

Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2013-0035 (web version)

CITY OF WINNIPEG WINNIPEG GOLF SERVICES SPECIAL OPERATING AGENCY

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 6(2), 12(1)(c)(i), 10(1), 18(1)(b), 18(1)(c)(i)(ii)

REPORT ISSUED ON JULY 29, 2013

SUMMARY: On November 7, 2012 the complainant made a request for access to information concerning the revenues and expenses of city golf courses between 2007 and 2012, including both those operated under lease agreements and those operated by the City of Winnipeg (the city). The city responded stating that some information was publicly available; however, the detailed break out by individual course that had been requested did not exist. Access to information concerning the revenues and expenses of leased courses was denied pursuant to subsection 18(1) of FIPPA (disclosure harmful to a third party's business interests). Following receipt of a complaint of refused access, our investigation determined that information concerning the revenues and expenses of city operated courses for the years requested and broken down by individual course was able to be produced. However, with one exception, information concerning the revenues and expenses of leased courses could not be located by the city at the time the request was made. In accordance with the results of our investigation, the city issued a revised decision letter to the complainant on June 4, 2013.

THE COMPLAINT

The complainant requested the following information under *The Freedom of Information and Protection of Privacy Act* (FIPPA or the act) on November 7, 2012:

Finances for Winnipeg's City-owned golf courses...Please provide the Interest, Taxes, Depreciation and Amortization expenses for each of the 12 City owned golf courses for each year from 2007 to 2012. Please provide the total revenue for each of the City operated golf

courses for each year from 2007 to 2012. Please provide the total expenses for each of the City operated golf courses for each year from 2007 to 2012.

The city issued its decision regarding access to this information on December 7, 2012. The complainant was directed to the publicly available *Winnipeg Golf Services Special Operating Agency 2012 Business Plan*, which contained information on amalgamated revenues and expenses for Winnipeg Golf Services for 2010 and 2011 and projections for 2012. Figures were not broken out for individual golf courses and no figures for 2007 to 2009 were provided in this document. The complainant was also directed to the publicly accessible terminals at 457 or 510 Main Street for information on taxes paid on golf course properties. As stated in subsection 6(2), the access to information provisions found in Part 2 of FIPPA do not apply to information that is publicly available. Subsection 6(2) reads:

Part does not apply to publicly available information

6(2) This Part does not apply to information that is available to the public free of charge or for purchase.

Access to information concerning the seven courses operated under lease arrangements was refused pursuant to clause 18(1)(b) and subclauses 18(1)(c)(i)(ii) of FIPPA, which read 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,

The city further stated that no other records existed which matched the request. In particular, there were no records that identified the interest, taxes, depreciation and amortization expenses for each of the city operated golf courses individually for the time period requested. Accordingly access was refused, in part, under subclause 12(1)(c)(i) of FIPPA, which reads:

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,

The complainant maintained that a breakout of revenue and expenses (including interest, taxes, depreciation and amortization expenses), at least for each of the five city operated and/or

maintained courses, should exist for the period requested. A complaint of refused access was received in our office on February 4, 2013.

BACKGROUND

The mix of twelve municipal golf courses includes five private clubs on city-owned lands (Assiniboine, Rossmere, St. Boniface, Transcona, Wildwood) and two courses operated under management agreements (private operators on city owned lands - Canoe Club and Tuxedo). These seven courses are operated under lease arrangements. Two courses are contractor operated and city maintained courses (Blumberg and Harbor View) and three courses are city operated and maintained (Kildonan, Windsor Park and Crescent Drive).

INVESTIGATION AND FINDINGS

Was information concerning the annual revenue and expenses of each city operated course available for the years 2007 to 2012?

A large amount of information pertaining to the revenue and expenses of city operated golf courses has been made available publicly on the online City of Winnipeg Clerk's Department Decision Making Information System. At the time of our investigation this included *City of Winnipeg Golf Services – SOA 2011 Statement of Operations by Course* (for the year ending December 31, 2011)¹ which includes revenue and expenses (including property tax equivalents, interest payments and depreciation) broken down by golf course for Kildonan, Windsor Park, Harbour View and Crescent Drive. The fact that figures broken down by course could be assembled for 2011 strongly suggested to our office that similar detailed revenue and expense information for Kildonan, Windsor Park, Harbour View and Crescent Drive might also be available for the years 2007 to 2010.

The city was asked to verify whether or not information similar to that used to create the record *City of Winnipeg Golf Services – SOA 2011 Statement of Operations by Course* existed for the years 2007 to 2010. The city determined that similar information was available for Kildonan Park, Windsor Park, Crescent Drive and Harbor View, however, not in the same documentary format as the *2011 Statement of Operations by Course*. The city was also able to identify information which broke out interest and depreciation figures (incorporating amortization amounts) for these courses and John Blumberg for the period requested.

FIPPA allows for access to records (*information* in recorded form) and it is not necessary that the information exist in a specific documentary form. Even if the information exists only in an electronic format (such as an Excel spreadsheet), under subsection 10(1) of FIPPA such records

¹ The city explained that this actual document did not exist at the time the complainant made the initial access to information request. However, when this document was created for a committee of council on February 25, 2013 the city recognized that this information would be responsive to the complainant's request and the complainant was provided with a copy at that time.

are considered responsive if information in that form is relevant to the request. Subsection 10(1) reads:

Access to records in electronic form

10(1) If information requested is in an electronic form in the custody or under the control of a public body, the head of the public body shall produce a record for the applicant if

- (a) it can be produced using the normal computer hardware and software and technical expertise of the public body; and
- (b) producing it would not interfere unreasonably with the operations of the public body.

