Manitoba Ombudsman

REPORT WITH RECOMMENDATION ISSUED ON NOVEMBER 27, 2018

AND

REPORT ON COMPLIANCE WITH RECOMMENDATION

UNDER THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2017-0458

CITY OF WINNIPEG – WINNIPEG POLICE SERVICE

ACCESS COMPLAINT: CONTESTS DECISION THAT FIPPA DOES NOT APPLY TO THE RECORDS

PROVISION CONSIDERED: 4(i)

PUBLICLY RELEASED ON JANUARY 10, 2019

SUMMARY OF REPORT WITH RECOMMENDATION AND RESPONSE:

A request was made under the Freedom of Information and Protection of Privacy Act (FIPPA) to the City of Winnipeg – Winnipeg Police Service (WPS) for access to records about stayed breach charges. The WPS determined that the records related to an ongoing prosecution and were therefore not subject to FIPPA on the basis of clause 4(i) of the act.

Our office found that the records were subject to FIPPA and recommended that the WPS issue an access decision in response to the request for access. On December 5, 2018, the WPS provided its response to our report and accepted the recommendation.

On December 18, 2018, the WPS reported to our office that it had complied with the recommendation and issued an access decision to the complainant granting access in part to the responsive records.

Manitoba Ombudsman

REPORT WITH RECOMMENDATION UNDER

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REPORT ISSUED ON NOVEMBER 27, 2018

SUMMARY: **The complainant made an application for access to the City of Winnipeg - Winnipeg Police Service (the WPS) for copies of police records related to charges made against the complainant that were stayed by the Manitoba Prosecution Service. The WPS determined that the responsive records were not subject to the Freedom of Information and Protection of Privacy Act (FIPPA) as they were related to an ongoing prosecution and referenced clause 4(i) of FIPPA as the basis for this decision. A complaint was made to our office relating to this access decision. The ombudsman found that, with the exception of the recognizance, the responsive records were not related to an ongoing prosecution, and therefore the records were not excluded from FIPPA. The ombudsman recommended that the WPS issue an access decision to the complainant on the basis that the records, other than the recognizance, are subject to FIPPA.**

BACKGROUND

In June and July of 2016, the complainant was charged with offences (the substantive charges) and was subsequently released on a recognizance (a court order that imposes conditions the accused person must follow). In June of 2017, the Winnipeg Police Service charged the complainant with failure to abide by the conditions of the recognizance (the breach charges).

THE COMPLAINT

On November 3, 2017, the City of Winnipeg – Winnipeg Police Service (the WPS or the public body) received an access request from the complainant for the following records:

> *I am seeking all information from an arrest of my person on* [date]*, 2017 at* [address]. *These informations may consist of police notes, videos/audio recordings, written charges, police communications, etc. The information numbers are* [numbers removed].

In its response letter dated November 9, 2017, the WPS indicated that the requested records pertain to prosecutions pending before the courts. The WPS stated that the Freedom of Information and Protection of Privacy Act (FIPPA) does not apply to the records until all proceedings have concluded. The WPS relied on clause 4(i) of FIPPA for its decision that the records are excluded from the application of FIPPA.

On November 16, 2017, the complainant made a complaint to our office. The complainant explained that the breach charges were stayed in August of 2017. Therefore, he did not understand why the WPS had determined that the records were related to a prosecution for which all proceedings had not yet been completed.

SCOPE OF THE INVESTIGATION

The WPS determined that the records were excluded from FIPPA on the basis that the records related to a prosecution and all proceedings had not yet been completed, as described under clause 4(i) of the act:

> ***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;*

At issue in this investigation is whether the requested records are subject to clause 4(i) of FIPPA, which means that FIPPA does not apply to the records. If it is determined that FIPPA does not apply to the records, the complainant cannot pursue access to them under FIPPA.

However, if it is determined that FIPPA applies to the records, the complainant's access request must be dealt with under FIPPA and as a result, the public body would need to decide whether to give or refuse access based on exceptions set out in FIPPA. Accordingly, the scope of this investigation is to determine if the records are subject to FIPPA, not whether the records should be released under FIPPA.

