



**MANITOBA
OMBUDSMAN**

FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT INVESTIGATION REPORT

Executive Council

Refused Access

**CASE# MO-03643
Final Report with
Recommendations &
Response**

Issued to Public Body:
April 1, 2026

Published with
Response:
June 2, 2026

**Provisions considered:
FIPPA - 12(2)(a)**



SUMMARY

The complainant made a request under The Freedom of Information and Protection of Privacy Act (FIPPA or the Act) to Executive Council for threat or threat assessment records involving elected officials. The public body responded that, pursuant to subsection 12(2) of FIPPA, it was refusing to either confirm or deny the existence of records containing the information requested and the requests for access were, therefore, refused.

Clauses 12(2)(a) of FIPPA is a discretionary provision. It states that the head of a public body may refuse to confirm or deny the existence of a record containing information described in section 24 (disclosure harmful to individual or public safety) or 25 (disclosure harmful to law enforcement or legal proceedings) of the Act.

Our office considered whether the requested records, if they existed, would be subject to sections 24 or 25 of FIPPA and, if so, whether a refusal to confirm or deny the existence of the requested records would be a reasonable exercise of discretion by the public body.

We concluded that, if records as requested existed, they may contain the type of information described in the exceptions. However, given the fact that it is common knowledge that elected officials are receiving threats, the decision to refuse to confirm or deny the existence of records in this case did not appear to be reasonable. As such, the complaint was supported and our office issued a recommendation to Executive Council.

The public body complied with the time limit to respond in writing to our report and recommendations. It accepted the recommendation however, requested additional time to reprocess the access decision. The revised access decision was provided to the complainant on May 20, 2026, within the extended timeframe requested by the public body.

BACKGROUND AND COMPLAINT

On February 3, 2023, the Manitoba Finance Access and Privacy Branch received a request under The Freedom of Information and Protection of Privacy Act (FIPPA), seeking access to the following records from the Executive Council (the public body):

Please provide all records of threats against, or threat assessments involving, the premier and cabinet ministers, including who the threat was made against, when the threat was received, how it came in (social media, phone call, email, etc.), what

the threat involved, if the threat was investigated, and what was the outcome of the investigation (substantiated/unsubstantiated/forwarded to police, etc.).

Timeframe: January 1, 2022 to December 31, 2022

In responding to the request on March 3, 2023, the public body advised it was refusing to confirm or deny the existence of the requested records under clause 12(2)(a) of FIPPA. Further the public body stated that if the requested records existed, the information in them would fall within the exceptions to disclosure in sections 24 and 25 of FIPPA and access would be refused.

These sections (24 and 25) address the issue of a reasonable expectation of harm resulting from disclosure of the requested records.

A complaint concerning the decision was received on March 7, 2023. In discussing the complaint with our office, the complainant indicated that they had made similar requests in other provinces and federally. In response to those requests, the complainant advised they received a deidentified report containing the date, source of the threat and a summary of the incident and said they felt it would be reasonable for the public body to provide something similar.

PURPOSES OF FIPPA

One of the purposes of FIPPA, as set out in clause 2(a), is to allow any person a right of access to records in the custody or under the control of a public body. The right of access to records promotes the public interest by ensuring government decision making is accountable and transparent.

This right of access is also subject to exceptions set out in the legislation, which serve to protect other important public interests, including but not limited to, individual or public safety and law enforcement or legal proceedings. These exceptions recognize that, in certain circumstances, the public interest is best served by withholding rather than releasing records.

To ensure the purposes of the legislation are met, the Act imposes several obligations on a public body that receives a request for access. The obligations include the duty to assist an applicant (under section 9), a requirement to respond within a specific time period (under section 11) and a requirement to provide certain information to an applicant in responding to an application (under section 12). The requirements of section 12 of FIPPA are relevant to this complaint.

FRAMEWORK OF THE OMBUDSMAN'S REVIEW

Clause 12(1)(c) of FIPPA requires, among other things, that a public body that refuses access to a requested record shall advise the applicant whether the record in question does not exist or cannot be found, or, in the case of a record that does exist, the reasons for the refusal and the provisions of FIPPA under which access is refused.

