Office of the Information & Privacy Commissioner for British Columbia

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Order F18-17

CITY OF PARKSVILLE
Erika Syrotuck
Adjudicator

May 16, 2018

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Summary: The applicant corporation made a request to the City of Parksville (City) for records relating to the City's decision to undertake litigation against the applicant. The City refused to disclose portions of the records on the basis that it would reveal local body confidences under s.12(3)(b), advice or recommendations under s. 13(1), solicitor client privileged information under s. 14 or would unreasonably invade third party privacy under s. 22. The adjudicator found that the City could withhold some but not all of the information under ss. 12(3)(b), 13(1) and 14 of FIPPA. As a result of these findings, it was not necessary for the adjudicator to consider whether s. 22 applied.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(3)(b), 13(1), 13(2), 14, 22(1), 22(2)(f), 22(3)(d), 22(4)(e).

INTRODUCTION

[1] The applicant corporation requested a copy of the staff report and the minutes relating to the City's decision to pursue litigation against it. In response, the City provided two records but withheld some information under s. 12(3)(b) (local body confidences), and s. 14 (solicitor client privilege) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the City's decision to withhold the information in the records. Mediation failed to resolve the issues and the applicant requested that the matter proceed to inquiry. Before the start of the inquiry, the City advised the OIPC Investigator that it would also be relying on s. 13(1) (advice and recommendations) to withhold the information in dispute and that issue was added to the inquiry.

PRELIMINARY MATTER

[2] At the inquiry, the City made submissions on s. 22 (unreasonable invasion of third party personal privacy) and applied it to a small portion of the minutes. Normally, parties may not raise new issues at the inquiry stage without permission. However, s. 22 is a mandatory exception to disclosure, and public bodies cannot decline to apply it if they believe disclosure of personal information would be an unreasonable invasion of third party personal privacy. The City should have applied s. 22 when it first made its severing decision; however, it is appropriate that it did so once it determined that s. 22 applied. Since the City included s. 22 in its initial submissions, the applicant was able to respond to s. 22 issues in its submissions. Based on the foregoing, I have decided that s. 22 is also an issue in this inquiry.

ISSUES

[3] The issues to be decided at this inquiry are:

1. Is the City authorized to withhold the information in dispute under s. 12(3)(b), 13(1) or 14 of FIPPA?

2. Is the City required to refuse to disclose the information in dispute under s. 22 of FIPPA?

[4] Under s. 57 (1) of FIPPA, the burden of proof is on the City to establish that the applicant has no right of access to all or part of a record withheld under ss. 12(3)(b), 13(1) and 14. Section 57(2) of FIPPA places the burden of proof on the applicant to establish that disclosure of information would not be an unreasonable invasion of a third party's personal privacy under s. 22.

DISCUSSION

Background

[5] The City brought a petition against the applicant regarding unpermitted buildings on the applicant's property (Litigation). The BC Supreme Court declared that the applicant had contravened specific bylaws and the *Local Government Act* and ordered that, among other things, the applicant obtain building permits or remove the buildings. The BC Supreme Court also ordered that the applicant pay the City's costs of the Litigation and authorized the City to remove the buildings at the cost of the applicant, if the applicant failed to do so itself.[1]

[1] A copy of the Order is attached to the Director of Administrative Services Affidavit as Exhibit F.

Records in Dispute

[6] The information in dispute is in two records. The first record is a five page report authored by City staff regarding proposed litigation against the applicant's property (Report). The other record is the minutes of the *in camera* City Council meeting in which the council made a decision about whether to pursue the proposed litigation (Minutes).

[7] The City withheld all of the information in dispute under s. 12(3)(b). The City also applied ss. 13(1) and 14 to all of the withheld information in the Report. It also withheld some information in the Minutes under ss. 14 and 22.

Section 14

[8] Section 14 allows a public body to refuse to disclose to an applicant information that is subject to solicitor client privilege. It is well established that s. 14 includes litigation privilege and legal advice privilege.[2] The City refused to disclose all of the disputed information in the Report and some in the Minutes on the basis that both documents are protected by litigation privilege. The City also withheld a small amount of information in the Report on the basis of legal advice privilege.

[9] In its submissions, the applicant says it disputes all of the City's submissions and discusses the overall importance of public transparency, accountability and the accuracy of records. With regards to s. 14, the applicant disputes that the Report and the Minutes were created for the dominant purpose of litigation.[3]

Litigation Privilege

[10] Litigation privilege is a rule of evidence that protects documents or communications that are made for the dominant purpose of litigation from disclosure.[4] The purpose of litigation privilege is to create a "zone of privacy" in relation to pending or apprehended litigation[5] by providing a protected space for parties involved in the adversarial process of litigation to investigate, prepare and develop respective positions and strategies, free from the intrusion of their adversary.[6] Litigation privilege is not restricted to communications between a lawyer and client; it can include communication with third parties.[7]

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[2] See for example, Decision F05-04, 2005 CanLII 18155 (BC IPC) at para. 13; *College of Physicians of B.C. v British Columbia (Information and Privacy Commissioner*) 2002 BCCA 665 [*College*] at para. 26.
[3] Applicant's submissions, page 4.
[4] *Lizotte v Aviva Insurance Company of Canada,* 2016 SCC 52 at paras. 20 and 23.
[5] *Blank v Canada (Minister of Justice)* 2006 SCC 39 [*Blank*] at para. 34.
[6] *Raj v Khosravi* 2015 BCCA 49 at para. 7.
[7] *Blank, supra* note 5 at para. 27.

[11] The privilege ends once the litigation is completed. As explained by the Supreme Court of Canada in *Blank v Canada (Minister of Justice)*, "[o]nce the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose — and therefore its justification."[8] However, the Court said that litigation privilege can continue "where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended"[9] and that "litigation" includes, at minimum, separate proceedings that include the same or related causes of action or proceedings that raise issues common to the initial action and share its essential purpose.[10] The Supreme Court also stated that "the boundaries of this extended meaning of "litigation" are limited by the purpose for which litigation privilege is granted."[11]

[12] The City has a judgment against the applicant, but the City submits that the Litigation is not concluded and the Minutes and the Report remain protected by litigation privilege because the City has not yet received costs owed to it under the court order. The City says that litigation is ongoing because all aspects of the order have not been fulfilled.[12] The City submits that "any litigation related to these costs would be related litigation since such litigation would involve the same parties and arise from the same cause of action."[13]

[13] In my view, a proceeding to collect outstanding costs would not arise from the same cause of action as the Litigation. *Black's Law Dictionary* defines "cause of action" as "[a] group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person."[14] The City's cause of action for enforcing the part of the order that relates to costs is that the applicant did not pay the costs. The cause of action for the prior Litigation was contravention of the City bylaws and the *Local Government Act*.

[14] Similarly, enforcing the costs order does not share common issues or have the same "essential purpose" as the Litigation. The purpose of the Litigation was to obtain an order to bring the applicant into compliance with City bylaws and the *Local Government Act*. In my view, this has a separate purpose from collecting outstanding costs owed under that order.

[15] I have found that the cause of action, issues and purpose of an action for costs are separate from the Litigation. In my view, affording protection to the Report and the Minutes in these circumstances falls outside the boundaries of the purpose of litigation privilege. For these reasons, I find that an action for

[8] *Blank, supra* note 5 at para. 34.
[9] *Blank, supra* note 5 at para. 38.
[10] *Blank, supra* note 5 at para. 39.
[11] *Blank, supra* note 5 at para. 40.
[12] City's initial submissions at para. 110.
[13] City's initial submissions at para. 111.
[14] Black's Law Dictionary, 10th ed, "cause of action."

unpaid costs and the Litigation are not related proceedings as contemplated in *Blank*.

[16] The City also says that litigation in relation to costs is "in reasonable apprehension."[15] The City has not provided any submissions or evidence indicating if or when it is planning to enforce the costs order. Without more, I am not persuaded that any litigation related to the enforcement of costs is underway, pending or reasonably apprehended.

[17] The City's submissions also suggest that litigation privilege should continue because it is possible that applicant will initiate related proceedings in the future. The City states that the applicant has initiated related litigation against the City in the past.[16] In Order P10-02, Adjudicator McEvoy found that the organization's speculation that the applicant would make a future complaint was not sufficient evidence and he stated that "[t]o accept such speculation without any evidentiary basis would be tantamount to applying litigation privilege in such a way as to make it permanent."[17] Similarly, I do not find that the potential that the applicant in this case may initiate future litigation against the City is sufficient to establish that a proceeding is reasonably apprehended as contemplated in *Blank.*

[18] The City has not established that an action to enforce costs is related to the Litigation or that litigation in relation to costs, or any other matter, is underway, pending or reasonably apprehended. Accordingly, I find that litigation privilege does not apply to either the Report or the Minutes.

