

Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2013-0179 (web version)

RURAL MUNICIPALITY OF WOODLANDS

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 18(1)(b) and 18(1)(c)(iv)

REPORT ISSUED ON AUGUST 20, 2013

SUMMARY: The complainant requested copies of records of animal unit verification counts that were conducted with respect to a resident third party's hog operation. The Rural Municipality of Woodlands refused access under clause 18(1)(b) and subclause 18(1)(c)(iv) of FIPPA. Our office found that the cited exception to disclosure contained in subclause 18(1)(c)(iv) was applicable to the requested information.

THE COMPLAINT

On April 15, 2013, the complainant requested, under *The Freedom of Information and Protection of Privacy Act* (FIPPA), the following information:

We are requesting the number of animal units determined in the count at [resident hog operation] in December of 2012 and March of 2013.

The Rural Municipality of Woodlands advised the complainant on May 7, 2013 that access to the requested information was being refused pursuant to the exceptions to disclosure set out in section 18 of FIPPA. The complainant filed a complaint with our office on May 14, 2013.

POSITION OF THE RURAL MUNICIPALITY OF WOODLANDS

The Rural Municipality of Woodlands took the position that the reports and related details of the monitoring activities acquired during the inspection and enforcement process were not releasable under FIPPA.

In support of its position, the RM made reference to the following clauses:

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

(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.

ANALYSIS OF ISSUES AND FINDINGS

Would disclosure of the withheld information reasonably be expected to result in the harm described under subclause 18(1)(c)(iv)?

Public bodies can acquire a considerable amount of information about the business activities of third parties. The exceptions in subsection 18(1) of FIPPA impose a duty on the head of a public body to refuse to disclose specified information about the business interests of a third party. It is recognized that much of this information is a valuable business asset and that disclosure to another could harm the third party's business interests.

Clause 18(1)(c) of FIPPA is a mandatory exception to the right of access under section 7 of FIPPA. The exception in subclause 18(1)(c)(iv) involves a reasonable expectation of harm test. The head of a public body must determine whether disclosure of the information could reasonably be expected to result in the described harm. If the information in question is subject to this exception, then FIPPA prohibits a public body from disclosing that information.

The harm contemplated by subclause 18(1)(c)(iv) is the idea that disclosure of a third party's business information might deter the third party from providing that information to the public body. With respect to the interpretation of this provision, our office considered several excerpts from the Manitoba *FIPPA Resource Manual* to be relevant and applicable in our investigation. While our office is not bound by the resource manual, we do give consideration to information in the manual, as it was created by the government as a reference for public bodies to assist in meeting the requirements of FIPPA. In this case, we considered the following excerpts:

"Supplied" means provided or furnished to the public body.

"Result in similar information no longer being supplied to the public body" means that disclosure of the information would discourage either the third party concerned or other third parties from providing similar information to the public body in the future.

"When it is in the public interest that similar information continue to be supplied" means that the head of the public body must determine whether it is in the public interest that the third party, or other third parties, continue to supply this type of information. In making this determination, the head should consider all relevant facts and circumstances, including third party representations.

The Rural Municipality of Woodlands administers and enforces *The Planning Act* by virtue of section 13 of the act, which provides:

Subject to this Part, the council of a municipality is responsible for the adoption, administration and enforcement of the development plan by-law, zoning by-law and all other by-laws respecting land use and development for the municipality.

According to information previously provided to our office, the resident third party's hog operation has been in existence prior to the implementation of provincial legislation and regulations pertaining to land use and livestock operations and is subject to the Rural Municipality of Woodlands' authority/oversight under *The Planning Act*. The resident third party's hog operation is currently considered to be a legal non-conforming use. The effect of this means that the third party cannot intensify its hog operations without first gaining permission from the rural municipality.

In 2005, the resident third party applied to the RM of Woodlands for a permit to build a new barn to replace the existing structure. The third party was not planning to expand its hog operation, but rather, simply replace existing shelters with a proper barn. The RM consulted with representatives of Community Planning Services (a branch of Manitoba Municipal Government) and was informed that as long as the new barn did not constitute an expansion of the hog operation, then a conditional use order and a technical review report were not required. On March 16, 2005, the RM issued a development permit to the resident third party allowing construction of its new barn.

The third party's level of operation as mutually agreed to between the RM and the third party was established at [x number] animal units. In 2012, the public body was asked by neighbouring municipalities to carry out an animal count to verify if the third party was operating within the agreed upon limits with respect to the size of its operation. The RM approached the third party seeking its permission to conduct an animal count. The third party advised it was making modifications to its operation and taking steps to reduce the number of animal units. The parties subsequently agreed to schedule a couple of animal counts and inspections (November 2012 and March 2013).

With respect to the above inspections and counts the rural municipality provided our office with the following information and concern:

The Municipality retained the services of Manitoba Agriculture Food & Rural Initiatives ("MAFRI") to carry out the inspection. MAFRI are experts in the hog industry. An understanding of the hog industry is needed to carry out such an inspection, as well as

appropriate animal welfare procedures must be followed and respected when entering the facilities so as not to put the health of the animals at risk.

Here there is a real risk that the municipality will lose [the third party's] cooperation in the ongoing inspections and counts if the actual numbers of the count are subject to disclosure to the public. Such disclosure is inconsistent with the confidential nature on which this information is being supplied by the [third party]. The Municipality has committed to ongoing monitoring of the animal units at the [third party's operation].

To accomplish this on-going monitoring, [the third party's] cooperation is crucial. The only way to determine if the [third party] is in compliance is to have an expert such as MAFRI carry out an inspection on the Municipality's behalf with the [third party] allowing the inspectors into the barns. There is no other way to have this ongoing monitoring. With the [third party's] continued cooperation the Municipality can continue with this enforcement. If the [third party] withdraws this cooperation, the monitoring will end. The Municipality could then only gain access to the [third party's] barns by meeting the test for obtaining a warrant from the Court. The Municipality believes it is not in the public interest ... to put the ongoing monitoring and enforcement at risk.

[The complainant] requested copies of the animal counts. The Municipality responded by letter dated May 7, 2013. We provided confirmation that an animal unit violation had occurred and has been addressed. We have also confirmed that we intend to continue monitoring the situation - with the needed cooperation of the [third party].

During the course of our investigation, we determined that the Rural Municipality of Woodlands does not have the authority under *The Planning Act* to carry out routine inspections where there is no reasonable basis to believe that there may be a violation. Accordingly, the rural municipality has to rely on the cooperation of the third party to facilitate ongoing routine animal unit verification. The RM has indicated that the resident third party's cooperation would be jeopardized by the release of the actual animal unit counts. As it is in the public interest for this information to continue to be provided to the RM, we have concluded, following our review that the withheld information was subject to subclause 18(1)(c)(iv). Inasmuch as we found that subclause 18(1)(c)(iv) was applicable, it was not necessary to determine the applicability of clause 18(1)(b).

CONCLUSION

Based on our findings, the complaint is not 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 Woodlands' decision to refuse access to the Court of Queen's Bench within 30 days following receipt of this report.

August 20, 2013
Manitoba Ombudsman