Order 00-49

INQUIRY REGARDING CITY OF NEW WESTMINSTER RECORDS

David Loukidelis, Information and Privacy Commissioner
November 8, 2000

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Summary: Applicant entitled to access to some records over which City claimed solicitor client privilege, but not others. City provided no evidence to support counsel's assertion that solicitor client privilege applied to certain records. Absent supporting evidence, certain records did not themselves support City's assertions. City entitled to withhold some records under s. 12(3)(b), but not others. City found not to have performed its duty under s. 6 (1) and required to search again for records.

Key Words: search for records - every reasonable effort - *in camera* meeting - substance of deliberations - solicitor client privilege.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 2(1), 12(3)(b), 14; *Interpretation Act*, s. 8.

Authorities Considered: B.C.: Order 00-08; Order 00-14; Order 00-15; Order 00-32; Order 00-39, Order No. 48-1995, Order No. 81-1996; Order No. 182-1997; Order No. 326-1999.

Cases Considered: *B.* v. *Canada*, [1995] 5 W.W.R. 374 (B.C.S.C.); *Buttes Gas & Oil Co.* v. *Hammer*, [1980] All E.R. 475 (Q.B.); *Aquasource Ltd.* v. *British Columbia (Information and Privacy Commissioner)* (1998), 8 Admin. L.R. 236.

1.0 INTRODUCTION

This case is connected with construction, by an entity referred to as the Rapid Transit Project 2000 Ltd. ("RTP"), of extensions to the elevated Skytrain rapid transit system in the Vancouver area. The applicant is a principal of a company that has operated a float-plane

business in the City of New Westminster ("City") and also a principal of other companies involved in the operation of that business. The business has operated from a location on the edge of the Fraser River, adjacent to part of the Skytrain extension. It appears the business is located on land owned by the City and occupied by one of the applicant's companies or sub-tenants under some form of tenure granted by the City. It seems that adjacent construction of the Skytrain extension may have resulted in trespass by Skytrain construction contractors onto the float-plane property. This led to dealings between the applicant, the float-plane companies, the City and the entity responsible for construction of the Skytrain extension. As a result, various letters, memorandums and other documents were created. Some of them were written by City staff, some were written by representatives of the applicant's companies and some were created by lawyers for various parties (including the Skytrain project).

By a letter dated November 16, 1999, the applicant wrote to the City and sought access, under the *Freedom of Information and Protection of Privacy Act* ("Act"), to

> ... any and all information in the custody and control of the City of New Westminster relating to Skytrain, SAR Transit, RTP 2000, and negotiations with the City of New Westminster that relate in any way to [the applicant's companies, the applicant, the applicant's sub-tenant, and another named individual] including negotiations, meetings, discussions, site meetings, etc., and the "Notice to Proceed" and the "Memorandum of Understanding" between New Westminster and Skytrain relating specifically to [the site of the applicant's company] and lands immediately adjacent both south and north of [this site].

The letter specified that the request included, but was not limited to,

> ... memos, correspondence, field notes, personal diary notes, telephone calls and e-mails, and specifically all information on "In Camera" meetings, and specifically the In Camera meeting of November 8, 1999.

The City responded on January 17, 2000; it withheld a number of records in their entirety and disclosed portions of other records. In withholding information, or entire records, the City relied on ss. 12(3)(b) and 14 of the Act. This decision prompted the applicant to, by a letter dated January 25, 2000, request a review under s. 52 of the Act. Because the matter did not settle in mediation, I held a written inquiry under s. 56 of the Act.

2.0 ISSUES

The issues to be addressed in this inquiry are as follows:

1. In searching for records in response to the applicant's request, did the City perform its duty under s. 6(1) of the Act to make every reasonable effort to assist the applicant and to respond openly, accurately and completely?
2. Was the City authorized to withhold information under s. 12(3)(b) of the Act?
3. Was the City authorized to withhold information under s. 14 of the Act?

