

# *Notes and Communications*

## *Freedom of Information and Privacy: The Story of Vancouver's By-Law*

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Access to information and privacy laws are most often associated with senior jurisdictions such as national, provincial and state governments. For example, *Canada's Access to Information Act*, accompanied by a *Privacy Act*, came into effect in 1983, the year after the Act's passage. Most Canadian provinces have also passed similar legislation regarding access to information and privacy. The province of British Columbia is a notable exception to this pattern, but within its borders several municipalities have attempted on their own to promote government accountability through access legislation.<sup>1</sup>

On 26 October 1982 Vancouver City Council passed By-Law No. 5591, "A By-law relating to the release of City documents and information." The origins of this measure, also designated as the "Freedom of Information and Privacy By-law," are best understood by reviewing the situation that existed both in law and in practice before that time.

Vancouver is the only city in British Columbia that operates under its own Charter rather than under the provincial *Municipal Act*. The Charter, adopted in 1953, replaced Vancouver's *Incorporation Act* of 1921, the successor to the city's earlier Incorporation Acts of 1900 and 1886. The 1953 Charter contains a section on access to government records, where it is stated that

A bona fide request for inspection of any record or document of the city, subject to reasonable regulations as to the time and manner of such inspection, or for a copy thereof, shall be complied with, unless for good causes the Director of Finance otherwise directs. For furnishing copies, the city may make the same charge as is made by the official stenographer to the Supreme Court for the like service.<sup>2</sup>

The Charter does not provide for examining these records at an archival institution, although at the time of the Charter's adoption in 1953, Vancouver had had an archives for twenty years. The colourful and controversial Major James Skitt Matthews, was named Archivist by Vancouver's City Council in 1933, and held the post until his death in 1970. A former army officer and businessman, he jealously defended "his" Archives against any citizen or civic official who disagreed with his personal vision of Vancouver's

history. That vision was illustrated by Matthews's diverse collection of manuscripts, pioneer reminiscences, maps, drawings, photographs, newspaper clippings and assorted memorabilia. Consultation of this material was at the discretion of the Archivist.

Matthews had relatively little use for the city's official records, some of which, as they became inactive, were simply stored in vaults at City Hall. As archivist Robin Keirstead explained in an earlier issue of *Archivaria*,<sup>3</sup> other Vancouver municipal records ended up in a landfill in Burnaby. This forcefully illustrates that right of access does not necessarily equate with accessibility—the creation of appropriate physical conditions for the effective use of archival material.

Keirstead conjectured that Matthews's death prompted Vancouver City Council not only to examine the Archives' status, but also to propose clearer policies for handling the civic records which the Major had so disdained. In a memorandum adopted 2 February 1971 Council stated,

It is intended that the Archives should serve as a place where Public Records and Private Papers will be assembled, organized, catalogued, and preserved, and made available for examination, study and display, and further it is intended that it shall be a Records Centre for the safekeeping and temporary storage of what is [*sic*] called "inactive" City Records until they become permanent historical records or are destroyed.

Later that year, on 23 November, Council clarified its goals for the city's Archives by issuing a statement of "purposes and objectives" for that institution. In a paragraph headed "Services" Council declared,

In the discharge of these responsibilities the City Archivist will ensure that all such records are made available for reference, examination, study and display. In order to facilitate such services, the Division will prepare indexes, catalogues, guides, analytical pamphlets, and other finding aids or descriptive inventories of the records for internal use or publication.

To summarize the situation before 1982, three declarations—one in the City's charter, and two in statements by Council—offered Vancouver's citizens the general right to examine the records of their local government. Indeed, the statement of 23 November 1971 promised intellectual access as well. The Major Matthews Building, opened in 1972, assured physical accessibility as did the regular transfer of municipal records under a new records management programme.

According to Sue Baptie, the present City Archivist, researchers during this period could and did freely inspect the Archives' holdings of city records, except for the minutes of in-camera Council meetings. These closed sessions usually dealt with property negotiations, personnel matters or litigation involving the city. Also considered as restricted were documents relating to property negotiations discussed in some context other than an in-camera Council meeting.

From the Archives' point of view, there was initial surprise that a demand had arisen for an access to information by-law. Behind the by-law, however, lay not disgruntled scholars' thwarted research, but more fundamental issues of governmental accountability and freedom of information. These issues were raised by an alderman of the time, Marguerite Ford, who was motivated both by the principle involved and by specific incidents.<sup>4</sup>

In the late 1970s, Alderman Ford was also serving on the executive of the Union of British Columbia Municipalities. That body, in 1977 and 1978, had resolved that the province should pass freedom of information legislation. In accordance with procedure, the resolution was sent to the then Minister of Municipal Affairs, Bill Vander Zalm. He was less than enthusiastic about such a measure, and replied that if the municipalities would first pass their own freedom of information by-laws, then the province might consider taking action.

