



Gibsons Alliance of Business and Community Society

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## COMPLAINT TO THE OIPC UNDER BC FIPPA

June 13, 2018

Information and Privacy Commissioner  
Office of the Information and Privacy Commissioner  
for British Columbia  
PO Box 9038 Stn. Prov. Govt  
4th Floor, 947 Fort Street  
Victoria, BC V8W 9A4

**Re: Town of Gibsons FOI Request FOI 2017-14 re: Peer Reviews of Technical Reports for the George Hotel Development Application (DA).**

Dear Commissioner Michael McEvoy:

Please accept this letter as our request for a review of the Town of Gibsons decision to withhold records contained in GABC's FOI request FOI 2017-14 re: peer reviews of technical reports for George Hotel Development Application (DA).

GABC has been attempting (without success) to access critical public records related to a serious environmental issue in the Town of Gibsons, since July, 2017. On November 1, 2017, GABC submitted an FOI request to the Town of Gibsons. GABC asked the Town to provide us with the following records under the B.C. Freedom and Information and Protection of Privacy Act:

1. The most recent project plans for the George Hotel and Residences.
2. Geosystems L.P. Peer Review Report dated April 18, 2017 (referenced in Keystone Environmental June 29, 2017, Remedial Plan)
3. Horizon Engineering Inc.'s Draft Report dated May 15, 2017. (referenced in May 29, 2017 letter to Town of Gibsons from Geosystems, L.P.)
4. Geosystems L.P. review of Horizon Engineering Inc.'s Draft Report of May 15, 2017 dated May 29, 2017. (referenced in May 29, 2017 letter to Town of Gibsons from Geosystems, L.P.)
5. Notes, minutes, briefing communications re: Geosystems L.P. teleconference with Town of Gibsons. May 23, 2017. (referenced in May 29, 2017 letter to Town of Gibsons from Geosystems, L.P.)
6. Any and all peer reviews of the George project done by Waterline Resources Inc. and Levelton Engineering between May 12, 2015 and November 1, 2017.

Our original FOI request letter is attached to this complaint.

On December 13, 2017, the Town of Gibsons Corporate Officer, and FOI coordinator Selina Williams informed GABC that the requested records had been prepared and were ready for pick up at the town of Gibsons. GABC picked up the CD containing the records but the only document released was "1. The most recent project plans for the George Hotel and Residences."

On January 14, 2017 GABC emailed Selina Williams asking her to explain why each of the requested records was not released to GABC.

Ms. Williams responded to GABC via email on January 18, stating, “the Town relied [on] section 13(1) to refuse disclosure of the draft reports as they contain advice and recommendations prepared for the Town.” Ms. Williams explained she had spent “a significant amount of time undertaking a line-by-line analysis of the documents with a view to severing only that text which falls within the scope of the exception. However, it was difficult to separate other information from the advice or recommendations because they are so interwoven together and form part of the overall advice and recommendations.”

On January 24, 2018 GABC responded to Ms. Williams with a letter of complaint in which we raised specific issues about the town’s reasons for refusing to disclose the records. We outlined some of the our email exchange with the Town of Gibsons, our concerns and rationale, and requested an immediate release of the redacted records. The January 24, 2018 letter of complaint to the Town is also attached to this complaint submission.

The town asserts it cannot release reports and reviews (undertaken on behalf of the public body) of technical reports (provided by a developer) under section 13(1) of FIPPA because it is impossible to separate technical information from advice and recommendations provided in the reports. It claims it is exercising discretion to withhold the records to ensure they are not misrepresented to the public, by GABC.

GABC asserts that the Town of Gibsons’ reasons for refusing to release the requested records, do not comply with the intent, or the wording of FIPPA. We argue three main points:

1. The purpose of section 13(1) of FIPPA is to encourage frankness in the providing of advice and recommendations to local governments by staff and consultants because frankness promotes good decision making by public bodies. We say that the release of the records would not impede decision making because the requested records, and the advice and recommendations interwoven into the records, relate to decisions that have already been made.
2. The intent of FIPPA section 13(2) is to guard against “advice and recommendations” being used excessively to redact records under section 13(1). Section 13(2) explicitly states that the head of a public body must not refuse to disclose specific types of records under section 13(1). Section 13(2) outlines specific types of records in subsections 13(2) (a-n). We say these records fall under subsection 13(2) and must not be redacted.
3. The records contain information relating to a risk of significant harm to the environment and the health and safety of members of the public in Gibsons and a matter before the Environmental Appeal Board of BC (EAB). The BC Supreme Court and Environmental Appeal Board of BC (EAB) both recognize that GABC has standing and the issues we have raised are real, serious and deserve to be heard by the EAB. Two weeks of public hearings will take place on the Sunshine Coast, to deal with GABC’s appeal, File #EMA 2017-10, in October-November 2018. Thus, these records must be released under Section 25 of FIPPA.

