

Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2013-0144 (web version)

RURAL MUNICIPALITY OF RITCHOT

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 9, 18(1)(b) and 23(1)(a)

REPORT ISSUED ON JULY 11, 2013

SUMMARY: The complainant requested access to records from the Rural Municipality of Ritchot (the public body or the RM) pertaining to any current or future development in Grande Pointe and/or west of Ile des Chenes and relating to the proposed changes to the development plan (By-Law 2/11) and/or *Zoning By-Law 8-2012*. The RM provided partial access to the records. Some records were withheld 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. Other records were refused on the basis that they do not exist. Finally, some information was withheld because the RM was of the opinion that its disclosure would reveal advice involving the public body and its employees. The ombudsman found that authority existed under subsections 18(1) and 23(1) of FIPPA to have refused access to most of the information and that the public body had conducted an adequate search for records that were found not to exist.

The complaint is partly supported.

INITIAL REQUEST AND RECORDS AT ISSUE

The complainant requested access to the following information under *The Freedom of Information and Protection of Privacy Act* (FIPPA or the act) on October 26, 2012:

Provide all records in the custody or under the control of the RM of Ritchot as it relates to any development (or future development) in Grande Pointe and/or West of Ile des Chenes (i.e. Rural Centres) as a result of the proposed changes to the Development Plan (By-law 2/11) ad/or Zoning By-law 8-2012. Such documents should include but not [sic] limited to:

- all records with [named developer] or their representative(s);
- all records with any other developer or their representative(s);
- all records relating to subdivision applications;
- all records relating to developer applications;
- all records relating to any studies, concept plans, vision plans, Secondary Plans, whether in draft form or other; and
- a copy of the 2011 Financial Statements.

A 'record' is information in any form and includes information that is written, photographed, recorded or stored in any manner on any storage medium or by any means including graphic, electronic or mechanical means.

The public body sent its initial response to the complainant on November 14, 2012, granting partial access to the records. We note that the initial response to the complainant was not complete in that it did not cite the specific provisions of the act and reasons for any refusal of access, nor did it advise of the ability to complain to the ombudsman of the public body's refusal of access. The public body is now aware of and will observe these requirements.

Upon receipt of the initial records, the complainant emailed the RM on November 27, 2012, alleging that the records were incomplete. The RM responded to the complainant, by providing an Estimate of Costs on December 19, 2012 for search and preparation of the records in question. The cover letter to that estimate advised that, in order to proceed, the RM would require a cheque from the complainant for the estimated costs, along with a copy of the signed Estimate of Costs form. A cheque was never received, nor was the Estimate of Costs accepted by the complainant. The RM continued to provide additional information/records to the complainant, refusing access in part, at various times since its initial release. These additional releases linked back to the formal access request and emails received from the complainant since making the access request, from which the RM was able to clarify/streamline the records/information requested. On March 1, 2013 the RM subsequently advised the complainant that, although it had spent a significant amount of time processing the request(s), it would waive the search and preparation fees that could be charged under FIPPA.

THE COMPLAINT

On April 16, 2013 our office received the complaint respecting the public body's decision to refuse access. For purposes of this investigation, the complainant advised that the records at issue are:

1. [Named Consultant] (February 2012) "Supply and Demand Market Assessment in Support for a Development Plan Amendment".

- In its March 1, 2013 response to the complainant, access to this information was refused in full under clause 18(1)(b) and subclauses 18(1)(c)(i)(ii)(iii)(iv)(v).

2. Documentation/information that was submitted to [named engineering firm] to assist the RM in preparing the “Ile des Chenes and Grande Pointe District Drinking Water & Wastewater Management Plan”.

- In its March 1, 2013 response to the complainant, access to this information was refused on the basis that the records do not exist.

3. The “Ile des Chenes and Grande Pointe District Drinking Water and Wastewater Management Plan” (the plan) dated May 30, 2012 that was passed by council on June 20, 2012 as per the RM meeting minutes.

- Access to the plan was provided in full on March 1, 2013, by providing a link to the RM’s website where it could be found. However, the public body later determined that the complainant was interested in receiving access to the plan in terms of a confidential addendum for council (the addendum) that was addressed at the June 20, 2012 council meeting. On March 4, 2013 this record was refused in full under clause 23(1)(a) of FIPPA.

The relevant provisions are as follows:

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.

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,
 - (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, or
 - (v) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

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

POSITION OF THE RURAL MUNICIPALITY OF RITCHOT

Record at Issue #1

In its response to the complainant dated March 1, 2013 the public body advised that, after careful consideration and consultation with a third party, it decided to withhold the *Supply and Demand Market Assessment in Support for a Development Plan Amendment* (the assessment) in full under section 18 of FIPPA. The third party with whom the RM had consulted objected to the disclosure of the responsive records.

The RM indicated in its response that the third party with whom it consulted advised that it would need to obtain consent to disclose the record from the authors of the report and that, typically, this consent would not be provided. Therefore, the RM denied access, relying on clauses 18(1)(b) and 18(1)(c).

Records at Issue #2

In terms of the portion of the complainant's request asking for documentation/information submitted to [named engineering firm] to assist the RM in preparing the plan, the RM's March 1, 2013 response letter indicated that, according to [named engineering firm], the information in the plan was drawn from documents originally authored by [named engineering firm and its partner]; [named engineering firm] did not receive any documents from the RM in order to complete the plan.

Record at Issue #3

In its response to the complainant dated March 4, 2013 the RM clarified that, for this portion of her request, the record being sought by the complainant was an addendum to the plan (the addendum). Access to this record was refused under clause 23(1)(a) of FIPPA in that the addendum was intended for council use only and not for use by the general public.

ANALYSIS OF ISSUES AND FINDINGS

1. Did the mandatory exceptions to disclosure in clauses 18(1)(b) and 18(1)(c) apply to the information withheld? (Record at Issue #1)

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) of FIPPA 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 exception in clause 18(1)(c) of FIPPA protects a third party's business interests and involves a *reasonable expectation of harm test*. The focus of this provision 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 clause 18(1)(c), an applicant is not entitled to access that information, unless a limitation to the exception under subsection 18(3) and/or subsection 18(4) of FIPPA applies.

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.

On April 30, 2013 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 any third party about disclosure of the records.

We received the RM's response on May 21, 2013. In its response, the RM advised that all of the information had been withheld under clauses 18(1)(b) and 18(1)(c). The third party, with whom the RM had consulted by telephone, was a private consultant working on behalf of the developer. It is this third party that had supplied the RM with a copy of the assessment. The RM advised that the assessment was provided as part of preliminary, confidential discussions between the developer and the RM concerning a proposed future development and that disclosure of the assessment at this time could impact the developer's business. The RM expressed that, at some future point in time, the assessment could be subject to disclosure, i.e., after a subdivision application is submitted by the developer.

The RM had initially indicated to the complainant that the complainant could contact the private consultant directly to determine whether it would provide the complainant a copy of the record, although, in the past, this type of record would not be disclosed.

Upon review of the record and the RM's response, we discovered that the RM had not included any representations by the third party responsible for preparing the assessment nor had it included any representations by the developer. As we considered these third parties to be "affected" third parties, on June 6, 2013 we provided notification under section 61 of FIPPA, and asked that they confirm their 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.

Subsection 18(1) of the act does not apply if the third party consents to the disclosure. In late June 2013, both the author of the assessment and the developer wrote our office and objected to the disclosure of the assessment in full. The author of the record advised that the assessment had been completed specifically to meet the needs of its client, the developer. The developer advised that it had consistently treated the record as confidential and had provided a copy to the RM on an explicitly confidential basis under clause 18(1)(b) of FIPPA, noting that the assessment contained a notation as to the confidential nature of the document.

In term of the RM's reliance on clause 18(1)(c), the developer advised that the assessment was prepared for the purposes of determining the market conditions of the area as part of a pending large scale residential subdivision. Additionally, it indicated that preparation of such a report is required by any prospective developer for submission to its client and that all of the information contained in the assessment was of a commercial or financial nature. It stated that disclosure of any information contained therein could be harmful to its competitive position with respect to the subdivision application procedures, could reasonably be expected to interfere with any contractual negotiations which are part and parcel to the proposed subdivision, and could result in a significant financial loss, i.e., could compromise its ability to gain approval and proceed with the proposed subdivision.