Under s. 57(1) of the Act, the City has the burden of proof respecting both the s. 12(3)(b) and s. 14 issues. Previous decisions have established that the City also has the burden of proof on the s. 6(1) issue.

3.0 DISCUSSION

3.1 The City's Search For Records - Section 6(1) of the Act requires the City, in responding to an access request, to "make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely." The applicant alleges the City failed to discharge this duty because it did not disclose all records relevant to the access request. The principles applicable to this question, and the standards imposed by s. 6(1) on a public body in searching for records, have already been dealt with extensively in Order 00-15 and Order 00-32. I refer to Order 00-15 briefly below.

In his initial submission, the applicant says he visited the City's municipal hall in February of this year, to see if further records could be obtained. At paragraph 4 of his initial submission, the applicant says that he encountered a public display, in front of the engineering counter in the City Hall foyer, which showed renderings of the Skytrain route in front of the subject property. He says that, when he asked for copies of this information, a City employee behind the engineering counter retrieved a two-ringed clipboard "which held a pile of documents approximately four inches thick" and provided the applicant with photocopies of the plans he indicated. The applicant says the existence of these documents held by the City's Engineering Department has given him reason to believe that the City has failed to respond completely to his request.

The City's s. 6(1) arguments, found at p. 6 of its initial submission, are as follows:

> The City submits that it has complied fully with its duty under Section 6 of the Act and has made every effort to respond to the applicant openly, accurately and completely. City officials have advised us that upon receipt of the Applicant's request for information a search was conducted of all relevant City files for any documentation relating to the Applicant's request. The review of City files included a review of the City's files relating to 'Sky Train'.

No affidavit evidence from any of the unidentified "City officials" was provided nor was a description of the search conducted by the City provided. The City tells me that "relevant City files" were searched but fails to identify which files were relevant, and how it made this determination. As I said in Order 00-15:

> a public body should, in an inquiry such as this, candidly describe all potential sources of records and its reasons for any decision not to explore any of them. It should also describe, in reasonable detail, the efforts it actually took to search for records, including by describing the various sources that it checked, by giving details as to how the search was conducted (e.g., whether e-mail requests were sent to public body staff who might have responsive records and whether the person responsible for processing the request actually conducted the search herself or himself), and by indicating how much time staff expended in the search. This is consistent, I note in passing, with views expressed in the Policy and Procedures Manual issued by the Information, Science and Technology Agency of the Ministry of Advanced Education, Training and Technology, for use by public bodies.

I am unable to give any particular weight to counsel's factual assertions. Nor can any real weight be placed on the applicant's factual assertions on the s. 6(1) issue. The "four inches" of documents he viewed may well relate to the Skytrain route but not to the applicant's more specific request for records relating to negotiations with the City of New Westminster that relate to the applicant, his companies and other named individuals and companies.

Previous orders have placed the burden of proof on the City on this point. The Notice of Written Inquiry issued to the parties by this Office, on May 9, 2000, explicitly noted this and no objection was taken. I find against the City on the basis that it has failed to provide

any evidence to prove that it has met its s. 6(1) obligations here. This finding is also based on my review of the records identified by the City as being responsive and on the breadth of the access request. The identified records speak to fairly extensive dealings, among several parties, regarding issues (and persons) mentioned in the applicant's request. It is reasonable to conclude - absent evidence from the City on the issue - that further responsive records may exist in the City's custody or under its control.

3.2 Does Solicitor Client Privilege Apply? - Under s. 14 of the Act, the City is entitled to withhold information that is "subject to solicitor client privilege." The City has relied on s. 14 to withhold thirteen records in whole or in part. As I indicated above, some of the records establish, on their own, that they are protected by s. 14. In other cases, however, the City has failed to make its case under s. 14.

Before turning to the records, I will deal with the City's contention that s. 14 should be interpreted "broadly". The City acknowledges, at p. 2 of its initial submission, that various court decisions confirm that s. 14 incorporates the "common law concept of solicitor client privilege". Yet it argues, at p. 5, that s. 14 should be given a "broad interpretation". There is no mandate under the Act, or any other statute, to give s. 14 a "broad interpretation". The common law principles of solicitor client privilege are the sole touchstone for deciding whether s. 14 applies.

