OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Order F05-17

CITY OF VANCOUVER

James Burrows, Adjudicator
June 28, 2005

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Summary: The applicant made a request for records relating to a development application considered by the City of Vancouver. The City released all responsive records but one. This record was withheld under s. 13(1). The record was found to be advice and recommendations and was properly withheld after the City's appropriate exercise of its discretion.

Key Words: advice and recommendations—exercise of discretion.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* s. 13.

Authorities Considered: B.C.: Order 00-17, [2000] B.C.I.P.C.D. No. 18; Order 01-14, [2001] B.C.I.P.C.D. No. 15; Order 02-57, [2002] B.C.I.P.C.D. No. 59.

1.0 INTRODUCTION

[1] On October 16, 2003, the applicant made an access request to the City of Vancouver ("City") for the records relating to an application by Merrick Architecture and Prima Properties to construct a 22-storey tower at 1900 West Georgia Street under the *Freedom of Information and Protection of Privacy Act* ("Act"). The City provided four separate responses to the applicant's request, releasing all the requested records but one, which it withheld under s. 13 of the Act. On December 8, 2003, the applicant requested a review by this office of the decision of the City to withhold one record. During mediation, the City agreed to release header information from the first page of the record but withheld the remaining information.

[2] As the matter did not settle in mediation, a written inquiry was held under Part 5 of the Act for April 21, 2004. I have dealt with this inquiry, by making all findings of fact and law, and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

2.0 ISSUE

[3] The issue before me in this inquiry is whether or not the City was authorized by s. 13 of the Act to refuse to disclose the information requested by the applicant? Under s. 57(1), the City has the burden of proof regarding s. 13.

3.0 DISCUSSION

[4] **3.1 Background –** The record consists of recommendations that the Development Permit Staff Committee ("DPSC") created for the Development Permit Board ("DPB"). Both groups are interdepartmental staff committees. To understand how the document was created, I believe it is important to have some understanding of how the development permit process for the City works. This background was provided in the affidavit of Jonathan Barrett, Development Planner for the City, and from the City website pages attached to the affidavit.

[5] The formal process for development permit approval begins when the DPSC considers a development permit application. The DPSC decides whether or not to support the application and then drafts a report for the consideration of the DPB. The report contains background information on the application, the recommendations of the DPSC and reasons for its recommendations. In an open meeting, the DPB considers the application by reviewing the staff report and hearing representations from the applicant, staff and interested members of the public. The DPB then discusses the application and ultimately decides whether or not to approve the application and what conditions to impose on the development.

[6] The development permit hearing which is at the centre of this issue occurred on September 29, 2003. The DPSC report which was considered at that meeting recommended that the DPB deny the permit application for 1900 West Georgia Street. (This recommendation to deny the application is publicly known.) The 23-page DPSC report contained the reasons for its recommendation to refuse the application and this report was made available to the applicant. However, as explained by the Development Planner, whenever the DPSC decides to recommend refusal of the application, it has been its practice to prepare approval conditions which the DPB could impose if the DPB went against the DPSC's recommendation and approved the development permit. These conditions are not submitted to the DPB as part of the DPSC report but are held back as "hip pocket" conditions. As the DPB endorsed the DPSC's recommendation to deny the development permit, the "hip pocket" conditions were never produced to the DPB. The document containing these recommendations remains at issue.

[7] **3.2 Applicability of Section 13(1) –** In its initial submission, the City argued that it had properly applied s. 13(1) to the record at issue. The City also acknowledged that it had the burden of proof with regard to s. 13(1) of the Act. Section 13(1) reads as follows:

> **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.

[8] The City stated that the conditions document consists of advice and recommendations from the DPSC to the DPB that would have been provided to the DPB if the DPB had decided to approve the development application. The City argued that the information was prepared by and for the public body and was still considered advice and recommendations even if the document was not provided to the other committee. As the document falls within the definition of s. 13(1), the City argued that it has the discretion to withhold the majority of the document.

[9] I have carefully reviewed the record and the affidavit of the Development Planner, which details the creation of the record. After reviewing the evidence before me, I find that the record contains advice and recommendations developed by or for a public body as defined in s. 13.

[10] What remains at issue is whether or not any parts of s. 13(2) override the application of s. 13(1):

> 13(2) The head of a public body must not refuse to disclose under subsection (1)
> …
> (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,
> …
> (m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy,
> …

Report of a committee

[11] The applicant argued that s. 13(2)(k) applies to the record. The applicant said that the "hip pocket" conditions were part of the DPSC report to the DPB even if the conditions document was not attached to the report. If it is part of the report, the applicant argued that the document cannot be withheld under s. 13(1), as s. 13(2)(k) would apply. The applicant submitted that the conditions form part of a standard report, that these conditions were "omitted" and therefore the Board could not make a proper determination. In the opinion of the applicant, this resulted in an unfair consequence.

[12] The City replied that the conditions document was not "a report" as it could not stand on its own. It argued that the document was not even part of a report, as it was not intended to be included with the report to the DPB Committee. The City stated that the record "is nothing more than a detailed list of recommendations." The applicant agreed that the conditions document was not part of the DPSC report but argued that it should have been included to allow the DPB "to make a decision in the context of a public hearing."

[13] I have reviewed the record carefully and I agree with the City that the conditions document is not a report, as required under s. 13(2)(k). The DPSC did submit a report with recommendations to the DPB for the development permit hearing. However, the conditions document was not, nor was it intended to be, part of that report. While a member of the DPB expressed concern about not receiving the recommendations, I have no evidence before me that the DPB, as a whole, requested the DPSC to include those recommendations with or as part of the report itself. I believe that the intention of s. 13(2)(k) is to ensure that the report of a committee or other similar body which forms the basis for a public body's decision, is available for the public. In this case, the withheld document could not have been used as the basis for the DPB's decision, since the board did not view the document. Therefore I find that s. 13(2)(k) does not apply to the record at issue.

[14] Both the applicant and the City put forward arguments as to whether or not the DPSC was a "committee" within the meaning of s. 13(2)(k). However, as I have found that the conditions document is not a report, as described in 13(2(k), I need not address this issue.

Information cited publicly by head of public body as basis for decision

[15] The applicant argued that the chair of the DPSC, the "head" of the committee, participated fully in the meeting where the application was rejected. The applicant's submission further stated that the withheld record was directly relevant to the decision of the DPB. To support this contention, the applicant referred to the comments of Larry Beasley, a member of the DPB, who stated that he did not believe that the DPSC should withhold "hip pocket conditions" from the DPB, as the DPB was then not able to fully assess the implications of its decisions. He further requested that this practice of withholding conditions until the DPB supported development applications against the recommendations of DPSC should not be continued.

[16] The applicant further submitted that, since the DPB members discussed whether or not having the "hip pocket conditions" could have resulted in a different decision, s. 13(2)(m) was invoked and the conditions must be released. The applicant also emphasized the statement of Mr. Thompson of the DPSC, who told the DPB that "the inclusion of the conditions of approval was the subject of lengthy debate by the Staff Committee." The applicant also relied on the comments of Mr. Beasley, who stated that, if the conditions had been available, it might have facilitated the process. The applicant

referred to the fact that the Chairman, Mr. Scobie, did not challenge Mr. Beasley's comments.

[17] The City's position regarding this argument was that under the City's Freedom of Information and Protection of Privacy By-law (No. 7364), the "head" of the public body, as defined in the Act, are the City Manager, the City Clerk and the Director of Legal Services. The City maintained that none of these three individuals sits on the DPSC or the DPB, and none has cited the information from the conditions document to make a decision or formulate a policy as required under s. 13(2)(m).

[18] Under Schedule 1 of the Act, the term "head" is defined as follows:

> **"head"**, in relation to a public body, means
>
> (a) if the public body is a ministry or office of the government of British Columbia, the member of the Executive Council who presides over it,
>
> (b) if the public body is designated in, or added by regulation to, Schedule 2, the person designated as the head of that public body in that Schedule or by regulation, and
>
> (c) in any other case, the person or group of persons designated under section 77 as the head of the public body;

[19] Section 77 further explains that:

> **Power to make bylaws**
>
> **77** A local public body, by bylaw or other legal instrument by which the local public body acts,
>
> (a) must designate a person or group of persons as the head of the local public body for the purposes of this Act,

[20] Based on the definition of "head" in the Act, s. 77 and the City's bylaw, I agree with the reasoning of the City. The Act specifies that it must be the "head" identified under the Act, not merely any City official, who cites the information publicly for s. 13(2)(m) to be invoked. I have no evidence before me that the "head" for the City, as identified in City Bylaw 7364, publicly cited the record and therefore find that the City is not required to release the record under s. 13(2)(m).

[21] **3.3 Exercise of Discretion** – Lastly, the City discussed how it exercised its discretion in determining whether or not to release the record. As s. 13 is a discretionary exception, a public body is required to review the information it is withholding and determine if it is necessary to apply the exception. The Information and Privacy

Commissioner discussed the exercise of discretion in a number of orders, particularly Order 02-38 and Order 02-50.[1] The Commissioner said the following in Order 02-50:

> [143] The word "may" in provisions such as s. 16 or s. 17 confers on the head of a public body a discretion to disclose information that can be withheld under one of Act's exceptions to the right of access. In Order 02-38, at para. 149, I affirmed once again that the head of a public body should always consider the public interest in disclosure of information that is technically protected from disclosure and cited some of the relevant factors in considering the public interest in disclosure. I will not repeat that non-exhaustive list of factors here.
>
> [144] The head must exercise that discretion in deciding whether to refuse access to information, and upon proper considerations. If the head of the public body has not done so, he or she can be ordered to re-consider the exercise of discretion. See, for example, Order No. 325-1999, [1999] B.C.I.P.C.D. No. 38, at p. 4. The commissioner can require the head to reconsider her or his exercise of discretion if it has been exercised in bad faith, has been exercised perversely or unfairly, where irrelevant or extraneous grounds have been considered or relevant ones have not been considered. See Order 02-38, at para. 147.

I will not repeat the rest of those discussions but apply the same principles here.

[22] The City outlined four factors that it considered in exercising its discretion to withhold the record. The City believed that the contents of the record are not relevant to a fair determination of the rights of the applicant. It confirmed that the record had not been considered by the Board in arriving at its decision on the development application. The City could not find any compelling argument that release would be in the public interest or for the purpose of subjecting the activities of the City to public scrutiny. Lastly, it has not been the practice of the City to release "hip pocket" conditions in the past.

[23] In its submission, the applicant argued that the conditions prepared by the DPSC were not confidential and should therefore be released. It also speculated that the same recommendations or at least some of them have been released to the applicant through an earlier information request and so confidentiality has not been maintained. In its reply submission, the City countered that the record at issue has never been released. While it conceded that it had provided the applicant with a copy of the draft conditions of approval, "it decided, as a matter of principle, to withhold the final "hip pocket conditions: as set out in the Conditions Document." I believe that the release of the draft conditions of approval is another factor in the exercise of discretion, but the City already has considered this factor.

[24] The City has exercised its discretion in deciding not to release the record. I find that the City is authorized by s. 13 to refuse access to the disputed record.

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[1] Order 02-38, [2002] B.C.I.P.C.D. No. 38, paras. 145-150 and Order 02-50, [2002] B.C.I.P.C.D. No. 51, paras. 142-151.

4.0 CONCLUSION

[25] For the reasons given above, under s. 58 of the Act, I confirm that the City is not required to disclose the information that it has withheld under s. 13 of the Act.

June 28, 2005

ORIGINAL SIGNED BY

James Burrows
Adjudicator