

# Manitoba mbudsman

## REPORT UNDER THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2015-0233

CITY OF WINNIPEG – ASSESSMENT AND TAXATION

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 1(1), 2(a), 12(1)(c)(ii), 13(1)(c), 28(1)(a),(b),(c)(i),(d)

REPORT ISSUED ON APRIL 26, 2016

**SUMMARY:** An application was made under the Freedom of Information and Protection of Privacy Act (FIPPA) to the City of Winnipeg – Assessment and Taxation Department (the city) for information related to determining the assessed value of a specific Winnipeg address during the period from 2013 to 2015. The city responded, directing the complainant to its responses to previous access requests the complainant had made for some of the requested information. The city withheld access to other requested information under clauses 28(1)(a), (b), (c) and (d) of FIPPA (disclosure harmful to economic and other interests of a public body). Our office found that, in issuing its access decision to the complainant, the city did not make a complete response as required under subclause 12(1)(c)(ii) of FIPPA (contents of response). Our office concluded that the city had disregarded a portion of the complainant's request as is allowed under clause 13(1)(c) of FIPPA. However, our office also determined that the complainant did not receive a complete response to his previous requests; therefore, we found that the city would not be authorized to disregard part of his later request on the grounds the request is for information already provided to the complainant. Our office also found that some of the information initially withheld under clauses 28(1)(a), (b), (c) and (d) of FIPPA was information that did not come within the definition of a 'record' in the act; therefore, there is no right of access to this information under FIPPA. However, our office found that clauses 28(1)(a) and (b) and subclause 28(1)(c)(i) of FIPPA were appropriately applied to withhold the remaining information withheld under these exceptions.

## COMPLAINT

On June 26, 2015 the complainant made a request under the Freedom of Information and Protection of Privacy Act (FIPPA) to the City of Winnipeg – Assessment and Taxation Department (the city) for access to the following information which related to the complainant's property:

City of Winnipeg Access Request 15 06 555

*All information including but not limited to policies, procedures, guidelines, rules, instructions, regulations, informal practices, formal practices, raw data required to independently duplicate assessed values for [City of Winnipeg street address] determined between July 1, 2013 and the present [June 26, 2015]. Be sure to include the algorithm or any other tools utilized.*

The city responded on July 14, 2015. For policies, procedures, guidelines, etc. the city directed the complainant to its responses to three other FIPPA requests made by the complainant. Access to data, the algorithm and other tools utilized in determining the assessed values for a home owned by the complainant was refused under clauses 28(1)(a), (b) and (d) of FIPPA.

A complaint of refused access was received in our office on August 18, 2015.

## ANALYSIS OF ISSUES AND FINDINGS

### **Did the city make a complete response to the complainant including the specific provision on which the refusal is based as required under subclause 12(1)(c)(ii) of FIPPA?**

In making its response to the complainant's request for "information including but not limited to policies, procedures, guidelines, rules, instructions, regulations, informal practices, formal practices, raw data required to independently duplicate assessed values for [City of Winnipeg street address] determined between July 1, 2013 and the present" the city directed the complainant to its responses to three other access requests which the complainant had made previously and to which the city had already responded. Our office noted that, in refusing access to this information, the city had not cited a specific exception to access as required under subclause 12(1)(c)(ii) of FIPPA:

*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,*

*(ii) in the case of a record that exists and can be located, the reasons for the refusal and the specific provision of this Act on which the refusal is based,*

While the city advised the complainant that it would not be giving access to information it believed it had already provided, it did not inform the complainant of the specific provision under FIPPA on which the refusal was based. Therefore, our office found that the city did not make a complete response to the complainant as required under subclause 12(1)(c)(ii) of FIPPA.