Summary of Applicable Principles

A communication may be privileged for the purposes of s. 14 in either of two ways recognized at common law. It will be privileged if it is a confidential communication between a lawyer and her client related to the seeking or giving of legal advice to the client. For the elements of this privilege - sometimes referred to as legal professional privilege - see *B.* v. *Canada,* [1995] 5 W.W.R. 374 (B.C.S.C.), cited in Order 00-08.

A communication also will be privileged if it was prepared for the dominant purpose of advising on or conducting litigation under way or in reasonable prospect at the time the communication came into existence. This is often called litigation privilege. See Order 00-08 and the authorities cited there.

Which Records Are Privileged?

The City has relied on s. 14 to withhold correspondence, excerpts from minutes of *in camera* meetings and two memorandums from its Director of Engineering to City Council. It has also severed one line of information from a third memorandum under s. 14. I will deal with each type of record in turn.

Correspondence - The letter from the City to its lawyer, dated December 23, 1999 (page 1), and the letter from the City's lawyer to the City, dated December 3, 1999 (page 2a), are protected by s. 14. They are clearly confidential communications between solicitor and client for the purpose of seeking or giving legal advice. These records are, on their own, sufficient to establish privilege, without any other evidence to support that claim.

Similarly, the October 19, 1999 e-mail (page 65) from the City's Assistant Director of

Engineering to the City's lawyer and City officials is privileged under s. 14. The e-mail is a confidential communication between solicitor and client relating to the seeking or giving of legal advice.

The City also relied on s. 14 to withhold a letter from the City's lawyer to the RTP's lawyers, dated November 9, 1999 (page 7), and an October 28, 1999 letter from the City's Director of Engineering to the RTP (page 38).

As regards the November 9 letter, the City argues that s. 14 applies on the basis that the letter's contents "are the direct result of (*i.e.*, the expression of) confidential communications between the City and its solicitor and relates to [*sic*] possible litigation by the Applicant". The City says it has not waived any privilege over "the confidential communications contained in the letter because the disclosure was made to a party having a common interest with the City". The City cites the English decision of *Buttes Gas & Oil Co.* v. *Hammer*, [1980] All E.R. 475 (Q.B.).

The City says the October 28, 1999 letter was sent "on the recommendation of the City's legal advisors who provided the author of the letter with legal advice regarding its content". The City goes on to make the following argument in support of its s. 14 claim (at p. 4 of its initial submission):

> The letter is, in our view, therefore privileged from disclosure on the basis of solicitor client privilege. The letter is an expression of the confidential communications between the public body and its legal advisors in contemplation of possible litigation. As discussed in relation to Page 7, that privilege has not been waived or lost by the City through disclosure to a party having a community interest with the City in relation to the possible litigation by the Applicant.

The City has not provided me with any evidence to substantiate its assertion that the letters are the "direct result of" - or that they express - confidential communications between the City and its lawyer. Neither letter is a confidential communication between lawyer and client. Each letter is a communication from the client (or its lawyer) to a third party (or the third party's lawyer). They are not, in my view, privileged communications between solicitor and client. This conclusion is not affected by any supposed "community of interest", between the City and the RTP, along the lines of *Buttes Gas & Oil*.

The decision in *Buttes Gas & Oil* does not assist the City. A supposed "community of interest" does not convert a communication with a third party into a solicitor-client communication. In any case, it is clear from the records before me - as well as the City's own submissions - that the RTP and the City hardly had a "community of interest". To the contrary, the City wrote to the RTP to put it on notice that the RTP's alleged trespass on lands occupied by the float-plane business had exposed the City to possible liability, for which the City expressed its intention to hold the RTP responsible. Far from having a community of interest, the City and the RTP were opposed in interest. Accordingly, even if s. 14 applied to the content of these records - which it does not - any privilege may have been lost when the City communicated the contents to the RTP.

