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**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 225-1998
April 22, 1998**

INQUIRY RE: The City of Victoria's custody or control of records containing financial information relating to a proposed arena/multiplex project

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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 February 2, 1998 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of the request by Russ Francis, News Editor for Monday Magazine in Victoria, (the applicant) for review of the response from the City of Victoria (the City) to his request for access to certain records.

2. Documentation of the inquiry process

The applicant wrote to the City on October 16, 1997 to request "financing details of the latest version of the multiplex." He also asked that any costs be waived. The City replied on November 6, 1997: "The City does not have these records in its custody or control and so is not able to provide the material which you have requested." The applicant then wrote to the Office on November 13, 1997 to request a review of the City's decision "not to release financing details of the latest version of the multiplex."

3. Issue under review and the burden of proof

The issue under review is whether the records setting out the "financing details of the latest version of the multiplex" fall within the custody or under the control of the City for the purposes of sections 3(1) and 4(1) of the Act. Section 3(1) provides that the Act applies to all records in the custody or under the control of a public body. Section 4(1) of the Act provides that a person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body.

Information rights

- 4(1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

Section 57 of the Act, which establishes the burden of proof on parties in an inquiry, is silent with respect to a request for review about whether a public body has custody or control of records. In this matter, the parties were invited to make submissions on the issue but chose not to. It is my view that the burden of proof is on a public body in these circumstances, because the public body is in the best position to provide information concerning whether it has custody or control of requested records. (See Order No. 170-1997, June 12, 1997)

4. The records in dispute

The City of Victoria and the third party acknowledge the existence of records relating to the third party's proposal to build and operate a "multi purpose sports and entertainment facility" (the multiplex). The records in dispute are those setting out the "financing details of the latest version of the multiplex". The difficulty lies in the fact that the third party has not yet discharged its obligation, which is a condition precedent under the Master Agreement with the City, to obtain a satisfactory financing commitment.

The records in dispute are to be distinguished from the periodic updates which the third party has provided to the City with respect to the entire development process including the status of obtaining a financing commitment. The City and third party state that the periodic status reports have been primarily verbal in nature and that any update letters provided to the City have been presented to City Council and form part of the public record.

5. Monday Magazine's case

The applicant describes as "false" the City's claim that it does not have the records in dispute under its custody or control. He suggests that the City's claim that it does not have the records in its custody "borders on the incredible."

For a project of this magnitude with so much in public funds at stake, it stretches the imagination to claim that the city holds no records - no documents, no notes, no e-mail -- concerning the financial details.
(Submission of the Applicant, p. 1)

The applicant seeks to rely on Order No. 11-1994, June 16, 1994 to argue that the City does, or should have, control over the records he is seeking. In his view, the City has

a right to possession of the records, they relate to its mandate and functions, and the City has obviously relied on them. The applicant further seeks to show that a City by-law demands that the disputed records, “or something very like them,” be provided to it. He does this by means of a detailed analysis of the Master Agreement passed by Council on May 29, 1997. I see no need to enter into the details of this agreement as the applicant has chosen to do. (Submission of the Applicant, p. 3)

The applicant further infers, from an interview with a member of City Council, that the City “had access to the records, but made a conscious decision to return the records to the developer after examining them, if it did indeed examine them.”

I submit that when a public body is in the position to choose whether or not to keep a copy of records within the four walls of its buildings, then such records are under the control of the public body. (Submission of the Applicant, p. 4)

6. The third party’s case

Victoria Sports/Entertainment Associates (VSEA) made the following submission:

Under the terms of the Master Agreement, VSEA is providing periodic updates to the City of Victoria on its progress in the development process, including the status of financing for the project. These reports are for the most part verbal, although we have provided the City with update letters, which have been presented to the City Council and made public. We have not otherwise deposited any financial information or other materials with the City, nor does the City have the right at this time to receive any such materials. (Submission of the Third Party, paragraph 2)

7. The City of Victoria’s case

The City submits that it does not have either the custody or control of records relating to “the financing details of the latest version of the Multiplex.” At present, “any record with respect to the financing of the Multiplex is within the sole custody and control of this third party. The City does not have any control over the third party’s financial documentation such that it could obtain it and release them [*sic*] to the applicant.” The City submitted an affidavit by Donald Roughley, the City Manager, in support of these statements.

The City further submits that under the terms of the Master Agreement, it has no control over the financing details of the proposed Multiplex, until the third party has satisfied the financing condition set out in the Agreement. The third party has yet to provide the City with such a financing commitment on terms satisfactory to it and the City. (Submission of the City, paragraph 3) Thus the City argues that the applicant’s

request for access to information is premature. (Submission of the City, paragraph 5) It relies for the meaning of the term “control” on Order No. 11-1994 to argue that the City does not have such control.

At this point in time the City does not have in its custody or control any records with respect to the satisfaction of financing and what rights the City does have will occur on the happening of a future event, namely the satisfaction of a condition by the third party.

(See also Order No. 95-1996, March 21, 1996, in this regard) (Submission of the City, p. 4)

8. Discussion

The City has entered into a Master Agreement with the third party to construct and operate the multiplex. (See Order No. 142-1997, January 15, 1997 for further background) The obligation of the third party and the City to complete the Master Agreement is conditional on the satisfaction of a number of conditions precedent, one of which relates to the obligation of the third party to receive a financing commitment on terms satisfactory to it and to the City by February 16, 1998.

I accept that the City has established that it does not have custody of records setting out the “financing details of the latest version of the multiplex” based on the affidavit of Donald Roughley. The real issue in this case turns on whether the City has control over the records in dispute by virtue of the provisions of the Master Agreement.

The applicant advanced a number of arguments based on various provisions of the Master Agreement to suggest that the “city does indeed have a contractual agreement, through the Master Agreement, with the developer that the latter supply such records to the city - whether or not it has actually done so.” (Reply Submission of the Applicant, p.1)

I cannot accede to the applicant’s arguments based on the evidence. Paragraph 1.05(b) of the Master Agreement clearly specifies that the obligation of the third party and the City to complete the transactions contemplated in the Master Agreement is conditional upon the third party receiving, on or before August 29, 1997 or such other date as the parties mutually agree upon, a financing commitment for the multiplex on terms satisfactory to the third party and to the City. The deadline for obtaining a financing commitment was subsequently extended to February 16, 1998. The provisions of the Master Agreement and the modifications and extensions dated September 11, 1997, November 13, 1997, and December 15, 1997 support the City’s position that completion of the transactions contemplated in the Master Agreement is conditional upon the third party receiving a satisfactory financing commitment. Until that condition precedent has been fulfilled, the City has no contractual authority to demand financial information from the third party. The applicant’s reliance on operating

provisions within the Master Agreement to establish the City's authority to demand information is misconceived. The operating provisions are not binding until the conditions precedent have been fulfilled.

The applicant also seeks to persuade me that there is "a private *de facto* agreement between the city and the developer [which] means that the records are indeed under the city's control." (Reply Submission of the Applicant, p. 1) This is based upon allegations that the City has been shown relevant financial records and made a conscious decision not to keep them in its physical custody for fear of an access request under the Act. The City "flatly rejects this submission," which is directly contrary to its submissions. (Reply Submission of the City, paragraph 3)

I agree with the City's submission that this allegation is contrary to the evidence. The City indicated that "[a]ny written information which has been presented by the third party to the City has been made public. Some status reports from the third party have been verbal and provided to Council. These progress reports deal with the third party's progress in attempting to secure a financing commitment. They do not reference any details of financing that the applicant is requesting from the City" (Reply Submission of the City, paragraph 2)

9. Order

I find that the records requested by the applicant are not in the custody or under the control of the City of Victoria under section 4(1) of the Act.

Under section 58(2)(b), I confirm the decision of the City of Victoria to refuse access to the applicant.

David H. Flaherty
Commissioner

April 22, 1998