

Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2012-0416 (web version)

THE CITY OF WINNIPEG FIRE PARAMEDIC SERVICE

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 18(1)(b), 18(1)(c)(i)(ii)(iii), 23(1)(a)(b)

REPORT ISSUED ON JUNE 5, 2013

SUMMARY: The complainant requested access to records from the City of Winnipeg, Fire Paramedic Service (the public body or the city), involving the new fire station at Route 90 and Portage Avenue and its effect on traffic. Access to all of the information was refused because of the confidentiality of the information furnished by a third party and on the basis that disclosure would be harmful to a third party's business interests. The information was also withheld because the city was of the opinion that its disclosure would reveal advice and consultations or deliberations involving the public body and its employees. The ombudsman found that authority did not exist under section 18 of the act to refuse access but that authority did exist under subsection 23(1) to refuse access to some of the information.

During the course of our investigation, the public body reconsidered its initial position to withhold the records in their entirety and disclosed some of the information in the records to the complainant.

The complaint is partly supported.

THE COMPLAINT

The complainant requested access to the following information under *The Freedom of Information and Protection of Privacy Act* (FIPPA) on August 29, 2012:

Please provide copies of all draft traffic engineer and other reports on the impact the new fire station at route 90 and Portage Ave would have on traffic. Be sure to include the

documents noting traffic engineers and staff originally advised against placing the station in that location.

On September 28, 2012 the public body extended the deadline for responding to October 28, 2012 as it required time to consult with a third party before deciding whether or not to grant access to the records. On October 26, 2012 the public body sent the complainant its response advising that access to all of the requested information was being refused under the following exceptions to disclosure: clause 18(1)(b), subclauses 18(1)(c)(i),(ii),(iii), and clauses 23(1)(a)(b).

On December 18, 2012 our office received the complaint respecting the public body's decision to refuse access in full to the requested information. In a letter accompanying his complaint, the complainant expressed the view that, at the very least, the city should be able to provide the name of the firm that completed the study, the cost of the study and a copy of all reports, severing any 'truly' confidential information. As the complainant's access request had not asked for information respecting the cost(s) of the reports, it was not a matter at issue for purposes of our investigation.

INITIAL POSITION OF THE CITY OF WINNIPEG

In its response to the complainant dated October 26, 2012 the public body advised that, after careful consideration and consultation with a third party, it decided to withhold all records relating to the request under sections 18 and 23 of FIPPA. The third party with whom the city had consulted had provided written representations objecting to the disclosure of the responsive records.

The city's rationale for refusing access included the explanation that subsection 18(1) is intended to ensure that information supplied to a public body by a third party in confidence is treated as confidential throughout negotiations. Additionally, the city advised that subsection 18(1) protects third parties from harm to their competitive position or "threats" to other contractual negotiations they may undertake.

Finally, the public body advised that the intent of clauses 23(1)(a)(b) is to promote open and candid discussion in the decision making process of government by protecting advice, opinions, proposals, recommendations and analyses provided to decisions makers and any related consultations and deliberations of the issues and projects between employees and officials of the public body. The city believed that disclosure of any of the information in the records would reveal information protected by these provisions.

The relevant provisions are as follows:

Disclosure harmful to a third party's business interests

18(1) The head of a public body shall refuse to disclose to an applicant information that would reveal

- (b) commercial, financial, labour relations, scientific or technical information supplied to the public body by a third party, explicitly or implicitly, on a confidential basis and treated consistently as confidential information by the third party; or

(c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to

- (i) harm the competitive position of a third party
- (ii) interfere with contractual or other negotiations of a third party
- (iii) result in significant financial loss or gain to a third party

Advice to a public body

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

- (a) advice, opinions, proposals, recommendations, analyses or policy options developed by or for the public body or a minister
- (b) consultations or deliberations involving officers or employees of the public body or a minister

ANALYSIS OF ISSUES AND FINDINGS

1. Do the mandatory exceptions to disclosure in clause 18(1)(b) and subclauses 18(1)(c)(i)(ii)(iii) apply to the information withheld?

Subsection 18(1) sets out mandatory exceptions to disclosure and in those instances where the information in question is subject to these exceptions, then a public body is statutorily prohibited from disclosing the information.

