

# Legal Update

## Regional District Chairs (CEOs) and CAOs Forum

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Rosie Jacobs, Associate Lawyer

# Part I: General Legal Update

# 667895 BC Ltd. v Delta (District), BCCA 2018

- Challenge to road closure bylaw
- **Chambers Judge:** set aside for inadequate notice
- **Issue on Appeal:** right to oral hearing?
- **CC:** “...council must ... provide an opportunity for persons who consider they are affected by the bylaw to make representations to council.”
- No right to public hearing

# Kelowna (City) v Khurana, BCSC 2018

- Amendment to Zoning Bylaw for agri-tourist accommodation
- Notice stated “housekeeping amendments”
- Notice insufficient because did not reasonably notify citizens of purpose of the bylaw

# Wu v Vancouver (City), BCSC 2017

- Duty to make decisions on development permits in a reasonable time
- Found City negligent for failing to process application within a reasonable time
- Based on own administrative timelines
- City has filed an appeal

# Canadian Centre for Bio-Ethical Reform v South Coast BC Transportation Authority, BCSC 2017

- Freedom of Expression
- Pro-life advertisement on outside of buses
- Limit reasonable and justified under Charter
  - Proposed location could psychologically harm children
  - Choice to submit revised advertisement
  - Proposed content of message could psychologically harm women

# Part II: Privacy & FOI Update

# Personal Privacy – Basic Concepts

- FIPPA regulates the collection, use and disclosure of personal information
- Requires direct collection, notice of collection and purpose, use and disclosure for original purpose, and accountability for these things
- Requires public bodies to implement “reasonable” security measures to protect personal information from unauthorized use, disclosure or destruction



# Use of Video Surveillance

- *Public Comment* (Feb. 2018) on use of video surveillance by local governments
  - Key question: whether less privacy-invasive options attempted
  - OIPC Position: little evidence surveillance addresses public safety issues
- *Report P16-01* on use of video surveillance by private clinic

# Use of Video Surveillance

- Updated “Guide to Using Overt Video Surveillance” (Oct. 2017)
  - Have a privacy policy re rationale and purpose; when and how monitored or recorded; use and disclosure of personal information; retention and disposal of records; complaint process
  - Limit active use; avoid unintended subjects/areas
  - Consider how provide access to applicants
  - Adequate security arrangement and notice of use
  - Should exhaust other options first and limit use

# Custody or Control – Basic Concept

- 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...

# Custody vs. Control

- **“Custody”**: actual physical possession and responsibility for care
  - Emails stored on internal servers
- **“Control”**: created or acquired by for the public body as part of its mandate and functions
  - Emails related to local government business on personal email account

# Control

- Control issue arises where another person possesses the record (including an employee, elected official or contractor)
- Factors:
  - who created the record in the first place?
  - Does the record relate to your business or functions?
  - Can you control use or further disclosure of the record?

# Control

- **Key Factor:** right to obtain the record?
- **Leading case:** *National Defence*, SCC 2011
- Issues: were ministerial calendars located in ministerial offices in the “control” of departments?
- SCC test has two parts
- First, does the record relate to a departmental matter?
- If it does, could the department reasonably be expected to obtain a copy?

# Control – Elected Official Records

- *City of Toronto (Re)*, Order MO-3471
- Request for records of councillor's staff relating to councillor's twitter account
- Local Governments do not have custody or control of personal or political records of councillor's office relating to councillor's activities as an elected representative

# Control – Recent BC Order

- *British Columbia Lottery Corporation (Re)*, Order F17-20
- Request for CEO's emails with former director of BCLC
- Overall they were created in the course of the CEO's duties as CEO
- The dual nature of the relationship did not mean BCLC not in custody or control



# Custody or Control – Practice Points

- Develop clear policies regarding personal use of work email accounts (or personal email account for district-related business)
- Have a plan to handle requests for political records of elected officials
- Have a plan to obtain district-related records not in possession of the regional district

# Settlement Privilege

- *Richmond (City) v Campbell*, BCSC 2017
- Settlement privilege, seen as important to the legal system, was held to be a free-standing exemption, though not incorporated under SCP or any other FIPPA exemption in BC

# Proactive Disclosure

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

...

(b) the disclosure of which is, for any other reason, clearly in the public interest.

# Proactive Disclosure – Report F16-02

- 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” (26)

# Proactive Disclosure – Report F16-02

- Two-Step Approach:
- 1. Is the subject matter or circumstances surrounding the information justify disclosure?
  - Widespread debate?
  - Systemic problem?
  - Contribute to public education, public information, facilitate public debate?
  - Hold public body accountable for actions?

# Proactive Disclosure – Report F16-02

- 2. Does information relate to “issue of objectively material, even significant, public importance?”
  - Threshold question
  - Not static
  - Consider competing public interests, arguments for or against disclosure

# Proactive Disclosure – Application in Report F16-02

- Test results had to be disclosed in the public interest
- **Disclosure Justified:** Widespread debate, Verify actions taken by Ministry of Environment
- **Significant public importance:** Harm to public serious and ongoing

# Proactive Disclosure – Recent Decisions

- *City of White Rock (Re)*, Order F17-17: Request for records related to CAO's statement about municipal water supply
  - Do not have to disclose all considerations that influence decision-making
  - Only information that contributed in substantive way to facilitate expression of public opinion and making political decisions



# Proactive Disclosure – Recent Decisions

- *City of Vancouver (Re)*, Order F17-41: Request for financial statements of EasyPark
  - s. 25 only applies to clearest and most serious situations
  - May apply to other records even if excluded from the Act under s. 3(1)
  - Applies only to the information, not the record

# Proactive Disclosure – Practice Points

- New BC test still sets a “high threshold” and requires a “serious situation” (IR F2016-02)
- Test is forward-looking, not retrospective, but if a past matter may create a future risk, disclosure may still be required

# Section 12(3)(b) – Closed Meetings

- May withhold information that would disclose deliberations of closed meeting
- *Town of Newmarket (Re)*, Order MO-3462
- Draft Agreements and related emails could be withheld
- Minutes demonstrate terms of draft agreements were deliberated at closed meeting
- disclosure of draft agreements, and related emails, would disclose those deliberations

# Workplace Investigations

- *City of Vancouver (Re)*, Order F18-03
- Section 13 (Advice & Rec.): emails between City managers and HR consultants
- Section 22 (Personal Privacy):
  - Third party names, witness statements generally protected
  - Factors: if information supplied in confidence, applicant's knowledge of information

# Contact Information

**Rosie Jacobs**

**Email:** [jacobs@younganderson.ca](mailto:jacobs@younganderson.ca)

**Tel:** (604) 689 7400