



Order F25-59

## CITY OF KELOWNA

Allison J. Shamas  
Adjudicator

July 29, 2025

CanLII Cite: 2025 BCIPC 68

Quicklaw Cite: [2025] B.C.I.P.C.D. No. 68

**Summary:** An individual (applicant) asked the City of Kelowna (City) for access to records about the City's decision to take legal action against them. The City provided responsive records but withheld some information under ss. 12(3)(b) (local public body confidences), 13(1) (advice and recommendations), 14 (solicitor-client privilege) and 15(1)(a) (harm to law enforcement) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator found the City was authorized to withhold some information under s. 12(3)(b) but not under s. 14. Because the City applied ss. 13(1) and 15(1)(a) to the information the adjudicator found it was authorized to withhold under s. 12(3)(b), the adjudicator did not consider these sections. The adjudicator ordered the City to disclose the balance of the information in dispute to the applicant.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165 ss. 12(3)(b) and 14.

## INTRODUCTION

[1] An individual (applicant) asked the City of Kelowna (City) for access to records about the City's decision to take legal action against the applicant.

[2] The City provided the responsive records but withheld information from them under ss. 12(3)(b) (local public body confidences), 13(1) (advice and recommendations), 14 (solicitor-client privilege) and 15(1)(a) (harm to law enforcement) of the *Freedom of Information and Protection of Privacy Act*<sup>1</sup> (FIPPA).

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the City's decision. The OIPC's mediation

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<sup>1</sup> RSBC 1996 c. 165.

process did not resolve the issues in dispute, and the matter proceeded to inquiry.

## **PRELIMINARY ISSUES**

### ***Relevance of the parties' history***

[4] The applicant provides detailed background information about their history with the City and explains that, in their view, the City is misusing FIPPA to conceal its actions related to that history. The applicant says this background is important so the Commissioner does not simply accept the City at its word.

[5] The City says that much of the background information provided by the applicant constitutes serious allegations against the City and its employees which are unfounded and irrelevant to the inquiry. The City denies the allegations and submits that no weight should be given to them.

[6] While I have reviewed all the evidence and argument provided by both parties, my jurisdiction is limited to considering the City's application of the FIPPA exceptions at issue to the information in dispute. In this matter, I do not need to decide which parties' version of the background events is true to adjudicate the issues before me. Accordingly, I will not do so, and I will only discuss the parties' underlying dispute where it is relevant to the FIPPA issues before me.

[7] With respect to the applicant's concerns, I confirm that as in all OIPC inquiries, I will make an independent decision about the City's decision to apply the FIPPA exceptions informed by all the evidence and argument before me, including the records themselves.

### ***Fairness of the inquiry***

[8] The applicant submits that because they cannot see parts of the City's evidence or the information in dispute, their ability to understand the City's case and respond to its submissions is unfairly limited. This, according to the applicant, hampers the fairness of the inquiry.

[9] The applicant's submissions about the parts of the City's evidence they cannot see relate to the OIPC's *in camera* process. Section 56(2) of FIPPA permits the OIPC to conduct an inquiry in private and s. 56(4) gives the OIPC the discretion to decide whether a person is entitled "to have access to or comment on representations made to the commissioner by another person". These provisions allow the OIPC to receive inquiry material *in camera*, meaning only the OIPC may see it.

[10] When considering a party's request to submit material *in camera*, the OIPC balances a party's ability to fully present their case with the other party's

ability to know and respond to the materials being considered by the OIPC. The BC Supreme Court recently ruled that receiving *in camera* material in an OIPC inquiry is not procedurally unfair if the OIPC considers the negative impact on the other party's ability to meet the case against them and conducts this assessment from a fairness perspective.<sup>2</sup>

[11] In this inquiry, the OIPC permitted the City to submit some of the information in witnesses' affidavits on an *in camera* basis. I have considered the correspondence between the adjudicator and the City concerning the City's request to provide *in camera* material as well as the material provided *in camera* itself. There is nothing before me to suggest that the adjudicator failed to weigh the correct factors in making the decision to accept certain information on an *in camera* basis.

[12] What the applicant describes with respect to not being able to see the information in dispute is necessarily a part of every OIPC inquiry involving a request for review of a public body's decision to withhold information under FIPPA. For the applicant to have access to the information in dispute would defeat the purpose of the inquiry.

[13] Ultimately, in this case the issues in dispute are clearly set out in the notice of inquiry. Both parties provided detailed submissions and affidavit evidence addressing each of these issues. In my view, it is clear from the applicant's submissions that they were able to understand the issues and respond to the case presented by the City. For these reasons, I find that the applicant has been afforded a sufficient degree of procedural fairness.

