

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 104-1996
May 24, 1996**

INQUIRY RE: A request by the media to the Ministry of Attorney General concerning information about possible sites for a correctional centre in the Central Okanagan

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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 on April 17, 1996 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 of a decision by the Ministry of Attorney General (the Ministry) to refuse a media request for access to records pertaining to proposed prison sites in the Central Okanagan region of the province.

2. Documentation of the inquiry process

On October 13, 1995 the applicant, Rob Munro, a reporter for the Kelowna Daily Courier, submitted a request for records to the Ministry relating to the proposed sites for a new central Okanagan prison. Specifically, the applicant requested:

1. The list of the original 40 or so sites considered by the Ministry, and documents relating to those sites and the reasons why each was rejected.
2. The list of sites considered by the citizens' committee, any documents relating to those sites, and the reasons why each was rejected.
3. In particular, any documentation by either the ministry or citizens' group on the Brenda Mines site, including any evaluations or recommendations.

The Ministry responded to the request on January 4, 1996. The applicant received a copy of the Okanagan Citizens' Committee Report and portions of assessment reports that related to the four proposed prison location sites which were announced to the public. The Ministry withheld a number of records under section 17, specifically assessment reports of thirty-six potential prison sites that were not released to the public.

The applicant requested a review of the Ministry's decision to withhold information.

3. Issue under review and the burden of proof

The issue under review in this inquiry is whether the records in dispute should be withheld under section 17 of the Act. This section reads in part as follows:

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:

...
(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.

Section 57(1) establishes the burden of proof on the parties in this inquiry. At an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part. Thus the Ministry of Attorney General has the burden of proof in this inquiry.

4. The records in dispute

The records in dispute consist of about three hundred pages of descriptive assessments of potential prison sites prepared by an appraisal company. With respect to information on four sites already released to the applicant, the Ministry has severed a small amount of information which relates to the approximate value range or prices for certain sites as assessed by the appraisal company. (Submission of the applicant, pp. 10, 11) The Ministry has ultimately refused to disclose records about thirty-six sites which were not publicly announced in the Citizens' Review Committee Report, dated September 1995 (see below).

5. The Ministry of Attorney General's case

The Ministry explained that the British Columbia Building Corporation (BCBC) serves as its agent in providing land and buildings for required services to the public. BCBC usually does this

through an agent in order to prevent property owners from asking inflated selling prices for property. In the present case it did so through an appraisal company, which initially identified fifteen potential sites and secured options on several of them. The Beaver Lake Road industrial site became the preferred choice; it also became controversial for certain residents of the City of Kelowna.

As a result, a Citizens' Review Committee was formed. It then identified forty potential sites. Each was evaluated by the appraisal company. The report of the Review Committee selected four top sites but apparently split evenly on the preferred one. The Ministry selected the Hiram Walker site. A rezoning application for this site is now pending before the City Council of Kelowna; approval is not a foregone conclusion. (Submission of the Ministry, pp. 6-10)

The Ministry submits that the records in dispute "fall within the description of information" in sections 17(1)(b), (d), and (e) of the Act, "or is information which is similar in type to the information listed and meets the harms test set out" in the section. (Submission of the applicant, pp. 12, 21) I have discussed its detailed submissions below.

6. The applicant's case

I have presented here, and below, arguments made by the applicant that I found relevant to the issue of the application of section 17 of the Act in this inquiry. His essential point is that "the Ministry has not proved it will be financially harmed. Owners of many - possibly all - of those properties already know they have been considered for a jail site and there are steps the Ministry can take to protect its interests should it need to acquire a different site." The applicant "believes that the public is better served by having as much information as possible. That can reduce controversy that, particularly in this case, has added significantly to the cost of building a jail in the Central Okanagan. The information I seek would be for the public good and would, in all likelihood, also be to the benefit of the Ministry both financially and in terms of public image." (Submission of the applicant, p. 3)

It is the applicant's view that "[t]here is strong feeling in this community [Kelowna] that the site selection process was not thorough enough and many suitable sites were never considered." (Submission of the applicant, p. 4) He points out that only fifteen sites were considered in the first round, a number that was expanded to forty only after public opposition arose to the Beaver Lake Road site. In his view, any bias on the part of the Ministry towards a particular site should be publicly known.

On the basis of a recent interview, the applicant also states that the management of Hiram Walker was aware in 1994 and again in 1995 that the potential buyer for its plant site was the government of B.C. for use as a jail site: "The Ministry, therefore, has failed to prove that the release of this information will be harmful to its negotiating ability, since the negotiations it did conduct were clearly done with the full knowledge of the owners that they were negotiating with the provincial government for a jail site." (Submission of the applicant, pp. 5, 6; see also pp. 9, 15) His point is that "many, if not all, potential site owners already know their property is being considered by the Ministry so release of that information can do no harm." (Submission of the applicant, p. 9)

On the basis of newspaper articles mostly written by himself, the applicant quotes a Ministry official to the effect that only the Hiram Walker site is acceptable and that there is no alternate site in the Central Okanagan: "In other words, disclosure of other potential sites can do the Ministry no harm since it intends (or at least threatens) not to build a jail here if it can't be on the Hiram Walker site." (Submission of the applicant, p. 6)

The applicant concludes that it might actually be to the financial advantage of the Ministry to release the records in dispute. In particular, the Ministry should be held accountable for why it has not chosen to locate the jail on crown lands, "which could save millions in acquisition costs." (Submission of the applicant, p. 15)

7. Discussion

The Ministry made both a substantial open submission and a brief *in camera* submission in connection with this inquiry. One of its three affidavits was also submitted on an *in camera* basis.

