

No.: 17 2052
Victoria Registry

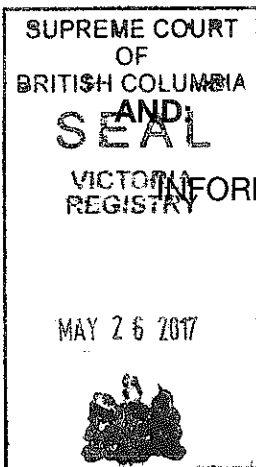
IN THE SUPREME COURT OF BRITISH COLUMBIA

In the matter of the decision of the Office of the Information and Privacy
Commissioner, Order F17-17 dated April 12, 2017 and in the matter of the
Judicial Review Procedure Act, R.S.B.C. 1996, c. 241

BETWEEN:

METRO VANCOUVER REGIONAL DISTRICT

PETITIONER



INFORMATION AND PRIVACY COMMISSIONER OF BRITISH COLUMBIA, ROSS
BUCHANAN and CITY OF WHITE ROCK

RESPONDENTS

PETITION TO THE COURT

ON NOTICE TO:

Information and Privacy Commissioner of British Columbia
4th Floor, 947 Fort Street
Victoria, BC
V8V 3K3

Mr. Ross Buchanan
104 – 15169 Buena Vista Avenue
White Rock, BC
V4B 1Y2

City of White Rock
15322 Buena Vista Avenue
White Rock, BC
V4B 1Y6

Attorney General for British Columbia
Legal Services Branch
1001 Douglas Street
P.O. Box 9280, Stn Prov Govt
Victoria, BC
V8W 9J7

This proceeding has been started by the petitioner for the relief set out in Part 1 below.

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the petitioner
 - (i) 2 copies of the filed response to petition, and
 - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner,

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by order of the court, within that time.

<p>(1) The address of the Registry is:</p> <p>850 Burdett Avenue Victoria, BC V8W 1B4</p>
<p>(2) The ADDRESS FOR SERVICE of the petitioner is:</p> <p>c/o Stewart McDannold Stuart Barristers and Solicitors 2nd Floor, 837 Burdett Avenue Victoria, BC V8W 1B3</p> <p>Fax number address for service of the petitioner: n/a Email address for service of the petitioner: jlocke@sms.bc.ca</p>
<p>(3) The name and office address of the petitioner's lawyer is:</p> <p>Jeffrey W. Locke Stewart McDannold Stuart Barristers and Solicitors 2nd Floor, 837 Burdett Avenue Victoria, BC V8W 1B3</p>

CLAIM OF THE PETITIONER

Part 1: ORDERS SOUGHT

1. An order in the nature of certiorari setting aside those portions of Order F17-17 of the Information and Privacy Commissioner for British Columbia ("OIPC") dated April 12, 2017, requiring the City of White Rock to provide the applicant with:
 - a. The minutes of a February 28, 2013 closed meeting of the Metro Vancouver Utilities Committee (the "February 28th Minutes"), and
 - b. The agenda for an April 4, 2013 closed meeting of the Metro Vancouver Utilities Committee (the "April 4th Agenda"),

(collectively, the "Metro Vancouver Records");

2. An order remitting this matter back to the OIPC for a new inquiry in respect of OIPC File No. F15-62198 pertaining to the Metro Vancouver Records, and that:
 - a. The petitioner, Metro Vancouver Regional District (“Metro Vancouver”) be a party to such inquiry for all purposes; and
 - b. On the inquiry the parties be entitled to tender further evidence or submissions, or both, as the parties consider necessary;
3. A stay of proceedings in respect of Order F17-17 pertaining to the Metro Vancouver Records to remain in place until (1) the judicial review of Order F17-17 is complete, or (2) a further inquiry of OIPC File No. F15-62198 is complete;
4. An order obliging the OIPC to provide Metro Vancouver a copy of the complete record of the inquiry which resulted in Order F17-17;
5. An order sealing *in camera* material that was before the OIPC; and
6. Costs.

Part 2: FACTUAL BASIS

A. The Nature of this Petition

1. Adjudicator Chelsea Lott (the “Adjudicator”), a delegate of OIPC, issued Order F17-17 on April 12, 2017.
2. Order F17-17 followed an inquiry held pursuant to the provisions of the *Freedom of Information and Privacy Act*, R.S.B.C. 1996, c. 165 (“*FIPPA*”) as the result of an access request made by the respondent, Ross Buchanan.
3. Order F17-17 requires the respondent, City of White Rock (“White Rock”) to provide Mr. Buchanan with the Metro Vancouver Records by May 29, 2017.
4. Order F17-17 should be quashed for the following reasons:

- a. The Adjudicator had no jurisdiction to make an order compelling White Rock to disclose to Mr. Buchanan documents that White Rock has no legal authority to have; and
 - b. The Adjudicator violated the principles of procedural fairness when she made an order related to documents solely within the custody and control of Metro Vancouver when Metro Vancouver was not provided with an opportunity to make submissions on the Inquiry.
5. This petition is an application for judicial review of Order F17-17.

B. The Parties

6. The petitioner, Metro Vancouver, is a regional district pursuant to the provisions of the *Local Government Act*, R.S.B.C. 2015, c. 1 (the “LGA”) and a “public authority” under the provisions of *FIPPA*.
7. Metro Vancouver was previously known as Greater Vancouver Regional District (“GVRD”) and is located in the geographical area of what is generally known as the Lower Mainland area of British Columbia. The governing body of Metro Vancouver consists of a board of directors representing 22 member municipalities, one electoral area, and the Tsawwassen First Nation.
8. In 2013, Metro Vancouver established a standing Utilities Committee under the authority of the *LGA* for the general purpose of overseeing water and liquid waste management services provided through Metro Vancouver.
9. OIPC is a tribunal established under *FIPPA*.
10. On April 21, 2015, the respondent Mr. Buchanan, requested OIPC conduct an inquiry of the disclosure of documents by the City of White Rock related to the financial viability of connecting the water system of the City of White Rock to the water system of Metro Vancouver.
11. White Rock is a municipality pursuant to the provisions of the *Community Charter*, SBC 2003, c. 26 and a “public authority” under *FIPPA*.

C. Background and Procedural History

i. The Metro Vancouver Records

12. As a committee of Metro Vancouver, the Utilities Committee is authorized under section 226 of the *LGA* and sections 90 and 93(a) of the *Community Charter* to proceed by way of meetings which are closed to the public and to create documents for the purposes of such meetings.
13. The Metro Vancouver Records arose from meetings that were lawfully closed to the public pursuant to section 90 of the *Community Charter*.
14. The February 28th Minutes document is plainly marked in bold, underlined, all capital letters "CONFIDENTIAL". The document is also titled, in bold and all capital letters, "GREATER VANCOUVER REGIONAL DISTRICT UTILITIES COMMITTEE CLOSED MEETING".
15. The April 4th Agenda document is marked at the top with this disclaimer, surrounded by a box and written in all capital letters:

THIS INFORMATION IS CONFIDENTIAL

PLEASE DEAL WITH IT EITHER BY DESTROYING, RETURNING
TO CORPORATE SECRETARY, OR RETAINING SECURELY AS
CONFIDENTIAL INFORMATION

OTHER DISTRIBUTION, COPYING OR DISCLOSURE IS LIMITED

16. On their face, the Metro Vancouver Records plainly purport to be the confidential documents of Metro Vancouver.
17. At the time the Metro Vancouver Records were created, Wayne Baldwin was simultaneously (1) a Director of the Utilities Committee, (2) the Mayor of the City of White Rock, and (3) the White Rock-appointed member of the Metro Vancouver board of directors.
18. Director Baldwin, as a Director of the Utilities Committee, was provided with a copy of the Metro Vancouver Records for his use solely in his capacity as a Director of the Utilities Committee.

19. Pursuant to section 205 of the *Local Government Act* and section 117 of the *Community Charter*, confidential documents in the care and control of the Utilities Committee can only be released by resolution of the Board of Metro Vancouver. At no time has the board of directors of Metro Vancouver passed a resolution (1) authorizing the release of the Metro Vancouver Records to the City of White Rock or to any other public body, or (2) authorizing Director Baldwin to provide the Metro Vancouver Records to White Rock.
20. At no time did the Utilities Committee or Metro Vancouver provide the Metro Vancouver Documents to White Rock. As it presently stands, the specific circumstances by which White Rock came into possession of the Metro Vancouver Records are unknown to Metro Vancouver.
21. Metro Vancouver only became aware that White Rock was in possession of the Metro Vancouver Records following Mr. Buchanan's request to White Rock for records related to the financial viability of connecting the water system of the White Rock to the water system of Metro Vancouver.

ii. The Legislative Scheme of FIPPA

22. The purpose of *FIPPA*, as stated in section 2(1) of the Act, is to "make public bodies more accountable to the public" in part by "giving the public a right of access to records."
23. *FIPPA* provides a process by which the public can seek access to records. The first step is to make a written request for access to a record "to the public body that the applicant believes has custody or control of the record", section 5(c). When a person makes this request they are granted a statutory right, subject to some statutory exceptions, to "any record in the custody or under the control" of a public body [*FIPPA* section 4(1)].
24. When a public body is provided with such a request, it is obliged to inform the applicant whether or not the applicant is entitled to access to the record and if access is refused, reasons for the refusal must be provided along with reference to the appropriate provision of the Act [sections 7 and 8].
25. *FIPPA* provides, in Part 2, a number of exceptions to disclosure including: the protection of confidences, policy advice, legal advice, and when disclosure

would be harmful to intergovernmental relations, the economic interests of a public body, or safety. These exceptions reflect the Legislature's intention to balance the proper functioning of public bodies with advancing the policy interest in making public bodies accountable to the public.

26. If the applicant is not content with the response from the public body, the applicant can ask the OIPC to review the decision of the public body [section 52].
27. When the OIPC receives a request for review it must provide a copy of the request to "the head of the public body concerned" and "any other person that the commissioner considers appropriate" [section 54].
28. The OIPC can then conduct an inquiry and the applicant, the head of the public body and any person given a copy of the request for review must be given an opportunity to make representations during the inquiry [section 56(3)].
29. During the inquiry, the burden of proof to prove an applicant has no right of access to the record is on the head of the public body [section 57(1)].
30. As a fundamental principle, the head of the public body that has the burden of proof must also be the head of the public body that has custody or control of the record.
31. Consequently, the first step of an inquiry is a determination by the OIPC that the public body that has custody or control of the record is a participant in the inquiry. If the public body that has custody or control of the record is not a participant, the OIPC can either (1) inform the applicant to make a request for the record to the appropriate public body [pursuant to section 5(c)] or, (2) provide a copy of the request for review to that public body [pursuant to section 54(b)].

iii. The Procedural History of the Request, Investigation and OIPC Inquiry

32. On April 21, 2015, Mr. Buchanan requested that White Rock provide him with any and all records related to the statement made by White Rock that it was not a financially viable option for White Rock to access water treatment and water supply through Metro Vancouver (then known as the GVRD) (the "Request").

33. On July 8, 2015 and April 29, 2016, White Rock provided the records it believed were responsive to the Request.
34. On April 29, 2016, White Rock informed Metro Vancouver that a request had been made for confidential documents of the Utilities Commission and, in particular, the April 4th Agenda.
35. On May 3, 2016, Metro Vancouver informed White Rock that the April 4th Agenda was a confidential document which was not in the custody or control of White Rock, but that Metro Vancouver consented to the release of a severed version of minutes from the April 4, 2013 meeting of the Utilities Committee (the "April 4th Minutes").
36. On May 3, 2016, White Rock informed Shannon Hodge, an investigator with the OIPC, that Metro Vancouver wished to assert to the OIPC that, *inter alia*:

The Board minutes are NOT in the custody and control of the City of White Rock, as the City of White Rock must have more than simple physical possession of a record, and the City of White Rock does not have the legal right or obligation to the information in its possession before it can be said to have custody. Metro Vancouver Utilities is a separate entity from White Rock committees. Mayor Baldwin had access to these closed minutes in his capacity as the Metro Vancouver Utilities Committee Member. [emphasis in original]
37. On May 6, 2016:
 - a. the OIPC informed White Rock that Mr. Buchanan had requested the OIPC conduct an inquiry;
 - b. White Rock then advised Metro Vancouver that the Request was proceeding to an inquiry; and
 - c. Metro Vancouver informed White Rock that it may be interested in making submissions to the OIPC and asked to be kept informed.
38. Following May 6, 2016, Metro Vancouver, which had experienced the resolution or abandonment of similar requests, expected to be notified in the event that an

inquiry continued to proceed. Metro Vancouver received no such notification from White Rock, the OIPC or from any other source.

39. On May 9, 2016, White Rock provided further records it believed were responsive to the Request. Some of these further records contained information that was severed pursuant to the provisions of *FIPPA*.
40. On August 23, 2016, the Registrar of Inquiries of the OIPC informed Mr. Buchanan and White Rock that:
 - a. a delegate of the OIPC would conduct a written inquiry into the issue whether White Rock is authorized to withhold the Metro Vancouver Records;
 - b. a copy of the request for review would be provided to any person the commissioner of the OIPC considered appropriate; and
 - c. any person given a copy of the request for review would be given an opportunity to make submissions during the inquiry and would be given a copy of the submissions of the other persons involved in the inquiry.
41. At the direction of the Adjudicator, an inquiry then proceeded by way of written submissions received from Mr. Buchanan and White Rock only (the "Inquiry").
42. Both prior to and during the course of the Inquiry, the OIPC did not provide Metro Vancouver with:
 - a. a copy of Mr. Buchanan's request for review that initiated the Inquiry;
 - b. a copy of the submissions from Mr. Buchanan or White Rock; or
 - c. an opportunity to tender evidence or make submissions in the course of the Inquiry.
43. On August 31, 2016, White Rock provided its written submissions to the OIPC. In those submissions, White Rock stated the Metro Vancouver Records related to meetings that were closed to the public and that they were documents of the Metro Vancouver Utilities Committee. White Rock expressly stated:

The City was not responsible for the decision to hold any meeting of the Metro Vancouver Utility [sic] Committee in the absence of the public. **The City submits that it would be inappropriate for the City to use its own discretion to disclose closed meeting records of another public body.**

[Emphasis added]

44. On September 24, 2016, Mr. Buchanan provided a responsive submission addressing White Rock's submissions. In that submission he stated:

[5] With respect to [the Metro Vancouver Records], these are records of the [Metro Vancouver] Utilities Committee.