Subsection 12(2) of FIPPA excuses public bodies from the above referenced requirements in certain circumstances, in recognition of the fact that sometimes even the act of acknowledging that records exist (or confirming that they do not) would communicate information that could cause significant harm. In such circumstances, subsection 12(2) gives public bodies the discretion to refuse to confirm or deny the existence of records.

Refusal to confirm or deny existence of record

12(2) Despite clause (1)(c), the head of a public body may, in a response, refuse to confirm or deny the existence of

- (a) a record containing information described in section 24 or 25; or
- (b) a record containing personal information about a third party if disclosing the existence of the record would be an unreasonable invasion of the third party's privacy.

Clause 12(2)(a) of FIPPA is a discretionary provision as it states that the head of a public body may refuse to confirm or deny the existence of a record containing information described in section 24 or 25 of the Act.

To rely on this provision, the head of a public body must first determine that if records existed, they could be withheld under one or more clauses of section 24 or 25 of FIPPA.

The head of a public body must then exercise discretion to determine whether, in the circumstances, there should be:

- a refusal to confirm or deny the existence of records **or,**
- a refusal of access either on the basis that the records do not exist or on the basis that they can be withheld under specific provisions of section 24 or 25 of FIPPA.

Discretion is to be exercised in good faith, having regard for all relevant considerations in each individual case, and is to be guided by the purposes of the legislation under which the decision-maker is empowered to act. Whenever a public body relies on clause 12(2)(a) the head must weigh the public interest in accountability and increased

understanding of government decision-making against the public interest in protecting individual or public safety or law enforcement or legal proceedings from harm or injury (under sections 24 or 25). The public body also needs to identify whether the harm is realized by the mere knowledge the record exists or whether the harm is attributed to the content within the records, should they exist.

Limitations are placed on the Ombudsman when reviewing any complaint that might be made about a public body's discretionary decision to refuse to confirm or deny the existence of records that have been requested. In particular, clause 55(3)(b) of FIPPA provides that:

Reasonable precautions to avoid disclosure

55(3) *In conducting an investigation and in performing any other duty or exercising any power under this Act, the Ombudsman, and anyone acting for or under the direction of the Ombudsman, shall take every reasonable precaution to avoid disclosing and shall not disclose*

(b) whether information exists, if the head of a public body is authorized to refuse to confirm or deny that the information exists under subsection 12(2).

As a result, in investigating and issuing a report about a public body's decision to rely on subsection 12(2), our office is prohibited from disclosing information as to the existence or non-existence of records.

For purposes of our review of a public body's decision to rely on clause 12(2)(a), we consider that if the records existed, whether the information contained in the records would be subject to section 24 or 25 of FIPPA and, if so, whether a refusal to confirm or deny the existence of the requested records would be a reasonable exercise of discretion.

In accordance with subsection 55(3) of FIPPA, nothing stated in this report should be taken as confirming the existence or non-existence of records containing the requested information.

INVESTIGATION

Our office notified Executive Council of the complaint on March 27, 2023, and attempted to resolve this complaint during the course of the investigation. We asked for clarification regarding the public body's access decision. Specifically, we asked for written representations explaining why the public body determined that it was necessary to refuse to confirm or deny the existence of information. Further, we requested clarification

regarding which clauses under sections 24 and 25 would be applicable and an explanation on how those provisions would apply to the records at issue, if they existed.

In our communications with the public body, we relayed the complainant's position that they were seeking access to deidentifying information containing the date, source, summary of the threat and, if possible, the outcome of the review. While our office acknowledged that the request was for threats or threat assessment records, we explored opportunities for resolving this matter based on the clarification provided by the complainant. Executive Council advised our office that they were not prepared to reconsider their position in the matter.

In the representations to our office, the public body said that, hypothetically speaking, if it were to confirm or deny the existence of records requested, the type of information described by the complainant could threaten or harm the mental or physical health or the safety of another person, harm the effectiveness of investigative techniques and procedures currently used in law enforcement, and endanger the health, safety or life of an individual, and cited 24(1)(a) and 25(1)(c)(e) of FIPPA.