The City also has not provided me with any evidence to support counsel's assertion that the communications related to "possible litigation", by the applicant or anyone else. No

particulars are given to substantiate that claim by counsel. The records, and other material before me, do not lay a sufficient evidentiary foundation for me to find that litigation privilege applies to these letters.

Although I would have found that neither letter is excepted from disclosure by s. 14, the applicant says in paragraph 9 of his initial submission that he is no longer interested in receiving a copy of the November 9, 1999 letter. For this reason, I make no finding respecting that letter. I find, however, that the October 28, 1999 letter is not excepted from disclosure by s. 14.

Excerpts from Minutes of *In Camera* Meetings - The City has also applied s. 14 to excerpts from minutes of *in camera* meetings of City Council and one committee of City Council. The City argues that s. 14 applies because the City's solicitor attended these meetings and the minutes disclose legal advice provided by the solicitor. A lawyer's attendance at a meeting does not necessarily attract privilege over minutes taken at that meeting. I agree, however, that the *excerpts* of minutes in issue here disclose legal advice provided by the lawyer. Solicitor client privilege applies to the excerpts from minutes of meetings held on October 25, 1999 (page 54), November 1, 1999 (page 28), November 8, 1999 (page 9), and November 15, 1999 (page 2b). I am satisfied they are privileged because they set out legal advice given by the City's lawyer, who attended that *in camera* meeting and gave the recorded advice.

I do not agree, however, with the City's application of s. 14 to page 73 of the records. That page is an excerpt from an *in camera* meeting of the Budget and Strategic Issues Committee of City Council, held on October 18 1999. The City says this record was "withheld in its entirety on the basis of s. 12(3)(b) and s. 14 of the Act", but does not elaborate further. It is not clear if s. 14 is claimed on the basis of legal professional privilege or litigation privilege. The City has not provided me with any evidence to substantiate its claim that one branch of privilege or the other applies. It is not apparent on the face of the record that it contains information subject to either kind of privilege and the other material before me does not support any such conclusion. I find that s. 14 does not apply to this page.

Memorandums - The City says that an October 25, 1999 memorandum from its Director of Engineering to City Council (comprising pages 55 and 56) is privileged because it was "prepared in close consultation with the City's solicitor in response to a potential claim in trespass and breach of contract alleged by the applicant against the City". It says the memorandum "reveals the details of confidential communications between the public body and its legal advisors" that were developed "in contemplation of potential litigation and should be protected by solicitor client privilege".

Some of the disputed records refer to the applicant having claimed that the RTP trespassed on the City land that was occupied by the float-plane business. They refer, in passing and not in any detail at all, to the applicant's having alleged damage due to a trespass by RTP and to the applicant's expectation of compensation. Some of the records also allude to the applicant's having put the RTP on notice that the applicant (or its affiliates) had suffered damages and expected compensation. No dates are given, though it is reasonable to

conclude these events occurred before some or all of the disputed records were created. Is this sufficient - in the absence of any better evidence from the City - for me to conclude that litigation was in reasonable prospect, or underway, at the time the October 25, 1999 memorandum was created? Is it an adequate basis for me to conclude that the dominant purpose of the memorandum was to assist or conduct any litigation anticipated or existing at the time it was created?

An assertion that someone has a right to compensation, or to damages, does not necessarily compel the conclusion that either element of the litigation privilege rule has been satisfied. It is not my job to sift through records in order to make a public body's case under s. 14 (or any other section). While I readily acknowledge that our legal system places great importance on solicitor client privilege, s. 57(1) of the Act unequivocally places the burden on a public body to establish that s. 14 applies. The rules of natural justice also require me not to enter the fray, as it were, and make a party's case for it.

Here, the City's case on all issues rests entirely on its initial submission and on the disputed records themselves. (The City chose not to make a reply submission.) The City provided no affidavit evidence to support factual assertions made by counsel in its initial submission. Disputed records may themselves be probative of facts material to an inquiry. In other cases, however, the records will not suffice to shift a public body's burden of proof.

