Order F24-26

# BOARD OF EDUCATION OF SCHOOL DISTRICT 61 GREATER VICTORIA

Jay Fedorak
Adjudicator

April 4, 2024

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**Summary:** An applicant requested records relating to the seismic upgrade of a school in School District 61. The Board of Education of School District 61 (the Board) responded by providing access to records but withholding some information under s. 12(3)(b) (local public body confidences), s. 13(1) (advice and recommendations) and s. 17(1) (harm to the financial interests of the public body). The adjudicator found that the Board correctly applied s. 12(3)(b). The adjudicator also found that s. 17(1) applied to some of the information but did not apply to the floor plans of the school and ordered the Board to disclose them.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165, s. 12(3)(b), ss. 13(1), 13(3),17(1), 17(1)(b), 17(1)(c), 17(1)(d), 17(1)(e), 17(1)(f); *School Act*, RSBC 1996 c. 412, s. 69.

## INTRODUCTION

[1] An applicant requested, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), records relating to the seismic upgrade of a school in School District 61. The Board of Education of School District 61 (the Board) responded by providing access to records but withholding some information under s. 12(3)(b) (local public body confidences), s. 13(1) (advice and recommendations) and s. 17(1) (harm to the financial interests of the public body).

[2] The applicant was dissatisfied with this response and requested a review by the Office of the Information and Privacy Commissioner (OIPC). During mediation, the Board disclosed additional information. Mediation failed to resolve matters further and the applicant requested an inquiry.

[3] During the inquiry process, the Board disclosed additional information.

## ISSUES AND BURDEN OF PROOF

[4] The issues to be decided in this inquiry are:

1. Whether s. 12(3)(b) authorizes the Board to withhold information.
2. Whether s. 13(1) authorizes the Board to withhold information.
3. Whether s. 17(1) authorizes the Board to withhold information.

[5] Under s. 57(1), the Board has the burden of proving that the applicant has no right of access to the information it withheld under ss. 12(3)(b), 13(1) and 17(1).

## DISCUSSION

[6] **Background –** the Board launched a seismic upgrade project for one of the middle schools in the district. The project involves the building of a new school to replace the existing school.[1]

[7] **Records at issue –** the Board describes the records as follows:

- Confidential Memoranda that were prepared by the Secretary Treasurer and submitted to the Board at its *in camera* meetings ("In Camera Briefing Memos"); and
- A report that provides detailed plans and proposals for the seismic upgrade, including projected costs and budgeting information, risk assessment and alternative models for carrying out the seismic upgrade (the "Project Definition Report" or "PDR").

[8] The Board withheld most of the information in the In Camera Briefing Memos and some information in the PDR. There are 240 pages of records. The Board withheld information on 59 pages, in whole or in part.

### *Local Public Body Confidences – s. 12(3)*

[9] The Board withheld some information in the In Camera Briefing Memos under s. 12(3). The relevant provision is as follows:

> (3) The head of a local public body may refuse to disclose to an applicant information that would reveal
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> …
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> (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.

[1] SD 61's initial submission, affidavit of the Director of Facility Services, para. 6.

[10] A local public body may rely on s. 12(3)(b) when the conditions in the following three-part test apply:

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

[11] For the Board to rely on s. 12(3)(b), it must be a "local public body" under FIPPA. Schedule 1 of FIPPA defines a "local public body" to include "an educational body." FIPPA defines "an educational body" to include "a board as defined in the *School Act.*" The *School Act* defines "board" as "a board of school trustees constituted under this Act or a former Act." The Board is a board of school trustees constituted under the *School Act*. Therefore, I find the Board qualifies as a "local public body" under FIPPA and for the purposes of s. 12(3)(b).

[12] 1. Statutory Authority: The Board submits that it has the statutory authority to meet in the absence of the public. It cites s. 69 of the *School Act*, which provides as follows:

> 69 (1) Subject to subsection (2), the meetings of the board are open to the public.
> (2) If, in the opinion of the board, the public interest so requires, persons other than trustees may be excluded from a meeting.[3]

[13] The Board cites previous orders that have found that this provision is a statutory authority for the purposes of s. 12(3)(b).[4]

[14] It is plain and obvious that s. 69 of the *School Act* provides a statutory authority for a Board of Education to meet in the absence of the public, in accordance with s. 12(3)(b). As the Board submits, previous orders have found that this provision permits Boards of Education, such as itself, to meet in the absence of the public. Therefore, I find that the first part of the test is met.