Ford decided to take Vander Zalm at his word. She was further motivated by a dispute at the time concerning negotiations for a convention centre at Canada Place. Ford thought that the city was being required to pay a disproportionate amount of the planning costs. She also suspected that agreements had been changed secretly after their passage by Council. In attempting to investigate this matter, she was denied access to the relevant documents, which were declared the property of the Civic Development Corporation. Although this corporation was a civic body supported by tax money, some aldermen, including Ford, were not allowed to scrutinize its operations. Another incident involved one of Ford's constituents, *Vancouver Sun* reporter Judy Lindsay, who was not allowed to examine certain documents in connection with a story about municipal politics.

One can speculate as to why the Union of British Columbia Municipalities proposed a freedom of information resolution at that particular time. Perhaps discussions of access and privacy legislation at the federal level motivated the local initiative; it was a political topic whose time had come. Certainly Ford's championship of the measure, once it had been proposed, was easy to understand. Her enthusiasm was not shared by the Mayor of the day, Jack Volrich, who, like Vander Zalm, did not seem to regard access to information as a high governmental priority. By chance, Volrich was out of town when Ford introduced a resolution to Vancouver City Council for a freedom of information by-law. Lacking sufficient support to control Council in his absence, Volrich was unable to prevent the resolution's passage, on 27 November 1979. The Mayor's lack of enthusiasm, however, initially inclined city staff against taking the time to draft the measure, and so Ford prepared a preliminary draft of the by-law with the help of a university student. Council referred the draft to the city's Director of Legal Services on 4 November 1980, but still no by-law resulted.

Ford continued to promote freedom of information legislation during the term of the new Mayor, Michael Harcourt, who was elected in late November 1980. She attempted to enlist the aid of the B.C. Civil Liberties Association, but the group showed little interest. Shortly afterwards, Ford was at a social gathering where she described her disappointment to Bill Black, a law professor at the University of British Columbia. He expressed his surprise at the Association's reticence, promptly volunteered his assistance, and recruited two of his law students, David Unterman and Gary Nelson, to draft the by-law.

Unterman, now a lawyer in private practice in Vancouver, remembers the project with enthusiasm; so does Professor Black.<sup>5</sup> The work was cast as a term assignment for which Unterman and Nelson received a class credit. Unterman regarded Ford's input as the critical force behind the by-law's provisions. He saw himself and Nelson more or less as technicians, trying to capture the intentions of Ford and the committee in proper legal language. Ford, in turn, credits the contributions made by other committee members,

who included City Archivist Sue Baptie, City Clerk Bob Henry, and representatives from city departments such as Permits and Licences, Health and Legal Services. The committee consulted a number of statutes from both Canada and the United States. Ford remembers being particularly impressed with a by-law from Bellevue, Washington, a city the government of which was so remarkably open that, as she recalled, the City Manager's office "didn't even have a door on it!"

It took the students about one university term to draft the by-law, which was then submitted to the Director of Legal Services. The by-law received approval, although with reservations, because the city's lawyers argued that its wording could be interpreted restrictively and, in fact, provide less access than before. Nonetheless, on 26 October 1982, Council passed the new by-law.

The by-law is divided into five parts—interpretation, access, privacy, procedures and appeals. Part I specifies that the committee with ultimate authority for appeal is the Finance and Administration Committee, "convened as a special committee with power to act." It also defines "department head," "information" and "person." Information is interpreted broadly as "information in any form whatsoever," such as documents, maps, photographs and any electronic records. (This definition of "information" was taken from that of "record" in the *Interpretation Act*, R.S.B.C., 1979.)

Part II relates to the freedom of information provisions of the by-law. It states that all information held by the city is open to inspection by all persons. It does not restrict access to residents of the city or Canadian citizens. The by-law then lists a number of exemptions or instances in which the city is not required to release information. These are mostly related to matters of security, litigation, contract or labour negotiations, property and in-camera council sessions.

Specifically, the city does not have to release information which is related to an ongoing lawsuit or one that is likely to arise in the future. It also does not have to release information related to law enforcement investigations or to matters of security. It is furthermore entitled to withhold documents relating to contract or labour negotiations, as well as material relating to the sale of property, unless the transaction has been completed. Computer programmes and civil service test questions are exempt from inspection, and records of in-camera Council meetings are closed for one year.

Some of the access provisions are more general in nature and could provide a basis for the restrictive interpretations suggested by the city's legal department. For instance, the city does not have to release information if it could be sued for libel or slander because of the release of such information, or if the information were given to the city in the expectation that it would be held in confidence.

Other provisions in the access section permit city employees to obtain information which they need to conduct their official business. Finally, the by-law includes a subsection which allows citizens to request the correction of erroneous information that the city may hold about them. This passage is reminiscent of the *Canadian Human Rights Act*.

