Office of the Information & Privacy Commissioner for British Columbia

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Order F18-31

TOWNSHIP OF ESQUIMALT

Elizabeth Barker
Senior Adjudicator

August 2, 2018

CanLII Cite: 2018 BCIPC 34
Quicklaw Cite: [2018] B.C.I.P.C.D. No. 34

Summary: An applicant requested access to documents relating to his neighbour's property and to the boulevard out front. The Township of Esquimalt disclosed some records but refused to disclose others under ss. 12(3)(b) (local public body confidences), 14 (solicitor client privilege), 15 (disclosure harmful to law enforcement), 16 (disclosure harmful to intergovernmental relations or negotiations) and 22 (disclosure harmful to personal privacy) of FIPPA. Esquimalt also said that some of the records were not in its custody or under its control. The adjudicator determined that the particular records at issue were in Esquimalt's custody under s. 3(1). The adjudicator ultimately found that ss. 14, 15(1)(d), 16(1)(b) and 22(1) applied to some of the information, but ss. 12(3)(b), 15(1)(a), 15(1)(c) and 16(1)(a) did not apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1), 4(1), 4(2), 12(3)(b), 14, 15(1)(a), 15(1)(c), 15(1)(d), 16(1)(a), 16(1)(b), 22(1), 22(2)(a), 22(2)(f), 22(3)(a), 22(3)(b) and 22(4)(e).

INTRODUCTION

[1] This inquiry arises from years of disputes between neighbours about whether improvements to their properties and the shared boulevard were authorized by bylaw. The applicant submitted two requests to the Township of Esquimalt (Esquimalt) for access to records under the *Freedom of Information and Protection of Privacy Act* (FIPPA). Specifically, he asked for all documents relating to his neighbour's property and all documents relating to the boulevard in front of his and his neighbour's properties for a ten year period.

[2] Esquimalt allowed the applicant to view some of the records in person and make photocopies. However, it refused to disclose any part of other records under ss. 12(3)(b) (local public body confidences), 14 (solicitor client privilege), 15(1)(a), (c) and (d) (disclosure harmful to law enforcement), 16(1) (disclosure harmful to intergovernmental relations or negotiations) and 22 (disclosure harmful to personal privacy) of FIPPA. The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review Esquimalt's decision. Mediation did not resolve the matters in dispute and the applicant requested that they proceed to inquiry. A fact report and notice of inquiry were issued and the parties provided written submissions.

Preliminary matters

[3] Esquimalt raises two matters in its initial inquiry submission that were not listed in the notice of inquiry or the investigator's fact report. First, Esquimalt says that the some of the records it is refusing to disclose are not in its custody or under its control. Esquimalt does not explain why it waited until its initial inquiry submission to raise this issue. Prior OIPC orders have consistently explained that parties may not add new issues into an inquiry without the OIPC's prior consent.[1] In this case, however, I decided to consider Esquimalt's claim that some of the records are not in its custody or under its control because it goes to jurisdiction and whether FIPPA even applies to those records. I also took into account whether the applicant would be prejudiced if I did not invite him to make a submission on this new issue. Ultimately, I decided I did not need to hear from him because my finding below on this point is in his favour, namely that Esquimalt does have custody of the records and FIPPA applies to them.

[4] Second, Esquimalt says some of the information it is refusing to disclose under s. 16 is "not responsive to the applicant's request since it is not relevant to the issues at hand."[2] The applicant's access request was for all documents relating to his neighbour's property and all documents relating to the boulevard in front of his and his neighbour's properties for a ten year period. I have reviewed the records in dispute and all of them relate to these matters. Therefore, contrary to what Esquimalt says, these records are clearly responsive to the applicant's access request. For that reason, I will consider them in the s. 16 analysis below.

ISSUES

[5] The issues to be decided are as follows:

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[1] Order F10-23, 2010 BCIPC 34 (CanLII) at para. 4; Decision F08-02, 2008 CanLII 1647 (BC IPC), para. 30; Decision F07-03, 2007 CanLII 30393 (BC IPC); Order F15-20, 2015 BCIPC 22, at para. 12.

[2] Esquimalt's initial submission at p. 3. It says the information is on pages 190-191.

1. Are the records in the custody or under the control of Esquimalt within the meaning of s. 3(1) of FIPPA?

2. Is Esquimalt authorized to refuse access to the disputed information under ss. 12(3)(b),14, 15(1)(a), 15(1)(c), 15(1)(d), 16(1)(a) and 16(1)(b) of FIPPA?

3. Is Esquimalt required to refuse to disclose the disputed information under s. 22(1) of FIPPA?

[6] Section 57 governs the burden of proof, and it says that the public body has the burden of proving that ss. 12(3)(b),14, 15(1) and 16(1) apply. However, the applicant has the burden of proving that disclosure of third party personal information in the records would not be an unreasonable invasion of third party personal privacy under s. 22(1). Section 57 of FIPPA is silent regarding the burden of proof in cases involving s. 3(1). Previous decisions have established that the public body bears the burden of establishing that the records are excluded from the scope of FIPPA.[3]

DISCUSSION

Background

[7] Starting in approximately 2007, the applicant complained to Esquimalt about what he perceives to be his neighbour's bylaw infractions, such as tree cutting, excavating and building without the required permits. In particular, he is concerned about land slippage and damage to the Gorge waterline, which he says was caused by his neighbour's activities, and he wants to ensure that remediation and shoreline damage control work are done properly.

The records

[8] Esquimalt is withholding approximately 560 pages of records in their entirety. The records are largely emails but there are also some reports and other types of documents related to property development and bylaw matters.

[9] I found reviewing the records in dispute particularly challenging in this inquiry. In many instances Esquimalt only numbered every second page, and there are also multiple copies of numerous pages. Esquimalt also did not mark on the records the exceptions it applied; rather, in its initial inquiry submission, it identifies which exception it has generally applied to each page. The way Esquimalt processed the records adds an unnecessary layer of confusion. Public bodies should process records by clearly numbering each page and marking on

[3] For example: Order 02-29, [2002] B.C.I.P.C.D. No. 29; Order 03-14, [2003] B.C.I.P.C.D. No. 14; Order 01-43, [2001] B.C.I.P.C.D. No. 45; Order No. 115-1996, [1996] B.C.I.P.C.D. No. 42.

the face of the record what information is in dispute. In addition, the FIPPA exceptions being relied on to withhold information must be clearly marked immediately next to the disputed information or adjacent to it in the margins.[4]

[10] Further, it seems to me that Esquimalt did not conduct a line by line review and severing of the records where it has withheld entire pages.[5] Section 4(2) imposes a duty on a public body to sever records. It says:

> 4(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

[11] Public bodies must sever records on a line by line basis, and it is not acceptable to withhold an entire record without identifying which exception applies to particular information in the record. Former Commissioner Loukidelis said the following about a public body's obligation under s. 4(2):

> This section requires public bodies to review each record in detail – essentially line by line - and to decide which parts "can reasonably be severed" and withheld. This allows the remainder of the record to be disclosed as required by s. 4(2). This is obviously not a counsel of perfection. Section 4(2) requires severance to be carried out only where it can "reasonably" be done. But in the vast majority of cases where a record contains both protected and unprotected information, it will be possible to sever it, in accordance with s. 4(2), and release the unprotected portions of that record. I recognize that the time and energy required to carry out a careful analysis of a record may be considerable in some cases. This exercise is, however, mandated by s. 4(2) of the Act.[6]

[12] Despite the challenges caused by the manner in which Esquimalt processed the records, I did not send them back to Esquimalt to rectify these issues. I have considered the records as presented here by Esquimalt in order to avoid further delay to the prejudice of the applicant.

Custody and control

[13] FIPPA provides a general right of access to records which are in the custody or under the control of a public body. Section 3(1) defines the scope of FIPPA, and it says in part:

> 3(1) This Act applies to all records in the custody or under the control of a public body …

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[4] *Instructions for Written Inquiries* https://www.oipc.bc.ca/guidance-documents/1744.
[5] For example, Esquimalt applies s. 22 to entire pages although it is obvious that only some of the information on the page is personal information.
[6] Order 324-1999, 1999 CanLII 4054 (BC IPC) at p. 7.

[14] Section 4(1) provides a right to access to records in the custody or under the control of a public body:

> 4(1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body…

[15] Esquimalt submits that some of the records are not under its custody or control. Based on what it says and the layout of its submission, I understand it to mean that it does not have custody or control of the following records:

(a) an email from the Gorge Waterway Initiative's steering committee to Esquimalt staff forwarding the meeting minutes and an agenda for the next meeting;[7]

(b) a Fisheries and Oceans Canada draft document and emails between Esquimalt staff and Fisheries and Oceans Canada staff about the document;[8]

(c) Emails between Esquimalt staff discussing a WorkSafe BC matter.[9]

[16] Esquimalt's submissions regarding custody or control are as follows:

> The records noted above are not under the custody or control of the Township and/or were not prepared by the Township. These are records prepared by or which originated with third parties specifically concerned with the Gorge Waterway. The Federal Department of Fisheries and Oceans Canada has the primary responsibility relating to the slope failure and specifically any issues of remediation, stabilization or the slopes and cleanup of the Waterway as it relates to the Applicant's neighbour's property. These records are therefore not responsive records of the Township.
>
> In my letter to the Applicant dated September 16, 2016, I advised the Applicant that he should direct his inquiry to them and make a request for access to these records directly to the third parties involved in this issue.[10]
> …
>
> Which public body has authority over the Gorge Waterway and its foreshore is set out in Provincial and Federal Legislation over which the Township has no control. The Township is not privy to the records of these other public bodies and is not involved in their decisions relating to enforcement, remediation or other actions dealing with the landslide that occurred at [address]. Relating to actions taken or not taken by other

[7] Records: pp. 182-185.
[8] Records: pp. 186-189, 193-201 (back) and 202-203.
[9] Records: pp. 190 (back) and 191.
[10] Esquimalt's initial submission at p. 3.

> Provincial or Federal regulating authorities, we advised the Applicant to request those records directly from those third parties. Any documents provided to the Township by these public bodies are not the Township's records since they were not prepared by or authorized by the Township and are not in the custody and control of the Township. A copy of these exempted records has been provided to OIPC.[11]
>
> …
>
> The [Gorge Waterway Initiative] is not a body that is appointed by the Township of Esquimalt, nor does it report to or act under the authority of the Township. Therefore any records of this body, regardless of its composition and legal structure, are not under the custody or control of the Township.[12]

[17] The applicant does not make a submission regarding this issue.

Analysis

[18] Either custody *or* control over a particular record will suffice to bring it within the scope of s. 3(1). For the reasons that follow, it was only necessary to consider "custody" in this case.

[19] FIPPA does not define the term "custody." However, previous OIPC orders have said that some indicators of "custody" include whether the public body has possession of the records, whether the records are integrated with other records the public body holds, and whether the public body has any rights or responsibilities for the records, including respecting their use, safekeeping, disclosure and destruction. Past OIPC orders have said that physical possession of records is not enough to establish custody and that a public body will only have custody if it has "some right to deal with the records and some responsibility for their care and protection."[13]

[20] Based on my review of the records, it is evident that Esquimalt has physical possession of all of the records it claims are not in its custody. It does not dispute that this is the case. It has produced copies of them in response to the access request.

[21] All of the records Esquimalt says it does not have in its custody are clearly work emails to, from or between Esquimalt staff. The emails from the Gorge Waterway Initiative and Fisheries and Oceans Canada also include attachments. I can see from the cover email accompanying the Gorge Waterway Initiative attachment (i.e., steering committee minutes and agenda) that the Esquimalt employees receiving the attachment are members of the steering committee.

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[11] Esquimalt's reply submission at p. 2.
[12] Esquimalt's reply submission at p. 3.
[13] See, for example, Order 02-30, 2002 CanLII 42463 (BC IPC); Order No. 308-1999, 1999 CanLII 2976 (BC IPC), and Order F15-65, 2015 BCIPC 71 (CanLII).

As for the Fisheries and Oceans attachment (i.e., a draft document), it is evident from the content of the emails that the attachment was sent to Esquimalt staff for their input and approval because it pertains to their work. Finally, the Esquimalt staff emails about WorkSafe BC are discussions amongst exclusively Esquimalt staff about their own work responsibilities and jurisdiction. In conclusion, the content and context of these emails and their attachments satisfy me that these records were used by Esquimalt staff in fulfilling their work responsibilities for Esquimalt.

[22] Absent information to suggest otherwise, I think it is safe to assume that a public body has the right to decide access, use, disclosure and destruction of its staff's work emails on its servers. Esquimalt did not provide information that these specific emails and their related attachments do not reside on its servers along with other staff work emails, or that Esquimalt treats certain types of emails differently in terms of their care and protection.

[23] In conclusion, I am satisfied that the records Esquimalt produced for the purposes of responding to the access request and this inquiry are in Esquimalt's custody for the purposes of s. 3(1). Therefore, the records are within the scope of FIPPA and FIPPA applies to them.

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

[24] Esquimalt says s. 12(3)(b) applies to five pages of a staff report, and the applicant disputes that it applies. Section 12(3)(b) says:

> 12(3) The head of a local public body may refuse to disclose to an applicant information that would reveal
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> …
>
> (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.

[25] In order to be authorized to refuse access under s. 12(3)(b), previous orders[14] consistently say that a local public body must prove all three of the following:

1. it had the statutory authority to meet in the absence of the public;

2. a meeting was actually held in the absence of the public; and

[14] Order 00-11, 2000 CanLII 10554 (BC IPC); Order F13-10, 2013 BCIPC 11; Order F14-07, 2014 BCIPC 8 (CanLII); Order F16-03, 2016 BCIPC 3.

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

[26] Esquimalt's brief submission regarding s. 12(3)(b) is as follows:

> Pages 25-27 is a Staff Report presented to Council at an *In Camera* meeting relating to non-compliance with the Township's bylaws and requesting direction from Council on enforcement. It is the Township's practice and Policy (see attached Council Policy ADMIN-68 re Bylaw Enforcement) to keep all matters relating to Bylaw Enforcement confidential and to not disclose the identity of complainants.[15]

[27] The first element that must be met in order to properly apply s. 12(3)(b), is that the public body has the statutory authority to meet in the absence of the public. Esquimalt does not explain what statute authorized it to exclude the public from the meeting that relates to the staff report. I have reviewed the bylaw that Esquimalt provides, but it says nothing about Esquimalt's statutory authority to meet in the absence of the public.

[28] As for the second element, there is no evidence, such as an affidavit from a meeting attendee, meeting minutes or an agenda, to show that the public was excluded from the meeting as authorized by statute. The only information that sheds light on this is Esquimalt's brief submission and the report itself. However, I accept Esquimalt's submission that there was a council meeting held in the absence of the public, so I find that the second element of the test is met.

[29] The third element requires that the information would reveal the substance of deliberations of the meeting. The evidence about the third element is not persuasive. The designated spot in the report for the signature of the report's author and the Chief Administrative Officer are blank, which indicates that the record may not have been the version approved to go before council for deliberation. Further, there is information in the records that indicates that this version is a draft.[16] Presumably council is only given final or complete reports, which casts doubt on whether the report before me was ever before council and would reveal the substance of council's deliberations at the meeting in question. Esquimalt's evidence and submissions do not fill in the missing pieces. Therefore, I am not persuaded that disclosing the report would reveal the substance of council's deliberations at the meeting in question.

[30] In conclusion, I find that Esquimalt has not proven that s. 12(3)(b) applies to the staff report, so it is not authorized to refuse to disclose it on that basis.[17]

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[15] Esquimalt's initial submission at p. 2.
[16] I cannot be more precise without disclosing the information in dispute.
[17] The staff report is on pp. 25-27 of the records.

Solicitor client privilege, s. 14

[31] Section 14 of FIPPA states that the head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege. The law is well established that s.14 of FIPPA encompasses both legal advice privilege and litigation privilege.[18] Although it does not say directly, I understand Esquimalt to be claiming that legal advice privilege applies. Esquimalt does not suggest that the records relate to any ongoing litigation.

[32] When deciding if legal advice privilege applies, OIPC orders have consistently applied the following criteria:

1. there must be a communication, whether oral or written;

2. the communication must be of a confidential character;

3. the communication must be between a client (or his agent) and a legal advisor; and

4. the communication must be directly related to the seeking, formulating, or giving of legal advice.

[33] Not every communication between client and solicitor is protected by solicitor client privilege. However, if the four conditions set out above are satisfied, then legal advice privilege applies to the communications and the records relating to it.[19]

[34] Esquimalt's full submission regarding s. 14 is as follows:

> Pages 1-24 and pages 28-181 is [sic] email correspondence to and from the Township's solicitors, for the purpose of receiving legal advice and is specifically provided to the Township by our solicitors on a "privileged and confidential" basis. The legal advice privilege protects confidential communications between solicitor and client for the purpose of obtaining, giving or formulating legal advice.[20]

[35] The applicant disputes that s. 14 applies.

[36] I have reviewed the records and they are emails and attachments, and I find that the majority of them meet the criteria for solicitor client privilege. I am satisfied that they are confidential communications between Esquimalt staff and

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[18] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 at para. 26.
[19] *R. v. B.,* 1995 CanLII 2007 (BCSC) at para. 22. See also *Canada v. Solosky*, 1979 CanLII 9 (SCC) at p. 13.
[20] Esquimalt's initial submission on p. 2.

Esquimalt's lawyers. There is no indication that anyone else is involved in the communications. Further, these emails are unmistakeably about legal advice being sought and provided, and where there is an attachment, its context and content establish that it is an integral part of the privileged communication.

[37] However, there are several pages where the communication is not between a solicitor and client and it does not discuss legal advice or reveal anything about communications between Esquimalt and its lawyers. For instance: an email with attached images that a bylaw officer sent to himself (pages 7-12), an email and attached draft report a staff member sent to other staff (pages 94-97), and an email from one staff member to two other staff members about a council meeting (page 136). Esquimalt has not said anything in particular about these pages to explain how they meet the criteria for solicitor client privilege, and I find that it has not established that s. 14 applies to them.[21]

Disclosure harmful to law enforcement, s. 15(1)

[38] Esquimalt is refusing to disclose records under s. 15(1)(a), (c) and (d). Those provisions say:

> 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm a law enforcement matter,
>
> ...
>
> (c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,
>
> (d) reveal the identity of a confidential source of law enforcement information,
>
> …

[39] Schedule 1 of FIPPA defines the term "law enforcement" as follows:

> "law enforcement" means
>
> (a) policing, including criminal intelligence operations,
>
> (b) investigations that lead or could lead to a penalty or sanction being imposed, or
>
> (c) proceedings that lead or could lead to a penalty or sanction being imposed;

[40] The Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* said

[21] These pages also contain a small amount of personal information, which I consider below under s. 22.

the following about the standard of proof for exceptions, like s. 15(1), that use the language "reasonably be expected to harm":

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground… This inquiry of course is contextual and how much evidence and the 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": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.[22]

Parties' positions

[41] Esquimalt's says that the s. 15 information relates to its bylaw enforcement activities regarding the applicant's neighbour's property and that the bylaw enforcement matter is still active. Esquimalt also says that its practice and policy is to keep all matters related to bylaw enforcement confidential and to not disclose the identity of complainants. In support, it provides a copy of its policy called *Council Policy ADMIN-68 re Bylaw Enforcement*.

[42] Although the applicant does not specifically address s. 15 in his submission, based on what he does say, I understand that he disputes Esquimalt's application of that exception to refuse him access to the records.

Does the information relate to a law enforcement matter?

[43] The definition of "law enforcement" includes investigations that lead or could lead to a penalty or sanction being imposed. Previous OIPC orders have said that in order for a public body's investigation to meet the definition of law enforcement in FIPPA, the public body must have a specific statutory authority or mandate to conduct the investigation and to impose sanctions or penalties.[23] OIPC orders have also determined that an investigation into compliance with municipal bylaws is a "law enforcement" matter for the purposes of s. 15(1).[24]

[44] I have reviewed the records being withheld under s. 15(1) and they are about bylaw investigations regarding the applicant's neighbour's property. I find

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[22] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31 at para. 54.
[23] Order 36-1995, [1995] B.C.I.P.C.D. No. 8, at p. 14; Order 00-52, 2000 CanLII 14417 (BCIPC); Order F15-26, 2015 BCIPC 23 (CanLII).
[24] For example: Order F11-03, 2011 BCIPC 3 (CanLII) at para. 30; Order 00-01, 2000 CanLII 9670 (BC IPC) at para. 4.

that these records relate to a law enforcement matter as that term is defined in FIPPA.

Section 15(1)(a) and (c)

[45] In order to rely on s. 15(1)(a), a public body must establish that there is a reasonable expectation of harm to a law enforcement matter. Esquimalt does not say how it thinks disclosure of the information could harm a law enforcement matter. The information in the records pertains to past events. Although Esquimalt says that there is an active bylaw enforcement file dealing with the neighbour's property,[25] it does not explain if that is the law enforcement matter it is concerned will be harmed and, if so, how.

[46] Regarding s. 15(1)(c), Esquimalt must establish that there is a reasonable expectation of harm to investigative techniques and procedures currently used, or likely to be used, in law enforcement. Esquimalt does not say what investigative techniques and procedures could be harmed if the information in dispute is disclosed.

[47] I find that Esquimalt's submissions regarding harm under ss. 15(1)(a) and (c) are assertions unsupported by any persuasive evidence or explanation, and it has failed to demonstrate a connection between disclosure of the information in dispute and the harms it claims. In conclusion, Esquimalt may not refuse the applicant access to the information under ss. 15(1)(a) and (c).

Section 15(1)(d)

[48] Esquimalt did not specify which record or parts of the records reveal the identity of a confidential source of law enforcement information. However, I can see that some of the records contain the names, email addresses and other identifying information of individuals who complained to Esquimalt's bylaw enforcement staff. It is apparent from the records that what they said led to investigations into whether the bylaws had been broken. Therefore, I conclude that these complainants were a "source" of law enforcement information.

[49] I am also satisfied, for the reasons that follow, that each of these individuals was a "confidential" source. There are no express statements of confidentiality accompanying what these complainants and Esquimalt say to each other. However, as I see it, Esquimalt's *Council Policy ADMIN-68 re Bylaw Enforcement* sets an expectation for the public that Esquimalt will consider a complainant's identity to be confidential and it will not be disclosed without the complainant's consent, except as required by law, and in accordance with the

[25] Esquimalt's reply submission at p. 2.

provisions of the policy.[26] I am satisfied that one aim of the policy is to assure the public that bylaw complainant information will be kept confidential except in distinct circumstances. There is no evidence that the policy's exceptions to confidentiality apply in this case to the complainants whose identities are contained in the records. In my view, this policy is evidence of a reasonable expectation, and an implied understanding by the complainants and Esquimalt, that the identities of these complainants were confidential. In conclusion, I find that s. 15(1)(d) applies to the information in dispute that reveals the identity of these "confidential" sources of law enforcement information.

[50] However, it is evident from the records that not all of these sources of law enforcement information are confidential because the applicant's inquiry submission includes some of the disputed records and information. For instance he clearly already has a copy of the complaint letter at pages 269-271, which begins by saying that it was sent to support him in his dealings with Esquimalt and his neighbour.[27] I find that the person who wrote pages 269-271 is not a "confidential" source of law enforcement information. Further, as the applicant already knows this third party's personal information and she voluntarily shared it with the applicant, disclosure to him would not be an unreasonable invasion of her personal privacy, so s. 22(1) also does not apply.

[51] I find that the only information that Esquimalt is authorized to refuse access to under s. 15(1)(d) is on pages 221, 225, 226, 240, 241, 242 (back), 243, 257 (back) and 259. Esquimalt withheld these pages in their entirety, but s. 15(1)(d) only applies to portions of these pages. In a copy of the records I am sending to Esquimalt, I have highlighted the information that Esquimalt may withhold under s. 15(1)(d). Once that severing occurs, the pages will no longer identify the confidential sources of law enforcement information.[28]

Disclosure harmful to intergovernmental relations or negotiations, s. 16(1)

[52] Section 16(1) of FIPPA authorizes public bodies to refuse access to information if disclosure would be harmful to intergovernmental relations or negotiations. Section 16(1) states in part:

> 16(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

[26] The policy says that there are circumstances where Esquimalt will not guarantee the anonymity and confidentiality of complainants and may disclose personal information in bylaw enforcement files, specifically if the complainant has publicly disclosed their complaint, the investigation resulted in enforcement proceedings or disclosure is required under FIPPA or other laws.
[27] Applicant's submission pp. 803-804.
[28] These pages also contain the neighbour's personal information, which I consider below under s. 22.

> (a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:
>
> (i) the government of Canada or a province of Canada;
>
> (ii) the council of a municipality or the board of a regional district;
>
> (iii) an aboriginal government;
>
> (iv) the government of a foreign state;
>
> (v) an international organization of states,
>
> (b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies,…

[53] The records that Esquimalt is withholding under s. 16 are as follows:

(a) an email from the Gorge Waterway Initiative's steering committee to Esquimalt staff forwarding the meeting minutes and an agenda for the next meeting;[29]

(b) Two Esquimalt Fire Department incident reports (i.e., printouts from a case system or data base);[30]

(c) a Fisheries and Oceans Canada draft document and emails between Esquimalt staff and Fisheries and Oceans Canada staff about the document;[31]

(d) Emails between Esquimalt staff discussing a WorkSafe BC matter.[32]

[54] Esquimalt says the following about why it is withholding these records under s. 16:

> S. 16(1)(a) authorizes a public body to withhold information if its release could reasonably be expected to harm intergovernmental relations. S. 16(1)(b) authorizes a public body to withhold information that if released would reveal information received in confidence from another government. In this case, there was an implicit understanding of confidentiality between the other body and the Township when we were provided with the information from the other body.[33]

[55] The applicant disputes that s. 16(1) applies.

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[29] Records: pp. 182-185.
[30] Records: pp.189 (back) – 190.
[31] Records: pp. 186-189, 193-201 (back) and 202-203.
[32] Records: pp. 190 (back) and 191.
[33] Esquimalt's initial submission p. 3.

Section 16(1)(a)

[56] Esquimalt submits that s. 16(1)(a) applies because disclosure of the information could reasonably be expected to harm the conduct by the government of British Columbia of its relations with Esquimalt. Section 16(1)(a) applies to relations between the government of British Columbia (i.e., the provincial government) and the entities listed in s. 16(1)(a). Section 16(1)(a)(ii) includes "the council of a municipality." Although Esquimalt says nothing about s. 16(1)(a)(ii), I assume its position is that it applies.

[57] The government of British Columbia is not part of any of the communications to which Esquimalt has applied s. 16, and I do not see a connection between disclosure of the information and harm under s. 16(1)(a). Esquimalt has not explained or provided any detail about the harm it envisions. In short, Esquimalt's submission is not persuasive because it consists of an assertion unsupported by evidence or explanation. I find that Esquimalt has not proven that s. 16(1)(a) applies.

Section 16(1)(b)

[58] Section 16(1)(b) requires a public body to establish that disclosure would reveal information it received from a government, council or organization listed in s. 16(1)(a) or one of their agencies, and that the information was received in confidence.[34] Esquimalt is relying on this exception to withhold information it says it received from the Gorge Waterway Initiative's steering committee, the Esquimalt Fire Department, WorkSafe BC and Fisheries and Oceans Canada.

Gorge Waterway Initiative and the Esquimalt Fire Department

[59] Esquimalt says that the Gorge Waterway Initiative is "a steering committee appointed by and reporting to the Capital Regional District, of which the Township is a participant," that it is "not a body that is appointed by the Township of Esquimalt," and it does not "report to or act under the authority of the Township."[35] Esquimalt says nothing about the Esquimalt Fire Department.

[60] The information that Esquimalt provides is simply insufficient for me to conclude that the Gorge Waterway Initiative or Esquimalt's Fire Department is the type of entity s. 16(1)(b) means (i.e., "a government, council or organization listed in paragraph (a) or their agencies"). I have considered whether the Gorge Waterway Initiative is an "agency" of the Capital Regional District, but what Esquimalt says about those two entities is not enough for me to conclude that it is. In addition, it is not clear if the Esquimalt Fire Department is separate and

[34] Order 02-19, 2002 CanLII 42444 (BC IPC), para. 18; Order 331-1999, 1999 CanLII 4253 (BCIPC) at pp.6-9.
[35] Esquimalt's initial submission at p. 2 and reply submission at p. 3, point 3.

distinct from Esquimalt, let alone that it is the type of entity to which s. 16(1)(b) applies. Esquimalt has, therefore, failed to establish that it is authorized by s. 16(1)(b) to refuse to disclose the information it received from the Gorge Waterway Initiative and the Esquimalt Fire Department.

[61] Given that finding, it is not necessary to consider if the information was received in confidence. However, I have done so for the sake of completeness. The information from the Gorge Waterway Initiative is a cover email from its steering committee forwarding a copy of meeting minutes and an agenda for the next meeting. While I can see that the information was "received" from the steering committee, there is nothing in these records to suggest that the information was received "in confidence." The meetings do not appear to be conducted in the absence of the public and there is no indication that the information is confidential as it is about public and community matters.

[62] I am also not persuaded that the Esquimalt Fire Department reports were received in confidence by Esquimalt. There is not enough information about Esquimalt's relationship with the Esquimalt Fire Department and how the reports were shared between the two to allow me to reach any conclusion on that point. However, it is reasonable to conclude that the information in the reports would be viewed as confidential in so far as it identifies individuals assisted by the Fire Department. There is a small amount of information of that type on page 190, specifically medical information about an identifiable individual. Although I find that s. 16(1) does not apply to the Fire Department reports, I have considered the medical information in the s. 22 analysis below (and concluded that s. 22(1) applies).

WorkSafe BC

[63] Esquimalt is withholding pages three pages which it says "is information relevant to a WorkSafe BC issue" on the neighbour's property.[36] There appears to be a pagination mix-up, however, as page 190 is a Fire Department report that pre-dates the WorkSafe BC email by three years and it is not about WorkSafe BC matters. However, the other two pages do mention WorkSafe BC. These two pages are duplicates of the same brief email between Esquimalt staff discussing what they know about WorkSafe BC's jurisdiction and activities.

[64] The first question to decide is whether WorkSafe BC is the type of entity s. 16(1)(b) applies to, namely an entity referenced in s. 16(1)(a)(i)-(v). OIPC orders have not previously addressed this. Esquimalt makes no submissions on this point. The only possibility I can see for s. 16(1)(b) to apply is if WorkSafe BC is an agency of the provincial government. However, Esquimalt has provided insufficient information to establish that it is, and I find that it has not proven that s. 16(1)(b) applies.

[36] Records: pp. 190, 190 (back) and191. Esquimalt's initial submission at p. 3.

[65] For the sake of completeness, I have also considered whether the information in the email was received in confidence from WorkSafe BC. It is clear that the email contains information Esquimalt staff learned from discussions with WorkSafe BC, so it is information received from WorkSafe BC. In my view, however, it is the type of information regarding WorkSafe BC's mandate and general duties that WorkSafe BC would not consider confidential and would openly disclose to keep the public informed.

Fisheries and Oceans Canada

[66] Esquimalt does not say how it is that Fisheries and Oceans Canada is the type of entity listed in s. 16(1)(a). However, I am satisfied that the term "government of Canada" in s. 16(1)(a)(i) applies to Fisheries and Oceans Canada. The government of Canada consists generally of the Governor General, the Prime Minister and Cabinet ministers responsible for federal departments. Fisheries and Oceans Canada is a department of the federal government and there is a federal Cabinet minister responsible for its management.[37]

[67] The Fisheries and Oceans information is in a document drafted by Fisheries and Oceans staff as well as in emails between Esquimalt staff and Fisheries and Oceans staff about that draft document. I find that this information was "received" from Fisheries and Oceans Canada.

[68] None of these disputed records contain an express statement about confidentiality. Esquimalt says that there was an implicit understanding of confidentiality when the information was provided to Esquimalt. There is no evidence from the individuals who sent and received this information about their understanding regarding confidentiality or their usual and past practices when sharing information. Nevertheless, based on its context and content, I find that the Fisheries and Oceans Canada information is the type of information that a reasonable person would regard as having been provided and received in confidence. The Fisheries and Oceans Canada records are about a draft document, and it is evident that it is information regarding a matter that would not be expected or required to be disclosed in the ordinary course.[38] I find disclosing that information would reveal information received in confidence from Fisheries and Oceans Canada, so s. 16(1)(b) applies.

[69] In conclusion, the information that Esquimalt is authorized to refuse access to under s. 16(1)(b) is the information received from Fisheries and Oceans Canada, which is on pages 186-189 and 193-201 and 203. However,

[37] Fisheries and Oceans Canada website at http://www.dfo-mpo.gc.ca/index-eng.htm.
[38] I cannot say more without disclosing the disputed information.

s. 16(1)(b) applies only to the information that I have highlighted on those pages being sent to Esquimalt. [39]

Section 22

[70] Section 22 requires public bodies to refuse to disclose personal information if its disclosure would be an unreasonable invasion of a third party's personal privacy.[40] Esquimalt says that it is withholding the records under s. 22, but it does not specify where it believes the s. 22 information is located in the records. Instead, it submits that s. 22 applies to all of the records, although it is obvious that not all of the information on those pages is personal information. Esquimalt's submission about s. 22 is as follows:

> In addition, the Township is required by S. 22 to withhold these records for the protection of personal information relating to the Applicant's neighbour. None of the conditions of S. 22(4) apply to any of the withheld records. The Disputed Records in this Group consists of information contemplated in S. 22(3)(b), (f), (g) and (h), and disclosure would be presumed to be an unreasonable invasion of a third party's personal privacy. In making the determination to withhold these records, I considered all of the circumstances set out in S. 22(2).[41]

[71] The applicant says that Esquimalt's claim that disclosure of the records would be an unreasonable invasion of a third party's privacy is unwarranted, but he does not elaborate.[42]

[72] I will only consider the application of s. 22 to the information that I found may not be withheld under the other exceptions Esquimalt applied. Numerous orders have considered the application of s. 22, and I will apply those same principles in my analysis here.[43]

Personal information

[73] Only "personal information" may be withheld under s. 22. "Personal information" is defined in FIPPA as "recorded information about an identifiable individual other than contact information." "Contact information" is defined as "information to enable an individual at a place of business to be contacted and

[39] There is some personal information in the Fire Department records on pages 189 (back) and 190, which I address in the s. 22 analysis below.
[40] Schedule 1 of FIPPA says: "third party" in relation to a request for access to a record or for correction of personal information, means any person, group of persons or organization other than (a) the person who made the request, or (b) a public body.
[41] Esquimalt's initial submission at p. 3.
[42] Applicant's submission at p. 4.
[43] See for example, Order 01-53, 2001 CanLII 21607 (BC IPC) at p. 7.

includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual."[44]

[74] There is a fair bit of information that is clearly not personal information so it may not be withheld under s. 22(1). For instance, the subject lines of most of the emails and correspondence, the dates, page numbers and document headers and footers, greetings and pleasantries in emails and general process information about development and building permits and bylaw procedures. None of that information is about identifiable individuals. Further, there is a large amount of information that meets the definition of "contact information." It is the signature block and email address information of officials and employees of Esquimalt and other public bodies. Contact information is not "personal information", so s. 22(1) does not apply to it and Esquimalt cannot refuse to disclose it on that basis.

[75] However, the records do contain some third party personal information. For instance, some of the information that Esquimalt is withholding is about the neighbour, so it is her personal information. There is also a small snippet of personal information in a Fire Department report about a named individual who was helped.[45] In addition, there is some personal information of officials and employees of Esquimalt, the Fire Department, Fisheries and Oceans Canada and WorkSafe BC. It is comprised of their names and what they said and did while working on the issues addressed in the records.

Section 22(4)

[76] The next step in the s. 22 analysis is to determine if the personal information falls into any of the types of information listed in s. 22(4). If it does, then disclosure would not be an unreasonable invasion of personal privacy.

[77] Section 22(4)(e) says that a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff. I find that s. 22(4)(e) applies to the personal information of the officials and employees of Esquimalt, the Fire Department, Fisheries and Oceans Canada and WorkSafe BC. All of this is objective, factual information about these individuals in the normal course of carrying out their work functions. It contains no evaluation or qualitative assessment about them as individuals or how they performed their work functions.[46] Esquimalt cannot refuse to disclose this information under s. 22(1).

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44 See Schedule 1 of FIPPA for these definitions.

45 The medical information is on p. 190. Page 189 (back) contains no personal information about the person helped by the firefighters because the person is not identifiable.

46 For a similar finding, see Order 01-53, 2001 CanLII 21607 (BC IPC) at para. 40.

Presumptions, s. 22(3)

[78] The third step in the s. 22 analysis is to determine whether any of the presumptions in s. 22(3) apply to the third party personal information. If so, disclosure is presumed to be an unreasonable invasion of third party privacy. The following parts of s. 22(3) are in play here:

> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,
>
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,
>
> …
>
> (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness,
>
> (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,
>
> (h) the disclosure could reasonably be expected to reveal the content of a personal recommendation or evaluation, a character reference or a personnel evaluation supplied by the third party in confidence and the applicant could reasonably be expected to know the identity of the third party,
>
> …

[79] Esquimalt submits that ss. 22(3)(b), (f), (g) and (h) apply, but it does not say anything further by way of explanation. The information does not relate to the matters (f), (g) and (h) cover, so I find those three presumptions do not apply. However, s. 22(3)(a) applies to a small amount of medical information in the Esquimalt Fire Department report at page 190. I also find that s. 22(3)(b) applies to a portion of the neighbour's personal information because it was evidently compiled by Esquimalt as part of investigations into complaints about her perceived non-compliance with municipal bylaws.[47]

[47] This finding is consistent with previous orders have found about in similar cases. For example: Order F07-02, 2007 CanLII 2529 (BC IPC) at para. 58; Order F14-38, 2014 BCIPC 41(CanLII) at para. 25.

Relevant circumstances, s. 22(2)

[80] The final step in the s. 22 analysis is to consider the impact of disclosure of the personal information in light of all relevant circumstances, including those listed in s. 22(2). It is at this step, after considering all relevant circumstances, that the presumptions may be rebutted.

[81] I have considered s. 22(2)(a), which contemplates whether disclosure is desirable for the purpose of subjecting the activities of the government or a public body to public scrutiny. Where disclosure of records would foster accountability of a public body, this may, in some circumstances, support a finding for the release of third party personal information.[48] The third party personal information is about individuals and their particular property disputes with each other and Esquimalt. I cannot see how this personal information would have any significance to the public in general. Based on my review of the materials before me, I can see no grounds for finding that disclosure of any of the third party personal information is desirable for the purpose of subjecting the activities of Esquimalt to public scrutiny in this case.

[82] I have also considered s. 22(2)(f) which is about whether the personal information was supplied in confidence. I have already found that the identities of the bylaw complainants may be withheld under s. 15(1)(d) as they are confidential sources of law enforcement information. For the same reason, I find that what they say about the individual they are complaining about, the neighbour, is personal information that was supplied in confidence for the purposes of s. 22(2)(f). I also find that the medical information in the Fire Department report on p. 190 was information that was supplied in confidence based on is inherent sensitivity.

[83] Some of the third party personal information is about the neighbour and her husband and it is in their direct communications with Esquimalt staff about bylaw matters under investigation. There is no evidence that this personal information was explicitly supplied in confidence. However, I accept that the parties to these communications would have wanted the personal information contained in these conversations regarding such contentious matters (i.e., allegations of wrong-doing and bylaw contraventions) to be confidential. Given its content and context, it is reasonable to conclude that this is personal information that the neighbour and her husband supplied implicitly in confidence.

[84] The fact that the applicant clearly knows a fair bit of the personal information in dispute is a relevant circumstance in this case. I conclude this based on the voluminous records that he provided with his inquiry submission, which reveal what he knows and Esquimalt previously disclosed. In fact, he has

[48] Order F05-10, 2005 CanLII 24734 (BC IPC).

copies of some of the records in dispute.[49] I have also considered the fact that the neighbour's personal information is about her property and the property matters causing concern are visible to the applicant. Therefore, I can confidently conclude that the applicant knows the subject matter of the permitting, bylaw and enforcement actions regarding his neighbour's property. However, I am not satisfied that he knows the details of what the neighbour, her husband and Esquimalt said to each other or what complainants and Esquimalt said to each other.

[85] I have also considered two factors that lessen the privacy concerns regarding some of the disputed information. First, most of the neighbour's personal information is not of an intimate or sensitive nature because it is about property. Further, I have considered the fact that some of the information is quite dated and relates to property issues that occurred seven years ago.

Conclusions, s. 22

[86] I find some of the information withheld by Esquimalt under s. 22 is not "personal information" so s. 22(1) does not apply to it.

[87] As for the information that is personal information, some of it falls under s. 22(4)(e) because it is about third parties' functions as public body employees, so disclosure is deemed not to be an unreasonable invasion of third party personal privacy. Esquimalt is not authorized to refuse to disclose that s. 22(4)(e) personal information under section 22(1).

[88] I find that that the ss. 22(3)(a) and (b) presumptions apply to some of the third party personal information. The s. 22(3)(a) presumption applies to a small amount of medical information in the Esquimalt Fire Department report. Having considered the above relevant circumstances, I find that the s. 22(3)(a) presumption has not been rebutted. Therefore, disclosing this information would be an unreasonable invasion of third party personal privacy and Esquimalt must withhold it under s. 22(1).

[89] The s. 22(3)(b) presumption applies to some of the personal information which was compiled by Esquimalt as part of investigations into complaints about the neighbour's alleged non-compliance with municipal bylaws. I find that the presumption has been rebutted where the personal information only reveals the general subject matter of the issues addressed in the records, so s. 22(1) does not apply. However, it has not been rebutted for the details of what the third parties and Esquimalt said to each other about those matters, and Esquimalt must refuse to disclose that information under s. 22(1).

[49] For instance, pp. 232 (back), 233 (back) and 269-271.

[90] Finally, for the remainder of the personal information, I find there are no s. 22(3) presumptions that apply and considering the relevant circumstances, it would not be an unreasonable invasion of third party personal privacy for Esquimalt to disclose this information.

[91] For clarity, in a copy of the records I am sending to Esquimalt, I have highlighted the only third party personal information that Esquimalt must refuse to disclose under s. 22(1).

CONCLUSION

[92] For the reasons above, I make the following order under s. 58 of FIPPA:

1. Esquimalt is not authorized under ss. 12(3)(b), 15(1)(a), 15(1)(c) and 16(1)(a) to refuse access to the information.

2. Esquimalt is authorized under s. 14 to refuse access to the information, with the exception of information on pages 7-12, 94-97 and 136.

3. Esquimalt is authorized and/or required under ss. 15(1)(d), 16(1)(b), and 22(1) to refuse access to some of the information.

4. Esquimalt is required to give the applicant access to the information it is not authorized and/or required to refuse access to under the exceptions it applied, subject to paragraph 5 below,

5. In a copy of the records that I am sending to Esquimalt, I have highlighted the only information that Esquimalt is authorized and/or required to withhold under ss. 15(1)(d), 16(1)(b) and 22(1).

6. I require Esquimalt to give the applicant access to the information as ordered in paragraph 5 above by September 14, 2018. Esquimalt must concurrently provide the OIPC Registrar of Inquiries with a copy of its cover letter and the records sent to the applicant.

August 2, 2018

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

OIPC Files: F16-67864 and F16-67865