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THE 911 ON WHAT TO DO BEFORE THE INFORMATION AND PRIVACY COMMISSIONER CALLS

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I. INTRODUCTION

This year marks a significant year for local governments and their relationship with the Office of the Information and Privacy Commissioner in British Columbia ("OIPC"). The OIPC continued its recent practice of undertaking proactive compliance audits and reviews and continued to focus on local governments. In the first audit and compliance report examined here, Audit and Compliance Report F16-01, former Commissioner Elizabeth Denham[1] set standards expected from local governments when they respond to freedom of information ("FOI") requests under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). Local governments should expect continued close scrutiny from the OIPC on this front.

The year's second investigation report, Investigation Report F16-02, indicates another significant area of scrutiny for local governments. In this report, the Commissioner confirms her finding last year that public bodies are required to proactively disclose information that is clearly in the public interest whether release of that information is urgent or not. Local governments should expect that the OIPC will be interested in whether local governments are meeting their obligation to proactively disclose information that is clearly in the public interest under section 25(1)(b).

Local government compliance with FIPPA is clearly a strategic priority for the OIPC, as these two reports confirm. Despite the change in commissioner, local governments should assume that this focus will continue. The OIPC is likely to continue to focus on whether local governments are taking proper measures to ensure they are consistently meeting their FIPPA obligations. In this paper, we examine these reports and their implications for local governments. We also discuss key FOI decisions issued by the OIPC this year. The goal is to suggest possible solutions local governments may implement to avoid any 911 situations in case the OIPC comes calling.

The reports discussed here have potentially significant resource implications for local governments striving to meet the many needs of their communities. However, the likelihood that the OIPC will continue to scrutinize local governments requires the investment of resources to avoid adverse findings and negative publicity.

[1] She has left the OIPC to become the Information Commissioner of the UK. An acting commissioner has been appointed and as of this date a new commissioner has yet to be appointed.

II. REVIEW OF LOCAL GOVERNMENT FOI REQUEST

Audit & Compliance Report F16-01[2] reviews the process used by the City of Vancouver ("Vancouver") to respond to FOI requests. Although the report focuses solely on Vancouver's FOI response process, the Commissioner states that she intentionally chose to review a local government body because "local governments have very direct interactions with citizens."[3] Overall, this report indicates that local government bodies can expect the OIPC to take a closer look at the steps they take to respond to FOI requests. It also demonstrates that the OIPC will expect them to be able to prove, with clear documentation, that they have met their duties under FIPPA.

The report focuses on the duty to assist applicants under section 6(1) of FIPPA:

> Duty to assist applicants
>
> 6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

As Report F16-01 emphasizes, the duty to assist is not aspirational: it is a "serious and meaningful duty" that requires local governments to approach FOI requests with a sense of co-operation, not conflict.[4] In reviewing a sample of Vancouver's FOI response files, the Commissioner identified four main areas in which the duty was not consistently met:[5]

- A lack of documentation in FOI request files;
- Failures to meet the timelines mandated in FIPPA;
- Issues in the content of responses to FOI applicants, and
- Unhelpful communication from Vancouver to applicants.

The report covers many issues within each area of concern, and local government staff that assist with FOI response processes in local governments should take the time to review them. This paper focuses on two of the concerns discussed in the report:

- The importance of documenting each step in the FOI response process; and

[2] https://www.oipc.bc.ca/media/16877/ac-report-f16-01_city-of-vancouver-23june2016.pdf ("Report F16-01").
[3] Report F16-01 at 4.
[4] Report F16-01 at 10-11.
[5] Report F16-01 at 5-6.

- The importance of having a policy regarding the use of personal email accounts or personal devices for public business.

A. Documenting the Steps in the FOI Request Process

Although the report discusses many different areas of concern, a close review of the report indicates that many of Vancouver's shortcomings in discharging the duty to assist stemmed from failures to consistently and comprehensively document each step staff took to respond to each request. For example, the report criticizes Vancouver for not detailing the searches conducted to locate responsive records and for not recording whether or not access to information staff followed up with department staff to determine what files were searched and what search terms were used to locate responsive records.[6] The report also criticizes Vancouver's failure to explain to applicants why no responsive records exist where that was the response.[7]

The inability to explain in all instances why no responsive records exist was likely influenced in part because access to information staff did not have a record of what files were searched by departments. Without knowing which files were searched, staff could only report to an applicant that no responsive records could be found, which the report indicates is an unsatisfactory response.[8]

As this example shows, Vancouver perhaps could have avoided many of the OIPC's criticisms if staff had documented each step taken in responding to requests. Other local governments might avoid similar OIPC criticisms if they adopt a comprehensive documentation policy for FOI requests. This is particularly important, as Report F16-01 illustrates, in the areas of response time and records searches. These are common areas of complaint from FOI requesters and criticism by the OIPC.

Ideally the policy should include clear direction to staff on what must be documented at each step of the FOI response process and include a review of the filing system used in each department of the local government body. Once this policy is adopted, local government bodies should ensure staff are trained on a continuous basis and check to ensure staff are consistently following the policy. [9]

[6] Report F16-01 at 28-30.
[7] Report F16-01 at 37-38.
[8] Report F16-01 at 38, 48.
[9] In addition to documenting what they do, local governments should train staff to implement the FOI request response policy and practices consistently. Ongoing access and privacy training is a recurring theme for the OIPC, which in all audits and investigations will look for evidence of training in assessing compliance with FIPPA's access and privacy obligations.

The report points to several steps or types of information staff should record throughout the FOI process:

- The date the request is received;
- A copy of the original request received;
- Any communications, including telephone or in-person communications, with an applicant to clarify a request;
- Any method used to estimate a fee for a request;
- The date a fee estimate is provided to the applicant;
- The date a fee is received or waived;
- The time spent locating, retrieving, producing and preparing records for the request;
- The records or locations searched by staff to respond to the request, including a record of any search terms or methods used to search records or locations;
- The records or locations not searched and why;
- If no responsive records are located, a record of the possible reason why no responsive records were located;
- The date any extension is taken and why;
- The response letter and records provided to an applicant; and
- Any records deemed to be non-responsive, withheld or severed from the response.

Again, it is clear from the report that local governments should ensure staff record this information. A practical measure is creating a standard form that includes a checklist to be used for the processing of each FOI request. The form should be updated as each step in the FOI request process is completed.

Local governments always have the burden of proving to the OIPC that they have met their FIPPA duties. Report F16-01 demonstrates that full and detailed documentation will assist in proving that appropriate searches for records were made and that FIPPA's deadlines were met (or properly extended under section 10 of FIPPA). Proper documentation will also assist with ensuring that applicants are provided with adequate reasons for the content of the local government's response (as required by section 8).

Report F16-01 also provides direction on what training all staff, not just FOI staff, should regularly receive, so they understand the local government's obligations under FIPPA. As indicated in the report, training should include the typical steps to search for records within their department and the expectations regarding records management, retention and storage.[10] This training will help ensure all staff are aware of the obligations under FIPPA in conducting searches for responsive records, which may reduce the time spent conducting searches and thus help meet FIPPA's response deadlines (a local government should also have policies regarding the documentation and retention of certain records).[11]

Report F16-01 offers a cautionary tale for local governments and other public bodies. The key concerns around record searches, response timelines and response contents illustrate that improved processes, documentation of FOI request response activities, and training are important best practices that the OIPC will continue to expect to find.[12]

B. Use of Personal Email Accounts or Personal Devices

Another important aspect of Report F16-01 relates to use of personal email accounts and devices. The report criticizes Vancouver for not having a policy on the use of personal email accounts and personal devices for city business.[13] The report affirms earlier OIPC expectations that all public bodies have a duty to search for any responsive records that may be stored on a personal email account or a personal device. Vancouver, however, did not have a clear policy that ensured these sources were adequately searched, which left ambiguity as to whether it had adequately searched all possible sources for responsive records. Without a policy, the report indicates, a local government body would, at a minimum, have to require every staff member to attest that he or she does not conduct any city business on a personal email account or a personal device. An alternative would be that the local government would have to prove that the personal email account or personal device was searched for responsive records.[14]

The use of personal email accounts or devices by local government officials or staff has been of recent interest by regulators across Canada. In Ontario, for example, a recent decision by the Office of the Information and Privacy Commissioner, Order MO-3281, ordered the City of Oshawa to disclose emails sent by a city councillor from a personal email account because the

[10] Report F16-01 at 12, 45.
[11] Report F16-01 at 12.
[12] We note here the OIPC's concern in Report F16-01 with the tone of communication between Vancouver's FOI staff and some requesters. Some observers believe that, in making these criticisms, the OIPC veered into editorializing without necessarily accounting for the challenging behaviour of some requesters. Be that as it may, the report indicates that the OIPC expects FOI staff to take the high road. This is important in the case of email, especially, the instantaneous and casual nature of which can sometimes lead to things being said that should not be said.
[13] Report F16-01 at 38-39.
[14] Report F16-01 at 39.

emails related to a city matter and were therefore under the control of the city.[15] In Newfoundland and Labrador, the new Information and Privacy Commissioner issued a practice bulletin this year stating that "public bodies should NOT allow the use of personal email accounts for work" (emphasis in the original)[16] and re-iterated those concerns in Report A-2016-022.[17]

Here at home, the OIPC's stance on the use of personal email accounts is set out in its guideline, "Use of Personal Email Accounts for Public Business."[18] In this guideline, the OIPC recommends that local government bodies not allow officials or staff to use personal email accounts for work purposes and that they require staff to use the internal email system as a condition of employment. If a prohibition on the use of a personal email account is not feasible, the OIPC recommends adopting a policy that requires an individual that sends or receives work-related emails from a personal email account to copy these emails to an official email.[19] The goal is to ensure the local government body will have a means to access these records if it receives an FOI request for these records.

The OIPC's goal in recommending a policy on the use of personal email accounts also relates to privacy compliance. It is concerned that, without such a policy, a local government body cannot ensure it is meeting its obligations to protect personal information under FIPPA.[20] Among other things, under FIPPA, local governments are required to store personal information in their possession in Canada.[21] FIPPA only authorizes a local government to disclose personal information outside of Canada in very specific circumstances.[22] If an elected official or staff member uses a personal email account, the local government cannot ensure that all records that may contain personal information are stored in Canada and are not disclosed outside Canada. FIPPA also requires local governments to ensure records that contain personal information are stored in a secure manner,[23] which may not be the case if personal email accounts are used. FIPPA's in-Canada storage and access provisions are backed up by heavy fines and possible jail time, so local governments should heed this OIPC guidance.

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[15] City of Oshawa (22 January 2016) Order MO-3281, online: Office of the Information and Privacy Commissioner of Ontario http://decisions.ipc.on.ca/ipc-cipvp/orders/en/item/144731/index.do?r=AAAAAQANT3JkZXIgTU8tMzI4MQE#.

[16] Practice Bulletin, "Use of Personal Email Accounts for Public Business" (6 June 2016) online: Office of the Information an Privacy Commissioner of Newfoundland and Labrador http://www.oipc.nl.ca/pdfs/Use-of-Personal-Email-Accounts-for-Public-Business.pdf.

[17] Department of Natural Resources (4 October 2016) Report A-2016-022 at para 23, online: Office of the Information and Privacy Commissioner of Newfoundland and Labrador http://www.oipc.nl.ca/pdfs/A-2016-022_NR.pdf.

[18] OIPC, "Use of Personal Email Accounts for Public Business," (18 March 2013) online: OIPC https://www.oipc.bc.ca/guidance-documents/1515 ("Guideline").

[19] Guideline at 2.

[20] Guideline at 3.

[21] FIPPA, s. 30.1.

[22] FIPPA, ss. 33, 33.1.

[23] FIPPA, s. 30.

There are, of course, practical difficulties in requiring members of city council or a regional district board to use an internal email system, since they are elected officials and not employees. This may make it more difficult for a local government to require members of council or a board to adhere to a policy on the use of personal email accounts or personal devices. However, as Order F2016-19, issued by the Office of the Information and Privacy Commissioner of Alberta, indicates, a local government may be exposing itself to liability under FIPPA if it does not take steps to require elected officials to provide records stored on personal email accounts or personal devices.[24]

In Order F2016-19, an applicant requested from the City of St. Albert "any documents, e-mails, text messages from [two councillors] that comment on the third floor news blog and any e-mails to/from [an individual]." The request explicitly included "city and personal e-mails."[25] Under the legislation in Alberta, the City of St. Albert ("St. Albert") was required to respond to the applicant within 30 days. However, St. Albert was not able to respond on time because it made multiple attempts "to convince" the councillors of their obligations to provide St. Albert any existing records, which resulted in St. Albert exceeding the time limit stipulated in the legislation.[26]

In her reasons, the adjudicator pointed out that it was not clear whether St. Albert had custody or control of the records because the request included personal emails. The adjudicator clarified that "personal emails and text messages that are not created in the councillor's representative capacity, but in their personal capacities may not be records to which [the legislation] applies."[27] Based on the evidence, the adjudicator found that St. Albert had not yet determined whether it actually had custody or control over the records. St. Albert had to make that determination first in order to respond to the request. Once St. Albert made that determination, St. Albert was obligated either to exercise its legal right and take steps to obtain those records, or communicate to the applicant that the records are not in its custody or control.[28]

Unfortunately, the adjudicator did not clarify how St. Albert could obtain copies of these records if it determined it had custody or control of the records. Rather, she simply said that, "if it determines that it has custody or control of some or all of the records, then I order [St. Albert] to exert this control and to obtain these records by whatever means are available to it."[29] The order seems to suggest that St. Albert may have an obligation to pursue litigation

[24] City of St. Albert (26 May 2016) Order F2016-19 online: Office of the Information and Privacy Commissioner of Alberta https://www.oipc.ab.ca/media/701719/f2016-19order.pdf ("Order F2016-19").
[25] Order F2016-19 at para 1.
[26] Order F2016-19 at para 5.
[27] Order F2016-19 at para 19.
[28] Order F2016-19 at para 21.
[29] Order F2016-19 at para 30.

against its councillors to obtain these records as it is not clear what other option St. Albert would have to enforce a legal right to these records. Litigation would obviously not be the best solution, but if a local government is not able to legally compel records stored on personal email accounts or devices, litigation may be the only option.

To minimize potential issues, a local government could require elected officials to sign an acknowledgement and agreement that they will comply with the policy on personal email use. They would also agree that they will promptly on request search their personal account for any responsive emails, and turn them over to staff. This could perhaps best be done during their orientation and on-boarding. Explanation of why this is important to the local government for legal reasons might help them see the benefits of complying. From a political perspective, the controversy about Hillary Clinton's use of a private email server should help elected officials understand the risk to their own reputation. This will not be an ironclad guarantee of co-operation, but it will alert members of council or a board of their obligations and the risks they are assuming by using personal email accounts or personal devices to conduct public business. It may also provide another means for the local government body to enforce its legal rights to obtain records under its custody or control.[30]

III. PROACTIVE DISCLOSURE OF INFORMATION CLEARLY IN THE PUBLIC INTEREST

A. The New Test established in Report F15-02

As discussed in our previous privacy update, in Investigation Report F15-02, the Commissioner overturned an almost 15-year-old interpretation of FIPPA's public interest disclosure provision.[31] Under this new view, section 25(1)(b) requires immediate disclosure in the public interest—even where no FOI request has been made and even if there are no urgent circumstances.[32] Rather, the test for disclosure is whether, considering the circumstances, disclosure of that information would be "clearly in the public interest."[33]

[30] There are several cases across Canada similar to the St. Albert case, where inadequate controls left public bodies in the position of being ordered, in effect, to litigate in order to retrieve responsive records from elected officials (as well as former employees and contractors).

[31] Lawyers, at least, will be interested to know that this was despite the fact that, in a submission to a legislative review of FIPPA, the Commissioner had called for amendment of section 25(1)(b), to eliminate the temporal urgency requirement, acknowledging that the provision required urgency to be present.

[32] Audit & Compliance Report F15-02: Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies (2015) 2015 BCIPC No. 30, online: OIPC https://www.oipc.bc.ca/investigation-reports/1814 ("Report F15-02").

[33] Report F15-02 at 26.

Section 25(1) of FIPPA reads:

> Information must be disclosed if in the public interest
>
> 25 (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.

The Commissioner said in that report that all public bodies, including local governments, should "diligently and promptly" assess information they possess and determine whether any of it must be disclosed to public on the basis that disclosure is clearly in the public interest.[34] The Commissioner also recommended that public bodies adopt a policy that sets out the specific steps employees should follow to ensure information that must be disclosed is brought to the attention of the head of the public body appointed under FIPPA.[35]

B. Factual Background of Report F16-02

Although Investigation Report F15-02 clarified the new test and provided factors to determine when information must be disclosed in the public interest, it did not provide any specific examples of records that were required to be disclosed. However, this year Investigation Report F16-02 ("Report F16-02") analyzes specific records that a public body was required to disclose as being clearly in the public interest. This provides further guidance on public interest disclosure obligations, with potentially profound implications for local governments.[36]

The report deals with whether the Ministry of Environment ("Ministry") was obligated to disclose soil test results, and the analysis of these results, that formed the key basis for the Ministry's decision to authorize a farm to apply liquid manure to its land. The farm in question was located in the Township of Spallumcheen. In March 2014, the Steele Springs Waterworks District informed 200 residents that their drinking water was no longer safe to drink for vulnerable individuals, such as infants and individuals with compromised immune systems.[37] The Ministry had reason to believe that the contamination might have been caused by the

[34] Report F15-02 at 36.
[35] Report F15-02 at 36.
[36] Audit & Compliance Report F16-02: Clearly in the Public Interest: The Disclosure of Information Related to Water Quality in Spallumcheen (2016) 2016 BCIPC No. 36, online: OIPC https://www.oipc.bc.ca/investigation-reports/1814 ("Report F16-02").
[37] Report F16-02 at 7.

application of manure. In March 2014, the Ministry issued an order requiring one farm to stop applying liquid manure unless it first submitted to the Ministry a nutrient management plan prepared by a qualified professional.[38] The farm submitted a plan, which contained soil test results, and the Ministry authorized the farm to apply liquid manure on four occasions. When the public became aware of this, some citizens became concerned and requested copies of the soil test results from the Ministry. The Ministry refused to disclose the results.[39] Report F16-02 ordered the Ministry to disclose information in the public interest, and to do so on an ongoing basis until the situation is resolved.[40]

C. Framework for Public Interest Disclosure under Section 25(1)(b)

The issue in the report was whether the Ministry was obligated under section 25(1)(b) to disclose the test results, and the analysis of these results, so that the public could determine for themselves that the Ministry was making appropriate decisions to protect water quality. The Commissioner found that the Ministry was so obligated. In beginning her analysis of section 25(1)(b), the Commissioner re-iterated that the test is "solely whether, in the circumstances, disclosure is 'clearly in the public interest'."[41] Disclosure is "clearly in the public interest" where:

> a disinterested and reasonable observer, knowing the information and knowing all of the circumstances, would conclude that disclosure is plainly and obviously in the public interest.[42]

The report sets up a two-step analysis for determining whether disclosure is clearly in the public interest. The first step is to determine whether the subject matter or circumstances surrounding the information justify public disclosure.[43] Factors indicating whether disclosure is justified include whether:[44]

- The information relates to a matter that is the subject of widespread debate in the media, legislature or an oversight body;
- The information relates to a systematic problem or just an isolated situation;
- Disclosure would contribute to public education on the matter;
- Disclosure would contribute to public information on the matter in a substantive way;

[38] Report F16-02 at 7-8.
[39] Report F16-02 at 9-10.
[40] Report F16-02 at 41-42.
[41] Report F16-02 at 26.
[42] Report F16-02 at 26.
[43] Report F16-02 at 27.
[44] Report F16-02 at 27.

- Disclosure would facilitate public debate or enable the public to make informed political decisions; or

- Disclosure would contribute to holding the public body accountable for its actions or decisions in a meaningful way.

If any of these factors indicate that public disclosure may be justified, the second step is to consider whether the information relates to an "issue of objectively material, even significant, public importance."[45]

In applying section 25(1)(b) to this case, the Commissioner concludes that disclosure of the information is justified. As a preliminary matter, the Commissioner established that, in some circumstances, disclosure so that the public could verify for itself that a public body acted appropriately justifies disclosure under section 25(1)(b).[46] In these particular circumstances, water quality and the use of manure were the subjects of significant public debate and media attention, but the Ministry still refused to disclose the information.[47] More significantly, the harm to the public, which was serious, was ongoing.[48]

Interestingly, although the Commissioner states that section 25(1)(b) usually only requires the disclosure of information and not the entire record containing the information, in this situation, the Commissioner required the disclosure of the entire record. The Commissioner found that, in these circumstances, the only means by which the public could adequately determine whether the Ministry acted appropriately was for the full disclosure of the report that contained the soil test results.[49]

D. Significance to Local Governments

This report provides guidance to local governments on how to determine whether information is "clearly in the public interest" and must be disclosed. Local governments should incorporate this two-step test into proactive disclosure policies and ensure department managers are aware of this framework so that pertinent information is brought to the attention of the FIPPA head in a timely manner. As the Commissioner re-iterates in this report, information required to be disclosed under section 25(1)(b) must be disclosed "as soon as possible and without regard as to how to package, explain or characterize the information."[50]

The report also indicates that information that relates to a matter that receives a heavy amount of public attention is more likely to be information the disclosure of which is "clearly in the public interest", particularly if it relates to the health or safety of the public. Even if disclosure

[45] Report F16-02 at 22, 36.
[46] Report F16-02 at 28-30, 35-36.
[47] Report F16-02 at 36.
[48] Report F16-02 at 37-38.
[49] Report F16-02 at 38-39.
[50] Report F16-02 at 22.

of the information will not necessarily improve public health or safety, a local government may be required to disclose information if the public questions the actions taken by it and the local government has no other means to justify its actions.

Local governments hold considerable amounts of information the disclosure of which may be required under the new approach to public interest disclosure. In addition to water quality information, other examples include information about flood or flood debris risks,[51] geotechnical hazards such as land slip or landslide, sewage treatment and effluent risks, and restaurant inspection information. These are some of the priority areas that local governments should assess in light of the significant shift in OIPC interpretation of FIPPA's public interest disclosure requirements.

IV. RECENT OIPC ORDERS OF INTEREST TO LOCAL GOVERNMENTS

Local governments have not been the subject of many significant OIPC orders thus far in 2016. However, Order F16-15[52] and Order F16-43[53] merit attention. Order F16-15 adds to the case law on when local governments have custody or control over records created by arbitrators, while Order F16-43 clarifies when factual information may be severed from a record because it relates to advice and recommendations to a public body.

A. Order F16-15: Clarifying Custody or Control over Arbitrator Records

Order F16-15 clarifies when records are in the custody or under the control of a local government when an independent arbitrator appointed by the local government creates a record. Essentially, if the circumstances are clear that the appointment of the arbitrator was intended to establish an independent and impartial resolution process, then the local government does not have control over records created by the arbitrator because control would compromise the impartiality of the process.

In this order, the applicant was a former member of the West Vancouver Police Department ("WVPD") who lodged a harassment complaint. The WVPD is a separate organization from the District of West Vancouver ("West Vancouver"), but West Vancouver decided to assist in resolving the complaint and recommended two arbitrators for appointment to investigate, mediate and adjudicate the complaint. The scope of the arbitrators' roles was detailed in an agreement that included a term that none of the parties would seek the production of an

[51] Alberta's Information and Privacy Commissioner recently required the City of Edmonton to disclose information revealing which residential properties are at risk of flooding. The City had refused to disclose the information because it might affect property values, and might unnecessarily worry affected residents. Although disclosure was not mandated under Alberta's public interest section, this case affirms that local government information of this kind may be implicated.

[52] District of West Vancouver (15 March 2016) Order F16-15 online: OIPC https://www.oipc.bc.ca/orders/1934 ("Order F16-15").

[53] City of Vancouver (21 September 2016) Order F16-43 online: OIPC https://www.oipc.bc.ca/orders/1987 ("Order F16-43").

arbitrator's notes. The applicant was ultimately not a party to the agreement but made a request to West Vancouver for "all materials generated by two arbitrators who [West Vancouver] retained to address the applicant's complaints against the police department".[54] West Vancouver was also not a party to the agreement, but it considered itself bound by this term in the agreement.

The OIPC concluded that West Vancouver did not have "custody" of the records under FIPPA since West Vancouver never had physical possession of them. Further, the OIPC acknowledged that a public body that retains an individual and pays for services generally has control of any work product generated by the retained individual. It held, however, that this general principle is not necessarily determinative. In these circumstances, the records were not under the control of West Vancouver because the evidence, especially the agreement, established that West Vancouver made a "concerted effort to establish an independent and impartial resolution process" and the independence and impartiality of the arbitrator would be undermined if West Vancouver retained control over the arbitrator's records. [55] The records, therefore, were not under the control of West Vancouver.

As this order indicates, local governments should be aware that records created by a contractor, including an arbitrator or investigator, are not necessarily under their control. The records therefore may not be records to which the obligations under FIPPA apply. When an applicant requests records that are created by an individual that is not an employee, the local government should review the circumstances in which the records were created and determine whether any of the work product records were intended to be under the control of the local government. If not, FIPPA may not apply to those records.

This order, like earlier OIPC decisions, shows that local governments should decide at the outset whether they wish to have control over a contractor's records. While it is not possible to contract out of FIPPA with any certainty, contract provisions addressing control can be important. If the local government wants to have control, the contract should say that it does. The contract should require the contractor to deliver to the local government any requested records promptly after request. It should also require the contractor to co-operate with the local government in the processing of the request (for example, by providing information to assist in deciding whether access exceptions apply, particularly section 22, which protects third-party personal information). If the local government does not want to have control, the contract should say so (noting, again, that this may not survive OIPC scrutiny if other factors point to control).

[54] Order F16-15 at para 1.
[55] Order F16-15 at para 23.

B. Order F16-43: Severing Advice or Recommendations to a Local Government

In Order F16-43, an adjudicator clarified when a local government may withhold information under sections 13 of FIPPA. This order concerned three different requests for records for reports provided to the Bid Committee of the City of Vancouver. The Bid Committee decides who will be awarded contracts for goods and services up to $2,000,000.00. When a proposed contract will exceed $500,000.00, staff prepares a report for the Bid Committee to provide advice and recommendations.

In providing a response to these requests, the City of Vancouver severed some information on the grounds that the information would reveal advice and recommendations developed for it under section 13(1). The OIPC held that this section applies to all information that "directly reveals advice or recommendations, as well as information that would enable an individual to draw accurate inferences about advice or recommendations."[56] If the information could reasonably reveal advice or recommendations developed for a public body, then the local government may withhold this information unless an exception under section 13(2) applies.

Here, much of the severed information would reveal advice or recommendations to the Bid Committee. However, the titles and headings in the report could not reasonably reveal the advice or recommendations, so these could not be withheld. The OIPC also found that the exception under section 13(2)(a), which requires a public body to disclose "factual material," did not apply because the factual material in the reports was compiled for the "express purpose" of providing advice and recommendations and was "integral" to the advice and recommendations contained in the reports.[57]

V. CONCLUSION

As this paper indicates, local governments can expect closer scrutiny of the processes and policies they use to meet their obligations under FIPPA. Although a new commissioner is expected to be appointed sometime next year, local governments should not assume the OIPC's expectations will change. As this paper shows, the OIPC's decisions and reports this year have a consistent message: you must have a plan in place to ensure all staff know how to fulfill your obligations under FIPPA. Whether it is properly documenting each step taken to locate responsive records, or ensuring the proper information is publicly disclosed in a timely matter, clear policies will help ensure all staff have the knowledge and tools they need to help meet the local government's obligations under FIPPA. The bottom line is that local governments should take steps now to implement policies and procedures to ensure they are ready in case the OIPC comes calling. Otherwise, local governments may be making 911 calls to their lawyers

[56] Order F16-43 at para 14.
[57] Order F16-43 at para 26.

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