MANITOBA OMBUDSMAN

FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT INVESTIGATION REPORT

The City of Winnipeg- Winnipeg Police Service

Refused Access Complaint

CASE# MO-06061
Final Report

Issue Date:
April 30, 2025

Provisions considered:
FIPPA - 9, 13(1)(b), 25(1)(e), 27(1)(a)

SUMMARY

The City of Winnipeg- Winnipeg Police Service ("the public body or the WPS") received an access request under The Freedom of Information and Protection of Privacy Act (FIPPA) for copies of correspondence, email records and other communications sent to and from employees of the City of Winnipeg and the WPS and the complainant in March 2023. The public body withheld access in part under 13(1)(b) (disregard because information was already provided), 25(1)(a) (harmful to law enforcement), and 27(1)(a) (solicitor-client privilege). A complaint about refused access and adequacy of search was made to our office.

Upon review of the information withheld under clauses 25(1)(e) and 27(1)(a), our office determined that the exceptions to disclosure were appropriately applied in this circumstance. Regarding clause 13(1)(b) applied to a portion of an email chain by WPS, we determined that while the WPS could demonstrate the portion of the email chain had previously been provided, the public body did not appear to consider that this did not automatically mean that this portion of the email request should be disregarded. As a result, we could not conclude that the public body reasonably exercised discretion when deciding to disregard the portion of the request that encompassed this record. Despite this finding, because this portion of the email chain was outside the date range of the access request and we were able to determine the complainant retained a copy, we did not ask the WPS to provide an additional copy of the email record to the complainant.

During our investigation, the WPS disclosed additional records that had been inadvertently omitted from the records issued to the complainant. We concluded that the search conducted to locate records for this request by the WPS was reasonable and consistent with FIPPA.

Therefore, the complaint is partly supported.

BACKGROUND

On April 21, 2023, the City of Winnipeg- Winnipeg Police Service (the public body or the WPS) received an access request under The Freedom of Information and Protection of Privacy Act (FIPPA). On May 31, 2023, the complainant revised their request to be for the following records:

Under the FIPPA Act, I would like to request any records in the NICHE system that are related to myself;
As well, I am also requesting copies of all correspondence, including emails, internal memos, or other internal communications (example: Slack messages, Microsoft Teams messages) that were originated by, received by, or deleted by the following employees in March 2023 (March 1st, 2023 - March 31st, 2023):
[6 named employees of the WPS and/or the City of Winnipeg]
I am looking for records that mention one or more of the following words (case-insensitive): [various combinations of the names of the complainant and their father, and their father's former work location]

The public body issued a fee estimate for search and preparation time necessary to process the request, and after the complainant approved the fee estimate and paid the fee, the WPS completed processing the request, and made an access decision in writing on September 5, 2023.

The WPS identified 9 pages of records as responsive to the complainant's request. The records contained email threads to and from the complainant and named members of WPS. WPS determined that access to a specific email record was disregarded under clause 13(1)(b) of FIPPA on the basis that information was already provided to the complainant. The public body also refused access to some information under clauses 25(1)(e) and 27(1)(a) stating that disclosure could reasonably be expected to endanger safety of law enforcement officer, and that other information was subject to solicitor-client privilege respectively.

Under subsection 59(1) of FIPPA an applicant may make a complaint to the Ombudsman about any decision, act or failure to act that relates to his or her request for access. On November 3, 2023, our office received a complaint about the public body's decision.

THE COMPLAINT

The complainant brought forward the following concerns arising from the decision of WPS for our review: the decision to disregard a portion of his request, the refusal of access to some records on the basis of exceptions, and whether the WPS had conducted an adequate search for the records requested.

The complainant alleged that WPS was wrong to have withheld information under the provisions indicated in its access decision. The complainant asked us to review the appropriateness of the redactions made to information in the email records under the exceptions to disclosure cited by WPS.

In relation to the decision of WPS to disregard a portion of the request under clause 13(1)(b) of FIPPA, the complainant argued that they had not previously received information outside the 9-page email records issued to them under this request. The complainant questioned the adequacy of the search conducted by the WPS for the requested records, stating that there were several specific email records they believed to exist that were not included in the FIPPA response provided to them.

INVESTIGATION

Based on the above, our investigation considered whether the WPS appropriately applied clauses 25(1)(e) and 27(1)(a) of FIPPA to refuse access. Secondly, we considered whether the WPS was authorized to disregard a portion of the request under clause 13(1)(b) of FIPPA, and whether that was consistent with its duty to assist under section 9. Lastly, we considered whether the search conducted for the requested records was adequate and reasonable in the circumstances of this request.

Our office contacted the WPS and requested representations to address the issues raised by the complainant. The public body provided information regarding its decision to withhold information from the email records and its decision to disregard a portion of the request on the basis that it was for a record previously provided to the complainant. In addition, the WPS submitted evidence in support of its position that all reasonable efforts were made to locate records responsive to the complainant's request. The WPS provided our office with an unsevered copy of the responsive email records, with the exception of information claimed to be subject to

solicitor-client privilege. The WPS provided additional information and explanation to our office on multiple occasions during the investigation.

We obtained additional information from the complainant as well, including a list of email communications he had with the public body, screenshots of the applicable email metadata, and confirmation of whether he retained these emails, so we could cross-reference this list with responsive email records that were identified by the public body.

ANALYSIS OF ISSUES AND FINDINGS

Application of Clause 27(1)(a)

The WPS stated that it withheld privileged information from the email records on the basis of the exception to disclosure in clause 27(1)(a) of FIPPA:

Privileged information
27(1) The head of a public body may refuse to disclose to an applicant
(a) information that is subject to any type of legal privilege, including solicitor-client privilege and litigation privilege;

Given the fundamental importance of solicitor-client privilege in our Canadian system of justice, and in order to minimally infringe on that privilege, WPS did not provide our office with any of the information it withheld under clause 27(1)(a) of FIPPA. Instead, we requested additional information from the public body to demonstrate why it believed the information falls within the noted exception under FIPPA.

The public body explained that the withheld information at the bottom of page 5, top of page 6, and on page 8 is correspondence between a City employee and City lawyer that entails confidential seeking and giving of legal advice. In the same vein, WPS attested that the withheld information at the top of page 5 and at the bottom of each of pages 7 and 9 is correspondence between two employees of the City directly related to or relaying the confidential legal advice provided. Therefore, the WPS maintained that based on these reasons, the information is subject to solicitor-client privilege, and it decided to exercise discretion to withhold the information under clause 27(1)(a) of FIPPA.

In *Gower v Tolko*, the Manitoba Court of Appeal remarked that a party claiming under this privilege must establish three factors in connection to a particular information in document:

1. *that the document was the giving or obtaining of legal advice;*
2. *the presence of a solicitor and the presence of a client; and*
3. *the existence of the solicitor-client relationship.*[1]

We note from this case that not every communication between a solicitor and their client is privileged, but if the conditions above are satisfied, then legal advice privilege applies to the communication.

Based on our review of the surrounding context and the attestation provided by the WPS, our office is satisfied that the information on the bottom of page 5, and on page 6 and page 8 contained confidential and privileged information between a lawyer and a client within the solicitor-client relationship for the provision of legal advice.

We considered whether communication between employees of the City of Winnipeg at bottom of page 7, and top of page 9 is confidential and privileged as the participants in these communications did not include lawyers. In a decision of the British Columbia Supreme Court, the court reasoned that legal advice privilege extends to communications between employees of the client which transmit or comment on privileged communications with the client's lawyers.[2] In this situation, we are satisfied that legal advice privilege applies, as the disclosure of this information would reveal confidential communications that earlier occurred between a lawyer and client.

Based on the above analysis, our office found that legal advice privilege applies to the information withheld from the email chains and the public body was authorized to withhold this information under clause 27(1)(a) of FIPPA. Given the fundamental importance of privilege in the Canadian justice system, we are satisfied that the public body reasonably exercised discretion in deciding to withhold, rather than release this information.

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[1] Para 18, *Gower v. Tolko Manitoba Inc.*, 2001 MBCA 11 (CanLII), <https://canlii.ca/t/1fl6p>, retrieved on 2025-03-07

[2] Para 12, Bank of Montreal v. Tortora, 2010 BCSC 1430 (CanLII), <https://canlii.ca/t/2cx5k>, retrieved on 2025-03-31

Application of clause 25(1)(e)

Regarding clause 25(1)(e), the WPS explained that it severed the names of members of the WPS from the records for safety reasons. As part of our investigation, our office reviewed the redacted and unredacted records provided by the WPS and considered the application of clause 25(1)(e) of FIPPA to withhold the names of WPS members. 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. Clause 25(1)(e) reads 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
(e) endanger the life or safety of a law enforcement officer or any other person;

The public body applied clause 25(1)(e) of FIPPA to withhold the names of WPS members contained in the email records. As a matter of precedent, the WPS has generally withheld the names of WPS officers and employees when giving access to police records under FIPPA. The reason for this is that the WPS has previously noted examples of harm and harassment being perpetrated against WPS employees on the basis of their employment. The public body has a real concern that the routine disclosure of WPS members' names under FIPPA, together with the potential for wider dissemination of these records once released, could lead to the identities of WPS officers becoming more widely known to the general public, which could in turn result in increased safety risks to officers (and their families). We agree that an increased risk to officer safety could reasonably be expected to result from routine disclosure of officer names under FIPPA.

Based on our review, we are satisfied that the decision by the WPS to withhold WPS members' names from the email records that were provided to the complainant under clause 25(1)(e) is authorized. We also concluded that the public body reasonably exercised discretion in its application of clause 25(1)(e) of FIPPA.

Application of Clause 13(1)(b)

The public body disregarded a portion of the request under clause 13(1)(b) of FIPPA:

> *Public body may disregard certain requests*
> *13(1) The head of a public body may disregard a request for access if the head is of the opinion that*
> *(b) the request is for information already provided to the applicant;*

When a public body disregards a request, it must fulfill the following requirements of subsection 13(2):

> *Notice*
> *13(2) In the circumstances mentioned in subsection (1), the head shall state in the response given under section 11*
> *(a) that the request is refused and the reason why;*
> *(b) the reasons for the head's decision; and*
> *(c) that the applicant may make a complaint to the Ombudsman about the refusal.*

The public body stated that it did not disregard the complainant's entire request under clause 13(1)(b), just the part of the request that encompassed one email that was previously sent to the complainant. The WPS argued that its decision to disregard the email record was in a bid to quickly respond to the complainant within the legislated timeframe and avoid unnecessary fees to them, and that information was already provided.

We reviewed the email record, and verified it was indeed an email, which was sent to the complainant by an employee of the public body, and is part of a chain of three emails, as illustrated in the following table:

Email #3	Complainant to public body	March 11, 2023 09:31	Released in full
Email #2	Public body to complainant	Not visible in record released to complainant	Removed in entirety, clause 13(1)(b)
Email #1	Complainant to public body	August 4, 2022 3:41 pm	Released in full

We considered if the middle email could be deemed already provided to the complainant in this instance. The WPS asserted that there is no requirement under FIPPA that clause 13(1)(b) could only be applied if the applicant already has the "record" through a previous FIPPA request.

In other jurisdictions with legislation similar to FIPPA, the term "information already provided to the applicant" has been interpreted as requiring that the information was previously provided to the applicant in response to an access to information request. During this investigation, we explained to the public body that our office interprets that provision as including information that is provided under FIPPA or through another process. An email previously sent by the public body to the applicant would, in our view, qualify as information previously provided to the applicant.

However, the analysis does not stop there. As indicated on pages 4-30 and 4-31 of the FIPPA Resource Manual[3], the power to disregard a request is intended to be for exceptional situations, and to be exercised sparingly and on strong grounds. Disregarding a request or a portion of a request is not the invariable outcome of determining the request is for or includes information previously provided to the applicant. This is because disregarding a request is a discretionary decision. For our office to support a public body's decision to disregard, we must be satisfied not only that the circumstances set out in the relevant provision of section 13 are met, but also that the public body exercised discretion reasonably in deciding whether or not to disregard.

We asked the public body to consider that a request for information that was previously provided to the applicant may be made for good reasons, such as that the applicant no longer retains the information. We indicated that since the decision is discretionary and that the public body has a duty to assist the applicant under section 9 of FIPPA, our office would generally expect that before a public body disregards a request or portion thereof under clause 13(1)(b), there would be some communication with the applicant to determine if the applicant intended these types of records to be part of their request, and if so, whether there may be a good reason for the public body to process this part of the request, rather than choosing to disregard it.

[3] https://www.gov.mb.ca/fippa/public_bodies/resource_manual.html
While our office is not bound by the manual, we frequently reference it as it is the guidance issued by government to support public bodies' compliance with FIPPA.

We also explained that if a public body chose to disregard under clause 13(1)(b), it should provide reasons for the decision as required by clauses 13(2)(a) and (b) of FIPPA, and it should provide sufficient context to allow the applicant to determine if they were previously provided with and retain a copy of the information. For example, the public body could provide a list of the email records, including dates and times, and sender/recipient(s).

The public body questioned if determining whether the applicant still has a copy of a record previously provided to them is a prerequisite to applying clause 13(1)(b) to disregard the portion of a request that includes that information. They asked whether our office had asked the complainant if they had retained a copy of the email or not.

While it is our view that this question should have been raised by the public body with the complainant before the response was issued, we did make this inquiry with the complainant on two occasions, once in July 2024 and again in November 2024. We asked the complainant to go through their records and confirm what email records they did have so we could cross-reference them with the records identified as responsive by the WPS. This would help us identify any records (email correspondence) they thought could be missing from the records provided in the FIPPA response, and would help us determine if the record at issue under clause 13(1)(b) was one of these records.

On October 10, 2024, WPS provided our office with additional information. They asserted that the complainant should be aware of the redacted email because the dates and times for the emails were disclosed for the complainant's reference which thus indicates what information had been withheld under this provision. While we recognize that the surrounding emails in the chain were left intact, the date and time of the redacted email was not left intact, resulting in the loss of context for the surrounding emails that were released.

The complainant provided additional information to our office in a tabular format to indicate the recipients, subject, and dates/times of their communication with WPS for specific days in August 2022 and March 2023. In further correspondence with our office, the complainant provided screenshots of the metadata (the sender, recipient, date, and subject) of email records between them and WPS for the specific dates mentioned above which provided evidence the records existed, and that showed that the complainant still has access to the emails.

On December 20, 2024, we contacted the WPS to advise of the email records the complainant believed were still outstanding. There were two emails sent by the complainant to the same recipient, one at 4:00 pm on March 10, 2023, and one at 08:11 pm[4] on March 17, 2023. These emails turned out to have been emails that were inadvertently left out of the public body's initial response to the complainant and the public body agreed to release these.

The public body did not locate another email that the complainant said they sent to this same recipient on March 17, 2023, also at 4:00 pm. However, based on further review, we believe this is a reference to the March 17, 2023 08:11 email, as that is the date and time reflected in the screenshot of metadata the complainant provided our office. The last record the complainant believed was missed, was an email sent to the complainant by a member of the WPS on August 7, 2022 at 8:48 pm. This email was outside the timeframe of the complainant's request (March 1-31, 2023).

On January 13, 2025, the WPS took the position that the plain interpretation of the clause provides the public body with the discretion to refuse access if information is already provided to an applicant. As such, the WPS determined that it exercised that discretion reasonably and did not fail in its duty to assist the complainant. The WPS noted that it communicated extensively with the complainant during the processing of the request to discuss the narrowing of the scope of the request and its approach to searching for the records including discussion of the search terms and combinations of them.

We acknowledge the efforts made by the WPS when it contacted and provided the complainant with opportunities to narrow the scope of their request. We also recognize that the WPS demonstrated that the one email to which clause 13(1)(b) was applied had previously been provided to the applicant because it was an email sent to them. However, we note that there was no conversation with the complainant during the processing of the request about whether they still had the record. This is not in keeping with the public body's duty to assist the applicant.

