Order 02-47

CITY OF VANCOUVER
Michael T. Skinner, Adjudicator

September 30, 2002

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Summary: Applicant requested copies of records relating to ongoing negotiations between a group of individuals and the City. Access was denied in part to certain *in camera* City council meeting minutes under s. 12(3)(b) of the Act. In a subsequent request, access to a memorandum was refused under s. 14 and s. 12(3)(b). The City lawfully severed information under s. 12(3)(b). Records withheld under s. 14 were found subject to solicitor-client privilege.

Key Words: *in camera* meeting – substance of deliberations – subject matter of the deliberations – Act authorizing holding of meeting in absence of public – solicitor-client privilege – *in camera* submission.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 4(2), 12(3)(b) and (4); 14; *Vancouver City Charter*, ss. 165.2 and 165.3.

Authorities Considered: B.C.: Order No. 81-1996, [1996] B.C.I.P.C.D. No. 7; Order No. 326-1999, [1999] B.C.I.P.C.D. No. 39; Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44; Order No. 00-06, [2000] B.C.I.P.C.D. No. 6; Order No. 02-22, [2002] B.C.I.P.C.D. No. 22.

Cases considered: *British Columbia (Minister of Environment, Lands and Parks)* v. *British Columbia (Information and Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64 (B.C.S.C.).

1.0 INTRODUCTION

[1] This is a consolidated inquiry under the *Freedom of Information and Protection of Privacy Act* ("Act"), combining two requests for review. The applicant represents a group of persons known as the False Creek Landlease Action Committee (to whom I will refer collectively as "FLAC") who individually lease land from the public body, the City of Vancouver ("City"). FLAC is engaged in negotiations with the City concerning lease pre-payment and possible sale of title to the various leasehold lands; the applicant has sought certain records described below in an effort to assist FLAC in these negotiations.

The first request for records

[2] In the first request, on June 10, 2001, the applicant requested from the City "all records… related to review of the Penny and Keenleyside appraisal and the City's earlier Burgess/Nilsen appraisals…". The City replied to this request July 25, 2001, and denied access to portions of two records pursuant to s. 12(3)(b) of the Act. The two records are *in camera* council meeting minutes of April 24, 2001 and May 8, 2001. The City also denied, in full, access to a number of other responsive records from the file of one of the City's solicitors, citing solicitor-client privilege as provided in s. 14 of the Act.

[3] The applicant submitted a request for review under the Act on September 5, 2001. During mediation of the request, further information from the meeting minutes was disclosed by the City, along with a record over which the City had previously claimed s. 14 privilege. The City also provided the applicant with a list of records to which it had applied s. 14, and provided additional detail concerning the nature of the privilege applying to the records, which the City was continuing to withhold. As a result of this, the applicant narrowed the scope of records sought to a complete copy of the meeting minutes of May 8, 2001. The City did not provide further records. The applicant requested that the Office of the Information and Privacy Commissioner ("OIPC") hold an inquiry concerning the remaining record in dispute.

The second request for records

[4] In the second request, on August 10, 2001, the applicant requested from the City a copy of a memorandum ("memorandum") dated June 25, 2001, from the Deputy City Manager and Assistant City Solicitor. The memorandum had been referred to in the *in camera* council minutes of June 26, 2001. In the City's response, access to the memorandum was denied under s. 14 of the Act, on the grounds that the memorandum was a confidential communication between solicitor and client for the purpose of providing legal advice. The applicant requested that the OIPC review the City's decision.

[5] During mediation of the second request, the City clarified that it considered both branches of solicitor-client privilege – legal professional privilege and litigation privilege – to apply to the memorandum. The City also said that that it was applying s. 12(3)(b) to the memorandum, as disclosure would reveal the substance of deliberations of an *in camera* council meeting. The applicant confirmed that he wished the OIPC to conduct an inquiry into the City's response to the second request.

[6] Because the reviews of the first and second requests did not settle in mediation, a consolidated written inquiry was held under Part 5 of the Act. I have dealt with this inquiry, by making all findings of fact and law and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

2.0 ISSUES

[7] The first issue is whether the City is authorized under s. 12(3)(b) of the Act to withhold portions of the disputed records. The relevant portions of s. 12 read as follows:

> …
>
> 12(3) The head of a local public body may refuse to disclose to an applicant information that would reveal
>
> (a) a draft of a resolution, bylaw or other legal instrument by which the local public body acts or a draft of a private Bill, or
>
> (b) 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.
>
> (4) Subsection (3) does not apply if
>
> (a) the draft of the resolution, bylaw, other legal instrument or private Bill or the subject matter of the deliberations has been considered in a meeting open to the public, or
>
> (b) the information referred to in that subsection is in a record that has been in existence for 15 or more years.

