

# Manitoba Ombudsman

## REPORT UNDER

### THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2021-1779/MO-00328

#### MANITOBA JUSTICE

#### ACCESS COMPLAINT: REFUSED ACCESS

**PROVISIONS CONSIDERED: 23(1)(a), 23(2)(b), 23(2)(c), 25(1)(a), 25(1)(c), 25(1)(k), 25(1)(i), 25(1)(n) and 26**

**REPORT ISSUED ON JULY 25, 2023**

**SUMMARY:** The complainant made 6 applications for access to Manitoba Justice (Justice or the public body) for copies of procedures and standing orders related to segregation, suicide prevention and other related topics. Justice refused access to portions of the records under clauses 23(1)(a), 25(1)(a), 25(1)(c), 25(1)(i), 25(1)(k), 25(1)(n) and section 26 of *The Freedom of Information and Protection of Privacy Act* (FIPPA). A complaint was made to our office relating to this refusal of access. Our office reviewed the redactions made by Justice and, as we determined that the exceptions did not apply to the majority of the information originally withheld, we asked the public body to issue a revised access decision. Justice did so and our office reviewed the revised access decision as well. Our office discussed the remaining redactions and asked Justice to further reconsider its position. Justice agreed to issue a further revised access decision, in which much of the previously withheld information was released. We determined that the exceptions applied to the remaining withheld information. However, as we found that the claimed exceptions did not apply to the majority of the information that was originally withheld, the complaint is partly supported.

#### BACKGROUND AND COMPLAINT

Manitoba Justice (Justice or the public body) received the complainant's requests for access under *The Freedom of Information and Protection of Privacy Act* (FIPPA) for the following records on May 14, 2021:

**FIPPA # 2021-214:** " Please provide copies of all Corrections Division policies with respect to segregation, preventive segregation, and administrative segregation at provincially-administered adult and youth custodial facilities. For greater clarity, "provincially administered adult and youth custodial facilities" includes the Agassiz Youth Centre, Brandon Correctional Centre, Dauphin Correctional Centre, Headingly Correctional Centre, Manitoba Youth Centre, Milner Ridge Correctional Centre, Portage Correctional Centre, Winnipeg Remand Centre (formerly the Provincial Remand Centre), and The Pas Correctional Centre, as well as the Bannock Point Camp and Egg Lake Camp."

**FIPPA # 2021-215:** "Please provide copies of the following Standing Orders applicable at the Manitoba Youth Centre: #03-964 Segregation of a Young Person; #03-965 Use of Observation Units; #02-841 Temporary Restrictions; #02-840 Discipline; #02-602 Admission of Young Person to MYC."

**FIPPA # 2021-216:** "Please provide copies of the following Standing Orders applicable at the Agassiz Youth Centre: #510 Lakewood Referrals and Admissions; #965 Confinement of Residents; #906A Medical Isolation; #968 Referral for Forensic Services; #840 Discipline."

**FIPPA # 2021-217:** "Please provide copies of all Standing Orders applicable at provincially-administered adult and youth custodial facilities with respect to preventive segregation, administrative segregation, segregation of young persons, medical isolation, confinement of inmates, discipline, disciplinary penalties, temporary restrictions, observation units (where applicable), special handling units (where applicable), and medical treatment for segregated inmates. For greater clarity, "provincially administered adult and youth custodial facilities" includes the Agassiz Youth Centre, Brandon Correctional Centre, Dauphin Correctional Centre, Headingly Correctional Centre, Manitoba Youth Centre, Milner Ridge Correctional Centre, Portage Correctional Centre, Winnipeg Remand Centre (formerly the Provincial Remand Centre), and The Pas Correctional Centre, as well as the Bannock Point Camp and Egg Lake Camp."

**FIPPA # 2021-218:** "Please provide a copy of the Agassiz Youth Centre post order #215 Lakewood Procedure."

**FIPPA # 2021-219:** "Please provide copies of the following Corrections Division policies: Use of Force Contingency; Youth - Suicide Prevention; Youth Self-harm; Detention of Intoxicated Persons."