The exception in clause 18(1)(b) focuses on the confidential nature of the information and has four requirements which must be satisfied in order for it to apply: the information must reveal commercial, financial, labour relations, scientific or technical information; the information must have been supplied to the public body by the third party; the information must have been supplied, explicitly or implicitly, on a confidential basis; and the information must be treated consistently as confidential information by the third party.

The mandatory exceptions contained in subclauses 18(1)(c)(i)(ii)(iii) of FIPPA protect a third party's business interests and involve a *reasonable expectation of harm test*. The focus of these provisions is not the source of information, but rather, whether the specified harm might reasonably be expected to result from disclosure. If information in the records falls within one of these exceptions, an applicant is not entitled to access that information, unless the information falls within subsection 18(3).

For clause 18(1)(c) to apply, a public body must establish that the following two required elements are met:

- The information must be one of the following types: commercial, financial, labour relations, scientific or technical information.
- An existing or potential business rival must exist and there must be a reasonable expectation of a specific type of harm that will result from the disclosure, i.e, the

disclosure shall not simply hinder or cause minimal interference. In the case of subclause 18(1)(c)(i), the specific harm would be to the third party's competitive position; in the case of subclause 18(1)(c)(ii), the specific harm would be to the third party's negotiations. In the case of subclause 18(1)(c)(iii), the specific harm would be to a third party's financial position.

On December 27, 2012 we wrote the public body and asked that it provide our office with a copy of the responsive records, along with a copy of any representations made by the third party about disclosure of the records. At that time, we also asked the city whether it had considered any of the limits to subsection 18(1), found under subsections 18(3) and 18(4) of FIPPA.

We received the city's response on February 6, 2013. In its response, the city advised that all of the information had been withheld under clause 18(1)(b) and subclauses 18(1)(c)(i)(ii)(iii) and that none of the limits to these exceptions applied. In particular, the city had determined that the public interest in disclosure for the purpose of improved competition [clause 18(4)(b)] did not outweigh the private interest of the third party in non-disclosure.

The public body had consulted with the third party with whom it understood it was under contract for the provision of the study at the time the study was commissioned. That third party objected to the release of the records.

Upon review of the records, we discovered that the city had not included any representations by another third party, the party responsible for preparing the Core Fire Hall Access Management Study, dated April 29, 2011 and its Addendum, dated May 20, 2011, i.e., the responsive records. For purposes of this report, we will refer to these records as "the study" and "the addendum".

We wrote another letter to the city on February 25, 2013 asking that it confirm with our office whether it had consulted with the third party responsible for creating the study and the addendum. It was our opinion that this third party should be approached regarding disclosure of these records.

On March 8, 2013 the city notified our office that, upon further review, it determined that the City of Winnipeg Public Works Department had commissioned the study and that a contract did not exist between the city and the third party that had objected to the release of the records at the time the study was commissioned.

The city provided us with information/records to support that it had provided "notice" on September 28, 2012 to the third party responsible for creating the study and the addendum. At the time the public body had made its access decision, this third party had not yet responded to the city with consent to disclose nor had it provided representations to support non-disclosure of the study and the addendum. As we considered this third party to be an 'affected' third party, we provided notification under section 61 of FIPPA, and asked that it confirm its position on the release of the records under subsection 64(1).

These provisions read as follows:

Notifying others of a complaint

61 As soon as practicable after receiving a complaint, the Ombudsman shall notify the head of the public body concerned and any other person who, in the Ombudsman's opinion, is affected by it.

Representations to the Ombudsman

64(1) During an investigation, the Ombudsman shall give the complainant and the head of the public body concerned an opportunity to make representations to the Ombudsman. The Ombudsman may also give any other person who has been notified of the complaint under section 61 an opportunity to make representations. However, no one is entitled to be present during an investigation or to have access to or to comment on representations made to the Ombudsman by another person.

In late March 2013 the author of the study and the addendum contacted both our office and the city and provided its consent for full disclosure of these records.