[15] 2. Meeting held in absence of the public: The Board provided an affidavit of its Superintendent that affirms there were statutorily authorized meetings where the trustees who are the elected officials that make up the Board discussed the In Camera Briefing Memos in the absence of the public. The Superintendent testifies those meetings took place on the following dates: March 9, 2020; December 15, 2020; February 22, 2021; and March 29, 2021.

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[2] Order F24-03, 2024 BCIPC 4 (CanLII), para. 155; Order F20-10, 2010 BCIPC 12 (CanLII), para. 8; Order 00-14, 2000 CanLII 10836 (BCIPC).
[3] RSBC 1996, c. 412.
[4] Order F10-19, 2010 BCIPC 30, paras. 9-11; Order 04-04, 2004 BCIPC 4 (CanLII).

[16] The Board submitted heavily severed copies of meetings minutes for those dates with the heading "In Camera Minutes."[5] The Board also submitted a copy of its Bylaw 9360.1 that governs Board meetings in the absence of the public. The Superintendent testifies that the Board conducted the meetings at issue in accordance with the bylaw.

[17] The Superintendent affirms in sworn testimony that the elected trustees of the Board met in the absence of the public on four occasions where it considered the briefing memos at issue. The Superintendent testifies that these meetings followed the procedures outlined in Bylaw 9360.1 and were held properly *in camera*. The meeting minutes provided by the Board also confirms those meetings were held in the absence of the public. Therefore, I find that the second part of the test is met.

[18] 3. Reveal substance of deliberations: The Superintendent testifies that she attended and participated in the deliberations of all four meetings. She also testifies that the In Camera Briefing Memos at issue were deliberated on at length at the meetings, which were held in the absence of the public. She testifies that it is her opinion and belief that the disclosure of the memos would reveal the substance of the deliberations of those meetings.

[19] She indicates that the memo dated March 9, 2020 was circulated to members of the Board for the meeting on March 9, 2020 and deliberated on at that meeting.[6] Similarly, she attests that the memo dated December 15, 2020 was circulated and deliberated on at the meeting of December 15, 2020.[7] Finally, she attests that the memo dated February 22, 2021 was deliberated on at the meeting on February 22, 2021 and again at the meeting on March 29, 2021.[8]

[20] The applicant denies that the arguments of the Board with respect to holding of meetings in the absence of the public necessarily justify the application of s. 12(3)(b) in this case. She argues as follows:

> However, because the Board is constituted under the *School Act*, the Board is dutybound to test their collective judgement on an ongoing basis to ensure that the Board's procedures during an *in camera* meeting abide by *School Act* regulations; meaning, whether or not the Board is required to abide by the School Act during an *in camera* meeting is *not* a matter of opinion.
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> A decision to hold an *in camera* meeting because the Board is of the opinion that to do so is in the public interest does not assume that the Board's actions during the meeting are in the public interest, especially if it can be shown that

[5] SD 61's supplemental submission, affidavit of the Superintendent, paras. 8-34.
[6] SD 61's supplemental submission, affidavit of the Superintendent, para. 12.
[7] SD 61's supplemental submission, affidavit of the Superintendent, para. 20.
[8] SD 61's supplemental submission, affidavit of the Superintendent, para. 27.

> deliberations and resolutions passed during the *in camera* meeting violate the School Act.[9]

[21] The applicant speculates that the Board discussed at these meetings the selling of the Board real estate without public consultation for the purposes of raising revenue, and that this would contravene the *School Act*.[10]

[22] In Order 03-22, former Commissioner Loukidelis determined that s. 12(3)(b) applied to information in a draft memorandum that was discussed by a city council at a closed meeting because the withheld information revealed not only the subject of deliberations but also provided detailed background information and interpretation that was in effect a guide for the discussions between staff and council members during the meeting.[11] I find that same reasoning applies here.

[23] I have reviewed the contents of the memos. In combination with the testimony of the Superintendent, I am satisfied that the memos provide detailed background and interpretation of the matters at issue and were a guide for discussion at the Board meetings. The Board made certain decisions at these meetings. The purpose of the memos was clearly to inform those deliberations and guide the Board's decisions and discussions. Therefore, I find that the third part of the test has been met.

[24] Consequently, I find that s. 12(3)(b) applies to the information the Board withheld in the In Camera Briefing Memos at issue, and the Board is authorized to withhold that information.

### *Harm to the financial interests of the public body s. 17(1)*

[25] The Board is refusing to disclose some information under s. 17(1) on the grounds that disclosure would be harmful to its financial interests. The Board's arguments raise the following parts of s. 17:

> 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
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> …
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> (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;

[9] Applicant's response submission, p. 11
[10] Applicant's response submission, pp. 11-12.
[11] Order 03-22, 2003 CanLII 49200 (BCIPC), para.15.

> (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;
> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
> (e) information about negotiations carried on by or for a public body or the government of British Columbia;
> (f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[26] Subsections 17(1)(a) to (f) are examples of the types of information that, if disclosed, could reasonably be expected to cause harm under s. 17(1). Past orders have said that subsections 17(1)(a) to (f) are not stand-alone provisions and, even if information fits within those subsections, a public body must also prove that disclosure of that information could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy.[12]

[27] To rely on s. 17(1), the Board must establish that disclosure of the information could reasonably be expected to harm its financial or economic interests. The "reasonable expectation of harm" standard for s. 17(1) is "a middle ground between that which is probable and that which is merely possible."[13] There is no need to show on a balance of probabilities that the harm will occur if the information is disclosed, but the public body must show that the risk of harm is well beyond the merely possible or speculative.[14] The evidence must be detailed enough to establish specific circumstances for the contemplated harm to be reasonably expected to result from disclosure of the information.[15]

[28] The Board must also demonstrate that the release of the information itself would give rise to a reasonable expectation of harm.[16] There must be a clear and direct connection between the disclosure of information and the harm that is alleged.[17]

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[12] Order F19-03, 2019 BCIPC 4 (CanLII), para. 22 and Order F22-35, 2022 BCIPC 39 (CanLII), para. 33.
[13] *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3, para. 201.
[14] *Ibid*, para. 206. See also *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, paras. 52-54.
[15] Order 02-50, 2002 BCIPC 51 (CanLII), para. 137.
[16] *British Columbia (Minister of Citizens' Services) v British Columbia (Information and Privacy Commissioner),* 2012 BCSC 875, para. 43.
[17] Order F19-10, 2019 BCIPC 12 (CanLII), para. 31; Order F07-15, 2007 BCIPC21 (CanLII), para 17.

[29] The Board has applied s. 17(1) to three categories of information:

1. Funding reserves;
2. In Camera Briefing Memos; and
3. School floor plans in the PDR

[30] As I have found that s. 12(3)(b) applies to the information in the In Camera Briefing Memos, I do not need to determine whether s. 17(1) applies to them and I decline to do so. I will consider the other two categories below.

1. Funding Reserves:

[31] The Board provided the applicant with access to the PDR but applied s. 17(1) to some information in the PDR. It characterizes that information as the identification and evaluation of potential risks to the project for the consideration of the Board, as well as recommendations as to the amount of funds the Board should set aside to cover those risks (funding reserves).[18]

[32] The Board submits that the information withheld in the PDR would enable a vendor, or other contracting parties, involved in the building of the new school under contract with the Board and the Ministry of Education, to infer the scope and size of the funding reserves. It says this could occur either through direct disclosure, revealing of the method of calculating the reserves, or providing of financial amounts that could be used to deduce the amounts in combination with other available information. The Board asserts that disclosure of this information could compromise the position of the Board in future negotiations with these contracting parties. Its concern is that, if any of the anticipated risks or contingencies arise, the contracting parties may request the Board negotiate price increases to cover the cost overruns. The Board submits that knowledge by the contracting parties of the upper limit of the Board's funding reserves would damage the Board's ability to negotiate a fair price.[19]

[33] The Board cites previous orders that have determined that information about available reserve funding can reasonable be expected to cause the harm stipulated in ss. 17(1) and 17(1)(f) (harm to public body's negotiating position).[20]

[34] The applicant submits that the Board has already disclosed the total amount of risk reserves publicly and has completed a tender process. The applicant argues, therefore, that s. 17(1) does not apply.[21]

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[18] SD 61's initial submission, para. 59.
[19] The Board's initial submission, paras. 63-65.
[20] The Board's initial submission, paras. 66-71; Order F18-51, 2018 BCIPC 55 (CanLII); F23-01, 2023 BCIPC 2 (CanLII); Order F06-19, 2006 CanLII 37939 (BCIPC); Order F20-38, 2020 BCIPC 44 (CanLII).
[21] Applicant's response submission, pp. 7-9.

[35] The Board acknowledges that it has already disclosed the aggregate total of risk reserves. Nevertheless, it submits that the disclosure of the information in the PDR would enable the contracting parties to infer how this total was spread over the various defined risk categories and how the Board calculated those amounts. Therefore, it contends the disclosure of this information would prejudice its negotiating position with respect to specific risks.[22]

[36] I have reviewed the passages of the PDR at issue. The PDR provides the Board with an overview of the seismic risk for the school in question and a detailed analysis of the various options for addressing that risk. It also comprises estimates regarding funding reserves that the Board should retain in reserve to cover contingencies.

[37] It is reasonable to conclude that this information would be valuable to a vendor involved in negotiations with the Board about cost overruns, in the event any of these anticipated risks materialize. I am also persuaded that this would put the Board at a disadvantage in these negotiations and constrain its ability to negotiate a commercially reasonable price. I accept that there is a reasonable expectation of probable harm, despite the fact that the Board has disclosed the global total of its risk reserves. This is because the information at issue reveals specific funding allocations for distinct risks that could be subject to negotiation between the parties.

[38] I find that this information is similar to the type of funding reserves that previous orders have found to be subject to s. 17(1)(f). In Order F23-01, I made a similar finding regarding information about funding reserves or "contingencies" for a capital project of the BC Hydro and Power Authority. I observed the following:

> I agree that this situation is analogous to that of insurance claim contingencies, as was the case with Order F18-51 that BC Hydro has cited. Insurance companies set aside financial amounts for settling each claim file. This is the maximum amount the insurance company expects to pay on the claim, but the insurance company makes every reasonable effort to settle for a lesser amount. Disclosing the insurance claim contingency would compromise the negotiating position of the insurance company in the same way that disclosure of BC Hydro's contract contingencies would compromise the negotiating position of BC Hydro: by giving valuable information to their adversaries. It is reasonable to expect that this would result in increased payouts by both insurance companies and BC Hydro. The application of s. 17(1)(f) is the same in both types of cases. As the adjudicator found in Order F18-51 on a similar set of facts and circumstances, I find that s. 17(1)(f) applies in this case.[23]

[22] The Board's reply submission, para. 10.
[23] Order F23-01, cited above, para. 24.

[39] I find the funding reserves in this case constitute sensitive and valuable financial information. Therefore, I conclude that disclosure of this information to a party with a competing financial interest may harm the financial interests of a public body. Accordingly, I find that the Board's submissions meet the required threshold of harm to establish the application of s. 17(1) to the funding reserves.

2. School floor plans:

[40] The Board has applied s. 17(1) to the floor plans for the current school, which is located in the PDR on pages 53-54. It submits that public disclosure of these plans would deprive it of the full benefits of its security and planning protocols and that disclosure of the plans might result in it incurring additional costs. It fears that third parties could use this information to endanger students or trespass on school property.[24] The Board does not identity any specific provision of s. 17(1) that might apply. It also does not specify the types of costs it might incur if the information were to be disclosed.

[41] The applicant does not make any submissions regarding the application of s. 17(1) to the floor plans.

[42] I find the Board's arguments that disclosure of the floor plans could put students at risk or facilitate trespassing by third parties are vague and speculative and lacking sufficient detail to establish the application of s. 17(1). The school is a public building. The size and location of the building and most of the rooms within it are visible to the public or visitors. The Board provided insufficient evidence to suggest that it is reasonable to expect that any students at the school are at risk of harm; that disclosure of the floor plans would facilitate that harm; or how that harm could reasonably be expected to affect adversely its financial interests. It is not evident on the face of the records how disclosing the school floor plans could reasonably be expected to result in the Board having to increase the level of security required for the building to the point at which it would incur additional costs or what those cost would involve. Therefore, I find that s. 17(1) does not apply to the floor plans on pages 53-54 of the PDR.

### *Section 13(1) – advice or recommendations*

[43] The Board applied s. 13(1) to the In Camera Briefing Memos. As I have already found that s. 12(3)(b) applies to those memos, I do not need to consider the application of s. 13(1) and I decline to do so.

[44] The Board applied s. 13(1) to the funding reserves. As I have already found that s. 17(1) applies to that information, I do not need to consider the application of s. 13(1) and I decline to do so.

[24] SD 61's initial submission, para. 73.

[45] The Board did not apply s. 13(1) to any other information at issue.

## CONCLUSION

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

1. I confirm the Board's decision to refuse to disclose the information it withheld under s. 12(3)(b) of FIPPA.

2. Subject to number 3 below, I confirm the Board's decision to refuse to disclose the information it withheld under s. 17(1) of FIPPA.

3. The Board is not authorized under s. 17(1) to withhold the floor plans on pages 53-54 of the PDR. It must disclose this information to the applicant.

4. The Board must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the pages described at item 2 above.

[47] Pursuant to s. 59(1) of FIPPA, Board is required to comply with this order by **May 16, 2024**.

April 4, 2024

**ORIGINAL SIGNED BY**

Jay Fedorak, Adjudicator

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