Office of the Information & Privacy Commissioner for British Columbia

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Order F17-17

CITY OF WHITE ROCK

Chelsea Lott
Adjudicator

April 12, 2017

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Summary: A resident of the City of White Rock requested access to records related to a statement made by its Chief Administrative Officer about the municipal water supply. The City provided records but it refused to disclose some information under ss. 12(3) (local public body confidences), 14 (solicitor client privilege), 17 (harm to financial or economic interests of a public body) and 21 (harm to third party business interests) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator found that the City was not authorized or required to refuse access to the information it had withheld under ss. 12(3), 17 or 21. The adjudicator further determined that s. 25 (public interest) did not apply to the information. The issue of whether certain information was properly withheld under s. 14 was moot because the applicant already had the information as the result of another applicant's FIPPA request.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(3)(b), 17(1), 17(1)(f), 21, 25; *Community Charter* ss. 90, 92.

Authorities Considered: B.C.: Order 02-38, 2002 CanLII 42472 (BC IPC); Order F17 01, 2017 BCIPC 1 (CanLII); Investigation Report F16-02, 2016 BCIPC No. 36; Order 00-11, 2000 CanLII 10554 (BC IPC); Order 00-14, 2000 CanLII 10836 (BC IPC); Order F16-03, 2016 BCIPC 3 (CanLII); Order F13-10, 2013 BCIPC 11 (CanLII); Order F17-03, 2017 BCIPC 3 (CanLII); Order F15-08, 2015 BCIPC 74 (CanLII); Order F16-39, 2016 BCIPC 43 (CanLII); Order F16-31, 2016 BCIPC 34 (CanLII); Order 03-02, 2003 CanLII 49166 (BC IPC).

Cases Considered: *Borowski v. Canada (Attorney General)*, 1989 CanLII 123, [1989] 1 SCR 342 (SCC); *Rizzo & Rizzo Shoes Ltd. (Re*), 1998 CanLII 837 (SCC); *Ontario (Community Safety and Correctional Services v. Ontario (Information and Privacy*

Commissioner), 2014 SCC 31 (CanLII); *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII); *Jill Schmidt v. British Columbia (Information and Privacy Commissioner), et al*, 2001 BCSC 101 (CanLII).

INTRODUCTION

[1] The applicant in this case made a request to the City of White Rock (the "City" or "White Rock") for records related to a statement by its Chief Administrative Officer about the financial viability of connecting to the water system of the Greater Vancouver Regional District. White Rock provided the applicant with records responsive to his request, but it refused to disclose some information in those records under ss. 12(3)(b) (local public body confidences), 13 (policy advice or recommendations), 16 (harm to intergovernmental relations or negotiations) and 17 (harm to public body's financial or economic interests) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA" or "the Act").

[2] The applicant requested the Office of the Information and Privacy Commissioner ("OIPC") review White Rock's decision. During mediation, White Rock disclosed additional information to the applicant. However, the applicant requested that the remaining issues proceed to inquiry. At the outset of the inquiry, White Rock reconsidered its decision to withhold information. As a result, White Rock disclosed further information, withdrew its reliance on ss. 13 and 16 and applied ss. 14 (legal advice) and 21 (harm to third party business interests) to withhold information. The applicant also raised s. 25 (public interest) as an issue. The Registrar permitted the late addition of the new issues to the inquiry.

ISSUES

[3] The issues to be decided in this inquiry are as follows:

1. Is White Rock required by s. 25 of FIPPA to disclose the requested information without delay?

2. Is White Rock authorized to refuse to disclose the information at issue under ss. 12(3)(b), 14 and 17 of FIPPA?

3. Is White Rock required to refuse to disclose the information at issue under s. 21?

[4] Pursuant to s. 57 of FIPPA, White Rock has the burden of proving that it is authorized under ss. 12(3)(b), 14 and 17 to refuse to disclose information and that s. 21 requires it to refuse to disclose information.

[5] Section 57 is silent on the burden of proof for s. 25. However, I adopt the following statement from Order 02-38:

> Where an applicant argues that s. 25(1) applies, it will be in the applicant's interest, as a practical matter, to provide whatever evidence the applicant can that s. 25(1) applies. While there is no statutory burden on the public body to establish that s. 25(1) does not apply, it is obliged to respond to the commissioner's inquiry into the issue and it also has a practical incentive to assist with the s. 25(1) determination to the extent it can.[1]

DISCUSSION

Background

[6] Water services for the City of White Rock have historically been owned and operated by a private company. That company, EPCOR White Rock Water Inc. ("EPCOR"), was subject to an order from the Fraser Health Authority due to water quality issues. As a result, EPCOR was planning to undertake a major project to treat the water supply and upgrade critical system infrastructure to meet the conditions of Fraser Health's order. This prompted the City of White Rock to undertake a review of its options for water supply.[2]

[7] White Rock considered options including acquiring and operating the water utility itself or connecting to Metro Vancouver's water supply.[3] In the end, White Rock elected to purchase the water utility. The acquisition was finalized in 2015, although the purchase price is to be determined through a future arbitration.

Information in Dispute

[8] The information in dispute is contained in four records:

- an agenda for an April 4, 2013 Metro Vancouver Utilities Committee meeting ("agenda");
- minutes of a February 28, 2013[4] Metro Vancouver Utilities Committee meeting ("meeting minutes");
- a three-page report to White Rock's mayor and council prepared by staff dated June 10, 2013 ("corporate report"); and

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[1] Order 02-38, 2002 CanLII 42472 (BC IPC).

[2] This background is taken from portions of record eight, the business case for acquiring the water utility, which has been disclosed to the applicant.

[3] This source of water is described interchangeably throughout the records and in the parties' submissions as Metro Vancouver, Greater Vancouver Regional District and the Greater Vancouver Water District. Although these may be different legal entities, nothing turns on the particular entity White Rock might have sourced water from. Accordingly, for ease of reference, I will refer to the water source only as Metro Vancouver.

[4] This meeting is described in White Rock's submissions as occurring on April 4, 2013, however, the record itself states it was a February 28, 2013 meeting. White Rock confirmed after the close of inquiry that the meeting in fact occurred on February 28, 2013.

- a report on the business case for acquisition of the water utility prepared by White Rock staff also dated June 10, 2013 and one of its appendices ("business case").

Preliminary Matter – Previously Disclosed Information

[9] As evidence for the inquiry, the applicant has provided three unsevered pages of the business case containing some of the information in dispute, to which White Rock has applied ss. 17(1) and 14. The applicant obtained the pages as the result of another individual's FIPPA access request to White Rock.[5] Because these pages were disclosed pursuant to an access to information request, there is no restriction on the applicant's use of them.[6] Accordingly, I consider the issue of whether White Rock was authorized to refuse to disclose the information contained in these three pages under ss. 14 and 17 to be moot. I can see no circumstances to justify considering that portion of the inquiry related to the three pages of the business case the applicant already has.[7]

[10] I am mindful that the disclosed pages contain the information to which White Rock has applied the exception of solicitor client privilege (s. 14).[8] In its initial submissions, White Rock stated its concern about waiving solicitor client privilege. However, in reply to the applicant's submissions, White Rock did not indicate that disclosure of these pages was in any way in error or improper. White Rock simply states that the applicant has "no need for" additional disclosure from the City because he already has these pages.[9] Accordingly, I understand White Rock's position to be that the pages were intentionally and properly disclosed to the public though another individual's FIPPA request.[10]

[11] As I consider the issues raised in the three pages of the business case to be moot, I will only decide whether information the applicant does not already have access to may be properly withheld under FIPPA. Therefore, s. 14 is no longer in issue.

Public Interest – s. 25

[12] Section 25 provides for the mandatory disclosure of information by a public body where disclosure is in the public interest. Section 25 overrides all of the Act's categories of exempted information and so I have considered it first.

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[5] Applicant submissions at Appendix D. They are pp. 16, 17 and 18 of the business case.
[6] Order F17-01, 2017 BCIPC 1 (CanLII) at para. 77. As opposed to, for example, if they were produced during litigation and were subject to an implied undertaking of confidentiality.
[7] The considerations for hearing a moot issue are outlined in *Borowski v. Canada (Attorney General)*, 1989 CanLII 123, [1989] 1 SCR 342 (SCC).
[8] Two sentences on p. 16 of the business case.
[9] White Rock reply submissions at para. 8.
[10] Disclosure of information through a FIPPA access request is in essence disclosure to the public: Order F17-01, *supra* at para. 77.

[13] The relevant portions of s. 25 read:

> 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.

[14] There is a high threshold in order for s. 25 to apply.[11]

Section 25(1)(a)

[15] Section 25(1)(a) applies to information about an imminent risk of significant harm to the environment or to human health or safety. The applicant criticizes White Rock's decision to purchase the water utility because its source water has "inordinately high levels of Arsenic and Manganese, levels which regularly exceed the Maximum Acceptable Concentration (MAC) for these metals laid out by Health Canada…"[12] He argues that information about the decision to purchase the water utility rather than connect to Metro Vancouver's water supply is subject to s. 25(1)(a). White Rock denies that there are any issues with its water quality or supply.

[16] There is no question that a safe water supply is fundamental to the health of the public and that information about risks to a water supply could come within s. 25(1)(a). In Investigation Report F16-02, relied on by the applicant, the former Commissioner held that information about the health risks posed by nitrate concentrations in the water supply for the Township of Spallumcheen was captured by s. 25(1)(a).[13]

[17] However, the withheld information in this case is different, as it is not about risks to White Rock's water supply. The applicant's request was for information about the financial viability of joining Metro Vancouver's water supply rather than about health risks or harm. I have reviewed the withheld information and can say that none of it addresses health risks or water quality testing. That type of information is publicly available, and the applicant has cited White Rock's website which contains published water quality test results from January 2015

[11] Investigation Report F16-02, 2016 BCIPC No. 36 at p. 22.
[12] Applicant submissions at para. 86.
[13] Despite her finding, the former Commissioner went on to conclude that s. 25(1)(a) did not require the Ministry of Environment to notify the public of the risk, as that requirement had already been met by water utility and health authority advisories.

to January 2017, including metal and microbial testing results.[14] The website also provides links to information and guidelines from Health Canada about water quality issues, including arsenic and manganese.[15]

[18] I find this case to be more analogous to Order 02-38, in which the applicant sought records related to the government's decision to delay implementation of a proposed regulation on smoking in the workplace. The applicant had argued that s. 25(1)(a) applied to information needed to understand the government's decision making about a health risk in addition to information about the risk itself. The former Commissioner held that s. 25(1)(a) was not as broad as suggested by the applicant:

> The information does not in any immediate sense disclose the existence of risks, describe their nature, describe the extent of anticipated harm, or allow the public to take or understand action necessary or possible to prevent or mitigate risks. In my view, the words "about a risk" in s. 25(1)(a) do not in this case include the government's consideration of the political and public policy tolerability of delaying curtailment of the risk involved here. I conclude that mandatory disclosure of the information withheld by the public bodies is not required under s. 25(1)(a).[16]

[19] Similarly, the withheld information in this case is not about any risk of harm to the environment or to the health or safety of people. Instead it is about other factors affecting municipal decision making. Accordingly, I find that s. 25(1)(a) does not require White Rock to disclose the information.

Section 25(1)(b)

[20] Under s. 25(1)(b), a public body must disclose information if, for any other reason, it is clearly in the public interest. As former Commissioner Denham said in Investigation Report F16-02:

> There must be an issue of objectively material, even significant, public importance, and in many cases it will have been the subject of public discussion. It is useful here to recall that, as I said in the Mount Polley Report, disclosure must be plainly and obviously required based on a disinterested, reasonable, assessment of the circumstances.[17]

[21] White Rock's water supply has certainly been the subject of public discussion. The applicant provided evidence in the form of coverage by a newspaper, *Peace Arch News*, which indicates that the subject has been

[14] <http://www.whiterockcity.ca/EN/main/city/my-water/water-quality.html>.
[15] <http://www.hc-sc.gc.ca/ewh-semt/alt_formats/pdf/pubs/water-eau/sum_guide-res_recom/sum_guide-res_recom_2014-10_eng.pdf> and <http://healthycanadians.gc.ca/publications/healthy-living-vie-saine/water-arsenic-eau/alt/water-arsenic-eau-eng.pdf>.
[16] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 62.
[17] Investigation Report F16-02, 2016 BCIPC 36 at p. 36.

a matter of contentious public debate in the community.[18] The municipality's decision to purchase the water utility as opposed to connecting to Metro Vancouver's water supply was part of that debate, as well as issues about water quality, treatment and firefighting capacity.

[22] Nevertheless, the disclosure of the information must be plainly and obviously in the public interest. The applicant argues that the public has a "right to know precisely and exactly all of the considerations that factored into the decision making and why the Public was purposefully and unfairly excluded from the process."[19] He argues that such knowledge would enable the public to contribute to make White Rock's water utility safe or take independent measures to ensure their personal health. He further states that disclosure would make White Rock accountable to the public for its actions. White Rock argues that the Metro Vancouver records are not sufficiently "relevant, important or even useful to be of public interest."[20]

[23] In my view, s. 25(1)(b) does not require White Rock to disclose all of the considerations which influenced its decision making. A similar proposition was rejected in Order 02-38, where the former Commissioner held that, "[s]ection 25(1)(b) does not compel disclosure of any and all policy and political advice or recommendations, and associated legal advice, in relation to a matter of significant public concern and debate…."[21] Rather, the information at issue must contribute in a substantive way to the body of information already available to facilitate effective means of expressing public opinion or making political decisions.[22]

[24] I can confidently state that the information withheld in the Metro Vancouver agenda and meeting minutes would not contribute at all to the public debate about the water supply. The agenda contains no substantive information about the issue of joining Metro Vancouver's water supply. The meeting minutes do not even touch on White Rock's water supply. These records are not subject to disclosure under s. 25(1)(b).

[25] I am also not persuaded that disclosure of the withheld information in White Rock's corporate report and business case is plainly and obviously in the public interest. The substantive information about White Rock's decision respecting the water utility is already in the public domain. The case for connecting to Metro Vancouver's water supply versus purchasing and operating the water utility is set out in the portions of the business case, which have been disclosed to the applicant. Further, White Rock has held two public forums on the

[18] Applicant submissions at Appendix I.
[19] Applicant submissions at para. 98.
[20] White Rock submissions at p. 7.
[21] Order 02-38, *supra* at para. 66.
[22] *Ibid.*

issue.[23] In addition, the applicant has produced unsevered portions of the business case which were disclosed to another access applicant. The portions disclosed state the estimated costs associated with purchasing the utility.[24] I fail to see how disclosure of the limited remaining withheld information would plainly and obviously be in the public interest and I conclude that s. 25(1)(b) does not require White Rock to release the information in dispute.

Local Public Body Confidences – s. 12(3)(b)

[26] White Rock is withholding portions of the agenda, meeting minutes, and the corporate report pursuant to s. 12(3)(b). The relevant portions of s. 12 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, …

[27] Previous orders have stated that three conditions must be met in order for s. 12(3)(b) to apply:

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
3. the information would, if disclosed, reveal the substance of deliberations of the meeting.[25]

For the purpose of the s. 12(3)(b) analysis, it is necessary to divide the responsive records into two groups; the first being the agenda and minutes and the second, the corporate report. I will deal with each in turn.

[23] Applicant submissions at Appendix I pp. 2 – 4 and 14 – 15.
[24] Applicant submissions at Appendix D.
[25] See for example: Order 00-11, 2000 CanLII 10554 (BC IPC) at p. 5, Order 00-14, 2000 CanLII 10836 (BC IPC) at p. 2, and Order F16-03, 2016 BCIPC 3 (CanLII) at para. 11.

Agenda and minutes

[28] The first set of records is comprised of the agenda and meeting minutes of the Metro Vancouver Utilities Committee.[26] White Rock argues that the agenda and minutes relate to a closed meeting which was lawfully held by the Committee pursuant to s. 90(1)(k) of the *Community Charter*. White Rock says the Committee "evidently found" its interests would be harmed if the records were made public. White Rock adds that, in any event, it is "inappropriate" for it to disclose the Committee agenda and minutes of another public body. Therefore, White Rock says it is properly authorized to withhold the Committee's records.

[29] It is not necessary for me assess the merits of White Rock's somewhat brief argument because, as I conclude below, s. 12(3)(b) can only be applied to information from a local public body's own closed meetings – not to another local public body's closed meetings

[30] For convenience, I will repeat s. 12(3)(b) here:

> 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,
>
> [italics added]

[31] Under the modern approach to statutory interpretation, the words of s. 12(3)(b) must be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the act, the object of the act and the intention of parliament.[27]

[32] The grammatical and ordinary sense of the wording in s. 12(3)(b) is unambiguous: "its" refers to the particular local public body which is withholding the record and not to any other public body. In other words, a public body can only apply s. 12(3)(b) to information that would reveal the substance of deliberations of a meeting of *its own* elected officials or governing body. In this case, the elected officials and the governing body to which the access to information request was made, was to White Rock's mayor and council. To interpret "its" in s. 12(3)(b) as including the elected officials and governing body of another public body - in this case the GVRD, would be illogical. The word "its" unambiguously refers to the local public body to which the access request has been directed, and for the records of that public body, not another.

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[26] According to the documents provided to me, the Metro Vancouver Utilities Committee is a Committee of the Greater Vancouver Regional District. The GVRD is a public body under FIPPA.
[27] *Rizzo & Rizzo Shoes Ltd. (Re*), 1998 CanLII 837 (SCC) at para. 21.

[33] If a public body has custody of records from another public body that are responsive to an access request and it believes are of a confidential nature, it could still apply other exceptions to disclosure under FIPPA. In particular, s. 16(1)(b) permits a public body to refuse to disclose information if it could "reasonably be expected to reveal information received in confidence" from a municipal council or board of a regional district. White Rock chose not to apply this provision here.

[34] Section 57(1) of FIPPA provides that a public body may, in a case such as this, only withhold records where it can establish that an exception to disclosure applies. There is no legal basis for withholding a responsive record, as White Rock has done here, based on a belief that doing so would be "inappropriate" because it was a record of another public body. If White Rock believed that another public body was in a better position to respond to the request it could have consulted with that other public body in preparing its case. Better yet, it could in the first place have transferred the request to that other public body, as s. 11 of FIPPA explicitly permits it to do.[28] This approach ensures that the local public body making the decision has the requisite knowledge of the records to properly exercise its discretion.

[35] Finally, even if it were open to White Rock to make a s. 12(3)(b) argument concerning the Committee's records, I would still find it has failed to satisfy the conditions necessary for the section to apply. I say this for similar reasons, set out below, that White Rock has failed to demonstrate that s. 12(3)(b) applies to its own corporate report. There is an insufficient evidentiary basis for me to find that the Committee had statutory authority to meet in the absence of public. With respect to the agenda, I am also not satisfied that the information would reveal the substance of deliberations of a meeting because I do not know whether this agenda was in fact adopted and discussed in a closed meeting.

[36] In summary, White Rock is withholding the agenda and minutes under s. 12(3)(b). These records relate exclusively to Metro Vancouver Utilities Committee meetings. The withheld information is clearly not about the deliberations of meetings of White Rock's elected officials, governing body or committees. White Rock's submission that it has discretion to withhold another public body's records is not supported by the grammatical and ordinary meaning of the words in s. 12(3)(b). This interpretation is in harmony with the purposes and scheme of FIPPA, and so I adopt it in this case. Therefore, I find that White Rock has not established that it may withhold the agenda or meeting minutes under s. 12(3)(b).

[28] Section 11(1)(b) permits the head of a public body to transfer a request and if necessary, the record to another public body if the record was produced by or for the other public body.

[37] The corporate report, however, does appear to relate to the deliberations of White Rock's council at a June 10, 2013 meeting, so I will now consider White Rock's decision to withhold information from the report under s. 12(3)(b).

Corporate report

OIPC's jurisdiction

[33] The first condition which must be satisfied for s. 12(3)(b) to apply is that there was statutory authority for White Rock to meet in the absence of the public. White Rock argues the OIPC lacks jurisdiction to decide the lawfulness of a public body's decision to close a meeting the public. The applicant disagrees, stating that the closed meeting must have been lawful in order to come within s. 12(3)(b). In Order 00-14, the former Commissioner described the OIPC's jurisdiction as follows:

> It is my function to determine whether a meeting met the requirements of s. 12(3)(b). Section 56(1) of the Act says the commissioner has the power to decide all questions of fact and law arising in the course of an inquiry. The s. 12(3)(b) issue just described is a question of law, or mixed fact and law, that I may decide under s. 56(1). It is not to be left to a local public body alone. This view is similar to that taken in Ontario Order M-802 (July 9, 1996). If any part of a disputed record deals with matters which do not qualify under s. 12(3)(b), then a public body cannot invoke that exception in respect of that information.[29]

[34] Accordingly, through the statutory authority of s. 56(1), it is within the OIPC's jurisdiction to determine, as a matter of mixed fact and law, whether a local public body's meeting was properly closed to the public in accordance with its governing legislation. Local public bodies should provide evidence to establish that the relevant statute actually authorized holding a closed meeting in respect of all matters dealt with in the disputed records.[30]

[35] I will now consider whether White Rock had authority to close the June 10, 2013 meeting to the public.

Community Charter

[36] Section 89 of the *Community Charter* provides that council meetings are open to the public except as provided for in that Act. Section 90(1) outlines the categories of subject matter which may be discussed in a closed meeting. White Rock relies on s. 90(1)(k) which provides:

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[29] Order 00-14, 2000 CanLII 10836 (BC IPC) at pp. 3 – 4.
[30] Order 00-14, *supra* at p. 4. See also Order F13-10, 2013 BCIPC 11 (CanLII) at paras. 7 – 10.

> 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:
>
> …
>
> (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;

[37] Section 92 of the *Community Charter* sets out what requirements a council must fulfill before it can hold a meeting in the absence of the public:

> 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,
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> (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.

[38] White Rock submits that s. 90(1)(k) of the *Community Charter* authorized it to close the meeting to the public; however it has not addressed whether it met the requirements of s. 92 to even hold a closed meeting. I do not have any meeting minutes before me, nor do I have evidence from the meeting participants about the conduct of the meeting, which could permit me to make a finding regarding s. 92. The withheld information in the records does not assist White Rock on this point either. In the circumstances, I find that White Rock did not have the statutory authority to close the meeting to the public.

[39] All three conditions of the s. 12(3)(b) test must be met before the exception to disclosure applies, so it is not strictly necessary for me to consider the remaining two conditions. Nevertheless, I would also find that White Rock has not established that it had actually held a meeting in the absence of the public. White Rock has provided no evidence that a meeting was actually held on June 10, 2013 or that, if one was, that it was closed to the public. As previously discussed, there are no meeting minutes in evidence or any affidavits from meeting participants. The corporate report itself does not refer to a council meeting. White Rock's bald assertion that a closed meeting occurred on June 10, 2013, does not satisfy me that a meeting was actually held on that date, and in the absence of the public.

[40] In summary, White Rock has not satisfied the first two conditions necessary for the application of s. 12(3)(b). Therefore, I find that s. 12(3)(b) does not apply to the corporate report.

Harm to Financial or Economic Interests – s. 17(1)

Business case

[41] The remaining information in dispute is contained in the business case. Most of it is being withheld under s. 17 and a small amount under s. 21.

[42] The relevant parts of s. 17 state:

> 17 (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
>
> …
>
> (f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[43] In order for a public body to rely on s. 17, it must establish that there is a reasonable expectation of probable harm.[31] A public body must prove that the risk of harm is considerably above a mere possibility, but it does not have to prove that the harm will in fact occur.[32] This inquiry is contextual and the amount and quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences."[33]

[44] White Rock is withholding the following information from the business case:

- the 2005 purchase price of the water utility;
- an estimated value of the water utility;
- borrowing limits;
- estimated legal and one time start-up costs;
- estimated debt servicing costs;
- estimated increase in water fees; and
- non-financial considerations.

[45] White Rock describes the information it has withheld under s. 17(1) as being about White Rock's projected valuation of the water utility and information it believes could be used to infer its estimate of the value of the utility. It argues

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[31] *Ontario (Community Safety and Correctional Services v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31 at para. 54.
[32] *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII) at para. 199.
[33] *Merck Frosst*, *supra* at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII) at para. 40.

that if this information is made public, it could harm the City's "negotiating position in its arbitration" and relies on s. 17(1)(f).[34]

[46] There is some dispute as to whether negotiations between White Rock and EPCOR have stalled, such that the next step is for the parties to go to arbitration.[35] The significance, according to the applicant, is that an arbitration is not captured by s. 17(1)(f), because it does not involve negotiation and thus could not harm a public body's "negotiating position."

[47] The state of the negotiations is not determinative in this case. Subsection 17(1)(f) is only an example of the type of information disclosure of which, may result in harm under s. 17(1).[36] Information that does not fit in s. 17(1)(a) to (f) may still fall under s. 17(1), where it could reasonably be expected to harm the financial or economic interests of a public body.

[48] White Rock's argument is that if it disclosed the information, it would be prevented from taking an alternative position about the utility's valuation. This would apply equally to a negotiation or an arbitration. In either instance, White Rock may tactically want to take a position on the value of the utility which is different from what appears in the business case. Disclosing White Rock's internal valuation could hamper White Rock's ability to do that.

[49] The difficulty that I have with the argument that disclosing this information would reveal White Rock's valuation of the utility, is that White Rock has already disclosed its valuation of the utility and its estimated legal and start-up costs to another access applicant. I discussed this disclosure previously as a preliminary matter.[37] If White Rock's valuation of the utility has already been released to the public, I fail to see how release of the same information, or information which could permit an accurate inference about White Rock's valuation, would cause the type of harm suggested by White Rock. Accordingly, I find that White Rock is not authorized to withhold the information in the business case under s. 17(1) of FIPPA.

Harm to Third-Party Business Interests – s. 21(1)

[50] In addition to s. 17(1), which I have found does not apply to any of the withheld information, White Rock is relying on s. 21 to refuse access to the amount EPCOR paid to acquire the water utility in 2005. Section 21 of FIPPA requires public bodies to refuse to disclose information when it could reasonably

[34] White Rock submissions at p. 5.
[35] White Rock submissions at p. 5, Applicant submissions at paras. 59 – 62, and White Rock reply submissions at para. 9.
[36] See Order F17-03, 2017 BCIPC 3 at para. 7 and Order F15-08, 2015 BCIPC 74 (CanLII) at para. 17.
[37] Paras. 9-11 of this Order.

be expected to harm the business interests of a third party. Section 21(1) sets out three elements that must be met for the section to apply, and it states in part:

> 21(1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
>
> …
>
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
>
> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> (iii) result in undue financial loss or gain to any person or organization, …

[51] I will address ss. 21(1)(a),(b) and (c) in turn.

[52] White Rock's submissions concerning the application of s. 21 to the purchase price are as follows:

> … EPCOR has provided this information to the City in confidence and has not consented to its release. Disclosure of this information could cause EPCOR to cease providing similar information to the City leading up to and following arbitration. Disclosure would also negatively affect the City and EPCOR's relationship, which could further weaken our ability to negotiate at or prior to arbitration.

[53] The applicant argues that the amount EPCOR paid for the water utility in 2005 is already publicly known. He also reiterates that White Rock has the burden of proof, and it has not met that burden.

Commercial or financial information – s. 21(1)(a)(ii)

[54] The withheld information evidences a substantial asset purchase by EPCOR in 2005. In my view, it is plainly commercial and/or financial information of or about EPCOR. The applicant does not dispute that the

information is financial or commercial information. I am satisfied that the purchase price comes within s. 21(1)(a)(ii).

Supplied in confidence – s. 21(1)(b)

[55] For s. 21(1)(b) to apply, the purchase price must have been supplied, either implicitly or explicitly, by EPCOR to White Rock in confidence. This is a two-part analysis. The first step is to determine whether the third party "supplied" the information to the public body. The second step is to determine whether the information was supplied "implicitly or explicitly in confidence."

Supplied

[56] The purchase price appears in the business case, a document authored solely by White Rock staff, which suggests it was not supplied. However, this is not sufficient to decide the matter, as it is the content rather than the form of the information that must be considered.[38]

[57] White Rock provides no evidence to substantiate its assertion that EPCOR supplied the information. However, it is logical to infer, based on the type of information it is, that EPCOR supplied it to White Rock.

[58] White Rock was not a party to the 2005 transaction and so would have no direct knowledge of the price, whereas EPCOR obviously had this knowledge. In addition, there is no evidence that the purchase price is a matter of public record. The applicant has submitted excerpts from a 2005 report by PricewaterhouseCoopers LLP, which he found on the internet, to show that the purchase price is publicly known.[39] He also submitted other hearsay evidence about the 2005 purchase price. All I will say is that the evidence presented by the applicant does not accurately state the purchase price and it does not establish that the price was publicly known. I am satisfied that EPCOR supplied the information to White Rock for the purpose of s. 21(1)(b).

In confidence

[59] The test for whether information was supplied, "explicitly or implicitly, in confidence" is objective, and the question is one of fact; evidence of the third party's subjective intentions with respect to confidentiality is not sufficient.[40]

[60] White Rock's unsupported assertion about confidentiality is not persuasive. The evidence that White Rock's CAO discussed the alleged

[38] *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII) at paras. 157 – 158.
[39] Applicant submissions at Appendix E.
[40] Order F16-39, 2016 BCIPC 43 (CanLII) at para. 27 and Order F16-31, 2016 BCIPC 34 (CanLII) at para. 29.

purchase price at a public meeting also casts doubt about its confidentiality.[41] White Rock has not discharged its burden with respect to whether the information was supplied in confidence and has been consistently treated as such.

Reasonable expectation of harm – s. 21(1)(c)

[61] Having found that s. 21(1)(b) does not apply to the purchase price, it is not necessary for me to consider whether disclosing the information could reasonably be expected to result in harm under s. 21(1)(c). However, for completeness, I will briefly address White Rock's argument regarding harm.

[62] As with s. 17, the standard of proof for s. 21(1)(c) is whether disclosure of the information could reasonably be expected to result in the specified harm. While the City need not show on a balance of probabilities that the harm will occur if the information if disclosed, it must nonetheless do more than show such harm is merely possible.[42]

[63] White Rock asserts that disclosure will result in EPCOR ceasing to provide similar information, and that it could affect the parties' relationship and consequently their negotiations. Other than its assertions, White Rock provides no evidence about how disclosure will result in the harms set out in s. 21(1)(c). They provide no evidence or explanation about the type of "similar information" it expects to receive from EPCOR in the future. With respect to the negotiations, I cannot see how disclosure of the 2005 purchase price would harm the good faith between the parties to the extent that it would affect a multimillion dollar negotiation. I am also skeptical of White Rock's assertions because, as mentioned previously, the CAO was willing to discuss the alleged price at an open town meeting.

[64] A public body's failure to provide evidence to establish the application of s. 21(1) can be fatal to its case.[43] In Order 03-02, a case involving the application of s. 21(1) to draft marketing agreements, former Commissioner Loukidelis found that no party had provided any evidentiary basis to support the application of s. 21(1) and, consequently, it did not apply. Those are the circumstances in this inquiry. White Rock has not satisfied me that disclosure of the 2005 purchase price could reasonably be expected to result in harm under s. 21(1)(c).

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[41] Contained in the applicant submissions at Appendix E, pp. 5 – 11.
[42] *Merck Frosst Canada v. Canada (Health)*, 2012 SCC 3 (CanLII) at para. 196.
[43] See *Jill Schmidt v. British Columbia (Information and Privacy Commissioner)*, *et al.*, 2001 BCSC 101 (CanLII) at paras. 37 – 38 and Order 03-02, 2003 CanLII 49166 (BC IPC) at paras. 119 – 120.

Summary and conclusion - s. 21

[65] I find that disclosing the information withheld under s. 21(1) (*i.e.*, the purchase price in the business case) would reveal commercial and/or financial information of or about EPCOR, so s. 21(1)(a)(ii) applies. White Rock has also satisfied me that the purchase price was supplied by EPCOR. However, it has not established that the information was supplied confidentially under s. 21(1)(b). It similarly has not established that disclosing the purchase price could reasonably be expected to result in harm under s. 21(1)(c). Therefore, I find that White Rock has failed to discharge its onus to establish that the criteria in section 21(1) have been met.

CONCLUSION

For the reasons above, under s. 58 of FIPPA, I require White Rock to give the applicant access to all of the information it has withheld in the records by May 29, 2017. White Rock must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

April 12, 2017

ORIGINAL SIGNED BY

Chelsea Lott, Adjudicator

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