Subsection 18(3)(a) of the act is relevant in this type of scenario and reads:

Exceptions

18(3) Subsections (1) and (2) do not apply if
(a) the third party consents to the disclosure

In our view, the application of subsection 18(1) to third party records and the notice(s) to any respective third party for representations or consent are specific to the third party to whom the information pertains. While another third party had objected to the disclosure of the responsive records, the relevant third party, i.e., the one responsible for creating the study and the addendum, consented to their disclosure. Therefore, we found that the mandatory exceptions to disclosure found under subsection 18(1) of the act did not apply to the study and the addendum.

2. Do the discretionary exceptions to disclosure in clauses 23(1)(a)(b) apply to the information withheld?

Subsection 23(1) of FIPPA protects the advisory and deliberative processes involving a public body or minister of the government of Manitoba. The exceptions in subsection 23(1) are “class exceptions” as they protect a type or kind of information in a record. There is no “reasonable expectation of harm test” associated with subsection 23(1) of FIPPA, however, as this provision is discretionary, consideration of harm from the release of the records may be a factor in a public body’s exercise of discretion in applying subsection 23(1).

The discretionary exceptions found under clauses 23(1)(a)(b) are intended to protect the deliberative process involved in decision making by a public body and to ensure that open discussion of issues takes place among officials, employees and others advising ministers or a public body. These provisions apply to advice, opinions, recommendations, etc. developed by or

for officials or staff of the public body. This includes suggestions about particular approaches to take.

Based on our review of the records and the representations received by the public body, we determined that clause 23(1)(a) of FIPPA applied to some but not all of the information that was withheld under this provision; most of the responsive records include advice, opinions, proposals, recommendations, analyses or policy options developed for the public body. Inasmuch as city staff would consult/deliberate over the content of the records, the city also had authority to withhold this same information under clause 23(1)(b) of FIPPA. To disclose this type of information would run counter to the need to preserve the confidential relationship between the public body and its advisors, in the free flow of advice involved in decision making.

By way of our letter dated December 27, 2012 we asked the public body whether it had considered any of the limits to disclosure set out in subsection 23(2):

Exceptions

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

- (a) is in a record that is more than 20 years old;
- (b) is an instruction or guideline issued to officers or employees of the public body;
- (c) is a substantive rule or statement of policy that has been adopted by the public body for the purpose of interpreting an enactment or administering a service, program or activity of the public body;
- (d) is the result of a product or environmental test conducted by or for the public body;
- (e) is a statement of the reasons for a decision made in the exercise of a quasi-judicial function or a discretionary power that affects the applicant;
- (f) is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal;
- (f.1) is a public opinion poll;
- (g) is a statistical survey; or
- (h) is a final report or final audit on the performance or efficiency of the public body or of any of its programs or policies, except where the information is a report or appraisal of the performance of an individual who is or was an officer or employee of the public body.

In its response to our office dated March 8, 2013 the city advised that, as at that date, none of the limits to disclosure applied.

As we were not satisfied that all of the information in the records would “reveal” the substance of the advice, opinions, recommendations, consultations, deliberations, etc., we presented our considerations to the city by way of a letter dated April 18, 2013 and asked that the city reconsider its application of clauses 23(1)(a)(b) to all of the information. Subsequently, in its letter to our office dated May 15, 2013 the public body advised it would be releasing additional information to the complainant. On May 17, 2013 the city provided the complainant with a copy of the records, releasing much of the information that had previously been withheld. Our office was provided with a copy of the correspondence and the severed records.

After reviewing the revised decision and the severed records, we found that the city had discretion and authority under subsection 23(1) of FIPPA to withhold the information that continued to be withheld under this provision. We were satisfied that the city reasonably exercised its discretion to withhold rather than release this remaining information.

SUMMARY OF FINDINGS

The ombudsman found that:

1. Section 18(1) did not apply to the information withheld, in that the third party responsible for preparing the responsive records consented to their release under clause 18(3)(a) of FIPPA.
2. Subsection 23(1) applied to the information that continued to be withheld from the records, and the city reasonably exercised its discretion to withhold rather than release this information.

CONCLUSION

Based upon the findings of the ombudsman, 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's decision to refuse access to the Court of Queen's Bench within 30 days following the receipt of this report.

June 5, 2013
Manitoba Ombudsman