



OFFICE OF THE
INFORMATION & PRIVACY
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Order F19-18

CITY OF WHITE ROCK

Erika Syrotuck
Adjudicator

April 12, 2019

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Summary: The City of White Rock refused access to records relating to its decision to censure one of its councillors on the basis of ss. 12(3)(b) (local body confidences), 14 (solicitor client privilege) and 22(1) (unreasonable invasion of personal privacy). The adjudicator found that ss. 12(3)(b), 14 and 22(1) applied in part and ordered disclosure of the remaining information in dispute.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(3)(b), 14 and 22(1), *Community Charter* ss. 90 and 92.

INTRODUCTION

[1] The applicant requested records relating to the censure of a City of White Rock councillor. The City of White Rock (City) refused to disclose the responsive records under s. 12(3)(b) (local body confidences) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the City's decision. Mediation failed to resolve the issues and the matter proceeded to inquiry.

[2] After providing its initial submissions, the City asserted that ss. 14 (solicitor client privilege) and 22 (unreasonable invasion of personal privacy) applied to some of the information in dispute and requested that these exceptions be added as issues in the inquiry. The applicant objected on the basis that these issues were not raised during mediation. The OIPC approved the City's request based on the importance of solicitor client privilege and the fact that s. 22(1) is a mandatory exception to disclosure.

ISSUES

[3] The issues in this inquiry are:

1. Is the City authorized to refuse to disclose the information in dispute under s. 12(3)(b) of FIPPA?
2. Is the City authorized to refuse to disclose the information in dispute under s. 14 of FIPPA?
3. Is the City required to refuse to disclose the information in dispute under s. 22(1) of FIPPA?

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

DISCUSSION

Background

[5] In October 2016, the City council censured one of its councillors (Councillor).¹ The reason for the censure was that the Councillor had divulged confidential information discussed at a June 27, 2016 *in camera* meeting of the City council. The City publicly announced the censure in a media release on October 24, 2016.

Records in Dispute

[6] The records in dispute are:

- Three pages of meeting minutes from a June 27, 2016 closed meeting (June Minutes);
- Five sets of correspondence related to the Councillor's unauthorized disclosure of confidential information and the censure (Correspondence);
- Six pages of meeting minutes from a September 19, 2016 closed meeting (September Minutes);

¹ A censure is an official reprimand. See *Black's Law Dictionary* 10th ed, *sub verbo* "censure."

- Nine pages of meeting minutes from an October 24, 2016 closed meeting (October Minutes);
- Notes about the October 24, 2016 closed meeting (October Notes);
- An agenda, with attachments, prepared for the October 24, 2016 closed meeting (October Agenda). One of the attachments is minutes from a closed meeting on October 3, 2016; and
- A draft media release about the censure (Media Release).

[7] The City has withheld all of the records in their entirety. The City explains that some of the records include information about matters unrelated to the Councillor's censure or the matter about which he divulged information. In his submission, the applicant clarifies that he does not want information about the unrelated matters discussed at the closed meetings.²

[8] I conclude that information about the unrelated matters is no longer in dispute.³ I will not consider it any further or make a determination about the City's decision to refuse the applicant access to it.⁴

Section 12(3)(b)

[9] Section 12(3)(b) allows a public body to refuse to disclose information that would reveal the substance of deliberations of a meeting of its elected officials or a governing body if an Act or a regulation under FIPPA authorized holding the meeting in the absence of the public. The City applied s. 12(3)(b) to all of the information in dispute. It asserts that all of the documents in dispute would reveal the substance of the City council's deliberations during either the June, September or October Meetings.

[10] 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.⁵

² Applicant's submissions, para 97.

³ For clarity, I have marked the information that I find is no longer in dispute in a copy of the records that I have sent to the City along with this order.

⁴ For similar findings, see Decision F08-08, CanLII 41156 (BC IPC) at para. 12; Order F17-11, 2017 BCIPC 12 at para 4.

⁵ Order F13-10, 2013 BCIPC 11 at para. 8.

[11] I will consider each of these conditions in turn.

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

[12] The City says that s. 90 of the *Community Charter* provided the statutory authority to hold each of the June, September and October meetings in the absence of the public.