45. On October 11, 2016, White Rock provided a reply submission. White Rock submitted that regarding whether the Metro Vancouver Records were made in a properly closed meeting, all White Rock could state was that section 90 of the *Community Charter* authorized holding meetings in the absence of the public. The City of White Rock said if the Adjudicator was going to make a determination whether a meeting was properly closed:

The City's FOI staff would have to investigate and lead evidence about the intentions of ... the Metro Vancouver Utilities Committee when they decided to close these meetings.

46. On January 26, 2017, the Adjudicator corresponded with White Rock advising:

I am the adjudicator assigned to the OIPC inquiry between the City of White Rock and Ross Buchanan. I have taken a preliminary review of the records in dispute. I believe [the February 28th Minutes] may have been included by mistake with the records provided to this office. White Rock describes the Record as "Minutes for the Closed Meeting of the Metro Vancouver Utilities Committee, held April 4, 2013." However, White Rock has provided meeting minutes from a February 28, 2013 GVRD Utilities Committee meeting. The subject matter of that meeting does not appear to me to be related to the issues in dispute.

47. The Adjudicator did not advise Metro Vancouver of her concerns regarding the February 28th Minutes nor give Metro Vancouver an opportunity to respond.

D. The Adjudicator's Reasons in Order F17-17

48. On April 12, 2017, the OIPC released Order F17-17 related to the Inquiry (the "Order"). The Order compels White Rock by May 29, 2017 to provide Mr. Buchanan with access to the information contained in the Metro Vancouver Records.

i. The Failure to Consider Jurisdiction

49. The Order, at paragraph 8, identifies four records in dispute:

- a. A report to White Rock's mayor and council prepared by staff;
- b. A report on a business case prepared by White Rock staff,
(collectively, the "White Rock Records");
- c. The April 4th Agenda; and
- d. The February 28th Minutes.

50. The Order contains no findings of fact or analysis whether the public body who has the custody and control of the records that are the subject of the request for review is a participant in the inquiry.

51. The White Rock Records appear, *prima facie*, to be in the custody or control of White Rock. There is no indication in the Order, however, that the Adjudicator considered whether the Metro Vancouver Records were within the custody or control of White Rock.

52. In fact, all of the evidence before the Adjudicator regarding the Metro Vancouver Records supported the conclusion that the Metro Vancouver Records were not within the custody of control of White Rock, including:

- a. The May 3, 2016 correspondence between White Rock and the OIPC in which the City of White Rock expressly stated the Metro Vancouver Records were not in the custody and control of White Rock:

The Board minutes are NOT in the custody and control of the City of White Rock, as the City of White Rock must have more

than simple physical possession of a record, and the City of White Rock does not have the legal right or obligation to the information in its possession before it can be said to have custody.

- b. White Rock's August 31, 2016 written submissions to the OIPC in which it stated, on page 4, in regard to the Metro Vancouver Records:

It is further noted that the City was not responsible for the decision to hold any meeting of the Metro Vancouver Utility Committee in the absence of the public. The City submits that it would be inappropriate for the City to use its own discretion to disclose **closed meeting records of another public body.** [Emphasis Added]

- c. White Rock's October 11, 2016 Reply submissions to the OIPC regarding the requirement for White Rock to provide evidence that the Metro Vancouver Records were made in a meeting properly closed to the public which stated, on page 2:

the City's FOI staff would have to investigate and lead evidence about the intentions of City Council and the Metro Vancouver Utilities Committee when they decided to close these meetings. It is not realistic or reasonable to expect the City's FOI staff to conduct such a high level of inquiry.

53. Moreover, there are numerous instances in the Order where the Adjudicator acknowledges that the Metro Vancouver Records are not records of White Rock:

- a. At paragraph 3 the Adjudicator identifies the records as recording the actions of the Metro Vancouver Utilities Committee;
- b. At paragraph 28 the Adjudicator describes the Metro Vancouver Records as a "set of records comprised of the agenda and meeting minutes of the Metro Vancouver Utilities Committee";
- c. At paragraph 29 the Adjudicator distinguishes the Metro Vancouver Records from the records of White Rock and states they are "information from...another local body's closed meetings";

- d. At paragraph 32 the Adjudicator states that the Metro Vancouver Records are the record of the “GVRD” which she states is “another public body” and not White Rock;
- e. At paragraph 34 the Adjudicator reiterates the Metro Vancouver Records are the “record of another public body”; and
- f. Ultimately, at paragraph 36 the Adjudicator states the Metro Vancouver Records:

relate exclusively to Metro Vancouver Utilities Committee meetings. The withheld information is clearly not about the deliberations or meetings of White Rock’s elected officials, governing body or committees. White Rock’s submission that it has discretion to withhold another public body’s records is not supported...

- 54. The Adjudicator appears to either not have considered the question of jurisdiction relating to the Metro Vancouver Records, or to have relied on the fact that White Rock had physical possession of the confidential records of another public body as proof that the Metro Vancouver Records were in the “custody and control” of White Rock.
- 55. Mere “possession” of records is not, however, equivalent to, or conclusive of, “custody and control” [see *Minister of Small Business, Tourism and Culture et al v. The Information and Privacy Commissioner of the Province of British Columbia et al*, 2000 BCSC 929, para. 25.]

ii. The Flawed Application of Section 12(3)(b) of FIPPA

- 56. A consequence of the Adjudicator’s failure to ensure the public body that had custody and control of the Metro Vancouver Records (i.e. Metro Vancouver) was a participant is the Adjudicator’s flawed application of sections 57 and 12 of *FIPPA*.
- 57. Section 57 of *FIPPA* places on the public body the burden to prove that the applicant has no right to access the records. The Metro Vancouver Records were plainly marked as being confidential records dealing with closed meetings of the Metro Vancouver Utilities Committee. Consequently, the records could,

prima facie, be excluded under the exception found at section 12(3)(b) of *FIPPA*, which reads:

12(3) The head of a local public body may refuse to disclose to an applicant information that would reveal

...

(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.

58. The Adjudicator, at paragraph 4, stated that White Rock had the burden of proving that section 12(3)(b) applied to the Metro Vancouver Records.
59. At paragraph 32, however, she determined that it was impossible for White Rock to prove that s. 12(3)(b) applied to the Metro Vancouver Records because those records were not White Rock's records:

[32] The grammatical and ordinary sense of the wording in s. 12(3)(b) is unambiguous: "its" refers to the particular local public body which is withholding the record and not to any other public body. In other words, a public body can only apply s. 12(3)(b) to information that would reveal the substance of deliberations of a meeting of its own elected officials or governing body. In this case, the elected officials and the governing body to which the access to information request was made, was to White Rock's mayor and council. To interpret "its" in s. 12(3)(b) as including the elected officials and governing body of another public body – in this case the GVRD, would be illogical. The word "its" unambiguously refers to the local public body to which the access request has been directed, and **for the records of that public body, not another.**

[Emphasis added]

60. While perhaps strictly correct in statutory interpretation of the intended application of section 12(3)(b), the failure of the Adjudicator to inform or invite submissions from Metro Vancouver operated to frustrate the intention of that important statutory exception to the requirement to disclose records.