### ***New Issue – s. 25(1)***

[14] The applicant raises s. 25(1) (disclosure in the public interest) in their inquiry submission. As s. 25(1) is not listed in the fact report or the notice of inquiry, it is a new issue. The notice of inquiry that the OIPC sent to the parties expressly states, "parties may not add new exceptions or issues without the OIPC's prior consent." The OIPC's *Written Instructions for Inquiries* contains a similar warning.<sup>3</sup>

[15] The applicant did not request the OIPC's consent to add s. 25(1) as an issue before submitting their inquiry submission. Previous OIPC orders have consistently held that new issues raised in a party's inquiry submission without the OIPC's prior authorization will not be considered, except in exceptional

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<sup>2</sup> *Cimolai v British Columbia (Information and Privacy Commissioner)*, 2024 BCSC 948 (CanLII) at paras 32, 34, and 36; *Instructions for Written Inquiries*, at pp 5-6, available at <https://www.oipc.bc.ca/documents/guidance-documents/1658>.

<sup>3</sup> <https://www.oipc.bc.ca/documents/guidance-documents/1658> at p 3.

circumstances.<sup>4</sup> There are good reasons for this practice. Most issues that come to the OIPC can be resolved or refined through the OIPC's investigation and mediation processes, without the need for a formal inquiry. When a new issue is added at the inquiry stage, the parties and the OIPC are denied the benefit of these early resolution procedures. In addition, considering a new issue raised during the inquiry often necessitates additional rounds of submissions. Collectively, these circumstances hinder the OIPC's ability to use the limited public resources afforded to it in a fair and efficient manner.

[16] The applicant does not explain why they did not request consent to add s. 25(1) prior to the inquiry or identify any exceptional circumstances which would warrant a departure from the OIPC's general practice in this case. In the circumstances, I decline to add s. 25(1) as an issue to this inquiry.

### **ISSUE IN DISPUTE**

[17] The issues in dispute in this inquiry are whether the City is authorized to refuse to disclose the information at issue under ss. 12(3)(b), 13(1), 14 and 15(1)(a) of FIPPA. Section 57(1) of FIPPA places the burden on the City to prove that the applicant has no right of access to the information withheld under these provisions.

### **BACKGROUND**

[18] The applicant participated in protests in City parks challenging measures imposed in response to the Covid-19 pandemic.<sup>5</sup> The applicant says that the City sought a court injunction to prohibit them from protesting in the City's downtown, which the City neither confirms nor denies.<sup>6</sup> The applicant's access request is for records related to the City's decision making process with respect to taking legal action taken against them.<sup>7</sup>

### **RECORDS IN DISPUTE**

[19] The City withheld information from three records totalling ten pages. Those records are meeting minutes from two City Council meetings held on July 25, 2022 and November 14, 2022 (Minutes) and a Report to City council also dated July 25, 2022 (Report). The City withheld most of the information from the records in dispute.

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<sup>4</sup> For orders where adjudicators came to similar conclusions regarding s. 25, see for example Order F16-30, 2016 BCIPC 33 (CanLII) at paras 12-14; Order F16-34, 2016 BCIPC 38 (CanLII) at paras 8-10; Order F18-07, 2018 BCIPC 9 (CanLII) at para 7; Order F19-47, 2019 BCIPC 53 (CanLII) at paras 7-10; and Order F24-86, 2024 BCIPC 98 (CanLII) at paras 6-9.

<sup>5</sup> Applicant's response at paras 11; Affidavit of the City's Bylaw Services Manager at para 5.

<sup>6</sup> Applicant's response at para 19.

<sup>7</sup> The applicant's access request is recorded in the fact report for this inquiry.

## SECTION 12(3)(B) – LOCAL PUBLIC BODY CONFIDENCES

[20] Section 12(3)(b) allows a local public body to refuse to disclose information that would reveal the substance of deliberations of a meeting of its elected officials or governing body if an Act or a regulation under FIPPA authorized holding that meeting in the absence of the public. The purpose of s. 12(3)(b) is to protect the full and frank exploration of all issues, despite how controversial they may be, by allowing a local public body's governing body to engage in certain discussions in the absence of the public.<sup>8</sup>

[21] Schedule 1 of FIPPA defines a "local public body" to include a "local government body". The definition of "local government body" under Schedule 1 of FIPPA includes a municipality. The City is a municipality. Therefore, the City is a "local public body" for the purposes of s. 12(3)(b).<sup>9</sup>

