



Order F20-10

CITY OF RICHMOND

Elizabeth Barker
Director of Adjudication

April 17, 2020

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Summary: The City of Richmond requested that the commissioner exercise his discretion under s. 56 of the Act and choose not to conduct an inquiry into the City's decision to refuse a journalist access to a report on policing. The adjudicator dismissed the application after finding that it was not plain and obvious that s. 12(3)(b) (local public body confidences) of the *Freedom of Information and Protection of Privacy Act* applies to the report.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(3)(b) and 56.

INTRODUCTION

[1] This matter began when the applicant who is a journalist requested the City of Richmond (City) give him access to a report titled "Policing Options for the City of Richmond" (Report). The City refused access to the report under ss. 12(3)(b) (local public body confidences), 13 (advice and recommendations), 16 (harm to intergovernmental relations) and 22 (unreasonable invasion of third party personal privacy) 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. Mediation by an OIPC investigator did not resolve the issues in dispute and the applicant requested they proceed to inquiry.

[2] Under s. 56 of FIPPA the commissioner has the discretion to choose whether to hold an inquiry. The City has requested that the commissioner decline to hold an inquiry in this case. The City says that it is plain and obvious that s. 12(3)(b) applies to the Report. Both parties provided a submission about how the OIPC should exercise its discretion in this case.

ISSUE

[3] In this order, I will decide whether the OIPC should exercise its discretion under s. 56 to not hold an inquiry into the City's decision to refuse the applicant access to the Report. The public body asking the OIPC to exercise its discretion to not hold an inquiry bears the burden of demonstrating why the OIPC should grant that request.¹

DISCUSSION

Record at issue

[4] The Report is the only record at issue. The City provided a copy of it for my review. It is several years old and 219 pages long.

Reviews by the commissioner

[5] Section 56(1) of FIPPA reads:

56(1) If the matter is not referred to a mediator or is not settled under section 55, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[6] Section 56 uses the word “may” and this gives the commissioner the discretion to decide whether to hold an inquiry. The principles for the exercise of discretion under s. 56 are summarized in Decision F08-11 as follows:

- the public body must show why an inquiry should not be held
- the respondent (the applicant for records) does not have a burden of showing why the inquiry should proceed; however, where it appears obvious from previous orders and decisions that the outcome of an inquiry will be to confirm that the public body properly applied FIPPA, the respondent must provide “some cogent basis for arguing the contrary”
- the reasons for exercising discretion under s. 56 in favour of not holding an inquiry are open-ended and include mootness, situations where it is plain and obvious that the records fall under a particular exception or outside the scope of FIPPA, and the principles of abuse of process, *res judicata* and issue estoppel
- it must in each case be clear that there is no arguable case that merits an inquiry.²

¹ Order F16-37, 2016 BCIPC 41 at para. 10.

² Decision F08-11, 2008 CanLII 65714 (BC IPC) at para. 8.

Local public body confidences

[7] Section 12(3)(b) 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.

...

[8] Three conditions must be met in order for a public body to withhold information under s. 12(3)(b);

1. The public body must have statutory authority to meet in the absence of the public (i.e., *in camera*);
2. The meeting must have taken place *in camera*; and
3. If disclosed, the information at issue would reveal the substance of deliberations at the *in camera* meeting.³

[9] In explaining the meaning of the term substance of deliberations, previous orders have said that the “substance” of deliberations does not mean the subject or basis of the deliberations; rather, it means the essential or material part of the deliberations. They have also said that “deliberations” includes “discussions conducted with a view to making a decision or following a course of action.”⁴

[10] In Order No. 326-1999, former Commissioner Loukidelis considered a report on firefighting services that the City of Cranbrook’s council considered *in camera*. He said that disclosing the report would, at most, only reveal the subject of the meeting. He concluded that disclosing the report would not reveal anything about council members’ debate or what was said at the council table. He found that disclosing the report would not reveal the substance of deliberations, so s. 12(3)(b) did not apply to the report.⁵

[11] Further, in Order 00-14 former Commissioner Loukidelis dealt with a decision by a local police board to refuse access to any part of the minutes of certain *in camera* meetings. He said that s. 12(3)(b) is designed “to protect what was said at a meeting about controversial matters, not the material which stimulated the discussion or the outcomes of deliberations in the form of written

³ Order F13-10, 2013 BCIPC 11 at para. 8.

⁴ Order 00-11, 2000 CanLII 10554 (BC IPC) at p. 5. See also Order F11-04, 2011 BCIPC 4 at paras. 35-37.

⁵ Order No. 326-1999, 1999 CanLII 4353 (BC IPC) at p. 4.

decisions.”⁶ He found that only the information that revealed which Board members made what motions and the debate on various matters would reveal the substance of deliberations. He also said that the subjects dealt with at the *in camera* meetings, in the absence of any evidence to the contrary, do not reveal the substance of deliberations.⁷

[12] Former Commissioner Loukidelis also explained in Order 00-14 that s. 12(3)(b) is not a class-based exception, in the sense that it does not apply to entire records because they relate to *in camera* deliberations. He said:

The section does not create a class-based exception that excludes records of, or related to, *in camera* meetings. There is a clear distinction between “information” and the “records” in which information is found. The duty under s. 4(2) of the Act to sever records, and disclose information not covered by one of the Act’s exceptions, applies to records which contain information protected by s. 12(3)(b).⁸

The parties’ submissions

[13] The City submits that the OIPC should not hold an inquiry in this case because it is plain and obvious that s. 12(3)(b) applies to the Report. The City says:

- (a) The City passed a motion on the date that the Record was presented that met the requirements for the meeting to be closed;
- (b) The meeting was actually held; and
- (c) the Record was discussed at the meeting and revealing the Record would reveal the substance of the members of Council’s deliberations at that meeting.⁹

[14] Support for the City’s case largely rests on what the City says were views expressed by OIPC investigators about the Report. The first instance was in 2017 when a different applicant sought the same from the City. The second instance is this case.

[15] The City also provides an affidavit from its Manager of Records and Information (Manager) who says that although she was not personally involved, she reviewed the minutes from the relevant meeting as well as the Report. She says that to the best of her knowledge and belief a committee comprised of all the members of the City council met in the absence of the public under s.

⁶ Order No. 114-1996, 1996 CanLII 827 (BC IPC) at p. 4; Order F11-04, 2011 BCIPC 4 (CanLII) at para 354; Order F12-11, 2012 BCIPC 15 at para. 14.

⁷ Order 00-14, 2000 CanLII 10836 (BC IPC) at p. 5.

⁸ Order 00-14, 2000 CanLII 10836 (BC IPC) at pp. 4-5.

⁹ City’s initial submission at para. 15, and the affidavit of the City’s Manager of Records and Information at para. 16.

90(1)(k) of the *Community Charter* to receive and consider the Report. The Manager also says that based on her inspection of the Report and the meeting minutes, she concludes that disclosing the Report would reveal the substance of deliberations at the closed meeting. The City's submissions do not include the meeting minutes the Manager says she reviewed.

[16] The applicant wants the OIPC to hold an inquiry and she disputes that s. 12(3)(b) applies.¹⁰

Analysis and decision

[17] The City's reliance on the views of the OIPC investigators is misplaced. In both instances cited by the City, the investigator's role was to assist the parties to reach a resolution through investigation, mediation and the offering of an opinion to assist in furtherance of settlement. This process, for obvious reasons, is separate and distinct from the adjudication function undertaken here. This being so, it would not be appropriate for me to consider matters related to the assistance provided by the OIPC investigators.

[18] For the reasons that follow, I find that it is not plain and obvious that s. 12(3)(b) applies to the information in the Report.

[19] In my view, it does not necessarily follow that because the Report was presented and considered at an *in camera* meeting that its contents would reveal the substance of council's deliberations. The Manager's opinion about this is not persuasive as it is based on her review of meeting minutes, which were not provided here.

[20] Further, I note that the City' is refusing to disclose any information whatsoever from the Report. This seems like the situation in Order 00-14 when former Commissioner Loukidelis said that s. 12(3)(b) is not a class-based exception and it only applies to information in a record. Based on my review of the Report, it seems the City applied s.12(3)(b) in a blanket fashion.¹¹ It may be that the City has evidence to prove how disclosing any fragment of information from the Report would reveal the substance of deliberations at an *in camera* meeting. However, the City did not provide that kind of evidence when it made this s. 56 application.

¹⁰ Applicant's reply at p. 1.

¹¹ I note that the City has also applied ss. 13, 16 and 22 in what seems to be a blanket fashion that does not recognize the City's obligation to conduct line-by-line examination of the Report and apply the exceptions to disclosure to "information" within the Report and disclose the remainder pursuant to s. 4(2).

[21] Therefore, while the City makes a case for how s. 12(3)(b) might apply, it has not established that it is plain and obvious that it applies to the information in the Report.

[22] In conclusion, I dismiss the City's application that the OIPC exercise its discretion under s. 56 to not hold an inquiry. An inquiry will be held and an adjudicator will decide – on the basis of the evidence and argument the parties submit - if s. 12(3)(b), 13, 16 and 22 apply to the information in the Report

April 17, 2020

ORIGINAL SIGNED BY

Elizabeth Barker, Director of Adjudication

OIPC File: F19-80428