OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER

British Columbia
Canada

Order No. 326-1999

INQUIRY REGARDING A CITY OF CRANBROOK FIRE-FIGHTING REPORT

David Loukidelis, Information & Privacy Commissioner
October 29, 1999

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Summary: City commissioned a consultant's report on City's fire-fighting services. City held not to be authorized to withhold entire report under s. 13(1). City ordered to perform severing required by s. 4(2) and return severed record for commissioner's review. City held not to be authorized to withhold information under s. 12(3)(b), since report was only the subject-matter of *in camera* City council meetings. Since report did not constitute a plan or proposal, City also not authorized to withhold it under s. 17(1). City also did not establish reasonable expectation of harm for the purposes of s. 17(1).

Key Words: Substance of deliberations – advice or recommendations – factual material – plan – proposal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(3)(b), 13(1), 13(2), 17(1)(c), 17(1)(d).

Authorities Considered: B.C.: Order No. 48-1995, Order No. 81-1996, Order No. 113-1996; Order No 182-1997; **Ontario**: P-229 (May 6, 1991), P-603 (December 21, 1993), P-772 (October 4, 1994).

1.0 INTRODUCTION

In December of 1997, an organization known as the Insurers Advisory Organization ("IAO") submitted to the City of Cranbrook ("City") a 68 page report entitled 'Evaluation of Fire Fighting Services for the Corporation of the City of Cranbrook'. This report had been commissioned by City council earlier in 1997, in order to undertake a "personnel and cost evaluation" of the City's fire-fighting services. The City indicated in

this inquiry that it has yet to act on the IAO Report because of a protracted labour dispute between the City and a union representing City employees.

On January 11, 1999, the applicant made an access to information request to the City, under the *Freedom of Information and Protection of Privacy Act* ("Act"), for (among other things) the IAO Report. The City responded quickly, on January 15, 1999, and denied the applicant's request for a copy of the IAO Report. The City gave the following reason for that decision:

> [The IAO Report] … is being withheld as Council is currently reviewing this report in confidential In-camera meetings. Section 17(1)(c) of the Act provides for this exemption as "Plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public.

In turn, the applicant sought a review of this decision under s. 52 of the Act. Because mediation of the dispute did not lead to a settlement, the matter proceeded to inquiry under s. 56 of the Act.

2.0 ISSUES

My reading of the City's original decision in this case leads me to conclude it was based only on s. 17(1)(c) of the Act. At this point, however, the issue is whether the City was entitled to withhold the IAO Report under ss. 12(3)(b), 13(1) or 17(1)(c) or (d) of the Act. Section 57(1) of the Act requires the City to prove that it was authorized to refuse to disclose the IAO Report to the applicant.

3.0 DISCUSSION

3.1 Substance of *In Camera* Deliberations – In my view, the City's reliance on the s. 12(3)(b) exception to the right of access is misplaced in this case.

Section 12(3)(b) of the Act authorizes a local public body such as the City to refuse to disclose to an applicant information the disclosure of which would reveal the "substance of deliberations" of an *in camera* meeting of its council. The exception applies only if the council was authorized to hold the meeting in question *in camera.* In this case, the City said it was authorized by s. 225 (2) of the *Municipal Act* to hold meetings in the public's absence. (This provision has since been amended significantly, by s. 63 of the *Local Government Statutes Amendment Act, 1999*, S.B.C. 1999, c. 37. New ss. 242.1 through 242.8 of the *Municipal Act* contain important new rules on the holding of *in camera* meetings.)

The City argued, in essence, that disclosure of the IAO Report would reveal the substance of deliberations of an *in camera* council meeting by permitting the drawing of inferences, from the report, about such a meeting. In support of its position, the City relied on three decisions of the previous commissioner, namely Order No. 48-1995, Order No. 81-1996

and Order No. 182-1997. Page 2 of the City's initial submissions in this inquiry contained the following passage:

> Therefore, it is not only the recorded minutes of an in-camera Council meeting that is protected by "the substance of deliberations", but also the documents considered at that in-camera Council meeting, if such documents would permit the drawing of accurate inferences with respect to the substance of those deliberations.

I agree with this statement. But the crucial question, of course, is whether disclosure of a particular record would, in the circumstances of the case, "permit the drawing of accurate inferences" about the "substance of deliberations" of a specific *in camera* meeting. Would disclosure of the IAO Report permit the drawing of such accurate inferences about a particular council meeting? In my view, it would not.