Part III of the by-law, the privacy section, specifies that city employees shall not release information that is private. This category encompasses information relating to mental or physical health, employment information, and any data concerning residents of city-owned facilities such as rest homes. However, the by-law states that the person

who is the subject of private information has the right to inspect this information, except for letters of reference in a personnel file.

Some information in Part II's exempted categories is declared open after a determinate period of time—property appraisals after three years, and in-camera Council minutes after one year. There are no provisions for private information to be automatically open after a specified time period, however, without the consent of the subject or his/her representative. The by-law does permit the release of statistical data which does not identify individuals.

The by-law concludes with Parts IV and V, which describe how to request information, and how to make an appeal if the request is denied. The researcher may present his/her query to the appropriate department or to the City Clerk. The city is obliged to help determine which departments or agencies “maintain or index the information,” and to help the researcher to find the information, inspect it and take any notes or abstracts that he/she may require. The researcher is entitled to a copy, but the city may determine whether it is the researcher or the city who makes the copy. In the latter case, the city may charge a “reasonable fee” for the service. If the city cannot provide the information promptly, it must, within five working days of the initial request, notify the researcher of the reasons for the denial or delay.

A researcher may appeal to the City Clerk if the request has been denied, whereupon the City Clerk is required to consult the department head. If the denial still stands, the City Clerk must then refer the matter to the Finance and Administration Committee. The committee must then convene a meeting and notify the researcher of the time of the meeting.

Although the by-law itself does not provide for a regular review of its provisions, Vancouver City Council amended the by-law on 25 August 1987. Besides a few minor changes in wording, Council changed the name of the appeal committee to the Standing Committee of Council on Finance and Priorities. So far, no appeal has ever been made to the original committee or to its successor.

Vancouver travelled a very different road towards freedom of information and privacy legislation than did the municipalities of Ontario, which, on 1 January 1991, came under provincial legislation. The Ontario legislation, as it affected municipalities, was subjected to scrutiny and comment by the community of archivists, although their recommendations apparently did not yield immediate results.<sup>6</sup> Archivists may find that some of the criticisms of the Ontario legislation are similarly applicable to Vancouver's by-law. For example, not all of the provisions for exemption have time limitations. Also, as Ford noted, Vancouver's by-law places no restrictions on the subject matter that can be discussed in camera. On the whole, however, the by-law speaks in favour of access and, ultimately, accountability. Simply put, it underlines the right of a citizen in a participatory democracy to obtain information from government. Such a principle merits careful delineation rather than the general statements of good intentions that existed before.

The City of Vancouver Archives is not specifically named in the by-law, although it applies to city records housed in the Archives. As of the time of writing, there have been no complaints concerning closed documents at the Archives, so perhaps the by-law may never be put to a serious test there. Indeed, Unterman stressed that the motive for the by-

law had not been to pry material out of recalcitrant archivists, but rather to pry recent material out of city departments. The future, however, will bring a new set of researchers who may well make different demands on Vancouver's archival heritage. Ford's acceptance of Vander Zalm's challenge, and the resulting by-law, could one day have consequences as yet unforeseen.

### Notes

- \* An earlier version of this paper was written as an essay for the course Archival Studies 636, Reference and Access, in the Master of Archival Studies Programme at the University of British Columbia. The author wishes to thank Professor Terry Eastwood for his comments on the original paper, and also Marguerite Ford, Sue Baptie, David Unterman and Wendy Hunt, who read and commented on the revised version.
- 1 On Vancouver Island, the municipality of Saanich passed its "Access to Information By-law, 1980," No. 4560, on 22 December 1980. The City of Victoria similarly adopted an "Access to Information By-law," No. 82-38, on 13 May 1982. Finally, Chilliwack passed an "Access to Information By-Law, 1984, No. 445" on 9 July 1984.
- 2 Vancouver Charter, 1953, c. 55, s. 168.
- 3 Robin G. Keirstead, "J.S. Matthews and an Archives for Vancouver, 1951-1972," *Archivaria*, 23 (Winter 1986-87), p. 99.
- 4 Marguerite Ford served on the Vancouver City Council for many years. She retired from politics and is currently a Commissioner on the Royal Commission on Health Care and Costs in British Columbia. The author originally spoke to her by telephone in January 1989, when she was Executive Director of the Alzheimer Society of British Columbia.
- 5 Telephone conversations with Bill Black and David Unterman, January 1989.
- 6 The brief, written by Mark Hopkins of the ACA Select Committee on Access to Information and Privacy Legislation, is entitled, "ACA Brief on the Municipal Freedom of Information and Protection of Privacy Act, Bill 49; and the Municipal Freedom of Information and Statute Law Amendment Act, Bill 52." For a complete text of the brief, see *ACA Bulletin*, 14 (March 1990), pp. 7-9.