

Manitoba mbudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2017-0209

CITY OF WINNIPEG

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISION CONSIDERED: 23(1)(a)

REPORT ISSUED ON SEPTEMBER 28, 2017

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 drafts and final reports related to City of Winnipeg Bid Opportunity 73-2016. A responsive record (a draft “Portage and Main Transportation Study” dated November 2016) was located. Initially the city refused access under subsection 32(1) of FIPPA, stating a final version of the report would be made public within 90 days of the request. When the report did not become public, the city treated the initial request as a new matter and refused access in full, stating that clause 23(1)(a) of FIPPA (advice to a public body) applied to the entire draft record.

Our investigation determined that this exception applied to the advice, opinions, analyses and recommendations that are contained in three draft versions of the report provided for our review. We concluded that the exception did not apply to the entire records absent a publicly available subsequent or final version to which a comparison could be made. Therefore, the complaint about the city’s decision to refuse access in full is partly supported. However, in the course of our investigation the city confirmed to our office that the final version of the report was definitively scheduled to be presented to city council on October 25, 2017. Consequently, the opportunity to compare the draft reports with a subsequent public version was no longer hypothetical but certain and those portions of the drafts which had changed

and which could reasonably be expected to reveal information subject to the exception would become identifiable.

While the ombudsman may make recommendations to a public body, it is not required and in this case, given the expectation of an imminent public release of the “Portage and Main Transportation Study,” our office did not consider it reasonable in the circumstances to make any recommendations.

COMPLAINT

As background, on January 19, 2017 the complainant made a request for access to the following information:

All drafts of reports and final report (if available) related to City of Winnipeg Bid Opportunity 73-2016 “Request for Proposal for Professional Consulting Services for Portage Avenue and Main Street Transportation Study”.

This request was clarified by the complainant on January 20, 2017 to include all deliverables from the awarded contract, including drafts. On February 21, 2017 the city advised the complainant that a search for the requested records returned one responsive record which was identified as a draft copy of the “Portage and Main Transportation Study (totalling 98 pages)” (the report). The city withheld the responsive record citing subsection 32(1) of FIPPA which allows a public body to refuse access to information that will be made available to the public within 90 days of the access request being received (in this case, by April 20, 2017).

The city advised the complainant on April 19, 2017 (as required by clause 32(1)(b) of FIPPA) that his request for access was being reconsidered as if it were a new request received on that date, as the information would not be made public within the specified timeframe. On May 17, 2017 the city issued its decision regarding access to the responsive record. Access was refused in full.

On May 23, 2017 a complaint of refused access was received by our office.

POSITION OF THE PUBLIC BODY

The city explained to the complainant that the record requested (a draft report) consisted of analyses, recommendations and policy options prepared for an officer of the City of Winnipeg. The city advised that, as the draft report was still under review, the document was withheld under clause 23(1)(a) of FIPPA:

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;

The city further explained that clause 23(1)(a) of FIPPA is a discretionary exception used to protect information which would reveal advice, recommendations and policy options developed for a public body. The city advised that, as the entire document was under review and subject to revision, it was not possible to sever information subject to the exception and give access to the remainder without disclosing the substance of the protected information.

THE INFORMATION AT ISSUE

On June 1, 2017 our office asked the city to provide representations explaining its reliance on the cited exception along with a copy of the responsive record for our review. The city responded on June 22, 2017. It explained that in preparing its response to our office it had expanded its search for responsive information to include not only the office of the city's chief administrative officer (CAO) and project manager for the Portage and Main Transportation Review but also the office of the chair of the Technical Steering Committee for the project. This committee had the responsibility for the initial review of any reports received from the consultant chosen to conduct the Portage and Main Transportation Study. As a result of the expanded search, two earlier drafts of the consultant's report were located. All three drafts were provided for our review. It is our understanding that a revised access decision, which would explain the existence of two further responsive records to the complainant, was not issued.

