



INVESTIGATION REPORT

Files ATP14-017AI and ATP14-019AI

Parties: Public Service Commission, Records Manager and the Complainant

Date: July 22, 2014

Provisions: 7, 9 (b), 10, 13 and 25

Complaint

On February 28, 2014, the Office of the Information and Privacy Commissioner received two complaints from the Complainant in relation to two letters of response she received from the Records Manager to her ATIPP Requests #A-5120 and #A-5148 (Access Requests). In her complaint the Complainant identified that she was unable to determine from the Responses and records received:

- if complete records or information from records was withheld,
- what records or information was withheld pursuant to subsection 25 (1),
- why subsection 25 (1) applies to the records or information withheld, and
- why these records or information was withheld.

Jurisdiction

I have authority under subsection 42 (b) to receive complaints from the public concerning the administration of the ATIPP Act, conduct investigations into those complaints and report on those investigations.

Response to Access Requests

In the letter of response to Access Request #A-5120 it states:

The Public Service Commission has granted access, in part, to your request for records. Information has been severed from the 252 pages of enclosed records in accordance with section 25 (1) of the ATIPP Act which states:

25 (1) A public body must refuse to disclose personal information about a third party to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

In the records provided to the Complainant with the letter, information was severed from records 167, 217 and 218. Written by hand in the spaces where the information was redacted from these records are the words "Section 25 (1) ATIPP Act."

In the letter of response to Access Request #A-5148 it states:

The Public Service Commission has granted access, in part, to your request for records. Information has been severed from the 245 pages of enclosed records in accordance with section 25 (1) of the ATIPP Act which states:

25 (1) A public body must refuse to disclose personal information about a third party to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

In the records provided to the Complainant with the letter, information was severed from records 206 and 207. Written by hand in the spaces where information was redacted from the records are the words "Section 25 (1)."

Both letters indicate that the records are enclosed and contain the name of an ATIPP Coordinator who can be contacted with questions about the response along with her address and phone number. The letters also identify that the applicant can request a review by me.

The Public Body and the Records Manager confirmed that the only information provided to the Complainant about the letters she received to her Access Requests were contained in the letters and records provided.

The Public Body and the Records Manager further confirmed they had no discussion with each other about the application of section 25 (1) to the information severed from the records or the requirements of subparagraph 13 (1)(c)(i) in relation to the letters of response provided.

Analysis

The Complainant's complaint is that she was unable to determine from the letters she received to her Access Requests if records or just information was refused, what information or records subsection 25 (1) applies to, why this subsection applies and the reasons for refusing access in reliance on this subsection.

Sections 7 through 14 set out the responsibilities of the Records Manager and a public body in providing a response to an applicant.

Section 7 requires the Records Manager to make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely. Section 10 requires a public body to make every reasonable effort to assist the Records Manager and enable her to respond to each applicant openly, accurately and completely. The elements of an open, accurate and complete response are set out in section 13.

Section 13 requires, among other things, that the Records Manager tell an applicant in a response whether partial or full access to the records requested was provided, the reasons for a refusal, and the provisions of the Act relied on for a refusal. Subsection 9 (b) requires a public body to provide the Records Manager with information and comments that enable the Records Manager to give on behalf of the public body a response that complies with section 13.

Did the responses to the Access Requests meet the requirements of section 13?

Upon review of the letters, I have determined that the letters contain the information required by paragraphs 13 (1)(a) and (b) and subparagraphs 13 (1)(c)(ii) and (iii). I have also determined that the letters do not contain the information required by subparagraph 13 (1)(c)(i) . My reason for making this determination follows.

The requirements under subparagraph 13 (1)(c)(i) are clear; when providing a response to a request for access to records, the response must include both the reasons for the refusal and the provision of the ATIPP Act on which the refusal is based. The purpose of the requirement to provide reasons in subparagraph 13 (1)(c)(i) is to provide an applicant with enough information to make a reasonably informed decision about whether or not to seek a review of a public body's decision about refusing to provide access to information.¹

¹ *Saskatchewan Justice, Re*, 2006 CanLII 31815 (SK IPC), at para. 28. Paragraph 7 (2)(d) of Saskatchewan's FOIPPA has a similar requirement to subparagraph 13 (1)(c)(i) of the ATIPP Act. Paragraph 7 (2)(d) states: "7 (2) *The head shall give written notice to the applicant within 30 days after the application is made: (d) stating that access is*

In the letters provided to the Complainant, it states only that information was severed in accordance with subsection 25 (1). In the records provided to the Complainant in the location where the information was severed “section 25 (1)” is written.

Citing only subsection 25 (1) as authority to refuse access to personal information from the records is insufficient to inform the Complainant of the Public Body's authority under section 25 to refuse access to information or a record.

Section 25 has four subsections, (1), (2), (3) and (4). Subsection (2) and (4) contain paragraphs. When applying section 25, subsections (1), (2) and (4) must be considered by the Public Body before making its decision that disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy. An example of how section 25 operates follows.

If a record contains personal information, a public body will look to section 25 to see if it is required to refuse to disclose the information. Subsection 25 (1) requires a public body to refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy. Subsection (2) identifies the kind of personal information that if disclosed is presumed to be an unreasonable invasion of personal privacy. If the public body determines that personal information is the kind listed in paragraphs (a) through (i) of subsection (2) or if it determines otherwise that release of the information would be an unreasonable invasion of an third party's personal privacy, before refusing disclosure of the information it must first consider all the relevant circumstances in subsection 4 to determine if the presumption in subsection (2) can be rebutted.²

Given the way section 25 operates, for the Complainant to be properly informed of the Public Body's authority to refuse access to personal information under section 25 and to meet the requirements of subparagraph 13 (1)(c)(i), the Complainant would need to be informed of all the relevant subsections, paragraphs and subparagraphs relied on by the Public Body under section 25 to refuse this access. That did not occur in this case.

