



Order F22-51

## STRATHCONA REGIONAL DISTRICT

Emily Kraft  
Adjudicator

October 27, 2022

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**Summary:** The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Strathcona Regional District (SRD) for copies of correspondence referencing herself. The SRD withheld the information in dispute under ss. 12(3)(b) (local public body confidences) and 16(1)(b) (harm to intergovernmental relations). The adjudicator found that ss. 12(3)(b) and 16(1)(b) applied to most of the information in dispute and ordered the SRD to disclose the information it was not authorized to withhold under ss. 12(3)(b) and 16(1)(b).

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, ss. 12(3)(b) and 16(1)(b); *Community Charter* RSBC 2003, c. 26, ss. 90 and 92.

### INTRODUCTION

[1] An individual (applicant) made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Strathcona Regional District (SRD) for copies of correspondence between SRD staff or board members and the BC provincial government referencing herself and/or SRD governance matters.

[2] The SRD withheld the responsive records in their entirety under ss. 12(3)(b) (local public body confidences) and 15(1)(a) (harm to law enforcement) of FIPPA.

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the SRD's decision. Mediation failed to resolve the issues and the matter proceeded to inquiry.

[4] After the notice of inquiry was issued, the SRD submitted that s. 16(1)(b) (harm to intergovernmental relations) is more applicable to the information it withheld under s. 15(1)(a). It requested the OIPC's permission to add s. 16(1)(b) as an issue in this inquiry, replacing s. 15(1)(a). The applicant did not object to this request. The OIPC approved the request.

## **ISSUES**

[5] The issues to be decided in this inquiry are as follows:

1. Is the SRD authorized to refuse to disclose the information in dispute under s. 12(3)(b) of FIPPA?
2. Is the SRD authorized to refuse to disclose the information in dispute under s. 16(1)(b) of FIPPA?

[6] Under s. 57(1) of FIPPA, the SRD has the burden of proving the applicant has no right of access to the information being withheld under ss. 12(3)(b) and 16(1)(b).

## **DISCUSSION**

### **Background**

[7] The SRD is governed by a board of 14 directors. The applicant is a director on the board. In her capacity as a director, the applicant has allegedly breached the confidence of the SRD on several occasions. As a result, since early 2019, the SRD has limited the applicant's access to certain confidential information. The SRD has also formally censured the applicant. There are ongoing judicial review appeal proceedings pertaining to these decisions.<sup>1</sup>

### **Records in dispute**

[8] The investigator's fact report provides that there are 18 pages of records in dispute in this inquiry.<sup>2</sup> However, the SRD only provided 17 pages of records for my review. I wrote to the SRD and asked it to explain this discrepancy. In response, the SRD provided me with a copy of the missing page, which can be described as an email from an SRD staff member (Email). The parties did not make submissions about the Email. The Email post-dates the time period of the access request and is not otherwise responsive to the request. I have decided not to make a decision about whether the SRD is authorized to withhold the Email because I find it is not a record that the applicant requested.

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<sup>1</sup> This background information comes from the SRD's initial submission at paras 9-15. The applicant did not address the accuracy of this information or provide any additional background information in her response submission.

<sup>2</sup> Investigator's fact report at para 6.

[9] The responsive records consist of the following:

- A letter from the SRD's Chief Administrative Officer dated May 10, 2019 (May 10 Letter) with the following enclosures:
  - A copy of the applicant's Oath of Office (Oath of Office);
  - A copy of SRD bylaw No. 330 (Director Code of Conduct) (Bylaw);
  - A copy of a letter dated March 2019 (March Letter); and
  - A certified copy of an SRD board resolution passed on April 10, 2019 (Certified Resolution).
- A letter to the SRD's Chief Administrative Officer dated May 30, 2019 (May 30 Letter).

[10] During this inquiry, the SRD released the Oath of Office and the Bylaw to the applicant. Therefore, those records are no longer in dispute. The SRD withheld the remaining records in their entirety.