ANALYSIS OF THE ISSUES AND FINDING

We obtained further information from the complainant and the public body. The complainant had advised our office that his lawyer informed him that all charges, to which the requested records relate, were stayed. He also provided written documentation to our office to confirm this. The breach charges were stayed or dropped by the Crown, meaning that there would be no prosecution of those breach charges (stayed breach charges).

The requested records are not about the prosecution of the substantive charges, which we understood was currently pending. Accordingly, it appeared that if the breach charges were stayed, the requested records may relate to proceedings that were considered to be completed. As it was not clear to our office whether the WPS was aware, at the time of its FIPPA decision, that the breach charges were stayed, we consulted with the WPS.

The WPS advised that it was aware that the breach charges were stayed, but indicated that it was of the view that the records related to the prosecution of the substantive charges, which was still pending. The WPS indicated that it would not be appropriate for the WPS to presume to determine what evidence a Crown attorney may find relevant to a prosecution and therefore, while the other charges were pending, the WPS considered the requested records to be outside the scope of FIPPA.

During subsequent discussions with our office the WPS maintained and provided further context for its position. The WPS referenced several legal cases that identified certain circumstances in which stayed charges could be considered to be related to a current prosecution of a different matter.

The WPS also advised our office that, subsequent to discussions with our office, it had consulted with the Manitoba Prosecution Service (Prosecutions) in reaching its decision. This information is described in greater detail later in the report. Our office also consulted with Prosecutions and sought a legal opinion from legal counsel in relation to this matter.

The WPS was of the view that because it had determined that the requested records are not subject to FIPPA, it did not need to provide copies of the records for our office's review. Nevertheless, the WPS did provide our office with supporting documentation about how it processed the access request and how it determined that FIPPA did not apply to the responsive records. The WPS also provided our office with a list of the charges and their status before the courts and a copy of the complainant's recognizance.

As our office was not provided with copies of the responsive records, our analysis of the issues and findings are based on our knowledge of typical contents of police files, and our understanding of the circumstances of the complainant's case. It is our office's understanding that a criminal case file generally contains police notes, a police narrative, witness statements, copies of any relevant court records, such as a recognizance, a copy of the accused's criminal record and copies of any paper/electronic evidence which was gathered in relation to the offence.

Are records of a stayed breach charge related to the prosecution of a substantive charge and therefore not subject to FIPPA under clause 4(i)?

Section 4 of FIPPA sets out the types of records that are not subject to FIPPA, even if they are in the custody or under the control of a public body. Clause 4(i) of FIPPA states that FIPPA does not apply to records relating to a prosecution if all proceedings concerning the prosecution have not been completed.

To determine what kinds of records clause 4(i) applies to, we must first determine what the words "relating to a prosecution" mean. *Ministry of the Attorney General v. Toronto Star et al.*[1] (*Toronto Star*) is a case under Ontario's FIPPA legislation, where the court was tasked with determining whether the records in question were excluded from the Ontario FIPPA, under subsection 65(5.2):

> *(5.2) This Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed*

The court reviewed a decision made by an adjudicator on behalf of the Information and Privacy Commissioner of Ontario that the records at issue in that case did not relate to a prosecution. In particular, two of the aspects of the adjudicator's decision that the court reviewed were the purpose of the section excluding records under the Ontario provision and he meaning of "relating to."

In *Toronto Star*, the court found that the purpose of the section was to ensure that the accused got a fair trial and to ensure that the protection of solicitor-client and litigation privilege were not unduly jeopardized by the production of prosecution records.

