

Manitoba mbudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2013-0001 (web version)

THE CITY OF WINNIPEG CORPORATE SUPPORT SERVICES DEPARTMENT

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 18(1)(b), 18(3)(a), 28(1)(c)

REPORT ISSUED ON MAY 17, 2013

SUMMARY: The complainant requested access to information maintained by the City of Winnipeg (the city or the public body) with respect to invoices paid to a number of real estate companies over the last five years. The public body refused access in full to the records requested, advising that some of the records did not exist; those that did exist were being withheld under clauses 18(1)(a)(b), subclauses 18(1)(c)(i)(ii)(iii)(iv) and subclauses 28(1)(c)(i)(ii)(iii). The ombudsman found that subsection 18(1) did not apply to the invoices regarding those companies that had provided consent for their disclosure. The ombudsman found that clause 18(1)(b) applied to the invoices generated by the one company that had not provided consent for their disclosure, as they had been provided in confidence to the public body, and had always been treated as confidential by that third party.

Inasmuch as section 18 no longer applied to the invoices for which consent was obtained, we were not able to determine that the city's interests could be harmed by the release of those invoices under section 28 – disclosure harmful to economic and other interests of a public body. During the course of our investigation, the public body disclosed the invoices for which consent had been obtained.

The complaint is partly supported.

THE COMPLAINT

On September 7, 2012 the complainant made a request to the City of Winnipeg under Part 2 of *The Freedom of Information and Protection of Privacy Act* (FIPPA or the act) for access to the following records:

Invoices paid to [a number of named real estate companies] for the last 5 years.

The public body wrote the complainant on November 26, 2012 advising that it was extending the deadline for responding to December 24, 2012, as time was required to consult with third parties before deciding whether or not to grant access to the records. Additionally, the letter indicated that records respecting certain companies did not exist and, in that regard, access was being refused (subclause 12(1)(c)(i)).

On December 19, 2012 the public body sent its response to the complainant advising that, after consulting with the third parties and considering all the relevant circumstances, it had decided to refuse access in full under clauses 18(1)(a)(b), subclauses 18(1)(c)(i)(ii)(iii)(iv) and subclauses 28(1)(c)(i)(ii)(iii) of FIPPA to those records that did exist. The December 19 letter restated that, respecting some of the companies cited in the access request, the search for records did not reveal the existence of any invoices. For purposes of this investigation, the records at issue are those invoices that exist and were withheld in their entirety.

The cited provisions read as follows:

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,
 - (i) in the case of a record that does not exist or cannot be located, that the record does not exist or cannot be located

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

- (a) a trade secret of a third party;
- (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
 - (iv) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied

Disclosure harmful to economic and other interests of a public body

28(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to harm the economic or financial interests or negotiating position of a public body or the Government of Manitoba, including the following information:

- (c) information the disclosure of which could reasonably be expected to
- (i) result in financial loss to,
 - (ii) prejudice the competitive position of, or
 - (iii) interfere with or prejudice contractual or other negotiations of, a public body or the Government of Manitoba;

Our office received a complaint about refused access on January 2, 2013. The complainant expressed the following views in a letter accompanying his complaint:

- The complainant disputed that invoices paid to real estate companies for services constitute a trade secret under FIPPA.
- The complainant believed that much of the information in the invoices would have been contained in publicly available tenders and therefore could not be considered confidential in nature.
- The complainant could not determine that disclosure of the information contained in the invoices would meet the reasonable expectation of harm test.
- Similarly, even if there could be financial losses or gains resulting from the release of the information, he could not determine how these losses or gains could be significant.
- The complainant did not believe that disclosing the information would result in a loss of revenue, loss of reputation or loss of goodwill in the marketplace, nor would it result in a loss of competitive advantage, in consideration that the public body is a unique entity.
- He believed that the public interest in disclosure outweighed the private interests of the third parties in non-disclosure.

POSITION OF THE CITY OF WINNIPEG, CORPORATE SUPPORT SERVICES DEPARTMENT

Respecting the companies for which invoices did exist, the city advised that it had consulted with the respective third parties to give them an opportunity to consent to the disclosure of the invoices. The city's position was that, although some of the third parties had provided consent to disclose the invoices, a selection of invoices from different companies could be interpreted in different ways by different readers and because it could not guarantee that disclosure of some of the invoices would not cause harm to any of the other parties, it refused access to all of the invoices requested. It believed that confidentiality was essential to ensuring that all companies cited in the request would be treated fairly and ethically.

The city denied access to the records under sections 18 and 28 of the act, advising that the invoices reflected information and processes that were proprietary. Their disclosure could unfairly provide competitors with information that could be used in future competitive bid processes. The public body maintained that knowledge of the specific details negotiated in contracts would potentially influence negotiating positions in the future. This, in turn, would influence the ability of third parties to negotiate other terms and details going forward.

The city advised that the focus of section 18 is on the confidential nature of the information and on the consistent practice of receiving information from bidders* in a process where there is an

implicit expectation by all parties that the information provided to the city will be kept confidential. It stressed that confidentiality is an assurance provided to the business community, necessary to the bidding process. The city's competitive position could be harmed in that the release of competitors' bids could cause the business community to withhold key information which, in turn, would limit the city's ability to make the best decision about the award of a particular contract. Not maintaining confidentiality could also cause bidders to cease doing business with the city for fear that the city might later disclose this information.

The city also included in its response letter that, as a procurer of goods and services on behalf of citizens, it is committed to protecting its economic and financial interests in securing the best contract. By disclosing certain details of bids and contracts and not respecting the commitment to confidentiality, the city believed its business interests could be compromised as could its ability to procure goods and services at a competitive price. In other words, its interests in future bid opportunities and contractual negotiations with contractors could be negatively affected. Put another way, the lack of commitment to confidentiality could affect the city's reputation and goodwill in the marketplace and this, in turn, could result in financial loss to the city.

*We note that the city used the terms "bids/contracts/invoices" interchangeably in its representations. However, these terms are not one and the same. The access request in this case was for "invoices" only.

INITIAL MATTERS INCLUDING SEARCH FOR RESPONSIVE RECORDS AND RECORDS AT ISSUE

Clause 18(1)(a) of FIPPA

During the course of our investigation, the city advised our office that it had not intended to rely on clause 18(1)(a) to withhold the responsive records. This clause authorizes a public body to refuse access to certain types of information that would reveal a trade secret of a third party.

Adequacy of Search for Records

During the course of our investigation, we noticed that one of the third parties, during the consultation period, had questioned the city as to whether the invoices provided to it for review represented only a random sample of the responsive records. The fact that this issue was raised by a third party necessitated further questioning on our part as to the city's search for responsive records. We asked the city to provide us with further information about its search for records.

The city responded, advising that staff of its Corporate Controller's Office conducted searches of the City of Winnipeg's Peoplesoft Accounts Payable system for vendors named in the application for access for the period in question. Each supporting document in the system was then reviewed to determine responsiveness, relying on the following definition of invoice: *a commercial document issued by a seller to the buyer, indicating the products, quantities, and agreed prices for products or services the seller has provided the buyer. An invoice indicates the buyer must pay the seller, according to the payment terms.*

Subsequently, the city provided our office with records to substantiate that other accounts payable in its system would not fall under its definition of invoice in that, for example, they were statements of monthly lease charges such as rent, tax, and hydro.

We are satisfied that these records are not “invoices” and would not be responsive to this access request.

ANALYSIS OF ISSUES AND FINDINGS

1. Do the mandatory exceptions to disclosure in clauses 18(1)(b) and 18(1)(c) apply to the withheld records?

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 that 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)(iv) 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 any of the clauses of 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 course of our investigation, we asked the city to provide our office with a copy of the responsive records, along with the third parties' representations and further information to support reliance on section 18 of FIPPA. The city's response letter to our office included a copy of the records and the responses by the third parties.

Most of the third parties had explicitly consented to the disclosure of their respective invoices. One of the third parties had not provided the city with consent to disclose nor had it provided representations to support non-disclosure of its invoice(s). We considered this third party to be

an 'affected' third party. During the course of our investigation, as provided for under section 61 and subsection 64(1) of the act, we wrote the third party, asking that it confirm its position on the release of its invoice(s).

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.

On March 21, 2013 the third party advised our office that it consented to the disclosure of the record.

Subsection 18(3)(a) of the act is relevant in this type of scenario as it provides:

Exceptions

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

Regardless of whether the invoices could be interpreted in different ways and could perhaps cause harm to any other third party's business interests, 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. In our view, it is not reasonable to suggest that a third party, other than the third party to whom the information belongs, may review and/or comment on the records relating to another third party, and either consent or provide representations as to why another party's information should not be disclosed.

We found that the mandatory exceptions to disclosure provided under subsection 18(1) of the act did not apply to the invoices pertaining to those companies that consented to disclosure of their invoices. As such, we presented the above considerations to the city by way of a letter dated April 16, 2013 and asked that it reconsider its application of subsection 18(1) to those invoices. On May 1, 2013 we received a copy of the city's April 29, 2013 letter to the complainant, in which it provided full access to the invoices pertaining to those companies that had provided consent for disclosure.

The remaining third party objected to the disclosure of its invoices, advising that disclosure of the details in the invoices would reveal proprietary information that could be used to harm its

position in the competitive market. This third party differed from the others that were named in the access request in that, being locally owned and headquartered in Winnipeg, it believed disclosure of the information in the invoices could injure its opportunities in future competitive bidding processes with the city. Given the competitive marketplace, this third party felt that if its competitors and/or its customers were to become aware of specific details negotiated in a deal, that knowledge could have the strong potential to influence negotiating positions going forward. This opinion was confirmed internally with city staff, knowledgeable about real estate and development.