Our arguments are outlined in more detail in an email sent to Ms. Williams on February 19, 2018 and included below as Appendix 1. We have also included in Appendix 2, key facts and dates re: the process GABC has undertaken to access the records and prepare for this OIPC complaint.

We ask that the OIPC review GABC’s FOI request and rationales, the Town’s justifications for withholding the records and the records themselves, to determine whether the records should be released to GABC.

Thank you for your time and consideration of our concerns,

Suzanne Senger, President GABC Society  
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## APPENDIX 1

From: **A.B.C. Gibsons** <[gibsonsalliance@gmail.com](mailto:gibsonsalliance@gmail.com)>

Date: Mon, Feb 19, 2018 at 10:28 PM

Subject: Re: FOI 2017-14 Re: FOI request re: peer reviews of technical reports for "The George" DA

To: CO Selina Williams <[slwilliams@gibsons.ca](mailto:slwilliams@gibsons.ca)>

Dear Selina,

Welcome back.

Thank you for committing to include a digital copy of FOI “response letters” with digital copies of FOI records.

GABC disagrees with the Town of Gibsons interpretation of FIPPA in this situation and the justifications you have cited to withhold the requested records. I’ve restated some key facts, cited parts of FIPPA and made a few comments below, to help explain why we disagree with your decision.

### Key Facts

- The requested records are peer review studies of technical reports, undertaken on behalf of the public body.
- The studies are required under multiple recommendations, policies, guidelines and bylaws of the public body.
- The public body has a past practice of routinely releasing similar information.
- The requested records have been publicly cited by senior staff and elected officials as the basis for the town’s decision to issue development permits.
- The development permits issued allow work that poses a risk of significant harm to the community drinking water aquifer and the environment.
- This FOI request was made *after* the decision to approve the development permits was made and the permits were issued.
- The development permits are the subject of a petition for judicial review heard in the BC Supreme Court in January 2018 (GABC vs Town of Gibsons).
- The requested records relate to an appeal before the Environmental Appeal Board of BC. (Filed by GABC - July 2017)

### FIPPA Section 25

Under Section 25 of FIPPA, *information must be disclosed if in the public interest. “Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or (b) the disclosure of which is, for any other reason, clearly in the public interest. (2) Subsection (1) applies despite any other provision of this Act.*

### Comments:

- **The public body does not deny there is a risk of harm** to the environment associated with the project and the permits these records relate to.
- Public interest can be described as **“the welfare or well-being of the general public” and “appeal or relevance to the general populace.”**
- The requested records relate specifically to an **appeal before the Environmental Appeal Board of BC (EAB)**. The EAB determined that GABC has raised serious issues about proposed work on this site that the issue raised are neither frivolous nor vexatious. The EAB recognized there is **conflicting technical evidence as to whether proposed work on the project site poses a risk** of damaging the aquifer or causing tributyltin (TBT) to be dispersed or inadequately

remediated, **such that there would be permanent harm to the aquifer or the environment.** The EAB concluded that **conflicting technical evidence should be considered in the context of a full hearing of the merits of and appeal.**

### **FIPPA Section 13 (1)**

*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. (2) The head of a public body must not refuse to disclose under subsection (1).*

The purpose of section 13 (1) of FIPPA is to encourage frankness in the providing of advice and recommendations to local governments by staff and consultants, because frankness promotes **good decision making by public bodies.**

#### **Comment:**

- **Release of the records would not impede decision making** because the requested records, and the advice and recommendations interwoven into the requested records, relate to decisions that have already been made. If the town stands by its decisions, what's the problem?