The applicant, an experienced reporter, has obviously learned a great deal about possible sites for a correctional facility in the Okanagan through his interviews and sleuthing efforts. He then argues that since he already knows so much, as do some of the property owners, what is the possible harm in giving him information on the other thirty-six sites? (Submission of the applicant, pp. 9, 10) It does not follow, however, that the Ministry has an inherent obligation under the Act to release information to the applicant that he already claims to know. In other words, because information may have already become available to the public through the media, it does not necessarily mean that it is information that must be released to the public under the Act.

I also wish to comment on the applicant's argument that councillors in Kelowna may be persuaded that the Hiram Walker site is the best one, if the records in dispute are disclosed. (Submission of the applicant, p. 11) It is up to the Ministry to decide what to reveal to councillors for rezoning purposes about alternate sites that were considered in the selection process. That is not a judgment that I can or should make under the Act when section 17 considerations are being invoked.

Section 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: ...

The Ministry's position is that it is not necessary to demonstrate that actual harm will result but only that there is a reasonable expectation of probable harm to the interests of both BCBC and the Ministry. For example, "[d]isclosure of the other potential sites at this time could seriously derail the rezoning process on the Hiram Walker site," causing the Ministry to lose the money it has expended on the option and public consultation and requiring it to negotiate further option(s) on different site(s). To date, the two public bodies have spent approximately \$600,000 to option

sites, prepare preliminary plans and technical studies, and consult with the public. (Submission of the Ministry, pp. 17, 18)

The Ministry emphasizes that the greatest financial harm that could reasonably be expected to arise from the disclosure of the additional records of potential sites will be the government's inability to purchase a property at or near market value, because of the demands of property owners and the actions of speculators in taking out options on potential properties. The Ministry presented me with a specific example of how this has already occurred in the present Okanagan discussion: "...when the plan to build a new correctional centre became public knowledge, a land owner approached BCBC with an offer to sell a 160 acre site for \$1,600,000. This property had been purchased in 1991 for \$158,000. In 1994, it was assessed at \$248,200." A speculator subsequently entered into an option agreement to purchase about half of the same property for an even higher price depending on when it was sold. (Submission of the Ministry, pp. 18, 19)

The applicant counters that speculation has already taken place despite the efforts of the Ministry to maintain secrecy: "I don't believe that making the list public would add to the speculation and there's nothing in the Ministry's evidence to prove it would increase the speculation." (Submission of the Ministry, p. 13)

The Ministry emphasizes that it and BCBC have attempted to keep all potential site information confidential since the start of the current project. See Affidavit of Jim Baker of BCBC, Exhibits A and B. However, once rezoning approval has been obtained for a site and it has been purchased, the Ministry is willing to disclose the records in dispute in their entirety with the exception of a small amount of personal information as required under the Act. (Submission of the Ministry, pp. 20, 21)

Section 17(1)(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

The Ministry argues that the records in dispute contain information related to the monetary value of various properties and comprehensive assessments and appraisals of them. The latter includes "technical information on services, the present zoning, improvements existing on the site, approximate price range, access, the future use of the site, and the size and shape of the sites." (Submission of the applicant, p. 13) These records belong to BCBC and the Ministry and have significant intrinsic or monetary value, the Ministry argues, especially in terms of the bargaining position that will be lost if the records are disclosed.

The applicant's position is that if "the rezoning is refused, anyone owning a parcel of 20 acres or greater will know the government is looking, again, for a jail site. Any speculation or inflation of prices will happen regardless of whether the information is made public or not. The only difference with making it public is that residents of the Central Okanagan will be better able to form their own opinions on the suitability of the Sites." (Submission of the applicant, p. 10)

I accept the Ministry's argument on this point and find that the records in dispute are financial, commercial, and technical information belonging to the Ministry that have monetary value.

Section 17(1)(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

The Ministry argues that each potential location for the announced correctional centre is a "proposal" within the overall project to build one. It argues that disclosure now would be premature. If the City of Kelowna does not approve the Hiram Walker site, BCBC and the Ministry may have to attempt to negotiate options on some of the thirty-six sites that remain unknown. (Submission of the applicant, pp. 14, 15)

The Ministry further argues that disclosure could also reasonably be expected to result in undue financial gain to a third party, since individuals may speculate on the location that will be chosen. (Submission of the applicant, p. 16)

In light of the Ministry's points in the preceding paragraphs, I cannot agree with the applicant that the disclosure of the information sought will not affect the monetary value of the various sites. (Submission of the applicant, p. 7)

I find that disclosure of the records in dispute could reasonably be expected to result in premature disclosure of proposals for a correctional site and in undue financial gain to property owners or speculators.

Section 17(1)(e): information about negotiations carried on by or for a public body or the government of British Columbia.

The Ministry argues that disclosure of the records in dispute will implicitly disclose the negotiating position of BCBC and encourage property owners to ask more than market value for their property. Alternatively, a property owner may be unwilling to sell property for a correctional centre out of concern that it will devalue neighbouring property. (Submission of the Ministry, pp. 16, 17)

The in camera submission of the Ministry discusses the approach that it will take to site selection if its preferred site is not rezoned by the City of Kelowna. I cannot further discuss the nature of this submission, except to note that I find it persuasive with respect to the application of section 17(1)(e) in this case.

I find that disclosure of the records in dispute would reveal information about negotiations carried on by and for BCBC and the Ministry.

Review of the records in dispute

The applicant argues that producing a list of what sites were considered for the correctional centre and why they were rejected would place the Kelowna community in a better position to evaluate the merits of the chosen site at the Hiram Walker plant. (Submission of the applicant, p. 4) This point requires a consideration of what the contents of the records in dispute actually are

and whether they would be adequately responsive to the applicant's perception of the needs of the community.

The applicant has received from the Ministry the pages of site selection information about the Beaver Lake Road site and three other of the publicly-known sites. He argues that this information is very general and some of it is available to the public from the B.C. Assessment rolls. He suggests that the comments on the thirty-six other sites will be "much more critical and, therefore, not serve to increase the value of the land." The applicant believes that the "Ministry has not demonstrated that such information can truly harm its negotiating position and, therefore, I don't believe there's any information in the evaluations that should be kept secret." (Submission of the applicant, pp. 7, 8 and Exhibits 6, 7, 8)

Information about four sites for the correctional centre has been released. Thus the format used by the appraisal company for each of the forty sites is publicly known. The information presented includes the address or location of the site, a legal description, the registered owner, the listing agent, the site shape, the total site area, improvements, services (domestic water, sanitary sewer, natural gas, hydro electric power, and public transit), topography, access, zoning, Agricultural Land Reserve status, potential for proposed use, availability, probability of rezoning, list price or approximate value range, and a "comments" section about the appropriateness of the site for its intended purposes. For each site there are also photographs, maps, and a printout of the B.C. Assessment roll.

While I acknowledge that much of the information assembled for each site by the appraisal company is in fact public information in many ways, for example, gleaned in part from the listing agreement for its proposed sale, what is ultimately most sensitive is the fact that the Ministry is interested in the particular piece of property. The appraisal company has also offered evaluative information with clear commercial value both to it and its clients in this case, BCBC and the Ministry. This information would serve as the starting point for any future negotiations by BCBC with owners of specific sites.

Ontario precedents

The Information and Privacy Commissioner for Ontario has made several decisions, comparable to the issue before me in this inquiry, that I find instructive for purposes of my own decision making. On November 23, 1995 Inquiry Officer Holly Big Canoe issued Order P-1058 concerning the release of a study by a consulting firm of the economic benefits of a proposal to locate an experimental reactor in Ontario. She concluded, on the basis of a review of the record and the representations and in the language of the appropriate Ontario section, that "disclosure of the record could reasonably be expected to prejudice the economic interests of Hydro." In two other Ontario cases, Orders M-188 and M-189, issued September 22, 1993, the same Inquiry Officer decided on the release of records concerning solid waste disposal sites and potential landfill sites in Metropolitan Toronto. In applying the test of whether the "disclosure could reasonably be expected to be injurious to the financial interests" of the public body, she stated as follows in both decisions:

The evidence provided by the Municipality is not sufficiently detailed and convincing to demonstrate a reasonable expectation of harm. The Municipality has submitted journalistic evidence that persons living in the vicinity of proposed landfill sites express strong opposition to such proposals. In my view, however, the Municipality has not provided detailed and convincing evidence that the types of harm described above can reasonably be expected to occur if the list of potential landfill sites is disclosed. The Municipality has failed to make the necessary connection between the disclosure of the information contained in the records themselves and any specific responses to the disclosure of such information that could reasonably be expected to be injurious to its financial interests.

Since I agree with this formulation of the appropriate standard of proof of harm in this type of case, I need only conclude that, in the present inquiry, I find that there is sufficient evidence to demonstrate a reasonable expectation of harm to the financial or economic interests of the Ministry. I am further satisfied that the Ministry of Attorney General has met the burden of proving that the applicant has no right of access to the information requested.

8. Order

I find that the Ministry of Attorney General is authorized to refuse access to the records in dispute under section 17(1) of the Act. Under section 58(2)(b), I confirm the decision of the head of the Ministry to refuse to give access to the records requested by the applicant under section 17(1) of the Act.

May 24, 1996

David H. Flaherty
Commissioner