



OFFICE OF THE
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Order F14-07

CITY OF ROSSLAND

Ross Alexander
Adjudicator

February 27, 2014

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Summary: The applicant requested copies of complaints sent to the City of Rossland's external auditor about concerns with City financial matters and related correspondence. The City disclosed most of the responsive records, but withheld an excerpt of a complaint from a City councillor to the auditor on the basis that disclosure would reveal the substance of *in camera* council meeting deliberations (s. 12(3)(b)) and would also be an unreasonable invasion of personal privacy (s. 22). The City also withheld the name of the person at the auditor's office to whom the complaint letter was addressed on the basis that disclosure would be an unreasonable invasion of the individual's personal privacy (s. 22). The adjudicator determined that the City was authorized to withhold the excerpt of the complaint because it would reveal the substance of deliberations of the *in camera* council meetings, but ordered the City to disclose the name of the person in the auditor's office.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(3), 12(4) and 22; *Community Charter*, [SBC 2003] c 26, ss. 90 and 92.

Authorities Considered: B.C.: Order F13-10, 2013 BCIPC No. 11; Order F11-04, 2011 BCIPC 4; Order 02-47, 2002 CanLII 42481; Order 02-22, 2002 CanLII 42447; Order F13-09, 2013 BCIPC 10 (CanLII); Order F12-08, 2012 BCIPC 12 (CanLII).

INTRODUCTION

[1] This inquiry relates to a request by a former city councillor to the City of Rossland ("City") for copies of complaints sent to the City's external auditor about City financial matters, and any resulting correspondence between the auditor, the complainants and the City.

[2] The City initially denied access to the responsive records, but it has since provided most of the responsive information. The remaining information consists of portions of a two page letter dated March 6, 2012 from City Councillor Moore to the City's external auditor firm ("Moore's letter"), which the City is withholding under ss. 12(3)(b) and 22 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

ISSUES

- [3] The issues in dispute are whether the City is:
- a) authorized to refuse to disclose information because disclosure would reveal the substance of deliberations of an *in camera* meeting within the meaning of s. 12(3)(b) of FIPPA; and
 - b) required to refuse to disclose information because disclosure would be an unreasonable invasion of a third party's personal privacy within the meaning of s. 22 of FIPPA.

DISCUSSION

[4] **Background**—The City building inspector¹ was the project manager for a community arena renovation.

[5] A City councillor, Kathy Moore, sent a letter to the City's external auditor expressing concerns that the building inspector awarded the community arena construction work to a company that the building inspector controlled.

[6] Subsequently, an external auditor sent a letter dated June 16, 2012 to the City Council discussing—among other things—what auditing steps were taken and what conclusions the auditor reached in relation to the concerns raised in Moore's letter. This letter by the external auditor attached Moore's letter as an appendix. The City Council then recommended "to receive and file" the auditor's letter during a regular council meeting.

[7] The applicant made a request for records, described above, which the City denied. Following the applicant's request to the Office of the Information and Privacy Commissioner to review this decision, the City Council passed a motion at a November 26, 2012 *in camera* meeting that both Moore's letter and the auditor's letter "...be declassified from confidential to non-confidential". This decision was reported out at a public Council meeting on December 10, 2012. The City then disclosed the responsive records, except for two portions of Moore's letter.

¹ At the time of this inquiry he was no longer the City's building inspector.

[8] **Record in Dispute**—Moore’s letter is the sole record in dispute. The City is withholding a portion of one paragraph under ss. 12(3)(b) and 22, and the name of the person at the external auditor’s office to whom Moore’s letter is addressed to under s. 22 only.

Local public body confidences – s. 12(3)(b)

[9] Section 12(3)(b) of FIPPA authorizes public bodies to withhold the substance of deliberations of *in camera* council meetings, unless s. 12(4) applies.

