Manitoba Ombudsman

REPORT WITH RECOMMENDATION ISSUED ON DECEMBER 29, 2014
AND
REPORT ON COMPLIANCE WITH RECOMMENDATION
UNDER *THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*

CASE 2014-0099

CITY OF WINNIPEG – CORPORATE SUPPORT SERVICES DEPARTMENT

ACCESS COMPLAINT: REFUSAL OF ACCESS
PROVISIONS CONSIDERED: 9, 23(1)(a), 29(b)

PUBLICLY RELEASED ON MARCH 11, 2015

SUMMARY OF REPORT WITH RECOMMENDATION AND RESPONSE:

An application was made under *The Freedom of Information and Protection of Privacy Act* (FIPPA or the act) to the City of Winnipeg (the city or the public body) for any analyses of the cost of recladding the Public Safety Building, the cost of renovating the Canada Post building and comparing the two projects. The city responded, refusing access in full, stating that such records came under the exception to access allowed by clause 23(1)(a) of FIPPA (could be expected to reveal advice, opinions, proposals, recommendations, analyses or policy options developed by or for a public body). During the course of our investigation, it came to light that the city had issued a decision regarding access without conducting a search for records or reviewing records identified as responsive. The ombudsman found that the city failed in its duty to assist as required by section 9 of FIPPA. During the course of our investigation responsive records were located and provided for our review. The ombudsman found that the city was correct in identifying clause 23(1)(a) of FIPPA as the appropriate exception to access to be applied in this case. The ombudsman also found that the city did not exercise its discretion in a reasonable fashion in deciding to refuse access to that information to which the discretionary exception could be shown to apply. Based on our findings, the ombudsman recommended that the city revisit its exercise of discretion in deciding to withhold rather than to give access and re-issue its decision concerning access to information.

On January 12, 2015 the City of Winnipeg provided its response to the ombudsman's report accepting the recommendation. The city requested additional time to comply with the recommendation on three occasions and the ombudsman agreed to two extensions. On March 4, 2015 the city reported to the ombudsman that it had complied with the recommendation to review its exercise of discretion. As a result the city reconsidered its original decision and granted access in part to the information requested.

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PROVISIONS CONSIDERED: 9, 23(1)(a), 29(b)

REPORTS CONSIDERED: ALBERTA OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER ORDER F2014-29

CASES CONSIDERED: ONTARIO (INFORMATION AND PRIVACY COMMISSIONER) VS. ONTARIO (MINISTER OF FINANCE), [2014] SCC 36

REPORT ISSUED ON DECEMBER 29, 2014

SUMMARY:

An application was made under *The Freedom of Information and Protection of Privacy Act* (FIPPA or the act) to the City of Winnipeg (the city or the public body) for any analyses of the cost of recladding the Public Safety Building, the cost of renovating the Canada Post building and comparing the two projects. The city responded, refusing access in full, stating that such records came under the exception to access allowed by clause 23(1)(a) of FIPPA (could be expected to reveal advice, opinions, proposals, recommendations, analyses or policy options developed by or for a public body). During the course of our investigation, it came to light that the city had issued a decision regarding access without conducting a search for records or reviewing records identified as responsive. The ombudsman found that the city failed in its duty to assist as required by section 9 of FIPPA. During the course of our investigation responsive records were located and provided for our review. The ombudsman found that the city was correct in identifying clause 23(1)(a) of FIPPA as the appropriate exception to access to be applied in this case. The ombudsman also found that the city did not exercise its discretion in a reasonable fashion in deciding to refuse access to that information to which the discretionary exception could be shown to apply. Based on our findings, the ombudsman recommended that the city revisit its exercise of discretion in deciding to withhold rather than to give access and re-issue its decision concerning access to information.

COMPLAINT

On February 3, 2014 the following request for access to information under *The Freedom of Information and Protection of Privacy Act* (FIPPA or the act) was received by the City of Winnipeg (the city or the public body):

1) *Any internal city analyses of A) The cost of recladding the Public Safety Building; B) The cost of renovating the Canada Post building; and C) Comparing the two projects, from Sept. 1, 2007 to Nov. 30, 2009.*

2) *Any external consultant analyses of A) The cost of recladding the Public Safety Building; B) The cost of renovating the Canada Post building; and C) Comparing the two projects, from Sept. 1, 2007 to Nov. 30, 2009.*

The city issued its decision on March 3, 2014 stating that access to the information requested was refused as the requested records fell within the exceptions to disclosure allowed under clauses 23(1)(a) and 29(b) of FIPPA. The cited provisions read as follows:

> ***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;*
>
> ***Testing procedures, tests and audits***
> ***29*** *The head of a public body may refuse to disclose to an applicant information relating to*
> *(b) details of specific tests to be given or audits to be conducted;*
> *if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits.*

A complaint of refused access was received in our office on March 11, 2014. Our office noted that the public body, in making its response to the complainant, did not include a description of the records identified as responsive to the request.