Based on the information received from the third parties, we found that the mandatory exception to disclosure found under clause 18(1)(b) applied to the assessment and that none of the limitations to the exception were relevant. This being the case, we did not give further consideration to the application of clause 18(1)(c) of FIPPA to withhold the record.

**2. Did the RM conduct an adequate search for records as required by the duty to assist?
(Records at Issue #2)**

The complainant believed that an adequate search for records by the public body would yield records responsive to this portion of the access request. This issue is relevant to section 9 of FIPPA, in that public bodies are required to make reasonable efforts to respond to access requests in an accurate and complete manner.

Section 9 of FIPPA reads as follows:

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.

In its response to the complainant on March 1, 2013 the RM had advised the complainant that, according to [named engineering firm], there were no documents submitted by the RM to [named engineering firm] to complete the *Drinking Water & Wastewater Management Plan* and that the plan was drawn up from documents originally authored by [named engineering firm and its partner].

We contacted the public body on April 30, 2013 advising that the complainant was of the view that additional records should exist, and referenced certain information in the plan that the complainant believed bore witness to this attestation. We also relayed to the public body the complainant's opinion that more maps should exist, responsive to the request. Regarding the latter supposition, we contacted the RM on two separate occasions and were advised that no additional maps exist.

On May 21, 2013, we were provided with the RM's response in which was included an email from the senior water specialist & vice president, Manitoba Division of [named engineering firm] that attested to the fact that the plan was drawn from documents which were already in [named engineering firm's] possession. [Named engineering firm] had authored these documents originally and the RM had not submitted additional records to [named engineering firm] in order for [named engineering firm] to complete the plan.

We found that this information was sufficient to determine that the public body had taken reasonable efforts to assist the complainant in terms of responding accurately and completely, i.e., conducting an adequate search for records.

3. Did the discretionary exception to disclosure in clause 23(1)(a) apply to the information withheld? (Record at Issue #3)

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 exception found under clause 23(1)(a) is intended to ensure that open discussion of issues takes place among employees and others advising ministers or a public body. This provision applies to advice, opinions, recommendations, etc. developed by or for officials or staff of the public body. This includes suggestions about particular approaches to take.

In terms of the *Ile des Chenes and Grande Pointe Drinking Water & Wastewater Management Plan* (the plan), to which access was provided in full, the RM advised that Resolution No. 2012-06-59 from its June 20, 2012 council meeting referred to the plan of May 30, 2012, accepted by council on June 20, 2012. Although accepted on June 20, 2012, the plan was not signed and sealed by the council until June 28, 2012, and therefore June 28, 2012 was the date published on the plan.

The record at issue is an addendum to the plan (the addendum). This record had been withheld in full. Based on our review of the record 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 record included advice, opinions, proposals, recommendations, analyses or policy options developed for the public body.

As we were not satisfied that all of the information in the record would “reveal” the substance of the advice, opinions, recommendations, etc., we presented our considerations to the RM and asked that it reconsider its application of clause 23(1)(a) to all of the information. Subsequently, the public body advised it would be releasing additional information to the complainant, continuing to apply clause 23(1)(a) to withhold pages 4 to 9 of the addendum. It believed that disclosing any of the information contained on those pages could hinder the council’s future negotiations.

On July 8, 2013 the RM provided the complainant with partial access to the addendum. Our office was provided with a copy of the correspondence and the pages of the addendum that were disclosed to the complainant.

After reviewing the subsequent decision/disclosure by the RM, we found that the public body had discretion and authority under clause 23(1)(a) of FIPPA to have withheld the information that continued to be withheld under this provision. We were satisfied that the RM reasonably exercised its discretion to withhold rather than release this remaining information.

SUMMARY OF FINDINGS

The ombudsman found that:

1. Clause 18(1)(b) applied to Record at Issue #1, in that the information was commercial or financial information that had been provided, explicitly in confidence by the third parties and consistently treated as confidential by the third parties.
2. Regarding Records at Issue #2, the public body met its duty to assist, in terms of responding completely and accurately.
3. Clause 23(1)(a) applied to the information that continued to be withheld from Record at Issue #3, and the RM 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 Rural Municipality of Ritchot's decision to refuse access to the Court of Queen's Bench within 30 days following the receipt of this report.

July 11, 2013
Manitoba Ombudsman