MANITOBA
OMBUDSMAN

# FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT INVESTIGATION REPORT

The City of Winnipeg – Winnipeg Police Service

Refusal of Access

Issue Date:
November, 2024

# SUMMARY

The complainant made an application for access to the City of Winnipeg - Winnipeg Police Service (the WPS) for records related to officer discipline. The WPS provided partial access to 59 pages of records, withholding some information on the basis that disclosure was harmful to third parties' privacy (section 17 of FIPPA). The WPS also refused access in full to 34 pages under clause 23(1)(b) of FIPPA (advice to a public body). Our office received a complaint about the WPS' access decision. The WPS subsequently provided the complainant with a revised decision in relation to the 34 pages withheld in full. The revised decision disclosed some information from the 34 pages and withheld most information under section 17.

The Ombudsman found that some of the information in the records was the personal information of identifiable individuals and disclosure would be harmful to multiple third parties' privacy. Therefore, this information was subject to the mandatory exception to disclosure in section 17 of FIPPA. However, the Ombudsman also determined that additional information could reasonably be severed from the records and disclosed without a reasonable expectation that individual WPS members could be identified.

The Ombudsman found that the WPS did not fulfill the requirements of subsection 7(2) of FIPPA. The Ombudsman recommends that the WPS reconsider the redaction of disciplinary penalties from the records and determine what penalties can be disclosed without reasonably expecting that an individual WPS member would be identified. In addition, the Ombudsman recommends that the WPS reconsider the 'facts in brief' and other information in the 34 pages to determine what information can be disclosed without reasonably expecting that an individual WPS member or member of the public would be identified.

The Ombudsman recommends that the WPS provide the complainant with a revised access decision disclosing additional information as outlined in this report.

**CASE MO-00105/2021-0214** | Final Report
Provisions considered: FIPPA -- 7(2), 9, 12(1)(c)(ii), 17(1), 17(2)(e), 23(1)(b), 24(a), and 25(1)(a)

MANITOBA OMBUDSMAN
300 - 5 Donald Street, Winnipeg, MB R3L 2T4
204-982-9130 | 1-800-665-0531 | ombudsman@ombudsman.mb.ca
www.ombudsman.mb.ca

# INTRODUCTION

Governments across Canada and the world have recognized that transparency in government is of the utmost importance to building and maintaining public trust and it is one of the underlying principles for the development of freedom of information legislation like The Freedom of Information and Protection of Privacy Act (FIPPA). Greater transparency about decisions, how and why those decisions were made, and the information those decisions were based upon can strengthen and enhance trust in public bodies.

The access to information system in Manitoba is designed to promote access as the rule, not the exception. FIPPA allows the public a right of access to information held by public bodies with limited and specific exceptions. Any severing of information from records must be reasonable and severing should be done to allow as much information as possible to be provided to the person requesting the information.

In general, the purpose of exceptions to access is to prevent some form of harm being caused by the release of the information. Sometimes that potential harm is readily apparent, such as with an unreasonable invasion of privacy caused by the unauthorized disclosure of an individual's personal health information. Other times it is not readily apparent, and it is the responsibility of the public body citing the exception to show that the withheld information is the type described in the exception and that the decision to redact the information is reasonable in the circumstances.

The purpose of an investigation by our office is to review the decision of the public body and determine whether it complied with the requirements of FIPPA and appropriately applied the exceptions to access, keeping in mind the overarching principle that access to information should be the default position in relation to information in the custody or the control of public bodies.

# BACKGROUND

## Access Request

On August 31, 2020, the applicant (now complainant) made an access request to the City of Winnipeg–Winnipeg Police Service (the WPS or the public body) for the following records:

> *Please provide from 2015 to date of receipt:*
> *-as per 45.01 of THE WINNIPEG POLICE SERVICE REGULATION BY-LAW NO. 7610/2000*

Please provide the records sent by the E.A.C.P, redacting the officer's name, outlining details of the Service Default along with the penalty being sought by the service.
The City of Winnipeg by-law no. 7610/2000[1] ("the by-law") contains the regulations governing the conduct and duties of members of the WPS, including minor service defaults and service defaults. Minor service defaults include abuse of conduct, insubordination, neglect of duty, and improper maintenance of a firearm.

Service defaults include discreditable conduct (e.g., destroys evidence without authorization), improper use of firearm, misuse of liquor or drugs, neglect of duty, unauthorized release of information, corrupt practice, and other behaviours. The by-law contains a range of penalties (disciplinary actions) in relation to minor service defaults and service defaults. Penalties include receiving an admonishment, written reprimand, loss of days off, suspension, or dismissal.

Section 45.01 of the by-law that was cited in the complainant's access request requires that the Executive Assistant to the Chief of Police (E.A.C.P) outline in writing the details of the alleged service default and the disciplinary penalty being sought.

---

[1] By-law no. 7610/2000 is available online at http://clkapps.winnipeg.ca/dmis/documents/docext/bl/2000/2000.7610.pdf.

The by-law requires that this documentation be served on the WPS member that is charged with a service default, as well as the appropriate police association. Section 45.01 also identifies other documentation that may be provided upon request to the WPS member charged. The complainant sought access to the records related to s. 45.01 of the by-law.

The responsive records at issue in this case are comprised of two types of records:

1. Charge Forms that include a 'facts in brief' section that gives a narrative of the event that led to the officer being charged

2. The corresponding letter to the charged WPS member that states the recommended discipline if the member does not contest the charge.

## November 26, 2020 and December 31, 2020 Access Responses

Following the issue of a fee estimate by the WPS and acceptance of the fee estimate by the complainant, the WPS notified the complainant of its access decision on November 26, 2020. The WPS stated that access to the records would be partly granted, and it expected to send the complainant the records on or by December 31, 2020.

The WPS stated that the records would be severed in accordance with clause 13(1)(c) (disregard an access request), subsection 17(1)/17(2)(e) (disclosure harmful to third party's privacy) and clause 23(1)(b) (advice to a public body). The WPS also advised the complainant that severing may occur for other reasons that would be explained when partial access to the records was provided.

On December 30, 2020, the WPS provided the complainant with partial access to 59 pages of records, withholding some information in the 59 pages of charge forms and letters as described above under subsection 17(1) in conjunction with clause 17(2)(e). The WPS advised the complainant that "WPS members' personal information/identifiers were gathered in relation to disciplinary matters against them; as this information relates to their employment histories, it must be removed."

In relation to the Charge Forms, the WPS withheld the name, rank, number, and division name of the officer, month and date of incident, and some of the 'facts in brief' that provide a narrative of the incident that led to the member being charged.

The material information from the charge forms that the WPS disclosed included the date of the charge form in full, the year of the incident, the provision of the by-law that the member was being charged with (e.g., section 20.04(a)–neglect of duty), and varying degrees of the narrative explaining the incident.

In relation to the letters to members, the WPS withheld part of the Professional Standards Unit (PSU) file number, the name, number, and rank of the officer, the recommended discipline penalty, and the rank of the officer's supervisor. The information disclosed by the WPS included the date of the letter, the year of the PSU file number, the charge(s), and template wording that explained that the matter had been reviewed by officers, there was enough evidence to substantiate the charge, and that the WPS determined a recommended penalty.

The penalty itself was severed. Further template wording was disclosed in the letters telling the member that if the matter proceeds to hearing, the recommended discipline could change. The template also included the timeline for a response from the member. In addition to the 59 pages where access was partially provided, the WPS withheld 34[2] pages in full under clause 23(1)(b) (advice to a public body) and advised the complainant that the records contain consultations regarding disciplinary considerations. The WPS stated that severing of these records was considered, but it determined that no substantive information would be disclosed after severing.

The WPS also disregarded the complainant's request for three pages of records (clause 13(1)(c)) as the WPS previously provided the three pages as sample records in the fee estimate to the complainant. Also, the WPS noted that some records did not exist and refused access to those records as required under section 12 of FIPPA.

---

[2] The WPS advised our office that it mistakenly stated that it was withholding access in full to 31 pages of records under section 23 in its December 30, 2020 letter to the complainant. The WPS later confirmed that it withheld access in full under section 23 to 34 pages of records.

Finally, the WPS observed that the complainant paid $1,336.00 for 44.5 hours of time. The WPS noted that the actual search time was just over 34 hours (in addition to the two free hours the complainant is entitled to under the Act) and the complainant could expect to receive a refund of $315.00.

## The Complaint

Our office received a complaint about the WPS' access decision. The complainant was of the view that additional information could be disclosed from the 59 pages without identifying an officer, as she had indicated in her access request that the names should be redacted. The complainant advised that she did not take issue with the public body not providing her with the three pages previously provided in relation to the fee estimate.

In addition, the complainant did not initially take issue with the severing made under clause 23(1)(b) (advice to a public body), as she stated that she did not see it used frequently in the redacted records. Therefore, our complaint investigation initially focused on the information the WPS withheld under clause 17(2)(e) of the Act in the 59 pages of records provided to the complainant.

The complainant also expressed concerns related to the public body's duty to assist an access applicant under section 9 of FIPPA. The complainant explained that she obtained permission from her organization to pay the fee estimate based upon a sample record that the WPS provided, because it was in the public interest to better understand why police face internal discipline. The complainant explained that in that sample, enough information was disclosed so that she was able to "glean some information" from the record.

However, the complainant observed that the actual records that she was provided were so heavily redacted she could not obtain useful information from them. Finally, the complainant stated that she attempted to contact the public body on three separate occasions for clarification on its response before making her complaint. The complainant later stated that she received a response after some time had passed, but it did not ease her concerns. The complainant felt that the WPS did not fulfill its responsibilities to assist her as prescribed by FIPPA.

# INVESTIGATION

As part of our investigation, our office reviewed the redacted and unredacted records provided by the WPS. We observed that contrary to the complainant's initial understanding that the WPS withheld little information under section 23 of FIPPA (advice to a public body), the WPS had actually withheld 34 pages in full under section 23.

We observed that the information in the 34 pages withheld in full consisted of charge forms and letters to members with the potential penalties. The nature of the information in the 34 pages withheld in full seemed comparable to the information contained in the 59 pages of records that the WPS had disclosed in part to the complainant. Therefore, we asked the WPS for further information to support its seemingly disparate decisions on what appeared to be the same type of records.

We also explained to the WPS that we did not have evidence to establish how section 23 applied to all of the information in the 34 pages. We asked the WPS to conduct a line-by-line review as required by subsection 7(2) of FIPPA (discussed later in this report) and issue a revised response to the complainant with any information subject to section 17 (disclosure harmful to third party's privacy) and any other exception to disclosure redacted.

We explained to the WPS that without further information to establish the application of section 23 (advice to a public body) to the information, we would expect similar severing to be applied to the 34 pages as was applied to the 59 pages already severed under section 17 and provided in part to the complainant.

On September 1, 2021, the WPS provided the complainant with a revised access decision in relation to the 34 pages previously withheld in full, releasing minimal information and redacting most information under section 17. The WPS released no information about the facts in brief to the complainant.

The WPS redacted the charges on the charge forms and on the letters to the members. In addition, the entire offence date was redacted in the 34 pages, whereas the WPS disclosed the year of the offence in the 59 pages.

The revised decision did not indicate the WPS was still relying on section 23 to withhold any information, so we did not consider that provision in the remainder of the investigation.

Our office contacted the complainant, who was not satisfied with the revised response. As with the 59 pages previously provided by the WPS in part, the complainant believed that additional information could be disclosed without identifying WPS members. Our office shared this view, and we asked the WPS for an explanation of its revised decision and to explain the apparent inconsistencies between the information severed in the 34 pages and the information severed in the 59 pages.

The WPS advised our office that it had expected that the matter would be resolved with its revised decision. The WPS related that the 34 pages are about charges that were not finalized and that were about identifiable members whose privacy the WPS is required to protect under FIPPA.

Our office noted to the WPS that the subject matter of the information in the 59 pages, which were severed to disclose more information, also seemed to relate to charges that were not finalized. Given this observation, we again reached out to the WPS and identified the specific differences in severing and asked for further clarification.

The WPS noted that it expected a decision regarding an appeal of a past access decision related to personal information and discipline records from the Manitoba Court of King's Bench. The WPS noted, and we agreed, that the outcome of the appeal may be relevant to this matter. We agreed to hold the investigation in abeyance and advised the complainant who did not take issue with this decision.

Once the related Manitoba Court decision was released on November 23, 2022, we proceeded with our investigation. Considering the decision of the appeal—Annable (CBC) v. City of Winnipeg[3] (Annable)—our office again reviewed the severing in both the 59 pages and 34 pages of responsive records in this matter.

[3] *Annable (CBC) v. City of Winnipeg*, 2022 MBKB 222 (CanLII), <https://canlii.ca/t/jt67s>, retrieved on 2023-10-31 [Annabel]

On May 2, 2023, we wrote to the WPS and explained that while we concur that the information in the records is subject to the mandatory exceptions to disclosure under section 17, we believed that additional information could be disclosed from the records without identifying individual members.

On August 3, 2023, the WPS advised our office that it maintains its view that disclosure of any additional information would identify WPS members and result in an unreasonable invasion of members' privacy. The WPS also cited three additional provisions of FIPPA in support of its position that the information should not be disclosed: clauses 17(2)(b), 24(a), and 25(1)(a). The WPS also provided additional details in relation to how individual officers could be identified and the applicability of the cited exceptions to access, which will be discussed below.

## Preliminary Issues

### The Application of Additional Exceptions to Access

If a public body determines, after making its initial access decision, that additional or different exceptions to access appropriately apply to the information contained in responsive records, then it must issue a revised access decision to the applicant before it is able to rely on those exceptions as the basis for its refusal of access. It is a fundamental matter of fairness that the applicant knows the basis and reasons for the decision.

Section 12 of FIPPA sets out what information a public body is required to provide to the applicant in response to a request for access. Specifically, subclause 12(1)(c)(ii) requires public bodies to inform applicants of the specific provisions on which the refusal of access is based:

> ***Contents of response***
> ***12(1)*** *In a response under section 11, the head of the public body shall inform the applicant*
>
> *(c) if access to the record or part of the record is refused,*
>
> *(ii) in the case of a record that exists and can be located, the reasons for the refusal and the specific provision of this Act on which the refusal is based,*

For a public body to meet its responsibilities under section 12 it must inform an applicant of all the relevant sections of FIPPA being relied upon and explain how the section applies to the information and how the public body made its decision. This requirement remains in effect even if a complaint is made or the public body subsequently determines that other sections of FIPPA apply to the information in replacement of, or in addition to, the previously cited exceptions.

Generally, if a public body references a new exception to our office in its representations and does not issue a revised access decision informing the complainant of this, as is the case here, our office does not consider whether the new exceptions to access apply to the responsive records.

Although the public body did not provide a revised access decision to the complainant, given the extent of the representations made by the public body, we felt it was important to address key considerations they raised about the application of clause 17(2)(b) and sections 24 and 25, including analysis of the application of these exceptions.

We will not be making findings as to whether those sections apply to specific information within the responsive records as the public body did not suggest specific information could be redacted under those sections, but rather made a general argument that those sections would apply to the responsive records.

However, we will be reviewing considerations related to the application of these exceptions, in general, in order to inform the public body and the complainant as to how our office would approach these sections if they form part of future access decisions we may review.

Our analysis in this case will examine the various requirements of FIPPA and how they apply to information in the records we reviewed in this case as well as the representations made to our office by the WPS. fermentum ante.

## The Duty to Assist

As mentioned above, the complainant raised an issue around the Duty to Assist related to the sample redaction the WPS provided because that sample was one of the factors the complainant considered when deciding whether to pay the fee estimate. Section 9 of FIPPA places a duty to assist applicants on public bodies:

> ***Duty to assist applicant***
> ***9*** *The head of a public body shall make every reasonable effort to assist an applicant and to respond without delay, openly, accurately and completely.*

Because public bodies are the experts in their own records, they are in the best position to assist an applicant in ensuring that the records they request contain the information they are looking for. The duty to assist places a positive obligation on public bodies to take all reasonable efforts to help applicants and applies throughout the request process, including when the public body decides to issue a fee estimate.

When the processing of an application for access requires a fee estimate, the duty to assist may involve suggesting ways to focus or reduce the size of the request, or providing a representative sample of the records and the redactions required to the applicant. Correctly identifying a representative sample of the records can assist the public body in determining the number of redactions required.

While it is not always possible for a public body to determine, in advance of reviewing all of the records, what redactions will be needed, if it determines that a significant number of redactions need to be applied to the responsive records the applicant should be informed as soon as practicable.

In this case, the initial sample done by the public body and provided to the complainant suggested more information would be provided in the responsive records than what was actually provided. Given the difference between the redactions to the sample and the number of redactions in the responsive records, it was evident that the sample provided by the WPS was not representative.

The duty to assist does not specifically require a public body to correctly identify a representative sample nor does it expressly require a public body to inform an applicant when the number of required redactions turns out to be greater than the redactions in the sample.  However, the duty does require a public body to make "every reasonable effort" to assist an applicant, including by responding openly and completely.

In this case, the sample provided by the WPS was not consistent with the information that was ultimately provided to the applicant. The WPS did not acknowledge this to the applicant, nor did it provide any explanation for why that might be the case. It is reasonable to have concerns and questions about such a significant inconsistency, particularly when the applicant decided to pay a fee of over $1,000 on the basis of what they received in the original sample. Therefore, we were not satisfied that the WPS fulfilled its obligation to respond openly and completely.

## Analysis

Section 1 of FIPPA defines several terms used throughout the act, including "personal information". Specifically, it starts with the requirement that for information to be "personal information" it must be recorded and about an identifiable individual:

> ***"personal information"*** *means recorded information about an identifiable individual, including*

The definition then lists several types of information, such as an individual's name, health information or work history that would clearly be personal information, provided the information is about an identifiable individual, or can be used to identify an individual. While this list is not exhaustive, it does give context for the types of information considered to be "personal information".

We note that the complainant requested records with the names of the WPS members redacted. As part of our investigation, our office reviewed the recent Annable decision, noted above.

In Annable, the Court considered the City of Winnipeg's (the City) decision to disclose information regarding WPS members' service defaults but sever individual disciplinary penalties that corresponded with the defaults on the basis that releasing the information would be an unreasonable invasion of the WPS members' privacy.

The City argued that even with the police officers' names removed, there were enough details in the penalties to allow others, specifically other employees of the WPS and the family members of the police officers, to identify the police officers involved.

The Court found that the disclosure of penalties in conjunction with other information that may be known about the police officers involved was not enough information to identify individual officers and ordered the City to release the previously severed disciplinary penalty information to the Appellant. In Annable, Justice Martin clarified the test for disclosure under section 17. Specifically, Justice Martin stated that the test has two key components:

1. Is the information personal information about an identifiable individual?

2. Would the disclosure of the information be an unreasonable invasion of the individual's privacy?

At paragraphs 31 to 33 of Annable, Justice Martin outlined 2 considerations for determining whether information is personal information about an identifiable individual:

1. whether the information is about, or speaks to, an identifiable individual; and

2. whether the information can reveal or identify the individual.

With respect to the first consideration, information is about an identifiable individual if the information is uniquely related to a certain individual. In this case, the information in each record is uniquely related to an individual WPS member.

With respect to the second consideration, the Court confirmed that the test for determining whether information can reveal or identify an individual is whether there is a reasonable expectation that the individual can be identified.

Justice Martin clarified the second step of the test using the analytical framework described by Barbara von Tigerstrom in Information and Privacy Law in Canada[4]:

> *In order for information to qualify as personal information, it must be possible to identify the individual subject or subjects of the information. … The test that has long been used in Ontario is whether there is a "reasonable expectation that the individual can be identified" from the information that is disclosed. This must be demonstrated on a balance of probabilities, and the evidence may vary from case to case.*

Justice Martin further considered what a reasonable expectation would be at paragraph 36:

> *All in, a reasonable expectation standard means something considerably higher than a mere possibility, but lower than a probability, of an outcome occurring (such as identifying an individual). The evidence must be based on reason, on real and substantial grounds when looked at objectively, not matters that are fanciful, imaginary, contrived, or speculative.*[5]

The Court further states at paragraph 33 that a reasonable expectation analysis must consider all of the information that is disclosed or publicly available. In this case, the records contain details of incidents where it is alleged that WPS members violated various by-laws. The details include the name, rank, badge number, date of the incident, the details of the alleged offence, and the recommended penalty.

The WPS noted that, unlike the records in Annable, the records at issue in this case identify WPS members and the information is not generic. Our office agrees, and we observe that in some cases, the incident details involve third parties beyond the WPS member.

This means that if unique details from the records were disclosed (even in the absence of names or other directly identifying information), those third parties may reasonably be expected to identify the WPS member and gain knowledge of the fact that they faced discipline for the incident if the records were disclosed. In addition, disclosure of some of the incident details could also reasonably be expected to identify the third parties.

---

[4] Barbara von Tigerstrom, *Information and Privacy Law in Canada*, (Toronto: Irwin Law Inc., 2020) at 210.

[5] *Annable*, *supra* note 3, at para 36.

We determined that the records contain recorded information about identifiable individuals and the information is personal information as defined by FIPPA. Considerations relating to personal information of individuals other than police officers are discussed later in this report. The remainder of this section deals solely with personal information of police officers.

Section 17 of FIPPA provides a mandatory exception to access that is specific to personal information. Subsection 17(1) sets out the basic principle that personal information should not be disclosed if it is an unreasonable invasion of a third party's privacy:

> ***Disclosure harmful to a third party's privacy***
> ***17(1)*** *The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's privacy.*

Subsection 17(2) provides a list of the types of personal information, the disclosure of which is deemed to be an unreasonable invasion of privacy. The WPS specifically cited 17(2)(e) in its December 30, 2020 access decision and its September 1, 2021 revised decision:

> ***Disclosures deemed to be an unreasonable invasion of privacy***
> ***17(2)*** *A disclosure of personal information about a third party is deemed to be an unreasonable invasion of the third party's privacy if*
>
> *(e) the personal information relates to the third party's employment, occupational or educational history;*

In this case, the information at issue is disciplinary information, which our office considers part of an individual's employment history. Employee disciplinary records are protected from disclosure by clause 17(2)(e) of FIPPA.