[22] Previous orders have held that three conditions must be met for a public body to withhold information under s. 12(3)(b):

1. the public body has statutory authority to meet in the absence of the public;
2. a meeting was actually held in the absence of the public; and
3. the information would, if disclosed, reveal the substance of deliberations of the meeting.<sup>10</sup>

### ***Statutory authority to meet in the absence of the public***

[23] The City relies on s. 90 of the *Community Charter*<sup>11</sup> as its statutory authority to meet in the absence of the public. The relevant parts of s. 90 are as follows:

90 (1) A part of a council meeting may be closed to the public if the subject matter being considered relates to or is one or more of the following:

(a) personal information about an identifiable individual who holds or is being considered for a position as an officer, employee or agent of the municipality or another position appointed by the municipality; ...

(g) litigation or potential litigation affecting the municipality; ...

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<sup>8</sup> See Order F11-04, 2011 BCIPC 4 at para 29 and Order 04-04, 2004 CanLII 34258 (BC IPC) at para 72.

<sup>9</sup> Order in Council 219/1905 (BC) at Letters Patent; *Interpretation Act*, RSBC 1996, c 238, at s. 29 sub verbo "municipality".

<sup>10</sup> Order F13-10, 2013 BCIPC 11 at para 8.

<sup>11</sup> SBC 2003, c 26.

(i) the receipt of advice that is subject to solicitor-client privilege, including communications necessary for that purpose; ...

(l) discussions with municipal officers and employees respecting municipal objectives, measures and progress reports for the purposes of preparing an annual report under section 98;

[24] In addition, s. 92 of the *Community Charter* sets out requirements that must be met before a meeting can be closed to the public:

92 Before holding a meeting or part of a meeting that is to be closed to the public, a council must state, by resolution passed in a public meeting,

(a) the fact that the meeting or part is to be closed, and

(b) the basis under the applicable subsection of section 90 on which the meeting or part is to be closed.

[25] The City relies on affidavit evidence from its City Clerk, copies of the Minutes and meeting minutes from two other City Council meetings that also took place on July 25 and November 14, 2022 (Other Minutes).<sup>12</sup> The City Clerk's evidence is that their responsibilities include ensuring that accurate minutes of City Council meetings are prepared, and that all four of the meeting minutes accurately reflect what was discussed at the meetings.

[26] All four of the meeting minutes indicate that on July 25, 2022 and November 14, 2022, City Council met in meetings open to the public and passed resolutions that the meetings be closed to the public under various subsections of s. 90(1) of the *Community Charter*.<sup>13</sup> I can also see that the matters recorded in the Minutes relate to the subsections of s. 90(1) which were cited as the reasons to close the meetings to the public. Based on this material, I am satisfied that the City had the statutory authority to meet in the absence of the public. Accordingly, the first criterion is met.

### ***Held in the absence of the public***

[27] The Minutes are labeled "closed" and they record that the meetings took place in the absence of the public. Further, the City Clerk attests that the Minutes are an accurate record of those meetings. I am satisfied that the meetings were held in the absence of the public. Accordingly, I find that the second criterion is met.

### ***Reveal the substance of deliberations of the meeting***

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<sup>12</sup> Copies of the minutes are attached to the affidavit of the City Clerk.

<sup>13</sup> City Council relied on ss. 90(1)(g) and (i) on July 25, 2022 and ss. 90(1)(a), (g), (i), and (l) on November 14, 2022.

[28] In the context of s. 12(3)(b), the phrase “substance of deliberations” covers the essential or material part of discussions conducted with a view to making a decision or following a course of action.<sup>14</sup> Past orders also describe the phrase as capturing “what was discussed or decided at the *in camera* meeting such as the different views and various possible courses of actions being expressed and suggested by the meeting attendees.”<sup>15</sup>

[29] Because s. 12(3)(b) only applies to what took place during a meeting,<sup>16</sup> it does not apply to background materials unless disclosing the background materials would allow someone to draw accurate inferences about what was discussed during the *in camera* meeting.<sup>17</sup> In past orders the OIPC has held that s. 12(3)(b) does not apply to background information that would reveal only the “basis of deliberations” such as “the material which stimulated the discussion.”<sup>18</sup> It has however, held that s. 12(3)(b) applies to background information that “provide[s] detailed background information and interpretation that are, in effect, a guide for the discussions between staff and Council members during the meeting.”<sup>19</sup> It has also held that s. 12(3)(b) applies to information that was “entirely and directly related to the matter before council for decision, and ... contain[ed] specific details directly tied to the recommendation.”<sup>20</sup>

#### *Parties’ submissions*

[30] The City submits that because the Minutes are an accurate record of what was substantively deliberated at the meetings, disclosing the withheld parts of the Minutes would disclose or allow accurate inferences about the substance of City Council’s deliberations at the closed meetings. The City Clerk deposes that the information withheld from the Minutes would reveal council’s deliberations about the legal matters discussed at the closed meeting.

[31] The City submits that the Report was integral to council’s debate about the recommendations made in the Report. Thus, according to the City, considering the Report independent of the information in the Minutes would fail to recognize the Report’s relevance to deliberations and frustrate the purpose of the statutory protection under s. 12(3)(b). The City Clerk confirms that City Council considered the Report at the July 25, 2022 closed meeting.

[32] Finally, the City explains that it withheld the names and job titles of certain attendees because this information could allow an assiduous reader to infer the

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<sup>14</sup> Order 00-11, 2000 CanLII 10554 (BC IPC) p 5.

<sup>15</sup> Order F24-03, 2024 BCIPC 4 (CanLII) at para 158.

<sup>16</sup> Order F11-04, 2011 BCIPC 4 at paras 29 and 35.

<sup>17</sup> Order F12-11, 2012 BCIPC 15 at para 14.

<sup>18</sup> Order No. 114-1996, <https://www.oipc.bc.ca/orders/295> at p 5.

<sup>19</sup> Order 03-22, 2003 CanLII 49200 (BC IPC) at para 15.

<sup>20</sup> Order F15-56, 2015 BCIPC 59 (CanLII) at para 39.

substance of deliberations of the Closed Meetings from the background and involvement of those individuals.

[33] The applicant submits that the City's application of s. 12(3)(b) is overly broad. They say that the term "deliberations", is limited to discussions and does not extend to decisions or protect all information considered by council during deliberations.

[34] The applicant also argues that the question is not whether the withheld information might allow accurate inferences to be drawn about deliberations, but rather whether the withheld portions are essential or material to the deliberations themselves. The applicant argues that the City has failed to meet this standard.

### *Findings and analysis*

[35] Based on my review of the records, I find that the City withheld the following information from the Minutes:

- motions;
- names of the councillors who made and seconded those motions;
- updates provided to City Council by meeting attendees;
- names and titles of meeting attendees; and
- headings.

I find the City withheld the following information from the Report:

- the name and title of the Report's author;
- the title of the Report; and
- a draft motion, detailed background information, and recommendations (collectively the "body" of the Report).

[36] I find that disclosing the motions and the names of the councillors who made and seconded those motions would reveal the substance of deliberations at the closed meetings.<sup>21</sup> In past orders, the OIPC has held that s. 12(3)(b) applies to the substantive content of motions<sup>22</sup> and to how council members voted.<sup>23</sup> I agree with and adopt this approach because I find that the motions

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<sup>21</sup> The motions and names of councilors are found on pages 1-5.

<sup>22</sup> Order 00-14, 2000 CanLII 10836 (BC IPC); Order 03-09, 2003 CanLII 49173 (BC IPC) at paras 23 and 24; Order 04-04, 2004 CanLII 34258 (BC IPC) at paras 80 and 81; Order F15-56, 2015 BCIPC 59 (CanLII) at para 40; F16-03, 2016 BCIPC 3 (CanLII) at para 13; Order F18-17, 2018 BCIPC 20 (CanLII) at para 46; Order F19-18, 2019 BCIPC 20 (CanLII) at para 31; Order F22-21, 2022 BCIPC 23 (CanLII) at para 35; Order F23-57, 2023 BCIPC 67 (CanLII) at para 43; and Order F25-40, 2025 BCIPC 48 at para 48.

<sup>23</sup> Order 00-11, 2000 CanLII 10554 (BC IPC) p 5; Order 00-14, 2000 CanLII 10836 (BC IPC); Order 02-22, 2002 CanLII 42447 (BC IPC); Order 02-47, 2002 CanLII 42481 (BC IPC); Order 00-49, F03-09, 2003 CanLII 49173 (BC IPC) at para 24; F12-11, 2012 BCIPC 15 (CanLII) at para 23;



reveal the material part of City Council's deliberative process at the closed meetings – namely what was deliberated on and who said what during those deliberations.

[37] I also find that some of the updates provided to City Council by meeting attendees would reveal the substance of deliberations.<sup>24</sup> This finding applies to each update that both clearly relates to discussions about a proposed course of action that took place at the closed meeting, and that is sufficiently detailed as to allow accurate inferences about the meeting participants' views or discussions about those matters.

[38] However, other updates are exclusively factual in nature and appear to be for the purpose of informing council members about City matters. There is insufficient evidence before me to establish that these updates relate in any way to discussions about a proposed decision or course of action that took place at the closed meeting. As noted above, s. 12(3)(b) protects deliberations conducted with a view to making a decision or following a course of action. It is not enough that something was simply said at a closed meeting. Consequently, I find that the balance of the information in the updates would not reveal the substance of deliberations.<sup>25</sup>

[39] I find that the name and title of two individuals who attended the closed meetings and the name and title of the author of the Report would reveal the substance of deliberations.<sup>26</sup> I make this finding in two circumstances. First, where the records clearly indicate that the individual's presence at the meeting would allow an assiduous reader to infer what was deliberated at that meeting. Second, where having regard to the circumstances surrounding this inquiry, I find that the applicant would be able to infer what the named individual said about matters that were deliberated on at the closed meetings.

[40] However, I am not persuaded that the balance of the withheld names and titles would reveal the substance of deliberations.<sup>27</sup> It is not clear from the records, and the City does not explain how disclosing the balance of the withheld names and titles would reveal anything more than the fact that a topic relevant to the individual or their work was discussed at the meeting. It is well-established

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F05-13; Order 48-1995, (upheld on judicial review in *Aquasource Ltd. v. British Columbia Freedom of Information and Protection of Privacy Commissioner*, 1998 CanLII 6444 (BC CA); and Order F15-20, 2015 BCIPC 22 at para 28.

<sup>24</sup> The updates from meeting attendees that would reveal the substance of deliberations are found on pages 1, 2 and 6 of the records.

<sup>25</sup> The updates from meeting attendees that would not reveal the substance of deliberations are found on pages 2, 5, and 6 of the records.

<sup>26</sup> The names and positions that would reveal the substance of deliberations are found on pages 1, 4, 7 and 10 of the records.

<sup>27</sup> The names and positions that would not reveal the substance of deliberations are found on pages 1 and 4 of the records.

that s. 12(3)(b) does not protect information that would reveal only the topic of deliberations,<sup>28</sup> and I find that this principle is applicable here.

[41] On the other hand, I find that title of the Report and some of the headings from the Minutes would reveal the substance of deliberations because they are sufficiently detailed that they reveal what was actually discussed at the closed meetings.<sup>29</sup> However, the balance of the headings in the Minutes are general in nature, and at most reveal the topic of deliberations in a general sense. I find that the balance of the headings would not reveal the substance of deliberations.<sup>30</sup>

[42] Finally, I find that the body of the Report would reveal the substance of deliberations.<sup>31</sup> The Report contains a motion, recommendations, and detailed background information required to understand the recommendations and make an informed decision about the motion. The Report was clearly prepared to guide council's deliberations about the subject of the Report. Furthermore, the July 25, 2022 Minutes indicates that the council considered the Report and deliberated on the recommendations contained in it.

### ***Discretion***

[43] Section 12(3)(b) is a discretionary exception to access under FIPPA. Past orders establish that when considering discretionary exceptions to disclosure, a public body must "exercise that discretion in deciding whether to refuse access to information, and upon proper considerations."<sup>32</sup> Past orders also establish that a public body must "establish that [it has] considered, in all the circumstances, whether information should be released even though it is technically covered by the discretionary exception."<sup>33</sup>

[44] If the City has failed to exercise its discretion, I can require it to do so. I can also order the City to reconsider the exercise of discretion if its decision to withhold information was made in bad faith or for an improper purpose, if the decision took into account irrelevant considerations, or if the decision failed to

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<sup>28</sup> See for example Order F15-20, 2015 BCIPC 22 at para 28; Order F05-13, 2005 CanLII 11964 (BC IPC); Order 00-49, 2000 CanLII 14414 (BC IPC) para 42; Order 00-14, 2000 CanLII 10836 (BC IPC) at para 21.

<sup>29</sup> Order F15-20, 2015 BCIPC 22 at para 28.

<sup>29</sup> The headings that would reveal the substance of deliberations are found on pages 1, 4, 5 and 7 of the records.

<sup>30</sup> The headings that would not reveal the substance of deliberations are found on pages 2, 5 and 6.

<sup>31</sup> The substance of the Report is found on pages 7 – 10 of the records.

<sup>32</sup> Order 02-50, 2002 CanLII 42486 (BC IPC) at para 144 and the cases citing it. For recent examples see Order F24-73, 2024 BCIPC 83 (CanLII) at para 187 and Order F24-88, 2024 BCIPC 100 (CanLII) at para 97.

<sup>33</sup> Order No 325-1999, October 12, 1999, [1999] BCIPCD No 38 at page 4 and the cases citing it. For recent examples see Order F24-73, 2024 BCIPC 83 (CanLII) at para 187 and Order F24-88, 2024 BCIPC 100 (CanLII) at para 97.

take into account relevant considerations.<sup>34</sup> I cannot, however, substitute my own decision for that of the City.

[45] The City Clerk deposes that in deciding what information to withhold under s. 12(3)(b), the City exercised its discretion and in doing so considered all and only relevant factors, in good faith. The City Clerk states that these considerations include the relevant recency of the records, the City's past practice of withholding similar information from similar records, and the nature of the records, including that they contain information about ongoing litigation.

[46] The applicant submits that the City's reliance on its past practices is inconsistent with its obligation to exercise discretion because discretionary decisions must be case-specific and not applied mechanically based on past conduct. They also argue that the City's reliance on the age of the records is improper because it suggests the City is only disclosing older records that no longer threaten the City's interests or impact its accountability to the public. With respect to ongoing litigation, the applicant says that the City has failed to provide evidence to establish that all of the information in dispute relates to ongoing litigation.

[47] I am not persuaded by the applicant's submissions. The considerations the City Clerk identifies in their affidavit are the very kinds of considerations the OIPC has identified as relevant to the exercise of a public body's discretion to withhold information in past orders.<sup>35</sup> Past practice is an appropriate consideration because consistency across a public body's responses to similar access requests is, in general, to be preferred. There is no evidence to support the applicant's suggestion that by considering past practice, the City made its decision in an automatic or mechanical way.

[48] The age of the record<sup>36</sup> and the extent to which the document is sensitive to the City are also relevant considerations, as are the interests that s. 12(3)(b) is intended to protect. Those interests include the City's ability to engage in full and frank exploration of all issues in the absence of the public despite how controversial they may be. For these reasons, even if the applicant is correct that the City is more likely to withhold information that might threaten its interests if it considers the age of the records, I do not see anything impermissible about that approach.

[49] Finally, I can see that some of the information in dispute relates to legal matters, and the City Clerk states in their affidavit that some of it relates to

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<sup>34</sup> Order F23-51, 2023 BCIPC 59 at para 142, citing *John Doe v Ontario (Finance)*, 2014 SCC 36 at para 52 and Order 02-38, 2002 CanLII 42472 (BC IPC) at para 147.

<sup>35</sup> See Order 02-38, 2002 CanLII 42472 at para 149 and Order F08-03, 2008 CanLII 57363 (BC IPC) at para 38.

<sup>36</sup> In this case, the records are dated July 25 and November 14, 2022.

ongoing City litigation. A connection between the information and litigation can certainly affect the sensitivity of the information. I find that the City's consideration of the connection between the information in dispute and litigation is relevant. I do not share the applicant's concern that the City failed to specify that this consideration did not apply to every piece of information it withheld.

[50] Relying on the evidence of the City Clerk, and for the reasons given above, I find that the City properly exercised its discretion under s. 12(3)(b).

### **Conclusion – Section 12(3)(b)**

[51] In summary, I find the City is authorized to withhold the following information under s. 12(3)(b):

- all the information withheld from the Report;
- all the motions and names of the councillors who made and seconded those motions withheld from the Minutes;
- some of the updates provided by meeting attendees;
- some of the names and titles of attendees; and
- some headings in the Minutes.

## **SECTION 14 - SOLICITOR-CLIENT PRIVILEGE**

[52] The City applied s. 14 to the same information that it withheld under s. 12(3)(b). Where I found that s. 12(3)(b) applies, it is not necessary for me to also consider whether s. 14 applies. Given my findings above, the only information that remains in dispute under s. 14 is the content of two updates provided to City Council by a City employee who attended the closed meetings. This information is found in the Minutes.<sup>37</sup>

[53] The term "solicitor-client privilege" under s. 14 encompasses both legal advice privilege and litigation privilege.<sup>38</sup> While the City asserts that both apply, its submissions about litigation privilege appear to relate exclusively to the Report which is no longer in issue under s. 14 because I have already decided the City is authorized to withhold it under s. 12(3)(b).

### **Legal advice privilege**

[54] Legal advice privilege protects confidential communications between a solicitor and client made for the purpose of seeking or providing legal advice, opinion, or analysis.<sup>39</sup> For information to be protected by legal advice privilege it must be:

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<sup>37</sup> This information is found on pages 2 and 5 of the records.

<sup>38</sup> Order P06-01, 2006 CanLII 13537 at para 53.

<sup>39</sup> *Solosky v The Queen*, 1979 CanLII 9 (SCC) [*Solosky*] at p 13.

1. a communication between solicitor and client (or their agent),
2. that is intended by the solicitor and client to be confidential, and
3. that entails the seeking or providing of legal advice.<sup>40</sup>

While not every communication between solicitor and client is protected by legal advice privilege, if the conditions set out above are satisfied, then legal advice privilege applies.<sup>41</sup>

[55] However, legal advice privilege is not limited to records that communicate or proffer legal advice. It also extends to information that does not satisfy the test set out above, where disclosure of the information would reveal or allow an accurate inference to be made about privileged communications. For example, legal advice privilege extends to internal client communications that discuss legal advice and its implications.<sup>42</sup>

#### *Parties' submissions*

[56] The City submits that legal advice privilege applies to the updates because disclosing that information would reveal legal advice sought and received by the City. The City relies on the evidence of the City Clerk who states that a purpose of both closed meetings was for Council to consider updates about ongoing City litigation,<sup>43</sup> and that revealing the information at issue would disclose information about Council's deliberations over several ongoing legal matters.<sup>44</sup>

[57] The applicant submits that the City failed to provide adequate evidence to substantiate its assertion of legal advice privilege, and that the City should not be permitted to rely on unsubstantiated assertions. More specifically, the applicant states that the City failed to identify either the solicitor or the client involved in the communications over which it asserts privilege. In this regard, the applicant submits that because the presence of third parties in communications between solicitor and client defeats the necessary requirement of confidentiality, it is essential for a party claiming privilege to identify the individuals involved in the communications. Furthermore, emphasizing that the mere involvement of a lawyer does not automatically render communications privileged, the applicant says the City provided no evidence to demonstrate that the withheld information

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<sup>40</sup> *Ibid.*

<sup>41</sup> *R. v B.*, 1995 CanLII 2007 (BC SC) at para 22; *Solosky*, *ibid* at p 13; *R. v McClure*, 2001 SCC 14 [McClure] at para 36, *Festing v Canada (Attorney General)*, 2001 BCCA 612 at para 92.

<sup>42</sup> *Solosky* *supra* note 45 at para 12 citing *Mutual Life Assurance Co. of Canada v Canada (Deputy Attorney General)* [1988] OJ No. 1090 (Ont. SCJ). See also Order F22-34, 2022 BCIPC 38 (CanLII), at para 41, Order F22-53, 2022 BCIPC 60 (CanLII), at para 13, and Order F23-07, 2023 BCIPC 8 (CanLII), at para 25.

<sup>43</sup> Affidavit of City Clerk at paras 16 and 21.

<sup>44</sup> Affidavit of City Clerk at paras 18 and 23.

consists of legal advice or that it was communicated in the context of a solicitor-client relationship.

[58] In reply, the City asserts that the evidentiary concerns raised by the applicant pertain to information that is itself subject to s. 14. I understand the City to mean that the applicant's concerns are not relevant here because the information at issue is not itself privileged but is instead internal client communications that reveal privileged communications.

### *Findings and analysis*

[59] The City provided the information it withheld under s. 14 for my review. In arriving at the findings below, I have considered the records, the City Clerk's evidence, and the parties' submissions.

[60] The information in dispute is two updates provided to City Council by a City employee who attended the closed meetings. The individual is identified by name and job title in the Minutes. Their job title does not suggest that they are a lawyer, and the City does not assert that this is the case. Accordingly, I find that the individual who provided the updates is not a lawyer.

[61] As the individual is a non-lawyer and a City employee,<sup>45</sup> I find that there is no solicitor-client relationship between the City and the individual who provided the updates to the City. As a result, I find that the updates are not themselves privileged lawyer-client communications. Therefore, as the City suggests, the question is whether disclosing the updates would reveal privileged communications.

[62] I now turn to the parties' dispute about whether the City is required to establish the three requirements of legal advice privilege in this circumstance.

[63] Respectfully, I do not agree with the City's position. While the City is not required to establish that the updates themselves satisfy the test for legal advice privilege, a party seeking to rely on legal advice privilege to protect information that would reveal a privileged communication, must first establish that the communications they are seeking to protect exist and are in fact privileged. For the reasons below, I find that the City has failed to do so.

[64] The information at issue is short factual updates about various legal matters. I accept the City Clerk's evidence that the updates concern ongoing City litigation. However, the City does not identify a lawyer or even say that the City

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<sup>45</sup> I make this distinction not to suggest that a City employee could not be in a solicitor-client relationship with the City, but rather to distinguish the circumstances before me from those where a non-lawyer employee of a law firm communicates with a lawyer's client, which can attract legal advice privilege.

was represented by legal counsel with respect to the legal matters at issue. It also does not say that disclosing these updates would reveal communications that took place between the City and a lawyer, nor does the City suggest that the information even relates to communications between a lawyer and a client. Finally, the City does not suggest that any such communications, if they took place, were confidential.

[65] More simply, the City has not established that any communications that satisfy the requirements for legal advice privilege ever took place. As a result, I find that the City's position that disclosing the updates would reveal privileged communications is, as the applicant suggests, unsubstantiated.

[66] Legal advice privilege protects privileged communications. It does not apply simply because the information at issue relates to legal matters or proceedings. It is not enough for the City to assert that the information relates to ongoing City litigation or that disclosing the information would reveal the City's internal discussions about legal matters. To establish legal advice privilege, the City must establish that disclosing the information in dispute would reveal privileged information, and I find that the City has failed to do so. Accordingly, I find that legal advice privilege does not apply to the two updates that I considered under s. 14.

### ***Litigation privilege***

[67] It does not appear to me that the City is seeking to rely on litigation privilege with respect to the updates. As noted above, its arguments about litigation privilege relate primarily to the Report. However, in case I am mistaken I will briefly explain why litigation privilege does not apply to the updates.

[68] Litigation privilege protects a party's ability to effectively conduct litigation. Its purpose is to ensure the efficacy of the adversarial process.<sup>46</sup> Once the litigation ends, so does the privilege, unless related litigation is ongoing or reasonably apprehended.<sup>47</sup>

[69] To succeed in a claim of litigation privilege the party invoking it must establish that:

1. Litigation was ongoing or was in reasonable prospect at the time the document was created; and

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<sup>46</sup> *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para 27.

<sup>47</sup> *Ibid* at paras 34 – 39.

2. The dominant purpose of creating the document was to prepare or aid in the conduct of that litigation.<sup>48</sup>

[70] I find that the application of litigation privilege can be resolved based on the second requirement. The updates at issue are found in the Minutes which are a record of resolutions and what was said at two City Council meetings. The City does not assert that the dominant purpose for which the Minutes were created was to prepare for or aid in the conduct of litigation. Nothing in the content of the Minutes themselves, the surrounding circumstances, or the nature of municipal council meeting minutes in general suggests that this is the case.

[71] I am not persuaded that the dominant purpose for which the Minutes were created was to prepare or aid in the conduct of that litigation. As both requirements must be met for litigation privilege to apply, I find that the City has not established that litigation privilege applies to the two updates that I considered under s. 14.

### **Conclusion – s. 14**

[72] I find that the City is not authorized under s. 14 to withhold any of the information that remains in dispute because none of that information is subject to solicitor-client privilege.

### **REMAINING EXCEPTIONS – SS. 13(1) AND 15(1)(A)**

[73] Section 13(1) allows a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body. Section 15(1)(a) allows a public body to refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm a law enforcement matter.

[74] The City applied ss. 13(1) and 15(1)(a) to the same information that I found it is authorized to withhold under s. 12(3)(b). As a result, it is not necessary for me to consider whether ss. 13(1) and 15(1)(a) also apply to this information. Accordingly, I will not consider ss. 13(1) or 15(1)(a).

### **CONCLUSION**

[75] For the reasons given above, I make the following order under s. 58 of FIPPA:

1. Subject to item 2 below, I confirm the City's decision to withhold information under s. 12(3)(b).

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<sup>48</sup> *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2014 BCCA 259 (CanLII) at para 32, and *Raj v Khosravi*, 2015 BCCA at paras 12 and 20.



2. The City is not authorized under ss. 12(3)(b), 13(1), 14, or 15(1)(a) to refuse access to the information highlighted in yellow in a copy of the records that will be provided to the City with this order. That information is found on pages 1, 2, 4, 5, and 6 of the records.
3. I require the City to give the applicant access to the information described in item 2, above.
4. I require the City to provide the OIPC registrar of inquiries with a copy of its correspondence to the applicant and the accompanying information sent in compliance with item 3, above.

[76] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by September 11, 2025.

July 29, 2025

**ORIGINAL SIGNED BY**

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Allison J. Shamas

OIPC File No.: F23-92890