On receiving this complaint, our office asked the city for more information about the specific provision on which its response was based. The city advised our office that it believed that “information including but not limited to policies, procedures, guidelines, rules, instructions, regulations, informal practices, formal practices, raw data required to independently duplicate assessed values for [City of Winnipeg street address] determined between July 1, 2013 and the present” had previously been provided to the complainant in response to his City of Winnipeg Access Requests #15 06 516, #15 05 444 and #15 06 554. Therefore, our office concluded the city was disregarding the complainant’s request for the same information made as part of City of Winnipeg Access Request #15 06 555 as is allowed under clause 13(1)(c) of FIPPA:

***Public body may disregard certain requests***

***13(1)*** *The head of a public body may disregard a request for access if he or she is of the opinion that*

*(c) the request is for information already provided to the applicant.*

**Was the city authorized to disregard the complainant’s request for access to “information including but not limited to policies, procedures, guidelines, rules, instructions, regulations, informal practices, formal practices and raw data...required to independently duplicate assessed values for [City of Winnipeg street address] determined between July 1, 2013 and the present” as is allowed under clause 13(1)(c) of FIPPA?**

In making his complaint of refused access in this matter the complainant maintained that the specified information had not been provided previously. Our office then turned to a review of information already provided to the complainant by the city in response to his other City of Winnipeg Access Requests (#15 06 516, #15 05 444 and #15 06 554) to determine if the specified information had already been provided to the complainant as the city maintained. Our office asked the city for more information concerning the access decisions made in response to those earlier requests.

Following our review of the complainant’s previous access requests and the responses made by the city, our office concluded that it was not possible to determine whether the complainant had previously been provided with all the information he had requested as the city had not described

the responsive record or advised whether the complainant had been given access in full or in part to the requested record as required by clause 12 (1)(a) of FIPPA:

***Contents of response***

***12(1)*** *In a response under section 11, the head of the public body shall inform the applicant*

*(a) whether access to the record or part of the record is granted or refused;*

Therefore, our office found that the city would not be authorized to disregard the complainant's City of Winnipeg Access Request #15 06 555.

Generally, on concluding that a public body was not authorized to disregard a request for access to information, our office will ask a public body to re-issue its decision concerning access. However, while our investigation of this matter was ongoing, complaints of refused access further to the city's decisions issued in response to City of Winnipeg Access Request #15 06 554 and City of Winnipeg Access Request #15 06 516 were received in our office on September 9, 2015. These were investigated by our office as cases 2015-0255 and 2015-0256 respectively.

The investigation in this complaint that related to those portions of the complainant's City of Winnipeg Access Request #15 06 555 which were disregarded as previously provided was continued as part of our investigation into case 2015-0256. Our report in case 2015-0256 contains our findings in a complaint of refused access in relation to that material which was said to have been provided and we will not be dealing with this matter in this report.

**Do the discretionary exceptions to disclosure afforded by clauses 28(1)(a), (b), (c) and (d) of FIPPA apply to the information to which access was refused?**

In refusing access to the raw data, the algorithm and other tools utilized in determining assessed values the city initially cited the discretionary exceptions allowed under clauses 28(1)(a), (b), (c) and (d) of FIPPA:

***Disclosure harmful to economic and other interests of a public body***

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

- (a) a trade secret of a public body or the Government of Manitoba;*
- (b) financial, commercial, scientific, technical or other information in which a public body or the Government of Manitoba has a proprietary interest or right of use;*
- (c) information the disclosure of which could reasonably be expected to*
  - (i) result in financial loss to,*

- (ii) *prejudice the competitive position of, or*
- (iii) *interfere with or prejudice contractual or other negotiations of, a public body or the Government of Manitoba;*
- (d) *innovative scientific or technical information obtained through research by an employee of a public body or the Government of Manitoba;*

In considering the application of these exceptions, our office asked the city for a description of the records which it identified as responsive to this portion of the complainant's request. The city described that the tools, in addition to the algorithm requested by the complainant, used to determine assessed values for Market Region 7<sup>1</sup> (which includes the City of Winnipeg street address specified by the complainant) between July 1, 2013 and the present consisted of:

1. Model 7 SPSS Syntax
2. Model 7 SPSS Output
3. SPSS version 16 and above software
4. Valcura Software
5. Market Region 7 Sales and Inventory Data

The city provided further information about the records and its decision to continue to refuse access to these records. The city explained that SPSS<sup>2</sup> is a commercial software package used for statistical analysis. Model 7 SPSS Syntax is a developed syntax, or set of commands, that execute certain functions in the SPSS software program. Valcura is customized NovaLis software which is used by the City of Winnipeg to implement the market value approach via the regression method in Oracle (another software program used by the city); a syntax-based approach that extends Oracle's view technology.