**Section 12(3)(b)**

[11] 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.

[12] The SRD applied s. 12(3)(b) to the May 10 Letter and the enclosed March Letter and Certified Resolution. It says that the information in those records would reveal the substance of deliberations of a closed board meeting held on April 10, 2019. Although she was a director at the time, the applicant was excluded from the meeting in question pursuant to the SRD's decision to limit her access to certain materials.<sup>3</sup>

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

1. The public body has a statutory authority to meet in the absence of the public;
2. The meeting was actually held in the absence of the public; and

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<sup>3</sup> SRD's initial submission at para 16.

3. The information would, if disclosed, reveal the substance of deliberations of the meeting.<sup>4</sup>

[14] I will consider each of these conditions below.

*Was the SRD authorized to hold the meeting in the absence of the public?*

[15] The SRD says that ss. 90(1)(c), (g), (i), (j), (n) and (o) of the *Community Charter* authorized it to hold a portion of its April 10, 2019 meeting in the absence of the public.

[16] The relevant portions of the *Community Charter* are as follows:

**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;

...

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

(j) information that is prohibited, or information that if it were presented in a document would be prohibited, from disclosure under section 21 of the *Freedom of Information and Protection of Privacy Act*;

...

(n) the consideration of whether a council meeting should be closed under a provision of this subsection or subsection (2);

...

(o) the consideration of whether the authority under section 91 [*other persons attending closed meetings*] should be exercised in relation to a council meeting.

**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.

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<sup>4</sup> Order F13-10, 2013 BCIPC 11 at para 8.

[17] To show that it was authorized to meet in the absence of the public under the *Community Charter*, a public body must provide evidence that it met the requirements in s. 92.

[18] The SRD provided the minutes of the public portion of the April 10, 2019 meeting, which show that the SRD passed a resolution to close the meeting “to consider matters deemed to fall within the parameters of subsections 90(1)(c), (g), (i), (j), (n) and (o) of the *Community Charter*.”<sup>5</sup> I find that the SRD has met the formal requirements of s. 92 of the *Community Charter*.

[19] However, the SRD must also show that the subject matter it actually considered at the closed meeting relates to one of the s. 90(1) grounds that it cited as a basis for closing the meeting.<sup>6</sup>

[20] The SRD provided sworn evidence that it received and deliberated upon legal advice at the closed meeting.<sup>7</sup> It also submitted the closed meeting minutes *in camera* (i.e. for the OIPC to see, but not the applicant).<sup>8</sup> The minutes show that several matters were considered at the closed meeting, including a matter that related to the receipt of advice that is subject to solicitor-client privilege.

[21] The applicant says that the first condition of the s. 12(3)(b) test has not been met because the SRD has provided “no explanation whatsoever” about how the subject matter of the information in the disputed records relates to the s. 90(1) grounds the SRD relied on to close the meeting.<sup>9</sup> The applicant says that the SRD presumably considered more than one matter at the closed meeting and that it failed to explain how the records it withheld under s. 12(3)(b) relate to a matter that it was authorized to consider in the absence of the public.<sup>10</sup> The applicant submits that “in the absence of any explanation whatsoever, [she] has no meaningful ability to respond” to what the SRD says.<sup>11</sup>

[22] Based on my review of the closed meeting minutes, as well as the SRD’s sworn evidence, I am satisfied that the SRD was authorized to discuss a particular matter in the absence of the public because it related to the receipt of legal advice. I can confirm that the records withheld under s. 12(3)(b) relate to the receipt of this legal advice. Accordingly, I find that s. 90(1)(i) of the *Community Charter* provided statutory authority for the SRD to close the meeting in question. I do not need to consider whether the other cited s. 90(1) grounds also apply.

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<sup>5</sup> Affidavit of TY, Exhibit A.

<sup>6</sup> Order F19-18, 2019 BCIPC 20 at para 14.

<sup>7</sup> Affidavit of TY at para 14.

<sup>8</sup> The SRD requested and was given prior approval from the OIPC to submit parts of its evidence and submissions *in camera*.

<sup>9</sup> Applicant’s response submission at para 18.

<sup>10</sup> Applicant’s response submission at paras 16-19.

<sup>11</sup> Applicant’s response submission at para 20.

[23] I do not accept the applicant's assertion that the SRD provided no explanation whatsoever and, therefore, she had no meaningful opportunity to respond to the SRD's case. In my view, the SRD provided sufficient explanation and evidence to show that it was authorized to meet in the absence of the public. Although the applicant did not see all of the submissions and evidence provided, as some of it was properly submitted *in camera*, in my view the SRD provided sufficient information in the open portions of its materials to explain what parts of s. 90(1) it relied on to close the meeting to the public. Furthermore, I find that the applicant clearly understood that the SRD was relying on s. 90(1)(i) to close the meeting in question because she directly addresses that fact in her response submission.<sup>12</sup>

[24] In conclusion, the SRD has established that it was authorized by the *Community Charter* to hold the meeting in question in the absence of the public.

*Did the SRD hold the meeting in the absence of the public?*

[25] The meeting minutes state that a portion of the April 10, 2019 meeting was closed. The SRD provided sworn evidence that the public was excluded from the closed portion of the meeting.<sup>13</sup> The applicant does not dispute this. I am therefore satisfied that the meeting in question was held in the absence of the public.

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

[26] Previous orders have said that the "substance" of deliberations does not mean the subject or basis of the deliberations, but rather the essential or material part of the deliberations. Previous orders have also said that "deliberations" includes "discussions conducted with a view to making a decision or following a course of action."<sup>14</sup>

[27] In Order No. 326-1999, former Commissioner Loukidelis said that s. 12(3)(b) may be applied where disclosure of a record would permit the drawing of accurate inferences about the substance of deliberations of a closed meeting.<sup>15</sup>

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<sup>12</sup> The applicant says the following at para 17 of her response submission: "Indeed, at para 16 of the Submissions the Respondent appears to acknowledge that the Board had closed that meeting to the public at least in part to consider legal advice – which is borne out by the explicit reference to subsection 90(1)(i) in the meeting minutes (Exhibit A)."

<sup>13</sup> Affidavit of TY at para 12.

<sup>14</sup> Order 00-11, 2000 CanLII 10554 (BCIPC).

<sup>15</sup> Order No. 326-1999, 1999 CanLII 4353 (BC IPC) at p 3.

[28] I will now consider whether disclosing the information in the March Letter, the Certified Resolution, and the May 10 Letter would reveal or permit a reader to accurately infer the substance of deliberations of the closed meeting.

#### March Letter

[29] The SRD says that the March Letter was received by the board at the closed meeting.<sup>16</sup> The SRD does not explain how disclosing the content of the March Letter would reveal the substance of deliberations of the closed meeting. Instead, for reasons set out in the *in camera* portion of the SRD's submission, the SRD says it assumes the applicant already has access to the March Letter and that disclosing it would not provide her with any new information. The SRD also says that it has not released the March Letter to the public and it does not believe it is otherwise available to the public.<sup>17</sup>

[30] The applicant does not specifically address the March Letter in her submission.

[31] I accept the SRD's evidence that the March Letter was received by the SRD at the closed meeting. However, the fact that a document was considered at a closed meeting (and presumably discussed) does not necessarily mean that the document would reveal what the board discussed or decided about the matters raised by the document.<sup>18</sup> In this case, without more explanation and context, I am not persuaded that disclosure of the March Letter would reveal or allow a reader to accurately infer the substance of the SRD's deliberations. In my view, disclosing the March Letter would only reveal, at most, the subject or basis of the SRD's discussions.

[32] The SRD has not met its burden of proof regarding the application of s. 12(3)(b) to the March Letter. I find that it is not authorized under s. 12(3)(b) to refuse the applicant access to any information in the March Letter.