[10] The City is withholding information in Moore’s letter under s. 12(3)(b) on the basis that it relates to *in camera* deliberations. The applicant submits that the City cannot withhold this information under s. 12(3)(b) because the City Council was not properly *in camera* during the deliberations at issue. He also submits that s. 12(3)(b) does not apply because the subject matter of the deliberations was considered in a public meeting within the meaning of s. 12(4)(a). The applicant further contends that the information cannot be withheld because the City Council “declassified” the letter, or alternatively because Councillor Moore has since consented to its release.

[11] I will first address the arguments under s. 12(3)(b). Section 12(3)(b) of FIPPA states:

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.

[12] Previous orders have stated that three conditions must be met in order for s. 12(3)(b) to apply:

- 1) there was statutory authority to meet in the absence of the public;
- 2) a meeting was actually held in the absence of the public; and
- 3) the information would, if disclosed, reveal the substance of deliberations of the meeting.²

² See, for example, Order F13-10, 2013 BCIPC No. 11 at para. 8.

Was the Council Meeting in camera within the meaning of s. 12(3)(b)?

[13] The first condition for s. 12(3)(b) to apply is that the City Council must have had the statutory authority to meet in the absence of the public.

[14] The statutory authority for the City to meet *in camera* is s. 92 of the *Community Charter*. Section 92 of the *Community Charter* requires the City to state by resolution in a public meeting:

- (a) the fact that the meeting or part is to be closed; and
- (b) the basis under the applicable subsection of section 90 on which the meeting or part is to be closed.

[15] Moore's letter refers to *in camera* deliberations at a January 9, 2012 council meeting.³ I will therefore determine whether this meeting was held *in camera* within the meaning of s. 12(3)(b).

[16] The applicant provided background information and supporting documents relating to the January 9, 2012 *in camera* meeting. This included the public meeting agenda and an excerpt of the public portion of the meeting minutes.⁴

[17] The public portion of the January 9, 2012 council meeting minutes clearly state that the City Council passed a resolution to go *in camera*. The minutes also state that the meeting was closed to the public under ss. 90(1)(b), (g) and (k) of the *Community Charter*. Section 90(1)(b) relates to personal information about people being considered for municipal awards and honours, and gifts offered to the municipality on the condition of anonymity; s. 90(1)(g) relates to litigation or potential litigation affecting the municipality; and s. 90(1)(k) relates to "negotiations and related discussions respecting the proposed provision of a municipal service that are at their preliminary stages".⁵ Although not specified in the January 9, 2012 minutes, the City states in its submissions in this inquiry that s. 90(1)(c) regarding labour relations or other employee relations is also applicable because the deliberations of the meeting were about a labour matter that is still ongoing for City Council and may have litigation implications.

[18] The applicant submits that ss. 90(1)(b), (c), (g) and (k) of the *Community Charter* do not apply in the circumstances. He states that it is unlikely that the

³ The deliberations referenced in Moore's letter must have occurred sometime before Moore wrote her letter in March 2012. The applicant submits in his initial submissions that the *in camera* City Council meeting discussions referred to in Moore's letter occurred on January 9, 2012. The City does not refute the applicant's submission about the date of the deliberations, so I accept that this meeting occurred on January 9, 2012.

⁴ The City did not address the January 9, 2012 council meeting deliberations in its submissions.

⁵ Section 90(1)(k) also requires that there be a reasonable expectation of harm to municipal interests, in the view of the Council, if the discussion is held in public.

withheld information would have labour relations implications under s. 90(1)(c), since the basis of Moore's letter was to request a financial audit of work performed for the City. On the issue of potential litigation under s. 90(1)(g), the applicant states that the City's initial submissions are the first time the City has made any reference to ongoing litigation implications. He also points out that the City has not provided any evidence that litigation is even remotely being considered. He also argues that the City did not have the statutory authority to meet in the absence of the public because the meeting agenda did not specifically state that council would meet *in camera*.

[19] Concerning the meeting agenda issue, s. 92 of the *Community Charter* does not require that there be a meeting agenda stating that the City Council will meet *in camera* during the meeting. I therefore do not accept the applicant's submission that the absence of a reference to *in camera* deliberations in the meeting agenda means that the Council did not have the authority to meet *in camera* within the meaning of s. 12(3)(b) of FIPPA.

[20] As to whether the City Council had proper grounds to go *in camera* during the January 9, 2012 meeting, I agree with the applicant that ss. 90(1)(b) and (k) of the *Community Charter* do not apply to the information that is withheld in the excerpt.

[21] However, I find that s. 90(1)(g) is a ground for the January 9, 2012 meeting to be properly held *in camera*. This provision applies if the subject matter being considered by the Council related to "litigation or potential litigation affecting the municipality".

[22] Given the wording of s. 90(1)(g), this ground must be considered as of the time Council went *in camera*, which was January 9, 2012.⁶ Councillor Moore had requested the *in camera* Council meeting to discuss what she believed were potentially fraudulent actions by a City employee resulting in financial losses to the City.⁷ Councillor Moore was requesting that the City conduct a forensic audit or in-depth investigation.⁸ Therefore, it is apparent in my view that there was potential litigation between the City and this employee at that time with respect to a possible financial loss by the City or breach of the employee's employment obligations.⁹

⁶ Given this conclusion, it is unnecessary for me to determine whether I accept the City's assertion that there is an ongoing potential for litigation, or if disclosure of the excerpt may have litigation implications.

⁷ According to a portion of Moore's letter that has already been disclosed to the applicant.

⁸ According to a portion of Moore's letter that has already been disclosed to the applicant.

⁹ Given this finding that s. 90(1)(g) applies, it is unnecessary for me to consider s. 90(1)(c).

[23] For the above reasons, I find that the City had the statutory authority to meet in the absence of the public in January 2012 to discuss the information contained in the excerpt.

[24] The second condition that must be met for s. 12(3)(b) to apply is that the meeting must have actually been held in the absence of the public. The January 9, 2012 public meeting minutes state that the City Council resolved to meet *in camera*, and there is nothing in the materials to suggest that the public was present during the January 9, 2012 discussions. I also note that the applicant does not dispute that the meeting was held in the absence of the public. For these reasons, I am satisfied that the excerpt in Moore's letter refers to discussions that occurred in the absence of the public.

[25] The third condition that must be met for s. 12(3)(b) to apply is that the information, if disclosed, must reveal the substance of deliberations of the meeting. Previous orders, such as Order F11-04, have clarified that the substance of deliberations relates to "what was said at a meeting", not the "subject of deliberations—what stimulated the discussion".¹⁰ Based on my review of Moore's letter, I am satisfied that this third condition has been met because disclosure of the excerpt would clearly reveal the deliberations themselves.

[26] Therefore, I find that disclosure of the withheld portion of the Moore letter would reveal the substance of *in camera* deliberations of the January 9, 2012 meeting, and it falls under s. 12(3)(b) of FIPPA.

Section 12(4)(a)

[27] Section 12(4)(a) of FIPPA states that s. 12(3)(b) does not apply if "the subject matter of the deliberations has been considered in a meeting open to the public".

[28] I have already found that the January 9, 2012 deliberations referred to in Moore's letter were closed to the public. However, the applicant submits that s. 12(4)(a) applies because the subject matter of Moore's letter was considered in City Council meetings that were open to the public.

[29] The subsequent City Council meetings at issue here occurred on May 28 and December 10, 2012.¹¹ The applicant argues that the subject matter of the issues raised in Moore's letter—if not the substance of the deliberations

¹⁰ Order F11-04, 2011 BCIPC 4 at para. 35.

¹¹ The City Council discussed Moore's letter at an *in camera* portion of a July 16, 2012 Council meeting. However, the City provided an excerpt of the meeting minutes stating that the meeting was closed to the public, and the applicant does not argue that s. 12(4)(a) applies to this meeting.

themselves—were considered in these meetings and have been widely reported in the press.

[30] The applicant does not say that he attended the open Council meetings where these issues were allegedly discussed, nor is there evidence from anyone who attended the meetings to say what was discussed. However, the applicant provides the following evidence:

- A January 17, 2013 online article discussing the arena renovation and the former building inspector, quoting Councillor Moore stating that there was a January 9, 2012 *in camera* meeting discussion on personnel issues that was not fruitful. This article also references a January 2013 town hall meeting on this arena renovation issue.
- May 28, 2012 City Council meeting minutes refer to the auditor's letter. The minutes state: "recommendation to receive and file" the auditors letter. The auditor's letter states that Moore's letter is an appendix to the letter.
- December 10, 2012 City Council meeting minutes that pass a resolution to disclose the portion of the minutes from the November 26, 2012 *in camera* meeting that resolve to declassify Moore's letter and the auditor's response letter from confidential to non-confidential.

[31] There is evidence that the existence of Moore's letter was acknowledged at a public meeting, and the arena renovation issue is a known issue in the community. However, there is no evidence that the January 9, 2012 *in camera* deliberations were discussed—or that Moore's letter was read out loud or revealed to the public in any other way—at a public Council meeting.

[32] Section 12(4)(a) has been considered in previous orders. In Order 02-47 the applicant sought information from a city in relation to land lease negotiations. The city in that case was withholding *in camera* meeting minutes and a memo under s. 12(3)(b), but the applicant argued that s. 12(4)(a) applied because a city councillor made a submission at a public meeting on the same topic as the information that fell within s. 12(3)(b). In determining how to interpret s. 12(4), Adjudicator Skinner stated:

... [the transcript evidence] does indeed record a City councillor 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.

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.¹²

[33] Based on the above considerations, Adjudicator Skinner determined that s. 12(4)(a) did not apply to the memo or meeting minutes, and these documents were withheld under s. 12(3)(b). This interpretation of s. 12(4)(a) is consistent with Order 02-22, in which Former Commissioner Loukidelis stated:

...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.¹³ [*emphasis added*]

[34] In this case, the withheld excerpt in Moore’s letter reveals her perspective of the conclusions, positions, characterization of facts, or views expressed by certain meeting participants during the January 2012 *in camera* deliberation. In short, Moore’s letter reveals the substance of that *in camera* meeting. In my view, there must be more than a general discussion of the arena renovation issue for s. 12(4)(a) to apply to this information.

[35] The May 28, 2012 public Council meeting minutes state that the City received the auditor’s letter. This letter attaches Moore’s letter. However, there is no evidence that Moore’s letter was circulated, read aloud or otherwise disclosed during this meeting.

[36] The City’s December 10, 2012 City Council meeting minutes state that Moore’s letter and the auditor’s letter are “declassified”. However, there is no evidence before me that the content of the excerpt was ever discussed or disclosed, including at the subsequent town hall meeting.

¹² Order 02-47, 2002 BCIPC 48 at paras. 21 and 22.

¹³ Order 02-22, 2002 BCIPC No. 22 at para. 26; also quoted in Order 02-47, 2002 BCIPC 48 at para. 23.

[37] In summary, while the general topic of Moore's letter was raised in an open Council meeting, I am not satisfied that the substance of the deliberations referred to in Moore's letter has been considered. I therefore find that s. 12(4)(a) does not apply.

Other Arguments

[38] The applicant submits that the City Council's resolution to "declassify" Moore's letter compels City officers to disclose the letter in its entirety. He states that the resolution would have contained a reference to redacting part of the letter, if that had been the Council's intention. The City's submission in this inquiry, however, stands by its decision to withhold the excerpt.

[39] In my view, the November 26, 2012 and December 10, 2012 resolutions should have stated that only portions of Moore's letter were being "declassified", if that was the City Council's intent.¹⁴ However, there is no evidence that the excerpt was ever read out, discussed at any open City Council meetings, or otherwise disclosed. Further, to the extent the applicant is arguing that City officials are acting contrary to the City Council's resolution by withholding the excerpt, this issue is not within my authority to decide. I also note that the Mayor signed the City's submissions opposing disclosure of this information. I am not satisfied that the City has somehow waived its right to use its discretion under s. 12(3)(b) to withhold the excerpt.

[40] Finally, the applicant says the author of the letter in dispute, Councillor Moore, consents to its release.

[41] While consent to disclosure entitles disclosure in some circumstances under FIPPA, such as s. 22,¹⁵ it does not apply for s. 12(3)(b). The consent of the person who drafted the record at issue is not an exception under s. 12(3)(b) because s. 12(3) protects the deliberations of public bodies. In this case, there is no evidence or suggestion that Councillor Moore has the authority to disclose what occurred during the *in camera* council meeting. I find that Councillor Moore's consent does not disentitle the City from withholding the excerpt under s. 12(3)(b).

¹⁴ Even if the City Council resolved to disclose the information, the resolution is not necessarily determinative of whether the information would be disclosed. Section 22 of FIPPA, for example, requires public bodies to refuse to disclose information that would be an unreasonable invasion of personal privacy. The City could not disclose the information if s. 22 applies, even if that was the City's preference.

¹⁵ Section 22(4)(a). However, the information might still be withheld if it is intertwined with the personal information of others.

Conclusion for s. 12(3)(b)

[42] Based upon all of the above, I find that the City is authorized to refuse to disclose the excerpt under s. 12(3)(b).

Disclosure Harmful to Personal Privacy – s. 22

[43] I do not need to consider the excerpt from Moore's letter under s. 22 because the City is authorized to withhold the information under s. 12(3)(b). However, I must consider whether the City is required by s. 22 to withhold the name of the person at the auditor's office to whom Moore's letter is addressed.

[44] Numerous orders have considered the analytical approach to s. 22.¹⁶ It is first necessary to determine if the information in dispute is "personal information" as defined by FIPPA. If so, it must be determined whether the information meets the criteria identified in s. 22(4). If s. 22(4) applies, s. 22 does not require the public body to refuse to disclose the information. If s. 22(4) does not apply, it is necessary to determine whether disclosure of the information falls within s. 22(3). If s. 23(3) applies, disclosure is presumed to be an unreasonable invasion of third party privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, it is necessary to consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.

[45] Section 22 of FIPPA only applies to "personal information" of third parties. Schedule 1 of FIPPA defines "personal information" as follows:

"personal information" means recorded information about an identifiable individual other than contact information;

[46] Given this definition, "contact information" is not "personal information". Schedule 1 of FIPPA defines "contact information" as follows:

"contact information" means information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual;

[47] The name information the City is withholding under s. 22 is the name of the person at the external auditor's office to whom Moore's letter is directed to.

[48] I find that the name information is "contact information" because it is information to enable Moore's letter to reach the individual in his or her work capacity at the auditor's office. I therefore find that the name information is not

¹⁶ Order F13-09, 2013 BCIPC 10; Order F12-08, 2012 BCIPC 12; et. al.

“personal information” because it is “contact information”. Given this, s. 22 of FIPPA does not apply, and the City is not authorized to refuse to disclose the name information under s. 22 of FIPPA.

CONCLUSION

[49] For the reasons given above, under s. 58 of FIPPA, I order that the City is:

- a) authorized to refuse to disclose the information in Moore’s letter it is withholding under s. 12(3)(b) of FIPPA; and
- b) required to give the applicant access to the information in Moore’s letter that I have highlighted in a copy of the record that will be sent to the City along with this decision by **April 10, 2014**, pursuant to s. 59 of FIPPA. The City must concurrently copy me on its cover letter to the applicant, together with a copy of Moore’s letter.

February 27, 2014

ORIGINAL SIGNED BY

Ross Alexander, Adjudicator

OIPC File No.: F12-50571