The city further explained that the algorithm requested by the applicant is an electronic mathematical equation used with the above software tools. The city now submitted that, as such, the algorithm and the tools described above as items 1-4 did not fall under the definition of a 'record', as defined by FIPPA. Further, the city now maintained that as the algorithm and tools are not considered to be records under the act, FIPPA's access provisions do not apply to this type of information.

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<sup>1</sup> Information in the city document "VALUATION OF RESIDENTIAL AND CONDOMINIUM PROPERTIES – 2016 General Assessment" (available at [http://www.winnipegassessment.com/AsmtTax/English/previewprogram/2016Overview\\_ResidentialCondominiumProperties.pdf](http://www.winnipegassessment.com/AsmtTax/English/previewprogram/2016Overview_ResidentialCondominiumProperties.pdf)) explains that for valuation purposes, the city is divided into 10 market regions based on building type, age, sale prices, natural boundaries and volume of properties.

<sup>2</sup> 'SPSS' is the acronym of the software *Statistical Package for the Social Science*. SPSS is one of the most popular statistical packages which can perform highly complex data manipulation and analysis with simple instructions. The current versions (2015) are officially named *IBM SPSS Statistics*.

Our office identified the following provisions of FIPPA as relevant:

***Definitions***

***1(1)*** *In this Act,*

***"record"*** *means a record of 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 by graphic, electronic or mechanical means, **but does not include electronic software or any mechanism that produces records;***

[emphasis added]

The first purpose of FIPPA is stated in clause 2(a):

***Purposes of this Act***

***2*** *The purposes of this Act are*

*(a) to allow any person a right of access to **records** in the custody or under the control of public bodies, subject to the limited and specific exceptions set out in this Act;*

[emphasis added]

Our office looked for more information to better understand the various tools described by the city as responsive to the complainant's request. Our office notes that 'electronic software' is not a term that is defined by FIPPA. The *Concise Oxford English Dictionary* defines software as the programs and other operating information used by a computer; in other words, the instructions that tell a computer what to do so that the user may perform specific tasks and view the results.

In computer science, the syntax of a computer language (or software) is the set of rules that defines the combinations of symbols that are considered to be a correctly structured fragment in that language. Thus, correctly structured syntax is necessary for correct software operation. Computer languages consist of programming languages (source code) as well as markup languages (such as HTML) which affect how results are viewed.

Based on the foregoing and in light of the city's description of the items responsive to the complainant's request for "the raw data, the algorithm and other tools utilized in determining assessed values," our office concluded that items 3 and 4 are 'electronic software' as defined by FIPPA. Item 1 and the algorithm requested by the applicant are understood by our office to be fragments of the computer languages (or syntax) which operate in and form part of the software tools employed by the city in determining property values. Our office found, therefore, that items 1, 3 and 4 and the algorithm requested by the applicant are software or form part of software and are specifically excluded from the definition of a 'record' under FIPPA. As such, there is no right of access to this information under FIPPA.

Our analysis then turned to an examination of the application of the exceptions allowed under clauses 28(1)(a), (b), (c) and (d) to item 2 (Model 7 SPSS Output) and item 5 (Market Region 7 Sales and Inventory Data). With respect to the interpretation of these exceptions our office consulted 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. The manual explains that the exceptions in subsection 28(1) are designed to protect diverse economic, financial and other interests of a public body. Economic interests relate to the specific interests of the public body in the management of its financial and other resources. Financial interests relate to the ability to generate revenues.

The exceptions in clauses 28(1)(a), (b) and (d) are class exceptions as they protect a type or kind of information. However, use of the word ‘including’ in order to introduce the subordinate clauses of subsection 28(1) indicates that the records or information listed in clauses (a), (b) and (d) are not the only records or information that fall within the exception. There may be information or records that are not described which, if disclosed, "could reasonably be expected to harm the economic or financial interests or negotiating position of a public body or the Government of Manitoba." Such information or records would still fall within the exception to disclosure described in the opening words of subsection 28(1). The exception in the opening words of subsection 28(1) and the exceptions in clause 28(1)(c) contains a ‘reasonable expectation of harm’ test. For the exception to apply, the public body must determine whether disclosure of the information could "reasonably be expected" to cause the harm described in the exception.