POSITION OF THE PUBLIC BODY AND PRELIMINARY MATTERS

In making its response to the complainant on February 3, 2014 the city stated that the purpose of section 23 of FIPPA is to ensure that full and frank discussions take place among officers, employees and others who may be advising a public body and to ensure that the confidential

relationship between a public body and its advisors is preserved. The city informed the complainant:

> *The information that you have requested represent[s] advice, opinions, proposals, recommendations, analyses or policy options noted in the act, which resulted in the final administrative report to City Council.*

The city further explained that the requested records were also being withheld under the exception allowed by clause 29(b) of FIPPA, which permits a public body to refuse to disclose information relating to the details of specific tests or audits to be conducted if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits. The city informed the complainant that the information sought in the complainant's request was currently being examined as part of an audit ordered by city council and disclosure before the audit was complete could prejudice the use and results of the audit.

In a complaint about a refusal of access, the onus is on the public body to support its decision by demonstrating how the claimed exceptions apply to the information requested. With regard to its reliance on the cited exceptions, our office asked the public body to provide us with representations clarifying the public body's decision to refuse access and giving reasons with specific reference to the records identified as responsive to the access request. We also asked the city to provide evidence to support its assertion that the record requested consisted entirely of the type of information described in the exception. For example, even if a document uses the phrase 'An Analysis of...' in the title, it would seldom be the case that every part of that document could by strictly described as 'analysis' and it would likely contain background material or historical data and assumptions. We asked the city to explain why severing, as required by subsection 7(2) of FIPPA, was not possible. Subsection 7(2) states:

> ***Severing information***
> ***7(2)*** *The right of access to a record does not extend to information that is excepted from disclosure under Division 3 or 4 of this Part, but if that information can reasonably be severed from the record, an applicant has a right of access to the remainder of the record.*

In order to investigate and assess the appropriateness of the city's access decision, our office also requested copies of the records which the city had identified as responsive for our review. Our office made this request to the city on March 19, 2014.

The city responded on May 1, 2014 stating that, as the complainant had specifically requested 'analyses' in his application for access, the complainant had therefore requested only information that would fall within the exception allowed under clause 23(1)(a) of FIPPA and therefore, by implication, a search for records was not necessary. The city explained:

> *The applicant's request was specific to analyses, and for this reason, the City did not originally conduct a formal search for records, consider severing, conduct a line by line review, or prepare a description of records. [The City has] initiated a search for the analyses requested...and will forward them as soon as possible for your review.*

It is the view of this office that conducting a proper and thorough search for records is essential to providing an accurate and complete response to a FIPPA request, not least by identifying all records responsive to the request. On reviewing the city's response to our request for representations and copies of responsive records for review, our office considered the possibility that the city had made an assumption (without actually conferring with the complainant) as to the intended scope of the complainant's request by confining the request to 'analyses' in the specific as in a descriptive noun applied to a particular research product or report. In conversations with our office early in the complainant investigation process, the complainant had explained that he did not have a particular record in mind when making his request. Rather he wished to obtain access to any record (or group of records) that would give evidence that the city had compared and evaluated alternatives for the future of the Winnipeg Police Service headquarters building. In this respect he used the word 'analyses' in a generic more general way as a verb to describe a particular research activity.

The information we obtained from our conversations with the complainant was conveyed to the city on May 1, 2014 and on May 7, 2014 the city reaffirmed its position that:

> *...the original request...refers specifically to internal and external analyses, and does not refer to other records...(It bears repeating at this point that the original request was so clearly written that consultation was unnecessary).*

The city further stated that any attempt to change the scope of the request at this point would widen the request to include "all records relating to the recladding of the PSB" and "all records related to the renovations of the Canada Post building" and would place the city in an unfair position, depriving it of the an opportunity to consider the amount of time required to make a search for records, prepare an estimate of costs and ask the applicant to refine his request.

While our office did not agree, in order to avoid further excessive delay to our review of the records that the city believed were responsive we indicated that we were prepared to accept the city's interpretation of the applicant's two part request as applying to specific analyses which it had apparently already identified. Still, our office found it problematic that a decision concerning access had apparently been issued to the complainant without the city locating and reviewing the records identified as responsive. In this regard, our office notes the following requirement of FIPPA:

> ***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.*

The city explained with regard to the application of subsection 7(2) of FIPPA, that any information contained in a record that did not fall within the exception allowed under clause 23(1)(a), would not be considered by the city to be responsive to the complainant's request. On May 1, 2014 the city had written:

> *Our response to the applicant was based on the original application which specifically requested 'internal city analyses' and 'external consultant analyses'. On the face of the application, then, it requests only those records or portions of records that fall within s.23(1)(a)...*
>
> *...This application is not seeking records which may contain background material or other information that can be severed from analysis that is exempted from disclosure under s.23(1)(a). It is requesting solely those records or portions of records that constitute "internal City analyses" and "external City analyses". The very nature of the application, therefore, makes it impossible to server those portions that do not fall within s.23(1)(a) from those that do.*

In reply, our office explained to the city that the accurate application of exceptions and any decisions with regard to severing would normally require a review of records identified as responsive.

With regard to the requirement to conduct a line by line review when applying exceptions to access under clauses 23(1)(a) and 29(b) of FIPPA, our office would highlight the following excerpt from the *Manitoba FIPPA Resource Manual*. While our office is not bound by the information contained in the manual, we frequently consider it as it was created by the Manitoba government as a reference to assist public bodies in meeting the requirements of FIPPA. It states:

> *A careful review of the information contained in a record is required in order to determine whether or not an exception to disclosure applies, and whether or not information can be severed out and provided to the applicant as required by subsection 7(2) of FIPPA. Very few of the exceptions to disclosure in sections 17 to 32 of FIPPA apply to a category or type of record (an example of an exception to disclosure that applies to a category of records is clause 19(1)(a), respecting an agenda, minute or other record of the deliberations of Cabinet). Generally, it is not possible to determine whether an exception to disclosure applies merely on the basis of the title, type, classification or format of a record. That is, a line-by-line review of the information in the record is required to identify information that falls within an exception to disclosure.*[1]

[1] 'Manitoba FIPPA Resource Manual', p. 4-41.

As it seemed to our office that the city had identified a specific record(s) responsive to the applicant's request, we again asked that copies of these records be provided for our review. On June 9, 2014 the city provided a document (hereafter referred to as the document) dating from April 2008 consisting of a 42 page draft report including appendices and supporting financial information (the report), a six page executive summary (the summary) and two Excel spreadsheets (the spreadsheets) for our review. This document should have been located and reviewed by the city before it issued its decision letter to the complainant on February 3, 2014. Although the city's access decision letter and later representations to our office indicated that a specific analysis or analyses could easily be identified, our office notes that there was a considerable delay in providing copies of responsive records for our review as originally requested on March 19, 2014. The delay in providing copies of responsive records as required for our complaint investigation had a significant impact on our ability to conduct a timely investigation as required by section 65 the act.

Our office has concluded that the city did not make reasonable efforts to search for and identify records that responded to the complainant's access request and did not respond to the complainant openly and accurately. Our office has also determined that the city did not make a timely response to the ombudsman's request for copies of records considered relevant to our investigation of this complaint. As a result our office has found that the city failed in its duty to assist as required by section 9 of FIPPA.

ISSUES AND ANALYSIS

Following receipt of a copy of the document which the city considered responsive to the complainant's request, our investigation then turned to an analysis of the application of the exceptions cited by the city in its decision to refuse access.

Does the exception to access allowed under clause 23(1)(a) of FIPPA apply to the record identified as responsive by the city?

In previous reports from this jurisdiction, our office has allowed that the discretionary exceptions to access allowed under subsection 23(1) are intended to protect the deliberative processes involved in decision making by a public body and thereby ensure that open and frank discussion takes place among officials, employees and others charged with advising the public body with the ultimate goal of facilitating quality decision making by well-informed decision makers.

The exception to access allowed under clause 23(1)(a) applies to the type of information that could reasonably be expected to reveal advice, opinions, proposals, recommendations, analyses, or policy options developed by or for the public body. Its application would reasonably require

that the information fall within the categories of information named in the clause and that the information relate to a particular anticipated work product, decision or policy. Information excepted from access under clause 23(1)(a) would not generally include factual information or background research that does not reveal the types of excepted information.

The meaning of the categories of information set out in the exception has been the subject of much discussion in investigative reports from this office and access and privacy offices in other provinces with similar access provisions to Manitoba's FIPPA. Our office considered the following definition to be helpful in assessing the application of the exception allowed by clause 23(1)(a):

> *'Advice' then, is the course of action put forward, while 'analyses' refers to the examination and evaluation of relevant information that forms, or will form, the basis of the advice, recommendations, proposals, and policy options as to a course of action.*
> (Alberta Office of the Information and Privacy Commissioner, Order F2014-29)

Advice may be defined, therefore, as setting out or suggesting a possible course(s) of action. Recommendations may support one suggested course of action over another. Analyses are defined as the examination and evaluation of relevant information that forms or will form the basis of advice, etc. as to a course of action that in some way weighs the available options.

The application of this exception has also been considered at length in complaint investigation reports from this and other provincial jurisdictions. Decisions issued in other cases have cautioned against an overly broad interpretation of this type of provision and they have suggested that the type of exception allowed under clause 23(1)(a) of FIPPA applies only to information which would reveal substantively advice, opinions, proposals, recommendations, analyses or policy options developed by or for a public body. For information to fall under this exception they write, it must be more than mere information or facts. Our office found the following consideration of the application of a similar provision under the Alberta *Freedom of Information and Protection of Privacy Act* (AB FIPPA) to be helpful in this regard:

> *The Public Body seems to argue that the disclosure of any headings, background facts, or similar information would reveal information to which section 24(1)(a) applies…the Public Body's interpretation of section 24(1)(a) is overly broad; this provision applies only to information that would reveal the substance of the advice etc. listed in section 24(1)(a).*
> (Alberta Office of the Information and Privacy Commissioner, Order F2014-29)

The responsive record at the heart of this investigation was prepared with input by both Winnipeg public servants and outside consultants who were tasked by Winnipeg's city council with investigating and presenting possible options for the future home for the Winnipeg Police Service (WPS). Although it had not at that point conducted a formal search for records, the city

stated in its decision letter to the complainant that "the information requested represented advice, opinions, proposals, recommendations, analyses or policy options... which resulted in the final administrative report to City Council." Our office notes that the use of the word 'the' rather than 'a' in regard to 'final administrative report', would seem to indicate that the advice and recommendations contained in the document related to a particular work product. The work product was not identified by the city but a search of the Winnipeg City Clerk's Department Decision Making Information System by our office identified the 'Report – Standing Policy Committee on Downtown Development – November 6, 2009' which appeared as 'Minute No. 37' in the council minutes of November 25, 2009 as the likely administrative report to which the city referred. This report recommended that the proposed purchase of the Canada Post building comprised of an office tower and the Winnipeg Mail Processing Plant (WMPP) be approved and the Winnipeg Police Service be consolidated into the WMPP.

The document provided for our review consists of an analysis and evaluation of possible options for the future home for the WPS and presents a final or conclusive recommendation that favours one option over all the others initially presented and discussed. On review of this document, our office has determined that the record contained the type of information captured by the exception allowed under clause 23(1)(a) of FIPPA.

However, we were initially of the opinion that the document also contained factual information and background research that it could be argued was not subject to the exception. Making a distinction between factual information and information that would reveal advice and recommendations, etc. can be problematic. This question was considered in an early report from this office (96-110-3-F3 under the old *Freedom of Information Act*) where a public body raised a principle that a record containing a mere recitation of facts could be interpreted as advice. Our office accepted that this argument had some validity:

> *The Department has raised a principle that a record containing a recitation of facts could be interpreted as advice. This did not go unheard and, in my opinion, has some validity. Where a recitation of facts communicated from one government official to another has the effect of revealing the formulation of a particular policy, the making of a particular decision or the development of a particular negotiating position under consideration, one might be able to conclude that this constitutes advice…*[2]

However, in that instance our office determined on review that 'the recitation of facts' contained in the responsive record would not reveal information to which the exception allowed by clause 23(1)(a) of FIPPA would apply. The document under consideration in this matter also contains significant amounts of 'factual' and background information which cannot appropriately be described here. A not inconsiderable portion of this information had become known to the public by the time the access request was made in February of 2014.

[2] 'Manitoba FIPPA Resource Manual', p. 5-155 citing Annual Report of the Ombudsman dated October 31, 1997 re: Manitoba Justice.

Arguably the collection of these facts in itself constitutes a form of 'analysis' as evaluative choices must necessarily have been made by the authors of the document in choosing what information to include and what to leave out. As previously noted, the document presents a final or conclusive recommendation that favours one option over all the others initially presented and discussed in the document. It might be assumed that the authors would choose to include background information that would support the recommendation chosen.

Our office was not initially convinced that the city appropriately applied clause 23(1)(a) of FIPPA to refuse access in full to the entire responsive document (for example: historical facts, background data, assumptions). Our office was inclined to the view that, although an important first step, the compilation and recitation of background facts would not generally be considered to be analysis as described in the exception. Further, we felt that information that reveals only that advice is being sought or given (names, dates) and not the substance of advice would not generally be determined to fall under the exception allowed by clause 23(1)(a) of FIPPA.

Our office advised the city that the information it had provided to us thus far in the investigation would support a conclusion that the exception allowed under clause 23(1)(a) of FIPPA would apply only to a portion of the information contained in the document and not to the whole document. We afforded the city a final opportunity to provide any additional information and/or representations prior to our making findings in this matter. The city provided supplemental representations which are discussed later in this report.

Does the exception to access allowed under clause 29(b) of FIPPA apply to the records identified as responsive by the city?

Our office also considered the city's application of the exceptions allowed by clause 29(b) of FIPPA to the information contained in the document. The exception is intended to protect the details of specific tests to be given or audits to be conducted if they have yet to be conducted or may be employed more than once. The exceptions in section 29 contain a 'reasonable expectation of harm' test. The public body must determine whether disclosure of the information could "reasonably be expected" to cause the harm described. In this exception, the anticipated harm would be that test questions to be asked or procedures to be followed in conducting an audit would become widely known to test or audit subjects and the efficacy of those tests or audit procedures could be compromised.

Our office notes that the protection afforded by section 29 does not pertain to the subject matter (or subjects) of a test or audit but rather the details of tests to be given (i.e. questions) or matters to be considered by a specific audit. Although the content of the document may be considered (along with other information and testimony) as part of an audit process, in our opinion the

information that may be considered would not reveal the audit method or inquiry process (what information will be sought and from whom) that any auditors would intend follow.

Our office determined that the document provided for our review did not contain details of specific tests or audits to be conducted by the city (or anyone else) and therefore was not subject to the exception allowed under clause 29(b) of FIPPA. The ombudsman's office advised the city that the representations it had provided to our office had not established that harm would result to ongoing or future audit methods or processes through the release of the information contained in the document provided for our review. We afforded the city a final opportunity to provide any additional information and/or representations prior to our making findings in this matter. The city provided supplemental representations which are discussed later in this report.

Did the city demonstrate that it exercised discretion in a reasonable fashion in refusing to give access to that information to which the discretionary exception allowed by clause 23(1)(a) of FIPPA can been shown to apply?

The exception allowed by clause 23(1)(a) of FIPPA is a discretionary exception meaning that, even though an exception to access may be shown to apply to some or all of the information contained in the document, FIPPA permits the public body the discretion to give rather than withhold access to the information requested. The application of discretionary exceptions requires a two step process. A public body must not only show the exception applies (and that there is no limit to the exception) but also demonstrate that discretion has been exercised in a reasonable fashion in making the decision to apply the exception in refusing access. The FIPPA resource manual offers some guidance to public bodies in the application of discretionary exceptions:

> *The exercise of discretion is not simply a formality where the head of the public body considers the issues before routinely saying no. The head must consider whether or not to exercise the discretion to disclose information with respect to each access request, taking into consideration the information requested and the particular circumstances of the case. The head must not replace the exercise of discretion with a blanket policy that information will not be released, simply because it can be withheld under one of the discretionary exceptions. A public body may develop guidelines on exercising discretion but may not treat them as binding rules. In exercising his or her discretion, the head must "have regard to all relevant considerations" and to the spirit and purposes of FIPPA.*[3]

As required in investigating any complaint of refused access under the discretionary exceptions allowed by sections 21 to 32 of FIPPA, our office considered whether or not the city properly exercised its discretion in deciding to withhold rather than to disclose the information contained in the document. To this end we asked the city for representations explaining its exercise of

[3] 'Manitoba FIPPA Resource Manual', p. 5-9.

discretion, including an explanation of all factors that were considered by the city to be relevant to its decision. To that end, the city provided the following in its letter to our office of June 9, 2014:

> *The City's position is that it intends to follow the practice of exercising its discretion not to disclose these and – for that matter – other documents that fall under s. 23(1)(a) unless there are exceptionally compelling reasons to disclose them. The City's rationale for this position is that the Legislature in drafting this exception to the rule in favour of disclosure recognized that, as with solicitor-client privilege, there are benefits to the public that result from having the authors of analyses – internal and external – freed of any concern that their analyses will be made public...as with solicitor-client privilege, the benefits of the City's ability to withhold these documents diminish if the City frequently releases them. The more often they are released, the more noteworthy is a decision not to release an analysis and the more likely is the public's conclusion that its contents must be particularly negative to the City...*

Based on this representation, our office was left with the impression that the city had fettered its discretion with regard to the document under consideration by stating its intention "to follow the practice of exercising its discretion not to disclose these and – for that matter – other documents that fall under s. 23(1)(a) unless there are exceptionally compelling reasons to disclose them." This suggests that the city had not exercised its discretion appropriately with respect to the access request that is the subject of this complaint by considering irrelevant factors. Our office concluded that the city was not basing its exercise of discretion on factors relevant to this request but rather factors relevant to a request for a hypothetical future record, the refusal of access to which could cast the city in a bad light with the public.

Further, as previously noted, much of the information contained in the document has become known to the public in the intervening years since the document's creation in 2008. Our office finds the exercise of discretion to withhold from access information to which the exception may be shown to apply but which is already largely known to the public, to be problematic and arguably counter to the purpose of access to information legislation. A public body should consider the character of the information at issue (including if much of this information is already known to the public) in exercising discretion to withhold rather than give access to information.

In light of the representations provided by the city and the evidence available to our office that much of the information in the document was publically available, we concluded that the city had not properly exercised its discretion in deciding to withhold rather than to disclose the excepted information. We afforded the city a final opportunity to provide any additional information and/or representations prior to our making findings in this matter. The city provided supplemental representations which are discussed below.

SUPPLEMENTAL ARGUMENTS OF THE PUBLIC BODY

Following our review of the document and after considering all representations received from the city our office advised the public body on September 22, 2014 of our conclusions, which we anticipated to form the basis of findings in our report on this investigation. We advised the city that, based on representations received, it was our conclusion that not all information in the document was subject to the exception allowed under clause 23(1)(a) of FIPPA and the document could be severed and information which was not subject to the exception could be provided to the complainant. The ombudsman's office advised the city that the representations it had provided to our office had not established that harm to would result to ongoing or future audit processes through the release of the information contained in the document provided for our review and therefore the exception allowed under clause 29(b) of FIPPA could not be shown to apply. Our office also advised the city that we had concluded that the city had not properly exercised its discretion in deciding to withhold rather than to disclose the excepted information. We afforded the city an opportunity to provide any additional information and to make supplemental representations. The city disagreed with our provisional findings and responded in detail. The city did not provide supplemental representations on the application of subclause 29(b) and advised our office it was no longer relying on that exception to refuse access to the document.

The city cautioned our office against adopting a position similar to that of the Office of the Information and Privacy Commissioner of Alberta in its Investigative Report F2014-29 which concluded that aspects of a record such as headings, historical information, background data and statistical information were not properly included within an exception for 'advice and recommendations' such as clause 23(1)(a) of FIPPA. In support of this position the city cited the Supreme Court of Canada (SCC or the Supreme Court) in its recent decision in *John Doe v. Ontario (Finance)*[4] which considered an appeal involving the application of subsection 13(1) of the Ontario *Freedom of Information and Protection of Privacy Act* (ON FIPPA). The city stated that this decision of the Supreme Court clearly established that the exception for 'advice and recommendations' played a critical role in good governance and quoted from the decision:

> *To permit or require the disclosure of advice given...would erode government's ability to formulate and justify its policies. It would be an intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted...* [5]

[4] Supreme Court of Canada, *John Doe v. Ontario (Finance)*, 2014 SCC 36.
[5] Ibid, para. 44 citing *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, [1994] 4 F.C. 245, paras. 30-31.

> *...Requiring that such advice or recommendations be disclosed risks introducing actual or perceived partisan considerations into public servants' participation in the decision-making process.*[6]

Our office agrees with the city's assessment of the harm that could result if "governments...were forced to disclose to public scrutiny the internal evolution" of policy formulation; however, we do not agree that the information under consideration in the Supreme Court decision cited by the city is of the same type as is under consideration here. In *John Doe v. Ontario (Finance)*, the exception was applied to the opinions of public servants on the advantages and disadvantages of alternative effective dates of legislative amendments relating to tax policy. The information under consideration here is entirely different in character from sensitive fiscal policy development in that it concerns a matter of program implementation and project management rather than policy formulation.

The city further stated that a distinction between 'analysis' on the one hand and 'mere information' (headings, historical facts, background data and assumptions) cannot be made. The city wrote:

> *...the determination of what information...is germane to an issue is in fact intrinsic to that analysis. Indeed, the key factor in producing differing analyses is frequently the facts each has identified as relevant. Moreover, the manner in which facts are set out will generally suggest the weight being placed on them and the view being taken of them and therefore the outcome of the analysis.*

The city maintains that "a distinction between analysis and mere information is impossible to draw' and a release of information which was collected and later relied upon to produce an analysis will reveal the substance of the analysis. On considering the city's supplemental representations, our office is prepared to accept, at least in this case, the difficulty of distinguishing mere facts from the evaluative process of fact collection that underpins the advice, opinions, proposals, recommendations and analyses which appear in the document under consideration. Background information which appears in the document, while not analysis per se, does reveal by virtue of the information collected, the two options under consideration in the formulation of recommendations. Our office also accepts that an astute reader could deduce the obvious favoured option by virtue of the facts chosen to be presented. We note that most Winnipeggers are already quite familiar with the two options proposed and are aware which one was ultimately chosen, and why (see minute #37 of city council minutes of November 25, 2009). However, if the exception under clause 23(1)(a) is interpreted as broadly as the city would espouse, the exception could apply to almost all information created by public servants in the course of their work and the exercise of discretion in making decisions concerning access with regard to this type of information assumes significant import.

[6] Ibid, para. 45.

When investigating a complaint about a refusal of access relating to a discretionary exception, the ombudsman cannot override a public body's decision where the public body has established that the exception applies and it has properly exercised its discretion. However, the ombudsman can recommend that a public body revisit the exercise of discretion when there is evidence that the public body has exercised its discretion inappropriately. As the FIPPA resource manual states, some of the general principles that apply to the exercise of discretion are:

> *...the discretion must be exercised by the authority to which it is committed, which must act on its own and not under the dictation of any other body, and ...it must be willing to exercise its discretion in each individual case which comes before it. The authority must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation which gives it power to act, and must not act arbitrarily or capriciously.*[7]

Our office concluded that the city's representations provided evidence that the city had predetermined its decision by making a decision not to disclose all "documents that fall under s. 23(1)(a) unless there are exceptionally compelling reasons to disclose them" and was not exercising its discretion based on the merits of the individual and specific record and access decision under consideration here. Our office concluded that the city was not basing its exercise of discretion on factors relevant to the request for this record but rather factors relevant to a request for a hypothetical future record, the refusal of access to which could cast the city in a bad light with the public. Further, our office found that the city did not provide representations indicating that it had considered the relevant consideration that, while information contained in the document could be shown to be subject to the exception under clause 23(1)(a), significant portions of that information subsequently became known to the public long before the access request was made. For example, relevant factors identified in this report include public interest and accountability, the public availability of considerable information found in the document and the original intended audience of the record, etcetera.

In its supplemental representations, the city took issue with the suggestion that the city's exercise of discretion was a mere formality with the outcome predetermined. The city contended that its approach was merely presumptive in favour of withholding. The city states that the presumption in favour of withholding information protected by clause 23(1)(a) is more than justified by the findings of the Supreme Court in *John Doe v. Ontario (Finance)*. In support of this position, the city also cites the Supreme Court in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*[8] which found that the discretionary exception in ON FIPPA to protect solicitor-client

[7]Manitoba FIPPA Resource Manual, p. 5-9, citing *Administrative Law* by Evans, Janisch, Mullan and Risk (1980), page 623.
[8] Supreme Court of Canada, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.

privilege has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship.

The city would appear to be making a case that the relationship between public servants and the public body, to whom they may give advice, is analogous to the relationship between a solicitor and his or her client. Thus, the near absolute respect for solicitor-client privilege in the Canadian justice system and consequent presumption of privilege with regard to communication between a solicitor and his or her client may be applied to information to which clause 23(1)(a) can be shown to apply. With respect, our office concludes that the analogy is forced. If the city's analogy is carried through to its logical conclusion, information found to be subject to clause 23(1)(a) of FIPPA would be withheld in virtually every situation thus undermining the purpose of the act to support transparency and accountability on the part of public bodies. While our office agrees that the Supreme Court clearly established that the exception for 'advice and recommendations' plays a critical role in good governance we do not agree that it necessarily follows that the application of the exception should be 'as close to absolute as possible' as this would remove the exercise of discretion from the application of the exception.

Our office notes the city's concerns with regard to the release of advice, etc.:

> *Even if public servants estimate that their opinions, advice or analyses are likely to be withheld, the chance that they will be released will tend to inhibit their expression of their opinions, advice and analyses. They are, in the words of the Supreme Court, more likely to self-censor and be less likely to provide full, frank and free opinions, advice and analyses.*

We also note that this may not be a relevant consideration here as it appears that the authors of the document under consideration here wrote the document with the intention that it be submitted to council for consideration and, therefore, any self-censoring that may have taken place would likely have taken place before the document was drafted.

We conclude that in cases, such as this one, where much of the information is already public and significant time has passed, the weight of this concern for possible harm diminishes in favour of the factors supporting disclosure in the public interest. It stands to reason that the denial of access can effectively preclude meaningful public discussion on matters of public interest, such as a significant expenditure of public funds. The city acknowledged that there may be a component of public interest which would support the release of the information in the document. However, the city states:

> *...a pattern of selectively releasing information protected by s. 23(1)(a) [will] inevitably lead to reasonable conclusions about the contents of documents that are not released. Releasing this information when the interests of public release are determined to exceed the harm*

caused by their release will inevitably lead to conclusions, that, when material is not being released, it must be detrimental to the public body.

Our office finds that possible future detriment to the public body is an irrelevant consideration in the exercise of discretion and finds that the city has not exercised its discretion in a reasonable fashion in refusing to give access to that information to which the dictionary exception allowed by clause 23(1)(a) of FIPPA may be shown to apply.

FINDINGS

1) The ombudsman found that the city failed in its duty to assist the complainant by providing an open and accurate response as required by section 9 of FIPPA.

2) The ombudsman found that the city was correct in identifying clause 23(1)(a) of FIPPA as the appropriate exception to access to be applied in this case.

3) Our office finds that the city has not exercised its discretion in a reasonable fashion in refusing to give access to that information to which the discretionary exception allowed by clause 23(1)(a) of FIPPA may be appropriately applied.

RECOMMENDATION

1) The ombudsman recommends that the city revisit its exercise of discretion to withhold rather than give access to the document which it has identified as responsive to the complainant's request and re-issue its decision concerning access to this information. The decision should include an explanation of all factors that were considered by the city to be relevant in exercising its discretion and give evidence that the city considered the particular and unique circumstances of this case.

HEAD'S RESPONSE TO THE RECOMMENDATION

Under subsection 66(4), the City of Winnipeg must respond to the ombudsman's report in writing within 15 days of receiving this report. As this report is being sent by courier to the head on this date, the head shall respond by January 13, 2014.

Head's response to the report
66(4) If the report contains recommendations, the head of the public body shall, within 15 days after receiving the report, send the Ombudsman a written response indicating

(a) that the head accepts the recommendations and describing any action the head has taken or proposes to take to implement them; or
(b) the reasons why the head refuses to take action to implement the recommendations.

OMBUDSMAN TO NOTIFY THE COMPLAINANT OF THE HEAD'S RESPONSE

After the ombudsman has received the City of Winnipeg's response to his recommendation, he will notify the complainant about the head's response as required under subsection 66(5) of FIPPA.

HEAD'S COMPLIANCE WITH RECOMMENDATION

If the head accepts the recommendation, subsection 66(6)(a) requires the head to comply with the recommendation within 15 days of acceptance of the recommendation or within an additional period if the ombudsman considers it to be reasonable. Accordingly, the head should provide written notice to the ombudsman and information to demonstrate that the public body has complied with the recommendation and did so within the specified time period.

Alternatively, if the head believes that an additional period of time is required to comply with the recommendations, the head's response to the ombudsman under subsection 66(4) must include a request that the ombudsman consider an additional period of time for compliance with the recommendations. A request for additional time must include the number of days being requested and the reasons why the additional time is needed.

Manitoba Ombudsman
December 29, 2014

Manitoba Ombudsman

REPORT ON COMPLIANCE WITH RECOMMENDATION UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2014-0099

CITY OF WINNIPEG –
CORPORATE SUPPORT SERVICES DEPARTMENT

ACCESS COMPLAINT: REFUSAL OF ACCESS

SUMMARY:

On January 12, 2015 the City of Winnipeg – Corporate Support Services Department provided its response to the ombudsman's report with recommendation under *The Freedom of Information and Protection of Privacy Act* accepting the recommendation. The city requested additional time to comply with the recommendation on three occasions and the ombudsman agreed to two extensions. On March 4, 2015 the city reported to the ombudsman that it had complied with the recommendation to review its exercise of discretion. As a result the city reconsidered its original decision and granted access in part to the information requested.

COMPLIANCE WITH THE RECOMMENDATION

On December 29, 2014 the ombudsman issued a report with recommendation in this case following investigation of a complaint of refused access against the City of Winnipeg – Corporate Support Services (the city) under *The Freedom of Information and Protection of Privacy Act* (FIPPA or the act). On January 12, 2015 the city responded to the ombudsman accepting the recommendation. The recommendation was as follows:

> *The Ombudsman recommends that the City revisit its exercise of discretion to withhold rather than give access to the document which it has identified as responsive to the complainant's request and re-issue its decision concerning access to this information. The decision should include an explanation of all factors that were considered by the City to be relevant in exercising its discretion and give evidence that the City considered the particular and unique circumstances of this case.*

Under subsection 66(6) of FIPPA, when a public body accepts a recommendation it is required to comply with the recommendation within 15 days or within such additional time as the ombudsman considers reasonable. In accepting the recommendation, the city requested an additional 15 days to comply, extending the period for compliance to 30 days. The city explained that revisiting the exercise of discretion would require the collaboration of senior city officials, who were at the time focussed on the city's annual budget process. On January 13, 2015 the ombudsman responded that the deadline for compliance with the recommendation in this matter was extended to February 11, 2015. As required under subsection 66(5) of FIPPA, the complainant was notified regarding the city's response to the recommendation in this matter without delay.

On February 9, 2015 the city advised the ombudsman that, due to the need to conduct further internal consultations, it was unable to meet the February 11, 2015 deadline for compliance with the recommendation and requested a further extension. The ombudsman considered the city's request and, in light of the circumstances outlined by the city, agreed to extend the period for compliance to March 2, 2015. The complainant was notified accordingly.

On March 2, 2015 the city contacted the ombudsman advising that senior city officials were still in the process of collaborating on reviewing the city's response to the ombudsman's recommendation. The city requested that the period for compliance with the recommendation contained in the report issued on December 29, 2014 be further extended to April 2, 2015. The ombudsman responded to the city noting that two extensions (on January 12, 2015 and February 9, 2015) to the usual deadline for compliance with a recommendation (which was 15 days as stipulated under clause 66(6)(a) of *The Freedom of Information and Protection of Privacy Act)* had previously been considered and approved. The ombudsman further noted that over one year had elapsed since the complainant's original access to information request was submitted to the city. In order to consider the reasonableness of the city's request, the ombudsman asked for a more detailed description of the activities already undertaken by the city in order to comply with the recommendation by the previously agreed deadline of March 2, 2015.

On March 4, 2015 the city advised the ombudsman that it was withdrawing its request for an extension to the time to comply with the recommendation. The city explained that, upon review of its exercise of discretion (which included conducting a line by line review of the records identified as responsive to the complainant's access request), the city had reconsidered its original position and decided to grant access in part to the information requested by the complainant. Some information was severed as allowed by the exception described under section 26 of FIPPA. The cited exception reads:

Disclosure harmful to security of property

26 *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to harm or threaten the security of any property or system, including a building, a vehicle, an electronic information system or a communications system.*

The city explained that the information severed (less than ten words) concerned the location of specific buildings used by the Winnipeg Police Service (WPS). The WPS has consistently maintained that the disclosure of these specific locations could pose security risks to WPS equipment and personnel. The ombudsman reviewed the city's severing in this case and considers it to be reasonable.

As required by subsection 66(5) of *The Freedom of Information and Protection of Privacy Act*, the ombudsman is advising the complainant by this report that he will not be requesting the information and privacy adjudicator to review this matter.

In accordance with subsection 67(3) of *The Freedom of Information and Protection of Privacy Act*, the complainant may appeal the City of Winnipeg's decision to refuse access to the information severed to the Court of Queen's Bench within 30 days of receiving this report.

SUMMARY

The ombudsman is satisfied that the City of Winnipeg - Corporate Support Services has complied with the recommendation contained in our report.

Mel Holley
A/Manitoba Ombudsman
March 10, 2015