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**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 172-1997
July 11, 1997**

INQUIRY RE: A request by the Canada Mortgage and Housing Corporation for access to records in the custody of the District of North Vancouver

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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 May 7, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of the District of North Vancouver's (the District) decision to refuse access to some records requested by the applicant.

2. Documentation of the inquiry process

The applicant, the Canada Mortgage and Housing Corporation (CMHC), made a written request on October 3, 1996 for "all records of any kind whatsoever, including video and audio reproductions, maps, charts, illustrations, photographs, and any other material relating to the following issues: [four detailed categories]." The applicant placed the request in the context of current litigation between the CMHC and the District and generally asked for records relating to various specific District by-laws as well as "the agenda, minutes and all documents reviewed or considered during in-camera meetings of District Council since 1994 relating in any fashion to the areas in North Vancouver known as the Blair Rifle Range lands, the Mountain Forest lands, the Cove Forest lands, and the Northlands lands, and all documents and records of any kind prepared by the mayor or counsellors, District staff, consultants and other contractors retained by the District, relating in any fashion to the areas in North Vancouver known as the Blair Rifle Range lands, the Mountain Forest lands, the Cove Forest lands, and the Northlands lands."

The District notified the CMHC on October 31, 1996 that it was extending the time for responding by thirty days, pursuant to section 10 of the Act, and wrote again on

December 5, 1996 to indicate that records were available for the applicant's examination, save those listed in an appendix as withheld. The applicant received the District's response letter on December 16, 1996, subsequently examined the available records, and obtained copies of most of them, for which it paid the District the fees it requested (approximately \$2700.00).

The CMHC wrote to my Office on January 16, 1997 to request a review of the District's decision with respect to the records withheld. A few additional records were disclosed during the review period, which was extended by consent to May 7, 1997. The Office subsequently issued a Notice of Written Inquiry for an inquiry on that date.

3. Issue under review at the inquiry and the burden of proof

Readers should be aware that I am now using the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, which involves some renumbering of sections of the Act. Thus section 12.1, for example, is now section 12(3).

The issues under review in this inquiry are the application by the District of sections 12(3), 13, 14, and 17 of the Act to the records in dispute. The relevant portions of these sections are:

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 the holding of 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.

Policy advice, recommendations or draft regulations

- 13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.
- (2) The head of a public body must not refuse to disclose under subsection (1)
- (a) any factual material,
 - (b) a public opinion poll,
 - (c) a statistical survey,
 - (d) an appraisal,
 - (e) an economic forecast,
 - (f) an environmental impact statement or similar information,
 - ...
 - (i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,
 - (j) a report on the results of field research undertaken before a policy proposal is formulated,
 - (k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,
 - (l) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body,
 - (m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or
 - (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.
- (3) Subsection (1) does not apply to information in a record that has been in existence for 10 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.

Disclosure harmful to the financial or economic interests of a public body

17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:

- (a) trade secrets of a public body or the government of British Columbia;
- (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;
- ...
- (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
- (e) information about negotiations carried on by or for a public body or the government of British Columbia.
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Under section 57(1) of the Act, if access to information in a record has been refused under sections 12(3), 13, 14, or 17, it is up to the public body, in this case the District of North Vancouver, to prove that the applicant has no right of access to the record or part of the record.

4. The records in dispute

The records in dispute are most of those listed by the District in an Appendix to its response letter dated December 5, 1996; 52 records are still at issue. One set of records was numbered from 1 through 40 with a second set numbered from 1 through 22. For the purposes of this inquiry, they are numbered as 1 through 40 and B1 through B22. During the review period, the District advised that several records initially withheld under sections 14 and 17 were also being withheld under sections 12(3) and 13. The District also released to the applicant some records initially withheld (those numbered 8, 17, 20-23, 26, 28, 34, and 37), which are not therefore at issue in this inquiry.

In its reply submission, the CMHC narrowed the scope of its request to the following 9 records: B4, B5, B6, B7, B8, B9, B10, B11, B12. I decided, however, that I would decide this inquiry on the basis of the original request for review.