This appeared to be a relevant consideration in this case and our office asked the city to consider whether subsection 10(1) might apply. The city agreed that it was possible to provide a print out of the information on revenue and expenses for city operated courses for the period from 2007 to 2012 and to consider releasing this information to the complainant. At this point, this information was no longer at issue in the complaint.

Did information pertaining to golf courses operated under lease agreements exist?

The ombudsman's investigation then turned to the financial information of the remaining golf courses. The city was asked by our office to provide for our review copies of these documents, to which the exceptions allowed under clauses 18(1)(b) and subclauses 18(1)(c)(i)(ii) of FIPPA had been applied. These consisted of the annual financial statements of the golf courses operating under a variety of lease arrangements. However, with the exception of information pertaining to [named company] (which operates the Tuxedo Golf Course) for the years ending February 2011 and February 2012, no records responsive to the complainant's request were located. The city explained that, although the City of Winnipeg By-Law 86/2010 stipulates that Winnipeg Golf Services records are to be maintained for at least six years after file closure, after Winnipeg Golf Services moved offices in January of 2012, they were unable to locate financial records for leased courses that may have been received prior to that date. If the information requested cannot be found then the public body must refuse access to this information under subclause 12(1)(c)(i) of FIPPA (information does not exist or cannot be located). The city agreed that this was the case for information concerning leased courses with the exception of the Tuxedo Golf Course.

Was the exception allowed under clause 18(1)(b) and subclauses 18(1)(c)(i)(ii) of FIPPA properly applied by the city when denying access to information concerning leased courses?

For the financial information pertaining to the leased Tuxedo Golf Course that was located and deemed to be responsive to the complainant's request, the city continued to apply the exception to access allowed under clause 18(1)(b) and subclauses 18(1)(c)(i)(ii) of FIPPA. The exceptions to access allowed by subsection 18(1) are mandatory exceptions. If the information requested can be shown to be subject to those exceptions, then a public body is statutorily prohibited from disclosing the information. Our office reviewed the record in question and considered the city's representations on the application of subsection 18(1). The exception to access allowed by clause

18(1)(b) has four requirements, all of which must be met for the exception 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 who would be affected by the disclosure; 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. It was the city's position that the record in question included commercial and/or financial information supplied to the city in confidence by [named company] and consistently treated as confidential by the third party.

Clause 18(1)(c) speaks to the harm that could reasonably result from the disclosure of information that would reveal commercial, financial, labour relations, scientific or technical information of a third party. This harm could take the form of the loss of competitive advantage in the market place, prejudice to ongoing or future contractual or other negotiations of the third party or a significant financial loss (or gain) to a third party.

The city's position was that the release of financial information pertaining to the leased Tuxedo Golf Course could affect the lessee's ability to lease or purchase equipment and could affect the lessee's cost of financing. Contained in the financial records are details of negotiated lease payments by [named company] to the city, which if released could reasonably be expected to have an impact on the lessee's future competitive position by divulging to competitors specific contract details.

If clause 18(1)(b) and subclauses 18(1)(c)(i)(ii) of FIPPA apply then the information must be excepted from access unless a limitation to the exception under subsection 18(3) or 18(4) is shown to be relevant. The limitations to the exceptions read as follows,

Exceptions

- 18(3) Subsections (1) and (2) do not apply if
- (a) the third party consents to the disclosure;
 - (b) the information is publicly available;
 - (c) an enactment of Manitoba or Canada expressly authorizes or requires the disclosure; or
 - (d) the information discloses the final results of a product or environmental test conducted by or for the public body, unless the test was done for a fee paid by the third party.

Disclosure in the public interest

18(4) Subject to section 33 and the other exceptions in this Act, a head of a public body may disclose a record that contains information described in subsection (1) or (2) if, in the opinion of the head, the private interest of the third party in non-disclosure is clearly outweighed by the public interest in disclosure for the purposes of

- (a) public health or safety or protection of the environment;
- (b) improved competition; or
- (c) government regulation of undesirable trade practices.

Our office requested that the third party, [named company], be contacted by the city. The third party provided information relevant to the harm that could reasonably be expected to result from the disclosure of their financial information and they did not consent to its disclosure. The information in question was further found not to be publicly available. Our investigation determined that the city appropriately excepted the financial information of [named company] from access under clauses 18(1)(b) and subclauses 18(1)(c)(i)(ii) of FIPPA and the limitations allowed under subsection 18(3) or 18(4) were found not to apply in this case.

SUMMARY

Based on the results of our investigation, the city was asked to issue a revised decision letter to the complainant, which it did on June 4, 2013. In the matter of information on revenues and expenses (and information on taxes, interest and depreciation) for city operated courses dating from 2007-2012 which was found to be able to be produced, access was granted and the information was provided to the complainant. With respect to the financial records of leased courses (with the exception of [named company] for the years ending in February 2011 and February 2012), access was refused under subclause 12(1)(c)(i) of FIPPA on the basis that the records could not be located. In the case of the financial information of [named company] the city continued to apply the exception to access allowed under clause 18(1)(b) and subclauses 18(1)(c)(i)(ii) of FIPPA and our office found that the exceptions to access were appropriately applied in this case.

CONCLUSION

Based on our investigation we have concluded that 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 of receiving this report.

July 29, 2013
Manitoba Ombudsman