Disclosure harmful to individual or public safety

24 *The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if disclosure could reasonably be expected to*

(a) threaten or harm the mental or physical health or the safety of another person;

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*

(c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement;

(e) endanger the life or safety of a law enforcement officer or any other person;

As part of our investigation, we also considered whether there was any publicly available information concerning threats against elected officials. Our office found several news

articles¹²³⁴ in which government confirmed the existence of threats against elected officials and senior-level civil servants. The extent of the information in the public domain could lead a member of the public reading these articles to assume there are records in existence that document these matters. It is reasonable in these circumstances for the complainant to question the basis for the public body's application of clause 12(2)(a). Our office contacted the public body and advised that we would not be able to support the application of 12(2)(a) in this circumstance.

Our office shared our preliminary findings about the publicly available media and asked if Executive Council wished to reconsider its access decision. During the course of our investigation, there was a change in the head of the public body. As such, it is the current Clerk of the Executive Council who needed to determine whether its position in relation to this matter had changed. In responding to our office, Executive Council advised the access decision stands and it did not have any additional representations to provide to our office.

ANALYSIS AND FINDINGS

If records exist, what information would they contain?

In this case, we would expect requested records would include, at minimum, records generated by the matters described in the news articles. We then considered what types of information could be contained in such records, which would include the nature of the threat, an assessment of the threat, the name of the person the threat was made against, the date the threat was made, how the public body learned about the threat, if the threat was investigated, the findings and outcome of a potential investigation, and remedies pursued.

¹ Lett, Dan, "Goertzen, family threatened over pandemic health measures" Winnipeg Free Press, September 23, 2021, <https://www.winnipegfreepress.com/breakingnews/2021/09/23/goertzen-family-threatened-over-pandemic-health-measures>

² Lambert, Steve, "Manitoba Eyes Security Changes As Threats To Politicians Appear On The Rise", Canadian Security Magazine, December 21, 2021, <https://www.canadiansecuritymag.com/manitoba-eyes-security-changes-as-threats-to-politicians-appear-on-the-rise/>

³ Lambert, Steve, "Security concerns partly blamed for cancellation of annual Manitoba traditions", Winnipeg Free Press, November 24, 2022, <https://www.winnipegfreepress.com/uncategorized/2022/11/24/security-concerns-partly-blamed-for-cancellation-of-annual-manitoba-traditions>

⁴ Manitoba man accused of posting online threats against government, medical officials", The Canadian Press, January 16, 2023, https://www.thecanadianpressnews.ca/prairies_bc/manitoba/manitoba-man-accused-of-posting-online-threats-against-government-medical-officials/article_9399fba1-e94f-5bcc-a04c-1500b818e408.html

If records exist, would they be subject to sections 24 and 25?

In certain circumstances, the mere knowledge that a record containing certain information exists will cause harm. The public body provided our office with representations to support its position that the mere knowledge that such record(s) did or did not exist could reasonably be expected to threaten or harm individual or public safety or harm law enforcement or legal proceedings.

It is for these reasons that clause 12(2)(a) of FIPPA permits the public body to refuse to confirm or deny the existence of a record containing information as described in sections 24 and 25 of FIPPA. Section 24 and subsection 25(1) contain a reasonable expectation of probable harm test. The public body stated that, if records responsive to the complainant's access request existed, it would rely on clause 24(a) as well as clauses 25(1)(c)(e) to refuse access (as cited above).

Did Executive Council reasonably exercise its discretion in relying on clause 12(2)(a)?

Having concluded that records, if they existed, could contain information described in section 24 and 25, we then gave consideration to how the public body exercised its discretion in deciding to refuse to confirm or deny the existence of records under clause 12(2)(a).

