

Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2016-0250

CITY OF WINNIPEG – PLANNING, PROPERTY AND DEVELOPMENT

ACCESS COMPLAINT: REFUSED ACCESS

PROVISIONS CONSIDERED: 22(1)(a)

REPORT ISSUED ON JUNE 27, 2017

SUMMARY: On June 1, 2016 a request for access to information under the Freedom of Information and Protection of Privacy Act (FIPPA or the act) was made to the City of Winnipeg. The city issued an access decision on July 4, 2016 stating that it had identified two responsive items. One item was publicly available. The city refused access in full to the second responsive item, stating that it fell under the exception to access allowed by clause 22(1)(a) of FIPPA (local public body confidences). Our office considered representations from the city and concluded that the city had not established the application of the cited exception to the information withheld from the complainant. Our office asked the city to revisit its access decision and consider giving access to the requested record. On December 16, 2016 the city advised our office that it was reconsidering its access decision. On January 25, 2017 the complainant was provided with a revised access decision and full access to the record identified as responsive to his request. On February 21, 2017 the complainant notified our office that he considered the records he received from the city to have satisfied his access request. At that point, our office considered the complaint to have been resolved and our investigation was discontinued.

COMPLAINT

On June 1, 2016 the complainant made a request to the City of Winnipeg for access under the Freedom of Information and Protection of Privacy Act (FIPPA or the act) for the following information:

Any and all reports authored by [named city employee] between the dates October 1, 2012 and October 1, 2015.

On July 4, 2016 the City of Winnipeg – Planning, Property and Development Department (the city or the public body) issued a decision concerning access to the requested information. The city explained that it had identified a report responsive to the complainant’s request that was considered at the meeting of City of Winnipeg – Executive Policy Committee on September 11, 2013. The city provided the complainant with information for locating this report online on the City Clerk's Department Decision Making Information System¹. The city explained that, as this report was available to the public free of charge, access to this report was refused. In refusing access the city cited clause 3(a) and subsection 6(2) of FIPPA, which read:

Scope of this Act

3 This Act

(a) is in addition to and does not replace existing procedures for access to records or information normally available to the public, including any requirement to pay fees;

Part does not apply to publicly available information

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

The city further explained that one other report was identified as responsive to the complainant’s request; however, as this report had never been considered in a meeting open to the public, access was refused as allowed under clause 22(1)(a) of FIPPA:

Local public body confidences

22(1) *The head of a local public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal*

(a) a draft of a resolution, by-law or other legal instrument by which the local public body acts;

A complaint of refused access was received by the Manitoba Ombudsman on August 17, 2016.

¹ <http://clkapps.winnipeg.ca/dmis/>.

POSITION OF THE COMPLAINANT

In information which accompanied his complaint and in subsequent conversations with our office, the complainant noted that the exception to access allowed under clause 22(1)(a) of FIPPA is discretionary. The complainant was aware that discretionary exceptions, such as clause 22(1)(a), provide the head of a public body with the discretion to disclose information in a record even though it falls within the exception. The complainant explained to us that, on receiving the city's access decision, he had contacted the Planning, Property and Development Department and asked it (unsuccessfully) to reconsider its decision. It was the complainant's view that the report in question contains information of public interest and that it should have been released.

THE RESPONSIVE RECORD

Preliminary inquiries by our office indicated that there may have been more reports authored by the named city employee in addition to the two which had been identified in the city's decision letter. In conversation with the complainant, he explained that his interest was in reports that provided updates on the city's attempts since 2009 to meet greenhouse-gas emission targets. It was his belief that a report on this topic had been produced by the named city employee within the time frame specified by his request.

Our office contacted the public body and asked it to provide a copy of the record identified as responsive to the complainant's request for our review. We also asked the city to confirm that there were no other reports authored by the named city employee that could be considered responsive to the complainant's request.

On September 23, 2016 the city provided our office with a copy of a draft city administrative report titled *Update to the Community-Wide "Climate Change Action Plan Development."* The draft was authored by the named city employee on June 5, 2015. Included with this draft report was an attachment titled *Winnipeg's 2011 Community Greenhouse Gas Inventory and Forecast.* This attachment, authored by Golder Associates, was dated March 2015 and was described in the draft report as 'Golder Final Report'².

The city confirmed to our office that there were no other reports authored by the named city employee which would be considered responsive to the complainant's request other than the two which the city had identified. Our office then turned to a consideration of the application of the exception cited by the city in refusing access to the responsive record.

² Our office has determined that this report was provided in response to City of Winnipeg Request for Proposal No. 631-2012 'Request for Proposal for Professional Consulting Services for Community Greenhouse Gas Inventory, Forecast and Emission Reduction Opportunities Assessment.'

ANALYSIS OF ISSUES AND FINDINGS

Was the exception allowed under clause 22(1)(a) of FIPPA appropriately applied to refuse access to the responsive record?

Clause 22(1)(a) of FIPPA applies to information that could reasonably be expected to reveal a draft of a resolution, by-law or other legal instrument by which the local public body acts. Subsection 22(1) recognizes the need for confidential discussion when drafting these items. However, for information to fall under the exception allowed by clause 22(1)(a), it must be the type of information specified in the exception. In determining the type of information to which the exception applies, our office considered the *FIPPA for Public Bodies Resource Manual* (the manual) 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 a resolution is a formal expression of the opinion or will of an official body or public assembly, adopted by vote. The term is usually employed to denote the adoption of a motion, the subject matter of which would not properly constitute a law.

