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# Office of the Information and Privacy Commissioner
# Province of British Columbia
# Order No. 182-1997
# August 13, 1997

**INQUIRY RE: A review of a decision by the City of Prince George to withhold records from Babine Investments Ltd.**

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## 1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on June 24, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for a review by Babine Investments Ltd. (the applicant) of a decision by the City of Prince George (the City) to withhold information under sections 12(3)(b) and 14 of the Act. The applicant has also asked me to review the City's efforts to search for records responsive to the request, to consider whether the fee levied by the City was appropriate, and to consider whether the City has a duty, under section 25 of the Act, to disclose the withheld records to the applicant.

## 2. Documentation of the inquiry process

Counsel for the applicant made a written request to the City on February 7, 1997 for records in six separate and detailed categories relating to properties both owned by the applicant and adjacent to them, a specific restrictive covenant and City By-law No. 4305. The City responded on March 6, 1997 to indicate that it would give the applicant access to some of the requested records, that some records and information were excepted from disclosure, and that it required payment of a $318.75 fee. The applicant paid the requested fee and was given access to some records. The applicant wrote to the Office on March 10, 1997 to ask for a review of the four issues described below. The City and the applicant consented to an extension of the original ninety-day deadline of June 9, 1997.

## 3. Issues under review and the burden of proof

The issues before me are: 1) whether the City properly applied sections 12(3) and 12(4) and 14 of the Act; 2) whether the City conducted an adequate search for records responsive to the access request; 3) whether the fee was appropriate for the information provided; and 4) whether the City had a duty to disclose information withheld to the applicant under section 25 of the Act. The relevant portions of the Act read as follows:

***Duty to assist applicants***

6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

***Cabinet and local public body confidences***

12(3) The head of a local public body may refuse to disclose to an applicant information that would reveal

(a) a draft of a resolution, bylaw or other legal instrument by which the local public body acts or a draft of a private Bill, or

(b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes holding that meeting in the absence of the public.

(4) Subsection (3) does not apply if

(a) the draft of the resolution, bylaw, other legal instrument or private Bill or the subject matter of the deliberations has been considered in a meeting open to the public, or

(b) the information referred to in that subsection is in a record that has been in existence for 15 or more years.

***Legal advice***

14. The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

***Information must be disclosed if in the public interest***

> 25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this Act.
>
> (3) Before disclosing information under subsection (1), the head of a public body must, if practicable, notify
>
> (a) any third party to whom the information relates, and
>
> (b) the commissioner.
>
> (4) If it is not practicable to comply with subsection (3), the head of the public body must mail a notice of disclosure in the prescribed form
>
> (a) to the last known address of the third party, and
>
> (b) to the commissioner.

Section 57 of the Act establishes the burden of proof on the parties in an inquiry. Under section 57(1), where access to information in the record has been refused, it is up to the public body, in this case the City, to prove that the applicant has no right of access to the records.

Section 57 is silent with respect to a request for review about the duty to assist under section 6 of the Act. I decided in Order No. 110-1996, June 5, 1996, that the burden of proof is on the public body to demonstrate it has discharged its duty under section 6 of the Act.

Section 57 of the Act is also silent with respect to a request for review about a public body's decision not to apply section 25 of the Act to disclose records. As I decided in Order No. 162-1997, May 9, 1997 (a matter involving the same applicant and public body), I am of the view that the burden of proof is on the applicant with respect to section 25.

## 4. Discussion

I have dealt previously with similar issues in Order No. 162-1997. I will now deal separately with each of the four issues raised by the applicant.

***Issue 1: The City's application of sections 12(3) and 14***

***Section 12(3)(b): local public body confidences***

The record in dispute is a two-page memo dated January 22, 1997.

The applicant submits that the City applied section 12(3)(b) of the Act in error and wrongly severed information in two ways. The applicant argues that the language of this section requires a specific Act to authorize holding of a meeting in the absence of the public. (Submission of the Applicant, p. 3; and Reply Submission of the Applicant, pp. 2-5) I agree with the City's submissions that section 220 of the *Municipal Act* and *Consolidated Council Procedures By-law No. 4912*, 1989, authorized the City to conduct the meeting in the absence of the public. (See Submission of the City, p. 4; and Reply Submission of the City, p. 2)

The applicant also argues that the severing does not fall within the meaning of the "substance of deliberations" of a meeting as I discussed the term in connection with meetings of the provincial Cabinet in Order No. 48-1995, July 7, 1995. It believes that the term "should be restricted to minutes of Council and nothing more." (Submission of the Applicant, pp. 3-5) I do not accept that, for purposes of section 12(3)(b) of the Act, the phrase "substance of deliberations" should be so narrowly construed as to apply only to "minutes of Council and nothing more." There is nothing in section 12(3) which would support such a restrictive interpretation of the provision. I am satisfied that the severed portion of the document dated January 27, 1997 reflects the substance of the *in camera* deliberations of the City, and that the City was entitled to withhold this information on that basis. (See also Reply Submission of the City, pp. 2, 3)

In addition, I see no reason to invite the City to reconsider its use of its discretion not to disclose this record. (Submission of the Applicant, pp. 5-8; see also the Submission of the City, pp. 4, 5) In my view, the record is also not an appropriate document for severing.

***Section 14: Legal advice***

The records in dispute are two letters between the City and a Prince George law firm in 1994 and 1997 respectively.

The information severed by the City concerns confidential communications between it and its solicitor for the purpose of obtaining legal advice. On the basis of my own review of these records, I can confirm that they have this particular character, and that the City was within its authority under the Act to choose to withhold the records. (See Submission of the City, p. 5; and Reply Submission of the City, pp. 3, 4)

In addition, I see no reason to invite the City to reconsider its use of its discretion not to release this record. (Submission of the Applicant, pp. 5-8) Given the applicant's February 6, 1997 Notice to the City under section 755 of the *Municipal Act*, I am satisfied that the City has good reason not to exercise its discretion in favour of disclosure. (Reply Submission of the City, p. 4) Solicitor-client privilege applies to the whole of the record. Severance is therefore inappropriate.

***Issue 2: Adequacy of a search***

The applicant submits that the City did not conduct an adequate search for records responsive to his request, since it did not provide all of the records in its possession or under its control. He refers in particular to two letters submitted on his behalf to the City in January 1997 and to the lack of evidence of the Council's instructions to set up a meeting with respect to the issues raised in the applicant's correspondence with the City.

The City's specific submission is that its response to or dealings with the two letters were outside the time frame of the applicant's request. According to the City, the two letters

> ...would not have been considered [by Council *in camera*] until the 10th of February, after the request for information had been made. Accordingly, the City's response would not include a record of these items being received or dealt with by Mayor and Council. (Submission of the City, p.3)

In addition, the record that would indicate the City's instructions were excepted from disclosure under the Act. (Submission of the City, p.3)

The City's general response is that the applicant was seeking all of the records described in its own original request, except for records of tax notices and utility bills. Thus a "substantial amount of time and effort was spent by the various City Departments and Divisions manually searching files and record logs for records responsive to the applicant's request." (Submission of the City, pp. 2, 3)

I find that the City conducted a reasonable search in the context of the demands of this applicant.

***Issue 3: Reasonableness of fees***

The applicant submits that the fee of $318.75 imposed by the City pursuant to section 75 of the Act was inappropriate and unreasonable. First, the applicant says it was inappropriate and unreasonable for the City to copy documents which it had submitted to the City: "The applicant feels that the City of Prince George ought to have confirmed with the applicant whether the applicant wanted copies of such information." Second, the

applicant says is that the time spent locating and retrieving the records (five hours) and preparing them for disclosure (seven hours) is unreasonable and out of proportion to an amount it paid in its first request for information. (Submission of the Applicant, pp. 14, 15) The applicant did not request a fee waiver or reduction under section 75(5) of the Act.

I have already indicated above that the applicant refused to narrow his request for records. As the City states: "The applicant's own records clearly fall within the scope of the request." (Submission of the City, p. 5) With respect to the total amount and time charged, the City submits that:

> The amount the City has charged the applicant for responding to this request is considerably less than the actual time spent locating, retrieving, copying, reviewing, and preparing the records for disclosure. (Submission of the City, p. 6; see also Reply Submission of the City, p. 5)

The applicant believes that the City should have submitted memos from the various departments to substantiate its submissions. However, given the small number of hours involved and the limited amounts of money, I am of the opinion that it would be excessive to require the City to do so in this inquiry. (Reply Submission of the Applicant, p. 7)

I find that the fees charged by the City to the applicant under section 75 of the Act are not unreasonable.

***Issue 4: Section 25: Public interest paramount***

I have already discussed the meaning and relevance of this section to this kind of local dispute in Order No. 162-1997. At pages 3 and 4 of that Order, I wrote:

> I find that the applicant has misunderstood the meaning of 'public interest' in the context of this particular inquiry. The records in dispute concern a private matter affecting the interests of Babine Investments Ltd., its tenants, and adjacent residents and property owners. The interests of the parties seeking disclosure do not rise to the level of public interest as defined by section 25 of the Act. Moreover, I defer to the similar determination of the City of Prince George on this matter. In my view, the facts in this inquiry do not meet the test of urgency and vital communication implied by the language of section 25. The fact that some members of the public might be interested in an issue does not necessarily make it a matter 'clearly in the public interest.'

Despite the submissions of the applicant, which I have carefully reviewed, I have concluded that disclosure of the withheld information is not required in the public interest for purposes of section 25(1) of the Act. (Submission of the Applicant, pp. 8-13; see also

Submission of the City, p. 7) I agree with the City that the records in dispute concern what is essentially a private matter rather than one of significant public concern. (Reply Submission of the City, p. 5) The solution to the applicant's problems with "the fence in question" do not lie in a mandatory disclosure of records under this section of the Act. Nor am I in a position to order the City to enforce a Bylaw and a Restrictive Covenant.

## 8. Order

***Issue 1: Sections 12(3)(b) and 14***

I find that the head of the City of Prince George is authorized to refuse access to information in the records in dispute under sections 12(3)(b) and 14 of the Act. Under section 58(2)(b), I confirm the decision of the head of the City to refuse access to these records.

***Issue 2: Adequacy of the search for records***

I also find that the search for records conducted by the head of the City of Prince George was adequate within the meaning of section 6(1) of the Act. Under section 58(3)(a), I require the head of the City to perform his duty to assist the applicant. However, since I have found that the head of the City has made every reasonable effort to search for records, I find that the head of the City has complied with this Order and has discharged his duty under section 6(1).

***Issue 3: Reasonableness of the fees***

I also find that the head of the City of Prince George complied with section 75(1) of the Act and section 7 of the Regulation with respect to the calculation of the fee in this case. Under section 58(3)(c), I confirm the decision of the head of the City on the fees charged in this case.

***Issue 4: Section 25***

I also find that the head of the City of Prince George has acted properly in refusing to apply section 25 of the Act pursuant to the applicant's request. I make no order in this respect other than to note that the applicant has not satisfied me that the application of section 25 to the records in issue is warranted under the Act.

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David H. Flaherty
Commissioner

August 13, 1997