[13] The portions of the *Community Charter* that are relevant in this case 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:

(a) personal information about an identifiable individual who holds or is being considered for a position as an officer, employee or agent of the municipality or another position appointed by the municipality;

(d) the security of the property of the municipality;

(g) litigation or potential litigation affecting the municipality;

(i) the receipt of advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

(2) A part of a council meeting must be closed to the public if the subject matter being considered relates to one or more of the following:

(b) the consideration of information received and held in confidence relating to negotiations between the municipality and a provincial government or the federal government or both, or between a provincial government or the federal government or both and a third party;

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.

[14] To show that it was authorized to close a meeting to the public under the *Community Charter*, a public body must provide evidence that it met the requirements in s. 92. In addition, the public body must show that the subject

matter the public body actually considered at the meeting relates to at least one of the bases under s. 90 that it identified as a basis for closing the meeting.⁶ For the reasons, below, I find that the City was authorized under the *Community Charter* to hold the June 27, 2016, September 19, 2016 and October 24, 2016 Meetings in the absence of the public.

[15] The information in dispute in the June Minutes is about the matter the Councillor later disclosed without the City council's authorization. The City has referred to this as the Confidential Matter, and I will do the same. The information in dispute in the September and October Minutes relates to the Confidential Matter and how the City responded when the Councillor divulged it.

[16] In its submissions, the City states that it relied on multiple sections, including s. 90(1)(i) to close the relevant portions of all three meetings. Section 90(1)(i) authorizes excluding the public from a meeting where the topic of discussion relates to the receipt of advice subject to solicitor client privilege including communications necessary for that purpose.

[17] The City has provided the meeting minutes of open meetings on June 27, 2016, September 19, 2016 and October 24, 2016 showing that the City council passed a resolution closing each meeting on several bases, including ss. 90(1)(i).⁷ I find that the City has met the formal requirements in s. 92 of the *Community Charter*.

[18] However, as discussed above, the evidence must also show that the subject matter City council considered at the closed meeting relates to or is at least one of the subject matters under s. 90 that the City identified as a basis for closing the meeting.

[19] In this regard, the Director of Corporate Services for the City (Director) says that in the June 27, 2016 meeting, council considered legal advice and communications from the City's Solicitor.⁸ With regard to the September 19, 2016 and October 24, 2016 closed meetings, the Director says that the City's solicitor attended these meetings and gave advice about the Confidential Matter and about the Councillor's unauthorized disclosure of information.⁹

⁶ Many past orders have considered this. For example see Order F14-07, 2014 BCIPC 8 at paras 20-22; Order F15-20, 2015 BCIPC 22 at para. 21; Order F15-56, 2015 BCIPC 59 at para 31; Order F12-11, 2012 BCIPC 15 at para. 11; and Order F07-02, 2007 CanLII 2529 (BCIPC) at paras. 30-35.

⁷ Director of Corporate Services Affidavit, Exhibits C, F and I. I note that the applicant says that the person who commissioned the Director's affidavit was in a conflict of interest because he was also the FOI Clerk at the time of the applicant's request. The role of the commissioner is to ensure the affiant understands their oath. I do not think there is a conflict of interest or see how this affects the reliability or weight of the Director's evidence.

⁸ Director of Corporate Services Affidavit, para. 8.

⁹ Director of Corporate Services Affidavit, paras. 13, 14, 19 and 21.

[20] The applicant submits that there is no statute lawfully authorizing the City council to censure or punish the Councillor at a closed meeting that excluded the public.¹⁰ Specifically, the applicant says that none of the exceptions in s. 90(1) or 90(2) of the *Community Charter* apply when Council intends to censor and punish a publicly elected Council member for reported misbehaviour in their capacity as a Councillor.¹¹ The applicant further says that Council erroneously relied on s. 90(1)(a) because the Councillor is not an “officer” under the *Community Charter*.

[21] I find that s. 90(1)(i) authorized the City council to discuss both the Confidential Matter and the Councillor’s unauthorized disclosure of information relating to the Confidential Matter in the absence of the public. While there is no indication that a lawyer was present at the June 27, 2016 closed meeting, I am nonetheless satisfied that the City considered advice received from its lawyer relating to the Confidential Matter. This is because the June Minutes reference legal advice from a City lawyer to the Council. With regard to the September 19, 2016 and October 24, 2016 closed meetings, I accept the City’s evidence that one of its lawyers was present and gave advice at both meetings. Both sets of minutes show that a City lawyer was present at the relevant portions of these meetings. I find that the City was authorized to meet to discuss these issues the absence of the public because the subject matter being considered related to the receipt of advice that is subject to solicitor-client privilege, including communications necessary for that purpose.

