



Disclosure and Access to Information: British Columbia Taxpayer Perspective

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This is a general overview of the subject matter and should not be relied upon as legal advice or opinion. For specific legal advice on the information provided and related topics, please contact the author or any member of the Property Tax Law Group.

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DISCLOSURE AND ACCESS TO INFORMATION: BRITISH COLUMBIA TAXPAYER PERSPECTIVE

1. Introduction

Thank you for inviting me to speak as part of this Panel.

In British Columbia, as elsewhere, there exists a tension between, on the one hand, the need to disclose sufficient information to complete the roll and to appeal assessments, and on the other hand, the need to protect commercially sensitive information from unnecessary and potentially harmful exposure to competitors. It has generally fallen to the Board to attempt to strike the balance between these competing interests.

I have reproduced below the questions put to the Panel (in the context of British Columbia legislation and caselaw), my “short answers” to these questions, and the underlying analysis:

Questions Posed and Short Answers:

- **Under what circumstances can BC Assessment inspect your property? How is this right enforced and by whom?**

Strictly speaking, BC Assessment can enter on and inspect your property at any stage of the roll preparation and confirmation process. As a practical matter, inspections are coordinated in advance between the assessment office and the taxpayer. The Board will not enforce BC Assessment’s right to inspect property. However it has its own right to inspect the subject property in the presence of the parties, and can enforce this right, or dismiss your appeal if you refuse reasonable and necessary access.

- **What information must you disclose to BC Assessment during roll preparation and in an appeal? Is there any protection for commercially sensitive information like appraisals, confidential leases, rent rolls, and the like?**

Strictly speaking, during the roll preparation process, you must disclose to the assessor all information including corporate or personal documents, previous appraisals, sales information, and the like that are relevant and material to your assessment, whether discovered or requested by the assessor during a property inspection, or demanded formally in writing by the assessor. As a practical matter, discussions with the assessor ought to narrow the scope of information provided to what is reasonably necessary for the issues, failing which the matter is likely to fall to the Board in an appeal. On appeal, the Board can order disclosure by both parties of all relevant and material information including documents in pre-hearing management or at the hearing, can direct examinations for discovery or answers to written questions, and can sanction non-disclosure by refusing to admit undisclosed documents, dismissing the appeal or awarding costs.

Protection against dissemination of your commercially sensitive information is limited. While the assessor, the Board and others who obtain commercially sensitive information must not disclose this other than to administer the Assessment Act, in response to a Board or court order, or in an appeal, and while the Board will weigh competing interests in applications to disclose commercially sensitive information of the taxpayer or third parties to strike a balance between substantive correctness and procedural fairness, as a practical matter, these protections do not guarantee that your information will not ultimately find its way into the public realm. The only way to guarantee this is not to appeal your assessment.

- **How do you deal with onerous information requests?**

The best strategy is to speak with the assessor to attempt to narrow the scope of the request to what is reasonable and necessary. If this fails, a flat refusal could theoretically end up in an application to court for enforcement, followed by quasi-criminal fines or a jail term for non-compliance.

However it is more likely to result in an assessment to your disadvantage which you must appeal. Once before the Board, you will most likely be met with a renewal of the request in an application to the Board. This can be opposed on the grounds of relevance and materiality and commercial reasonableness.

- **Conversely, what information can you demand from BC Assessment during roll preparation and in an appeal? Does this include information obtained from third parties?**

While there is no statutory right to demand information from the assessor during roll preparation, taxpayers generally have access to their own files (including property value statements). Prior to PARP sittings, residential taxpayers have online access to a limited number of assessments of other neighboring properties to evaluate equity. Requests for third party information will likely be met with opposition which must be resolved under the B.C. Freedom of Information and Protection of Privacy Act.

As noted, the Board can order the assessor to produce information, including (where the Board sees fit) information of third parties in the assessor's files that is relevant and material to the issues. The Board will, however, do so only where the parties cannot find some other way to value the property to the Board's satisfaction without impinging on third party rights.

