

**DISCLOSURE OF CONTROLLED SUBSTANCE
PROPERTIES AND THE FREEDOM OF INFORMATION
AND PROTECTION OF
PRIVACY ACT**

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PROBLEM STATEMENT

Members of the public and REALTORS® are unable to consistently receive confirmation from public officials on whether a property they intend to purchase or occupy has ever been used as a marijuana grow operation or a clandestine drug lab.

A typical question asked is: “Has this property ever been investigated due to allegations that it was used for the cultivation of marijuana or a clandestine drug lab or has the property been invoiced by the City on the basis that it had been used for the purpose of cultivation of marijuana or a clandestine drug lab?”

While this requires only a simple “yes” or “no” answer, the public officials who have the answer are typically slow to respond. They are inconsistent in their responses and frequently cite rules that protect personal privacy when refusing to disclose information.

The lack of information leaves unanswered questions about the safety of the home for the future occupants, as well as about the property’s value.

Freedom of Information and Protection of Privacy Act

A major impediment to the flow of information and service to the public seems to be public officials’ interpretation and understanding of *Freedom of Information and Protection of Privacy Act* RSBC 1996 (FIPPA). The purpose of the Act is to make public bodies more accountable to the public and to protect personal privacy. The Act gives the public the right of access to records while specifying some limitations, such as the disclosure of personal information by public bodies.

Both goals of the Act (accountability plus privacy) are often not being achieved because public officials have incorrectly determined that information being requested is “personal information.” This prevents the disclosure of information that otherwise would be available to the public, such as whether or not a property was used for drug production.

Additionally, public officials may be concerned that “record linkage” may result in the disclosure of personal information that causes harm to individuals. When in doubt as to the nature of the information, officials appear to choose non-disclosure as the safe strategy and the approach that limits liability exposure of the institution.

This is this precise issue facing REALTORS® and the public when they try to determine if there is any history of a property being associated with controlled substances such as marijuana or clandestine drug production.

Solutions

Pre-Approved Questions

FIPPA offers protections for personal information, which it defines as “information about an identifiable individual.” However, according to correspondence from David Loukidelis

when he was B.C.'s Information and Privacy Commissioner, information about the physical condition of a particular property, or about any building bylaw or other bylaw infractions, notices or actions respecting a piece of property, "is not personal information of anyone, including the registered owner."

It would follow that questions regarding these matters could be answered by officials with "yes" or "no" answers and be within the scope of the Act. As such, a possible solution to the problem described above would be to provide public officials with a template of pre-approved questions related to information they can disclose about a property.

Wording of questions:

Given that the information must only be about a notice or an action related to the property, questions could include the following:

- "According to City records, has the property ever been investigated for the cultivation of marijuana or as a clandestine drug lab?"
- "Has the City's Controlled Substance Property Bylaw been enforced at this property?"

If the answer is "no" to either of these questions, it would appear to provide relief for the REALTOR® or member of the public.

By necessity, the questions need to qualify that the source of the information is the City, as opposed to police records. Information in police records is exempt under the Act if it is felt disclosure might harm a law enforcement matter or an investigation, or if the matter is before the court. While police records may contain information that the property was used for drug production, the police are not required to share this information with the City.

A term such as "Illegal Drug Operation" should also not be used in the questions, because the word "illegal" excludes the many legal medical marijuana grow operations sanctioned by the Canadian Government. Information about medical grow operations is just as important to the public and REALTORS® because many of these legal installations have never passed safety inspections and carry the same risks to safety, health and property as illegal drug operations.

Seller consent

Seller consent to disclosure about certain property information by the public officials could help address the additional concern that harm might be caused to individuals if personal information was disclosed through "record linkage."

On this issue, Loukidelis states, "Of course, personal information may be found in association with this type of information, so a local government would have to ensure

that it discloses only information about building bylaw or other bylaw infractions, notices or actions respecting the property and not personal information of individuals.”

He asserts that if this argument is wrong, such that personal information were being disclosed when a property is listed for sale, “the seller could consent in writing at the time of listing to disclosure by the relevant local government of information about the condition of the property and whether it has been used for grow-ops or other illegal drug operations.”

Section 33.1 (1)(b) of the Act states: “A public body may disclose personal information referred to in section 33 inside or outside Canada as follows: (b) if the individual the information is about has identified the information and consented, in the prescribed manner, to its disclosure...”.

As such, this remedy might be preferred by local governments because the language for a disclosure statement could be developed by a real estate board for consistency, it would be worded to meet the needs of the association, and it would be tested for fairness by the marketplace. Further, this approach would relieve local government of the burden of correctly interpreting (FIPPA) because the individual has given permission to release certain information whether or not it is a matter of privacy.

Additional questions for the public and REALTOR®

The public and REALTOR® would likely have additional questions than those noted above. For simplicity they might be written to require a “yes” or “no” answer, but due to the additional time required to obtain the information, a City Official may require the individual or REALTOR® to make a formal application under FIPPA.

Examples of additional questions:

Given that according to City records:

- Has the property has been investigated for the cultivation of marijuana or as a clandestine drug lab?
- Was the property ever invoiced by the City on the basis that it had been used for cultivation of marijuana or as a clandestine drug lab enforced at this property?
- Was a City action taken as a result of findings in a residential building on the property?
- Was a City action taken as a result of findings in a non-residential outbuilding, barn, shed or other shelter situated away from the residence?
- Have the requirements of the action been undertaken such that the requirements of the Bylaw or other City order been satisfied?

CONCLUSION

This paper recommends two approaches to satisfy the needs of the public and REALTORS®.

The first relies on government to develop a template of questions that are pre-approved and satisfy the requirement of FIPPA, because the information is about the physical condition of a particular property, or about any building bylaw or other bylaw infractions, notices or actions respecting a piece of property. It is not information about an individual.

The second would require a seller to consent in writing at the time of listing to disclosure by the relevant local government of information about the condition of the property and if it has been used for any drug operations. For the real estate industry, this may be the best solution, as it allows for the disclosure of specific information and allows for the development of questions and answers relevant to the industry.

Both of these approaches will be a step towards protecting future buyers and occupants from the health and safety risks associated with former drug houses, as well as potential negative effects on property value.