Legal Advice Privilege

[19] The City submits that one sentence in the Report is protected from disclosure under s. 14 because it is subject to legal advice privilege.

[20] Not every communication between a lawyer and a client is privileged. In order for legal advice privilege to apply, all four of the following conditions must be satisfied:

1. there must be a communication, whether oral or written;

2. the communication must be of a confidential character;

3. the communication must be between a client and a legal advisor; and

[15] City's initial submissions at para. 112.
[16] City's initial submissions at para. 112. Also, in the Director of Administrative Services' affidavit at para. 19, she states that the applicant brought an application to the BC Supreme Court seeking a stay of the court order after the deadline passed and the application was dismissed.
[17] Order P10-02, 2010 BCIPC 10 at para. 31.

> 4. the communication must be directly related to the seeking, formulating, or giving of legal advice.[18]

[21] In this case, I am satisfied that all four criteria are met. The withheld sentence clearly indicates that there was a communication between the City's lawyers and City staff. It is also clear from the withheld information that it is directly related to giving legal advice. The City submits that the communication was of a confidential character since it was recorded in a staff report marked "confidential", was communicated to Council at a closed meeting and to the best of the Director of Administrative Services' knowledge, has not been communicated to any person external to the City.[19] I am satisfied, based on the City's evidence that the sentence is subject to legal advice privilege. The City may refuse to disclose this information.

Conclusion on s. 14

[22] Litigation privilege does not apply to either the Report or the Minutes. Legal advice privilege applies to one sentence in the Report.

Section 13

[23] The City applied s. 13(1) to all of the information it withheld in the Report. Section 13(1) gives public bodies discretion to refuse to disclose information that would reveal advice or recommendations developed by or for a public body subject to the exceptions listed in section 13(2).

[24] Section 13(1) of FIPPA recognizes that some degree of deliberative secrecy fosters the decision-making process by keeping investigations and deliberations focused on the substantive issues, free of disruption from extensive and routine inquiries.[20] The BC Supreme Court stated that documents that are created as part of the deliberative process are protected under s. 13(1) even where they include background facts necessary to the analysis. [21] In interpreting the meaning of s. 13(1), the BC Court of Appeal said that "advice" includes an opinion that involves exercising judgment and skill to weigh significance of matters of fact.[22] Previous orders have held that s. 13(1) applies to information

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[18] Order F17-13, 2017 BCIPC 14 at paras. 29-30.
[19] City's initial submissions at para. 92; Director of Administrative Services Affidavit at para. 25. The applicant disputes this on the basis that a related company received legal advice from the same law firm involved in the Litigation; however, further details that the applicant provides clearly indicate that the previous legal advice was about a different matter than the advice in dispute in this inquiry. Applicant's submissions, page 4.
[20] *College, supra* note 2 at para. 105.
[21] *Insurance Corporation of British Columbia v Automotive Retailers Association* 2013 BCSC 2025 at para. 52.
[22] *College, supra* note 2 at para. 113.

that would allow an accurate inference to be made about advice or recommendations.[23]

[25] The first step in any s. 13 analysis is to determine whether the information is advice or recommendations developed by or for a public body. The next step is to determine whether the information falls within any of the circumstances described in s. 13(2); if so, the public body must not refuse to disclose the information under s. 13(1).

[26] The City submits that parts of the Report are advice or recommendations because the Report clearly provides its staff's recommendations for consideration by council and options available to the City.[24] The City submits that other parts of the Report fall under s. 13(1) because judgment and skill were exercised to provide opinions, analyze facts and give reasons to support the recommendations in the Report.[25]

[27] Based on my review, most of the Report contains advice or recommendations within the meaning of s. 13(1). In some portions of the Report, staff clearly provide recommendations to council about litigation with the applicant. In other parts, staff clearly set out options and give opinions on factual matters. This information would directly reveal advice and recommendations developed by City staff for the City council.