When applying discretionary exceptions under FIPPA, the exercise of discretion should take into account all relevant circumstances, including those that may weigh in favour of releasing the information. The proper exercise of discretion is governed by the spirit and purposes of FIPPA. One of the main purposes of the Act is to provide access, subject to limited and specific exceptions. With this purpose in mind, some factors to consider include:

- If disclosure of the information would increase public confidence in the operation of the public body and transparency of government decision-making.
- Whether concerns that the information would be taken out of context could be addressed by providing an explanation of the context in the response to the applicant.
- Whether the request can be handled by severing the record, if it exists, and providing the applicant with some information or as much information as possible, rather than no information at all.

If a public body were to refuse access to records under section 24 or 25, the public body would be required by clause 12(1)(c) of FIPPA to identify not only the specific provisions, but to provide reasons why they apply to the record(s) in question. For a public body to establish that it was authorized to refuse access to a record under 24 or 25(1) of FIPPA, the public body would need apply a reasonable expectation of probable harm test. The Supreme Court of Canada (the SCC) clarified this harms test in the case of *Merck Frosst Canada Ltd. v. Canada (Health)*⁵ (*Merck*).

In *Merck*, the SCC noted the importance of correctly interpreting this test as it can be applied to many exceptions to access in both the federal and provincial legislation. The Court states:

I am not persuaded that we should change the way this test has been expressed by the Federal Courts for such an extended period of time. Such a change would also affect other provisions because similar language to that in s. 20(1)(c) is employed in several other exemptions under the Act, including those relating to federal-provincial affairs (s. 14), international affairs and defence (s. 15), law enforcement and investigations (s. 16), safety of individuals (s. 17), and economic interests of Canada (s. 18). In addition, as the respondent points out, the “reasonable expectation of probable harm” test has been followed with respect to a number of similarly worded provincial access to information statutes. Accordingly, the legislative interpretation of this expression is of importance both to the application of many exemptions in the federal Act and to similarly worded provisions in various provincial statutes.⁶

The SCC set out the test as follows:

... A balance must be struck between the important goals of disclosure and avoiding harm to third parties resulting from disclosure. The important objective of access to information would be thwarted by a mere possibility of harm standard. Exemption from disclosure should not be granted on the basis of fear of harm that is fanciful, imaginary or contrived. Such fears of harm are not reasonable because they are not based on reason: see Air Atonabee, at p. 277, quoting Re Actors’ Equity Assn. of Australia and Australian Broadcasting Tribunal (No 2) (1985), 7 A.L.J. 584 (Admin. App. Trib.), at para. 25. The words “could reasonably be expected” “refer to an expectation for which real and substantial grounds exist

⁵ *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), [2012] 1 SCR 23, <<https://canlii.ca/t/fpvd1>>, retrieved on 2023-10-31 [*Merck*]

⁶ *Merck*, *supra* note 5, at para 195.

when looked at objectively”: Watt v. Forests, [2007] NSWADT 197 (AustLII), at para. 120. On the other hand, what is at issue is risk of future harm that depends on how future uncertain events unfold. Thus, requiring a third party (or, in other provisions, the government) to prove that harm is more likely than not to occur would impose in many cases an impossible standard of proof.⁷

(emphasis added)

Given the SCC’s decision in *Merck* and the requirements of FIPPA, our office considers the following factors when reviewing a public body’s decision to apply a discretionary exception to access:

1. The information must be of the type referenced in the exception.
2. There must be a reasonable expectation of probable harm.
3. The harm must be caused by the disclosure of the information.
4. The exercise of discretion by the public body must be reasonable in the circumstances.

The harms test set out in *Merck* can be used to both determine whether the exception to access applies to the information and be used as a basis for reviewing the public body’s exercise of discretion under 24 and 25(1) of FIPPA.

For example, in the case of clause 25(1)(e), a provision which allows information to be withheld if its disclosure could endanger the life or safety of a law enforcement officer or any other person, the public body would need to describe the nature and probability of the harm, and establish how disclosure of the information in question would cause that harm.

