



Order F20-05

## CITY OF VANCOUVER

Erika Syrotuck  
Adjudicator

February 3, 2020

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**Summary:** A society complained to the OIPC that the City of Vancouver (City) did not meet its duty to assist under s. 6(1) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The adjudicator found that the City did not respond openly, accurately and completely to the access request and that the City did not adequately search for records. The adjudicator ordered the City to conduct another search. In addition, the adjudicator found that certain records were responsive records in the custody and control of the City under s. 4 of FIPPA.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, s. 4, s. 6(1).

### INTRODUCTION

[1] A society made a request to the City of Vancouver (City) under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for records relating to the Brenhill Land Swap. This inquiry is about the society's complaint that the City failed to comply with s. 6(1) of FIPPA, which requires a public body to respond openly, accurately and completely to an access request. This inquiry is also about whether the City has custody and control of records relating to that request.

### **Background**

#### *The Brenhill Land Swap*

[2] The City describes the Brenhill Land Swap as a strategic land swap agreement where a development company called Brenhill Developments Limited (Brenhill) agreed to construct an affordable housing development at 1099 Richards Street. In exchange for constructing the housing development, the City

would then give Brenhill a property at 508 Helmcken Street. Brenhill planned to build a 36 story tower on the Helmcken property.

[3] The City says that the Brenhill Land Swap has been the subject of intense media scrutiny and litigation.

[4] The City says it engaged Ernst & Young to perform an independent review of the Brenhill Land Swap. Ernst & Young provided a draft report called “City of Vancouver: Brenhill Land Swap.” This report was authored by Ernst & Young and dated March 24, 2015. I will refer to this report as the Ernst & Young Report.

[5] The City says it was happy with the report in the draft version and never pursued a finalized version.

*The access request*

[6] The society requested a copy of the Ernst & Young Report and the additional following related information:

1. All Correspondence and other records for commissioning and engaging the “Report”, and the engagement of all externally sourced expert opinion, in respect of the Brenhill land swap transaction that originated in Spring 2012 and consummated later in that same year, and all respective terms of reference;
2. All 3rd party opinion findings, the final version of the “Report” findings and any other subsequent versions of the report;
3. The line by line itemized billing and invoices including (all records of invoices, all disbursements, and all payments, associated with the engagements and services or portions of such services and/or engagements, that were relied on and/or supplied, for both, the assistance or completion of the “**Report**” and any externally sourced opinion in respect of the Brenhill land swap transaction; regarding payments made with respect to any contractors entities, individuals, subcontractors, and anyone else, directly and or indirectly, compensated by the City or promised to be compensated, as a result of such described assistance.

[7] The society specified a date range of July 1, 2011 to November 30, 2016.

[8] After some correspondence, the City provided four unsevered records in response to the access request:

1. The Ernst & Young Report;
2. A letter from Ernst & Young setting out the terms for the services and advice to be provided (Engagement Letter);

3. An addendum to the Engagement Letter sent by Ernst & Young to the City (Addendum); and
4. Ernst & Young's invoices to the City for time and expenses relating to the Ernst & Young Report (Invoices).

[9] The society complained to the OIPC that the City failed to comply with s. 6(1) of FIPPA, which requires a public body to respond openly, accurately and completely to an access request. It alleged that the City did not provide access to all of the records responsive to the request, specifically the following four documents listed by Ernst & Young in its report as externally sourced documents:

- Altus Group cost analysis (Altus Report)
- BTY cost escalation analysis (BTY analysis)
- Burgess, Cawley, Sullivan and Associates – assessment and validation of sale price and transaction economic assumption (BCSA analysis)
- Rennie Marketing Systems- valuation analysis (Rennie analysis)

[10] Mediation did not resolve the issues and the matter proceeded to inquiry.

### ***Preliminary Issue***

[11] The City says that the society's submissions should be given limited weight because it has not provided sworn evidence and has not identified the individual making submissions on behalf of the society.

[12] I decline to reduce the weight of the society's submissions on either of the bases that the City suggests. There is no requirement that inquiry submissions be sworn<sup>1</sup> and in my view, it would be unfair to reject or reduce the weight of the society's submissions on this basis. In addition, although no individual's name appears on the society's submissions, it is unclear to me how this is prejudicial to the City and the City did not explain.<sup>2</sup>

### **ISSUES**

[13] The issues to be decided in this inquiry are:

1. Did the City do its duty to respond without delay, openly, accurately and completely under s. 6(1) of FIPPA?
2. Did the City of Vancouver have custody and control of the records in dispute for the purpose of ss. 3(1) and 4(1) of FIPPA?

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<sup>1</sup> See OIPC's *Guide for Written Inquiries* <<https://www.oipc.bc.ca/guidance-documents/1744>>.

<sup>2</sup> I note that the access request and the complaint to the OIPC were submitted by two named individuals, on behalf of the society. These two named individuals are also on the contact list for the inquiry.

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## DISCUSSION

### **Section 6(1)**

[14] Section 6(1) of FIPPA states:

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.

[15] This section imposes a duty on a public body to conduct an adequate search for records.<sup>3</sup>

[16] There are two aspects of the society's complaint that the City did not comply with its duty under s. 6(1). The society initially contacted the OIPC because it did not get a clear response from the City. The society also complained that the City did not provide all of the records that it felt were responsive.

[17] With regards to the City's initial response to the society, the City says that it made every effort to respond openly, accurately and completely and without delay to the society. It says that it proactively released records relating to the Brenhill Land Swap. Further, it says that it responded to the access request within 12 days and provided a response to each follow up email within one day. In its submission, the City included a copy of its correspondence with the society about the access request.<sup>4</sup>

[18] In my view, the City's correspondence with the society in relation to its access request fell short of its duty to respond openly, accurately and completely.

[19] The City's initial response to the society was that "responsive records relating to your request are already publicly available" and it provided a link to the City's online catalogue of released information. This response was not accurate or complete. If the City wanted to provide a response by way of its information catalogue, at the very least, the City also needed to provide the society with a complete list of the specific records it believed were responsive to the request.

[20] The next day, the society followed up with the City to ask for clarification. The City reiterated that its response letter contained a link to "responsive records relating to your request."

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<sup>3</sup> Order 02-18, 2002 CanLII 42443 (BCIPC) at para 7.

<sup>4</sup> Affidavit of the Director of Access and Information for the City of Vancouver, dated December 10, 2018, Exhibits G and H.

[21] The society again followed up with the City, noting that the link did not identify which records were responsive. The society asked for “exact, specific dynamic web links” to the records or electronic copies of the records themselves. In the email, the society referenced the City’s duty to assist under s. 6(1) and stated that this duty required the responsive records to be clear and obvious.

[22] The City responded to this email with: “Yes, please look under *Released FOI Records*.”

[23] Again, these responses were not complete or accurate. The society, quite reasonably, did not understand which records in the online catalogue the City believed were responsive to the society’s access request. The City’s responses offered no additional information.

[24] The society then sent a third request for clarification, again re-iterating the City’s duty under s. 6(1). The society replied that it was unable to find the responsive records and again asked for dynamic web links to be sent in the body of a reply email.

[25] The City responded with a web link to a partial response to a different, but similar, request made by another applicant under FIPPA. This response only included three of the four records that the City later said were responsive to the request.

[26] This response was also not complete or accurate. While the City provided a direct link to some of the responsive records, it was incomplete because it did not provide the Ernst & Young Report or identify it as a responsive record. It also lacked an explanation about why the City was providing the society with a partial response to a different access request.

[27] The society then contacted the OIPC complaining that the City breached its s. 6(1) duty to assist.

[28] After this, the City sent a letter to the society copied to the OIPC with a list of specific records relating to each part of the access request. This response did not include the specific records but the City provided reasonably detailed instructions on how to access them through its website. It also provided additional information that it thought was of interest to the society. This is the kind of response that should have been provided when the City first responded to the access request.

[29] In general, it is acceptable for public bodies to provide links to a catalogue of records rather than the actual records themselves, so long as it is clear to the applicant which records the public body believes are responsive to the request. If

the applicant seeks clarification, the public body should not hesitate to provide paper or electronic versions of the records.

[30] In summary, the City did not respond openly and accurately in its dealings with the society. The society followed up three times reiterating that it did not understand which records the City believed to be responsive. While the City responded quickly each time, the City repeatedly failed to specify which records in the catalogue were responsive to the society's request. The City only clarified which records it believed to be responsive after the society contacted the OIPC.

[31] The second aspect of the society's complaint under s. 6(1) is whether the City adequately searched for records; in other words, whether the City's response was complete. This first requires me to determine whether the City reasonably interpreted the scope of the request. A public body's interpretation of the access request will determine the nature and scope of its search for records. For this reason, whether a public body adequately searched for records cannot be addressed without answering this question.<sup>5</sup>

[32] In Investigation Report F08-01, former Commissioner Loukidelis said that requests should be interpreted in a manner that a fair and rational person would consider appropriate in the circumstances. Further, he said that public bodies should avoid overly literal or narrow interpretations of requests.<sup>6</sup>

[33] The duty to assist may require the public body to clarify the access request.<sup>7</sup>

[34] The City says it was uncertain as to what the terms "externally sourced expert opinion" and "third party opinion findings" in the access request meant but interpreted these terms as referring to records related to third parties hired by the City or consulted by Ernst & Young for the purpose of the review.<sup>8</sup> The City says that the Altus Report was not within the scope of the access request because Altus was not an expert engaged in the review by Ernst & Young.<sup>9</sup> The City says it commissioned the Altus Report prior to and independently of the Ernst & Young Report.<sup>10</sup>

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<sup>5</sup> Order 01-41, 2001 CanLII 21595 (BCIPC) at para 23.

<sup>6</sup> Investigation Report F08-01, 2008 CanLII 1648 at para. 18.

<sup>7</sup> No 328-1999, 1999 CanLII 4754 (BCIPC) at 3.2; Order 00-33, 2000 CanLII 14398 (BC IPC) at 3.2.

<sup>8</sup> Affidavit of the Director of Access and Information for the City of Vancouver, dated December 10, 2018, at paras. 28 and 29.

<sup>9</sup> City's initial submissions, para. 40.

<sup>10</sup> Affidavit of the Director of Access and Information for the City of Vancouver, dated December 10, 2018, at para 40(c).

[35] In addition, the City says that, while it does not believe the BCSA analysis is responsive, the City has specifically searched for this record and related invoices but has been unable to locate it.<sup>11</sup>

[36] The society says that the City's response to its access request is incomplete. The society provided extensive submissions on which records it feels are missing. In particular, the society says that the City should have provided the BCSA analysis and payment details. In addition, the society pointed to documents mentioned in the Ernst & Young Report that appear to be a third party opinion or report.<sup>12</sup> One of the items on this list is "external appraisal reports".

[37] In my view, the City did not meet its duty under s. 6(1) when interpreting the access request.

[38] The City admits that it was unsure what some of the language in the access request meant. In my view, the City should have sought clarification from the society as part of its duty to assist.

[39] In my opinion, the City did not respond to the access request in a fair and reasonable way. This is because the City took an overly literal approach to interpreting the society's access request. Specifically, it appears to have used the words "engagement of all externally sourced expert opinion" in the first bullet point of the access request to limit the scope of the request to records related to expert or external opinions that were specifically commissioned for the Ernst & Young review.

[40] I do not think that limiting the request in this way is a fair interpretation of the access request. I think it was clear from the society's access request that it was interested in records related to any expert or third party opinion or report used by Ernst and Young during the review, including any that may have existed prior to the review. The second bullet point of the access request for "all third party opinion findings" does not suggest that the request is limited only to opinions specifically commissioned for the Ernst & Young review. For this reason, I think it was unreasonable for the City not to search for or provide records that relate to any third parties whose opinion or report Ernst & Young considered during its review, even if those third parties were not expressly retained to provide an opinion or report for Ernst & Young.

[41] The City should conduct another search for any records that are or relate to any expert or third party opinion, finding or report used by Ernst & Young during the review, including those mentioned in the Ernst & Young Report.

[42] There are a few specific records that bear further comment.

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<sup>11</sup> City's reply submissions, para. 14.

<sup>12</sup> Specifically, on pages 27 and 30 of the Ernst & Young Report.

[43] First, the City should have determined that the Altus Report, the BTY analysis, the BCSA analysis and the Rennie analysis were responsive records because all of them were produced by a third party and clearly listed as a document that was considered in the Ernst & Young Report.

[44] In addition, as I discussed above, the society pointed to documents listed in the Ernst & Young Report as “external appraisal reports”. The City attached a response to another access request stating that it had searched for “external appraisal reports” as listed in the Ernst & Young Report and that it was unable to locate records responsive to this request.<sup>13</sup> I accept this evidence and find that the City does not have to repeat its search for “external appraisal reports”.

[45] In conclusion, the City did not meet its duty under s. 6(1) to respond to the access request without delay, openly, accurately and completely. First, the City did not adequately respond to the access request because it did not clarify which records it believed were responsive to the access request. Second, the City interpreted the access request too narrowly and therefore was unable to conduct an adequate search for records. It must conduct another search for records in accordance with my above comments.

#### **Section 4 - Custody and Control**

[46] The remaining issue in this inquiry is about whether the City has custody and control of the records in dispute. I will address only those I found are responsive to the access request so far: the Altus Report, BTY analysis, Rennie analysis and the BCSA analysis.<sup>14</sup>

[47] Section 3(1) states that FIPPA applies to all records in the custody or under the control of a public body subject to the exclusions listed in s. 3(1)(a) through (k), none of which apply here. Where FIPPA applies, ss. 4(1) and (2) give a person a right of access to any record in the custody or under the control of a public body, subject to the exceptions to disclosure in Part 2 of FIPPA.

[48] The City acknowledges that the Altus Report is in its custody and under its control, therefore whether the City has custody and control of this record is not in dispute.

[49] I have issued this order concurrently with Order F20-04. That order concerns a different request made by a different access applicant for the Altus Report, the BTY analysis, the BCSA analysis and the Rennie analysis. Without repeating them here, I adopt those same legal principles and analysis and find

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<sup>13</sup> Director of Access and Information for the City of Vancouver dated January 21, 2019 at para. 5 and Exhibit B.

<sup>14</sup> However, because I have ordered the City to conduct another search, the City may locate more responsive records.

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that the Altus Report and the BTY analysis are in the custody and under the control of the City, but the Rennie analysis and the BCSA analysis are not.

[50] The society made submissions on custody or control, but not explicitly with regards to the BCSA analysis or the Rennie analysis.<sup>15</sup> I have reviewed the society's submissions, and nothing in them alters my conclusion in Order F20-04 that these two analyses are not in the custody or control of the City.

[51] In summary, the BTY analysis and Altus Report are in the custody and under the control of the City but the BCSA and Rennie analyses are not.

## **CONCLUSION**

[52] For the reasons above, under s. 58, I make the following orders:

1. I order the City to perform its duty to conduct an adequate search. It must conduct another search for records in accordance with my comments above. The City must concurrently copy the OIPC registrar of inquiries when it writes to inform the society of the results of its search.
2. As the City does not have custody or control of the BCSA analysis or the Rennie analysis, I confirm that the City has performed its duties under FIPPA with regards to these records.
3. As the Altus Report and the BTY analysis are responsive records within the custody and under the control of the City, I require the City to provide these records in accordance with part 2 of FIPPA. The City must concurrently copy the OIPC registrar of inquiries on its response.

[53] Under s. 59(1), the City of Vancouver must comply with the above orders by March 17, 2020.

February 3, 2020

## **ORIGINAL SIGNED BY**

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Erika Syrotuck, Adjudicator

OIPC File No.: F16-68422

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<sup>15</sup> Society's submissions at paras. 28-29.