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Order F12-11

CITY OF NEW WESTMINSTER

Elizabeth Barker, Adjudicator

July 4, 2012

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Summary: A performing arts society requested records regarding assets located in a City-owned theatre. The City withheld two reports prepared for council and withheld portions of the minutes from two council meetings under s. 12(3)(b) of FIPPA. The adjudicator found that s. 12(3)(b) applied to the minutes of the *in camera* council meetings but not to the reports and that their release would not reveal the substance of council's deliberations.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 12(3)(b); *Community Charter* RSBC 2003, c. 26.

Authorities Considered: B.C.: Order No. 8-1994, [1994] B.C.I.P.C.D. No. 11; Order No. 48-1995, [1995] B.C.I.P.C.D. No. 21; Order No. 113-1996, [1996] B.C.I.P.C.D. No. 40; Order No. 114-1996, [1996] B.C.I.P.C.D. No. 41; Order No. 172-1997, [1997] B.C.I.P.C.D. No. 33; Order No. 326-1999, [1999] B.C.I.P.C.D. No. 39; Order 00-11, [2000] B.C.I.P.C.D. No. 13; Order 00-14, [2000] B.C.I.P.C.D. No. 17; Order 00-49, [2000] B.C.I.P.C.D. No. 53; Order 02-19, [2002] B.C.I.P.C.D. No. 19; Order 03-22, [2003] B.C.I.P.C.D. No. 22; Order 03-24, [2003] B.C.I.P.C.D. No. 24.

INTRODUCTION

[1] This inquiry concerns a request by a performing arts society ("Society") for records in the custody and control of the City of New Westminster ("City"). The records relate to communications between the City and the Society regarding assets located in a formerly City-owned theatre. In response to the request, the City released a number of records but withheld two reports in their entirety and severed information from the minutes of two council meetings. The City relies upon s. 12(3)(b) of the *Freedom of Information and Protection of*

Privacy Act (“FIPPA”) on the grounds that disclosure of the withheld information would reveal the substance of City council deliberations during meetings held in the absence of the public.

[2] The Society asked the Office of the Information and Privacy Commissioner (“OIPC”) to review the City’s decision. Mediation did not resolve the matter and a written inquiry was held under Part 5 of FIPPA.

ISSUE

[3] Does s. 12(3)(b) of FIPPA authorize the City to refuse access to the requested records?

DISCUSSION

[4] **Background**— The Society managed and operated a City-owned theatre until March 2006 at which time the lease expired and was not renewed. The circumstances surrounding the end of the lease led to a dispute between the parties over assets such as the stage, seats, cables, and curtains which were left in the theatre. The Society requested information about the assets, and the City responded by disclosing some records in their entirety and releasing others with portions of the records withheld. The City relied on s. 12(3)(b) of FIPPA for all of the information withheld. During mediation, the City disclosed further information.

[5] **Records at Issue**—There are four records at issue in this inquiry: the minutes from two *in camera* City council meetings held on May 15, 2006 (May minutes) and August 30, 2010 (August minutes) and two reports to council, dated May 11, 2006 (May report) and August 30, 2010 (August report).

Would disclosure reveal the substance of a Board meeting held appropriately in camera?

[6] The City relies on s. 12(3)(b) of FIPPA as authority for withholding the requested information:

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.

[7] Section 57(1) of FIPPA imposes on the City the burden of establishing that this exception applies.

[8] The Orders of the OIPC have consistently applied the same framework in their analysis of s. 12(3)(b). Former Commissioner Loukidelis articulated the three conditions that must be met in order for a local public body to successfully rely upon the s. 12(3)(b) exception:

... a local public body can rely on s. 12(3)(b) only if it proves all of the following things:

1. A meeting of its elected officials, or of its governing body or a committee of its governing body, was actually held;
2. An Act of the Legislature, or a regulation under the *Freedom of Information and Protection of Privacy Act*, authorized the holding of that meeting in the absence of the public; and
3. Disclosure of requested information would reveal the substance of deliberations of that meeting.

If a local public body fails, in a given inquiry, to prove all three of those things, it cannot use s. 12(3)(b) to refuse to disclose information.¹

[9] Both the Society and City acknowledge that this is the applicable framework, and I follow that same approach here.

[10] The City explains that the two council meetings in question were held *in camera* as authorized by s. 90(1)(e) of the *Community Charter* RSBC 2003, c. 26 which states,

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:

...

- (e) the acquisition, disposition or expropriation of land or improvements, if the council considers that disclosure could reasonably be expected to harm the interests of the municipality;

...

- (k) negotiations and related discussions respecting the proposed provision of a municipal service that are at their preliminary stages and that, in the view of the council, could reasonably be expected to harm the interests of the municipality if they were held in public;

¹ Order 00-11, [2000] B.C.I.P.C.D. No. 13, p. 5.

[11] A review of the records satisfies me that the May 15, 2006 and August 30, 2010 meetings were held, and the first element of the test has been met. With respect to the second element, the chief administrative officer for the City explains in his affidavit that there was an error in the August minutes, which state that the meeting was closed to the public under s. 90(1)(k) of the *Community Charter*, when it should have been recorded that it was closed pursuant to s. 90(1)(e). The Society argues that this error means that the public was not properly excluded, and, consequently s. 12(3)(b) of FIPPA does not apply to the documents and minutes of that meeting. I find from my review of the minutes that the subject matter of that meeting could fall within the parameters of either of the two subsections, and that the City had the statutory authority to exclude the public from the August meeting. Therefore, the information I have reviewed satisfies me that the second element of the s. 12(3)(b) framework has also been met. I now turn to the third element of the framework, which is whether disclosure of the withheld information would reveal the substance of the City's deliberations at its May and August *in camera* meetings.

[12] The purpose of s. 12(3) is to protect a public body's full and frank exploration of issues.² In the words of former Commissioner Flaherty in Order No. 114-1996,³ the essence of the section is "to protect what was said at a meeting about controversial matters, not the material which stimulated the discussion or the outcomes of deliberations in the form of written decisions." In that case, he found that s. 12(3) of FIPPA did not apply to the correspondence that was the subject of deliberations at various *in camera* school board meetings. Although the correspondence contained information that was discussed by the school board, the correspondence itself did not contain the substance of the board's discussions. Other Orders have consistently applied the same approach to *in camera* discussions of public bodies. A critical aspect of these Orders is that they draw a distinction between revealing the "basis" for deliberations and protecting the "substance of deliberations."

May 2006 and August 2010 Reports

[13] The City explains in its submission and supporting affidavits that the May and August reports were considered in detail at their respective May 15, 2006 and August 30, 2010 *in camera* meetings. The City submits that those meetings were closed to the public to prevent harm to the interests of the City and to avoid prejudicing its position regarding the issues contained in the reports. Based on that evidence, I accept that the reports were considered at their respective *in camera* meetings.

² Order F11-04, [2011] B.C.I.P.C.D. No. 4, para. 29.

³ [1996] B.C.I.P.C.D. No. 41, p. 3.

[14] I have reviewed the May report, which consists of a one page cover memorandum and a two page attachment. I am constrained from describing the contents because doing so would reveal the information in dispute. What I am able to say is that, while this record discloses the subject matter referred for council's consideration, one cannot reasonably conclude from this material what council members thought, said or decided regarding it.

[15] The August 30, 2010 report is five pages with another seven pages of appendices. I find that the report provides background and options on a topic that was available for discussion by the City at its August *in camera* meeting. The report does not reveal any of the following: how council members dealt with the report in the meeting; whether they debated any of its options or recommendations; what options, if any, they accepted; what individual members said; whether a vote was taken; or how they voted.

[16] The City submits that, "it has the discretion to withhold the May report and the August report under s. 12(3)(b) of FIPPA, if it can show that disclosure of such reports would permit the drawing of accurate inferences about a particular council meeting."⁴ Former Commissioner Loukidelis articulated the law with respect to "accurate inferences" as follows:

... the crucial question, of course, is whether disclosure of a particular record would, in the circumstances of the case, "permit the drawing of accurate inferences" about the "substance of deliberations" of a specific *in camera* meeting.⁵

[17] That case dealt with a report evaluating firefighting services that the City of Cranbrook had considered at an *in camera* meeting. Former Commissioner Loukidelis ruled that reading the report in question would not facilitate the drawing of any conclusions, directly or by inference, about the substance of council's deliberations on the report:

Still, disclosure of the report would not reveal anything about those discussions. Council members may have debated the IAO Report vigorously, with many different views being expressed and various possible courses of actions being suggested. The IAO Report itself is silent about this. Its disclosure tells us nothing about what was said at the council table, much less what was decided. We simply do not know, and cannot tell from the IAO Report - which was prepared by outside consultants - what the deliberations of council were. The most that can be said is that disclosure of the report would disclose one subject of such meetings.⁶

⁴ City's initial submission, para. 20.

⁵ Order No. 326-1999, [1999] B.C.I.P.C.D. No. 39, p. 3.

⁶ Order No. 326-1999, [1999] B.C.I.P.C.D. No. 39, p. 4.

[18] In the circumstances of this case, I find that the May and August reports would not permit the drawing of accurate inferences about the substance of the council's deliberations. They indicate nothing about what motions were debated or what views, if any, council members expressed about them. The records read in isolation, in the manner they would be disclosed to the Society, would not allow any inferences to be drawn regarding the substance of deliberations.

[19] I conclude that s. 12(3)(b) does not authorize the City to withhold the contents of the May 2006 report, as that report does not reveal the substance of the deliberations of the May 15, 2006 *in camera* meeting.

[20] With respect to the August report, I find that with one exception, s. 12(3)(b) does not authorize the City to withhold the contents. The one exception is on page two of the report, where there is an exact quotation of the minutes from the May 15, 2006 *in camera* meeting. For reasons explained below, I find that disclosure of the May minutes would reveal the substance of council's May 15, 2006 deliberations. Therefore, s. 12(3)(b) authorizes the City to withhold the quotation of the May 2006 minutes located on page two of the August report.

May Minutes and August Minutes

[21] The City also submits that the portions of the minutes that they have refused to disclose would reveal the issues the council discussed, their deliberations, the resolutions they passed and how they voted. The City has already released the agenda of the May 15, 2006 meeting, which reveals that the May report was scheduled to be the fifth item for discussion. Of the May minutes, the City released the first page, which indicates the date, location, attendees, and the record of the vote to hold the meeting *in camera*. Regarding the August minutes, the City also released the first page, which indicates the date, location, attendees, the record of the vote to hold the meeting *in camera*, and the heading in the minutes, which indicates that the August 30, 2010 report was the sixth item.

[22] The City submits that the information that it has severed from the minutes would "reveal the issues discussed by Council, the resolutions passed by Council, who voted for the resolutions, and the deliberations of Council"⁷. The Society concedes in its reply submission⁸ that s. 12(3)(b) does apply to the previously severed portions of the minutes and that the severed information would likely reveal the substance of deliberations.

⁷ City's initial submissions, para. 17.

⁸ Para. 35.

[23] I have reviewed the full content of the minutes, and I conclude that, in this case, disclosing the withheld portions of the minutes would permit the reader to draw accurate inferences about the Council's deliberations, including what was discussed and how voting proceeded. Therefore, I find that the City is entitled, pursuant to s. 12(3)(b) of FIPPA, to withhold those portions of the May and August minutes not yet disclosed.

CONCLUSION

[24] For the reasons set out above, I make the following Orders under s. 58 of FIPPA:

1. The City is authorized by s. 12(3)(b) of FIPPA to withhold the portions of the May and August minutes not yet disclosed.
2. The City is not authorized by s. 12(3)(b) of FIPPA to withhold the May report and must give the Society a copy of that report within 30 days of the date of this Order, as FIPPA defines "day", that is, on or before August 16, 2012, and, concurrently, to copy me on its cover letter to the Society.
3. With the exception of the quotation from the May 2006 minutes found on page two of the August report, which I have marked in yellow in the copy of the August report being delivered to the City, the City is not authorized by s. 12(3)(b) of FIPPA to withhold the August report. The City must give the Society a copy of that report, excluding the yellow highlighted passage, within 30 days of the date of this Order, as FIPPA defines "day", that is, on or before August 16, 2012, and, concurrently, to copy me on its cover letter to the Society.

July 4, 2012

ORIGINAL SIGNED BY

Elizabeth Barker, Adjudicator

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