61. Furthermore, the Adjudicator made no use of the provisions in *FIPPA* which exist to rectify a situation where an application has been made to a public body for the disclosure of a record not in that public body's custody or control. Section 54 of *FIPPA* imposes upon the commissioner an obligation to consider whether to provide a copy of a request for review to any other person who would be interested in that request. Section 54 states:

54 On receiving a request for a review, the commissioner must give a copy to

(a) the head of the public body concerned, and

(b) any other person that the commissioner considers appropriate.

62. Under subsections 56(3) and 56(5), any person provided with a copy of a request for review has specific rights during an inquiry:

56(3) The person who asked for the review, the head of the public body concerned and **any person given a copy of the request for a review must be given an opportunity to make representations to the commissioner during the inquiry.**

(5) The person who asked for the review, the head of the public body concerned and **any person given a copy of the request for a review may be represented at the inquiry by counsel or an agent.**

[emphasis added]

63. The Order is silent regarding whether the Adjudicator (as the commissioner's delegate) considered whether to provide a copy of the request for review to Metro Vancouver.
64. The Adjudicator violated the requirement for procedural fairness when she failed to provide a copy of the request for review to Metro Vancouver while she simultaneously imposed on White Rock the impossible burden of proving that section 12(3)(b) of *FIPPA* applied to the Metro Vancouver Records.

iii. The Improper Consideration of Section 16 of *FIPPA*

65. The Order, at paragraph 33, acknowledges there is an exception to disclosure when a public body has custody of records from another public body whose disclosure could reveal confidential information. Section 16(1)(b) of *FIPPA* states:

16(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

...

(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies [including a "board of a regional district"],

66. The Adjudicator notes that White Rock did not seek to apply that provision. The fact that White Rock did not argue the application of s. 16(1)(b) is consistent with the other actions of the City of White Rock which indicate it did not have custody of the Metro Vancouver Records.
67. Furthermore, White Rock could not have relied on section 16(1)(b) of *FIPPA* because it never "received in confidence" the Metro Vancouver Records. The Metro Vancouver Records were never provided to White Rock by Metro Vancouver. As noted, at no time has the board of directors of Metro Vancouver passed a resolution authorizing (1) the release of the Metro Vancouver Records to the City of White Rock or any other public body, or (2) Director Baldwin to provide the Metro Vancouver Records to White Rock.
68. The fact that the Adjudicator commented that White Rock could have argued that the Metro Vancouver Records were exempt from disclosure under section 16(1)(b) demonstrates a fundamental misapprehension of the nature of the Metro Vancouver Records and the jurisdiction of the OIPC to make orders requiring White Rock to provide Mr. Buchanan with access to these records.

iv. The Improper Consideration of Section 11 of *FIPPA*

69. At paragraph 34, the Order states:

If White Rock believed that another public body was in a better position to respond to the request it could have consulted with that other public body in preparing its case. Better yet, it could in the first place have transferred the request to that other public body, as s. 11 of *FIPPA* explicitly permits it to do. This approach ensures that the local public body making the decision has the requisite knowledge of the records to properly exercise its discretion.

70. This paragraph demonstrates the Adjudicator fundamentally misunderstood the evidence before her. Paragraph 1 of the Order states:

The applicant in this case made a request to the City of White Rock (the “City” or “White Rock”) for records related to a statement by its Chief Administrative Officer about the financial viability of connecting to the water system of the Greater Vancouver Regional District.

71. White Rock could not have transferred the request to Metro Vancouver under section 11 of *FIPPA* because the request was for White Rock records.
72. The problem the Adjudicator faced was not that the applicant applied for records from the wrong public body, the problem was that White Rock informed the applicant that it had in its possession records that White Rock had no legal right to possess.
73. The appropriate course of action for the Adjudicator to take would have been to either advise the applicant to make a request for the record from the appropriate public body (Metro Vancouver) pursuant to section 5(c) of *FIPPA* or to provide a copy of the request for review to Metro Vancouver pursuant to section 54(b) of *FIPPA*.
74. However, the Adjudicator did neither of those things and instead improperly exercised jurisdiction over the Metro Vancouver Records and ordered their disclosure by White Rock.
- v. The Improper Requirement to Provide Access to the February 28th Minutes**
75. The Adjudicator, on January 26, 2017, understood that the February 28th Minutes did “not appear to ... be related to the issues in dispute”.

76. The fact that White Rock included non-relevant records in the response to Mr. Buchanan should have prompted the Adjudicator to assess whether it was appropriate for the public body that created those records (i.e. Metro Vancouver) to be provided with a copy of the request for review under section 54 of *FIPPA*.
77. Section 54 of *FIPPA* imposes on the commissioner an obligation to consider if it is appropriate to provide any other person with a copy of a request for review. The Order is silent regarding whether the Adjudicator considered giving a copy of the request for a review to Metro Vancouver. The Adjudicator failed to follow the procedural requirements imposed by section 54 of *FIPPA* and this was a material failure. It was a material failure because, had Metro Vancouver been provided with the opportunity to make representations during the inquiry, it would have informed the Adjudicator that White Rock had no legal right to possess the February 28th Minutes.

Part 3: LEGAL BASIS

78. The Petition is brought pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 and the Supreme Court Civil Rules.
79. Order F17-17 should be quashed for the following reasons:
- a. The Adjudicator had no jurisdiction to make an order compelling White Rock to disclose to Mr. Buchanan documents that White Rock has no legal authority to have; and
 - b. The Adjudicator violated the principles of procedural fairness when she made an order related to documents solely within the custody and control of Metro Vancouver when Metro Vancouver was not provided with an opportunity to make submissions on the Inquiry.

A. The Standard of Review

80. The standard of review for findings of jurisdiction is correctness. See, *Simon Fraser University v. British Columbia (Information and Privacy Commissioner)*, 2009 BCSC 1481, para. 70.

81. The standard of review for procedural fairness is correctness. See, *Economical Mutual Insurance Company v British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 903, para. 85.

B. Error of Law in Determining Jurisdiction

82. Section 4 of *FIPPA* provides an applicant the right to access “all records in the custody or control” of a public body to whom a written request is made. The jurisdiction of the commissioner to conduct a review and make an inquiry under section 52 of *FIPPA* is limited to the response of that public body.
83. The scope of “custody or control” is not defined in *FIPPA* but has been judicially considered. A document is in the custody and control of a public body when it has the “authority to regulate or control [the] use or disposition” of the document. See, *Minister of Small Business, Tourism and Culture et al*, para. 25.
84. White Rock did not have custody or control over the Metro Vancouver Records. Consequently, the applicant had no right to access those records as the result of a written request to White Rock, and the commissioner had no jurisdiction to review the refusal of White Rock to not provide those documents under section 52 of *FIPPA*.
85. Furthermore, not only did White Rock not have custody or control over the Metro Vancouver Records, White Rock had no legal right to the Metro Vancouver Records or the information they contained.
86. It is *ultra vires* the jurisdiction of the OIPC to order that White Rock provide an applicant documents that White Rock has no legal right to, and those portions of the Order that make reference to the Metro Vancouver Records should be quashed.

C. Violation of the Principles of Procedural Fairness

87. Metro Vancouver has sole custody and control over the Metro Vancouver Records.

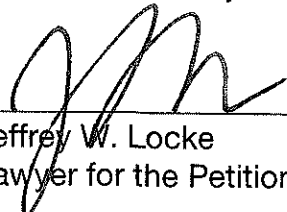
88. When the Adjudicator incorrectly determined that she had jurisdiction to consider whether the Metro Vancouver Records should be provided to Mr. Buchanan, Metro Vancouver acquired the right to participate in the inquiry.
89. It is a principle of procedural fairness that a party which will be directly affected by the results of an administrative decision-maker has a right to hear and be heard by that tribunal.
90. The denial of a right to a fair hearing always renders a decision invalid. This is because the right to a fair hearing is an independent, unqualified right that “finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have”. See, *Cardinal v. Kent Institution*, [1985] 2 SCR 643 at 661 and *British Columbia Lottery Corporation v. Skelton*, 2013 BCSC 12 at paras. 70-72.
91. This right to a fair hearing is reflected in sections 54 and 56(3) of *FIPPA*. The Adjudicator failed to permit Metro Vancouver from participating in the inquiry and the result is that the court should quash those portions of the Order that make reference to the Metro Vancouver Records.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Christopher Plagnol made May 25, 2017;
2. Affidavit #1 of Candice Work made May 25, 2017;
3. The complete record comprising the record before the OIPC in the Inquiry.

The Petitioner estimates that the hearing of the petition will take one day.

Date: May 26, 2017



Jeffrey W. Locke
Lawyer for the Petitioner

To be completed by the court only:

Order made

in the terms requested in paragraphs _____ of Part 1 of this petition

with the following variations and additional terms:

Date: _____

Signature of [] Judge [] Master



S= 175042

No.

Vancouver Registry

In the Supreme Court of British Columbia

In the Matter of the *Judicial Review Procedure Act*, RSBC 1996, c. 241
and in the Matter of the decision of the Delegate of the Information
and Privacy Commissioner for British Columbia, Order F17-17

Between

City of White Rock

Petitioner

and

Ross Buchanan and Metro Vancouver Regional District and
The Information and Privacy Commissioner of British Columbia

Respondents

PETITION TO THE COURT

ON NOTICE TO:

Information and Privacy Commissioner of British Columbia
4th floor – 947 Fort Street
Victoria, BC V8V 3K3

Mr. Ross Buchanan
104 – 15169 Buena Vista Avenue
White Rock, BC
V4B 1Y2

Metro Vancouver Regional District
4330 Kingsway
Burnaby, BC V5H 4G8

AND ON NOTICE TO:

Attorney General of British Columbia
Legal Services Branch
6th floor, 1001 Douglas Street
Victoria, BC V8W 9J7

This proceeding is brought for the relief set out in Part 1 below, by

[X] the person named as petitioner in the style of proceedings above

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the petitioner(s)
 - (i) 2 copies of the filed response to petition, and
 - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner(s),

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is: 800 Smithe Street, Vancouver, B.C. V6Z 2E1
(2)	The ADDRESS FOR SERVICE of the petitioner(s) is: c/o Lidstone & Company Barristers and Solicitors Suite 1300 – 128 Pender Street West Vancouver, B.C. V6B 1R8
(3)	The name and office address of the petitioner's lawyer is: Marisa Cruickshank Lidstone & Company Barristers and Solicitors Suite 1300 – 128 Pender Street West Vancouver, B.C. V6B 1R8

Claim of the Petitioner

Part 1: ORDERS SOUGHT

1. An order that Order F17-17, dated April 12, 2017, of a delegate of the Office of the Information and Privacy Commissioner for British Columbia (“OIPC”) requiring the City of White Rock to disclose four records be quashed;
2. An order remitting this matter back to the Information and Privacy Commissioner for British Columbia for a new inquiry in respect of OIPC File No. F15-62198 and that, on the inquiry, the City be entitled to tender further evidence or submissions, or both, as the City consider necessary;
3. An order requiring the Information and Privacy Commissioner to add Metro Vancouver as a party to the new inquiry in respect of OIPC File No. F15-62198 in accordance with s. 54 of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 241 and permitting Metro Vancouver to tender its own evidence and submissions, as it considers necessary;
4. An order extending the stay of proceedings in respect of Order F17-17 until the judicial review of Order F17-17 is complete or a further inquiry of OIPC File No. F15-62198 is complete;
5. An order sealing *in camera* material that was before the OIPC in the below proceedings and the court clerk’s notes regarding this sealed *in camera* material;
6. An order authorizing the Petitioner and the Respondents to make *in camera* submissions to this Court regarding documents sealed by this Court’s order; and
7. Costs.

Part 2: FACTUAL BASIS

a. The Parties

1. The Petitioner, the City of White Rock (the “City”), is a municipal corporation duly constituted pursuant to the laws of British Columbia, having its municipal offices at 15322 Buena Vista Avenue, White Rock, BC.
2. The Respondent, Ross Buchanan (the “Respondent”), is an individual who resides within the City of White Rock and who made the access request that was the subject of the OIPC Inquiry.
3. The Respondent, Metro Vancouver Regional District (“Metro Vancouver”), is a regional district duly constituted pursuant to the laws of British Columbia, having its offices at 4330 Kingsway, Burnaby, BC.

4. The Respondent, the Information and Privacy Commissioner of BC, through the Office of the Information and Privacy Commissioner of British Columbia (the "OIPC"), is a tribunal established pursuant to the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 241 ("FIPPA").

b. The Nature of the Petition

5. On April 12, 2017, Adjudicator Chelsea Lott, a delegate of the Information and Privacy Commissioner, issued Order F17-17 (the "Order").
6. Order F17-17 followed an inquiry held pursuant to the provisions of *FIPPA* as a result of a complaint made by the Respondent related to an access request he had made to the City (the "Inquiry").
7. The Order requires the City to disclose to the Respondent the following records by May 29, 2017:
 - An agenda for an April 4, 2013 Metro Vancouver Utilities Committee meeting (the "Agenda");
 - Minutes of a February 28, 2013 Metro Vancouver Utilities Committee meeting (the "February 28 minutes");
 - A three-page report to White Rock's mayor and council prepared by staff dated June 10, 2013 (the "Corporate Report"); and
 - A business case for acquisition of the water utility prepared by White Rock staff also dated June 10, 2013 and one of its appendices (the "Business Case").
8. On May 26, 2016, the City received notification from the Adjudicator that she was not prepared to re-open Order F17-16 to permit White Rock to adduce additional evidence and argument.
9. This is an application for judicial review of the Order.

c. Background

10. On April 21, 2015, the Respondent made an access request to the City, pursuant to s. 5 of *FIPPA*, for any and all records related to a statement the City's CAO had made that the City's access to water treatment and supply through the Greater Vancouver Regional District would not be a financially viable option for the City of White Rock.
11. At the time the Respondent made his access request, the City had undertaken a review of its options for water supply and had decided to acquire the water utility from EPCOR White Rock Water Inc. ("EPCOR") and operate the utility itself, rather than connect to Metro Vancouver's water supply.
12. On July 8, 2015, the City released a set of documents to the Respondent that were responsive to his request. Certain portions of the documents were redacted pursuant to various sections of *FIPPA*, including ss. 12(3)(b), 13, 16, and 17(1).