The duty to provide reasons under paragraph 13 (1)(c)(i) of the ATIPP Act is a separate duty from the duty to include the provision of the ATIPP Act on which the refusal is based. Consequently, when a public body refuses access to a record in accordance with an exemption under the ATIPP Act, it must provide reasons why it applied the exemption.

Other jurisdictions have considered the duty to provide reasons and provide some helpful information about what this duty entails.

refused, setting out the reason for the refusal and identifying the specific provision of this Act on which the refusal is based;”

² Yukon Information & Privacy Commissioner Inquiry Report File# 09-003AR at paras. 10 - 13, and *Branigan v. Commissioner of the Yukon Territory*, 2004 YKSC 79 (CanLII) at paras. 8-10.

In Order 00-31 issued by British Columbia's Information and Privacy Commissioner, in reviewing a public body's obligations under paragraph 8 (1)(c)(i) of British Columbia's *Freedom of Information and Protection of Privacy Act*³ which contains a similar requirement to the requirement in subparagraph 13 (1)(c)(i) of the ATIPP Act to "give reasons for refusal" , Commissioner Loukidelis stated:

*"In a number of orders, I have noted that public bodies must, as required by s. 8 (1)(c)(i) of the Act, give "reasons for refusal" by the public body to disclose information. This duty is in addition to the s.8 (1)(c)(i) obligation to tell an applicant "the provision of this Act on which the refusal" to disclose information is based. BCIT ...failed to give "reasons for refusal". I readily acknowledge that it will, in many cases, be difficult for a Public Body to give detailed reasons for refusal without disclosing information it has withheld. But s. 8(1) requires reasons to be given in as much detail as is reasonably practicable in the circumstances of each case and bearing in mind the practical limits just described."*⁴

In Report F-2006-003 issued by the Office of the Information and Privacy Commissioner of Saskatchewan, Commissioner Dickson, in reviewing whether a public body met the requirement contained in Saskatchewan's *Freedom of Information and Protection of Privacy Act* to "set out the reasons for refusal" under section 7 (b) of that Act, stated:

*"...Justice did not ...provide an adequate explanation as to why it invoked each exception cited."*⁵

In this Report, Commissioner Dickson provided some clarification on what elements a response should contain by pointing to Ontario Information and Privacy Commissioner's Practice Number 1, which states:

*"(a) For each record or part of a record that is refused, explain why the provision applies to the record. This explanation, along with the general description of the records, should enable the requester to understand why the information cannot be disclosed."*⁶

The letters provided to the Complainant's Access Requests did not include a reason why section 25 was applied to the information severed.

³ Subparagraph 8 (1)(c)(i) of BC's FIPPA states "8 (1) In a response under section 7, the head of a public body must tell the applicant (c) if access to the record or part of the record is refused, (i) the reasons for refusal and the provision of this Act on which the refusal is based,".

⁴ *British Columbia Institute of Technology, Re*, 2000 CanLII 14396 (BC IPC), at p. 5.

⁵ *Saskatchewan Justice, Re*, 2006 CanLII 31815 (SK IPC), at para. 28.

⁶ *Ibid*, at para. 26.

In relation to the requirements of sections 7 and 10, given that there was no discussion between the Records Manager and the Public Body about whether the requirements in subparagraph 13 (1)(c)(i) were met in preparing the letters of response provided to Complainant, it cannot be said that “every reasonable effort” was made to ensure the Complainant received a response that was open, accurate and complete.

Conclusion and Recommendations

Based on the foregoing, I have determined the following.

- In responding to the Complainant’s Access Requests the Records Manager failed to meet the requirements in section 7 as she did not make every reasonable effort to respond to the Complainant openly, accurately and completely and subparagraph 13 (1)(c)(i) as the response provided did not contain the provision of the ATIPP Act on which the refusal was based or the reasons for refusal.
- The Public Body failed to meet the requirements in section 10 as it did not make every reasonable effort to enable the Records Manager to respond to the Complainant openly, accurately and completely and subsection 9 (b) as it did not provide the Records manager with the information required to enable her to provide a response on behalf of the Public Body that met the requirements of section 13.

As a result of not meeting these requirements, the Complainant received a response that prevented her from making an informed decision about whether to challenge the decision made by the Public Body to refuse her access to information.

In regards to the Complainant’s complaint that she was unable to determine from the response what records or information subsection 25 (1) applies to, I am satisfied that by writing the provision relied upon in the space where the information was removed from the records makes it clear what provision applies to the information severed.

I understand that the Complainant was provided with a revised response through mediation on her Request for Review and that the Review has been settled. Consequently, I will not make any recommendations specific to this complaint. I will, however, recommend that the Public

Body and Records Manager work together to ensure that all future responses provided to applicants who request records are open, accurate and complete by ensuring all the requirements in section 13 are met.

Diane McLeod-McKay
Information and Privacy Commissioner

Post Script:

In her complaint, the Complainant identified that she was unable to determine from the response received whether complete records or just information was refused. Although I determined that the Records Manager and Public Body met the requirements of paragraph 13 (1) (a) in the response provided to the Complainant's Access Requests, the Records Manager and Public Body may wish to consider if more information should be provided to applicants to help them better understand what it means to provide access to part of a record.

Using these Access Requests as an example, the response to the Complainant could have indicated the following:

The Public Service Commission has granted access, in part, to your request for records. This means that you were provided with all the records responsive to your request, but that some information contained in the records was removed.

Our authority to remove this information from the records and our reasons for relying on this authority are as follows...