2. Overview and Analysis

Under the British Columbia *Assessment Act*, R.S.B.C. 1996, c.20 (the "Assessment Act", or "Act"), different rules govern the obligation of taxpayers to disclose information at the roll preparation stage and at the appeal stage:

(a) Disclosure for Roll Preparation and Confirmation

In the context of annual roll preparation and confirmation, BC Assessment is given sweeping powers under Part 2 of the Assessment Act for entry on private property and inspection and copying of documents relevant to its functions, the practical limits of which remain untested by B.C. courts, and have only been addressed in passing by the Board.

No corresponding statutory right of access to BC Assessment information exists for a taxpayer under the Act for the roll preparation process. What rights do exist arise under the British Columbia *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c.165 (the “FOI Act”).

(b) Disclosure for Appeals

Once before the Board, access and disclosure rights and obligations are governed by the Board’s powers conferred by the *Administrative Tribunals Act*, S.B.C. 2004, c.45 and the Board’s Rules. Together these authorize the Board to order both the taxpayer and assessor, and in appropriate circumstances, third parties, to disclose documentary and other information relevant and material to an appeal.

A more detailed review of these provisions is set out below.

3. Assessor’s Right of Inspection and Taxpayer’s Obligation to Disclose Information for Roll Preparation and Confirmation

A. Entry and Inspection of Property

(i) Obligation to Allow Entry for Inspection and Copying of Documents

Section 14 of the Assessment Act allows any “authorized person” (an assessor, appraiser or authorized BC Assessment employee) to enter on or inspect land and improvements “for any purpose relating to assessment”. Likewise, section 16(1) allows BC Assessment to enter on any premises and examine any property to determine an assessment of land and improvements in respect of which BC Assessment thinks a person may be liable to assessment, or to confirm an assessment.

On its face, section 14 confers on the assessor the extraordinary power of “warrantless search” of private property. The enforceability and limits of this provision remain to be tested by a BC court. Meanwhile, as a practical matter, inspections are routinely scheduled as part of the roll preparation process.

(ii) Consequences of Non-Compliance

There is no specific provision in the Act that deems non-compliance with section 14 to be an offence. Inspection disputes are more likely to end up before the Board than the court. Since the Board has its own inspection power and the ability to sanction non-compliance with an inspection order with dismissal of the taxpayer’s appeal, the Board is likely to remain the arbiter of disputes over limits on access for inspection.

(iii) Practical Implications

The Board¹ has refused to enforce the assessor's right to inspect property as an imposition on private property rights beyond the Board's powers. However as noted, the Board has its own power to inspect property in the presence of the parties under section 46(2) of the Assessment Act, and to sanction non-compliance with an inspection order by dismissing the appeal². Faced with this, it would seem largely futile for taxpayers to deny reasonable access to prepare, confirm or appeal an assessment. The real question is what is "reasonable" in the circumstances. Repeated visits to a busy industrial facility with a view to exposing new issues beyond those identified in appeal management may not, for example, be considered "reasonable".

B. Document Disclosure

The Act requires four general types of document disclosure for roll preparation and confirmation:

- (a) a taxpayer's obligation to respond to section 15 written information requests from BC Assessment;
- (b) a taxpayer's obligation to disclose documents including previous appraisals to BC Assessment;

¹ See for example *West Fraser Mills Ltd. v. Assessor of Area #23 – Kamloops*, 2005 PAABBC 20051072.

Sections 15 and 16 of the *Assessment Act* confer broad powers (tantamount to a standing search warrant) on the Assessor to enter onto property and conduct inspections, and to inspect and take copies of documents in the course of administering the Act. Sections 46(2)(a) and (b) of the Act permit the Board, in the course of an appeal, to enter on and inspect property and require production of any record relating to the appeal. There is no specific provision permitting the Board to order a property owner to allow the Assessor access to property in the course of an appeal.

In *West Fraser*, the Assessor applied to the Board under section 46(2) of the *Assessment Act*, and sections 11 and 14 of the *Administrative Tribunals Act*, as well as the Board's general powers under Rule 15(2) of their Rules, for an order compelling West Fraser Mills to permit the Assessor access to the property so the Assessor could prepare a report for the hearing, or alternatively, to order a Board inspection accompanied by the parties. West Fraser contended that the Board has no jurisdiction to compel access to property, and ought not do indirectly what it cannot do directly.