Severing

The term ‘information’, rather than the term ‘record’, is used in 24 and 25(1) to indicate that the exceptions apply to the information in a record, and not necessarily to the whole record. Subsection 7(2) of FIPPA requires that, where an exception applies to some of the information in a record, only that information is severed, and the applicant is entitled to

⁷ *Merck*, *supra* note 5, at para 204.

access the remainder of the record, unless an exception in another section of FIPPA applies to it.

CONCLUSION

In our assessment of the nature of the records requested by the complainant, we agree that, should the records exist, portions of the information may be subject to the provisions cited by the public body. In our review of Executive Council's representations, we find the reasons provided to demonstrate the exercise of discretion, should records exist, unsatisfactory.

In our assessment of the nature of the records requested by the complainant and Executive Council's representations, we find that, should the records exist, not all the information would be subject to the provisions cited by the public body, and could benefit from reasonable severing.

It is important to note, in the course of our investigation, we learned the complainant would accept deidentified information containing the date, source, summary of threats and if possible, the outcome of a review, between January 1, 2022 and December 31, 2022. If records exist, our office does not see how high-level, deidentified information could threaten or harm the health or safety of another person, harm the effectiveness of investigation techniques used in law enforcement, or endanger the life or safety of a law enforcement officer or other persons.

Accordingly, the decision to refuse to confirm or deny the existence of records under 12(2)(a) is not reasonable in this case. The complaint is supported, and our office is issuing a recommendation to the public body.

RECOMMENDATIONS & REQUIREMENT TO RESPOND

Based on the finding that Executive Council did not meet the requirements of clause 12(2)(a) of FIPPA, the Ombudsman makes the following recommendation;

Recommendation 1:

That Executive Council reprocess the access request in its entirety, search records in its control, if they exist, and fulfill its duty to assist, responding openly, accurately and completely. A line-by-line review of each responsive record - if they exist - must be

conducted if exceptions to access are applied and reasons for applying such provisions must be included in the revised access decision to the complainant.

Requirement to Respond to the Recommendations

Under subsection 66(4), the Executive Council must respond to the Ombudsman's report in writing within 15 days of receiving this report. As this report is being sent by email to the head on April 1, 2026, the head shall respond by April 16, 2026. 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 Public Body's Response

When the Ombudsman has received Executive Council's response to her recommendations, she will notify the complainant about the head's response as required under subsection 66(5).

The Public Body's Compliance with Recommendations

If the head accepts the recommendations, subsection 66(6) requires the head to comply with the recommendation within 15 days of acceptance of the recommendations or within an additional period if the Ombudsman considers it to be reasonable. If the head believes that an additional period of time is required to comply with the recommendations, 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 recommendations. A request for additional time must include the number of days being requested and the reasons why the additional time is needed.

HEAD'S RESPONSE TO THE RECOMMENDATIONS

On April 16, 2026, the public body notified our office that it was accepting the recommendation and requested additional time to comply in accordance with subsection 66(6) of FIPPA. It explained that additional time was needed to fulfill activities related to reprocessing the request including engagement with the complainant to discuss narrowing the scope of the request, conducting a search for responsive records and potentially conducting consultations with Manitoba Justice or other third parties. Further complications were noted with respect to responding to the request given the change in government and process for accessing these types of records.

Our office determined that the additional time required to reprocess the request was reasonable in the case. On April 24, 2026, we provided our response to the public body and the complainant advising that the revised access decision should be issued to the complainant no later than June 1, 2026.

As the initial steps in reprocessing the request were contingent on contacting the complainant, we highlighted the complainant's willingness to narrow the scope of the request, as referenced on page 11 of this report. We advised that should the public body be unsuccessful in contacting the complainant in the upcoming weeks, it would be reasonable to proceed with reprocessing the request based on this clarification.

The Revised Access Decision

The revised access decision was provided to the complainant on May 20, 2026. The public body made efforts to contact the complainant to clarify the scope of the request but was unsuccessful. Accordingly, Executive Council processed the request based on complainant's communication with our office that they would accept deidentified information containing the date, source, summary of threats and if possible, the outcome of a review. The public body granted access to this information in full.

This report is available in alternate formats upon request.

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