The exercise of discretion must consider all relevant circumstances and must be reasonable. Although WPS argued that the complainant should have known the exact email that was redacted from the email chain under this provision, it is not clear to us

[4] The WPS confirmed this was 8:11 am, not 8:11 pm.

that there was sufficient information for the applicant to positively identify this record, since the entire email including sender, recipient, date, time, content and signature were removed from the email chain, and the dates of the two surrounding emails in the chain are seven months apart.

Furthermore, the only explanation provided about why the public body chose to remove the email under clause 13(1)(b) was that omitting that information would save time and costs for the applicant. While we recognize that this argument has merit if requests encompass large numbers of records previously provided to an applicant that would take time to search and prepare, that is not the case with the current request.

The public body, the complainant, and our office have all spent considerably more time trying to achieve clarity on this one issue than would have been spent if either the date, time and subject of the middle email had been left visible in the email chain, or if the email had simply not been excised from the surrounding chain under clause 13(1)(b) in the first place.

It is noted that the email to which clause 13(1)(b) was applied is one of the same emails the complainant identified as missing from the response to their request, the email sent by a member of the WPS to the complainant at 8:48 pm on August 7, 2022. The fact that the complainant included this email in the list of records they felt were missing is indicative that they were not able to identify the record from the surrounding information, notwithstanding that it is outside the timeframe of the request.

In our view, the public body has not demonstrated that it reasonably exercised its discretion in deciding to apply clause 13(1)(b) to this one email, because it did not consider all the factors relevant to this case, including that excising this one message from the middle of the chain of three emails did not save time and money and resulted in the record lacking context and continuity.

Notwithstanding this finding, the email is outside the timeframe of the complainant's request, and screenshots of metadata provided by the complainant demonstrate that they continue to have record of this email. As a result, we are not asking the public body to provide another copy of this email to the complainant.

Public Body's Search for Records

In relation to the complainant's concerns about the adequacy of the public body's search for records, the WPS noted that it inadvertently omitted one email chain deemed responsive to the request which should have been included in the package issued to the complainant. These records were located in the initial search but had not been released due to human error, and they advised our office these records would be provided to the complainant. On March 4, 2025, during our investigation, the WPS provided an additional 3 pages of email records to the complainant. On March 11, 2025, the complainant confirmed that they received this additional record from the WPS.

The public body explained that in order to conduct the search for WPS email records, its Information Technology and Solutions Division had restored the emails from the respective accounts for the relevant time period (March 1-31, 2023), and that the search included the restored emails, archived files and current PST[5] folders. Search terms specified by the complainant were used sequentially when conducting the email search for each named WPS employee. The same approach to searching was used for the City of Winnipeg employee that was not a member of WPS. The public body provided evidence to our office which demonstrated the steps taken to search for records. The search for the requested records was focused on email as that is the format in which the public body employees were aware the responsive records existed.

As the complainant's request for access to any record in Niche (a police database) about them did not appear to have been addressed in the access decision letter or in other communications between the complainant and the public body, our office asked the public body about this. The WPS confirmed that a search for Niche records had been conducted on April 24, 2023, and no records had been found.

Going forward, where a specific record has been identified as part of a request, and is found not to exist, the public body should ensure this is addressed in its access decision. As required by subclause 12(1)(c)(i), if a record does not exist or cannot be found, the public body must refuse access to that record on the basis that it does not exist or cannot be found.

[5] PST stands for 'personal storage table', a file format in Microsoft programs, which stores Outlook messages and other Outlook items (contacts, appointments, tasks, notes etc.)

Based on our review of the steps taken to search for the requested records, we are satisfied that the public body conducted a reasonable search for records responsive to the complainant's request – it searched in areas where records, if they existed, would be expected to be found. We carefully considered the public body's search and found it reasonable.

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 the City of Winnipeg- Winnipeg Police Service's decision to refuse access to the Court of King's Bench within 30 days following the receipt of this report.

April 30, 2025
Manitoba Ombudsman

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