The manual further explains that, in the context of clause 22(1)(a), the term by-law means a law made by a local public body within the scope of its jurisdiction or authority. We note that the enactment of a by-law generally follows a specific procedure for their development, often requiring a process of consultation before adoption.

The manual also explains that a legal instrument is a formal written document that regulates the activities of the local public body or that regulates those matters within the jurisdiction of the local public body (for example, rules of procedure adopted by a local public body). We note that a 'legal instrument' has a specific meaning in law. It is a formally executed written document that states a contractual relationship or grants some right. It expresses a legally enforceable act, process or contractual duty, obligation or right. A legal instrument evidences the act of preparing the legal instrument or agreement. Examples include bonds, mortgages, deeds, contracts and wills.

The manual further notes that the exception covers all drafts, but does not apply to a resolution, by-law or other legal instrument that has been adopted.

On August 24, 2016 our office asked the city to provide us with representations which explain how the city administrative report titled *Update to the Community-Wide "Climate Change Action Plan Development"* and its attachment was of the type of information captured by the exception. The city responded on September 23, 2016.

The city acknowledged that the draft administrative report was clearly not a draft of a by-law. However, the city advanced arguments in support of its view that the information contained in the draft administrative report would reveal a draft of a resolution. In doing so, the city employed the definition that a "...resolution is a written motion adopted by a deliberative body."

The city explained that the draft administrative report would be submitted for the consideration of the appropriate approval bodies in due course – the Standing Committee on Water and Waste, Riverbank Management and the Environment, Executive Policy Committee and eventually, city council. At each stage, the report would be considered and by resolution, either be approved or sent back for further study and revision. The city further explained that the official body will be presented with a recommendation (as contained in the report), which is (the city submits), consistent with the the manual definition of a resolution as "a formal expression of the opinion or will of an official body or public assembly, [to be, or not] adopted by vote." The city maintained that any recommendation is supported by the content of the report and is not separate from it; therefore, the entire report is the subject of the recommendation and thus was withheld in its entirety.

Our office reviewed the draft administrative report and noted it does contain a recommendation of a member of the city's public service. We observed that the report contained information under headings titled 'Recommendations' and 'Implications of the Recommendations.' It also contained background information such as 'Reason for the Report' and 'History' outlining the history of decision making and other actions leading to the report recommendation. Thus, the administrative report would not only provide a recommendation which could be the subject of a resolution but it also brought together background information to inform city council decision making.

As used in clause 22(1)(a) of FIPPA, the term 'would reveal' would generally reference information which would reveal the substance of a resolution and would not generally include decision making history or background information, much of which is already publicly known. In our view the entire draft administrative report would not reveal a draft of a resolution (which, in this instance would contain wording to either approve and receive the report or send it back for further study and revision) although small parts of it might possibly reveal the content of a resolution.

The city also represented that the draft administrative report could be described as a 'legal instrument' within the meaning of the exception. In the city's view, the draft administrative report (with attachment) was a 'written instrument' (in essence the same as a "legal instrument" as described in clause 22(1)(a) of FIPPA) submitted for the consideration of the appropriate approval body and containing a recommendation that would be adopted or not as it moved through the process to a final council decision. The city suggested that it was supported in this view by the manual which describes "other legal instrument by which the local public body acts"

as “*any other formal written document* that regulates the activities of the local public body or that regulates those matters within the jurisdiction of the local public body (for example, rules adopted by a local public body).” We were not persuaded that the term ‘written instrument’ as used by the public body has the same meaning as ‘legal instrument’ as that term is used in clause 22(1)(a) of FIPPA. As previously explained, it is our view that a ‘legal instrument’ has a specific meaning in law and the draft administrative report was not a legal instrument within the meaning of the exception.

At this point in the investigation (November 30, 2016) our office advised the city that we had concluded that the city had not established the application of the exception allowed under clause 22(1)(a) of FIPPA to the responsive record (which had been withheld in its entirety). We invited the city to provide any further information and/or case law which would support its position for our consideration. We advised the city that, in the absence of further representations, our office would be asking the city to revisit its access decision and consider giving access to the requested record. On December 16, 2016 the city advised our office that it was reconsidering its decision concerning access to the draft report as the final report had been presented to council.

On January 25, 2017 the city issued a revised access decision. The city explained to the complainant that the administrative report titled *Update to the Community-Wide “Climate Change Action Plan Development”* had been presented to city council on November 16, 2016 as part of the report of the Standing Policy Committee on Water and Waste, Riverbank Management and the Environment. The city provided the complainant with a draft of this report, which had been authored by the city employee named in his request, and provided instructions whereby a copy of the ‘Golder Report’ attachment could be accessed online on the City Clerk’s Department Decision Making Information System. The complainant asked for time to review the release and on February 21, 2017 the complainant advised our office that he was satisfied that the record provided to him by the city was a complete response to his access request. At that point, our office considered the complaint to have been resolved and our investigation was discontinued.

Manitoba Ombudsman
June 27, 2017