#### Certified Resolution

[33] The Certified Resolution is a certified copy of a resolution that was passed at the closed meeting. The SRD says that the wording of the resolution is sufficiently specific to allow a person to infer the substance of the deliberations at the closed meeting.<sup>19</sup>

[34] The applicant does not specifically address the Certified Resolution in her submission. However, she emphasizes that previous orders have said s. 12(3)(b)

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<sup>16</sup> Affidavit of TY at para 16.

<sup>17</sup> SRD's initial submission at para 53.

<sup>18</sup> Order F11-04, 2011 BCIPC 4 at para 36.

<sup>19</sup> SRD's initial submission at para 57.

is designed to protect what was said at a closed meeting, not the outcomes of deliberations in the form of written decisions.<sup>20</sup>

[35] Numerous OIPC orders have said that disclosing a motion passed at a closed meeting would reveal the substance of deliberations at the closed meeting.<sup>21</sup> In Order 00-14, former Commissioner Loukidelis found that a board's decisions on specific issues in a closed meeting were protected from disclosure under s. 12(3)(b).<sup>22</sup>

[36] Consistent with previous orders, I find that disclosing the resolution passed at the closed meeting would reveal the substance of deliberations. However, I find that the letterhead, title, certification statement, signature block, and footer in the Certified Resolution do not reveal the substance of deliberations and cannot be withheld under s. 12(3)(b).

#### May 10 Letter

[37] The SRD says that the May 10 Letter would, in combination with publicly available knowledge about the applicant's conduct, allow a person to draw accurate inferences about the substance of deliberations at the closed meeting.<sup>23</sup> It points out that the May 10 Letter directly refers to the resolution passed at the closed meeting and includes a list of statements in support of the resolution. The SRD's Corporate Officer provided affidavit evidence that those statements directly reflect the deliberations at the closed meeting.<sup>24</sup>

[38] The applicant says that, unless the May 10 Letter reveals what members of the board said or thought at the closed meeting, the content of the letter should be disclosed.<sup>25</sup>

[39] The applicant also says that the SRD improperly applied s. 12(3)(b) in a blanket fashion.<sup>26</sup> She points to s. 4(2) of FIPPA, which requires a public body to provide access to part of a record, if the information that is properly excepted from disclosure can reasonably be severed from the record. She says that any information that does not reveal the substance of the board's deliberations at the closed meeting must be disclosed in accordance with s. 4(2).

[40] I find that most of the information in the May 10 Letter would reveal the substance of deliberations at the closed meeting. I am satisfied that disclosing

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<sup>20</sup> Applicant's response submission at para 33. The applicant cited Order 00-14, but the correct authority is Order No. 114-1996, 1996 CanLII 827 (BC IPC).

<sup>21</sup> See for example Order 03-09, 2003 CanLII 49173 (BCIPC) and Order F16-03, 2016 BCIPC 3.

<sup>22</sup> Order 00-14, 2000 CanLII 10836 (BC IPC) at p 6.

<sup>23</sup> SRD's initial submission at para 44.

<sup>24</sup> Affidavit of TY at para 20.

<sup>25</sup> Applicant's response submission at para 32.

<sup>26</sup> Applicant's response submission at para 23.



the addressee and their address, the file number (it identifies where the addressee works), the subject line, and most of the body of the May 10 Letter would reveal or allow a reader to accurately infer the SRD's decision on a specific issue and the material parts of the discussion surrounding that decision. The SRD is authorized to withhold this information under s. 12(3)(b).

[41] However, I agree with the applicant that the SRD applied s. 12(3)(b) in a blanket fashion. As mentioned above, the SRD withheld the May 10 Letter in its entirety. It says that the letterhead, date, footer, page number and signature line cannot reasonably be severed because they are “disconnected snippets of meaningless information.”<sup>27</sup> I disagree. Numerous orders have found that this type of information can reasonably be severed in accordance with s. 4(2) of FIPPA.<sup>28</sup> I see no reason to depart from these previous decisions. I find the SRD is not authorized under s. 12(3)(b) to withhold the letterhead, date, salutations, signature line, footer and page number in the May 10 Letter.

[42] Finally, I find the SRD is not authorized under s. 12(3)(b) to withhold any descriptions in the May 10 Letter of records that I have found cannot be withheld under s. 12(3)(b) or that have already been disclosed to the applicant.

#### *Waiver*

[43] The applicant says that, to the extent that the May 10 Letter communicates a decision made at the closed meeting to a third party, the confidentiality of that decision was “waived” by the SRD.<sup>29</sup> She says that the SRD cannot assert on one hand that the outcome or decision made at the closed meeting is confidential, and on the other hand release that information to members of the public, “including a representative of the Provincial Government.”<sup>30</sup>

[44] In reply, the SRD says that information withheld under s. 12(3)(b) is not subject to the requirements of common law privilege.<sup>31</sup> I understand the SRD to be saying that “waiver” is a legal concept that relates only to privilege, and I agree. I do not see how waiver applies.

[45] The applicant seems to be saying that s. 12(3)(b) cannot apply to information that has been shared with third parties. However, she provides no legal authority to support this assertion. It is not a requirement of s. 12(3)(b) that the substance of deliberations not be shared with anyone outside of the closed

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<sup>27</sup> SRD's initial submission at para 48.

<sup>28</sup> See for example Order F21-15, 2021 BCIPC 19; Order F20-20, 2020 BCIPC 23; Order F19-39, 2019 BCIPC 44.

<sup>29</sup> Applicant's response submission at para 34.

<sup>30</sup> Applicant's response submission at para 36.

<sup>31</sup> SRD's reply submission at para 20.

meeting. I am not persuaded that the information in dispute is not protected by s. 12(3)(b) because it was disclosed to a party outside of the SRD.

*Section 12(4)*

[46] Section 12(4) provides 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 or the information is in a record that has been in existence for 15 or more years. The SRD says that the withheld records were created in 2019 and the subject matter of the deliberations has not been considered in a meeting open to the public. The applicant does not address s. 12(4) in her submission. I am satisfied that s. 12(4) does not apply.

***Section 16(1)(b)***

[47] The SRD is withholding the May 30 Letter in its entirety under s. 16(1)(b). The relevant portions of s. 16(1)(b) are as follows:

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

(a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:

(i) the government of Canada or a province of Canada;

...

(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies...

[48] Section 16(1)(b) requires a public body to establish that disclosure would reveal information received from a government, council, or organization listed in s. 16(1)(a) or one of their agencies, and that the information was received in confidence.<sup>32</sup>

*Did the SRD receive information from an agency?*

[49] I cannot name the agency in question because it would reveal the information in dispute. However, based on previous OIPC orders, I am satisfied that the organization in question, that is, the sender of the May 30 Letter, is an agency for the purposes of s. 16(1)(b).

*Did the SRD receive the information “in confidence”?*

[50] In order for information to be received “in confidence” there must be an implicit or explicit agreement or understanding of confidentiality on the part of

<sup>32</sup> Order 02-19, 2002 CanLII 42444 (BC IPC) at para 18.

those supplying and receiving the information.<sup>33</sup> Information is not received “in confidence” solely because the receiver of the information intends it to be confidential – there must be evidence of an understanding of confidentiality on the part of the supplier, as well.<sup>34</sup>

[51] In Order No. 331-1999, former Commissioner Loukidelis said it may be that if a public body asks an agency for information and says the request is made in confidence, the information will have been received in confidence, unless the agency declined from the outset to treat the supply as confidential.<sup>35</sup>

[52] Former Commissioner Loukidelis also explained that, in general, it must be possible to conclude that the information has been received in confidence based on its content, the purpose of its supply and receipt, and the circumstances in which it was prepared and communicated.<sup>36</sup> He provided several non-exhaustive factors to consider, including the following:

- What is the nature of the information? Would a reasonable person regard it as confidential?
- Was the record prepared for a purpose that would not be expected to require or lead to disclosure?
- Was the record in question explicitly stated to be provided in confidence?
- Was there an agreement or understanding between the parties that the information would be treated as confidential by its recipient?<sup>37</sup>

[53] The SRD says that there was an implicit and explicit understanding between it and the sender of the May 30 Letter that the information in dispute would be treated as confidential. It relies on the following factors to support its position:

- The information in the May 30 Letter is of a confidential nature.
- The confidential nature of the subject matter of the May 30 Letter was communicated to the sender.
- The May 30 Letter was not prepared for a reason that would be expected to require or lead to disclosure.
- The May 30 Letter contains a confidentiality notice.
- The SRD has treated the May 30 Letter as confidential.<sup>38</sup>

[54] In response, the applicant says that the SRD has not provided sufficient evidence to show that the May 30 Letter was intended to be confidential. She

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<sup>33</sup> Order No. 331-1999, 1999 CanLII 4253 (BC IPC) at p 7.

<sup>34</sup> *Ibid* at p 7.

<sup>35</sup> *Ibid* at p 7.

<sup>36</sup> *Ibid* at p 8.

<sup>37</sup> *Ibid* at pp 8-9.

<sup>38</sup> SRD's initial submission at paras 70-75.

draws a distinction between the “issue” discussed in the May 30 Letter and the letter itself.<sup>39</sup>

[55] For the following reasons, I find that most of the information in the May 30 Letter was received in confidence.

[56] The standard confidentiality notice in the footer of the May 30 Letter provides some evidence that it was received in confidence. I agree with previous OIPC orders that have found that these types of generic, boilerplate notices are not by themselves sufficient to demonstrate an intention of confidentiality.<sup>40</sup> However, in this case, the SRD’s submissions and evidence, as well as the records themselves, provide additional information to support the finding that there was a mutual understanding of confidentiality

[57] In my view, the contextual evidence indicates that most of the information in the May 30 Letter was received in confidence. I accept the SRD’s evidence that it informed the sender of the May 30 Letter that the subject matter of their communications was confidential. There is no evidence to suggest that the sender declined to treat the matter as confidential. Further, the nature of the information in the May 30 Letter is such that a reasonable person would assume that the sender and recipient expected it to be sent and received in confidence. I conclude that there was a mutual understanding of confidentiality regarding most of the information in the May 30 Letter.

[58] However, I am not persuaded that the SRD received the date, addressee, salutations, and the confidentiality notice in the May 30 Letter in confidence. The SRD already disclosed the date and addressee information in its initial submission in this inquiry, and the salutations and confidentiality notice are boilerplate text that reveal nothing substantive about the subject of the May 30 Letter.

[59] Therefore, I find that the SRD is authorized to withhold all of the information in the May 30 Letter under s. 16(1)(b) except the date, addressee, salutations, and the confidentiality notice.

## **CONCLUSION**

[60] For the reasons given above, I make the following order under s. 58 of FIPPA:

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<sup>39</sup> Applicant’s response submission at para 41.

<sup>40</sup> See for example Order F13-01, 2013 BCIPC at para 26 and Order F19-38, 2019 BCIPC 43 at para 123.

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1. Subject to item 2 below, I confirm, in part, the SRD's decision to refuse to disclose the information in dispute to the applicant under ss. 12(3)(b) and 16(1)(b).
  2. The SRD is not authorized under ss. 12(3)(b) and 16(1)(b) to refuse to disclose the information I have highlighted in the copy of the records provided to the SRD with this order.
  3. I require the SRD to give the applicant access to the highlighted information described in item 2 above.
  4. The SRD must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records described at item 2 above.

[61] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by December 12, 2022.

October 27, 2022

**ORIGINAL SIGNED BY**

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Emily Kraft, Adjudicator

OIPC File No.: F20-82182