5. The Canada Mortgage and Housing Commission's case

The CMHC is a federal Crown corporation with a mandate to provide affordable housing for Canadians. It is involved in litigation with the District over the future of over 500 acres of land in an area known as Mountain Forest in North Vancouver worth at least \$100 million: "CMHC argues in its lawsuit that the District is acting in bad faith and attempting to effectively expropriate the lands in question from CMHC without any compensation." (Submission of the CMHC, p. 1)

The District evidently passed six rezoning by-laws in the fall of 1995 that redesignated CMHC lands from permitting residential development to parks, recreation, and open space/wilderness. (Submission of the CMHC, paragraphs 5, 6) In the context of the lawsuit, the District has stated that there are legitimate reasons for acting in the way it did, including proper planning considerations. For its part, the CMHC has brought this access request in order to ascertain whether there are records that contradict or cast doubt on the assertions of the District. (Submission of the CMHC, paragraphs 9-12)

I have presented below the essence of the CMHC's submissions on specific sections of the Act.

6. The District of North Vancouver's case

The District states that in October 1995 it adopted three by-laws, which amended and rezoned portions of lands known as Mountain Forest and Cove Forest areas. In November 1995 the CMHC filed a petition to the Supreme Court of British Columbia seeking orders that the by-laws be set aside and declared void for illegality.

The District has provided me with a description of each record withheld and the basis under the Act by which it has been withheld. I have discussed these matters below.

7. Discussion

The litigation context

The District submits that the CMHC is attempting to use the Act to circumvent the *Rules of Court* to obtain the records required to pursue its legal action. Since the CMHC had to proceed by way of petition [a petition being a specialized legal form used to commence an application for judicial review], the District submits that the *Rules* governing petitions do not provide for discovery of documents. It claims that the date for the hearing of the petition has been delayed pending resolution of this request under the

Act. (Submission of the District, pp. 1, 2) The CMHC is of the view that there is nothing to stop the District from pressing for an expeditious hearing on the petition. (Reply Submission of the CMHC, paragraph 6)

In the end, I agree with the CMHC that “the right to bring a lawsuit against a public body and the right to access records under the Act are independent and coextensive civil rights which may both be exercised where a person seeks to make a public body accountable for its actions.” (Reply Submission of the CMHC, p. 1)

Review of the records in dispute

I have found it most useful in this inquiry to discuss each record, or set of records, in dispute under the heading of the section of the Act used to withhold it. In each instance, my finding is based upon my application of the Act to the specific record in dispute.

Records withheld under sections 12(3) and 13

B(4): An April 25, 1995 report from one official of the District to another.

The District submits that it is a draft of a final report considered by Council *in camera*, which was subsequently released. I find that this record, including the attachment, can be withheld on the basis of section 12(3)(a).

B(22): *In camera* Minute January 26, 1996 re Petition Commenced by CMHC.

I find that the record may be withheld under section 12(3)(b) of the Act, since the matter discussed is clearly authorized by section 220 of the *Municipal Act* to be discussed on an *in camera* basis.

Records withheld under sections 14 and 17:

7. Letter dated February 14, 1990 from Bull Housser Tupper about a specific matter

12. Letter dated July 20, 1995 from the District to Bull Housser Tupper

24. Letter dated May 29, 1989 from the District to Bull Housser Tupper

B(2): Letter dated September 29, 1994 from Bull Housser Tupper

B(13): Solicitor’s Opinion Report dated May 25, 1993

B(16): Letter dated December 31, 1993 from Bull Housser Tupper

The District submits that these six records “generally relate to advice respecting land values or other information [which would] potentially provide financial harm to the District.” (Submission of the District, p. 3) I find that they can be appropriately withheld on the basis of sections 14 and 17 of the Act. See, in particular, the discussion of section 17 immediately below.

It is relevant to indicate here my agreement with the submission of the District on the practice of attachments being included with requests for legal advice: "...it is common practice that when asking for solicitor opinion to provide attachments to the document rather than reproduce the information on which the opinion is solicited within the body of the correspondence. Where such attachments have become public documents or otherwise releasable, they have been provided to the applicant." (Reply Submission of the District, paragraph 4)

Records withheld under section 17 only

Section B: Records 1, 5, 6-12, 14

The District specifically applied sections 17(1)(b), (d), and (e) of the Act to these records, because they "deal with property valuations, the methods of determining those valuations, the costs of land exchanges and/or sales." According to the District:

Disclosing this information would severely impede the District's ability to conduct land related negotiations by providing third parties with detailed information of the District's strategies in these matters. If a third party is given the information on what the District feels is the appropriate value of any given property and/or what the District is willing to accept as fair value, then the third party has effectively taken away the District's powers of negotiation. Similarly, within the scope of litigation, this information would give parties other than the District unfair advantage in seeking levels of compensation. (Submission of the District, p. 4)