[22] Since I have found that s. 90(1)(i) provides statutory authority for the City to close all three meetings, I do not need to consider whether other sections under s. 90 also apply.

[23] I note here that my findings that the City was authorized to close the meetings on basis of s. 90(1)(i) of the *Community Charter* are not determinative of whether all of the information in dispute is subject to solicitor client privilege under s. 14 of FIPPA.

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

[24] The City submits that it held *in camera* meetings on June 27, 2016, September 19, 2016 and October 24, 2016. The Director of Corporate Administration says that she attended each of these three meetings and that they were closed to the public.¹² The applicant says that he does not dispute that the City actually held a series of closed meetings between June and October of 2016.¹³

¹⁰ Applicant’s submissions, para. 96.

¹¹ Applicant’s submissions, para. 107.

¹² Director of Corporate Services affidavit at paras. 4, 8, 13, and 19.

¹³ Applicant’s submissions, para. 84.

[25] Accordingly, I am satisfied that all three meetings were held in the absence of the public.

Would disclosure of the information in dispute reveal the substance of deliberations at the meeting?

[26] 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.

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.¹⁴

[27] In Order F11-04, Commissioner Denham said that the substance of deliberations is what was said at a meeting, not the material that stimulated the discussion.¹⁵ 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.¹⁶ Previous orders have found that disclosing a specific motion would reveal the substance of deliberations.¹⁷

[28] In Order 326-1999, Commissioner Loukidelis said that s. 12(3)(b) would apply to records that would permit the drawing of accurate inferences with respect to the substance of *in camera* deliberations.¹⁸

[29] The applicant says that information that was the basis of the Councillor’s reported divulging of information is not the substance of deliberations, rather it is the subject matter which the City council deliberated on.¹⁹

¹⁴ Order 00-11 2000, CanLII 10554 (BC IPC).

¹⁵ Order F11-04, 2011 BCIPC 4 at paras 29 and 35.

¹⁶ Order F12-11, 2012 BCIPC 15 at para. 14.

¹⁷ See, for example, Order 03-09, 2003 CanLII 49173 (BC IPC) at para. 23; Order F16-03, 2016 BCIPC 3 at para. 13.

¹⁸ Order 326-1999, 1999 CanLII 4353 (BC IPC) at 3.1.

¹⁹ Applicant’s submission, para. 197.

[30] I will consider whether disclosing the information in each type of record would reveal the substance of deliberations of one of the June 27, 2016, September 19, 2016, or October 24, 2016 closed meetings.

June, September and October Minutes

[31] All three sets of minutes show the specific motions voted on by Council and how the members of Council voted. Consistent with previous orders, I find that disclosing the content of the specific motions and how the City council members voted would reveal the substance of deliberations.

[32] There is also information in each of the minutes that precedes or follows a motion. Some of this information would reveal the substance of council's deliberations because it details the actual discussion of the City council and what members of the City council thought or said about the issues before them. For example, some of the information in dispute shows the opinion of council or a council member about an issue before council.

[33] However, some of the information that precedes or follows a motion does not reveal the substance of deliberations because it is either an update to council members, factual statements describing the issues before council, or information outlining the purpose and procedure for the City council's discussion. This information does not reveal what council members said or thought about the issues before them.

[34] In addition, the October Minutes include a statement by the Councillor, which the council members then discussed. In this case, the Councillor's statement was the topic of discussion. I find that disclosure of the Councillor's statement does not reveal the substance of deliberations about that statement.

[35] Finally, I find that the following information in the June, September and October Minutes does not reveal the substance of deliberations of council: the date, time, and location of the meetings, attendees, notes about staff members or lawyers coming and going, page numbers, and subject headings. The City may not withhold this under s. 12(3)(b).

Correspondence

[36] The City asserted that some of the Correspondence discloses the substance of deliberations about the Confidential Matter.

[37] Some of the Correspondence includes motions that are in the Minutes. I find that disclosing these motions would reveal the substance of deliberations.

