant has not made a request for records or information contained in records. FIPPA provides a right of access to any record in the custody or under the control of a public body. The complainant had requested the WRHA provide *estimates*, not records. The WRHA advised that the information requested is not contained in a record and therefore does not exist.
- with respect to item 9, it employs external counsel on an "as required" basis. Given that the WRHA must participate fully in inquests, regardless of the duration of same, there are no records containing information regarding *limits* or *caps* to be placed on work to be performed and/or disbursements to be incurred by external legal counsel.

The position of the WRHA is that the information requested in items 1, 2, 4 and 6 of the complainant's application is contained in two types of records:

- i) the agreement it entered into with external legal counsel regarding the provision of legal services which consists of three documents (the *records*); and
- ii) monthly invoices/statements of account it receives from external legal counsel (the *statements*).

During the course of our investigation of this complaint the WRHA stated that the information requested in item 1 of the complainant's application could be found in the *records*. The WRHA advised our office that the *records* fell within the mandatory exceptions to disclosure contained in subclause 18(1)(b) and subclauses 18(1)(c)(i), (ii) and (iii) of FIPPA which provide as follows:

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

(b) commercial, financial, labour relations, scientific or technical information supplied to the public body by a third party, explicitly or implicitly, on a confidential basis and treated consistently as confidential information by the third party; or

(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,

(ii) interfere with contractual or other negotiations of a third party,

(iii) result in significant financial loss or gain to a third party,

In particular, the WRHA advised that the *records* contained information of both a commercial and financial nature and that they were provided to the WRHA on the basis that they would be kept confidential and have been consistently treated as such by the third party. The WRHA further advised that disclosure of the *records* might harm the competitive position and/or interfere with contractual negotiations by the third party with its other/prospective clients resulting in significant financial loss to the third party.

During the course of our investigation of this complaint the WRHA also stated that information requested in items 1, 2, 4 and 6 of the complainant's application could be found in the *statements*. The WRHA advised our office that the *statements* fell within the discretionary exceptions to disclosure contained in subclauses 27(1)(b) and (c) of FIPPA which provide as follows:

Solicitor-client privilege

27(1) The head of a public body may refuse to disclose to an applicant

(b) information prepared by or for an agent or lawyer of the Minister of Justice and Attorney-General or the public body in relation to a matter involving the provision of legal advice or legal services or in relation to the investigation or prosecution of an offence; or

(c) information in correspondence between an agent or lawyer of the Minister of Justice and Attorney-General or the public body and any other person in relation to a matter involving the provision of legal advice or legal services or in relation to the investigation or prosecution of an offence.

In particular, the WRHA advised that the *statements* are subject to solicitor-client privilege as they contain information prepared by the WRHA's external legal counsel over a specific period of time on an identified file involving the provision of legal advice or legal services.

Finally, during the course of our investigation of this complaint the WRHA stated that, although it may provide information in its public accounts with respect to the total amount spent for all legal services in a year, it does not report publicly on amounts spent in relation to the provision of legal advice or legal services with respect to any particular matter as the information is subject to solicitor-client privilege.

ANALYSIS OF ISSUES AND FINDINGS

1. Would disclosure of information in the *records* withheld under clauses 18(1)(b) and 18(1)(c)(i), (ii), and (iii) of FIPPA be harmful to a third party's business interests?

Public bodies acquire a great deal of information about the business activities of third parties. The exceptions in subsection 18(1) of FIPPA impose a duty on the head of a public body to refuse to disclose specified information about the business interests of a third party. It is recognized that much of this information is a valuable business asset and that disclosure to another would harm the third party's business interests.

Clause 18(1)(b) of FIPPA is a mandatory exception to the right of access under section 7 of FIPPA. The head of a public body is required to (shall) refuse to disclose the confidential third party information described in clause 18(1)(b). The exception in clause 18(1)(b) is a "class exception" as it protects a certain type or kind of information.

The exception in clause 18(1)(b) of FIPPA has four requirements, all of which must be met for the exception to apply:

- i) the information must reveal commercial, financial, labour relations, scientific or technical information;

- ii) the information must have been supplied to the public body by the third party who would be affected by the disclosure;
- iii) the information must have been supplied, explicitly or implicitly, on a confidential basis; and
- iv) the information must be treated consistently as confidential information by the third party.

The WRHA advised that the *records* containing the information requested in item 1 of the complainant's application (hourly rates that the WRHA pays to retain external legal counsel) were withheld under clause 18(1)(b) of FIPPA.

Based on the information provided to our office by the WRHA, we are satisfied that disclosure of the *records* containing the information requested would reveal commercial and/or financial information supplied to the WRHA by the third party who would be affected by disclosure. We are also satisfied that the *records* containing the information requested were supplied to the WRHA explicitly in confidence and that the third party has consistently treated the *records* containing the information requested as confidential. Finally, we note that the third party involved objects to the disclosure of the *records* containing the commercial and/or financial information requested.

The Ombudsman found that clause 18(1)(b) of FIPPA applied to the *records* containing the information requested in item 1 regarding hourly rates that the WRHA pays to retain external legal counsel. As our office found that this exception applied to the *records* containing the information requested, we did not consider subclauses 18(1)(c)(i), (ii) and (iii) of FIPPA.

2. Do the discretionary exceptions to disclosure afforded by clauses 27(1)(b) and (c) of FIPPA apply to the *statements* containing the information requested?

The exceptions in subsection 27(1) of FIPPA provide that the head of a public body has the discretion to refuse to disclose information subject to solicitor-client privilege. The exception is a "class exception" in that it protects a certain type or kind of information in a record.

Clause 27(1)(b) of FIPPA is a discretionary exception to the right of access under section 7 of FIPPA. The head of a public body may refuse to disclose the information described in clause 27(1)(b) where the head determines that it would not be appropriate to disclose the requested information.

In order for clause 27(1)(b) of FIPPA to apply, the information must have been prepared by or for the private sector lawyer (external counsel) retained by the public body (the WRHA) in relation to a matter involving the provision of legal advice or legal services (the inquest).

The WRHA advised that the *statements* containing the information requested in items 1, 2, 4 and 6 of the complainant's application (hourly rates that the WRHA pays to retain external legal counsel; amount that WRHA has paid to external legal counsel to date; number of hours of legal work performed by external legal counsel to date; number of lawyers and law students who have provided services to WRHA to date) were withheld under clause 27(1)(b) of FIPPA.

Based on the information provided to our office by the WRHA, we are satisfied that the *statements* contain information prepared by the lawyer retained by the WRHA (external legal counsel) in relation to a matter (the representation of the WRHA at an inquest) involving both the provision of legal advice and legal services.

The Ombudsman found that clause 27(1)(b) of FIPPA applied to the *statements* containing the information requested in items 1, 2, 4 and 6 regarding hourly rates that the WRHA pays to retain external legal counsel, the amount that the WRHA has paid to external legal counsel to date, the number of hours of legal work performed by external legal counsel to date and the number of lawyers and law students who have provided services to WRHA to date. As our office found that this exception applied to the *statements* containing the information requested, we did not consider clause 27(1)(c) of FIPPA.

SUMMARY OF FINDINGS

1. The Ombudsman found that clause 18(1)(b) of FIPPA applied to the *records* containing the information requested in item 1 regarding hourly rates that the WRHA pays to retain external legal counsel.
2. The Ombudsman found that clause 27(1)(b) of FIPPA applied to the *statements* containing the information requested in items 1, 2, 4 and 6 regarding hourly rates that the WRHA pays to retain external legal counsel, the amount that the WRHA has paid to external legal counsel to date, the number of hours of legal work performed by external legal counsel to date and the number of lawyers and law students who have provided services to WRHA to date.

CONCLUSION

Based upon the findings of the Ombudsman, the complaint is not supported.

In accordance with subsection 67(3) of *The Freedom of Information and Protection of Privacy Act*, the complainant may file an appeal of the Winnipeg Regional Health Authority's decision to refuse access to the Court of Queen's Bench within 30 days following the receipt of this report.

May 25, 2010
Manitoba Ombudsman