The District cited in this connection my Order No. 104-1996, May 24, 1996. That Order involved a search by the Ministry of Attorney General for appropriate real estate in the Okanagan area for the construction of a new prison. I found that with respect to the information held by the Ministry relating to its analysis of the suitability of various sites, "there is sufficient evidence to demonstrate a reasonable expectation of harm to the financial or economic interests of the Ministry." I found under specific subsections of section 17 that disclosure of the records sought (which I determined to have monetary value) would be likely to increase speculation and harm the financial interests of the public body.

The District submits that records B5 to B12 appear "to relate to a contemplated acquisition by the District of lands owned by the private landowners other than CMHC affected by the Amending Bylaws in Cove and Mountain Forest." It further submits that these records may reveal various matters affecting the conflicting interests of the CMHC and the District. (Reply Submission of the District, paragraphs 12-17) While I appreciate the fact that the CMHC might find these records relevant and useful in its litigation against the District, that does not override the fact that the District has the right under the Act to claim the exceptions to disclosure provided in section 17. It is the right of the

District under the Act to assert that, for example, land valuations (assembled by the District), which are several years old, should remain confidential in order for the District to protect its financial interests.

While I am not in a position to settle a dispute between the parties in this case as to the accuracy or relevance of the valuations in determining fair market value, I can nonetheless assess the merits of the District's assertions that this information is of continuing utility for the purpose of determining current land values. I find that the information contained in the records withheld by the District also reveals to a significant extent the District's approach and strategy in determining values, which it would seek to apply to this relatively unique parcel of real estate, and that disclosure could reasonably be expected to harm its financial or economic position.

On the specific question of old or outdated property valuations, I addressed that issue in Order No. 14-1994, June 24, 1994, which involved financial information held by the Ministry of Aboriginal Affairs pertaining to the projected cost of settlement of certain land claims. In that case I wrote that "the applicant argued 'that the reasons cited for refusing to disclose the severed information in question are spurious and inadequate.' Moreover, he noted that the taxpayers have already paid a consulting firm for information now being withheld from them, and the data are two years old and thus obsolete."

In Order No. 14-1994 I concluded, after hearing specific *in camera* evidence, that "[e]ven though the data are dated January 1992, the evidence before me indicates that they are still meaningful. I found persuasive the Ministry's evidence that the severed information is not 'old, invalid' data, to use the words of my own question to Mr. Viereck, but information on royalties and cost sharing projects that are still timely, significant, and directly relevant to ongoing specific negotiations with the federal government and aboriginal governments."

I find that similar considerations apply in the case before me. While an appraiser might find the information withheld to be obsolete in terms of being able to rely directly upon it for current market values, the appraiser would likely also declare the information to have some utility in the analytical process of determining current land values. In other words, while it may be old, it is not invalid. And for a negotiator or litigator, I consider that the information might be of considerable value and importance, providing as it does a clear window into the internal processes employed by the District to value land under its direct jurisdiction.

On the basis of my review of each of the records under this broad category, I find that they have been appropriately withheld on the basis of section 17 of the Act.

B(17): Report dated July 20, 1994 between two District officials

This record concerns proposed litigation by a third party. I find that this record has been appropriately withheld on the basis of section 17.

B(22): *In camera* Minute January 26, 1996 about the Petition filed by the CMHC

This record has been appropriately withheld under section 12(3), as I noted above.

Severing

The CMHC submits that severing may be in order for records that are being withheld under section 17(1). (Reply Submission of the CMHC, paragraph 18) I accept the view of the District that severing is impractical in these cases.

8. Order

I find that the District of North Vancouver is authorized to refuse access to records B(4) and B(22) under sections 12(3)(a) and 12(3)(b) of the Act, respectively.

I find that the District of North Vancouver is authorized to refuse access to records 7, 12, 14, B(2), B(13), and B(16) under sections 14 and 17 of the Act.

I find that the District of North Vancouver is authorized to refuse access to records in section B numbered 1, 5, 6-12, and 14 under section 17 of the Act.

Under section 58(2)(b), I confirm the decision of the District of North Vancouver to refuse access to the records in dispute identified above.

David H. Flaherty
Commissioner

July 11, 1997