[38] In my view, the balance of the Correspondence does not reveal the substance of Council's deliberations at the June 27, 2016, September 19, 2016

or October 24, 2016 meetings. In particular, I have considered whether any parts of the Correspondence would reveal the substance of council's deliberations about the Confidential Matter at the June 27, 2016 closed meeting. I have reviewed the Correspondence in detail, and I am not satisfied that any part of it reveals what council members said or thought or decided at the June 27, 2016 meeting.

[39] In addition, the headings, footings, subject lines, page numbers, senders and recipients in the Correspondence all do not reveal the substance of council's deliberations. Disclosing this information would not reveal the substance of deliberations at one of the three closed council meetings.

October Agenda and Attachments

[40] The October Agenda sets out the issues to be discussed at the October 24, 2016 closed meeting. The portion of the October Agenda in dispute includes a motion passed at the September 19, 2016 closed council meeting. I find that disclosing this motion would reveal the substance of deliberations at the September closed meeting. The other information in the Agenda such as headings, page numbers, and notes do not reveal the substance of deliberations.

[41] The October Agenda includes various attachments, which the City is also withholding under s. 12(3)(b). Some of the attachments in dispute are duplicates of the Correspondence and the September Minutes. I make the same findings about these documents as above.

[42] The other attachment in dispute is minutes from a closed council meeting on October 3, 2016. The information in dispute in those minutes is about the Confidential Matter. The City has not explained and I do not see how this information reveals the substance of deliberations of the June 27, 2016, September 19, 2016 or October 24, 2016 closed meetings.

[43] I have also considered whether the disputed information in the minutes of the October 3, 2016 closed meeting reveal the substance of deliberations at that meeting. The City provided a copy of the minutes from both the open and the closed portions of the October 3 meeting.²⁰ They establish that a resolution was passed to close the meeting to the public for reasons related to ss. 90(1)(d),(g), (i) and 90(2)(b) of the *Community Charter*. I am satisfied that the City has met the requirements under s. 92 of the *Community Charter*.

[44] However, I am not satisfied that the subject matter that the City council discussed relates to or is one of 90(1)(d)(g)(i) and 90(2)(b). The burden is on the City to explain how the subject matter of the meeting relates to at least one of the bases on which it closed the meeting. The City did not explain and it is not

²⁰ Director of Corporate Services Affidavit, Exhibit H.

evident to me how any of these four sections of the *Community Charter* relate to the subject matter considered at the meeting. I have considered each basis as follows:

- Section 90(1)(d) allows a council to close a meeting if the subject matter of the meeting relates to the security of the property of the municipality. I can see how the subject matter relates to municipal property but not how it relates to the security of that property.
- 90(1)(g) allows a council to close a meeting if the subject matter of the meeting relates to litigation or potential litigation affecting the municipality. The City has stated that the Confidential Matter was the subject of litigation or potential litigation.²¹ The October 3, 2016 minutes reference a specific action by the City but it is not apparent from my review of the records and the City's evidence and argument how the subject matter relates to litigation or potential litigation.
- 90(1)(i) allows a council to close a meeting if the subject matter of the meeting relates to or is the receipt of advice that is subject to solicitor client privilege, including communications necessary for that purpose. The information in dispute indicates that a lawyer performed a legal service for the City, but the minutes do not mention legal advice. It is not evident to me if or how the information in dispute relates to the receipt of legal advice.
- Section 90(2)(b) requires a council to close a meeting if the subject matter relates to the consideration of information received and held in confidence relating to negotiations between the municipality and a provincial government or the federal government or both, or between a provincial government or the federal government or both and a third party. While the information relates to negotiations between the municipality, provincial and federal governments, the minutes themselves clearly indicate that the information was not held in confidence.

[45] In conclusion, I am not satisfied that the City is authorized to withhold the information in dispute in the October 3, 2016 closed meeting minutes under s. 12(3)(b).

October Notes

[46] The City says that the October Notes were taken before and during the October 24, 2016 meeting. Parts of the October Notes set out in detail the issues that council was to discuss, including draft resolutions and points of clarification about those resolutions. In my view, one could easily and accurately infer what City council discussed at the October 24, 2016 closed meeting by seeing these

²¹ City's initial submissions, para. 30.

parts of the October Notes. For that reason I find that those parts reveal the substance of deliberations at the October 24, 2016 closed meeting.

Media Release

[47] In my view, the information in the Media Release is so brief that it does not reveal the substance of deliberations of council.

Section 12(4)(a)

[48] Section 12(4)(a) says 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.

[49] In interpreting what is meant by “considered” under s. 12(4), Commissioner Loukidelis said that:

... 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.

[50] The applicant says that s. 12(4)(a) applies to the information in dispute because City council dealt with the matter of the Councillor’s censure at a meeting open to the public. The applicant points to the fact that the City council provided a public media release announcing the Councillor’s censure at the October 24, 2016 open meeting stating that the Councillor was censured for breach of trust and sharing of confidential/classified information. The applicant also says that the City dealt with the censure by announcing that the Councillor was no longer part of the deputy mayor rotation.²²

[51] The City says that the subject matter of the deliberations have not been considered at a meeting open to the public such that s. 12(4) of FIPPA applies. The City says that it announced that the Councillor had been censured, but that council’s deliberations about the censure were not made public. The City also says that the subject of the Confidential Matter was never made public.²³

[52] In my view, when the City issued its media release it was not considering the subject matter of its deliberations. Rather, the City was announcing a decision that it had already made. I conclude that s. 12(4) does not apply in this case.

²² Applicant’s submissions, paras. 213-214.

²³ City’s reply submissions, paras. 26-28.

Summary of s. 12(3)(b) findings

[53] In summary, I find that s. 12(3)(b) applies to some of the information in dispute relating to the June 27, 2016, September 19, 2016 and October 24, 2016 closed council meetings. Specifically, 12(3)(b) applies to motions, the discussions of council, and information that allows an accurate inference to be made about the discussions of council.

Section 14

[54] 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 solicitor client privilege encompasses both legal advice privilege and litigation privilege. The City has applied both types of privilege to some of the information in dispute. I will first assess the City's claim with respect to legal advice privilege and then regarding litigation privilege.

Legal Advice Privilege

[55] 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
4. the communication must be directly related to the seeking, formulating, or giving of legal advice.²⁴

[56] The City has claimed legal advice privilege over some of the Correspondence, the Media Release, the Notes, some parts of the Agenda and some of the Minutes. The City has stated that all of the disputed records contain information covered by legal advice privilege.²⁵ The applicant disputes that the Correspondence and the Media Release are subject to solicitor client privilege.²⁶

[57] I find that parts of the September and June Minutes are privileged.

[58] The September Minutes contain information that I am satisfied reflects legal advice communicated from the City's lawyer to the City, as well as information related to the giving of legal advice. I am satisfied that it was intended

²⁴ Order F17-13, 2017 BCIPC 14 at paras. 29-30.

²⁵ City's initial submissions, para. 16.

²⁶ See Applicant's submissions, paras. 153 - 156.

to be confidential because of the nature of the communication and the fact that it was communicated at an *in camera* meeting.

[59] Although it is not strictly necessary given that I have found this information may be withheld under s. 12(3)(b), I note that the June 27, 2016 meeting minutes contain advice from the City’s lawyer to the City. It was clearly intended to be confidential. This information is also subject to legal advice privilege.

[60] However, it is not clear to me that any other parts of the June and September Minutes reflect legal advice or are otherwise related to the seeking or formulating of legal advice. I find that legal advice privilege does not apply.

[61] The City says that the “real time legal advice” is set out in the October Notes and October Minutes.²⁷ I have reviewed the October Notes and it is not clear to me that any part of the Notes reflect legal advice given to the City by its lawyer. In addition, no parts of the October Minutes, Agenda or the attachments reveal a communication between a lawyer and client. I find that no part of the information in dispute in the Notes, Agenda or attachments to the Agenda are subject to legal advice privilege.

[62] Finally, I am not satisfied that legal advice privilege applies to the Correspondence or the Media Release. While the Correspondence is a written communication, none of it is between a client and legal advisor. The Media Release is also not a communication between a solicitor and a client. The City has not provided any evidence regarding the confidentiality of these communications. Further, having reviewed the records, they are not related to seeking, formulating or giving legal advice.

[63] In summary, legal advice privilege only applies to some information in the June and September meetings minutes.

Litigation Privilege

[64] Litigation privilege is a rule of evidence that protects documents or communications that are made for the dominant purpose of litigation from disclosure.²⁸ The purpose of litigation privilege is to create a “zone of privacy” in relation to pending or apprehended litigation²⁹ 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

²⁷ City’s initial submissions, para. 40.

²⁸ *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52 at paras. 20 and 23.

²⁹ *Blank v. Canada (Minister of Justice)* 2006 SCC 39 at para. 34.

adversary.³⁰ Litigation privilege is not restricted to communications between a lawyer and client; it can include communication with third parties.³¹

[65] The BC Court of Appeal affirmed the following test for litigation privilege:

Litigation Privilege must be established document by document. To invoke the privilege, counsel must establish two facts for each document over which the privilege is claimed:

1. litigation was ongoing or was reasonably contemplated at the time the document was created; and
2. the dominant purpose of creating the document was to prepare for that litigation.³²

[66] Litigation privilege ends once the litigation is completed, unless there are ongoing closely related proceedings.³³

[67] The City says that the censure hearing is a form of litigation³⁴ and that council's deliberations on the censure itself are subject to litigation privilege.³⁵ It also says that the censure itself occurred because the Councillor disclosed confidential information which was itself subject to litigation privilege.³⁶

[68] The applicant submits that the City never held a genuine belief that the censure would result in litigation or potential litigation.³⁷ The applicant says that the City has offered no proof to substantiate its claim that all of the disputed records contain information covered by solicitor client or litigation privilege.³⁸

[69] In my view, the City has not provided persuasive support for its assertion that censure is litigation for the purposes of litigation privilege. In any case, the City has already made the decision to censure the Councillor and announced that decision. Even if the censure was "litigation," the censure is complete. Therefore, litigation privilege does not apply.

[70] The City has not explained what litigation was ongoing or reasonably contemplated in relation to the Confidential Matter. I have reviewed the records and it is not evident to me that any litigation related to the Confidential Matter was ongoing or reasonably contemplated. Further, the City has not provided any

³⁰ *Raj v Khosravi* 2015 BCCA 49, at para. 7.

³¹ *Blank*, *supra*, at para 27.

³² *Keefe Laundry Ltd. v. Pellerin Milnor Corp. et al.*, 2006 BCSC 1180 at para. 96.

³³ *Blank v. Canada (Minister of Justice)* 2006 SCC 39 at paras. 34-36.

³⁴ City's initial submissions, at para. 33.

³⁵ City's reply submissions, para. 35.

³⁶ City's reply submissions, para. 35.

³⁷ Applicant's submissions, para 226.

³⁸ Applicant's submissions, para. 229.

persuasive explanation or evidence that the dominant purpose of any of the records in dispute was to prepare for litigation. I am not satisfied that litigation privilege applies.

[71] In conclusion, I find litigation privilege does not apply to any of the records in dispute.

Section 22

[72] The City is withholding some information under s. 22 in the Minutes, Correspondence, October Notes and October Agenda that I found the City may not refuse to disclose under ss. 12(3)(b) or 14.

[73] Section 22 requires public bodies to refuse to disclose personal information if disclosure would be an unreasonable invasion of a third party's personal privacy. The portions of s.22 pertaining to this inquiry state:

(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,

(d) the personal information relates to employment, occupational or educational history,

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,

(h) the disclosure could reasonably be expected to reveal the content of a personal recommendation or evaluation, a character reference or a personnel evaluation supplied by the third party in

confidence and the applicant could reasonably be expected to know the identity of the third party,

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(a) the third party has, in writing, consented to or requested the disclosure,

(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,

Personal Information

[74] The first step in any s. 22 analysis is to determine whether the information in dispute is personal information.

[75] FIPPA defines personal information as “recorded information about an identifiable individual other than contact information.” FIPPA defines contact information as “information to enable an individual at a place of business to be contacted and includes the name, position or title, business telephone number, business address, business email or business fax number of the individual.”³⁹ Previous orders have held that information is about an identifiable individual when it is reasonably capable of identifying an individual alone or when combined with information from other available sources.⁴⁰

[76] The applicant submits that the information in dispute is about the Councillor's reported misconduct, censure and punishment in his role as a public official, so it cannot be his personal information. This is a misunderstanding of the nature of personal information. Whether a third party is acting in a public capacity has no bearing on whether or not the information is personal information.

[77] In this case, the information in dispute is identifiable information about the Councillor because it is about his actions and the decision to censure him. This information is the Councillor's personal information.

[78] The information in dispute also includes the name, email addresses of the Mayor, other City councillors, City employees and other third parties. In the context in which they appear, the City employees' and officials' names and titles are contact information. Contact information is not personal information and therefore I will not consider this information any further.

³⁹ *Freedom of Information and Protection of Privacy Act*, Schedule 1.

⁴⁰ See for example, Order F16-38, 2016 BCIPC 42 (CanLII) at para. 112; Order F13-04, 2013 BCIPC 4 (CanLII) at para. 23.; Order P12-01, 2012 BCIPC 25 (CanLII) at para. 85.

[79] There is also the name and email address of a third party who is not a member of the City council or an employee of the City. This information is that person's personal information.

Section 54(b) notice

[80] As the information in dispute included the Councillor's personal information, I decided that the Councillor was an appropriate person to receive notice of the inquiry under s. 54(b) and the right to make a representation under s. 56(3). The registrar invited the Councillor under s. 54(b) to make a submission in the inquiry but the Councillor ultimately decided not to participate.

Section 22(4)

[81] Section 22(4) outlines circumstances where disclosure of a third party's personal information does not constitute an unreasonable invasion of that third party's personal privacy.

22(4)(a)

[82] Section 22(4)(a) says that disclosure of personal information is not an unreasonable invasion of a third party's personal information if the third party has, in writing, consented to the disclosure. The applicant says that "there is little doubt that if White Rock has asked [the Councillor] to provide his written consent to disclose the information, that written consent would have been immediately forthcoming."⁴¹

[83] No written consent is before me in this inquiry. As mentioned above, the Councillor declined to participate. Section 22(4)(a) does not apply.

22(4)(e)

[84] Under s. 22(4)(e), disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the information is about the third party's position, function or remuneration as an officer, employee or member of a public body or as a member of a minister's staff.

[85] The applicant says that, as a member of City council, the applicant is a member of the public body.⁴² The applicant also says that the information relates exclusively to information about the Councillor's position, function or remuneration as a City councillor.

⁴¹ Applicant's submissions, para. 268.

⁴² Applicant's submissions, para. 248.

[86] Other than his name and job title, I do not think that information in dispute about the Councillor falls under s. 22(4)(e). The information in dispute is not about his position or function as a Councillor, but rather how he carried out his role. In my view, this falls outside of the ambit of 22(4)(e).

[87] The name of the third party who does not work for the City does not fall under s. 22(4)(e) because this individual is not an officer, employee or member of a public body.

Section 22(3)

[88] Section 22(3) sets out circumstances where disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy.

22(3)(b)

[89] Section 22(3)(b) says that disclosure of personal information is presumed to be an unreasonable invasion if the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or continue the investigation.

[90] The City says that s. 22(3)(b) applies but has not explained in what way the personal information is related to a possible violation of law. In my view, s. 22(3)(b) does not apply.

22(3)(d)

[91] Under s. 22(3)(d) disclosure of a third party's personal information that relates to employment, occupational or educational history is presumed to be an unreasonable invasion of that third party's personal privacy.

[92] In my view, the information in dispute is related to the Councillor's occupational history. *Black's Law Dictionary* defines occupation as "an activity or pursuit in which a person engages, especially a person's usual or principal work or business."⁴³ In my view, a person's role as an elected official is their usual work. The information in dispute is about how the Councillor performed his role as a part of the City council. In my view, this relates to his occupational history as a City of White Rock councillor.

⁴³ *Black's Law Dictionary*, 10th ed, *sub verbo* "occupation."

22(3)(g) and (h)

[93] The City says that s. 22(3)(g) and (h) apply but offers no further argument.⁴⁴ In my view, the information in dispute does not consist of a personal recommendation or evaluation, a character reference or personnel evaluations within the meaning of either of these sections.

Section 22(2)

[94] Section 22(2) identifies circumstances that are relevant to determining whether disclosure of personal information is an unreasonable invasion of a third party's personal privacy. Section 22(2) is not exhaustive, there can be other circumstances relevant to whether the information in dispute is an unreasonable invasion of a third party's personal privacy.

22(2)(a)

[95] Under s. 22(2)(a), whether the disclosure is desirable for the purpose of subjecting the activities a public body to public scrutiny is a relevant circumstance.

[96] The applicant says that the records in dispute are totally and exclusively related to the Councillor's conduct as a City councillor elected by the public to serve the public.⁴⁵ The applicant says that because the records relate to the Councillor in his public capacity, disclosing the records is not an unreasonable invasion of his personal privacy.

[97] Section 22(2)(a) is about scrutinizing the actions of a public body, not an individual. In my view, disclosure of information about the actions of the Councillor himself would not serve the purpose of public scrutiny. However, information that shows how the City responded to the Councillor's disclosure of information about the Confidential Matter could meaningfully add to the understanding of the City's electorate about which kinds of behaviour it deems to be unacceptable and how it came to the decision to censure the Councillor. I find that s. 22(2)(a) is a relevant circumstance with regards to the information about how the City responded to the Councillor's unauthorized disclosure of information.

Elected Official

[98] In my view, it is relevant that the Councillor was an elected official and was clearly acting in his capacity as a councillor when he disclosed information that was discussed at a closed City council meeting. In my view, this weighs in

⁴⁴ See City's initial submissions, para. 54 and City's reply submissions, para. 24.

⁴⁵ Applicant's submissions, para. 251.

favour of disclosure of the information that relates to the Councillor's unauthorized disclosure of information related to the Confidential Matter.

Confidentiality

[99] Some of the Correspondence from the City to the Councillor about the censure is marked "Personal and Confidential." I understand the importance of the confidentiality of these communications at the time they were made, because the City had not yet made a decision about the censure. However, given that the City later announced the censure, I cannot see how these statements of confidentiality serve any continuing purpose. For this reason, I do not think the fact that some of the Correspondence is marked confidential is a factor weighing against disclosure.

Public Capacity

[100] As previously mentioned, there is personal information about another third party who is not affiliated with the City. The information is their name, email address and role within their organization. Information before me in this inquiry shows that this person's name and role within their organization have been publicized. The fact that this information about this person's role is in the public realm is a factor weighing in favour of disclosure.

Conclusion on s. 22

[101] I found that disclosure of the information in dispute is presumed to be unreasonable invasion of the Councillor's personal privacy under s. 22(3)(d) because it relates to his occupational history.

[102] In my view, the fact that the Councillor was an elected official and was acting as a City councillor when he disclosed information about the Confidential Matter overcomes the presumption under s. 22(3)(d) with regards to most of the information in dispute under s. 22(1). Therefore, I find that s. 22 does not apply to the Councillor's personal information that is directly related to the unauthorized disclosure of information and/or how the City council responded to the unauthorized disclosure.

[103] I find that disclosure of the remaining personal information in dispute is an unreasonable invasion of the Councillor's personal privacy. For example, some of the information in the Correspondence is the Councillor's home address or explains the Councillor's scheduling constraints. There are no circumstances that rebut the presumption that the disclosure of this information is presumed to be an unreasonable invasion of the Councillor's personal privacy. Disclosing this personal information would not meaningfully add to the public's understanding of how the City addressed the Councillor's unauthorized disclosure of confidential

information. Further, this information would not help the public to understand how or why the Councillor disclosed information in his capacity as an elected official. Section 22 applies to this information.

[104] Finally, with regards to the information in dispute about the other third party, the fact that this person's name and role have been publicized is a relevant circumstance weighing in favour of disclosure. However, there is no evidence that their email address is public and so I find that disclosing it is an unreasonable invasion of this third party's personal privacy.

[105] In conclusion, s. 22(1) applies to some but not all of the information in dispute.

CONCLUSION

[106] I make the following orders under s. 58 of FIPPA,

1. I confirm the City's decision in part, to refuse to disclose the information in dispute under ss. 12(3)(b), 14 and 22. The City is not authorized to refuse to disclose the information highlighted in pink on the copy of the records I have sent along with this order.
2. I require the City of White Rock to give the applicant access to the information highlighted in pink by May 29, 2019. The City of White Rock must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

April 12, 2019

ORIGINAL SIGNED BY

Erika Syrotuck, Adjudicator

OIPC File No.: F17-72222