



OFFICE OF THE
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Order F15-56

CITY OF NEW WESTMINSTER

Caitlin Lemiski
Adjudicator

October 6, 2015

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Summary: An applicant requested records related to a building developer's withdrawal from a partnership with the City of New Westminster. The City disclosed some records, but withheld some information under several exceptions of the *Freedom of Information and Protection of Privacy Act*. The adjudicator determined the City is authorized to withhold meeting minutes and a report to council and attachments under s. 12(3)(b) (local public body confidences), but not information from an agenda. The adjudicator also found that s. 13 (advice or recommendations) authorizes the City to withhold a draft communications brief. Finally, the adjudicator determined that the City is not authorized to withhold parts of the agenda and the meeting minutes on the basis that they were non-responsive to the applicant's request.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(3)(b), 13, 14 and 17; *Community Charter*, ss. 90, 92.

Authorities Considered: B.C.: Order 326-1999, 1999 CanLII 4353 (BC IPC); Order 00-11, 2000 CanLII 10554 (BC IPC); Order 00-49, 2000 CanLII 14414 (BC IPC); Order 03-22, 2003 CanLII 49200 (BC IPC); Order F12-11, 2012 BCIPC 15 (CanLII); Order F13-08, 2013 BCIPC 9 (CanLII); Order F14-07, 2014 BCIPC 8 (CanLII); Order F14-27, 2014 BCIPC 30 (CanLII); Order F14-44 2014 BCIPC 47 (CanLII); Order F15-26, 2015 BCIPC 28 (CanLII).

Cases Considered: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 (CanLII); *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII); *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 3430901; *British Columbia Lottery Corporation v. Skelton*, 2013 BCSC 12 (CanLII); *British Columbia (Attorney General) v. British Columbia (Information and Privacy*

Commissioner), 2011 BCSC 112 (CanLII); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); *R. v. Mohan*, [1994] 2 SCR 9, 1994 CanLII 80 (SCC).

INTRODUCTION

[1] An applicant requested information related to a building developer's ("Developer") withdrawal from a partnership with the City of New Westminster ("City"). The City and the Developer had planned to build a new office tower and a multi-purpose community facility together (the "Project").

[2] The City responded to the applicant's request by disclosing some records, but withholding certain information under ss. 12(3)(b) (local public body confidences), 13 (policy advice or recommendations), 14 (legal advice), and 17 (harm to the financial or economic interests of a public body) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The City is also withholding information on the basis that the information is outside the scope of the applicant's request.¹

[3] The applicant was not satisfied with this response and requested a review of the City's decision from the Office of the Information and Privacy Commissioner ("OIPC"). OIPC mediation did not resolve the matters in dispute and an inquiry was held. The applicant and the City both made initial and reply submissions.

ISSUES

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

- 1) Is the City authorized by FIPPA to withhold information from a responsive record on the basis the information is out of the scope of the applicant's request?
- 2) Is the City authorized by s. 12(3)(b) of FIPPA to refuse access to the requested information because disclosure would reveal local public body confidences?
- 3) Is the City authorized by s. 13 of FIPPA to refuse access to the requested information because it would reveal advice or recommendations developed by or for a public body?
- 4) Is the City authorized by s. 14 of FIPPA to refuse access to the requested information because it would reveal information that is protected by solicitor client privilege?

¹ Public body's initial submission at para. 9.

- 5) Is the City authorized by s. 17 of FIPPA to refuse access to the requested information because disclosure would be harmful to the financial or economic interests of a public body?

[5] The burden of proving that the applicant has no right to access the information withheld under ss. 12(3)(b), 13, 14 and 17 rests with the City under s. 57(1) of FIPPA. FIPPA is silent on the burden of proof involving cases where information has been severed on the basis that it is out of scope. Previous orders have established that in such a case the public body bears the burden of establishing that information is excluded from the scope of FIPPA.²

DISCUSSION

[6] **Background**—The City and the Developer planned the Project as partners. However, the Developer withdrew from the Project before construction began. The City proceeded alone with construction of the Project.³ The applicant's request is for records from a closed City council meeting held on January 23, 2012 ("Meeting"), which relate to the Developer's withdrawal from the Project.⁴

[7] **Records in dispute**—The records in dispute are as follows:

- The Meeting agenda ("Agenda");
- The Meeting minutes ("Minutes");
- A report prepared for the Meeting ("Report");
- Two letters attached to the Report ("Letters"); and
- A draft communications brief circulated at the Meeting ("Communications Brief").

[8] The City is withholding some parts of the Agenda and the Minutes on the basis that s. 12(3)(b) applies and is withholding other parts of the Agenda and the Minutes on the basis that the information is outside the scope of the applicant's request.⁵ The City is withholding the entire contents of the Report and the Letters attached to the Report under ss. 12(3)(b), 13, 14 and 17.⁶

² See Order F15-26 at para. 5 citing Order 170-1997, 1997 CanLII 1485 (BCIPC); Order 03-14, 2003 CanLII 49183 (BC IPC); Order F13-23, 2013 BCIPC 30 (CanLII).

³ Public body's initial submission at paras. 18 and 22.

⁴ The applicant requested the parts of the Agenda and the Minutes, as well as any other relevant records, specifically related to the Developer's disengagement from the Project.

⁵ Public body's initial submission at para. 8.

⁶ Public body's initial submission at para. 10.

The City is withholding the entire contents of the Communications Brief under ss. 13 and 14 of FIPPA.⁷

[9] After the inquiry began, the applicant obtained partial contents of the Letters from another source.⁸ I therefore consider the parts of the Letters the applicant has already obtained to be moot, and I will only decide whether information the applicant does not already have access to may be properly withheld under FIPPA.⁹

Preliminary matters

Contents of the City's response

[10] The applicant raises concerns with what he sees as several inconsistencies in how the City responded to his request and severed the records. For example, he submits that prior to the inquiry, there were differences between how the records he received were severed and what the City's response letter to him said about the severing.¹⁰ As another example, he submits that the City's various supporting affidavits contain conflicting information about what sections of FIPPA are being applied to information severed from the records in dispute.¹¹ He also alleges that the same exhibit in two supporting affidavits is severed differently.¹²

[11] I have reviewed the materials the City submitted for this inquiry, most of which were shared with the applicant (some of the City's materials were submitted only to the OIPC on an *in camera* basis). The City's initial submission clearly indicates that the exhibits of the City's Chief Administrative Officer ("CAO") are the records in dispute in this inquiry.¹³ The applicant has responded to that submission and the affidavits. Both parties have made submissions about all of the sections of FIPPA that the City has applied to the records. Further, although the Investigator's Fact Report and the Notice of Inquiry do not raise the issue of the City withholding information from the records on the basis that the

⁷ Public body's initial submission at para. 11. The City located the Communications Brief when preparing for this inquiry and it does not object to including it into the records at issue in this inquiry (para. 7 of the City's initial submissions). The applicant and the City have had the opportunity to make submissions as to whether the City has properly withheld the Communications Brief under ss. 13 and 14 of FIPPA.

⁸ He provided copies of the partially-disclosed Letters with his submissions. The City confirms that the partially-disclosed letters the applicant has are the same as the Letters in dispute in this inquiry. I can also confirm that they are the same.

⁹ My references to the "Letters" in this order refer only to the parts the applicant does not already have.

¹⁰ Applicant's initial submission at paras. 7-9 and reply submission at paras. 7-18.

¹¹ Applicant's reply submission at paras. 11-13.

¹² Applicant's reply submission at para. 17.

¹³ City's initial submission at paras. 6-12.

information is “non-responsive”, both parties made submissions on this issue.¹⁴ For these reasons, I am confident that it is clear what sections of FIPPA the City has relied on, that the applicant has made submissions about the same records in dispute and that he has been afforded an adequate opportunity to be heard.

Can the City withhold information on the basis that it is “non-responsive”?

[12] The City is withholding portions of the Agenda and the Minutes on the basis that this information is non-responsive to the applicant’s request. As an example, the City submits that it severed the name of a Meeting guest from the Minutes because that guest did not attend the portions of the Meeting that are responsive to the applicant’s request.¹⁵ The applicant submits that when a public body withholds information on the basis that it is non-responsive, it becomes a matter of trust as to whether that information is actually out of the scope of an applicant’s request.¹⁶

[13] In my view, FIPPA does not permit public bodies to withhold information on the basis that it is out of the scope of, or non-responsive to, an applicant’s request. The issue is one of statutory interpretation. Section 4(1) gives an applicant a right of access to any record in the custody or control of a public body, subject to limits set out in s. 4(2). If a public body decides to refuse access to information in accordance with s. 4(2), s. 8(1)(c)(i) of FIPPA requires the public body to give reasons for refusing the information and to cite the provision of FIPPA on which the refusal is based. Therefore, it is not open to a public body to withhold information unless the public body can cite a provision of FIPPA on which the refusal is based.

[14] My approach is consistent with Order F15-23.¹⁷ In that Order, Deputy Commissioner McEvoy held that FIPPA does not authorize a public body to withhold a portion of a record on the basis that the excerpt is not responsive to the applicant’s request if other portions of the record are responsive.¹⁸ I adopt and apply his analysis here in relation to the portions of the Agenda and the Minutes that the City is withholding on the basis that they are non-responsive. For the reasons set out in Order F15-23, I find that the City is not authorized to withhold portions of the Agenda and the Minutes on the basis that they are non-responsive to the applicant’s request. The City must therefore process the applicant’s request regarding that information and respond to him as required by Part 1 and 2 of FIPPA.

¹⁴ For example, the City’s reply submission at paras. 4-7 and the applicant’s reply submission at paras. 40-42.

¹⁵ Public body’s reply submission at para. 6.

¹⁶ Applicant’s reply submission at para. 41.

¹⁷ Order F15-23, 2015 BCIPC 25.

¹⁸ That order uses the terms “out of scope” and “non-responsive” interchangeably.

Expert opinion evidence

[15] The City's submission includes evidence from a lawyer who provides his opinion, attached as exhibit A to his sworn affidavit, regarding the applicability of FIPPA to the information in dispute at this inquiry.¹⁹ He states the City asked him for his opinion on the following questions in connection with this inquiry:

1. In your opinion, is the acquisition of marketing materials, design plans, and consultant and management services as listed in the Disengagement Agreement at Schedules A and B an aspect of the disposition or acquisition of municipal land or improvements in this case?
2. In your opinion, what is the relationship between the Report to Council, and the substance of deliberations of the Council of New Westminster at its closed meeting on January 23, 2012?
3. In your opinion, is there a credible risk of financial harm to the City with respect to existing or future negotiations by the City for the sale or lease of the Assets if it is understood that staff reports and correspondence in relation to negotiations regarding the Assets and the Project that are presented to Council in closed session for direction or decision are not protected from disclosure under FIPPA?
4. In your opinion, is there a credible risk of harm to the deliberative processes of City council if the records in dispute are disclosed?²⁰

[16] Both the City and the lawyer refer to the opinion as being that of an expert.²¹ In *British Columbia Lottery Corporation v. Skelton*, 2013 BCSC 12,²² Goepel J. described the law in relation to the admissibility of expert evidence as follows:

As a general rule, a witness may not give opinion evidence but may only testify as to matters within her or his knowledge, observation or experience. Expert evidence is an exception to this general rule. Experts are allowed to provide opinions in regard to matters that are likely to be beyond the fact-finder's knowledge or experience.²³

[17] I must now decide whether the lawyer's opinion is admissible as expert evidence. The legal framework for determining the admissibility of expert opinion

¹⁹ The Affidavit sworn December 5th, 2013 submitted as part of the public body's initial submission.

²⁰ Affidavit sworn December 5th, 2013 submitted as part of the public body's initial submission, at section 2.2.

²¹ Initial submission of the public body at para. 35 and para. 3 of the Affidavit sworn December 5th, 2013 submitted as part of the public body's initial submissions.

²² *British Columbia Lottery Corporation v. Skelton*, 2013 BCSC 12 (CanLII).

²³ *British Columbia Lottery Corporation v. Skelton*, at para. 55.

evidence has two steps. Step one is to determine whether it meets all four of the following criteria:

- (a) a properly qualified expert;
- (b) relevance;
- (c) necessity in assisting the trier of fact;
- (d) the absence of any exclusionary rule;²⁴

[18] If those criteria are met, the second step is to determine whether the benefits of admitting the expert opinion evidence outweigh the risks.²⁵ If I decide the lawyer's opinion evidence is inadmissible under this framework, I may still admit it given that the rules of evidence need not be strictly applied to administrative proceedings.

[19] A list of the lawyer's professional qualifications and a brief biography is included in his affidavit. Based on this information, I find he has specialized knowledge and experience regarding freedom of information and privacy matters as well as local government law that qualify him as an expert in those subject areas. I also find that the lawyer's opinions are relevant to the question of whether disclosure of the disputed information may be exempted from disclosure under FIPPA. In addition, if I find that the evidence is admissible as expert evidence, there is no exclusionary rule that would otherwise render it inadmissible.

[20] I do not find, however, that his opinion evidence meets the criteria of "necessity". In *R. v. Mohan*, [1994] 2 SCR 9, the Supreme Court of Canada described necessity in the context of the admissibility of expert opinion evidence as follows:

This pre-condition is often expressed in terms as to whether the evidence would be helpful to the trier of fact. The word "helpful" is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury": as quoted by Dickson J. in *R. v. Abbey*, supra. ...²⁶

[21] In my view, there is nothing that is so specialized, either scientifically, technically, or otherwise, that necessitates my consideration of the lawyer's

²⁴ As set out by the Supreme Court of Canada in *R. v. Mohan*, [1994] 2 SCR 9, 1994 CanLII 80 (SCC).

²⁵ *R. v. Mohan*, as discussed in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 (CanLII) at paras 19-24.

²⁶ *R. v. Mohan* at para. 22.

opinion evidence in order to fully appreciate the matters before me and render a decision.

[22] For these reasons, I find that the lawyer's opinion is not admissible as "expert evidence" because it fails on the necessity criteria. Although I have decided the lawyer's opinion evidence is inadmissible as expert evidence, given that the rules of evidence need not be strictly applied to administrative proceedings, I still admit it as evidence and have considered it.

Local public body confidences – s. 12(3)(b)

[23] The City is withholding parts of the Agenda, parts of the Minutes, and the entire contents of the Report (including the Letters, which are attached to the Report) under s. 12(3)(b) of FIPPA.

[24] Section 12(3)(b) of FIPPA is a discretionary provision that protects local public body confidences.²⁷ Section 12(4) states when s. 12(3) will not apply. Sections 12(3)(b) and 12(4) are 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.

(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

(b) the information referred to in that subsection is in a record that has been in existence for 15 or more years.

[25] Previous orders have established that the following three requirements must be met before a local public body can apply s. 12(3)(b):

- 1) there was statutory authority to meet in the absence of the public;
- 2) a meeting was actually held in the absence of the public; and

²⁷Under the definitions section of FIPPA (Schedule 1), a "local public body" includes a "local government body". The definition of "local government body" under FIPPA includes a municipality.

- 3) the information would, if disclosed, reveal the substance of deliberations of the meeting.²⁸

Statutory authority to meet in the absence of the public

[26] The City submits the *Community Charter* provides the statutory authority for council to meet in the absence of the public.²⁹ Section 89 of the *Community Charter* states that council meetings are open to the public except as provided for in Division 3 of that Act. Section 92 of the *Community Charter* (which is part of Division 3) sets out what requirements a council must fulfil before it can hold a meeting in the absence of the public (also known as going “*in camera*”):

- 92 Before holding a meeting or part of a meeting that is to be closed to the public, a council must state, by resolution passed in a public meeting,
 - (a) the fact that the meeting or part is to be closed, and
 - (b) the basis under the applicable subsection of section 90 on which the meeting or part is to be closed.

[27] The applicant does not dispute that a meeting was actually held in the absence of the public.³⁰ He submits, however, that the City never passed a resolution to go *in camera* before holding the Meeting.³¹ In support, the applicant provides a copy of the minutes from what he describes as the last public meeting immediately preceding the Meeting, and he submits that there is no reference that some or all of the Meeting would be held *in camera*.³²

[28] The City submits that, “[a]s a matter of both procedure and law, the meeting was not closed until this resolution [to go *in camera*] was passed.”³³ According to the City, the Minutes show that at the outset of the Meeting to which the records in dispute refer, council passed a resolution closing the Meeting.³⁴ The part of the Minutes, already disclosed, to which the City refers states:

Moved and Seconded that pursuant to Section 92 of the Community Charter, this meeting is closed to the public on the basis that the subject matter of all agenda items to be considered relates to matters listed under Section 90(1)

²⁸ See, for example, Order F14-07 2014 BCIPC 8 (CanLII), at para. 12; Order F14-27 2014 BCIPC 30 (CanLII), at para. 15.

²⁹ The public body’s initial submission at para. 73 and the *Community Charter*.

³⁰ Applicant’s initial submission at para. 25.

³¹ Applicant’s initial submission at para. 20.

³² Applicant’s initial submission at paras. 20-21 as well as Appendix B of his submissions. The last public meeting before the January 23rd, 2012 meeting was held on January 9th, 2012, according to the applicant’s submission.

³³ Public body’s reply submission at para. 11.

³⁴ Public body reply submission at para. 10.

and/or (2) of the Charter, and specifically matters listed under Section 90(1) (e), (f) and (i).³⁵

[29] I have considered the parties' positions and find that the City complied with the requirements of the *Community Charter* to hold an *in camera* meeting. The requirement in s. 92 of the *Community Charter* is to pass a resolution to go *in camera* at a public meeting before holding an *in camera* meeting, and this is what occurred. The applicant's argument is that because the whole meeting was *in camera*, the City never passed a resolution at a public meeting. In keeping with the default position in s. 89 of the *Community Charter* that council meetings are open to the public, I find that the Meeting was necessarily open to the public up until the point council passed a resolution closing it.

[30] In regards to the statutory basis under which the City is authorized to hold a meeting that is closed to the public, information already disclosed to the Applicant from the Minutes shows that the City relied on s. 90(1)(e) of the *Community Charter*. Section 90(1)(e) of the *Community Charter* is as follows:

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;

[31] I am satisfied from my review of the disputed information that the subject matter of the meeting falls under s. 90(1)(e).

[32] In summary, I find that part of the Meeting was held in the absence of the public and that the City had the statutory authority to meet in the absence of the public.

Substance of deliberations

[33] The City is withholding information from the Agenda, the Minutes, the Report and the Letters (which are attached to the Report) under s. 12(3)(b) of FIPPA on the basis that disclosing this information would reveal the substance of the deliberations of council.³⁶

[34] The purpose of s. 12(3)(b) is to promote full and frank discussions of controversial topics by protecting the contents of those discussions.³⁷ As stated

³⁵ Records in dispute at Appendix C of the public body's initial submission.

³⁶ Summary of initial submissions of the public body at para. 2 and at para. 102 of the public body's initial submission.

³⁷ See Order F13-08, 2013 BCIPC 9 (CanLII) at para. 22.

in Order 00-11;³⁸ “[w]ithout necessarily being exhaustive of the meaning of the word ‘deliberations’, I consider that term to cover discussions conducted with a view to making a decision or following a course of action.”³⁹ Section 12(3)(b) authorizes a public body to either refuse to disclose information that directly reveals the substance of deliberations of a local public body, or information that would permit the drawing of accurate inferences with respect to the substance of *in camera* deliberations.⁴⁰

Report and Letters

[35] The City is withholding all four pages of the Report, as well as the attached Letters. The City’s CAO deposes that the purpose of the Report was to give council the information necessary to make a decision about how to proceed with the Developer’s disengagement from the Project.⁴¹

[36] Previous OIPC orders have determined that in some cases, information presented to a council will qualify for protection under s. 12(3)(b), but only if disclosing it would reveal the substance of deliberations of council. For example, Order 326-1999 considered a consultant’s report prepared at the request of council in relation to the City of Cranbrook’s fire-fighting services. The evidence was that the City had reviewed the report during an *in camera* council meeting but had yet to take any action in relation to the report. There was no evidence that the report contained a specific recommendation that council considered at an *in camera* meeting. He determined that s. 12(3)(b) did not apply because it was not possible to tell from the report what the deliberations of council were.⁴²

[37] In Order 03-22, which the City also cites, it was determined that s. 12(3)(b) authorized the City of Vancouver to refuse to disclose two staff memorandums addressed to the City’s council.⁴³ The memorandums related to discussions between the City and the local transit authority about property taxation. In that case, two versions of the same memorandum (a draft and a final version) were in dispute. At least one version of the memorandums was considered at an *in camera* council meeting. Order 03-22 determined that s. 12(3)(b) applied to both versions because it was possible to infer from them the substance council’s deliberations.⁴⁴

[38] The City submits that unlike in Order 326-1999, the Report in this case is integral to Council’s deliberations, whereas the purpose of the firefighting report

³⁸ Order 00-11 was initially the subject of a judicial review application but it was discontinued on July 3, 2002.

³⁹ Order 00-11, 2000 CanLII 10554 (BC IPC), at p. 5.

⁴⁰ See Order 03-22 at para. 15 citing Order 326-1999 at p. 3.

⁴¹ Affidavit of the City’s Chief Administrative Officer at para. 41.

⁴² Order 326-1999, 1999 CanLII 4353 (BC IPC), at para. 15.

⁴³ Order 03-22, 2003 CanLII 49200 (BC IPC).

⁴⁴ Order 03-22 at paras. 9 and 16.

was only to “stimulate” discussion and to provide council with general information.⁴⁵ The City submits that the reasoning in Order 03-22 is more applicable to this case than the reasoning in Order 326-1999 or in other cases where s. 12(3)(b) was found not to apply, such as Order F12-11.⁴⁶ In that case, Adjudicator Barker determined that two reports to Council could not be withheld under s. 12(3)(b) because it would not be possible to tell what motions were debated or what views were expressed, if any, by council members.⁴⁷

[39] In this case, I must decide whether the contents of the Report and Letters would reveal, either directly or by inference, the substance of council’s deliberations. The Report contains a recommendation, and the evidence is that council considered the Report and made a decision based on the Report.⁴⁸ The City submits that the Report was “essential” to council’s deliberations.⁴⁹ While I cannot disclose the contents of the Report without revealing withheld information, I find that all of the information in the Report is entirely and directly related to the matter before council for decision, and that it contains specific details directly tied to the recommendation. I also find that the portions of the Letters he does not already have reveals the contents of the report.⁵⁰ For these reasons, I am satisfied that in this case, the City is entitled to withhold the Report and the Letters, because disclosing either would allow someone to accurately infer the substance of council’s deliberations.

Minutes

[40] The information severed from the Minutes under s. 12(3)(b) contains analysis provided by City staff members and comments by members of council. Other information severed includes details of a motion and how council members voted on it.⁵¹ The City submits that all of this information is a record of what council deliberated on at the Meeting.⁵² The City’s CAO was at the Meeting and deposes that the information severed from the Minutes accurately discloses the substance of council’s deliberations at that Meeting.⁵³ Based on this evidence and my own review of the severed information, I am satisfied that the City is

⁴⁵ Public body’s initial submission at para. 83.

⁴⁶ Public body’s initial submission at paras. 83 and 96.

⁴⁷ Order F12-11 at para 18. The Adjudicator did find that a small portion of one report was subject to s. 12(3)(b) because it was an exact quotation of the minutes of a previous *in camera* meeting to which she subsequently determined in that order that s. 12(3)(b) applied.

⁴⁸ Affidavit of the City’s Records and Information Administrator at paras. 11 and 15.

⁴⁹ Public body’s initial submission at paras. 83 and 96.

⁵⁰ As I have already noted (*supra*, at footnote 9), my references to the “Letters” in this order refer only to the parts the applicant does not already have.

⁵¹ Previous orders have found that s. 12(3)(b) applied to this type of information. See Order F12-11, 2012 BCIPC 15 (CanLII), at paras. 18 and 23 and Order 03-09 2003 CanLII 49173 (BC IPC) at para. 24.

⁵² Public body’s initial submission at para. 56.

⁵³ Affidavit of the City’s Chief Administrative Officer at paras. 42 and 53.

authorized to withhold all of the information it has severed from the Minutes under s. 12(3)(b).

Agenda

[41] The City is withholding an item from the Agenda under s. 12(3)(b). In *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*,⁵⁴ the British Columbia Supreme Court affirmed the adjudicator's decision in Order F08-17 that disclosing agenda items (in that case, of Cabinet Committee meetings) did not reveal the substance of deliberations of those meetings. In this case, I have determined that disclosing the item would only reveal the subject, but not the substance, of council's deliberations, therefore the City may not withhold this information under s. 12(3)(b).

Section 12(4) – information to which s. 12(3)(b) does not apply

[42] In this case, neither party presented any argument or evidence regarding the applicability of s. 12(4), and it is not apparent to me from the disputed information itself that either s. 12(4)(a) or s. 12(4)(b) applies. I therefore find that s. 12(4) does not require the City to disclose any of the information to which I have determined s. 12(3)(b) applies.

Advice or recommendations – s. 13

[43] The City is withholding the Report (including the Letters) and the Communications Brief in their entirety under s. 13 of FIPPA. As I have already determined the Report (including the Letters) may be withheld under s. 12(3)(b), I will only consider whether s. 13 authorizes the City to withhold the Communications Brief.

[44] Section 13(1) states that the head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister. Many orders have consistently held that the purpose of s. 13(1) is to protect a public body's internal decision-making process by allowing frank discussions of advice and recommendations.⁵⁵

[45] In addressing Ontario's equivalent to s. 13(1) in *John Doe v. Ontario (Finance)* [*John Doe*], the Supreme Court of Canada said:

...The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be

⁵⁴ *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 (CanLII).

⁵⁵ Order 01-15 2001 CanLII 21569 (BC IPC), at para. 22; Order F15-25 2015 BCIPC 27 (CanLII) at para. 16.

full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed.⁵⁶

[46] Previous orders have found that s. 13(1) applies when disclosure of the information would reveal advice or recommendations, including when it would allow accurate inferences about the advice or recommendations.⁵⁷ In addition, the courts have provided guidance regarding the meaning of the word “advice”. In *John Doe*, the Supreme Court of Canada said that “advice” includes policy options, whether or not the advice is communicated to anyone.⁵⁸ The BC Court of Appeal in *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)* said that “advice” for the purposes of s. 13 includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact, including expert opinions on matters of fact on which a public body must make a decision for future action.⁵⁹

[47] There are two stages for determining whether s. 13(1) applies. The first stage is to determine whether disclosure of the information would reveal advice or recommendations developed by or for the public body. If it does, it becomes necessary to consider whether the information to which s. 13(1) applies falls within any of the categories listed in s. 13(2). If s. 13(2) applies, the effect is that even if the information would reveal advice or recommendations developed by or for a public body, the public body must not withhold that information.

[48] The City is withholding the entire contents of the Communications Brief under s. 13 (as well as s. 14) of FIPPA. The City submits that its Communications and Economic Development Manager wrote the Communications Brief and that it contains strategic advice to Council.⁶⁰ The Communications and Economic Development Manager deposes that the Communications Brief was presented to council for its consideration and approval but that council never approved it and it was never finalized.⁶¹

[49] The applicant submits that s. 13(1) does not apply to any of the information in dispute.

⁵⁶ *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII), at para. 45.

⁵⁷ Order F15-25 2015 BCIPC 27 (CanLII) at para. 17; Order F14-44 2014 BCIPC 47 (CanLII) at para. 29, citing Order F10-15, 2010 BCIPC 24 (CanLII); Order 02-38; Order F06-16, 2006 CanLII 25576 (BCIPC).

⁵⁸ *John Doe v. Ontario (Finance)*, at para. 50.

⁵⁹ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII), at para. 111 - as cited in Order F13-24 2013 BCIPC 31 (CanLII) at para. 13; also Order F15-25 at para. 18.

⁶⁰ Public body’s initial submission at para. 60.

⁶¹ Affidavit of the City’s Communications and Economic Development Manager at paras. 7 and 9.

Analysis

[50] I find the Communications Brief comprises the advice of the City's Communications and Economic Development Manager about how to communicate publicly about a certain issue. Disclosing the Communications Brief would therefore directly reveal the advice developed by a City staff member for council.

Section 13(2)(a)

[51] The applicant submits that s. 13(2)(a) applies to the Communications Brief because it is factual information. The City submits that any factual information in the Communications Brief is integral to the advice it contains, therefore s. 13(2)(a) does not apply.⁶² In response to the City's argument on this point, the applicant submits:

The [City] argues in its submission that Section 13(1) should be protecting not only advice and recommendations but also all of the factual information because they are interwoven together.

I ask the adjudicator to carefully consider this argument as accepting it would make a precedent for other FIPPA applications where a lot of factual information becomes withheld even though FIPPA states factual information is exempt from redaction.⁶³

[52] In this case, the Communications Brief contains some information that, while it is not directly the advice, it is integral to that advice because it would be difficult to understand what the advice is without it and because in some instances, it would reveal, by inference, what the advice is.⁶⁴ For these reasons, I find that none of the information severed in the Communications Brief is "factual material" under s. 13(2)(a).

Section 13(2)(l)

[53] The applicant also submits that s. 13(2)(l) applies, which excludes a plan or proposal to establish a new program or activity or to change a program or activity, if the plan or proposal has been approved or rejected by the head of the public body, from the scope of s. 13(1). The terms "program" and "activity" are not defined in FIPPA. In Order 325-1999 it was determined that a "program" for the purposes of s. 13(2)(l) "is an operational or administrative program that involves the delivery of services under a specific statutory or other authority."⁶⁵

⁶² Public body's initial submission at paras. 104, 109 and 116.

⁶³ Applicant's reply submission at paras. 32 and 33.

⁶⁴ *Insurance Corporation of British Columbia v. Automotive Retailers Association*, at paras. 52 and 53.

⁶⁵ Order 325-1999 CanLII 4017 (BC IPC), at p. 4.

[54] The applicant submits that the Communications Brief is a proposed activity. He also submits that the City's decision not to proceed with the Developer in regards to the Project is a rejected activity.⁶⁶

[55] In this case, I am not satisfied that the Communications Brief is a "program" because it is not related to the delivery of services. I am also not satisfied that the Communications Brief is an "activity" because it does not propose any action to be taken. For these reasons, I find that s. 13(2)(l) does not apply to any of the information severed from the Communications Brief.

CONCLUSION

[56] I have determined that s. 12(3)(b) authorizes the City to withhold the information severed from the Minutes, the Report and the Letters, but that it does not apply to information severed from the Agenda. I have also determined that s. 13(1) authorizes the City to withhold the information severed from the Communications Brief.

[57] As I have determined that either ss. 12(3)(b) or 13(1) applies to all of the information the City withheld under ss. 14 and 17, it is not necessary to consider those latter two exceptions any further.

[58] Finally, I have also determined that the City is not authorized to withhold parts of responsive records on the basis that the information is non-responsive or out of the scope of the applicant's request. The City must process the applicant's request regarding that information and respond to him as required by Part 2 of FIPPA.

ORDER

[59] For the reasons given above, under s. 58 of FIPPA, I order that:

1. The City must give the applicant a decision under FIPPA about whether he is entitled to have access to the information in the records that the City has marked "non-responsive".
2. Subject to paragraph 4 below, the City may refuse to disclose to the applicant information withheld under ss. 12(3)(b) of FIPPA;
3. Subject to paragraph 4 below, the City may refuse to disclose to the applicant information under s. 13 of FIPPA.

⁶⁶ Applicant's initial submission at para. 38.

4. The City must disclose the information highlighted in yellow in the records which accompany the City's copy of this Order.
5. The City must disclose the information highlighted in yellow before November 19, 2015 pursuant to s. 59 of FIPPA. The City must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

October 6, 2015

ORIGINAL SIGNED BY

Caitlin Lemiski, Adjudicator

OIPC File No.: F13-52712