We next considered subsection 17(4), which sets out types of information and circumstances where the disclosure of personal information is not unreasonable, even if they are listed in subsection 17(2):

> ***When disclosure not unreasonable***
> ***17(4)*** *Despite subsection (2), disclosure of personal information is not an unreasonable invasion of a third party's privacy if*
>
> *(a) the third party has consented to or requested the disclosure;*
>
> *(b) there are compelling circumstances affecting the mental or physical health or the safety of the applicant or another person and notice of the disclosure is mailed to the last known address of the third party;*
>
> *(c) an enactment of Manitoba or Canada expressly authorizes or requires the disclosure;*
>
> *(d) the disclosure is for research purposes and is in accordance with section 47;*
>
> *(e) the information is about the third party's job classification, salary range, benefits, employment responsibilities or employment expenses*
>
> *(i) as an officer or employee of a public body,*
>
> *(ii) as a minister, or*
>
> *(iii) as an elected or appointed member of the governing council or body of a local public body or as a member of the staff of such a council or body;*
>
> *(f) the disclosure reveals financial or other details of a contract to supply goods or services to or on behalf of a public body;*
>
> *(g) the disclosure reveals information about a discretionary benefit of a financial nature granted to the third party by a public body, including the granting of a licence or permit;*
>
> *(h) the information is about an individual who has been dead for 25 years or more;*

> *(h.1) the information concerns a deceased individual and is disclosed to a relative of the deceased or an individual with whom the deceased shared a close personal relationship, if the head of the public body is satisfied that in the circumstances the disclosure is desirable for compassionate reasons; or*
>
> *(i) the record requested by the applicant is publicly available.*

We observe that the factors set out in subsection 17(4) of FIPPA constitute a closed list. Once a public body has determined that a provision of subsection 17(2) applies, it cannot consider any factors, other than those that are set out in subsection 17(4).

We observe that while clause 17(4)(e) does contemplate the release of some public body employee information, that information relates to more generic information, such as salary ranges and job classifications. FIPPA draws a sharp distinction between this information, which is subject to release, versus information about other aspects of "employment history", which is not.

Disciplinary records are part of employment history and, therefore, they are generally protected from disclosure. We determined that clause 17(4)(e) does not apply to the information. We also determined that no other provision of 17(4) was relevant to our analysis. Given the above considerations, we determined that some of the information in the records is personal information that is protected under clause 17(2)(e) of FIPPA.

### A word about public accountability

Our office is cognizant of the high public interest in police conduct and that one of the underlying purposes for access to information legislation is to promote transparency and accountability on the part of public bodies. We recognize that the general access principles apply in this case, consistent with clause 2(a) of FIPPA. However, we are also cognizant that we start with the actual wording of the legislation, because of the "modern principle" of statutory interpretation that Canadian Courts follow.

We observe that while the Legislature did contemplate the utility of public scrutiny of government operations, that is not a relevant factor once subsection 17(2) applies.

Rather, accountability becomes relevant as one factor in the analysis, as stated in clause 17(3)(a):

> ***Determining unreasonable invasion of privacy***
> ***17(3)*** *In determining under subsection (1) whether a disclosure of personal information not described in subsection (2) would unreasonably invade a third party's privacy, the head of a public body shall consider all the relevant circumstances including, but not limited to, whether*
>
> *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Manitoba or a public body to public scrutiny;*

However, clause 17(3)(a) is considered only if the information is not otherwise subject to subsection 17(2). By its inclusion of public scrutiny as a factor that is to be considered in some circumstances, but not others, the Legislature clearly expressed that if a public body determines that subsection 17(2) applies (for example, because the record contains an individual's employment history), then the need for public scrutiny is not a relevant factor.

Had the Legislature wanted public bodies to consider the public interest in scrutiny of government operations in the context of disclosing subsection 17(2) records it would have said so in subsection 17(4) of FIPPA. It did not.

## Reasonable Severing of the Records

As discussed above, the purpose of FIPPA is to allow individuals access to information in the custody or control of public bodies. While access to information is the starting point, FIPPA recognizes that some information should be kept confidential, including for the reason of protecting the privacy rights of third parties.

FIPPA balances these competing rights through limited exceptions to access and a requirement to sever information from a record to allow for as much information as reasonably possible to be provided to an applicant.

Subsection 7(2) sets out this requirement:

> ***Severing information***
> ***7(2)*** *The right of access to a record does not extend to information that is excepted from disclosure under Division 3 or 4 of this Part, but if that information can reasonably be severed from the record, an applicant has a right of access to the remainder of the record.*

Subsection 7(2) of FIPPA requires that where an exception applies to a portion of the information in a record, only that portion is severed, and the applicant is entitled to access to the remainder of the record unless an exception in another section of FIPPA applies. This severing is required to be reasonable and ensure that only the minimum amount of information necessary is severed while also ensuring that the information provided is meaningful and not disconnected pieces of information.

In reviewing the records in light of Annable, we determined that the appropriate question for this stage of our analysis is: Has the WPS demonstrated that the disclosure of additional information in the 'facts in brief' and the associated recommended discipline contained in the Charge Forms and letters to members, in conjunction with other available information, could reasonably be expected to identify the individual WPS member who received the disciplinary penalty? Correspondingly, has the WPS reasonably severed the records?

In our analysis of whether the WPS conducted reasonable severing, we heeded Justice Martin's caution in Annable that there are over 1300 individual officers to whom the information could relate, and that the "mosaic effect" should be employed sparingly. The mosaic effect is a concept that explains how information that seems to be non-identifiable on its own can be combined with other information to identify an individual.

However, we also acknowledge that, unlike in Annable, in this case, the 'facts in brief' sometimes provide unique details that could be combined with other information to reasonably lead to the identification of individual officers, if disclosed.

The WPS provided our office with detailed information concerning specific charge forms in the 59 partially disclosed pages that explained that certain third parties (including other members of the police shift, third parties involved in the incident, Crown attorneys, and others) could reasonably be expected to identify the WPS member involved and therefore learn that the WPS member faced a particular discipline for the matter.

The WPS identified these disciplinary situations as “distinct and uncommon”. While we are not able to share details from the WPS' rationale as that would disclose protected information, we agree with the WPS' determination that additional information from the 'facts in brief' cannot be disclosed in the 59 pages.

We acknowledge that there is evidence that the WPS conducted a line-by-line review in the 59 pages of records, and we observed that in situations that were less unique in the 59 pages, such as three incidents where officers accessed the WPS computer system without authorization, the WPS redacted less information as it was less likely that a WPS member could be identified. We concluded that the WPS' severing of the 'facts in brief' in the 59 pages was reasonable.

However, we also explained our view to the WPS that disclosure of the penalties in many cases in the 59 pages could not reasonably be expected to identify individual members. Our view is that once the WPS redacted the records so that individuals were not identifiable, the disclosure of the recommended discipline, which in many cases was generic (e.g., admonishment, written reprimand, loss of 'x' number of days leave) could not reasonably be expected to identify a member. It would only be cases where the penalty was unique that the information might reasonably be expected to identify a member.

In addition, we advised the WPS that it needs to conduct a line-by-line review of the 34 pages of records where no information about the 'facts in brief' was released.
We explained our view that releasing some information from the 'facts in brief' in the 34 pages (as the WPS did in the 59 pages), such as the charges, the year of the offence, and the recommended penalties could not reasonably be expected to identify an individual WPS member. In our view, the severing of the 34 pages of records was not reasonable.

The WPS disagreed with our office and stated that the disclosure of any further information would result in the identification of WPS members. In the WPS' view:

> "…consistent with Annable, the charge forms and charge letters have already been redacted as much as possible in order to leave information intact which is generic and would not reveal the circumstances or particulars of the incident, including when or how it arose."

The WPS also stated that an "analysis required to protect personal information requires a prospective component for the purpose of prevention of unreasonable invasion of individual privacy. The WPS cited *Canada (Information Commissioner) v. Canada (Public Safety and Emergency Preparedness)*[6] (*Public Safety*) as the basis for this position.

Specifically, the WPS cited paragraph 53 of *Public Safety*, which states:

> *I agree that standards and approaches applicable to section 20 of the ATIA are not necessarily applicable to section 19, given the different nature of the interests at stake in the two sections. At the same time, however, the "serious possibility" of Gordon and the "reasonable to expect" of NavCanada both appear to convey effectively the same standard: a possibility that is greater than speculation or a "mere possibility," but does not need to reach the level of "more likely than not" (i.e., need not be "probable" on a balance of probabilities). Applying such a standard recognizes the importance of access to information by not exempting information from disclosure on the basis of mere speculative possibilities, while respecting the importance of privacy rights and the inherently prospective nature of the analysis by not requiring an unduly high degree of proof that personal information will be released.*

Our office agrees that privacy and access rights ought to be considered harmoniously. Access is the general rule, but the personal information exception must not receive a narrow or "cramped interpretation". [7] The balancing of these rights is reflected in s.17 which contains a number of considerations to determine whether the release of personal information would be an unreasonable invasion of privacy. Both access provisions and privacy provisions must be given a full interpretation.

---

[6] *Canada (Information Commissioner) v. Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1279 (CanLII), <https://canlii.ca/t/j35r2>, retrieved on 2023-11-01
[7] *Dagg v. Canada (Minister of Finance),* 1997 CanLII 358 (SCC), [1997] 2 SCR 403, <https://canlii.ca/t/1fr0r>, retrieved on 2023-10-31

Whether information will identify an individual depends on the number of details available to the person who receives the information. The WPS noted in its representations that in other cases, information disclosed by its office has enabled applicants to identify the police officers involved even with some information severed from the records.

The WPS also provided specific details of one of these incidents for our review. In that case, the applicant was able to determine the name of one of the involved parties included in the responsive records and link that to other information from the responsive records.

However, our office notes that information of the nature disclosed was publicly available prior to the access decision being made. In addition, in that case, there was a unique penalty that only a small number of WPS members were given, which made it more reasonable to expect that the member could be identified.

The WPS also provided us with two examples where officers were charged with offences and named in the media. In situations where the WPS member has been publicly named, and where the charges are unique, we agree with the WPS that there is a reasonable expectation that an individual could be identified.

In our view, each situation must be analyzed on a case-by-case basis to determine whether a reasonable expectation that an individual can be identified exists. When determining whether an individual is identifiable, public bodies must consider the full context of the information available both in the responsive records and from other public sources.

The WPS maintains that it is impossible for it to know what information exists or is in possession of the applicant. However, public bodies are not required to know with certainty what information exists or is in the possession of the applicant. They are required to consider what information reasonably exists or could reasonably be in the possession of, or accessible by, the applicant.

Based on our analysis, it is our view that additional information can be disclosed from the records without a reasonable expectation that an individual would be identified.

Specifically, we believe that the WPS must conduct an analysis of each circumstance to determine whether disclosure could reasonably be expected to identify an individual WPS member.

We determined that in many cases, the release of penalties in the letters to members contained in both the 59 pages and the 34 pages of records can be disclosed, with the exception of those that are more unique and/or publicized.

Also, we believe that the WPS needs to conduct a line-by-line analysis of the 'facts in brief' in the 34 pages and disclose information that could not reasonably be expected to identify a WPS member. In addition, there are cases where, as in the case of the 59 pages of records, the year of the offence and the charges could be disclosed in the 34 pages.

Outside of identifying that the charges described in the 34 pages were not finalized, the WPS has not provided our office with a cogent rationale to explain why the severing in the 59 pages of charge forms and letters is different from the severing in the 34 pages of the charge forms and letters. Whether the charges were finalized would not appear to have a bearing on whether the members are identifiable.

Additionally, if the WPS takes the position that the release of a specific piece of information identifies the individual and meets the reasonable expectation standard, then it should be able to explain how it determined that the information could be reasonably expected to identify an individual and what factors it considered when making this determination.

Although the WPS provided specific information supporting its redactions of 'facts in brief' information in the 59 pages, this has not been done for the 34 pages of records, aside from a small sample in the WPS' letter of August 3, 2023. Despite this, more information has been severed from the 34 pages than the 59 pages.
Given the above considerations, our office finds that the WPS did not meet the requirements of subsection 7(2) of FIPPA.

### The Potential Application of Clause 17(2)(b) to the Responsive Records

As noted above, the WPS' representations reference clause 17(2)(b), which had not been cited in its access decision to the complainant. Given that the WPS has not issued a revised access decision with respect to this clause or section 24 and 25, which were also referenced, and has not indicated any specific information that it believes is subject to the requirements of clause 17(2)(b) and sections 24 and 25, we will review the requirements of these provisions, but will not be making any findings in relation to the application of these provisions to the responsive records.

Clause 17(2)(b) of FIPPA authorizes a public body to refuse access to personal information that was compiled and is identifiable as part of an investigation into a possible violation of a law.

> ***Disclosures deemed to be an unreasonable invasion of privacy***
> ***17(2)*** *A disclosure of personal information about a third party is deemed to be an unreasonable invasion of the third party's privacy if*
>
> *(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of a law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;*

When determining whether clause 17(2)(b) applies, a public body must determine whether:

- the information was compiled as part of an investigation into a possible violation of the law, and
- the information is identifiable as being part of an investigation, and
- the information relates to an identifiable individual

The first part of this analysis relates to whether the information was compiled as part of an investigation. If the information was collected by the public body for another purpose or as part of another process or if the investigation did not relate to a violation of a law, then this provision would not apply.

Next, the public body would need to determine whether the information is identifiable as being gathered as part of an investigation. For example, an individual's name might have been gathered as part of an investigation. However, if the name is on a document that does not mention or allude to the investigations, and the link is not otherwise clear from the circumstances, then this provision would not apply.

Finally, the public body would need to determine whether the information is personal information, i.e. is information about an identifiable individual. For example, if the information was the name of an involved business, that would not be information about an identifiable individual and this provision of FIPPA would not apply.

If the WPS intends to rely on clause 17(2)(b) to refuse access to information in the responsive records, it would need to issue a revised access decision indicating what information was being redacted under this clause and how it determined that 17(2)(b) applied to the redacted information.

## The Potential Application of s. 24 and 25 to the Responsive Records

In the public body's representations, the evidence and discussion related to sections 24 and 25 was the same. As such, our office will review these sections together. Sections 24 and 25 of FIPPA are discretionary exceptions to access which authorize a public body to refuse access to information that could harm individual or public safety, law enforcement or legal proceedings. The WPS specifically cited subsection 24(a) and clause 25(1)(a) in its representations.

> ***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*
>
> *(a) harm a law enforcement matter;*

The purpose of these sections is to allow public bodies to refuse access to information in records if the release of the information could cause the specified harm(s). When determining whether to refuse access under these sections, a public body must also consider whether doing so is an appropriate exercise of its discretion in the circumstances.

The *Merck* case cited by the Court in *Annable* is also relevant to the application of sections 24 and 25. In *Merck*, the SCC clarifies the harms test required when applying a discretionary exception to access. The Court states that the test is a "reasonable expectation of probable harm."

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.*[8]

Our office notes that the SCC specifically cited section 17 of the Access to Information Act[9], which does not have the exact same wording as section 24 of FIPPA but has a similar purpose.

[8] *Merck, supra* note 5, at para 195.
[9] *Access to Information Act*, RSC 1985, c A-1, <https://canlii.ca/t/563rq> retrieved on 2023-11-02

***Safety of individuals***
***17*** *The head of a government institution may refuse to disclose any record requested under this Part that contains information the disclosure of which could reasonably be expected to threaten the safety of individuals.*

(emphasis added)

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.D. 584 (Admin. App. Trib.), at para. 25. The words "could reasonably be expected" "refer to an expectation for which real and substantial grounds exist 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.*[10]

(emphasis added)

Given the test as set out in Merck and the requirements of FIPPA, in order for a discretionary exception to access to apply to information in a responsive record, the following factors must be present:

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.

The WPS routinely severs the names of police officers under section 25 and our office has found in the past that, in most circumstances, the WPS is authorized to do so.

[10] *Merck, supra* note 5, at para 204.

There are limited exceptions to this, such as the names of police officers who hold executive or public facing positions, such as the Chief of Police or the public information officer, and whose names and faces regularly appear in the media.

In relation to the application of sections 24 and 25, the WPS stated that the release of the redacted charge forms and letters could harm the mental and physical health of police officers. The WPS set out numerous factors to support its assertion, including the outcomes of research on officer stress. The WPS also provided specific information related to the general stress and mental health of police officers in the WPS.

Our office accepts that there are a number of factors that can have a negative effect on the mental and physical health of police officers. However, the WPS has not provided sufficient evidence that the release of the specific information in the responsive records could be reasonably expected to harm the mental and physical health of its members.

Returning to the test as it was set out in Merck, is there a reasonable expectation that the release of additional information from the responsive records would cause probable harm? The WPS has provided research to support that the negative perception of police in the media can cause harm to police officers.

However, there has been no evidence presented to show that the release of any specific information within the records created an expectation of harm "for which real and substantial grounds exist". Rather the WPS made a statement about the possible impacts of the release of the records as a whole on members of the WPS generally.

The proper application of FIPPA requires a line-by-line review of the responsive records. Each specific piece of information in the record must be examined to determine what, if any, exceptions to access might apply. A public body must be able to explain its reasons for severing each specific section of the record, be it a sentence or paragraph.

For sections 24 and/or 25 to be applied to the information in the responsive records, the WPS would have to show not only that there exists a reasonable expectation of probable harm, but that the harm would be caused by the disclosure of the information.

In this specific case, the WPS would have to provide evidence that the disclosure of additional information in the responsive records could reasonably be expected to exacerbate or otherwise increase the current risk to the mental and physical health or safety of police officers or to a matter of law enforcement.

If the release of information would have no substantive effect on the harm as it currently exists, then there is no reasonable expectation that the disclosure itself would cause probable harm.

# FINDINGS

Based on the above review of the evidence, representations of the complainant and the WPS, FIPPA and the case law, our office finds that the City of Winnipeg – Winnipeg Police Service did not fulfill the requirements of subsection 7(2) of FIPPA to reasonably sever the records responsive to the complainant's request.

The complainant believed that additional meaningful information could be extracted from the records and disclosed while still maintaining the privacy of individual WPS members and we agree. As such, the complaint is supported, and our office will be issuing recommendations to the public body.

# RECOMMENDATIONS

Based on our office's finding that the City of Winnipeg – Winnipeg Police Service did not meet the requirements of subsection 7(2) of FIPPA, the following recommendations are made:

**Recommendation 1:** The Ombudsman recommends that the City of Winnipeg - Winnipeg Police Service reconsider the redaction of the disciplinary penalties withheld in full in the 59 pages of records and in the 34 pages of records and release the penalties, with the exception of those penalties that would reasonably be expected to identify a WPS member as outlined earlier in this report.

**Recommendation 2:** The Ombudsman recommends that the City of Winnipeg—Winnipeg Police Service conduct a line-by-line review of the group of 34 records and in particular, the 'facts in brief', the year of the offence, and the charges. In doing so, we recommend they apply similar methodology to severing these records as was applied to the group of 59 records to facilitate the release of additional information, while continuing to sever information that would reasonably be expected to identify an individual (WPS members and other third parties).

**Recommendation 3:** Following the public body's reconsideration as described above, the Ombudsman recommends that the City of Winnipeg—Winnipeg Police Service issue a revised access decision to the complainant under section 12 of FIPPA and release the records, once the information that could reasonably be expected to identify individuals has been severed, as discussed in this report.

## HEAD'S RESPONSE TO THE RECOMMENDATIONS

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 email on November 20, 2024, the head shall respond by December 15, 2024. 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 her recommendations, she will notify the complainant about the head's response as required under subsection 66(5).

# HEAD'S COMPLIANCE WITH RECOMMENDATIONS

If the head accepts the recommendations, subsection 66(6) requires the head to comply with the recommendations within 15 days of acceptance of the recommendations 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 recommendations 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 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.

November 2024
Manitoba Ombudsman[11]

[11] The Manitoba Ombudsman has delegated the authority to issue this report to Manitoba's Deputy Ombudsman under section 56 of The Freedom of Information and Protection of Privacy Act due to a declared perceived conflict of interest.

MANITOBA
OMBUDSMAN

# REPORT ON THE RESPONSE TO THE RECOMMENDATIONS UNDER THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

The City of Winnipeg – Winnipeg Police Service

Refusal of Access

Issue Date:
December, 2024

Case MO-00105/2021-0214

# RESPONSE TO THE RECOMMENDATIONS

On November 20, 2024, the Ombudsman's Office issued a report with recommendations following the investigation of a complaint against the City of Winnipeg – Winnipeg Police Service (the WPS or the public body) about a refusal of access. The Ombudsman's Office made three recommendations:

> **Recommendation 1:** The Ombudsman recommends that the City of Winnipeg - Winnipeg Police Service reconsider the redaction of the disciplinary penalties withheld in full in the 59 pages of records and in the 34 pages of records and release the penalties, with the exception of those penalties that would reasonably be expected to identify a WPS member as outlined earlier in this report.

> **Recommendation 2:** The Ombudsman recommends that the City of Winnipeg—Winnipeg Police Service conduct a line-by-line review of the group of 34 records and in particular, the 'facts in brief', the year of the offence, and the charges. In doing so, we recommend they apply similar methodology to severing these records as was applied to the group of 59 records to facilitate the release of additional information, while continuing to sever information that would reasonably be expected to identify an individual (WPS members and other third parties).

> **Recommendation 3:** Following the public body's reconsideration as described above, the Ombudsman recommends that the City of Winnipeg—Winnipeg Police Service issue a revised access decision to the complainant under section 12 of FIPPA and release the records, once the information that could reasonably be expected to identify individuals has been severed, as discussed in this report.

Subsection 66(4) of FIPPA required the WPS to respond in writing to the recommendations by December 5, 2024, and indicate whether the recommendations were accepted. On December 5, 2024, the WPS notified our office that it was accepting the recommendations and would be issuing a revised access decision.

Subsection 66(6) requires public bodies to comply with recommendations they accept within 15 days or within a period that the Ombudsman's Office considers reasonable.

> ***Compliance with recommendations***
> ***66(6)*** *When the head of a public body accepts the recommendations in a report, the head shall comply with the recommendations*
>
> *(a) within 15 days of acceptance, if the complaint is about access under subsection 59(1), (2), (3.1) or (4); and*
>
> *(b) within 45 days in any other case;*
>
> *or within such additional period as the Ombudsman considers reasonable.*

The WPS requested 60 days to issue the revised access decision given the number of responsive records, its current workload and staff availability. Our office reviewed this request and determined that it was reasonable in the circumstances.

## CONCLUSION

The WPS complied with the time limit to respond in writing to our report and recommendations. The public body accepted the recommendations and requested additional time to comply with the recommendations. Our office agreed that the additional time was reasonable and set the due date for issuing the revised access decision as February 3, 2025.

December 2024
Manitoba Ombudsman[1]

[1] The Manitoba Ombudsman has delegated the authority to issue this report to Manitoba's Deputy Ombudsman under section 56 of The Freedom of Information and Protection of Privacy Act due to a declared perceived conflict of interest.