13. On July 14, 2015, the Respondent requested a review by the OIPC pursuant to s. 52 of *FIPPA*, alleging defects in the City's response, including that the City was not entitled to withhold any of the documents from disclosure.
14. The City disclosed additional documentation to the Respondent throughout the mediation process with the OIPC. However, mediation failed to resolve the matter and the applicant ultimately requested the matter proceed to Inquiry in or about April 2016.
15. Two of the four records that the City had continued to withhold from disclosure and which were the subject matter of the Inquiry were documents of the Metro Vancouver Utilities Commission: the Agenda and the February 28 minutes.
16. On April 29, 2016, after the City was made aware that the matter was proceeding to Inquiry, it was in communication with Metro Vancouver regarding its position on the City's release of the Metro Vancouver documents. Metro Vancouver maintained that the City did not have custody and control of in camera documents of Metro Vancouver's Committees. However, Metro Vancouver was of the view that the confidentiality of its outstanding documents could be maintained pursuant to s. 12(3)(b).
17. On May 3, 2017, the City advised an Investigator at the OIPC of Metro Vancouver's position with respect to Metro Vancouver's documents, including that Metro Vancouver was of the view that the documents were not in the custody and control of the City.
18. On July 28, 2016, the OIPC provided a Notice of Inquiry to the City and the Respondent.
19. On August 5, 2016, the City made one more round of disclosure to the Respondent, including a partially redacted version of the Business Case. The City redacted those portions of the Business Case that refer to privileged legal advice received by the City as well as confidential financial analysis and information relating to the City's purchase of the water utility from EPCOR. The City employee who provided the disclosure to the Respondent on August 5 was not aware that portions of the Business Case he had redacted in his disclosure had previously been disclosed to another FOI applicant by a different City employee. The City continued to withhold the Corporate Report in its entirety, as well as the two Metro Vancouver documents.
20. A Revised Notice of Inquiry was provided to the parties on August 23, 2016. The final paragraph of the Revised Notice of Inquiry advised that, pursuant to s. 54(b) of *FIPPA*, a copy of the request for review would be provided to any person the Commissioner considered appropriate and that person would be given an opportunity to make a submission during the inquiry and might also be given a copy of the parties' submissions.
21. Metro Vancouver was not provided with notice of the request for review by the Commissioner pursuant to s. 54(b). The Inquiry proceeded only by way of written submissions from the City and the Respondent.
22. On August 31, 2016, the City provided its initial submissions to the OIPC. The City did not include affidavit material with its submissions. The City employee who prepared the submissions had understood the Registrar at the OIPC to have advised him that affidavit

evidence was not required for the Inquiry. As a result, while the City was relying on s. 12(3)(b) of *FIPPA* to withhold the Corporate Report (given that the Corporate Report had been considered by Council at an in-camera meeting), the City did not specifically provide affidavit evidence to establish that an in-camera meeting had been held or that the requirements to hold the meeting in-camera had been met. Information establishing that the City had considered the report at an in-camera meeting was publicly available on the City's website.

23. On September 24, 2016, the Respondent provided his submissions to the OIPC. In his submissions, the Respondent indicated that portions of the Business Case document that the City had redacted from disclosure to him had been disclosed by the City to another FOI applicant and that he had obtained those portions of the document from that applicant.
24. On October 11, 2016, the City filed its reply submissions. In its reply, the City noted that since the Respondent identified that he already had obtained some of the information through alternative means, he had no need for additional disclosure of the same document from the City.
25. Following the Inquiry, the Adjudicator asked the Respondent to provide her with further documentation. The Adjudicator also asked the City and the Respondent to confirm that a link to the City's website that the Respondent had referenced in his submissions was the same as when they had considered it during their submissions. The Adjudicator did not request any additional evidence or submissions from the City.
26. At no time has Council for the City of White Rock waived privilege over those portions of the Business Case that were disclosed to another FOI applicant. Council for the City has always intended to keep the Business Case (and the Corporate Report to which it was appended) confidential and has only ever considered those documents in camera.
27. Council for the City has resolved to release from in-camera all documents related to the EPCOR purchase price once the final price has been determined. At the present time, the parties have not agreed on a purchase price and an arbitrator has been tentatively agreed upon. It is likely that some negotiations will take place, but the parties are preparing for arbitration should it be necessary. Until that time, the City's interests remain in ensuring that its negotiations with EPCOR are not compromised by the release of any confidential information or documents relating to its strategy or financial analysis, lest EPCOR attempt to use such information or documents to the City's detriment.

d. The Adjudicator's Reasons

28. On April 12, 2017, the Adjudicator issued her Order, requiring the City to disclose all four records that had previously been withheld from the Respondent. A summary of those aspects of the Order that the City seeks judicial review of is contained below.

i. **Mootness**

29. As a preliminary matter, the Adjudicator addressed the un-redacted pages of the Business Case that the Respondent had obtained from another FOI applicant and stated as follows, at para. 9:

[9] ... Because these pages were disclosed pursuant to an access to information request, there is no restriction on the applicant's use of them. Accordingly, I consider the issue of whether White Rock was authorized to refuse to disclose the information contained in these three pages under ss. 14 and 17 to be moot. I can see no circumstances to justify considering that portion of the inquiry related to the three pages of the business case the applicant already has.

[Footnotes omitted]

30. The Adjudicator went on to say that while she was mindful that the disclosed pages contained the information to which the City had applied the exception of solicitor client privilege, because the City had not indicated that disclosure of those pages was in any way an error or improper in its reply, she understood the City's position to be that the pages were intentionally and properly disclosed to the public through another individual's *FIPPA* request.
31. As a result, the Adjudicator determined that s. 14 was no longer in issue and that she would only decide whether the City could properly withhold the information the Respondent did not already have. The parties were not asked for submissions in relation to whether the City's claim of solicitor-client privilege was moot.

ii. **Section 12(3)(b) not applicable to Metro Vancouver's Agenda or February 28 Minutes**

32. The City argued that the Agenda and February 28 minutes related to a closed meeting that was lawfully held by the Metro Vancouver Utilities Committee, and thus should be withheld on the basis of s. 12(3)(b) of *FIPPA*. The Adjudicator summarized the City's argument as follows:

[28] ... White Rock says the Committee "evidently found" its interests would be harmed if the records were made public. White Rock adds that, in any event, it is "inappropriate" for it to disclose the Committee agenda and minutes of another public body. Therefore, White Rock says it is properly authorized to withhold the Committee's records.

33. The Adjudicator stated that it was not necessary for her to assess the merits of White Rock's argument because she concluded that s. 12(3)(b) could only be applied to information from a local public body's own closed meetings – not to another local public body's closed meetings (at para. 29).

34. The Adjudicator went on to state as follows:

[33] If a public body has custody of records from another public body that are responsive to an access request and it believes are of a confidential nature, it could still apply other exceptions to disclosure under *FIPPA*. In particular, s. 16(1)(b) permits a public body to refuse to disclose information if it could “reasonably be expected to reveal information received in confidence” from a municipal council or board of a regional district. White Rock chose not to apply this provision here.

[34] Section 57(1) of *FIPPA* provides that a public body may, in a case such as this, only withhold records where it can establish that an exception to disclosure applies. There is no legal basis for withholding a responsive record, as White Rock has done here, based on a belief that doing so would be “inappropriate” because it was a record of another public body. If White Rock believed that another public body was in a better position to respond to the request it could have consulted with that other public body in preparing its case. Better yet, it could in the first place have transferred the request to that other public body, as s. 11 of *FIPPA* explicitly permits it to do. This approach ensures that the local public body making the decision has the requisite knowledge of the records to properly exercise its discretion.

[Footnotes omitted]

35. The Order contains no findings of fact or analysis as to whether the Agenda or February 28 minutes were properly considered to be within the custody or control of the City and therefore whether the Adjudicator had jurisdiction to order disclosure of those records by the City. The Adjudicator acknowledged several times that the records were not the City’s records, referring to them as the “record of another public body” (at para. 32) and documents which “relate exclusively to Metro Vancouver Utilities Commission meetings” (at para. 36).
36. The Order does not address whether the Adjudicator considered providing a copy of the Respondent’s request for review to Metro Vancouver pursuant to s. 54(b) of *FIPPA*.

iii. Section 12(3)(b) not applicable to the Corporate Report

37. The Adjudicator considered whether the City was entitled to withhold its Corporate Report on the basis of s. 12(3)(b), stating:

[34] ...it is within the OIPC’s jurisdiction to determine, as a matter of mixed fact and law, whether a local public body’s meeting was properly closed to the public in accordance with its governing legislation. Local public bodies should provide evidence to establish that the relevant statute actually authorized holding a closed meeting in respect of all matters dealt with in the disputed records.

38. The Adjudicator determined that the City had not established the conditions necessary for the application of s. 12(3)(b), stating:

[38] White Rock submits that s. 90(1)(k) of the *Community Charter* authorized it to close the meeting to the public; however it has not addressed whether it met the requirements of s. 92 to even hold a closed meeting. I do not have any meeting minutes before me, nor do I have evidence from the meeting participants about the conduct of the meeting, which could permit me to make a finding regarding s. 92. The withheld information in the records does not assist White Rock on this point either. In the circumstances, I find that White Rock did not have the statutory authority to close the meeting to the public.

[39] All three conditions of the s. 12(3)(b) test must be met before the exception to disclosure applies, so it is not strictly necessary for me to consider the remaining two conditions. Nevertheless, I would also find that White Rock has not established that it had actually held a meeting in the absence of the public. White Rock has provided no evidence that a meeting was actually held on June 10, 2013 or that, if one was, that it was closed to the public. As previously discussed, there are no meeting minutes in evidence or any affidavits from meeting participants. The corporate report itself does not refer to a council meeting. White Rock's bald assertion that a closed meeting occurred on June 10, 2013, does not satisfy me that a meeting was actually held on that date, and in the absence of the public.

39. The Adjudicator did access the City's website after receiving the parties' submissions but prior to the Order in order to access a link that the Respondent had referred to in his submissions.
40. The City's website contains meeting agendas and minutes dating back to 2008. The website contains an agenda for an in-camera meeting dated June 10, 2013. The agenda contains a copy of a resolution authorizing Council to move in camera to consider items falling within s. 90(1)(a), (k) and (i) of the *Community Charter*. The Adjudicator had an un-redacted copy of the Corporate Report and the Business Case that the City had provided to her in-camera. Both of those documents refer to matters that fall within ss. 90(1)(k) and (i) of the *Community Charter*.

iv. Section 17(1) not applicable to the Business Case

41. The City argued that it was entitled to withhold portions of its Business case pursuant to ss. 14 and s. 17(1) of *FIPPA*. In light of the Adjudicator's ruling related to mootness, she considered only whether s. 17(1) entitled the City to withhold the remaining information in dispute – being an attachment to the Business Case dealing with revenue and expense implications in relation to the acquisition of the water utility.

42. The Adjudicator stated as follows:

[43] In order for a public body to rely on s. 17, it must establish that there is a reasonable expectation of probable harm. A public body must prove that the risk of harm is considerably above a mere possibility, but it does not have to prove that the harm will in fact occur. This inquiry is contextual and the amount and quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences.”

...

[45] White Rock describes the information it has withheld under s. 17(1) as being about White Rock’s projected valuation of the water utility and information it believes could be used to infer its estimate of the value of the utility. It argues that if this information is made public, it could harm the City’s “negotiating position in its arbitration” and relies on s. 17(1)(f).

...

[48] White Rock’s argument is that if it disclosed the information, it would be prevented from taking an alternative position about the utility’s valuation. This would apply equally to a negotiation or an arbitration. In either instance, White Rock may tactically want to take a position on the value of the utility which is different from what appears in the business case. Disclosing White Rock’s internal valuation could hamper White Rock’s ability to do that.

[49] The difficulty that I have with the argument that disclosing this information would reveal White Rock’s valuation of the utility, is that White Rock has already disclosed its valuation of the utility and its estimated legal and start-up costs to another access applicant. I discussed this disclosure previously as a preliminary matter. If White Rock’s valuation of the utility has already been released to the public, I fail to see how release of the same information, or information which could permit an accurate inference about White Rock’s valuation, would cause the type of harm suggested by White Rock. Accordingly, I find that White Rock is not authorized to withhold the information in the business case under s. 17(1) of *FIPPA*.

[Emphasis added. Footnotes omitted]

43. As noted above, the parties were not asked to provide any submissions with respect to whether the City’s disclosure of information in the Business Case to another applicant rendered its reliance on ss. 14 and 17(1) moot.

Part 3: LEGAL BASIS

44. Order F17-17 should be quashed for the following reasons:

- a. The OIPC breached its duty of fairness to the City throughout the Inquiry process;

- b. The Adjudicator breached her duty to be fair by making a determination of mootness without asking the parties to make submissions on that point;
- c. The Adjudicator's decision determination pursuant to s. 17(1) was unreasonable;
- d. The Adjudicator committed an error of law, exceeded her jurisdiction and breached the rules of natural justice by failing to provide notice of the Inquiry to Metro Vancouver pursuant to s. 54 of *FIPPA*; and
- e. The Adjudicator exceeded her jurisdiction by ordering the Petitioner to disclose records under the custody and control of Metro Vancouver without giving Metro Vancouver an opportunity to participate in the Inquiry.

Legislative Provisions

45. The Petitioner relies on:

- a. *Judicial Review Procedure Act*, RSBC 1996, c. 241;
- b. *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165;
- c. *Community Charter*, SBC 2003, c. 26; and
- d. *The Supreme Court Civil Rules*.