On July 14, 2021, the public body notified the complainant that it was granting access in part. Justice informed the complainant that some information was redacted from the records under provisions 23(1)(a), 25(1)(a), 25(1)(c), 25(1)(k), 25(1)(i), 25(1)(n) and 26 of FIPPA. On July 20, 2021, our office received a complaint related to Justice's decision to refuse access.

## INVESTIGATION

After receiving the complaint our office reviewed the access decision and the redacted records provided to our office by the complainant. During this review we noted that while the headings or ‘title’ information for various policies and standing orders contained within the responsive records were released; all the substantive information (the bodies of the records) was withheld.

Much of this information was redacted under clause 23(1)(a) of FIPPA:

***Advice to a public body***

***23(1)*** *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal*

*(a) advice, opinions, proposals, recommendations, analyses or policy options developed by or for the public body or a minister;*

However, information of this type is also subject to the limits to the exception in subsection 23(2). In this case, our review determined that clauses 23(2)(b) and/or clause 23(2)(c) likely applied to the redacted information.

***Exceptions***

***23(2)*** *Subsection (1) does not apply if the information*

*(b) is an instruction or guideline issued to officers or employees of the public body;*

*(c) is a substantive rule or statement of policy that has been adopted by the public body for the purpose of interpreting an enactment or administering a service, program or activity of the public body;*

Our office contacted the public body on July 29, 2021 asking it to reconsider its decision to withhold the redacted information or provide further details on how the cited sections of FIPPA applied and to explain what, if any, consideration was given to subsection 23(2). On August 26, 2021, a revised access decision was issued and the public body indicated that it was no longer relying on section 23.

However, none of the previously redacted information was released and the public body was still relying on sections 25 and 26. Our office contacted the public body on September 2, 2021 and requested a detailed explanation of how it determined that the cited exceptions to disclosure applied to the information. We also asked for unredacted copies of the responsive records.

Unredacted copies of the records were provided to our office in November 2021, however, the Justice employee that did the initial review of the records was no longer with the Justice FIPPA unit, and the new staff needed time to review the file and determine why the redactions were applied.

In February of 2022, we received an email from Justice which explained that the general principle is that the department does not disclose policies, procedures, and forms that relate to the security of the correctional facilities.

However, that rationale is not sufficient to support a refusal of access under sections 25 and 26. A fundamental principle of FIPPA is the disclosure of information. It is a settled position within Manitoba Jurisprudence that “*disclosure is the rule, not the exception.*”. This principle was first set out in *Oakley v. Minister of Health of Manitoba*<sup>1</sup> and has been reaffirmed in several Manitoba Court decisions, with the most recent being *Annable (CBC) v. City of Winnipeg*<sup>2</sup>.

Refusals of access should only occur when absolutely necessary. This is especially true in relation to the discretionary provisions of FIPPA. Public bodies should only use their discretion to refuse access under these sections if necessary to prevent harm from occurring.

Subsection 25(1) of FIPPA gives the head of a public body the discretion to refuse to disclose information where disclosure would be harmful to law enforcement or legal proceedings. Justice relied on the exceptions in clauses 25(1)(a), 25(1)(c), 25(1)(i), 25(1)(k), and 25(1)(n) which provide as follows:

***Disclosure harmful to law enforcement or legal proceedings***

***25(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to***

- (a) harm a law enforcement matter;*
- (c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement;*
- (i) facilitate the commission of an unlawful act or interfere with the control of crime;*
- (k) interfere with the proper custody or supervision of an individual who is lawfully detained;*
- (n) be injurious to the conduct of existing or anticipated legal proceedings.*

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<sup>1</sup> *Oakley v. Minister of Health of Manitoba*, 1995 CanLII 16375 (MB KB), <<https://canlii.ca/t/gbrd9>>, retrieved on 2023-07-25

<sup>2</sup> *Annable (CBC) v. City of Winnipeg*, 2022 MBKB 222 (CanLII), <<https://canlii.ca/t/jt67s>>, retrieved on 2023-07-25

Justice also relied on section 26 of FIPPA, which provides the head of a public body with the discretion to refuse to disclose information that could reasonably be expected to harm or threaten the security of any property or system. Section 26 reads as follows:

***Disclosure harmful to security of property***

**26** *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to harm or threaten the security of any property or system, including a building, a vehicle, an electronic information system or a communications system.*

The public body did not explain why specific information was redacted or how the cited sections of FIPPA applied to the redacted information. Also, the public body did not explain how it decided to exercise its discretion to redact that information, which is required as the cited sections are discretionary rather than mandatory<sup>3</sup>.