[28] Other parts of the Report contain background information which, in my view, is necessary for the reader to understand the recommendations and advice. In this way, the background facts are integral to the analysis as presented by staff in the Report. I find that s. 13(1) applies to this information.

[29] The remaining information that the City withheld under s. 13(1) is headings and signatures. I find that this information would not reveal advice or recommendations directly or by inference.

Section 13(2)

[30] Section 13(2) lists types of information that may not be withheld under s. 13(1). Section 13(2)(a) states that a public body may not refuse to disclose "factual material." In interpreting the phrase "factual material", the BC Supreme Court has distinguished it from "factual information" and found that information is not "factual material" where it was compiled and selected using expertise,

[23] See for example, Order F15-12, 2015 BCIPC 12 at para. 42; Order F16-28, 2016 BCIPC 30 at para. 22.
[24] City's initial submissions at para. 70.
[25] City's initial submissions at para. 72.

judgement and skill for the purpose of providing explanations necessary to the deliberative process.[26]

[31] The City submits that any factual information in the Report is necessary background information and is directly related to the recommendations in it.[27] The applicant submits that it needs and is entitled to the "factual material" and "objective information."[28] Above, I found that the background facts in the Report are integral to the analysis. For the same reason, I find that there is no "factual material" as contemplated by s. 13(2)(a).

[32] In conclusion, the City has established that disclosing most of the information in the Report withheld under s. 13(1) would reveal advice or recommendations and that s. 13(2) does not apply. The only exception to this is the headings and signatures.

Exercise of Discretion

[33] Section 13 is a discretionary exception, so a public body must properly exercise its discretion when refusing applicant access to information withheld under it. It is not my role to determine whether the City should have exercised its discretion to disclose specific information. Rather, I must be satisfied that the public body considered whether to exercise its discretion and that it did not make its decision in bad faith or for an improper purpose or took into account irrelevant considerations or failed to take into account relevant considerations.[29]

[34] The City submits that it properly exercised discretion to withhold the information it withheld in the Report.[30] In her affidavit, the Director of Administrative Services explains that, in exercising her discretion, she took into account that the Report was intended for use at a closed meeting to discuss potential litigation against the applicant and that it is the City's practice not to disclose this type of information considered at a closed meeting. She also states that she considered other factors including the sensitivity of the information, the impact on the public's confidence, and if there was any sympathetic or compelling need to release any further part of the Report.[31]

[35] The applicant states that it sees an enormous impact from withholding anything because the information is key to resolving an outstanding issue and to

[26] *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner),* 2013 BCSC 2322 at paras. 91 and 94.
[27] City's initial submissions at para. 74.
[28] Applicant's submissions, page 3.
[29] *John Doe v Ontario (Finance),* 2014 SCC 36 at para. 52.
[30] City's initial submissions at para. 78.
[31] Director of Administrative Services Affidavit, at paras. 57-61.

understand why the situation developed. The applicant also states that there is a need for transparency to facilitate good local government.[32]

[36] I am satisfied, based on the evidence before me, that the City considered whether to exercise its discretion, considered relevant factors and did not base its decision on irrelevant factors or act in bad faith.

Section 12(3)(b)

[37] Section 12(3)(b) is a discretionary exception that allows a public body to refuse to disclose information that would reveal the substance of deliberations of a meeting of elected officials or a governing body if there is statutory authority to have held that meeting in the absence of the public. The City applied s. 12(3)(b) to all of the disputed information in the Minutes and the Report. With regards to the Report, I will only consider whether s. 12(3)(b) applies to the information I found could not be withheld under s. 13(1).

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

1. The public body has statutory authority to meet in the absence of the public;
2. a meeting was actually held in the absence of the public; and
3. the information would, if disclosed, reveal the substance of deliberations of the meeting.[33]

[39] I will consider each of these three conditions.

Was the City authorized to hold the meeting in the absence of the public?

[40] The City refers to ss. 90 and 92 of the *Community Charter* as the statutory basis for holding a meeting in the absence of the public. The relevant portions of sections 90 and 92 of the *Community Charter* state:

> 90 (1) A part of a council meeting may be closed to the public if the subject matter being considered relates to or is one or more of the following:
>
> …
>
> (c) labour relations or other employee relations;
>
> …
>
> (g) litigation or potential litigation affecting the municipality;
>
> …

[32] Applicant's submissions page 5.
[33] Order F13-10, 2013 BCIPC 11 at para. 8.

> 92 Before holding a meeting or part of a meeting that is to be closed to the public, a council must state, by resolution passed in a public meeting,
>
> (a) the fact that the meeting or part is to be closed, and
>
> (b) the basis under the applicable subsection of section 90 on which the meeting or part is to be closed.

[41] On the date of the *in camera* meeting relating to the Minutes, the City held a public portion of the council meeting immediately before the *in camera* session.[34] The minutes from the public portion of the council meeting show that council passed a resolution stating:

> Pursuant to section 90(1)(c) and (g) of the *Community Charter*, Council proceed to a closed meeting to consider items relating to labour relations and potential litigation.

[42] Based on this resolution, I am satisfied that the City had statutory authority to hold the meeting in the absence of the public.

Did the City hold the meeting in the absence of the public?

[43] The Minutes state that the meeting was closed. The applicant does not specifically dispute that the portion of the meeting relating to the Minutes was held *in camera*. On my review of the Minutes, I am satisfied that the disputed information falls under ss. 90(1)(c) and (g). I am satisfied that the City held the meeting to discuss matters relating to ss. 90(1)(c) and (g) in the absence of the public.

Would disclosure of the Minutes reveal the substance of deliberations at the meeting?

[44] In order for a public body to withhold information under s. 12(3)(b), the information must reveal the substance of deliberations. Many past orders have considered the meaning of the phrase "substance of deliberations." Commissioner Loukidelis stated:

> The first question is what is meant by the words "substance" and "deliberations" in s. 12(3)(b). In my view, "substance" is not the same as the subject, or basis, of deliberations. As *Black's Law Dictionary*, 8th ed., puts it, 'substance' is the essential or material part of something, in this case, of the deliberations themselves. See, also, Order No. 48-1995 and Order No. 113-1996.

[34] The public portion of the meeting minutes are attached to the Director of Administrative Services' affidavit as exhibit G.

> Without necessarily being exhaustive of the meaning of the word 'deliberations', I consider that term to cover discussions conducted with a view to making a decision or following a course of action.[35]

[45] In Order F12-11, the adjudicator found that the records in dispute did not reveal the substance of deliberations because one cannot reasonably conclude from the material what council members thought, said or decided regarding the material being considered.[36] Previous orders have found that disclosing a specific motion would reveal the substance of deliberations.[37]

[46] Some of the withheld information in the Minutes are motions, including who moved and seconded each motion and who voted for each motion. I find that disclosure of this information would reveal the substance of council's deliberations.

[47] Other withheld information in the Minutes consists of headings, a note about staff members departing, times, signatures and that the minutes were certified as correct. There is a set of secondary headings which, in my view, only reveal the subject of discussions. I find that disclosing this information would not reveal the substance of deliberations.[38]

[48] The City also withheld signatures and headings in the Report under 12(3)(b). I do not find that disclosing this information would reveal the substance of deliberations and the City cannot rely on s. 12(3)(b) to withhold it.

Section 22

[49] I do not need to consider s. 22 because I have found that the City may refuse to disclose the information it withheld under s. 22 under s. 12(3)(b).

CONCLUSION

[50] For the reasons provided above, I make the following orders under s. 58:

1. The City is authorized, in part, to refuse to disclose the information in dispute under ss. 14, 13(1) and 12(3)(b). The City is not authorized to refuse to disclose the information in the copy of the Minutes and the Report underlined in red that I have sent to the City along with this order.

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[35] Order 00-11 2000, CanLII 10554 (BC IPC).
[36] Order F12-11, 2012 BCIPC 15 at para. 14.
[37] See, for example, Order 03-09, 2003 CanLII 49173 (BC IPC) at para. 23; Order F16-03, 2016 BCIPC 3 at para. 13.
[38] In Order F15-20, 2015 BCIPC 22 at para. 25, the adjudicator found that disclosure of the names of attendees, the dates and times of the meeting, the date the minutes were adopted and signed and who certified the minutes as correct would not reveal the substance of deliberations.

2. I require the City of Parksville to give the applicant access to the information underlined in red by June 28, 2018. The City of Parksville must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

May 16, 2018

ORIGINAL SIGNED BY

Erika Syrotuck, Adjudicator

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