The Board confirmed its previous ruling in *West Fraser v. Assessor of Area #25* 2000 PAABBC 20004121, to the effect that absent express statutory authority to compel access to the Assessor for inspection, the Board has no jurisdiction to do so. The Board found that despite its broad powers under the *Administrative Tribunals Act* and the *Assessment Act* to make rules and orders to fulfill its mandate, compelling access for inspection of property other than by the Board itself (as specifically permitted by section 46) verges on substantive rights over which the Board has no inherent jurisdiction. The Board observed that a statutory power akin to Supreme Court Rule 30 (under which the Court can compel examinations or inspections by a party's expert) would be a useful "tool" in the Board's "tool kit". Although denying the Assessor's application for access, the Board intimated that it was prepared, if necessary, to invoke its power under section 46 of the Act to order its own inspection, accompanied by the parties, to ensure fairness to the parties, and to seek redress in costs for retaining its own expert witness.

² See *Takla Leisure Air Ltd. v. Assessor of Area #26 – Prince George*, 2003 PAABBC 20031335.

(c) the Province's obligation to advise BC Assessment of sales, leases or Crown grants, and

(d) the Province's obligation to respond to requests for information from BC Assessment

Each of these is outlined briefly below.

(a) Obligation to Respond to Section 15 Written Information Requests

Section 15 of the Assessment Act requires a property owner, tenant or vendor to provide information "for any purpose related to the administration of the Act" within 21 days of receiving a written request for that information from BC Assessment. Section 15 requests are generally sent out well in advance of roll closure to ensure time for a fulsome response and further investigation by the assessor. In addition to identifying capital expenditures and improvements, responses should, of course, indicate closures, decommissioning and removal of equipment, and all other changes favorable to the taxpayer.

(i) Consequences of Non-Compliance

Failure to respond at all, sufficiently, or with false or misleading information is an offence punishable under sections 15(3), 70 and 71 of the Assessment Act on conviction to a fine up to \$10,000 or a jail term up to 2 years, or both. No taxpayer has yet been sanctioned with these penalties. Since most disputes end up before the Board, which lacks the power to impose these penalties, it seems unlikely they will be invoked.

(ii) Practical Implications

A taxpayer met with an overly broad section 15 request for information should first call the assessor to discuss the request and narrow it to what is needed. Unresolved requests are likely to end up in front of the Board which, as set out further below, can order mutual exchange of relevant material documents and order examinations for discovery or written responses to interrogatories. The Board will determine the scope of disclosure that is reasonably necessary in the circumstances.

(b) Obligation to Disclose Corporate Documents Including Previous Appraisals

Under section 16(2) of the Act a property owner must give BC Assessment access, to take copies and extracts of, books, accounts, vouchers, documents and appraisals of the property owner.

(i) Consequences of Non-Compliance

No provision of the Act specifically deems non-compliance with section 16(2) to be an offence. Disputes most often arise when the assessor asks for copies of confidential leases, rent rolls and internal valuations or analyses prepared for asset or share transfers or financing.

To date, the courts have not been called upon to impose sanctions for non-disclosure under section 16, likely because these disputes end up before the Board which can resolve them under its own rules.

(iii) Practical Implications

The ultimate sanction for refusal to disclose relevant material information is, of course, dismissal of a taxpayer's appeal. The taxpayer must therefore decide before appealing the extent to which they are comfortable disclosing sensitive information to prosecute the appeal

Where there is significant risk of confidential information being ordered disclosed by the Board, a taxpayer may prefer to negotiate a process for review of information by the assessor or their legal counsel without taking copies, so that the assessor can determine its relevance without the source documents automatically becoming part of the assessor's file and subject to further dissemination. While not guaranteeing this outcome, the process allows discussion to occur which may significantly reduce the scope of sensitive information which may become public. An alternative is to review sensitive documents with the assessor in a Board sanctioned settlement conference where documents must be returned and do not become part of either the Board's or assessor's file.

A different issue arises where the assessor demands a document which is protected from disclosure by a non-disclosure clause. Generally, a taxpayer is advised to obtain written consent of the third party before disclosing the document or its contents, or disclose it only under Board or court order.³

Assessor Not Bound by Taxpayer Response

Under section 15(4) the assessor is not bound by information provided by the taxpayer in response to a section 15 request. If the assessor doubts the accuracy of the response the property can be assessed in the manner and for an amount the assessor believes to be correct.

(c) Provincial Obligation to Advise Assessor of Sales and Leases and to Respond to Assessor Information Requests

In addition to taxpayer information, BC Assessment has access to building permits and other public documents relating to value.

Section 17(1) of the Act requires the minister of the relevant ministry to immediately advise BC Assessment of a sale, lease or grant of Crown land.

Section 17(2) requires all public officers and Crown corporation or agency officers and employees to provide information as requested in writing to BC Assessment to complete assessments under the Act.

(i) Consequences of Failure to Comply

No specific provision of the Act deems failure to comply with these obligations an offence, and it seems highly unlikely the Province or its officials would refuse to comply.

³ The taxpayer should seek legal advice before deciding on a course of action.

(ii) Practical Implications

Similar information is, in most cases⁴, available to taxpayers at a cost. The Act does not require notice to be given to a taxpayer of a Provincial response to a BC Assessment information request relating to the taxpayer's property. A taxpayer should ask for all such requests and responses in an appeal.

C. Limited Use of Information Obtained

The Act provides only limited protection against commercially sensitive information falling into the hands of competitors.

Section 16(3) of the Act prevents BC Assessment, a Property Assessment Review Panel, a Board member or any other person with custody of control of information or records obtained or created under the Act not to disclose that information to any other person except:

- (a) in the course of administering the Act, or performing functions under it;
- (b) in proceedings before PARP, the Board or the Court;
- (c) to the authorized agent of the property owner, or
- (d) pursuant to any regulation⁵ passed by the Lieutenant Governor in Council respecting disclosure of information.

(i) Consequences of Failure to Comply

The Act does not specifically address the consequences of BC Assessment or the Board disclosing taxpayer information contrary to section 16(3). Both no doubt have safeguards in place to ensure this does not occur. As a practical matter, the assessor may be reluctant to disclose your commercially sensitive information for fear of the chilling effect this may have on your willingness to share this information consensually in future.

(ii) Practical Implications

While ostensibly restricting the use to which taxpayer information can be put, in reality section 16 has very limited scope. There are three ways in which sensitive information may find its way into the public record and the hands of competitors:

⁴ Through BC Online, where transfer documents, leases and charges are registered. Note that property transfer tax returns are not generally publicly available, other than with written consent of the person filing the return.

⁵ Under B.C. Regulation 232/78, *Dissemination of Information Regulation*, BC Assessment may disclose to any person information under the Act respecting the declared value and physical characteristics of any property. Annually, BC Assessment makes available online for a limited time to residential taxpayers the assessed values and physical characteristics of a limited number of neighbouring homes to assist with an equity evaluation prior to PARP sittings.

First, while obviously prevented from simply handing out or publishing information gathered from taxpayers to strangers, the assessor may use that information for any purpose relating to preparation or confirmation of an assessment. In other words, a taxpayer should expect their information (rent rolls, capitalization rates, development costs and the like) to be used within BC Assessment as part of a database to create, confirm or defend before the Board other assessments.

Second, the assessor may disclose information on which an assessment is based in an appeal to defend or vary the assessment. Further the assessor must disclose information required by the Board which is relevant and material to the issues in the taxpayer's own appeal, and possibly, even in the appeals of third parties. The Board has on several occasions⁶ faced the challenge of balancing the Board's mandate to find actual value with potential harm from disclosure of commercially sensitive information. A taxpayer may ultimately face a choice between pursuing an appeal and protecting information. Hopefully a compromise can be reached that will fulfill both objectives.

Third, commercially sensitive information may be elicited verbally in cross-examination or on questioning by the Board. The Board's process is public⁷ and this information might well find its way into the public record as part of B.C. Supreme Court stated case record.

