OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Order 03-09

CITY OF VANCOUVER

Mary Carlson, Adjudicator
March 5, 2003

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Summary: Applicant requested copies of *in camera* minutes. Access was denied to portions of the minutes under s. 12(3)(b) of the Act. City authorized under s. 12(3)(b) to withhold the disputed information. Section 25 found not to apply.

Key Words: public interest – *in camera* meeting – substance of deliberations.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 12(3)(b), 25; *Vancouver Charter,* s. 165.2(1)(d), (e) and (h), 165.3.

Authorities Considered: B.C.: Order No. 8-1994, [1994] B.C.I.P.C.D. No. 8; Order No. 48-1995, [1995] B.C.I.P.C.D. No 48; Order No. 81-1996, [1996] B.C.I.P.C.D. No. 81; Order No. 114-1996, [1996] B.C.I.P.C.D. No. 114; Order No. 326-1999, [1999] B.C.I.P.C.D. No. 326; Order No. 00-49, [2000] B.C.I.P.C.D. No. 53; Order 02-22, [2002] B.C.I.P.C.D. No. 22; Order 02-38, [2002] B.C.I.P.C.D. No. 38.

Cases Considered: *Aquasource Ltd.* v. *British Columbia (Information and Privacy Commissioner,* (1998), 8 Admin. L.R. (3d) 236.

1.0 INTRODUCTION

[1] The False Creek Landlease Action Committee ("FLAC") is a group of persons who individually lease land from the public body, the City of Vancouver ("City"). On November 6, 2001, the applicant, the Chair of FLAC, made a request, under the *Freedom of Information and Protection of Privacy Act* ("Act"), for a copy of the minutes of an *in camera* council meeting held on October 30, 2001 "at which Council defeated Councilor Tim Louis's motion directing City staff to negotiate with False Creek South land

leaseholders." In the request, the applicant said "release of these minutes is in the public interest to further transparency and accountability in local government…"

[2] The City responded to this request on November 26, 2001 by providing a severed copy of the minutes. In its response, the City denied access to portions of the *in camera* meeting minutes under s. 12(3)(b) of the Act and cited various parts of the *Vancouver Charter* as its authority for holding that meeting in the absence of the public. The City also concluded that it was not in the public interest to release the minutes in question.

[3] The applicant requested a review of this decision under Part 5 of the Act. During mediation, the City released more information from the minutes but maintained that s. 12(3)(b) applies to the balance of the severed information. The applicant requested that the matter proceed to inquiry on April 8, 2002.

[4] Because the matter did not settle in mediation, a written inquiry was held under Part 5 of the Act. I have dealt with this inquiry, by making all findings of fact and law and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

2.0 ISSUE

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

1. Does s. 25(1) require the City to release the records?

2. Is the City authorized under s. 12(3)(b) to withhold portions of the records?

[6] In dealing with s. 25(1), I have applied the principles respecting burden of proof under s. 25(1) that are found paras. 32-39 of Order 02-38, [2002] B.C.I.P.C.D. No. 38. Previous decisions have established that the burden of proof respecting the second issue rests with the public body.

3.0 DISCUSSION

[7] **3.1 Public Interest Disclosure –** The first issue is whether the records must be released in the public interest as contemplated by s. 25 of the Act. The relevant portions of s. 25 read 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.
>
> (2) Subsection (1) applies despite any other provision of this Act.

[8] The applicant believes the records should be released in the public interest. In his initial submission, he states "We believe that release of these minutes is in the public interest to further transparency and accountability in local government, so that the leaseholders and general public can find out which Councilors supported negotiations."

[9] In assessing the applicant's argument that s. 25(1) applies and requires immediate, compulsory disclosure in the public interest, I have used the approach that the Commissioner set out in Order 02-38, and, without setting out my thinking in any detail, I am satisfied that the disputed information does not approach the level of urgency or significance that requires immediate, compulsory disclosure in the public interest.

[10] **3.2 Application of s. 12(3)(b) –** The next issue is whether the City is authorized under s. 12(3)(b) of the Act to withhold portions of the disputed records. That section reads:

> 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.

[11] Section 12(3)(b) is a discretionary exception to disclosure. The application of section 12(3)(b) must meet the criteria outlined by the Commissioner in several previous orders. See, for example, Order No.326-1999, [1999] B.C.I.P.C.D. No. 39 and Order 02-22, [2002] B.C.I.P.C.D. No. 22. The criteria are as follows:

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* meetings 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.

Did an Act authorize the in camera meeting?

[12] In its initial submission, the City cites s. 165.2(1) of the *Vancouver Charter* as its authority for holding meetings in the absence of the public. Section 165.2(1) reads:

> **Meetings that may or must be closed**
>
> 165.2(1) A part of a Council meeting may be closed to the public if the subject matter being considered relates to one or more of the following:

> (a) personal information about an identifiable individual who holds or is being considered for a position as an officer, employee or agent of the city or another position appointed by the city;
>
> (b) personal information about an identifiable individual who is being considered for an award or honour, or who has offered to provide a gift to the city on condition of anonymity;
>
> (c) labour relations or employee negotiations;
>
> (d) the security of property of the city;
>
> (e) the acquisition, disposition or expropriation of land or improvements, if the Council considers that disclosure might reasonably be expected to harm the interests of the city;
>
> (f) law enforcement, if the Council considers that disclosure might reasonably be expected to harm the conduct of an investigation under or enforcement of an Act, regulation or by-law;
>
> (g) consideration of whether paragraph (e) or (f) applies in relation to a matter;
>
> (h) litigation or potential litigation affecting the city;
>
> (i) the receiving of advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
>
> (k) a matter prescribed by regulation under section 165.8.
>
> (2) A part of a Council meeting must be closed to the public if the subject matter is a matter that, under another enactment, is such that the public must be excluded from the meeting.
>
> (3) If the only subject matter being considered at a Council meeting is one or more matters referred to in subsection (1) or (2), the applicable subsection applies to the entire meeting.

[13] Section 165.2(1) of the *Vancouver Charter* allows part of a Council meeting to be closed to the public if, amongst other things, the subject matter of the meeting is anything found in sections 165.2(1)(a) through (k) of the *Vancouver Charter*. The City submits that the subject matter of the *in camera* meeting of October 30, 2001 related to the security of property of the City (s.165.2(1)(d)), the acquisition, disposition or expropriation of land or improvements (s.165.2(1)(e)) and litigation or potential litigation affecting the City (s.165.2(1)(h)).

[14] Before a meeting is closed to the public, s. 165.3 of the *Vancouver Charter* requires Council to state by resolution, the fact that the meeting is to be closed and the basis under s. 165.2 on which the meeting is to be closed. That section reads:

Resolution required before meeting closed

165.3 Before a meeting or part of a meeting is closed to the public, the Council must state, by resolution,

(a) the fact that the meeting is to be closed, and

(b) the basis under section 165.2 on which the meeting is to be closed.

[15] The City submitted the affidavit of Brent MacGregor, Deputy City Manager, in which he deposed that Council passed a resolution allowing it to hold a portion of the relevant meeting in the absence of the public. The minutes of the open Council meeting appended to the MacGregor affidavit show that Council, by resolution, resolved to close portions of the October 30, 2001 meeting to the public to discuss matters related to ss. 165.2(1)(d), (e) and (h) of the *Vancouver Charter*.

[16] I conclude on the evidence before me that the *in camera* meeting of Council of October 30, 2001 was authorized by an Act to be, and was, properly held *in camera*.

Would disclosure reveal the substance of deliberations of Council?

[17] Before it can withhold information under s. 12(3)(b), the City must also show that disclosure of the information would reveal the "substance of deliberations of a meeting of its elected officials." Would disclosure of the information in dispute reveal the substance of deliberations of Council at the meeting?

[18] The City has withheld from the *in camera* minutes the names of the movers of two motions; the names of those who voted for and/or against one motion; and the contents of one motion.

[19] The applicant argues that information showing how an individual council member voted does not reveal the "substance of deliberations" as "deliberations are what occur BEFORE the vote (i.e. decision)."

[20] The phrase "substance of deliberations" is found twice in s. 12. The first time is in s. 12(1), which refers to the "substance of deliberations" of a committee of Cabinet, and then again in s. 12(3), which refers to the "substance of deliberations" of a meeting of the elected officials of a local public body. The test for both is the same. In Order No. 8-1994**,** [1994] B.C.I.P.C.D. No. 8, Commissioner David Flaherty said the following at p. 4:

> In my view, the "substance of deliberations" includes records of what was said at Cabinet, what was discussed, and recorded opinions and votes of individual ministers, if taken. The "substance of deliberations" is what the B.C. Civil Liberties Association described as "the Cabinet thinking out loud" although its scope includes a range of records which would reveal what happened in Cabinet.
>
> ...

> What is meant to be protected is the "substance" of Cabinet deliberations, meaning recorded information that reveals the oral arguments pro and con for a particular action or inaction or the policy considerations, whether written or oral, that motivated a particular decision.

[21] The British Columbia Court of Appeal, in judicial review proceedings involving Order No. 48-1995**,** [1995] B.C.I.P.C.D. No 48, upheld this interpretation. See *Aquasource Ltd*. v. *British Columbia (Information and Privacy Commissioner),* (1998), 8 Admin. L.R. (3d) 236. The same analysis of s. 12(1) has been applied in relation to local public bodies under s. 12(3)(b). See, for example, Order No. 81-1996, [1996] B.C.I.P.C.D. No. 81, Order No. 114-1996, [1996] B.C.I.P.C.D. No. 114, and Order No. 00-49, [2000] B.C.I.P.C.D. No. 53.

[22] Would disclosure of the motion that was voted on reveal the substance of deliberations? Distinctions have been made in previous orders between the "subject" of deliberations and the "substance" of deliberations (see, for example, Order 48-1995). The applicant has speculated on what he believes to be the contents of the motion that was defeated on October 30, 2001. The City has refused to confirm or deny the contents of that motion.

[23] The motion, stated in one sentence, is very specific. Given its specificity, it is difficult to see how disclosure of this motion would *not* reveal the substance of deliberations of Council. I am satisfied that, in this case, discussions of the merits of the motion cannot be separated from the motion itself and that disclosure of the motion would "reveal the substance of deliberations" of Council.

[24] Whether a particular member of Council voted for or against a particular motion would not only reveal the substance of the deliberations of Council but the exact deliberation itself. I find that disclosure of the records of how council voted at an *in camera* meeting would reveal the substance of Council's deliberations.

4.0 CONCLUSION

[25] For the reasons stated above, under s. 58 of the Act, I confirm that the City is authorized by s. 12(3)(b) to refuse to disclose information to the applicant. Having found that the City is not required to disclose the information under s. 25, under s. 58 of the Act, I confirm that the City has performed its duty to the applicant.

March 5, 2003

ORIGINAL SIGNED BY

Mary Carlson
Adjudicator