First, the City has only established clearly, on the evidence it submitted, that one *in camera* council meeting has been held about the IAO Report. The only City council meeting explicitly referred to in the material before me as having been held *in camera* is the January 15, 1998, meeting referred to in paragraph 5 of the affidavit of James Montain, sworn August 18, 1999 ("Montain Affidavit"). Mr. Montain is the City's Administrator. It should be noted that the City did not ask that the Montain Affidavit be received and kept *in camera*. Therefore, in accordance with our office's published policies and procedures for inquiries, copies of the City's written submission and affidavit were delivered to the applicant.

Paragraph 5 of the Montain Affidavit reads as follows:

> At City Council's in-camera meeting of January 15, 1998, I was directed to consult with the Fire Chief and the Deputy Fire Chief using information that was in the Insurance Advisory Association ("IAO") [*sic*] report to make recommendations to Council with respect to the Fire Department.

Paragraph 6 of the affidavit alludes to what is, apparently, a later City council meeting, but does not say whether any such meeting was held *in camera*:

> On March 5, 1998, City Council reviewed the IAO report and the comments of myself and the Director and Deputy Director of Fire and Emergency Services. At that time, I was directed as City Administrator to conduct more research and provide more details and information on a plan related to current staffing levels of the Fire Department.

Paragraph 8 of the Montain Affidavit says the IAO Report is "being considered by Council in in-camera meetings", but does not refer to any specific *in camera* meetings, including any *in camera* meetings held before the date of the City's access decision in this matter.

Again, the City bears the burden of establishing that s. 12(3)(b) applies here. The only unequivocal evidence before me as to *in camera* council meetings relates to the

January 15, 1998 council meeting. Paragraph 5 of the Montain Affidavit discloses at least one outcome of that council meeting, *i.e.*, it says City council directed Mr. Montain to consult with other City staff and to come forward with recommendations to council about the City's fire department.

Similarly, even if one concludes that paragraph 6 of the affidavit refers to an *in camera* council meeting held on March 5, 1998, the only thing we learn from that paragraph is that council "reviewed the IAO Report" and staff's comments on it. We also learn that Mr. Montain was told to conduct further research on fire department staffing levels. Paragraph 6 itself arguably reveals the substance of some of the deliberations of council. At the very least, it discloses one outcome of those deliberations.

In my view, reading the IAO Report would not allow anyone to draw any conclusions, directly or by drawing inferences, about the substance of City council's deliberations on the report. For all we know, council may have received the report for information and – without itself deliberating the report – directed staff to work on the issues raised by the report. Of course, paragraph 5 of the Montain Affidavit says council "reviewed" the report, which presumably means council discussed it in some way. Still, disclosure of the report would not reveal anything about those discussions. Council members may have debated the IAO Report vigorously, with many different views being expressed and various possible courses of actions being suggested. The IAO Report itself is silent about this. Its disclosure tells us nothing about what was said at the council table, much less what was decided. We simply do not know, and cannot tell from the IAO Report – which was prepared by outside consultants - what the deliberations of council were. The most that can be said is that disclosure of the report would disclose one subject of such meetings. We already know the IAO Report was one of the subjects addressed at the meeting or meetings discussed above, of course, from the Montain Affidavit and the City's submissions in this inquiry.

In this light, I have decided that s. 12(3)(b) does not apply in the circumstances of this case. The City was not authorized by that section to refuse to disclose the IAO Report to the applicant. This conclusion is consistent with the above decisions of my predecessor, with which I agree. It is also consistent with the reasoning in Order No. 113-1996, where the previous commissioner decided that disclosure of briefing papers prepared for school board trustees were not protected by what is now s. 12(3)(b). In reaching this conclusion, the commissioner noted that disclosure of the records would reveal only the subject of the relevant *in camera* board meeting, not the substance of the board's *in camera* deliberations. As was said in Order No. 113-1996, at p. 4, one can – in cases such as this one – release the source documents without disclosing the substance of deliberations about them.

One final note about s. 12(3)(b) is necessary. The City argued that the IAO Report is being considered by council at *in camera* meetings or that it is still before council in such meetings. The City did not provide any evidentiary support for its contention that the IAO Report will be considered at council meetings yet to be scheduled or that the record is somehow still 'before' council at *in camera* meetings. The City can, in my view, rely

on s. 12(3)(b) only if that section applied, on the facts, at the time the City made its decision on the applicant's access request. That exception to the right of access cannot be applied prospectively where a local public body thinks that an *in camera* meeting might be held, in the future, at which the requested record may be considered. The section applies only where a properly constituted *in camera* meeting has been held and where disclosure of the record would reveal the substance of deliberations of that meeting in the ways discussed above.

3.2 Financial Information – As is noted above, the City originally relied on s. 17(1)(c) of the Act in refusing to disclose the IAO Report to the applicant. For the purposes of this inquiry, the City has relied on that section and on s. 17(1)(d) of the Act as well. For the following reasons, I have decided that neither of those sections authorizes the City to refuse to disclose the IAO Report to the applicant.

Section 17(1) reads as follows:

> 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:

Sections 17(1)(c) and (d) of the Act set out two classes of information that may qualify for protection in accordance with the harms-based test set out in the introductory paragraph of section 17(1). Those provisions read as follows:

> (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;
>
> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;

The discussion below about s. 13(1) acknowledges that certain, relatively small, portions of the IAO Report qualify for protection under that section because they contain "advice or recommendations". In my view, neither s. 17(1)(c) nor s. 17(1)(d) apply in this case. The record contains, in part, "advice or recommendations" for the purposes of s. 13(1), but not any "plans", "proposal" or "project" for the purposes of ss. 17(1)(c) or (d).

First, the word "plans" is used in section 17(1)(c) in relation to "management of personnel" and to "administration of" the public body. The IAO Report does not contain any "plans" for dealing with those issues. I note that paragraph 6 of the Montain Affidavit suggests that City council, on March 5, 1998, directed City staff to "provide more information and details on a plan" flowing from the IAO Report. But the report is not, in my view, itself a 'plan'.

On this point, I agree with the approach taken in Ontario decisions under that province's freedom of information legislation.. In Order P-603 (December 21, 1993), the word "plans" in s. 18 of the Ontario legislation – which is similar to s. 17 of our Act - was interpreted to exclude a report containing recommendations that would form the basis for the development of a 'plan'. It was held that a plan, for the purposes of the section, is something that sets out detailed methods and action required to implement a policy. This decision built upon the approach taken earlier in Ontario, in Order P-229 (May 6, 1991). In that decision, the word 'plan' was given its dictionary meaning, as set out in the *Concise Oxford Dictionary*, 8th ed., *i.e.*, "a formulated and detailed method by which a thing is to be done, a design or scheme".

It should be noted in passing that this interpretation of the word "plans" is also consistent with the approach taken in the *Policy and Procedures Manual* issued by what was then the Ministry of Government Services. At p. 14 of Section C.4.8 of that document, the same interpretation is given to the word "plans".

I also agree with the Ontario approach to interpreting the word "project". In Order P-772 (October 4, 1994), it was held that the term "proposed project" meant a planned undertaking. In that case, a governmental negotiation strategy was found to be a planned undertaking and therefore a "proposed project" for the purposes of the Ontario legislation. Having carefully reviewed the IAO Report, I cannot agree it contains any information the disclosure of which would prematurely disclose a "project" within the meaning of the section.

Similarly, my review of the IAO Report leads me to conclude it does not contain any information that qualifies as a "proposal" for the purposes of section 17(1)(d) of the Act. In my view, the information in the disputed record does not qualify as a "proposal", because the report does not set out any detailed methods for implementing a particular policy or decision.

My decision in this case is based on my interpretation of the Act, including in light of the Ontario decisions discussed above. It should be noted, as an aside, that the *Policy and Procedures Manual*, at p. 17 of Section C.4.8, expresses a similar view of the meaning of the words "project" and "proposal" for the purposes of section 17(1) of the Act.

Two further points must be made. First, quite apart from my conclusion that the disputed record is not a record mentioned in either section 17(1)(c) or (d), the City has not, on the evidence, established a 'reasonable expectation', as required by section 17(1), to the City's financial or economic interests. In reaching this conclusion, I have considered the City's evidence in light of s. 17(1) and the views expressed about s. 17(1) in Order No. 324-1999 and other decisions respecting s. 17(1). In my view, the City's evidence here falls short of establishing that there is a reasonable expectation of harm from disclosure of information in the IAO Report.

The second point – which forms no part of my decision here – is specific to local government bodies under the Act. It may be that a record is a plan, proposal or project

for the purposes of section 17(1) only if it is a plan, project or proposal that has been approved by the council or other governing body of the local government body. For example, it may be that unless a council or regional district board – as the statutory governing body that exercises a local government's powers – has passed the appropriate resolution or bylaw under the *Municipal Act* or other authorizing legislation, no plan, proposal or project is involved. In cases where no such governing body action has been taken, it maybe necessary to determine if the draft (or recommended) plan, proposal or project is excepted from disclosure as advice or recommendations made by staff or outside consultants, under s. 13(1).

3.3 Advice or Recommendations – Section 13(1) of the Act authorizes a public body to refuse to disclose to an applicant information that would reveal "advice or recommendations" developed by or for the public body. In this case, the City withheld the entire IAO Report, arguing that its disclosure would reveal advice or recommendations made to the City by the IAO in the report. At p. 3 of its initial submissions, the City made the following argument:

> The City submits that this section applies to the entire record at issue in this Inquiry and is a strong basis for upholding the City's decision to deny access to the Report. The Report contains information that would reveal advice and recommendations developed by a consultant for City Council concerning the personnel and organizational structure of the Fire Department.

Having reviewed the IAO Report, I agree it contains some information that the City is authorized to withhold under s. 13(1). I do not agree, however, that the City is authorized by s. 13(1) to refuse to disclose all of the IAO Report. In light of the contents of the report, ss. 4(2) and 13(2) are clearly against the City on this point. Section 13(2) reads as follows:

> (2) The head of a public body must not refuse to disclose under subsection (1)
>
> (a) any factual material,
>
> (b) a public opinion poll,
>
> (c) a statistical survey,
>
> (d) an appraisal,
>
> (e) an economic forecast,
>
> (f) an environmental impact statement or similar information,
>
> (g) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies,
>
> (h) a consumer test report or a report of a test carried out on a product to test equipment of the public body,

> (i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,
>
> (j) a report on the results of field research undertaken before a policy proposal is formulated,
>
> (k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,
>
> (l) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body,
>
> (m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or
>
> (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

Section 4(2) of the Act reads as follows:

> The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

In this case, the effect of s. 4(2) is that the City is authorized to withhold only that information in the IAO Report that properly can be withheld under s. 13(1), bearing in mind the prohibitions set out in s. 13(2). I have reviewed the record in question carefully. Large portions of it are clearly "factual material" within the meaning of s. 13(2)(a). For example, pp. 6 through 9 set out the IAO's fire hazard classification system for the purposes of the report. That portion of the IAO Report also contains data about fire growth rates and response times. Other portions of the document – including large portions of pp. 10 through 21 – contain factual findings, or other data, respecting the City's current fire-fighting operations. Still other parts of the IAO Report set out statistics for the City and a number of other British Columbia communities about fire-fighting costs *per capita* and so on. These are only a few examples of the extensive amounts of "factual material" found in the IAO Report.

The City is obliged by section 4(2) of the Act to go through the document line by line and to sever only the portions protected from disclosure under s. 13(1). In doing this, the City should bear in mind the comments I made in Order No. 325-1999 about the proper exercise of the City's discretion to disclose information even if the information is covered by s. 13(1).

4.0 CONCLUSION

For the reasons given above, I make the following interim orders:

1. I find that the City was not authorized by s. 12(3)(b) of the Act to withhold information in the disputed record from the applicant. Under s. 58(2)(a) of the Act, I require the City to give the applicant access to the record, subject to my order respecting s. 13(1) of the Act.

2. I find that the City was not authorized by s. 17(1) of the Act to withhold information in the disputed record from the applicant. Under s. 58(2)(a) of the Act, I require the City to give the applicant access to the record, subject to my order respecting s. 13(1) of the Act.

3. Under s. 58(3)(a) of the Act, I order the City to comply with s. 4(2) of the Act by severing the IAO Report to withhold only the information that the City is authorized by s. 13(1) to refuse to disclose, and to return that record to me, so severed, within 10 days after the date of this interim order. I will then review the severed record, conclude this inquiry, and make an order in that regard under s. 58(2) of the Act.

Some comments are necessary about the order made in paragraph 3. Section 58(3)(a) of the Act empowers me to make orders requiring that a duty imposed by the Act or regulations is performed. My powers under s. 58(3) apply when an inquiry is into any matter other than a decision to give or refuse access to all or part of a record, in which case s. 58(2) operates. I am also authorized by s. 42(1)(b) of the Act to make an order described in s. 58(3) whether or not a review has been requested. In this case, a review was requested, but the inquiry is not yet concluded because the City did not comply with its duty under s. 4(2) in relation to the application of s. 13(1) of the Act. I have therefore made an appropriate order under s. 58(3)(a) and will make a final order under s. 58(2) as and when contemplated by the order in paragraph 3.

October 29, 1999

David Loukidelis
Information and Privacy Commissioner
for British Columbia