In Order 00-39, I made the following comments, at p. 4:

> Although the evidentiary rules and standards which would apply in a court need not be adopted for inquiries under the Act, I am not inclined to accept as evidence the assertions of the GVRD's counsel about contested, material facts. It is reasonable and fair to expect more direct evidentiary sources to discharge a public body's burden of proof to establish the applicability of exceptions under the Act.

As was the case in Order 00-39, I am not inclined to accept, as evidence probative of material facts, assertions made by counsel where the records themselves do not support those factual assertions. Some of the records before me are sufficient, taken alone, to establish facts material to the City's reliance on s. 14 (and on s. 12(3)(b), as discussed below). In the case of other records, however, the City's decision not to support its case with evidence is fatal to its case. The burden of proof stipulated by the Legislature in s. 57 clearly rests on the City. Where material facts asserted in the City's submissions are not evident from the records themselves, I find the City has failed to establish those facts.

Returning to the October 25, 1999 memorandum from the City's Director of Engineering to City Council (comprising pages 55-56), I find the City has failed to establish that either litigation privilege or legal professional privilege applies to that record.

As regards the October 18, 1999 memorandum from the City's Director of Engineering to the Budget Services and Strategic Issues Committee of City Council (pages 74-76), the City says (at p. 5 of its initial submission) that s. 14 applies for the following reasons:

> This record was withheld in its entirety on the basis of s. 12(3)(b) and s. 14 of the Act. The City reiterates its position, stated earlier, as to the broad interpretation which should be given to Sections 12(3)(b) and 14 of the Act. The subject memorandum is a report to council and essentially establishes the issues and the surrounding facts and circumstances to be deliberated by council at the closed meeting. The memorandum therefore contains confidential information which would reveal the substance of those confidential deliberations.

Whether the information contained in the memorandum is known to the Applicant or not is a matter of speculation. The contents of the memorandum should therefore be exempt from disclosure under Section 12(3)(b). In addition, to the extent that the information in the memorandum is a reflection of privileged communications and consultations between the City and its legal advisors regarding a matter of potential liability and possible litigation affecting the City, the memorandum should also be exempted from disclosure on the basis of solicitor client privilege.

The assertion that, "*to the extent* that the information in the memorandum is a *reflection* of privileged communications and consultations", the record should be subject to s. 14 is not a sufficient basis for me to find that s. 14 applies to this record as a whole (emphasis added). The record itself does not support the conclusion that it is privileged. The other material before me does not support such a conclusion. I find this record is not protected by s. 14.

The City initially withheld two letters that were attached to the October 18, 1999 memorandum. It relied on ss. 12(3)(b) and 14. The first, dated August 6, 1999 (page 77), was sent to the applicant's company through his lawyers. The other, dated October 7, 1999 (page 78), was sent directly to the applicant. Although the City now concedes these letters "should be disclosed", there is no evidence before me that the City has done this. They are not, in any case, covered by s. 14 and the City must disclose them.

The last document to which the City applied s. 14 to is a two-page memorandum to file dated October 29, 1999 (pages 34 and 35). The City severed one line from page 35 under s. 14. Neither party referred to this page in its submissions. I find that the record, on its own, is not sufficient to establish privilege for the purposes of s. 14. As the City has the burden of proof on s. 14, I find that the City has failed to establish that solicitor client privilege applies to this sentence and it must be disclosed.

3.3 Substance of *In Camera* Deliberations - In addition to s. 14, the City has also applied s. 12(3)(b) to the excerpts from minutes of *in camera* meetings and to the Director of Engineering's memorandums presented at those meetings. As is noted above, the City argues that s. 12(3)(b) of the Act should be given a "broad" interpretation, in order to protect the deliberative *in camera* processes of the City's council. Section 12(3)(b) authorizes the City to refuse to disclose information that would reveal

the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public.