Standard of Review

46. The standard of review applicable to questions of procedural fairness is correctness. In the procedural fairness context, the appropriate standard of review has been described simply as "fairness". The question for the Court to consider is whether, on the facts, the Petitioner was treated fairly. The requirements of procedural fairness depend on the context of each case. The case law confirms that in determining whether a tribunal has treated a party fairly, the reviewing court is not required to give deference to the tribunal's own assessment of whether its procedures were fair. Where issue of procedural fairness arise, the role of the court is to review the decision making process and not to determine whether the proper decision was made. Where there has been a denial of fairness, a new hearing must result.

Mission Institution v. Khela, 2014 SCC 24 at para. 79;

Robertson v. British Columbia (Commissioner, Teachers Act), 2014 BCCA 331 at para. 66.

Seaspan Ferries Corp. v. British Columbia Ferry Services Inc., 2013 BCCA 55 at paras. 49 and 52

Cardinal v. Director of Kent Institute, [1985] 2 S.C.R. 643 at para 23

47. The standard of review that applies to decisions of the OIPC pursuant to s. 17(1) is reasonableness.

Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner), 2013 BCSC 2322, at para. 60.

University of British Columbia v. Lister, 2017 BCSC 41

48. The standard of review applicable to the adequacy of the Adjudicator's reasons is reasonableness.

Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), 2011 SCC 62 at paras. 14 and 22

49. The standard of review applicable to questions of jurisdiction is correctness.

Simon Fraser University v. British Columbia (Information and Privacy Commissioner), 2009 BCSC 1481

Breaches of Procedural Fairness Obligations

50. The City employee who prepared the City's submissions in the Inquiry was inexperienced and sought procedural guidance from the OIPC Registrar. He was informed that no affidavit evidence was required. After having received submissions, the Adjudicator followed up with the parties in relation to a few issues, including asking the Respondent for additional documents. Given the context, and taking into account the fact that the rules of evidence and procedure are relaxed in administrative proceedings, it was reasonable to expect that the City would be notified if the Adjudicator required further information, particularly since the evidence it would have tendered by way of affidavit was all publicly available. Instead, the Adjudicator made an express finding that the City did not have the statutory authority to close its meeting to the public. The City ought to have been given an opportunity to respond prior to the Adjudicator making adverse factual findings against it.

British Columbia Lottery Corp. v. Skelton, 2013 BCSC 12, 2013 at para. 64

Paul v. British Columbia (Forest Appeals Commission), 2003 SCC 55 at para. 36

51. The Adjudicator also acted unfairly in making a determination that the City's reliance on solicitor-client privilege as a basis to withhold certain documents was moot. Solicitor-client privilege is a principle of fundamental justice. Case law confirms that solicitor-client privilege has evolved into a substantive protection and that it should not be interfered with unless absolutely necessary, and then only to the extent required.

Minister of National Revenue v. Thompson, 2016 SCC 21 at paras. 17-18

Alberta (Information and Privacy Commissioner) v. University of Calgary, 2016 SCC 53

52. By declaring the issue of solicitor-client privilege to be moot, the Adjudicator effectively made a determination that solicitor-client privilege had been waived by the City.

Solicitor-client privilege may only be waived by a resolution or bylaw passed by the majority of City Council.

Guelph (City) v. Super Blue Box Recycling Corp., 2004 CanLii 34954 (Ont. S.C.) at para. 84

Sections 114(3) and 122 of the *Community Charter*, SBC 2003, c. 26

Order F13-10, *District of North Saanich*, 2013 BCIPC No. 11

53. There was no evidence in front of the Adjudicator to support a conclusion that solicitor-client privilege had been waived by the City in the manner required. Moreover, if the Adjudicator was going to make a determination that the City's claim of solicitor-client privilege was moot, she ought to have given the City a reasonable opportunity to make submissions on that point. Her failure to do so constitutes a breach of her procedural fairness obligations.

Amacon Property Management Services Inc. v. Dutt, 2008 BCSC 889 at paras. 27-36

Economical Mutual Insurance Company v. British Columbia (Information and Privacy Commissioner), 2013 BCSC 903 at para. 86

54. For these reasons, the City submits that it was not treated fairly and that the Order should be quashed on this basis alone.

The Adjudicator's determination pursuant to s. 17(1) was unreasonable

55. Section 17(1) of *FIPPA* allows a public body to refuse to disclose information which could reasonably be expected to harm the financial or economic interests of a public body.
56. In its argument, the City advised that while its acquisition of the water utility had been finalized in 2015, the final purchase price was yet to be determined. A determination regarding the purchase price was to be made by an independent arbitrator in the future. The City argued that if the information it had withheld in the Business Case was made public, including the City's projected valuation of the utility, this disclosure could harm the City's negotiating position with EPCOR and potentially require the City to pay more than expected for the utility.
57. The Adjudicator's finding that the City was not entitled to rely on s. 17 to withhold the remaining portions of the Business Case flowed from her finding that the City had intentionally disclosed other portions of the Business Case to another applicant.
58. There was no evidence in front of the Adjudicator to support a determination that the disclosure to the other applicant was intentional. Nor was there any evidence in front of the Adjudicator to suggest that the disclosure of the valuation of the utility had, in fact,

been “released to the public” as opposed to just one or two individuals. In particular, there was no evidence that EPCOR already had the information in hand.

59. While the City acknowledges that it would not be permitted to recover the information it had disclosed to the other applicant, the Adjudicator’s failure to consider whether there was still an ongoing risk of harm that could be mitigated by limiting further disclosure was unreasonable.

Failure to Provide Notice to Metro Vancouver

60. Section 4 of *FIPPA* provides an applicant with a right of access to “all records in the custody or under the control of” a public body to whom the request is made. Pursuant to s. 52, the Commissioner has jurisdiction to review the public body’s “decision, act or failure” in relation to the access request.

61. The Order requires the City to disclose two records which the City identified as being the records of Metro Vancouver and which the Adjudicator recognized as being the records of Metro Vancouver.

62. Section 54 of *FIPPA* states:

54 On receiving a request for a review, the commissioner must give a copy to

- (a) The head of the public body concerned, and
- (b) Any other person that the commissioner considers appropriate.

63. A person provided with a copy of a request for a review has specific rights during an inquiry, as set out in s. 56 of *FIPPA*.

64. The City submits that the Adjudicator violated procedural fairness requirements by failing to provide a copy of the request for review to Metro Vancouver.

65. The City submits that the Adjudicator also committed an error of law by ordering the City to disclose records that are in the custody and control of another public body.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Ken Overton, made May 26, 2017.
2. Affidavit #1 of Tracey Arthur, made May 26, 2017.
3. Affidavit #1 of Deborah Low, made May 29, 2017.
4. The complete record and *in camera* record comprising the record before the OIPC in this Inquiry.

The petitioner estimates that the hearing of the petition will take 1 day.

Date:29 May/2017..... 

Signature of

petitioner lawyer for petitioner
Marisa L Cruickshank

<i>To be completed by the court only:</i>	
Order made	
<input type="checkbox"/> in the terms requested in paragraphs of Part 1 of this petition	
<input type="checkbox"/> with the following variations and additional terms:	
.....	
.....	
.....	
Date:[dd/mmm/yyyy]..... Signature of <input type="checkbox"/> Judge <input type="checkbox"/> Master