

**Office of the Information and Privacy Commissioner  
Province of British Columbia  
Order No. 281-1998  
December 7, 1998**

**\*\*\*\* This Order has been subject to Judicial Review \*\*\*\***

**INQUIRY RE: A decision by the Regional District of Nanaimo to sever information from the draft Official Community Plan for Nanoose Bay**

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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 April 9, 1998 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request by an applicant for a review of a decision by the Regional District of Nanaimo (the Regional District) to sever information from the draft Official Community Plan (OCP) for Nanoose Bay.

**2. Documentation of the inquiry process**

On November 5, 1997 the applicant made a written request to the Regional District for access to a preliminary draft of an Official Community Plan for Electoral Area "E" (Nanoose Bay) (the Smith Plan). This preliminary draft plan was prepared for the Regional District by Jim Smith, a planning consultant, in June 1997.

On December 5, 1997 the Regional District informed the applicant that it was denying access to the Smith Plan because it "contains 'draft regulations developed for the public body' and is therefore exempt under section 13 of the Act."

On January 5, 1998 the applicant applied to my Office for a review of the decision of the Regional District to refuse access to the Smith Plan.

On March 12, 1998 the Regional District decided to disclose some of the information in the Smith Plan to the applicant (i.e., information which contains factual material). However, the Regional District continued to withhold the remainder of the information in the Smith Plan. The

Regional District maintained that this information had been properly withheld under sections 12(3) and 13(1) of the Act.

On March 16, 1998 the applicant asked that the matter proceed to an inquiry. Both the applicant and the Regional District consented to extend the time period for holding an inquiry by three days, and the inquiry was scheduled for April 9, 1998.

### **3. Issue under review and the burden of proof**

This inquiry examines the Regional District's application of sections 12(3) and 13(1) of the Act to the information severed from the Smith Plan. The relevant sections of the Act read as follow:

#### ***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

....

#### ***Policy advice or recommendations***

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.

### **4. The record in dispute**

The record in dispute is the preliminary draft of an Official Community Plan for Electoral Area "E" (Nanoose Bay), which was prepared for the Regional District of Nanaimo by Jim Smith, a planning consultant (I will refer to it as the Smith draft plan). It is ninety pages in length. The "factual information" disclosed to the applicant amounts to about seventeen pages in total.

### **5. The applicant's case**

The applicant's position is that sections 12(3) and 13(1) do not apply to the information in the Smith draft plan that the Regional District has withheld. The applicant wants access to all of the information in the Smith draft plan. He points out that:

...in preparing this preliminary draft, Mr. Smith undertook extensive public and private meetings with a number of community groups and interested parties, both

with and without other staff from the public body in order to gauge and to articulate public concerns....

The applicant's position is quite simple: the applicant wishes to review the document which Mr. Smith prepared as an Official Community Plan after he spent months researching and meeting with community groups and interested parties. (Reply Submission of the Applicant, p. 2)

The applicant submits that section 12(3)(a) of the Act does not apply to the withheld information because "the fact that the Official Community Plan will be adopted by bylaw does not make the Official Community Plan itself a bylaw."

While we agree with the public body that the usual format for the adoption of an Official Community Plan is to adopt the plan as an appendix to a simple one-page bylaw, we submit that this fact, by itself, does not make the appendix an enforceable bylaw.

In fact, municipalities adopt and approve a number of documents by way of bylaw, including their annual budgets. The fact that the municipality has approved its budget by bylaw does not, we submit, make the budget itself a bylaw, but rather indicates the public body's support and approval of the planned budget. (Reply Submission of the Applicant, pp. 3-4)

The applicant also submits that the Official Community Plan is not a "legal instrument by which the local public body acts" for the purposes of section 12(3)(a) of the Act.

The applicant does not believe that the withheld information in the Smith draft plan would reveal "advice or recommendations" to the Regional District and says that an "Official Community Plan is a proposed policy and planning document for review and use by the public body." (Reply Submission of the Applicant, p. 7)

We submit that an examination of the Smith Draft OCP will reveal no assessment of a proposed course of action, no advice on a particular course of action, no recommendations that essentially set out the advantages or disadvantages of any particular approach, nor does it provide any rationale for any such recommendation.

It is simply a first draft of a policy planning document which would, once adopted, assist the public body in charting its future course as a Regional District. (Reply Submission of the Applicant, p. 7)

## **6. The Regional District of Nanaimo's case**

The Regional District did not accept parts of the Smith draft plan, so a new one was prepared and released to the community on October 28, 1997. The process of approving the current version of the Official Community Plan for Nanoose Bay is apparently still underway.

The Regional District “has not released portions of the Smith Draft OCP which deal with proposed policies in relation to development patterns such as urban containment, protection of rural lands, protection of the environment, servicing and schools.” (Submission of Regional District of Nanaimo, p. 2)

I have discussed below the Regional District’s arguments about the application of various sections of the Act to the information in dispute.

## **7. Discussion**

***Section 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***

The Regional District submits that the Smith draft plan “was either a draft of a bylaw or, alternatively, a draft of ‘[an]other legal instrument by which the local government acts.’” (Submission of the Regional District, p. 3) An Official Community Plan, it submits, is usually adopted as an appendix to a simple one-page bylaw. Various sections of the *Municipal Act* stipulate the contents of such a plan. (Submission of the Regional District, pp. 3-7)

An Official Community Plan has a legal effect, and is adopted by bylaw. It is therefore the submission of the Regional District of Nanaimo that an Official Community Plan is a bylaw or other legal instrument by which the Regional District of Nanaimo acts. The Regional District of Nanaimo has a discretion under section 12(3) of the *Freedom of Information and Protection of Privacy Act* to refuse disclosure of the entire document where the document in question is merely a draft. (Submission of the Regional District, p. 7)

The Regional District has in fact disclosed some portions of the Smith plan to the applicant “in the interests of providing as much disclosure of information as possible...” (Submission of the Regional District, p. 8)

The applicant essentially submits that “the fact that the Official Community Plan will be adopted by bylaw does not make the Official Community Plan itself a bylaw.” Counsel for the applicant reviewed a number of sources and authorities with respect to this proposition. (Reply Submission of the Applicant, pp. 3-7)

I agree with the submissions of the applicant on this issue. In my view, section 12(3) has no relevance to the record in dispute.

***Section 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***

The Regional District submits that by its very nature the Smith draft plan “incorporates the approaches, analyses, policies, strategies and recommendations of the person preparing the document with respect to all of the issues relating to planning within the area covered by the Official Community Plan.... The Smith Draft OCP contains information created as a result of Mr. Smith’s advice, analyses and recommendations to the Regional District having regard to a host of current settlement and servicing data, development potential, environmental values, servicing plans, and community values.” (Submission of the Regional District, p. 9)

The applicant argues that a draft community plan is not “advice or recommendations” to a public body but a “proposed policy and planning document for review and use by the public body.” (Reply Submission of the Applicant, p.7) He submits that the Smith draft plan is not policy advice or recommendations within the meaning of section 13(1). See Order No. 215-1998, February 23, 1998.

***Review of the Record in Dispute***

I have compared the original record to what has been disclosed to the applicant. I can find no authorization under section 13 of the Act to refuse to disclose descriptive information in the Smith draft plan. I have accepted the non-disclosure of specific advice or recommendations set out by Mr. Smith, sometimes following a paragraph of descriptive information. In my view, information not couched in terms of such advice or recommendations must be disclosed. However, when the drafter has offered “guidelines” or “action” plans to the Regional District with respect to specific sites, I have accepted them as falling within the category of advice or recommendations. The same judgement applies to “implementation actions.”

My severing will result in the disclosure of more factual and background information to the applicant, as I have determined that he should be given everything except the recommended policies and implementation or action plans. Since these are for the most part set out in discrete sections and sub-sections, it is a relatively easy task to identify the specific paragraphs which should be withheld. I have made a list for the Regional District of the numbered paragraphs which it is authorized to withhold and am requiring the Regional District to disclose the rest of the Smith draft plan.

**8. Order**

I find that the Regional District of Nanaimo was not authorized under sections 12 and 13 of the Act to refuse access to some of the information in the record in dispute. Under section 58(2)(a) of the Act, I require the Regional District of Nanaimo to give access to all information withheld on the basis of section 12 only, and to some of the information withheld on the basis of section 13, as identified by the list that I am providing to the Regional District.

I also find that the Regional District of Nanaimo was authorized to withhold some information in the records in dispute under section 13 of the Act. Under section 58(2)(b) of the Act, I confirm the decision of the Regional District of Nanaimo to withhold those specific portions of the Smith draft plan which I have identified to the Regional District.

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David H. Flaherty  
Commissioner

December 7, 1998