With respect to the phrase, "relating to", the court noted that when interpreting legislation, the Supreme Court of Canada (the SCC) has indicated that there is only one principle or approach; that the words of an act should be read in their entire context and in their grammatical and ordinary sense given the scheme and purpose of the act[2]. While the SCC has not specifically examined the meaning of the phrase "relating to," it has examined the meaning of the phrase "in respect of" and found the following:

> *The appellant's submission turns on whether these proceedings are undertaken "in respect of a cause of action". The words "in respect of" have been held by this Court to be words of the broadest scope that convey some link between two subject matters. See* Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 39, per Dickson J. (as he then was):*
>
> > *The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with".*

[1] *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII), <http://canlii.ca/t/28wk8>, retrieved on 2018-04-27 [*Toronto Star*]

[2] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, at para 21, 1998 CanLII 837 (SCC), <http://canlii.ca/t/1fqwt>, retrieved on 2018-04-27 [*Rizzo*]

> *The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.*
>
> *In the context of s. 32, the words "in respect of" require only that the relevant proceedings have some connection to a cause of action.*[3]

The court, in *Toronto Star*, found that based on the SCC's findings, the phrase "relating to" required that there be some connection between the records and the prosecution, but that a substantial connection was not required as the adjudicator held. The court also examined how the adjudicator's interpretation of "relating to" worked with the purpose of the section and the act as a whole.

Based on the analysis by the court in *Toronto Star*, our office concluded that there are two considerations, both of which a public body must show to be present, in order for records to be excluded on the basis that the records relate to a prosecution:

1. The records must have some connection to an active prosecution. The records must either be part of or have the potential to be used during the prosecution, independent of whether they are currently in the Crown's file.

2. The exclusion of the records must be in line with the purpose of the section. I.e. it must be shown that if the records were disclosed that the disclosure could have an effect on the fairness of the trial, interfere with the Crown's ability to try the case or put a type of privilege in undue jeopardy.

Each of these requirements is examined below in greater detail.

1. Is there "some connection" between the responsive records and the prosecution?

First, we considered whether the records will be used or have the potential to be used in the prosecution of the substantive charges. From our review of the available information, with the exception of any court records (discussed later in our report), the records excluded by the WPS did not appear to meet this test. This is so because records related to breach charges generally cannot be used by the prosecution or referenced during the trial for the substantive charges. The SCC stated in *R v G.(S.G.)*[4] that

> "[i]t is trite law that 'character evidence' which shows *only* that the accused is the type of person likely to have committed the offence in question is inadmissible."

[3] *Markevich v. Canada*, [2003] 1 SCR 94, at para 26, 2003 SCC 9 (CanLII), <http://canlii.ca/t/1g2hz>, retrieved on 2018-04-27 [*Markevich*]

[4] *R. v. G. (S.G.)*, [1997] 2 SCR 716, at para 63, 1997 CanLII 311 (SCC), <http://canlii.ca/t/1fr1d>, retrieved on 2018-04-27 [*R. v. G. (S.G.)*]

Based on the above and supported by the legal opinion we received, it is an impermissible inference to argue that because an accused has committed other crimes, they are likely to have committed the one for which they are on trial. So, even if the complainant had plead guilty to the breach charges (which is not the case), the records related to them could not be used as evidence in the trial on the substantive charges.

There are only two exceptions to this principle. One exception is if the accused lies on the stand and states that they have never committed a crime or something similar, which would open the door for the Crown to bring up a previous conviction in cross-examination of the accused.

The other exception is if the Crown makes a "similar-fact" application, which would require the Crown to prove that the actions taken committing the other offences are substantially similar to the ones committed in the subject offence and that those actions are so distinct as to be considered a unique identifier or "calling card" of the perpetrator.

However, these factors do not apply in this circumstance and cannot apply as the charges were stayed. Therefore, they cannot be used to prove that the accused has committed previous crimes and cannot be used as similar-fact evidence. Our office brought *R. v. G. (S.G.)* to the WPS's attention for its response. The WPS confirmed that its position had not changed. In support of its position, the WPS referenced several legal cases. We will now consider the specific arguments brought forward by the WPS.

1.1 Is the recognizance related to the prosecution?

In its April 17, 2018 letter, the WPS took several positions in relation to whether clause 4(i) applies to the responsive records. The first position was that given that the applicant's request is for records relating to charges for breaches of a recognizance, which is still in effect, the records relate to a prosecution.

Our office agrees that the recognizance itself may fall under clause 4(i) as the recognizance is related to the substantive charges. The recognizance could legally be entered into evidence in the prosecution of the substantive charges, though it is our understanding that such an action is unlikely given that the recognizance is evidence that charges were laid but not evidence of the charges themselves. Our office also notes that the recognizance is a court record. Under clause 4(a) of FIPPA, court records are not subject to FIPPA.

However, the remainder of the records relating to the breach charges, such as police notes, arrest records and narrative reports could not legally be entered as evidence of the substantive charges due to *R. v. G. (S.G.)*, as discussed above.

1.2 Does the potential use of records as part of a Crown's discretion relate that record to a prosecution?

The WPS indicated that it spoke with the Manitoba Prosecution Service (Prosecutions) and Prosecutions indicated concerns with releasing the records. Prosecutions was of the view that the charges "reflect incidents that are considered by [Prosecutions] in exercising their discretion on related charges."

However, our office notes that, in an effort to limit the amount of information it disclosed, the WPS did not inform Prosecution of the nature of the case or provide the complainant's name. Therefore, the comments provided by Prosecutions to the WPS were broad and only related to whether Prosecutions may have an issue with such records being released, not whether Prosecutions had any concerns related to this specific case.

It is our view that the possibility that Prosecutions may use previous charges as a factor in determining whether to proceed with new charges does not mean that the previous charges are "related to a prosecution where all proceedings concerning the prosecution have not been completed." If this were the case, then police records would constantly be in a state of flux even years after the prosecution of the charges was complete.

In addition, as discussed above, records relating to a prosecution must have some possibility of being used as evidence in a prosecution, not just by Prosecutions when considering whether to lay charges. While stayed charges can inform Prosecutions' discretion, information about them cannot be used as evidence in a future prosecution.

1.3 Can information about stayed charges be used for any other purposes in a future prosecution?

The WPS also suggested that information about the stayed breach charges could be used for a variety of purposes, including by the accused during Charter of Rights and Freedoms (charter) arguments or sentencing and as evidence of the state of mind of the accused if there are further breaches.

Arguments under the charter are based on the position that the state violated the accused's rights in relation to the charges before the court. However, it is our understanding that a violation of an accused's charter rights during his arrest or trial for breach charges could not be used to argue that the substantive charges should be dismissed. The accused would have to show that his charter rights were violated during his arrest or trial for the substantive charges.

It is our understanding that information about stayed charges would not be used in relation to sentencing for the substantive charges. The fact that an individual has received a stay of proceedings has no probative value. A stay does not mean that the person is innocent, it simply means that there was not enough evidence to proceed. There is no basis to expect that the defense would bring stays of proceedings to the judge's attention given that they would not mitigate an accused's sentence in any way.

Again, as mentioned above, stayed charges cannot legally be used to show the accused's state of mind with respect to other charges. Therefore, even if the complainant received further breach charges, the stay of his past breach charges could not be entered into evidence. Our office is unable to conclude that the information about the stayed breach charges could be used in a future prosecution by either the complainant or Prosecutions.

1.4 Does the case of R. v. Mahalingan suggest that the records at issue in this case could be used in the complainant's prosecution?

In its most recent representations to our office, the WPS referenced the case of *R. v. Mahalingan*[5]. The WPS was of the view that *Mahalingan* supported its position that evidence from breach charges could be used in a future prosecution. Based on our review, however, the facts in *Mahalingan* are substantially different from those in this case.

In *Mahalingan* the accused had previously been convicted after a trial and was then acquitted of other charges. The accused argued that the evidence from his second trial, which brought into question the credibility of the eyewitness in the first trial, should be considered during his appeal of his conviction.

In *Mahalingan*, the court discussed the concept of *res judicata* which is Latin for "a thing adjudicated." Essentially, *res judicata* prevents an issue from being re-litigated. There are two doctrines that make up *res judicata*. The first doctrine is action estoppel, which prevents the re-litigation of the same cause of action; in the criminal context this is also known as "double jeopardy." The second doctrine is issue estoppel, which is concerned with whether an issue to be decided in the current action is the same as one decided in a previous action.

The WPS argued that the responsive records in this case are related to a prosecution because the complainant may use them under the doctrine of issue estoppel in his trial for the substantive matters. However, our office does not find that the WPS's analysis of *Mahalingan* applies to the facts of this matter. The doctrine of issue estoppel relates to evidence introduced during a proceeding where findings were made.

In the complainant's case, unlike in *Mahalingan*, there were no findings because a stay of proceedings by the Crown is not a finding but rather an exercise of discretion. A stay of proceedings by a judge is a finding, but a judge is also required to provide reasons for their decision and base that decision on a legal principle.

Subsection 579.1(1) of the Criminal Code allows the attorney general or their counsel to stay any proceeding at any time for any reason. In our view, the principles set out in *Mahalingan* do not apply to the circumstances of this case as no findings were made in relation to the breach charges.

Based on our review and consideration of the representations of the WPS and Prosecutions, our office found that the records for the breach charges did not have enough of a connection to the prosecution of the substantive charges. The records for the breach charges cannot be used as evidence in the prosecution of the substantive charges or any future charges and cannot be used in any future sentence hearing. Therefore, the first consideration set out in *Toronto Star* is not satisfied. We will now move on to the second of the two considerations.

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[5] *R. v. Mahalingan*, [2008] 3 SCR 316, 2008 SCC 63 (CanLII), <http://canlii.ca/t/21h5z>, retrieved on 2018-04-30 [*Mahalingan*]

2. *Could the disclosure of the records have an effect on the fairness of the trial, interfere with the Crown's ability to try the case, or put a type of privilege in undue jeopardy?*

Our office reviewed the information provided by the WPS about its position, and in relation to its consultation with Prosecutions. We determined, based on the seriousness of the matter and the potential impact to the prosecution of the complainant's substantive charges (or other similar matters), that it was necessary to clarify certain points directly with Prosecutions. We advised the WPS of our decision to consult Prosecutions.

Our office then contacted Prosecutions to seek its position with respect to the records at issue. As noted above, Prosecutions advised our office that when it was initially consulted by the WPS, the WPS did not disclose the complainant's identity, and therefore Prosecutions' feedback was not based on the specific circumstances of the complainant's case.

We note that our office would generally expect that a public body would not disclose the identity of an access requester when consulting another public body, unless the public body determined that disclosure of the information was necessary for the consultation.

This would be consistent with best practices set out in our practice note, *Protecting the Privacy of Access Requesters*[6]. During our investigation, it became clear to our office that in order to obtain input from Prosecutions that would be specifically relevant to the complainant's case, we would need to share the complainant's identity.

With the complainant's consent, we made his identity known to Prosecutions, so it could be determined whether there were circumstances, in his particular case, that meant that the stayed charges could be considered to relate to the current prosecution. Prosecutions responded in writing to our office and provided clarification of its position regarding whether stayed charges fall under clause 4(i) of FIPPA, both generally, and in relation to the complainant's particular circumstances.

Prosecutions provided its general position in relation to the value of information about stayed charges in current prosecutions, noting that there were situations where the information about stayed charges may be relevant to current prosecutions. Consistent with the information provided to our office by the WPS, Prosecutions gave several examples of such situations, including:

- To determine if witnesses in the current prosecution are being intimidated
- To determine if witnesses in a current prosecution are reliable
- Using statements or versions of events by an accused to challenge credibility
- In determining the appropriateness of diverting a prosecution
- For historical prosecutions – older, stayed files have had significant relevance where abuse has previously been reported

[6] *Protecting the Privacy of Access Requesters*, Practice Notes, Manitoba Ombudsman, online: < https://www.ombudsman.mb.ca/uploads/document/files/pn-bbt13-protecting-the-privacy-of-access-requesters-en.pdf >

- Because breach charges can be about actions or behaviour that is abusive in nature, such as repeated contact with a victim, information about stayed charges can therefore inform the handling of the substantive charge that remains outstanding.

Our office notes that Prosecutions did not cite any of these instances in reference to the complainant's case, but rather as a general overview of the considerations made by Prosecutions. Prosecutions stressed that any disclosure related to the stayed charges should take into account and protect the privacy of third parties.

As indicated earlier in this report, the scope of the investigation is whether FIPPA applies to the records and not whether the records contain information that is subject to exceptions to disclosure, including mandatory exceptions that protect the personal information of a third party.

We reviewed the circumstances identified by Prosecutions, and we concluded, based on the information available to us, that none of the situations outlined by Prosecutions applied in this instance. We noted that the stayed charges do not relate to contact with the alleged victims or witnesses and occurred after the alleged commission of the substantive offences.

Based on our review and consideration of the representations of the WPS and Prosecutions, there was no information to suggest that disclosure could impact the fairness of the trial, interfere with the Crown's ability to try the case, or put a type of privilege in undue jeopardy, in relation to the second of the two considerations set out in *Toronto Star.*

As the WPS was copied on the letter our office received from Prosecutions, our office asked the WPS whether this changed its position that the records were excluded from FIPPA. The WPS confirmed that its position was unchanged, and it remained of the view that the records were excluded from FIPPA under clause 4(i).

CONCLUSION

In order to rely on clause 4(i) of FIPPA to exclude records from FIPPA, a public body must demonstrate that this provision applies to the records at issue. The Ontario Superior Court of Justice in *Toronto Star* found that for records to relate to a prosecution they must relate to an ongoing prosecution and have the potential to be used during the prosecution.

The court also stated that the exclusion of records must be in line with the purpose of the section under which they are excluded. In this case, the purpose of the section is to protect the fairness of the trial, prevent interference with the Crown's ability to prosecute and to prevent the breaching of any type of privilege that might be attached to the records.

Our office acknowledges that it is not an expert in the prosecution of offences. In order to understand the concerns and issues, our office sought representations from WPS and from Prosecutions.
The representations of the WPS and Prosecutions did not, in our opinion, establish that disclosure of the records at issue (about stayed breach charges) could impact the fairness of the

trial on the substantive charges; interfere with the Crown's ability to try the case; or put a type of privilege in undue jeopardy. Nevertheless, the WPS did not agree to reconsider its position and issue a new decision on the basis that FIPPA applies to the records.

Our office also sought, and received, a legal opinion from independent legal counsel to ensure that the analysis conducted by our office in this report was consistent with the legal meaning of the cases reviewed. The legal opinion received by our office indicated agreement with the analysis and finding of our office.

Accordingly, our office cannot find that clause 4(i) of FIPPA applies to the responsive records, with the exception of the recognizance itself. Based on the ombudsman's finding in this matter, the complaint is supported in part. This being the case, the ombudsman is making a recommendation to WPS.

As noted earlier in this report, a finding that records are not excluded from FIPPA under clause 4(i) does not mean that the records must be disclosed to the complainant. It means that an access decision must be made under section 12 of FIPPA, on the basis that FIPPA applies. The public body must then decide what information or records to disclose to the complainant and whether mandatory or discretionary exceptions to disclosure set out in FIPPA apply to the records.

RECOMMENDATION

Based on our office's finding that clause 4(i) of FIPPA does not apply to the records about the stayed breach charges, the following recommendation is made:

> The ombudsman recommends that the City of Winnipeg - Winnipeg Police Service issue a revised access decision to the complainant under section 12 of FIPPA concerning access to the responsive records, with the exception of the recognizance itself, on the basis that the records are subject to the act.

HEAD'S RESPONSE TO THE RECOMMENDATION

Under subsection 66(4), the City of Winnipeg – Winnipeg Police Service 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 November 27, 2018, the head shall respond by December 12, 2018. 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 City of Winnipeg – Winnipeg Police Service's response to his recommendation, he 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.

November 27, 2018
Marc Cormier
A/ Manitoba Ombudsman

Manitoba Ombudsman

REPORT ON COMPLIANCE WITH RECOMMENDATION UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2017-0458

CITY OF WINNIPEG – WINNIPEG POLICE SERVICE

ACCESS COMPLAINT: CONTESTS DECISION THAT FIPPA DOES NOT APPLY TO THE RECORDS

SUMMARY: In a letter dated December 5, 2018, the City of Winnipeg - Winnipeg Police Service (the WPS) provided its response to the ombudsman's report with a recommendation under the Freedom of Information and Protection of Privacy Act accepting the recommendation. On December 18, 2018, the WPS reported to the ombudsman that it had complied with the recommendation to issue an access decision in relation to the records responsive to the complainant's access request.

COMPLIANCE WITH THE RECOMMENDATION

On November 27, 2018, the ombudsman issued a report with a recommendation in this case following the investigation of a complaint against the City of Winnipeg - Winnipeg Police Service (the WPS) about its decision that the requested records were not subject to the Freedom of Information and Protection of Privacy Act (FIPPA).

On December 5, 2018, the WPS responded to the ombudsman and accepted the recommendation, as follows:

> *The Winnipeg Police Service ("WPS") accepts the recommendation contained therein and an access decision will be made within 15 days of today's date.*

Under subsection 66(6) of FIPPA, when a public body accepts a recommendation it is required to comply with the recommendation within 15 days or within such additional time as the ombudsman considers reasonable. In accepting the recommendations, the WPS agreed to provide the access decision to the complainant within 15 days.

On December 10, 2018, the ombudsman responded that the deadline for compliance with the recommendation in this matter was December 20, 2018. As required under subsection 66(5) of FIPPA, the complainant was notified regarding the city's response to the recommendation in this matter without delay.

On December 18, 2018, the ombudsman received a letter from the WPS. In the letter, the WPS reported that it had complied with the recommendation to issue an access decision to the complainant in relation to the records responsive to his access request.

The access decision, dated December 13, 2018, indicated that access was granted in part and that information was redacted from the records under clauses 17(2)(b), 17(2)(e), 25(1)(c), 25(1)(e) and 27(1)(b) and section 26 of FIPPA. The access decision also informed the complainant of his right to make a complaint to our office about the decision to refuse access to some of the requested information.

Our office confirmed with the complainant that he had received the access decision. Based on this, our office finds that the WPS complied with the recommendation made by our office. As required by subsection 66(5) of the Freedom of Information and Protection of Privacy Act, the ombudsman is advising the complainant by this report that he will not be requesting that the information and privacy adjudicator review this matter.

OTHER MATTER

In its response to our recommendation, the WPS identified a concern with the wording of our report in relation to its position. Specifically, the WPS observed that a reader of the report could believe that the WPS put forward the argument that the records could be used to support an inference that the applicant is the type of person likely to have committed the offence in question. The WPS notes that it did not put forward this argument.

To ensure clarity, our office can confirm that the only position taken by the WPS was that the responsive records were related to a prosecution. Based on this position, our office examined the various ways in which records of other charges could relate to the prosecution of active charges. One of the ways such records could relate to a prosecution is if they could be used as evidence in the trial of the active charges.

Accordingly, in our analysis we considered whether such records could be used as evidence to support an inference that the applicant is the type of person likely to have committed the offence in question. While our analysis was based on the position of the WPS, that the records were related to the prosecution, the WPS did not take the position that the responsive records would be used as evidence in this manner.

CONCLUSION

The ombudsman is satisfied that the City of Winnipeg - Winnipeg Police Service has complied with the recommendation contained in our report.

Marc Cormier
Acting Manitoba Ombudsman
December 21, 2018