Our office wrote to Justice, detailing the requirements of FIPPA and giving examples of redactions that did not seem to meet those requirements, and we met with Justice staff to further discuss these issues.

After our meeting with the public body, Justice issued a revised access decision and released a significant amount of information that had previously been redacted. However, there was still large portions of the records redacted, and the complainant did not consider the complaint to be resolved on the basis of the revised decision.

The complainant also pointed out that the Supreme Court of Canada (SCC) interpreted similar provisions of the Ontario legislation in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*<sup>4</sup>, and held that an institution must demonstrate "a reasonable expectation of probable harm" in order to justify non-disclosure, and that such an expectation must be supported by evidence which goes "'well beyond' or 'considerably above' a mere possibility of harm".

Our office recognizes that, due to the nature of its work, Justice has a special need to protect certain information from being released. This is especially true in relation to information about the security or processes of correctional facilities. However, much of the remaining redacted information did not seem to be of the type that would bring harm to the security of correctional facilities or staff and inmates if released.

We reviewed the responsive records and found that much of the redacted information seemed to be of the type that was either known to the public through case law, media stories or inquests into segregation or would be easily assumed through common sense. There did not seem to be a reasonable expectation of probable harm.

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<sup>3</sup> Mandatory sections of FIPPA (s. 17 – 20) require public bodies to redact information. Discretionary exceptions (s. 21 – 32) authorize public bodies to redact information at their discretion, to prevent harm.

<sup>4</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), [2014] 1 SCR 674, <<https://canlii.ca/t/g6lzb>>, retrieved on 2023-07-20 (

Our office wrote to Justice again on April 13, 2023, and further explained our position that much of the redacted information did not fall under the requirements of sections 25 or 26. Our office also referenced the SCC case and the test set out in it. As Justice had not established that the exceptions applied to much of the information, we asked the public body to reconsider its position again and to release this information. We advised the public body that if the information was not released, and if the public body could not demonstrate the exceptions applied, our office would need to make a formal recommendation under FIPPA to release much of the information.

On July 4, 2023, Justice informed our office that it was issuing another revised access decision and provided us with a copy of the decision and the responsive records with the new redactions. Our office reviewed the new decision and responsive records and noted that Justice was now releasing a significant amount of additional information.

In its revised access decision Justice cited clauses 24(a), 25(1)(c), 25(d), 25(1)(e), 25(1)(i), 25(1)(k) and section 26. Justice also explained how each section applied to the redacted information and what harm(s) it was trying to prevent by redacting that information.

Before finalizing our review of the application of the exceptions to the information that continued to be withheld, our office gave the complainant the opportunity to provide any further representations they may have about the revised decision and the information that continued to be withheld. The complainant did not provide further representations.

The information that remains redacted relates to specific security procedures and Justice provided information related to how the release of each specific piece of information could put staff and inmates of correctional facilities at risk of harm. It is also clear that Justice considered whether there was a real risk of probable harm as while these security procedures were not disclosed, information about other security procedures where the risk of harm is less probable was not redacted from the records.

Based on our review of the remaining withheld information along with the explanation Justice provided for the application of exceptions and its exercise of discretion, our office determined that the cited sections of FIPPA applied to the limited amount of information that continued to be withheld, and that Justice appropriately exercised its discretion not to release the redacted information.

## **CONCLUSION**

Based on our findings, the complaint is partly supported.

In accordance with subsection 67(3) of *The Freedom of Information and Protection of Privacy Act*, the complainant may file an appeal of Manitoba Justice's decisions to refuse access to the Court of King's Bench within 30 days following the receipt of this report.

July 25, 2023  
Manitoba Ombudsman