OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 02-11

CITY OF VANCOUVER

David Loukidelis, Information and Privacy Commissioner
March 6, 2002

Quicklaw Cite: [2002] B.C.I.P.C.D. No. 11
Document URL: http://www.oipcbc.org/orders/Order02-11.pdf
Office URL: http://www.oipcbc.org
ISSN 1198-6182

Summary: The applicant requested access to staff reports to City Council, and to minutes of Council meetings, regarding a City contract with a third party business. The City is not required to disclose information in the public interest under s. 25. The City is authorized by s. 13 to refuse to disclose advice or recommendations in the records and by s. 14 to refuse to disclose information protected by solicitor client privilege.

Key Words: policy advice – advice or recommendations – developed by or for a public body or a minister – legal advice – solicitor client privilege – exercise of prosecutorial discretion – public interest disclosure – public interest – significant harm – public safety.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 13(2)(a), (d), (e), (f), (k), (j), (l), (m), 14 and 25(1)(a) and (b).

Authorities Considered: B.C.: Order No. 324-1999, [1999] B.C.I.P.C.D. No. 37; Order 00-06, [2000] B.C.I.P.C.D. No. 6; Order 00-17, [2000] B.C.I.P.C.D. No. 20; Order 01-20, [2001] B.C.I.P.C.D. No. 21. **Ont.:** Order 94**,** [1989] O.I.P.C. No. 58.

Cases Considered: *British Columbia (Minister of Environment, Lands and Parks)* v. *British Columbia (Information and Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64 (B.C.S.C.).

1.0 INTRODUCTION

[1] This decision stems from a July 29, 2000 access to information request, made under the *Freedom of Information and Protection of Privacy Act* ("Act"), to the City of Vancouver ("City") for:

> … a copy of the report(s) to Council and related minutes regarding the new agreement with Central Heat Distribution Ltd. ["Central Heat"]

[2] The City responded, on August 30, 2000, by disclosing minutes of June 25, July 9, July 20/22 and September 19, 1999 Council meetings. The City withheld a June 10, 1996 report to Council under s. 14. It also withheld under s. 14 two further reports to Council dated February 4 and July 15, 1999. Last, it withheld minutes of the February 16, 1999 Council meeting.

[3] The applicant requested a review of the City's decision. His request for review included a new access request, since he at that time asked for a copy of a June 25, 1996 memorandum written by the City's General Manager of Engineering and copies of records related to a verbal report to Council by the General Manager of Engineering on July 9, 1996.

[4] On December 20, 2000, the City provided the applicant with severed versions of the records that it had previously withheld. The City continued to withhold information from those records under s. 13 and 14 of the Act.

[5] In a December 28, 2000 letter to the City, the applicant mentioned – as he had done in his request for review – the public interest in disclosure of the severed information. In a January 9, 2001 letter to the applicant, the City said it had decided that s. 25(1) of the Act did not require the City to immediately disclose the severed information in the public interest. The City's decision respecting s. 25 was the subject of a further request for review by the applicant, which formed part of the inquiry underlying this decision.

[6] As the applicant's request for review was not settled during mediation by this Office, I held a written inquiry under Part 5 of the Act.

2.0 ISSUE

[7] The issues to be considered here are as follows:

1. Is the City authorized by ss. 13 or 14 of the Act to refuse to disclose information to the applicant?

2. Does s. 25(1) of the Act require the City to disclose the withheld information?

[8] Section 57(1) of the Act provides that the City bears the burden of proof with respect to the ss. 13 and 14 issues, while previous decisions have established that the applicant bears the burden of proof with respect to the s. 25 issue.

3.0 DISCUSSION

[9] **3.1 Public Interest Disclosure –** Section 25(1) of the Act overrides all other provisions of the Act in requiring disclosure of information in the public interest in certain cases. Section 25(1) reads as follows:

> **Information must be disclosed if in the public interest**
>
> **25**(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
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> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.

Commissioner's authority in s. 25 matters

[10] At para. 54 of its initial submission, the City argues I have no authority to review its decision that s. 25(1) does not apply. This argument is not tenable. Section 52(1) of the Act says that an applicant "may ask the commissioner to review any decision, act or failure to act of the head that relates" to an access request. It also provides that a request for review can relate to "any matter that could be the subject of a complaint under s. 42(2)." That section authorizes the commissioner to address complaints that "a duty imposed by this Act or the regulations has not been performed". This clearly includes the duty to disclose information in the circumstances prescribed by s. 25(1). Section 58(1) requires the commissioner, on completing an inquiry under Part 5 of the Act, to dispose of the issues by making an order under s. 58. This includes, under s. 58(3)(a), ordering the head of the public body to, among other things, perform a duty imposed by the Act or the regulations. Such an order can encompass the disclosure duty created by s. 25(1). I have the authority to review the City's decision not to disclose under s. 25(1) and, if appropriate, to order it to comply with that section.

Applicant's reliance on s. 25(1)(a)

[11] In its reply submission, the City says the applicant should not be permitted to rely on s. 25(1)(a), on the basis that he raised it for the first time in his initial submission. The City says, in the alternative, that the applicant has failed to make the case for public-interest disclosure under s. 25(1)(a).

[12] The applicant has failed to establish that the disputed information is "about a risk of significant harm to the environment or to the health or safety of the public or a group of people" for the purposes of s. 25(1)(a) and must be disclosed. His reference to concerns about emissions from Central Heat's operations, through use of fossil fuels for heating purposes, is not sufficient to trigger s. 25(1)(a) respecting the material that has

been withheld here. The severed information does not directly relate to choices of fuel or pollution control in connection with Central Heat's operations. It concerns the City's contract dispute, and contract negotiations, with Central Heat.

Is disclosure otherwise in the public interest?

[13] In Order 01-20, [2001] B.C.I.P.C.D. No. 21, I said the following, at paras. 37-39, about public interest disclosure under s. 25(1)(b):

> [37] Even when I account for the weaknesses in the applicant's s. 25(1) evidence identified by UBC and CCB, there is evidence before me showing that there has been significant public curiosity about the agreement. Still, the fact that the public may be, or may have been, interested in a record does not necessarily mean that is "clearly in the public interest" to disclose it, without delay, under s. 25(1)(b) of the Act. The applicant acknowledges this. In the end, therefore, I am left with the applicant's policy argument that disclosure is clearly in the public interest because UBC is a publicly-funded educational institution which, under the agreement, is receiving what the applicant says is substantial funding from a private source.
>
> [38] The mandatory disclosure requirement in s. 25(1)(b) is not, to my mind, intended to be activated by such a policy consideration. Section 25 applies despite any other provision of the Act, whether or not an access request has been made. It requires disclosure "without delay" where information is about a risk of significant harm to the environment or to the health and safety of persons or where disclosure is for any other reason clearly in the public interest. Although the words used in s. 25(1)(b) potentially have a broad meaning, they must be read in conjunction with the requirement for immediate disclosure and by giving full force to the word "clearly", which modifies the phrase "in the public interest".
>
> [39] Even if I assume, without deciding, that disclosure of contractual and financial information is capable of being "clearly in the public interest" within the meaning of s. 25(1)(b), the required elements of urgent and compelling need for publication are not present in this case. Again, the applicant believes the agreement should be disclosed because UBC is a publicly-funded educational institution, such that the student body, general public and media ought to have the widest ability to scrutinize an exclusive commercial commitment by UBC to substantial funding from a private source. Even if this position is well-founded as a matter of public policy, it does not give rise to an urgent and compelling need for compulsory public disclosure despite any of the Act's exceptions. In my view, no particular urgency attaches to disclosure of this record. Nor is there a sufficiently clear and compelling interest in its disclosure.

[14] Here, the applicant argues that, because the City's Mayor is (the applicant says) a shareholder, officer and director of Central Heat, all the information in the reports must be open to "public scrutiny and debate" (p. 3, initial submission). As he puts it, the public interest calls for the "greatest possible transparency regarding how the City and the Mayor dealt with the Mayor's conflict of interest" (p. 3, initial submission). He also

alleges the renewal agreement between the City and Central Heat yields lower revenues for the City, so it is necessary to have

> … the greatest possible transparency regarding why the City accepted an agreement which harmed the public's financial interest.

[15] At pp. 3-6 of his initial submission, the applicant goes into some detail about the harm he contends the City will suffer under the new Central Heat agreement. He says the agreement is contrary to City policy and gives Central Heat a better deal than BC Gas Inc. got respecting its use of City streets for utility works. He also submits that the litigation between the City and Central Heat over arrears is

> … of public interest due to the significant loss of public funds which resulted from the alleged breach and City staff's failure to notice it for over 20 years.

[16] These are general arguments for accountability and transparency as contemplated by s. 2(1) of the Act. Having thought about this with care, I cannot distinguish this case from others in which s. 25(1)(b) is said to be triggered by the general desirability of subjecting a public body's activities to scrutiny. As was the case in Order 01-20, I am not persuaded there is an urgent and compelling need for compulsory public disclosure despite any of the Act's exceptions. I do not see any particular urgency attaching to disclosure of this information. Nor is there a sufficiently clear and compelling interest in its disclosure. I find that s. 25(1)(b) does not require the City to disclose the disputed information.

[17] **3.2 Advice or Recommendations –** The City has withheld what it says is advice or recommendations developed by City staff for Council. Section 13(1) of the Act authorizes a public body to refuse to disclose to an applicant "advice or recommendations developed by or for a public body or a minister." This exception is intended to provide some breathing space for public servants, so they can fully and frankly discuss alternative courses of action and policies. It protects the free flow of advice and recommendations, as part of the "deliberative process of government decision-making and policy-making" (Ontario Order 94, [1989] O.I.P.C. No. 58, at p. 3).

[18] As I have said before, s. 13(1) applies, at the very least, to information that, if disclosed, would reveal advice or recommendations developed by or for a public body as to a course of action, a policy choice or the exercise of a power, duty or function. See, for example, Order No. 324-1999, [1999] B.C.I.P.C.D. No. 37, and Order 00-17, [2000] B.C.I.P.C.D. No. 20.

[19] According to the affidavit sworn by Susan Clift, who is a Project Engineer for the City, the City and Central Heat in 1966 entered into a 30-year agreement under which Central Heat operated a steam heat business using City streets. That agreement expired on June 29, 1996. Because of disagreement over a variety of issues, negotiations for a new agreement were slow. As a result of a dispute over arrears of fees the City alleges were due to it, in 1999 the City sued Central Heat and, as of the date of the inquiry, the

litigation was still ongoing. The City and Central Heat entered into a new 30-year agreement on September 1, 1999.

[20] Susan Clift deposed that the disputed reports to Council were written by various City employees, including lawyers in the City's Legal Services Department. Clift also deposed that each of the reports was presented to Council at an *in camera* meeting and that, to the best of her knowledge, none of the severed portions of the various reports have ever been disclosed to the public.

[21] The City contends that the portions of the report severed under s. 13(1) all qualify as advice or recommendations. I have reviewed the severed information and agree that it qualifies as advice or recommendations on suggested courses of action or decisions. The advice and recommendations relate to the City's dealings with Central Heat.

[22] The applicant argues that all or parts of the withheld information "fall within a number of the categories listed in s. 13(2)", such that the City cannot refuse to disclose that information. The relevant portions of s. 13(2) read as follows:

> (2) The head of a public body must not refuse to disclose under subsection (1)
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> (a) any factual material,
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> …
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> (d) an appraisal,
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> (e) an economic forecast,
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> (f) an environmental impact statement or similar information,
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> …
>
> (i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,
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> (j) a report on the results of field research undertaken before a policy proposal is formulated,
>
> …
>
> (l) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body,
>
> (m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or … .

[23] In its reply submission, the City rebuts the applicant's contention that these aspects of s. 13(2) apply. I agree with the City. First, I do not consider that any of the severed information qualifies as "factual material" within the meaning of s. 13(2)(a). Nor does s. 13(2)(d) apply: none of the severed information is "an appraisal". Similarly, ss. 13(2)(e), (f), (i), (j) and (i) plainly do not apply to any of the disputed information.

[24] As for s. 13(2)(m), the applicant relies on a statement that allegedly was made publicly by the City's General Manager of Engineering at some point. The alleged statement appears only to contrast the revenue-sharing formula in the new City-Central Heat agreement with that found in the 1966 agreement. This information does not qualify as information "cited publicly as the basis for making a decision or formulating a policy", even if one assumes that the City's General Manger of Engineering is the head of the public body (or the head's delegate) as required by s. 13(2)(m).

[25] The City has also considered whether it should exercise its discretion under s. 13(1) to disclose some of the information protected by that provision. At paras. 19 and 20 of its initial submission, the City says the following about this decision:

> 19. In making its decision not to release the Withheld Information, the City considered the potential for harm to the City's interests of releasing information related to the ongoing legal action brought by the City against Central Heat.
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> 20. In making its decision not to release the Withheld Information, the City also took the following factors into account:
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> a. whether the individual's request could be satisfied by severing the record and by providing the applicant with as much information as is reasonably practicable (the document was severed as far as possible);
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> b. the historical practice of the public body with respect to the release of similar types of documents (*in camera* documents are not routinely released);
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> c. whether the disclosure of the information will increase public confidence in the operation of the public body (disclosure would satisfy the curiosity of the Applicant, but would not significantly affect public confidence);
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> d. the age of the records (they are relatively recent);
>
> e. whether there is a sympathetic or compelling need to release materials (there is none); and
>
> f. whether previous orders of the Commissioner have ruled that similar types of records or information should nor should not be subject to disclosure (they have not).

[26] I find that the City is authorized by s. 13(1) to refuse to disclose the information it withheld under that section.

[27] **3.3 Solicitor Client Privilege** – Section 14 of the Act authorizes a public body to refuse to disclose "information that is subject to solicitor client privilege". Of the two kinds of privilege recognized under s. 14, the City relies primarily on legal professional privilege, which protects confidential communications between a lawyer and

her or his client related to the seeking, formulating or giving of legal advice. It also relies on litigation privilege, as well, in relation to some of the severed information. I have not found it necessary to deal with that branch of solicitor client privilege, since the material withheld under s. 14 is, in my view, protected by legal professional privilege.

[28] The City has withheld only those portions of the reports that, it argues, contain privileged communications. Citing R. Manes and M. Silver, *Solicitor-Client Privilege in Canadian Law* (1993, Toronto: Butterworths), at p. 4, the City makes the following arguments in its initial submission:

> 32. In most cases, where privilege applies, it applies to a whole document. In other words, the document and the privileged communication are one and the same. For this reason, "document" and "communication" are often used interchangeably in judicial decisions.
>
> 33. In some cases, however, one document can contain more than one communication, some of which are privileged and some of which are not. In this case, it is possible to sever the entire privileged communication from the remainder of the document. Severance of privileged communications from non-privileged documents can be required under section 4(2) of the Act.
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> …
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> 36. It is conceded for the purpose of this review that a confidential report prepared by several staff, only one of whom is providing legal advice, is also severable under section 4(2) of the Act. Such a report is, in effect, a compendium of communications from different staff members.

[29] I agree with this formulation as it relates to the reports to Council, each of which is a compendium of separate communications, some of which are – as discussed below – privileged and some of which are not. This approach is also consistent with views about severance expressed by Thackray J. (as he then was), in passing, in *British Columbia (Minister of Environment, Lands and Parks)* v. *British Columbia (Information and Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64 (B.C.S.C.).

[30] Turning to the evidence here, Susan Clift deposed that she wrote the reports in issue, while the material withheld from the reports under s. 14 was written by lawyers employed in the City's Legal Services Department. Francois LeTourneux, a City-employed lawyer, wrote the portions of the various reports that relate to the litigation between the City and Central Heat. Kelly Oehlschlager wrote the portions of the reports that relate to other legal matters. The reports are addressed to City Council from the "General Manager of Engineering Services in consultation with the Director of Legal Services."

[31] This case is to be contrasted with the situation in Order 01-25, [2001] B.C.I.P.C.D. No. 26, where the public body argued that a memorandum ghost-written by a lawyer was protected under s. 14. I found that the record – which had been signed by the public body's president – on its face was not a communication between the public

body and its legal advisor. There was no evidence to support the finding that the memorandum should nonetheless be treated as a client-lawyer communication. Nor was the memorandum in any event related to the seeking or giving of legal advice.

[32] Here, the material severed under s. 14 very clearly communicates legal advice. Moreover, the fact that the communications to Council are from a lawyer is signaled by the reference, in each case, to consultation with the Director of Legal Services. The reference to the reports having been written "in consultation with" the Director must, in my view, be taken to refer to authorship by the Director or the Director's staff. The severed legal advice is readily identifiable and it is discrete from the other parts of the reports. In light of Susan Clift's evidence, and the contents of the reports themselves, I am satisfied that the severed portions are confidential communications of legal advice to Council. They are therefore privileged. I am also satisfied that the City's disclosure of the other portions of the reports, in response to the applicant's access request, does not disclose any privileged material or waive privilege over the withheld portions.

[33] I find that the City is authorized by s. 14 to refuse to disclose the information it withheld under that provision.

4.0 CONCLUSION

[34] For the reasons given above, under s. 58(2)(b) of the Act, I confirm the City's decision that it is authorized by s. 13 and by s. 14 to refuse to disclose the information that it withheld under those sections. No order is necessary under s. 58 respecting s. 25(1)(b) of the Act.

March 6, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia