

Manitoba Ombudsman

CONFIDENTIAL

April 28, 2014

Mr. Colin Craig
1881 Portage Avenue
P.O. Box 42123
Winnipeg MB R3J 3X7

Our File: 2014-0036
City of Winnipeg File: 13 12 842

Dear Mr. Craig:

Our office has completed its review of your complaint under *The Freedom of Information and Protection of Privacy Act* (FIPPA). We are enclosing our investigation report in this matter.

If you require any further information, please contact me at (204) 982 -9133.

Yours truly,



Suzanne Vouriot
Investigator
Access and Privacy Division

c: Ms Pam Langstaff, FIPPA Coordinator

Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2014-0036

THE CITY OF WINNIPEG PLANNING, PROPERTY & DEVELOPMENT DEPARTMENT

ACCESS COMPLAINT: REFUSED ACCESS

PROVISION CONSIDERED: 18(1)

REPORT ISSUED ON APRIL 28, 2014

SUMMARY: The complainant requested access to information on the number of firms submitting certain real estate rates in respect of the City's 2008 Request for Qualifications (RFQ) for commercial real estate services. The City granted partial access to what it believed was responsive to the request. Our office later clarified with the complainant what information he was interested in obtaining. Access to this information was provided in full and the matter was considered resolved.

THE COMPLAINT

On December 13, 2013 the City of Winnipeg (the City or the public body) received the complainant's application for access under *The Freedom of Information and Protection of Privacy Act* (FIPPA) as follows:

Please provide documentation on the number of firms that submitted rates for real estate consulting, real estate evaluation and buyer agent commission rates in their responses to the City's 2008 RFQ for commercial real estate services. I'm not looking what rate each firm bid, just if they submitted rates for those services.

Example:

Real Estate Consulting: 0

Real Estate Evaluation: 0

Buyer Agent Commission Rates: 0

The public body responded to the complainant on January 14, 2014, providing access in part to the records it considered responsive, namely, a copy of the letters sent by the City to the five successful and four unsuccessful firms in response to each firm's RFQ. Some of the information

was severed, under clauses 18(1)(b)(c) of FIPPA, from the letters that had been sent to the four unsuccessful firms.

The City's response letter indicated that its Qualification Opportunity No. 472-2008 (the RFQ for the provision of Commercial Real Estate Services) prequalified five commercial real estate firms to perform commercial real estate transactions. The letter also provided a link to the RFQ and the names of the successful firms and acknowledged that nine firms had responded to the RFQ for the provision of Commercial Real Estate Services. The response letter also quoted certain information from section D2.3 of the City's Qualification Opportunity No. 472-2008: "...the work may include acting as a buyer agent, listing agent, site evaluation, due diligence, and marketing of Commercial properties or any other related type of work as specified by the contract Administrator or designated representative".

A complaint about refused access was filed with the Ombudsman on January 29, 2014.

ANALYSIS OF ISSUES AND FINDINGS

Background Information:

Information included in the City's Qualification Opportunity No. 472-2008 RFQ

We reviewed the information contained in the City's Qualification Opportunity No. 472-2008 (publicly available). This included information such as Bid Submission (Part A), Bidding Procedures (Part B), General and Supplemental Conditions (Parts C and D) and Specifications (Part E).

Part B, specifically B2.1, advised that the intent of the RFQ was to provide the City with sufficient information to qualify Applicants to perform commercial real estate transactions with estimated commissions exceeding \$100,000.00 from the date of award of Contract to July 31, 2010. B2.3 indicated that Applicants qualified under the RFQ would be invited to perform commercial real estate transactions on behalf of the City. Notwithstanding B2.3, the City would still reserve the right to initiate a public bid solicitation, outside of the Pre-qualified Proponents List, if it were determined, by the City, to be in its best interests. B6.1 instructed those wishing to be qualified to submit:

- 1) a completed Qualification Application (Form A),
- 2) a completed Qualification Questionnaire, including references and disclosures (Form B)
- 3) resumes of key personnel proposed to perform the Work, and
- 4) a proposed Fee Schedule.

In terms of the proposed Fee Schedule, B10.1 instructed Applicants that they should include anticipated commissions on Commercial Properties sold for the City. Based on our review of the information package, this was the only instruction provided to Applicants in regards to any proposed fee schedule.

Scope/Clarification of the Request/Response

At the outset of our investigation, our office asked the public body to provide us with severed and unsevered versions of the records responsive to this request. We had interpreted the access request to be for a copy of any records that were submitted by the firms (Applicants) in respect of the 2008 RFQ and in which rates were provided for the provision of any or all of the categories identified by the complainant, i.e., real estate consulting, real estate evaluation, buyer agent commission rates.


On March 11, 2014 the public body wrote to our office, indicating that it had not considered the rate sheets, i.e., the proposed fee sheets, to be responsive as the complainant had indicated he was not interested in obtaining access to the rates themselves. At that time, the City provided us with a copy of the proposed fee schedules that had been submitted by the nine firms.

The records that had been considered to be responsive were the letters sent by the City to the five successful and four unsuccessful firms in response to each firm's RFQ. These records would demonstrate that nine firms had provided proposed fee schedules, a required component for the Qualification Submission, within which would be listed, as per B10.1, anticipated commissions on Commercial Properties sold for the City.

The City provided our office with a copy of these records to which access had been granted in part. In reviewing them, we determined that the City had applied subsection 18(1) to sever the names/addresses on the letters that it had sent to the unsuccessful firms (Applicants). The City believed that disclosure of this information would reveal information provided in confidence to the public body or would reveal information that could negatively impact a third party's competitive position or affect its negotiations.

During the course of our investigation, we contacted the complainant to affirm our understanding of what information/records he was seeking in respect of the firms that had responded to the RFQ. The complainant advised that he was only interesting in knowing the number of firms that had provided a breakdown of their fees into one or more of the following categories: real estate consulting, real estate evaluation, and/or buyer agent commission rates. As such, it was not necessary for our office to consider the application of subsection 18(1) to the information that had been severed from the records the City had provided to the complainant.

We later spoke with the public body about our determination that some of the information in the nine firms' proposed fee schedules was responsive to the access request. After reviewing the proposed fee schedules and, with the public body's consent, our office is able to advise that all of the nine firms submitted rates for buyer agent commission rates and that only one of the nine firms provided a rate for site evaluation. We understand that the public body had recently advised the complainant that one firm had included a rate for site evaluation, in response to one of his more recent access requests.



CONCLUSION

In this matter, we can see that the wording of an access request is very important to the subsequent interpretation of an access request; the way in which a request is interpreted will generally affect what records are deemed responsive and, subsequently, the public body's response to the applicant. To this end, we remind applicants to make the wording on access requests as clear as possible and to provide enough detail for public bodies to interpret what records may be responsive. We remind public bodies, in their duty to assist, of their responsibility to clarify what exactly are the records the applicants are requesting.

We trust this information is helpful to the complainant and the public body. As access to the information requested has been provided, we consider this matter to be resolved and will be closing our file.

April 28, 2014
Manitoba Ombudsman