[8] The second issue concerns whether s. 14 solicitor-client privilege applies to one of the records in dispute. Section 14 reads as follows:

> 14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[9] Section 57 of the Act states that the burden of proof is on the public body in inquiries considering the application of ss. 12 and 14.

3.0 DISCUSSION

[10] **3.1 Application of s. 12(3)(b) of the Act** – Section 12(3)(b) is discretionary. However, to withhold records the public body must show that the necessary elements of the section are satisfied. In Order 02-22, [2002] B.C.I.P.C.D. No. 22, Commissioner Loukidelis applied the test, which he articulated in Order 326-1999, [1999] B.C.I.P.C.D. No. 39, which I reproduce below:

> [11] As indicated in Order No. 326-1999, [1999] B.C.I.P.C.D. No. 39, in order to rely on this section, a local public body must establish the following things:
>
> 1. The local public body must establish that it has legal authority to meet *in camera;*
>
> 2. The local public body must establish that an authorized *in camera* meeting was, in fact, properly held; and

3. The local public body must establish that disclosure of the disputed records or information would reveal the substance of deliberations of the meeting.

[11] As to the first element of the test, the City cites ss. 165.2 and 165.3 of the *Vancouver Charter* as support for its authority to conduct *in camera* meetings. Those sections read as follows:

> 165.2 (1) A part of a Council meeting may be closed to the public if the subject matter being considered relates to 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 city or another position appointed by the city;
>
> (b) personal information about an identifiable individual who is being considered for an award or honour, or who has offered to provide a gift to the city on condition of anonymity;
>
> (c) labour relations or employee negotiations;
>
> (d) the security of property of the city;
>
> (e) the acquisition, disposition or expropriation of land or improvements, if the Council considers that disclosure might reasonably be expected to harm the interests of the city;
>
> (f) law enforcement, if the Council considers that disclosure might reasonably be expected to harm the conduct of an investigation under or enforcement of an Act, regulation or by-law;
>
> (g) consideration of whether paragraph (e) or (f) applies in relation to a matter;
>
> (h) litigation or potential litigation affecting the city;
>
> (i) the receiving of advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
>
> (j) information that is prohibited from disclosure under section 21 of the Freedom of Information and Protection of Privacy Act;
>
> (k) a matter prescribed by regulation under section 165.8.
>
> (2) A part of a Council meeting must be closed to the public if the subject matter is a matter that, under another enactment, is such that the public must be excluded from the meeting.
>
> (3) If the only subject matter being considered at a Council meeting is one or more matters referred to in subsection (1) or (2), the applicable subsection applies to the entire meeting.
>
> 165.3 Before a meeting or part of a meeting is closed to the public, the Council must state, by resolution,
>
> (a) the fact that the meeting is to be closed, and
>
> (b) the basis under section 165.2 on which the meeting is to be closed.

[12] There is no doubt that the *Vancouver Charter* provides the City with the legal authority to meet *in camera*. The question that remains is whether the City has complied with the requirements of the *Vancouver Charter*. As one would expect given the nature of the dispute in this inquiry, portions of the City's submission were provided on an *in camera* basis: these include minutes of meetings held *in camera* and the legal argument which discusses the purpose and substance of the *in camera* meetings. I am satisfied that the materials submitted by the City on an *in camera* basis are properly before me on that basis in this inquiry, with, however, a significant qualification concerning *in camera* legal arguments which I discuss at para. 27 below.

The in camera minutes

[13] The City submitted the affidavit of Brent MacGregor, Deputy City Manager, in which he deposed (at para. 3) that "…on May 8, 2001, City Council passed a resolution stating that it would go into a closed (*in camera*) meeting later that day under s. 165.2 of the *Vancouver Charter*." The minutes of the meeting referred to by Mr. MacGregor were appended as exhibit "A" to his affidavit and show that the resolution was passed in order to (quoting from the resolution): "discuss matters related to paragraphs: (a) personal information about an identifiable individual who holds or is being considered for a position as an officer, employee or agent of the city or another position appointed by the city." The City asserts that "…Council is not authorized to hold a closed meeting because it has passed a resolution under section 165.3; it passes a resolution because it is authorized to hold a closed meeting."

[14] The City passed the required resolution under s. 165.3 and in that resolution stated one of the s. 165.2(1) grounds for holding the meeting *in camera*, as stipulated by s. 165.3(b). It stated no other grounds, however, for a meeting that in fact covered other s. 165.2(1) topics, including the one presumably of interest to the applicant. The failure to state other applicable grounds for proceeding *in camera* appears to me to be in conflict with the intent and the black letter of ss. 165.2 and 165.3 with respect to accountability of local public bodies. It is also inconsistent with the intent of s. 12(3)(b) of the Act and indeed of the Act as a whole.

[15] However, in light of the Commissioner's conclusion in Order 02-22, I do not consider the facts of this case appropriate for making a finding that the meeting in question was not authorized by an Act or regulation for the purposes of s. 12(3)(b). In Order 02-22, Commissioner Loukidelis stated:

> Section 12(3)(b) focuses on whether or not "an Act or regulation" under the Act actually authorizes the *in camera* meeting. Accordingly, for the purposes of s. 12(3)(b), I do not consider it appropriate to hold the Board to a strict observance of the formality of reciting, in minutes, the statutory authority that in fact authorizes the *in camera* meeting. The approach to this issue might differ in another forum or for purposes other than s. 12(3)(b), and to that end it is up to the Board and the Town's council to comply with the *Police Act* and the *Local Government Ac*t.

[16] For this reason, I conclude that the City's *in camera* meeting of May 8, 2001 was authorized by an Act for the purpose of this case. I should also note that my finding is limited to the facts of this particular case.

[17] The next question to be answered is whether the City has established "that disclosure of the disputed records or information would reveal the substance of deliberations of the meeting." In Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44, Commissioner Loukidelis quoted with approval the definition of "substance of deliberations" articulated by his predecessor, Commissioner Flaherty, and I repeat that here:

> In a number of orders dealing with public bodies at the provincial level, and with local public bodies, my predecessor had to give meaning to the s. 12 phrase, "substance of deliberations". In the context of Cabinet meetings and s. 12(1), he said the following, at pp. 9 and 10 of Order 8-1994:
>
> > In my view, the "substance of deliberations" includes records of what was said at Cabinet, what was discussed, and recorded opinions and votes of individual ministers, if taken. The "substance of deliberations" is what the B.C. Civil Liberties Association described as "the Cabinet thinking out loud" although its scope includes a range of records which would reveal what happened in Cabinet.
> >
> > …
> >
> > What is meant to be protected is the "substance" of Cabinet deliberations, meaning recorded information that reveals the oral arguments pro and con for a particular action or inaction or the policy considerations, whether written or oral, that motivated a particular decision.

[18] Having reviewed the portion of the disputed minutes of May 8, 2001 which were severed by the City, and submitted as evidence in the City's *in camera* submission to this inquiry, I am satisfied that disclosure of the severed information would indeed reveal the substance of deliberations of one or more council members. The information severed is exclusively related to positions on a specific issue as presented at the meeting by members of City Council. This finding is consistent with the interpretation of s. 12 of the Act in previous orders of the Commissioner, and in my opinion manifestly qualifies as "substance of deliberations".

The memorandum

[19] Having found that s. 12(3)(b) applies to the minutes of the *in camera* meeting of May 8, 2001 ("the meeting"), I need also to consider whether, in the context of the second request, the memorandum can be withheld in part because it would "reveal" the substance of deliberations of the meeting. Given that the memorandum specifically incorporates a relevant verbatim excerpt from the meeting minutes, I have no trouble concluding that disclosure of the memorandum would allow the reader to accurately infer the substance of deliberations of the meeting. For that reason I find that s. 12(3)(b) can be applied to the memorandum, to the extent that the substance of the memorandum reflects the substance of Council's deliberations as recorded in the minutes.

[20] While the City has met the three parts of the test set out in Order No. 326-1999, the applicant argues s. 12(4) nonetheless applies to remove the exception provided by s. 12(3)(b), in that the "subject matter of the deliberations" has been considered in a meeting open to the public. In support of that contention, the applicant has submitted what he alleges to be a partial transcript of a City Council meeting of October 16, 2001, transcribed by the association from a videotape of the meeting. While I accept this record at face value, certification of accuracy and authenticity by a registered court reporter would add significantly to the evidentiary weight of the record.

[21] The transcript as provided – which, I note, was not the subject of any objections by the City, who received a copy prior to the close of the inquiry – does indeed record a City councilor making a submission on the central issue that concerns the applicant and FLAC, and which is, generally speaking, the subject of the information that falls within the s. 12(3)(b) exception. Is this sufficient to trigger the application of s. 12(4)? On one hand, a broad and remedial reading of s. 12(4) would, to some, conform to the intent of the Act in promoting greater accountability of public bodies. In this respect, *any* discussion by City council of the issue in dispute at a meeting open to the public would be sufficient to trigger s. 12(4). On the other hand, such an approach could destroy the goal of s. 12(3)(b), which is to provide an exception consistent with the intent of *in camera* meetings, the intent being to afford elected local officials an opportunity – in fact, a legislated encouragement – to freely and privately debate contentious issues.

[22] Section 12(4) refers to the "subject matter of the deliberations". I would restrict the phrase "subject matter of the deliberations" to mean the actual substance of what was discussed or presented at the *in camera* meeting – for example, a report, motion or discussion of a particular proposal or position – rather than the more general subject matter of the discussion, which may, again only as an example, be a long-standing local issue concerning land use.

[23] This conclusion is reinforced by the finding of Commissioner Loukidelis in Order 02-22, where he said the following:

> …when s. 12(4)(a) refers to a matter later being "considered" in an open meeting, this does not necessarily refer to a meeting where members of the public have merely made representations on aspects of a matter. Nor does the material before me lead to the conclusion that any *general discussions of the subject* would qualify as a consideration of the subject matter of the deliberations. [my emphasis]

[24] For the above reasons I find that the City has lawfully applied s. 12(3)(b) to the *in camera* meeting minutes of May 8, 2001, and to the memorandum.

[25] **3.2 Solicitor-Client Privilege -** Order 00-06, [2000] B.C.I.P.C.D. No. 6, sets out a helpful description of the essence of solicitor client privilege and its two branches. For convenience, I quote directly from Commissioner Loukidelis's discussion at p. 7:

> … Two kinds of legal professional privilege are recognized for the purposes of s. 14. First, a public body may withhold information that consists of, or would

> reveal, a confidential communication between a lawyer and his or her client directly related to the giving or receiving of legal advice. See, on this point, *British Columbia (Minister of Environment, Lands and Parks)* v. *British Columbia (Information and Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64 (B.C.S.C.), which set aside Order No. 29-1994. Second, a public body may withhold a record that was created for the dominant purpose of preparing for, advising on or conducting, litigation that was under way or in reasonable prospect at the time the record was created.

[26] The City submitted *in camera* to this inquiry a copy of the disputed memorandum, prepared by Brent MacGregor, Deputy City Manager, and Graham Johnsen, Assistant Director of Legal Services. Having reviewed the record, I am satisfied that it meets the test related to the giving or receiving of legal advice as cited above: it is a written communication of a clearly confidential character between a legal advisor (Legal Services) and the City, and is directly related to the formulating or giving of legal advice, in that it considers, among other things, the factual context of the legal matter, the positions taken by opposing parties, and the options available at law. It therefore qualifies as a privileged record (legal professional privilege) under s. 14 of the Act.

[27] Although the City submitted evidence and argument to support its contention that the memorandum is also covered by litigation privilege, I need not consider that aspect of the submission, given my finding above. However, I should state my concern regarding the City's use of *in camera* legal argument concerning, among several other aspects of this case, the application of litigation privilege. It is in this instance unnecessary and sheds no light on the content of the disputed record – in other words, disclosure of the majority of the *in camera* argument would not, in my view, prejudice the City's position. Given that I do not need to consider the application of litigation privilege to the memorandum, I will simply make the observation.

[28] The last aspect of the s. 14 issue is whether the disputed record can be severed, so that a portion of it can be disclosed. The leading authority in this area is Justice Thackray's decision in *British Columbia (Minister of Environment, Lands and Parks)* v. *British Columbia (Information and Privacy Commissioner)*, referred to above in the quote from Order 00-06. This was a judicial review of a decision of former Commissioner Flaherty, in which the British Columbia Supreme Court held that factual and descriptive information included in a record for the purpose of obtaining legal advice (and, conversely, when giving legal advice) is not severable under the general statutory principle enunciated in s. 4(2) of the Act. I consider that the observations of Justice Thackray are applicable in this case and find that the memorandum cannot be severed without doing violence to its status as a privileged communication.

[29] Under Justice Thackray's analysis, a memorandum of the type at issue in this inquiry is either privileged in total or it is not. The memorandum lands on the privileged side of the line. I therefore find that the City is authorized to withhold this record under s. 14 of the Act.

4.0 CONCLUSION

[30] For the above reasons, under s. 58(2)(b) of the Act, I confirm the City's decision that it is authorized by s. 12(3)(b) to refuse to disclose to the applicant information from minutes of *in camera* meeting held May 8, 2001 and from a portion of the memorandum.

[31] Under s. 58(2)(b) of the Act, I confirm the City's decision that it is authorized by s. 14 to refuse access to the memorandum.

September 30, 2002

ORIGINAL SIGNED BY

Michael T. Skinner
Adjudicator