### **FIPPA Section 13 (2)**

The intent of FIPPA **section 13(2) is to guard against “advice and recommendations” being used excessively to redact records under section 13(1).** Section 13(2) explicitly states that the head of a public body **must not refuse to disclose** specific types of records under section 13(1). Section 13(2) outlines specific types of records in subsection 13(2) (a-n)

#### **Comment:**

- The requested records fall under various subsections of 13(2).
- The intent of section 13(2) is to protect against “advice and recommendations” being used excessively to redact records under section 13(1), as the town appears to be trying to do.
- The information contained in the records may inform GABC, the BC Ministry of Environment, the EAB and the public as they grapple with an issue of risk to human health and the environment.
- GABC is committed to and has consistently demonstrated it will employ experts to interpret technical reports.
  - The first geotechnical peer review of the project in question (2014), which identified major risks, was done by an expert for GABC.
  - GABC identified the highly toxic substance Tributyltin (TBT) in foreshore sediments on the project site (2013) and consulted an expert (2014) to assess the TBT issue, when the project developer’s consultant neglected to do so (2004-2017).
  - GABC engaged West Coast Environmental Law (2014) and sent a letter to the Town of Gibsons explaining the law and asking it to manage the environmental issues on the site. The town ignored WCEL’s recommendations and ended up in court.
- The town’s stated reasons for withholding information are unfair and imply bias.
  - The town says it decided the public will not benefit from the release of information because the public does not have the capacity to interpret the information. But this is not true.
  - The town justified withholding information from the public based on its fear that information contained in the records would be misinterpreted by the public. Fear based decision making defies the very premise of ***freedom of information and privacy protection.***

Given all of the above, we ask that you please release the requested records without delay, so that we may avoid a costly and time consuming OIPC complaint process.

Thanks you,  
Suzanne Senger  
Gibsons Alliance of Business and Community Society

## APPENDIX 2

### Key Facts and Dates re: process and attempts to access information from the Town

On February 2, 2018 Selina Williams emailed GABC explaining she was out of the office (and country) until February 19<sup>th</sup>. In her email, she took the time to explain the town's position. She wrote: *"In exercising its discretion, the Town considered if the release of the records would provide a public benefit, assist the public in better understanding the matter and determined that it would not. The content of those records is extremely technical and would require expert interpretation to be understood and to show the reader how each piece of advice was incorporated into the final document. In the absence of that expert interpretation, the records provide no benefit to the public. Given the GABC's history of misrepresenting information to the public, and taking opposing stands on the same issue to serve its private interests, the Town is exercising its discretion to withhold those records to ensure they are not misrepresented to the public."*

On February 19, 2018 GABC sent another email to Ms. Williams expressing disagreement with the Town of Gibsons interpretation of FIPPA and the justifications cited to withhold the records. We re-stated key facts, sections of FIPPA we believe compel the town to release the records and added comment to explain our position. (This email exchange between GABC and Ms. Williams is excerpted as Appendix 1.)

Having not heard back from the Town of Gibsons, GABC emailed Ms. Williams on April 4, 2018, to ask if we had missed a reply from the Town or if it had simply not responded to our follow up request. On April 5, 2018 Ms. Williams replied by email saying, "I understand that you do not agree with the Town's decision to withhold the information requested and have previously provided the reasons by email. It does not serve either party to continue to debate the issue."

On April 17, 2018 GABC emailed Ms. Williams again, explaining that it seemed likely we would be forced to file a complaint with the OIPC. We asked that prior to filing our complaint with the OIPC, the Town please answer the following questions:

1. Has the Town of Gibsons reviewed and considered the facts presented to it (below) by GABC?
2. Does the Town of Gibsons dispute GABC's right/standing to access public records?
3. Does the Town of Gibsons dispute the fact that these records relate to an issue that is in the public interest?
4. Does the Town of Gibsons dispute the fact that the requested records relate to an issue of risk of significant harm to the environment, human health and/or safety?
5. Does the Town of Gibsons dispute the fact that under FIPPA, public interest is paramount?
6. Does the Town of Gibsons dispute the fact that under Section 25(1) of FIPPA the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or the disclosure of which is, for any other reason, clearly in the public interest?
7. Does the Town of Gibsons dispute the fact that Section 25(1) of FIPPA applies, despite any other provision of the Act?
8. Will the Town of Gibsons release the requested records without delay as per section 25 of FIPPA?

GABC asked the town to answer these questions and the town refused to do so through a series of emails between April 18 and June 12, 2018. We explained that the last time we filed a complaint to the OIPC, the Town hired expensive lawyers to defend against a fee waiver request, and GABC lost the 'case' because we could not afford legal support to properly make our argument. We explained that in order for us to craft a concise complaint to the OIPC, and avoid being sucked into irrelevant issues by the town's lawyers in a potential OIPC hearing situation (as occurred the last time we filed a complaint with the OIPC), we needed to have these questions answered. The Town unwaveringly refused to answer our questions and in a final email received by GABC on June 12, 2018, Ms. Williams stated: "...With respect to your insistence that I respond to questions that truthfully are more of an interrogation than an inquiry, the Town has nothing further to add to this conversation."