For the purposes of clause 28(1)(a), the manual explains that the term ‘trade secret’ refers to some identifiable business or technical information which is kept private for the purpose of economic gain. As defined by the manual, a trade secret includes specialized compilations of information that, in sum, are not publicly known and have unique value on that account. The exception in clause 28(1)(b) applies to information in which a public body has a proprietary interest or right of use. A ‘proprietary interest’ is a legal property interest in the information which would arise through ownership or through contractual rights. The three exceptions to disclosure in clause 28(1)(c) provide protection for the business and commercial activities of a public body. The exception in clause 28(1)(d) applies to innovative scientific information obtained through research by an employee of the public body in the natural, biological or social sciences or mathematics or technical information relating to architecture, engineering or electronics.

With regard to item 2, the city explained that the Model 7 SPSS Output is created after executing the Model 7 SPSS Syntax. Our office concluded, therefore, that the ‘output’ is what is produced following the statistical analysis performed by the SPSS software. Generally, the output (or result) is rendered in a table and can be produced as a static document. As such, our office

considers this result to be a record as defined by FIPPA. However, our office also considers the Model 7 SPSS Output, which is based on a proprietary syntax, to be a proprietary product. Based on our review, our office considers item 2 to be a specialized compilation of information which is not publically known and in which the city has a proprietary interest. This is the type of information described by clauses 28(1)(a) and (b) of FIPPA and our office found that these exceptions apply to item 2.

With regard to item 5, the Market Region 7 Sales and Inventory Data, the city explained it uses numerous resources to collect a body of real estate sales and inventory data further to the valuation process. The city enters into contractual arrangements with third parties and provides this data to the third parties for a fee. This allows the city to recoup some of the expenses incurred in acquiring this data. Making this data available to others without charge would compromise the ability of the city to enter into contractual arrangements with third parties for the provision of this data for a fee and result in financial loss to the city. As such, the city maintained, this data would be excepted from disclosure under subclause 28(1)(c)(i) of the act. Our office agreed that the exception allowed under subclause 28(1)(c)(i) applied to this information. Our office also found that item 5 contains the type of information described by clauses 28(1)(a) and (b) of FIPPA and those exceptions applied to item 5 as well.

The exceptions described under clauses 28(1)(a), (b) and subclause 28(1)(c)(i) of FIPPA are discretionary exceptions. Discretionary exceptions provide the head of a public body with discretion to disclose information in a record even though it may be shown to fall under the exception. Our office considered whether the city reasonably exercised its discretion in deciding to withhold rather than release the information in question. Based on our review, we determined that the exercise of discretion by the public body to withhold the information was not unreasonable.

Having found that the city was authorized to refuse access to items 2 and 5 under clauses 28(1)(a), (b) and subclause 28(1)(c)(i) of FIPPA, our office did not consider the application of clause 28(1)(d) to this information.

## **CONCLUSION**

The ombudsman concluded that the city was not authorized to disregard that portion of the complainant's request that pertained to "policies, procedures, guidelines, rules, instructions, regulations, informal practices, formal practices, raw data required to independently duplicate assessed values" on the basis that this information had already been provided to the complainant. Actions taken to address this finding are set out in the investigation of case 2015-0256.



With regard to that portion of the request that pertained to “the raw data, the algorithm and other tools utilized in determining assessed values”, the ombudsman found that item (1) (Model 7 SPSS Syntax), item (3) (SPSS version 16 and above software) and item (4) (Valcura Software) and the algorithm are software or form part of software and are specifically excluded from the definition of a ‘record’ under FIPPA. As such, there is no right of access to this information under FIPPA. The ombudsman found that the city was authorized to apply the exceptions allowed under clauses 28(1)(a), (b) to refuse access to item 2 (Model 7 SPSS Output) and item 5 (Market Region 7 Sales and Inventory Data). We also found that the city was authorized to refuse access to item 5 as allowed under subclause 28(1)(c)(i) of the act.

The complaint of refused access is, therefore, 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 following the receipt of this report.

Manitoba Ombudsman  
April 26, 2016