During the course of our investigation, as it appeared the third party was most concerned about the disclosure of specific details contained in its invoices, we asked the public body to once again consult with the third party to determine whether it would consent to releasing only the total amounts on its invoices. The third party replied, indicating that it was not willing to consent to disclosure of any information. It upheld its position that subsection 18(1) of the act applied to the totals of the invoices in that the invoices revealed commercial information that it had supplied to the public body on a confidential basis and had treated consistently as confidential information.

As part of our investigation, we asked the public body to determine whether any of the invoices were related to projects initiated either through the solicitation of competitive offers or through a resolution of council. If that were the case, the amount(s) of the bid/contract/award would be publicly available and it might be reasonable to expect that any invoice amount(s), representing and/or factoring into the bid/contract/award amount(s), could also be made known to the public.

The city advised that the majority of the contracts would have been issued pursuant to a competitive offer process and none were the result of a resolution of council. It further indicated that results of competitive offers are posted on its website at:

<http://www.winnipeg.ca/finance/findate/matmgt/bidres/Past/2013.asp>.

Additionally, the city advised that, while the information on bids solicited through a competitive offer process is generally available to the public, that information is limited and does not reflect the amount of information and detail found in the invoices. Furthermore, the city advised that the amounts paid typically vary from the award amounts found on its website.

Finally, the city noted that a number of the invoices were rendered to the city by the owner(s) of facilities leased to the city. The city would have paid those invoices but it would have been the owner(s) who procured the work, i.e., the work would not have been pursuant to the city's competitive offer process.

Having considered all of these factors, we found that clause 18(1)(b) applied to the invoices of the third party that objected to the disclosure of the records. The information in the records was financial or commercial information of a third party that had been provided in confidence by the third party and had always been treated as confidential by the third party.

As we found that clause 18(1)(b) applied to the information withheld, we did not give further consideration to whether clause 18(1)(c) applied to the same information.

1. Do the discretionary exceptions to disclosure in clause 28(1)(c) apply to the records withheld in their entirety?

The exceptions to disclosure in subclauses 28(1)(c)(i)(ii)(iii) provide protection for the business and commercial activities of a public body and in addition incorporate a reasonable expectation of harm test.

In the case of financial loss, there must be reasonable grounds to believe that disclosure of information in the specific records would result in direct monetary or equivalent loss. The loss cannot be speculative. In the case of prejudice to competitive position, a public body must have a reasonable expectation that disclosure of the information is capable of being used by an existing or potential competitor to reduce the public body's share of a market. Interference with contractual or other negotiations means to obstruct or make much more difficult the negotiation of a contract or other sort of agreement between the public body and a third party. The expectation of interference with negotiations as a result of disclosure must be reasonable and the negotiations have to be specific, not simply possible negotiations of a general kind that may occur in the future.

The city advised that disclosure could be expected to harm its business interests in that confidentiality is paramount to any business dealings it has with third parties. By not making the commitment to confidentiality and by disclosing certain details of bids and contracts and other details, i.e., invoices, the city believed its business interests could be compromised; future bidders for city projects would be less inclined to give the city a discounted price because they would be under pressure to give that discount to every customer.

Based on our review of the records and the representations made by the public body and the third parties, we were not able to determine that the public body had objective grounds for relying on subclauses 28(1)(c)(i)(ii)(iii) to refuse access to the invoices for which the third parties had provided consent to disclose. We were not satisfied that their disclosure could reasonably be expected to harm the public body's competitive position, prejudice its contractual negotiations or result in financial loss to the public body. These third parties had no expectation of confidentiality. In fact, their responses to the city revealed that they were committed to openness and transparency.

The public body held the position that its economic interests would be compromised or harmed if the withheld records were not treated as confidential, yet it would appear that the third parties, in providing consent, had contradicted this idea of 'confidentiality'. We were therefore not assured that the public body had initially exercised discretion reasonably in withholding all of the records under clause 28(1)(c). However, during the course of our investigation, the public body provided access in full to the invoices for which third party consent was obtained.

As the only information/records that continued to be withheld were those invoices for which clause 18(1)(b) of FIPPA was found to apply, we did not give further consideration to whether subsection 28(1) of FIPPA applied to those records.

SUMMARY OF FINDINGS

The ombudsman found that:

1. The mandatory exception to disclosure in clause 18(1)(b) applied to the information that continued to be withheld, for which third party consent was not obtained.
2. The limitation under clause 18(3)(a) of FIPPA applied to the information that was disclosed during the course of our investigation. On April 29, 2013, the city disclosed to the complainant a copy of the records, for which third party consent was received.

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's decision to refuse access to the Court of Queen's Bench within 30 days following the receipt of this report.

May 17, 2013