The records provided for our review are as follows:

Draft #1

Titled "Portage and Main Transportation Study Draft (September 2016 – 16-3623)"

Described by the city as "Portage and Main Microsimulation Analysis – Report 30Sept2016"

Submitted to the Technical Steering Committee September, 2016

Returned to the consultants with comments October 18, 2016

Draft #2

Titled "Portage and Main Transportation Study (November 2016 – 16-3623)"

Described by the city as "Portage and Main Microsimulation Analysis – FINAL DRAFT Report 2016-11-21"

Submitted to the Technical Steering Committee November 21, 2016

Forwarded to the project manager by the Technical Steering Committee December, 2016

Draft #3

Titled “Portage and Main Transportation Study (November 2016 – 16-3623)”

Described by the city as “Dillon Consulting Portage and Main Transportation Study Draft”

Submitted to the Technical Steering Committee March 23, 2017

Returned to the consultants with comments [after June 22, 2017]

INVESTIGATION AND ANALYSIS

In the circumstances of this request, the city eventually located three draft versions of the “Portage and Main Transportation Study” which it provided for our review. Our office noted that the city’s representations referred to a report in the singular; however, we considered its representations as applicable to each of the three draft reports that were provided.

In previous complaint investigation reports, our office has noted that clause 23(1)(a) preserves the confidential relationship between a public body and its advisors by protecting the free flow of advice and the deliberative processes involved in decision and policy making. For information to fall under this exception, it must reveal a suggested course of action which the public body was in a position to ultimately accept or reject. Advice is the course of action put forward. Analyses refer to the examination and evaluation of relevant information that forms or will form the basis of advice, etc. as to a proposed course of action. Clause 23(1)(a) would not generally apply to factual information that is already known unless the release of this information could reasonably be expected to reveal advice, etc.

The city represented to our office that, as the entire report was submitted to the Technical Steering Committee and the project manager for consideration, deliberation, review and comments, the entire contents of the report would fall under the exception allowed by clause 23(1)(a) of FIPPA. The city explained that the members of the Technical Steering Committee and the project manager were in a position to accept, reject or make changes to the entire report (including background, factual or technical information). The city was of the view that because the draft report, as a whole, was itself a course of action put forward that formed the basis of advice and recommendations, the entire draft report could be withheld under clause 23(1)(a). The city noted that, if drafts were released, comparisons could be made between versions and this would permit inferences to be drawn about the nature of advice that lead to any changes.

In reviewing the records provided by the city, our office observed that they did contain information of the type described in clause 23(1)(a). However, it is our view that, in the case of exceptions which apply to ‘information’ rather than to ‘records,’ a line-by-line review should

always be conducted in order to determine whether the exception to access applies to all information in a record or simply some of the information. In this case, we agreed that clause 23(1)(a) applied to the advice, opinions, analyses, proposals and recommendations that are contained in the reports, and that this information could be withheld from all drafts of the report. However, we noted that the reports contain other information, such as background and factual information already known to the public.

Our office considered the city's position that the draft report is in and of itself a course of action put forward that forms the basis of advice and recommendations. Our office observed that draft reports are generally put forward on this basis, and as such, we are not prepared to accept that an entire draft document would be subject to the exception, simply because it is a draft and may possibly be subject to revision.

Our office carefully examined all three drafts and our review observed that, with the exception of formatting, the three drafts were similar in content (with the exception of a number of discrete portions reflecting changes made to the earlier drafts). We determined that if all drafts were disclosed, a comparison of the drafts could identify changes that were made in some discrete portions of the report. This could allow inferences to be drawn about the advice that led to these changes, and could reasonably be expected to reveal information which would be subject to clause 23(1)(a). To the extent that these changes were made in portions of the drafts that did not otherwise consist of advice, analyses and recommendations, our office was prepared to accept that disclosing these revised sections would nonetheless reveal information subject to clause 23(1)(a). It was our view, therefore, that if Draft #1 and Draft #2 continued to be withheld in full, then portions of Draft #3 that were not otherwise subject to clause 23(1)(a) could be released to the complainant as no comparison to earlier drafts could be made in these circumstances.

We acknowledged to the city that in the event that a final report were to be completed and made public, comparing Draft #3 with the final version of the report could reveal advice that may have led to changes being made to the final product. We noted, however, that when we began our investigation the timeline for completion of the report and its public release was uncertain and had already been delayed by several months. As application of the exception in clause 23(1)(a) requires that there be a reasonable expectation (more than a simple possibility) that advice could be revealed by the disclosure, our office asked the city, on August 16, 2017, to reconsider its access decision in light of these factors.

Subsequently, on September 8, 2017, the city advised our office that the final revisions to Draft #3 had been submitted to the consultants and the final version of the "Portage and Main Transportation Study" was scheduled to be presented to the Executive Policy Committee of city council (along with an associated administrative report) in October prior to being presented to a meeting of city council on October 25, 2017. Therefore the opportunity to compare Draft #3 with a subsequent draft was no longer hypothetical but certain, and those portions of any public

version which changed from Draft #3, and which would reveal advice and recommendations, would become identifiable.

Discretionary exceptions, such as clause 23(1)(a), provide the head of a public body with discretion to disclose information in a record even though it falls within the exception. As the exception allowed under clause 23(1)(a) of FIPPA is discretionary, our office asked the city to provide representations which describe the factors considered in making the decision to exercise its discretion to refuse access in the particular circumstances of the complainant's request. The city explained the factors it considered included:

- Whether disclosure of the information would increase public confidence in the operation of the public body and the transparency of government decision making.
- Whether the requested information is about the requester.
- If there are factors personal to the requester or the situation might weigh in favour of the release of the requested information.
- Whether concerns that the information would be taken out of context could be addressed by providing an explanation of the context in the response to the applicant.
- Whether the record could be severed to provide the applicant with some information rather than no information at all.
- The age of the record.

Our office reviewed the city's representations with regard to its exercise of discretion in the circumstances of this request.

In reviewing the city's exercise of discretion our office considered whether or not the city exercised its discretion in a reasonable manner, relying only on relevant considerations. Our office may refer a matter back to a public body for a reconsideration of the exercise of discretion if we determine that discretion was not exercised based on relevant considerations. Our office may not, however, substitute its own discretion for that of the public body.

Our office is satisfied that the city exercised its discretion in a reasonable manner, in that it relied only on relevant considerations.

CONCLUSION

Our investigation of the public body's decision to refuse access determined that clause 23(1)(a) applied to the advice, opinions, analyses, proposals and recommendations that are contained in the draft reports. In the absence of a publicly available subsequent or final version to which a comparison could be made, we concluded that this exception would not apply to the entire

records. Our office found, therefore, that the complaint about the public body's decision to refuse access is partly supported.

Normally, on finding that the exception to access claimed by the public body does not apply to all the information withheld from access, our office would expect the public body to revise its access decision. However, in the course of our investigation the city confirmed to our office that the final version of the "Portage and Main Transportation Study" is scheduled to be presented to city council on October 25, 2017. Consequently, the opportunity to compare the draft reports with a subsequent, public version is no longer hypothetical but certain and imminent. Those portions of the drafts which had changed and which could reasonably be expected to reveal information subject to clause 23(1)(a) of FIPPA would become identifiable.

With the public release of the final report, any information in the draft versions that is not advice, opinions, analyses, proposals and recommendations, and that did not change between draft versions, will be disclosed. While the ombudsman may make any recommendations considered appropriate to a public body under subsection 66(1) of the act, in this case, given the expectation of an imminent public release of the "Portage and Main Transportation Study," our office did not consider it reasonable or practical in the circumstances to make any recommendations, including the release of portions of the draft report.

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
September 28, 2017