⁶ See for example *Caesar Park Hotels & Resorts Company Ltd. and Westin Hotel Company Limited v. Assessor of Area #09 – Vancouver*, 1999, PAABBC 19993795. The Board had made interim orders requiring the assessor to disclose financial information used by the assessor's appraiser to develop capitalization rates for the years under appeal, and financial information from the comparable hotels relied on by the assessor's appraiser to determine stabilized income for the subject. The Board declined to order the assessor to disclose net income figures used by the assessor's appraiser from 13 Vancouver hotels because the Board found no prima facie evidence of inequity. The third party hotels intervened and asked the Board to vacate the orders requiring disclosure of their sensitive information arguing onus, prematurity of disclosure, relevance and materiality, necessity and balance of harm and alternatives. The Board upheld these orders. The Board noted that the reasoning of the BC Court of Appeal in its 1996 decision in *Assessor of Area #9 – Vancouver v. Lord Realty Holdings Ltd.* (1996), Stated Case 359 (BCCA) (where the Court upheld the Board's order that the assessor disclose capitalization rates from sales properties used in the assessor's appraiser's analysis), although less relevant now that the Board could order disclosure during pre-hearing management instead of just at hearing, continued to ring true: while a taxpayer can reasonably assume the assessor will treat information disclosed as confidential, this does not mean "for our eyes only" and it might well end up being disclosed in Board proceedings as relevant and material to a third party appeal. The Board felt compelled in the circumstances to order disclosure of the third party information to ensure it could fulfill its inquisitorial mandate to find actual value. Ultimately, the Board struck the balance between substantive and procedural fairness concerns by restricting disclosure of third party information to what was reasonably necessary for the assessor to prove his case.

In a subsequent Board ruling, *Four Seasons Hotel Limited et al v. Assessor of Area #9 – Vancouver* PAABBC20002146, the Board initially ordered disclosure of information relied on by the assessor in valuing the subject hotel. On receiving submissions from intervening third party hoteliers objecting to disclosure of their information, the Board stayed the disclosure order and convened an interim hearing to entertain submissions from all interested, following which the Board left it to the parties and hoteliers to reach a compromise on the method of valuation which would avoid disclosure of third party information. The Board ultimately found itself able to value the subject without the need to inquire into further evidence, striking the balance between substantive and procedural concerns with input and cooperation from those concerned.

⁷ Under section 67 of the Act the Board must conduct public hearings. The exception is settlement conferences which under Board Rule 16(5) must be held *in camera*. Documents produced in a settlement conference must be returned.

C. Disclosure Before the Board

The Administrative Tribunals Act and Board Rules govern the Board's power to order disclosure of documents. Chief among these powers are the following:

(i) Power to Order Production of Statement of Issues, Evidence and Analysis

Under Rule 14 the Board can require the parties to file and exchange a statement of issues, evidence and analysis including a summary of evidence to be relied on and the implications of the evidence, and copies of documents referred to.

(ii) Access to Documents or Other Information Relevant and Material to Appeal

Under Rule 15(2)(d) the Board can require a taxpayer or the assessor to provide access to documents or other information that may be material and relevant to an issue in the appeal. Likewise the Board can order under Rule 15(2)(g) access to documents that will be submitted as evidence in the hearing.

(iii) Oral or Written Examination for Discovery

Under Rule 15(2)(h) the Board can order a party or proposed witness to submit to examination for discovery or to provide written answers to written questions (interrogatories) of another party.

(iv) Consequences for Failure to Comply

Under section 18 of the Administrative Tribunals Act and its Rules, the Board can sanction non-compliance with an order for production of documents by ruling them inadmissible in the hearing, dismissing the appeal and in particularly egregious circumstances, ordering costs.

D. Access to BC Assessment Information Under the Freedom of Information and Protection of Privacy Act

Taxpayer information requests of BC Assessment in the course of an appeal will be dealt with under the Board's powers.

Unresolved requests made during roll preparation must be pursued under the Freedom of Information and Protection of Privacy Act.

An exhaustive discussion of the interplay between the Assessment Act and the Freedom of Information and Protection of Privacy Act is beyond the scope of this paper. It suffices to say that:

- taxpayer demands for information relating to their own property from the assessor's file (eg. capitalization rates) ought to be fulfilled without dispute.

- demands for information underlying BC Assessment manuals and rates should also be fulfilled without dispute, to the extent they do not constitute legal advice, cabinet privileges or commercially sensitive information the disclosure of which could adversely affect third parties (who would be given the opportunity to dispute disclosure by the Commissioner in any event), and
- demands for third party information from the assessor's files would likely be opposed both under the Freedom of Information and Protection of Privacy Act rules (whence the third parties would be given the opportunity to object to disclosure of that information), and under section 16(3) of the Assessment Act. The outcome of a particular demand would depend on the circumstances. Practically speaking, the issue would most likely end up being resolved by the Board in an appeal.

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