Excerpts From Minutes of *In Camera* Meetings - As I noted earlier, the City's decision not to provide me with any evidence to support its case is problematic as regards some records. In Order No. 326-1999, I expressed concern about the fact that the municipality had not established, on the evidence before me, whether council meetings took place and whether they were actually held *in camera*. In this case, however, the records establish, on their face, that they are records of proceedings at *in camera* meetings of Council committees. I have already found that excerpts from minutes of *in camera* meetings held on October 25 and November 1, 8 and 15, 1999 are privileged under s. 14, so it is not necessary to consider s. 12(3)(b). If it were necessary to do so, however, I would find that s. 12(3)(b) applies to parts of those excerpts.

Because I have found that s. 14 does not apply to the excerpt of the *in camera* meeting held on October 18, 1999 (page 73), it is necessary to consider whether s. 12(3)(b) applies to it.

As I noted in Order 00-14, s. 12(3)(b) does not authorize a public body to refuse to disclose *in camera* meeting minutes in their entirety. It only applies to the "substance of deliberations" of an *in camera* meeting. Although disclosure of parts of the excerpt of minutes here would reveal the "substance of deliberations", other parts such as the subject line, the date and the first line of the minutes would not, in this case, disclose the substance of deliberations. (I do not exclude the possibility that other cases may differ on these points.) I find, therefore, that s. 12 (3)(b) applies to only part of the October 18, 1999 excerpt.

Memorandums to Council From Director of Engineering - The other two records in issue are memorandums from the City's Director of Engineering. The first, dated October 18, 1999, is addressed to the Budget Services and Strategic Issues Committee of Council (pages 74-76 of the records). The second, dated October 25, 1999, is addressed to the Mayor and Council (pages 55-56 of the records). The City's argument respecting the application of s. 12(3)(b) to these records is found in the following passages, from pp. 5 and 6 of its initial submission:

> In our view, Section 12(3)(b) must be interpreted broadly so as to include within its protection not only the details of any deliberations but also the subject matter of a closed meeting of a public body. This is because in most cases the subject matter of the meeting reveals, either directly or by obvious inference, the nature of the deliberations which took place at the meeting. Disclosure of the subject matter of a meeting would therefore reveal confidential information regarding the deliberations of the public body which should be protected. One example of this would be minutes of a closed meeting which disclosed that the public body had considered the 'Termination of [a city official]'. Certainly, the fact that the public body even considered such a matter should remain confidential. Also, the nature of the council's deliberations would, for all intents and purposes, be revealed by disclosure of the subject matter of such a meeting. The meaning given to the word 'substance' in the Shorter Oxford English Dictionary supports a broad interpretation of Section 12(3)(b). There, 'substance' is defined as the 'essence', 'essential nature', 'matter', 'subject matter' or 'subject of a study, discourse, written work etc.'. In our view, if there is any doubt concerning the disclosure of confidential public body confidences, s. 12(3)(b) should be broadly interpreted so as to include within its protection even the subject matter and other seemingly non-confidential information contained therein. We submit that the record [i.e., the October 25, 1999 memorandum] should therefore be withheld in its entirety.
> ...
>
> The subject memorandum [dated October 18, 1999] is a report to council and essentially establishes the issues and surrounding facts and circumstances to be deliberated by council at the closed meeting. The memorandum therefore contains confidential information which would reveal the substance of those confidential deliberations. Whether the information contained in the memorandum is known to the Applicant or not is a matter of speculation. The contents of the memorandum should therefore be exempt from disclosure under Section 12(3)(b).

The City says that if there is any doubt about disclosure of public body confidences, s. 12(3)(b) should be interpreted to protect the disputed information. There is no mandate in the Act, or any other statute, for a "broad" interpretation of s. 12(3)(b) as sought by the City. Section 12(3)(b) is to be interpreted according to the ordinary meaning of its words. (I note, in passing, that s. 8 of the *Interpretation Act* does not assist the City. That section requires that every Act be interpreted as "remedial" and stipulates that each Act is to "be given such fair, large and liberal construction [i.e., interpretation] as best ensures the attainment of its objects." The "objects", or purposes, of the Act are set out in s. 2(1). The first purpose mentioned there is "to make public bodies more accountable to the public", subject to

"limited exceptions to the rights of access" as specified in the Act.)

Further, the breadth attributed by the City to s. 12(3)(b) is difficult to square with the language of s. 12(1), the express language of which encompasses records similar to those in issue here. The broad scope of the explicit language of s. 12(1) was confirmed by the Court of Appeal in *Aquasource Ltd.* v. *British Columbia (Information and Privacy Commissioner)* (1998), 8 Admin. L.R. 236. At para. 41, Donald J.A. concluded that the class of things set out after the word "including" in s. 12(1) "extends the meaning of 'substance of deliberations'" in s. 12(1). Section 12(3)(b) does not set out the same or any other extended class of things, which indicates the Legislature did not intend s. 12(3)(b) to be as broad as s. 12(1). I also note that s. 12(3)(a), which applies to local public bodies such as the City, expressly sets out a separate class of things that can be withheld by a local public body under s. 12(3) - draft resolutions, bylaws or other legal instruments by which the local public body acts.

I do not agree that these two documents would, if disclosed, reveal the substance of deliberations of an *in camera* meeting. In Order No. 326-1999, I accepted that s. 12(3)(b) may apply where disclosure of information would "permit the drawing of accurate inferences" about the substance of deliberations of a specific *in camera* meeting. To similar effect, see Order No. 48-1995, Order No. 81-1996 and Order No. 182-1997. As was the case in Order No. 326-1999, however, I do not accept that the bulk of these records - which for the most part set out factual observations by staff - would permit the drawing of accurate inferences about the substance of deliberations of an *in camera* meeting.

As an exception to this, the last paragraph of the October 18, 1999 memorandum from, found at page 76 of the disputed records, would permit the drawing of accurate inferences as to the substance of deliberations at an *in camera* meeting. I therefore find that this paragraph can be withheld under s. 12(3)(b). Similarly, the last sentence of the October 25, 1999 memorandum (page 56) would, if disclosed, permit the drawing of an accurate inference as to the substance of deliberations at an *in camera* meeting. That sentence can, therefore, be withheld under s. 12(3)(b).

Finally, the City initially applied s. 12(3)(b) to the letters dated August 6 and October 7, 1999 (pages 77 and 78). These letters were attached to the October 18, 1999 memorandum. As I noted above, the City now concedes that these letters "should be disclosed". I agree: s. 12(3)(b) does not apply to them.

As a last point, I note that the City did not apply s. 13(1) to any part of the staff memorandums.

4.0 CONCLUSION

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

1. Under s. 58(3)(a) of the Act, I order the City to perform its duty to the applicant under s. 6(1) of the Act, by searching again for records that are responsive to the

applicant's access request. Under s. 58(4) of the Act:

(a) I require the City to complete the search within 30 days after the date of this order and to deliver to me (with a copy to the applicant directly and concurrently), within 10 days after completion of the search, an affidavit sworn by a knowledgeable person as to the efforts in undertaking that search and as to the results of that search; and

(b) I require the City to provide a response, in accordance with s. 8 of the Act, respecting any records found in the search under this paragraph, with that response being provided to me and to the applicant as contemplated by s. 1(a);

2.

3. Under s. 58(2)(b) of the Act, I confirm the City's decision that it is authorized by s. 14 of the Act to refuse access to the entirety of the pages of disputed records numbered 1, 2a, 2b, 9, 28, 54 and 65;
4. Under s. 58(2)(b) of the Act, I confirm the City's decision that it is authorized by s. 12(3)(b) of the Act to refuse access to that part of page 73 shown on the severed copy delivered to the City with this order, to the last paragraph on page 76 and to the last sentence on page 56; and
5. Under s. 58(2)(a) of the Act, and subject to paragraph 3, above, I require the City to give the applicant access to the pages, or portions of pages, withheld by the City under ss. 12 (3)(b) and 14 of the Act and numbered 35, 38, 55, 56, 73, 74, 75, 76, 77, and 78.

November 8, 2000

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia