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

Order 02-22

ESQUIMALT POLICE BOARD

David Loukidelis, Information and Privacy Commissioner
May 16, 2002

Quicklaw Cite: [2002] B.C.I.P.C.D. No. 22
Document URL: http://www.oipcbc.org/orders/Order02-22.pdf
Office URL: http://www.oipcbc.org
ISSN 1198-6182

Summary: The applicant police union requested access to minutes of police board *in camera* meetings held during a specified period regarding the issue of splitting the police and fire department functions. The police board refused to disclose some portions of the minutes, relying on s. 12(3)(b). The police board is not compelled by s. 25(1) to disclose the withheld information. The police board is authorized by s. 12(3)(b) to refuse disclosure.

Key Words: *in camera* meeting – substance of deliberations – public interest – subject matter – public safety - significant harm.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 12(3)(b), 25(1).

Authorities Considered: B.C.: Order No. 326-1999, [1999] B.C.I.P.C.D. No. 39; Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44; Order 00-14, [2000] B.C.I.P.C.D. No. 17; Order 01-20, [2001] B.C.I.P.C.D. No. 21; Order 01-50, [2001] B.C.I.P.C.D. No. 55.

1.0 INTRODUCTION

[1] On March 29, 2001, the applicant Esquimalt Police Union ("Union") sought access to copies of Esquimalt Police Board ("Board") meeting minutes. The request was for minutes of all meetings held by the Board "both sitting as the Police Board as well as those meetings held by the Police Board in conjunction with the Esquimalt Municipal Council (or representatives thereof)." The request, which was made under the *Freedom of Information and Protection of Privacy Act* ("Act"), specifically related to any meetings held between September 1, 2000 and February 2, 2001 "where matters concerning the issue of splitting the Esquimalt Police/Fire Department were discussed." In its June 18, 2001 response, the Board denied access to *in camera* meeting minutes under s. 12(3)(b)

of the Act. It cited various parts of s. 242 of the *Local Government Act* as the Board's authority to hold meetings in the absence of the public, *i.e.*, *in camera*.

[2] This decision prompted the applicant to request a review, under Part 5 of the Act, of the Board's decision. During mediation by this Office, the Board disclosed the disputed *in camera* minutes in severed form, with some out-of-scope information having been severed and with some responsive portions of the records having been severed and withheld under s. 12(3)(b). On August 21, 2001, the Board disclosed to the applicant a set of *in camera* meeting minutes that it had previously overlooked, with information severed from the minutes under s. 12(3)(b). Because the matter did not settle during mediation, I held a written inquiry under Part 5 of the Act.

[3] After the close of the inquiry, the Union told me that it had received a copy of the *in camera* minutes for January 4, 2001.

[4] I will deal here with the Union's objection to the Board's delivery, as part of its initial submission, of some *in camera* materials. The Union says that it cannot, because the materials were submitted *in camera*, meet the case against it. Section 47(3) of the Act authorizes me to receive material *in camera* in proper cases. Here, the *in camera* material consists of material that may be excepted from disclosure under the Act. I am satisfied that the Board's *in camera* material is properly received on that basis. It should be said, however, that it has not been necessary for me to rely on the *in camera* material in reaching my findings in this case.

2.0 ISSUE

[5] The only issue before me is whether the Board is authorized by s. 12(3)(b) of the Act to refuse to disclose information. Under s. 57(1) of the Act, the Board bears the burden of establishing that s. 12(3)(b) authorizes it to withhold information.

[6] In its initial submission in the inquiry, the Board for the first time argued – without advance notice to me or the Union and without any explanation for not giving notice – that s. 17(1)(e) of the Act applies to the disputed information. My finding that s. 12(3)(b) applies to the disputed information means I do not have to consider whether the Board should be allowed to rely on s. 17(1), at such a late date, or whether it applies to the disputed information.

[7] Similarly, the Union has argued in its initial submission that s. 25(1) of the Act requires the Board to disclose the disputed information in the public interest. This is the first time that this mandatory provision has been raised in this case. The Union gave no explanation for its failure to raise this issue earlier. I have decided to deal with the point in light of the mandatory nature of s. 25(1). I did not provide the Board with an opportunity to respond to the s. 25(1) arguments made by the Union, as it turns out, because it is clear to me that, on the face of the matter, s. 25(1) does not require the Board to disclose the disputed information.

3.0 DISCUSSION

[7] **3.1 Public Interest Disclosure** – At p. 3 of its initial submission, the Union says the following:

> It is difficult to imagine anyone arguing that the means of providing police and fire protection, the costs of those services and, indeed the levels of service provided, are not significant to the safety of the public. These issues are clearly in the public interest.
>
> In addition to the above, the Esquimalt Council and Police Board have made public statements referring to a significant public liability that they refuse to disclose to the public, that allegedly forms part of their reasons for not releasing the in-camera minutes. Obviously any such liability, real or imagined, is in the realm of the public interest as the taxpayers are the persons at risk for any such liability not the council or police board.

[8] 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
>
> (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.

[9] Although the subject matter of the various *in camera* meetings, and the deliberations at those meetings, may relate to a subject of public interest, the fact that the public may be interested in a subject does not mean that compulsory disclosure, without delay, of otherwise protected information is in the public interest. This is yet another case in which I conclude, based on my review of the materials themselves and the surrounding circumstances, that the necessary element of urgency and compelling public interest in disclosure of the disputed information is not present. In arriving at this finding, I have applied the two-part analysis in s. 25(1)(b) cases that I articulated in Order 01-20, [2001] B.C.I.P.C.D. No. 21. See, also, Order 01-50, [2001] B.C.I.P.C.D. No. 55.

[10] **3.2 Protection for *In Camera* Deliberations** – Section 12(3)(b) of the Act authorizes a local public body to refuse to disclose records that, if disclosed, would reveal the "substance of deliberations" of the governing body of that local public body or any of its committees. The section reads as follows:

> 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.

Test for s. 12(3)(b) cases

[11] As indicated in Order No. 326-1999, [1999] B.C.I.P.C.D. No. 39, in order to rely on this section, a local public body must establish the following things:

1. The local public body must establish that it has legal authority to meet *in camera;*

2. The local public body must establish that an authorized *in camera* meeting was, in fact, properly held; and

3. The local public body must establish that disclosure of the disputed records or information would reveal the substance of deliberations of the meeting.

[12] Applying these factors, has the Board established that s. 12(3)(b) applies to the disputed information? For the reasons given below, I find that the Board has satisfied the above three-part test for s. 12(3)(b).

***Legal authority for the Board to meet* in camera**

[13] In its June 18, 2001 response to the Union, the Board relied on aspects of s. 242 of the *Local Government Act*, which authorizes municipal councils to hold, in certain circumstances, meetings from which the public is excluded, known as *in camera* meetings. The difficulty with this, of course, is that the *Local Government Act* has nothing to do with *in camera* meetings of the Board itself. It governs only meetings of the Town's municipal council. The provision relevant to *in camera* police board meetings is s. 69 of the *Police Act*, which reads as follows:

> **Meetings and hearings open to public**
>
> 69(1) Subject to subsection (2), every meeting and hearing of a board or a committee must be open to the public.
>
> (2) If it believes that any of the following matters will arise in a meeting or hearing held by it, a board or committee may order that the portion of the meeting during which the matter will arise be held in private:
>
> (a) a matter concerning public security, the disclosure of which could reasonably be expected to seriously impair effective policing or law enforcement;

> (b) a matter concerning a person's financial or personal affairs, if the person's interest in the matter outweighs the public's interest in the matter;
>
> (c) a matter concerning labour contract discussions, labour management relations, layoffs or another personnel matter;
>
> (d) a matter concerning information that a person has requested he or she be allowed to give in private to the board or committee.
>
> (3) On making an order under subsection (2), the board or committee must promptly submit to the minister a copy of the minutes of the meeting or hearing and a statement of the reasons for holding a portion of the meeting or hearing in private.

[14] This section gives the Board legal authority to meet *in camera*.

Were* in camera *meetings properly held?

[15] The Board has not provided me with any affidavit evidence to confirm that *in camera* meetings were actually held. Although affidavit evidence on this point is preferable, the parties' submissions and the disputed records themselves confirm that joint meetings of the Town's municipal council and the Board were held in the latter part of 2000 and in early 2001. The records confirm, as the applicant is aware, that these meetings addressed the issue of splitting Esquimalt's joint fire and police service into two services.

[16] The minutes have been certified as reflecting an accurate record of the proceedings at such meetings. The Union does not dispute that meetings were held on the relevant dates, *e.g.*, its submissions in this inquiry refer to the holding of *in camera* meetings on the relevant dates. While direct evidence on this point is the best evidence, the factors just cited suffice to establish that the Board held *in camera* meetings when it says it did. Nor does the fact that a meeting is held jointly with a municipal council, as was done here, mean the meeting is not an *in camera* meeting.

[17] My finding that *in camera* meetings were actually held is consistent with Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44, for example, the minutes themselves are evidence that such meetings were in fact held. In Order No. 331-1999, the police board had not provided direct evidence that a memorandum sought by the applicant had been discussed at an *in camera* meeting. Despite the absence of direct evidence on the holding of the meeting and discussion of the memorandum, however, I concluded that the memorandum itself was a sufficient basis for finding that the record related to an *in camera* meeting. My finding that the memorandum could not be withheld turned on the fact, not relevant here, that disclosure of the memorandum would not reveal the substance of deliberations of the *in camera* meeting.

[18] The Union notes that the meeting minutes refer to sections of the *Local Government Act* as the authority for the Board to go *in camera*, even where it was meeting on its own and not jointly with the Town Council. This may reflect confusion on the part of the Board as to its status and authority under the *Police Act*. It does not, however, get around the fact that, as the minutes confirm, the Board had the authority in each case under s. 69 of the *Police Act*, to meet *in camera*. Section 12(3)(b) focusses on whether or not "an Act or regulation" under the Act actually authorizes the *in camera* meeting. Accordingly, for the purposes of s. 12(3)(b), I do not consider it appropriate to hold the Board to a strict observance of the formality of reciting, in minutes, the statutory authority that in fact authorizes the *in camera* meeting. The approach to this issue might differ in another forum or for purposes other than s. 12(3)(b), and to that end it is up to the Board and the Town's council to comply with the *Police Act* and the *Local Government Act*.

[19] In a similar vein, the Union argues the Board cannot rely on s. 12(3)(b) because it did not follow the proper procedure in going *in camera* at the relevant meetings. It says, at p. 3 of its initial submission, that the portions of the minutes that the Board released show that the Board

> … improperly conducted in-camera deliberations without in fact entering into an in-camera status by virtue of a motion made pursuant to an appropriate statutory authority.

[20] First, the minutes themselves record the fact that a motion to go *in camera* was made each instance, although the *Local Government Act* was cited as the authority for moving to *in camera* status. I have already found that this is not fatal to the Board's reliance on s. 12(3)(b).

[21] On p. 4 of the Union's initial submission, it contends that the "required public notice of the meeting [was] not given" in several cases, such that the affected meetings were not properly held *in camera*. The Union does not point to any statutory requirement, under the *Police Act*, that public notice of an *in camera* police board meeting must be given. I have found none. In any case, the usual presumption of regularity applies in the absence of any evidence to the contrary. I am not persuaded that this allegation deprives the Board of the benefit of s. 12(3)(b).

[22] Last, the Union says, in its reply submission, that the Board and the Town's council improperly created a joint committee. It asks me to find that this was an improper "violation of the separation of responsibilities" that is alleged to exist between the two bodies under the *Police Act* (p. 2, reply submission). This general allegation is not directly relevant to the issues before me. Certainly, the Union has not pointed to any statutory prohibition against a municipal council or police board holding a meeting jointly with another governing body, so long as the legislation governing the body in question – here, the Board – is followed. The fact that two governing bodies meet jointly is not fatal to the claim of *in camera* status.

Disclosure would reveal substance of deliberations

[23] I find that disclosure of the severed portions of the minutes would reveal the substance of deliberations of the various *in camera* meetings. In Order No. 331-1999, disclosure of the disputed memorandum would not have revealed the substance of deliberations at the meeting to which the memorandum related. Here, the minutes by their very nature record what was said and done at the meetings and their disclosure would reveal the substance of the *in camera* deliberations about the proposal to split the joint Esquimalt police and fire service into two services.

Later meetings open to the public

[24] The Union argues that, because the subject matter of the *in camera* deliberations has been considered in a meeting open to the public, the Board cannot rely on s. 12(3)(b). This argument stems from s. 12(4)(a), which reads as follows:

> (4) Subsection (3) does not apply if
>
> (a) the draft of the resolution, bylaw, other legal instrument or private Bill or the subject matter of the deliberations has been considered in a meeting open to the public, or … .

[25] The Union makes the following argument on this point, at p. 3 of its initial submission:

> There have been several open public meetings of council where the *subject matter* of the split decision has been discussed and where members of the public have made representations to council and asked questions about the decision to split the department. This clearly meets the criteria set out wherein the ability to use 12(3)(b) is <u>not applicable</u>. [original emphasis]

[26] The material before me is not persuasive on the issue of whether the Board later "considered" the subject matter of the *in camera* deliberations in open meetings. First, the Union refers in the above passage to later open meetings of the Town's council, not of the Board (joint or otherwise). The fact that some of the *in camera* meetings were held jointly held does not mean the council could, by holding a later open meeting and in some sense considering the subject matter of a joint meeting, on that basis preclude the Board from relying on s. 12(3)(b). Second, 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. I am not, therefore, persuaded that s. 12(4)(a) applies in this case.

[27] I find that the Board is authorized by s. 12(3)(b) to refuse to disclose the information that it has withheld under that section.

4.0 CONCLUSION

[28] For the above reasons, under s. 58(2)(b) of the Act, I confirm the Board's decision that it is authorized by s. 12(3)(b) to refuse to disclose information to the applicant.

May 16, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia