Office of the Information & Privacy Commissioner for British Columbia

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Order F16-17

CITY OF VANCOUVER

Celia Francis
Adjudicator

March 31, 2016

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Summary: Two journalists requested access to the final agreement between the City of Vancouver and Aquilini Investment Group regarding the sale of units in the Olympic Village. The City proposed to disclose most of the agreements. The third parties, Aquilini and Millennium Group, objected to disclosure of much of the information on the grounds that it could reasonably be expected to harm their business interests under s. 21(1) or third-party personal privacy under s. 22(1). The adjudicator found that s. 22(1) applied to a small amount of information and that s. 21(1) did not apply at all. The adjudicator ordered the City to disclose the agreement, except for some personal information of tenants of the Village.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 21(1)(a)(ii), 21(1)(b), 21(1)(c)(i), (ii) & (iii), 22(1), 22(2)(a), (f), (h), 22(3)(f).

Authorities Considered: B.C.: Order F15-64, 2015 BCIPC 70 (CanLII); Order F14-49, 2014 BCIPC 53 (CanLII); Order 03-02, 2003 CanLII 49166 (BC IPC); Order 03-15, 2003 CanLII 49185 (BC IPC); Order 01 39, 2001 CanLII 21593 (BC IPC); Order 01-36, 2001 CanLII 21590 (BC IPC); Order F08-03, 2008 CanLII 13321 (BC IPC); Order 03-15, 2003 CanLII 49185 (BC IPC); Order 00-22, 2000 CanLII 14389 (BC IPC); Order F05-05, 2005 CanLII 14303 (BC IPC); Order F13-06, 2013 BCIPC 6 (CanLII); Order F13-07, 2013 BCIPC 8 (CanLII); Order F15-53, 2015 BCIPC 56 (CanLII); Order 04-06, 2004 CanLII 34260 (BC IPC); Order 01-39, 2001 CanLII 21593 (BC IPC); Order 01-36, 2001 CanLII 21590 (BC IPC); Order F13-22, 2014 BCIPC 31 (CanLII); Order F14-58, 2014 BCIPC 62 (CanLII); Order 03-05, 2003 CanLII 49169 (CanLII); Order 00-10, 2000 CanLII 11042 (BC IPC); Order F14-04, 2014 BCIPC 31 (CanLII); Order F15-04, 2015 BCIPC 4 (CanLII); Order 02-50, 2002 CanLII 42486 (BC IPC); Order 01-20, 2001 CanLII 21574

(BC IPC); Order F05-05, 2005 CanLII 14303 (BC IPC); Order F15-03, 2015 BCIPC 3 (CanLII).

Cases Considered: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3.

INTRODUCTION

[1] In spring 2014, two journalists made separate requests under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to the City of Vancouver ("City") for access to the final agreement between the City and Aquilini Investment Group ("Aquilini") regarding the sale of units in the Olympic Village.

[2] The City gave notice of the requests under s. 23 of FIPPA to the third parties, Aquilini and Millennium Group of Companies ("Millennium"), and requested their views on disclosure of the agreement.[1] Millennium and Aquilini objected to the disclosure of most of the records on the grounds that disclosure could harm their business interests under s. 21(1) of FIPPA.

[3] After considering the third parties' objections, the City informed the third parties and the journalists that it had decided to disclose the records, with minor severing under ss. 15(1) (harm to law enforcement), 17(1) (harm to financial interests), 21(1) and 22(1) (harm to personal privacy). The third parties requested reviews by the Office of the Information and Privacy Commissioner ("OIPC") of the City's decisions not to apply s. 21(1) in both requests.

[4] Mediation by the OIPC did not resolve the requests for review and the matters proceeded to inquiry. The OIPC received submissions from the journalists, the City and the third parties.

[5] Although the inquiries proceeded separately, the records, issues and public body are the same in both cases. In addition, the parties made the same submissions in each inquiry. I have therefore dealt with the two inquiries in this order.

[6] The City initially decided to withhold a small amount of information under ss. 15(1), 17(1), 21(1) and 22(1) of FIPPA. In its initial submission to these inquiries, however, the City said it had decided to withdraw ss. 15(1), 17(1) and 21(1) and would rely only on s. 22(1).

[1] It appears from the material before me that the City also notified Ernst & Young ("EY"), receivers for Millennium, but that EY did not respond.

ISSUES

[7] The issues before me are whether the City is required by ss. 21(1) and 22(1) to withhold some of the information in the records in dispute. Under ss. 57(2) and 57(3)(a), the journalists have the burden of showing that disclosure of third-party personal information would not be an unreasonable invasion of third-party privacy. Under s. 57(3)(b), the third parties have the burden of proving that the journalists have no right of access to the information under s. 21(1).

DISCUSSION

Preliminary matter – late raising of additional FIPPA sections

[8] **Section 25** — The journalists argued in their joint inquiry submission that s. 25(1)(b) of FIPPA applies to the records for these reasons:

> The challenges faced by city hall, and visited upon taxpayers regarding the rollercoaster history of the Olympic Village mean that disclosure is "clearly in the public interest". The public has a right to know the totality of this asset's disposal. It placed a strain on City finances for several years and a large, yet not quantified, amount of staff time was diverted from other programs in order to shepherd this troubled asset.[2]

[9] The City noted that s. 25(1)(b) was not listed as an issue in the Notice of Inquiry for either case and argued that the journalists should not be permitted to raise it at this late date. The City added that, in any case, s. 25(1)(b) does not apply in this case.[3]

[10] Section 25(1)(b) requires public bodies to disclose information when it is clearly in the public interest to do so. There is no need to establish temporal urgency in order for s. 25(1)(b) to apply.[4] The journalists did not raise s. 25 during mediation of these third-party reviews and it was not listed as an issue in the Fact Reports and Notices of Inquiry that the OIPC issued to the parties at the start of the inquiries. The journalists did not seek permission to add this issue into the inquiry. They also did not provide any explanation as to why they did not raise it before this late stage nor why they should be permitted to do so now. Therefore, I will not consider the journalists' submission on s. 25 any further.[5]

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[2] Journalists' submission, paras. 7-11.
[3] City's reply submission, paras. 4-5.
[4] See Order F15-64, 2015 BCIPC 70, at para. 13.
[5] See Order F14-49, 2014 BCIPC 53 (CanLII), at para. 6, for a similar finding on the late raising of s. 25.

[11] **Section 35** — The journalists also raised s. 35 of FIPPA, arguing that journalists who report in the public interest have a duty to conduct research.[6] They did not elaborate on this submission. The City disputed this argument as well, for reasons similar to those it gave on s. 25(1)(b).[7]

[12] Section 35 of FIPPA permits a public body to disclose personal information in its custody or under its control for a research purpose, under specified conditions. As the City noted, there is no indication that the journalists raised this provision during the review processes for these cases. Section 35 is also not listed in the Notices of Inquiry and Fact Reports for these matters. I also note that s. 35 applies only to personal information and that the records contain very little of this type of information. As above, the journalists did not seek permission to add this issue to the inquiries. They also did not provide any explanation as to why they did not raise it before this late stage nor why they should be permitted to do so now. Therefore, I will not consider the journalists' argument on s. 35 further.

[13] **Section 21(2)** — The table of records attached to the third parties' submission lists s. 21(2) next to some entries. The corresponding highlighted portions of the records they provided are similarly annotated.

[14] Section 21(2) states that a public body must withhold information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax. This section was not listed in the Notices of Inquiry or Fact Reports for these inquiries. The third parties also did not seek permission to add this issue into the inquiry. They also did not provide any explanation as to why they did not raise it before this late stage nor why they should be permitted to do so now. Moreover, the third parties, who have the burden of proof in this matter, did not provide any argument or evidence about s. 21(2) in their submission. While the information in question does refer to tax matters, it is not obvious on its face that it falls under s. 21(2). I will therefore not consider this issue here.

Background

[15] The Olympic Village is a mixed-use development in the southeast False Creek area of Vancouver. It includes residential units, greenspace, public amenities and commercial space. The Village was constructed to house athletes during the 2010 Vancouver Winter Olympic Games. SEFC Properties Ltd ("SEFC"),[8] a company associated with Millennium, arranged financing for the construction of the Olympic Village through a Fortress Investment Group ("Fortress") consortium. In January 2009, the BC Legislature passed Bill 47

[6] Journalists' submission, para. 12.
[7] City's reply submission, paras. 6-7.
[8] SEFC stands for Southeast False Creek.

amending the *Vancouver Charter* to permit the City to borrow money to finance the development. In February 2009, the City purchased the loan from Fortress. In April 2014, Aquilini purchased SEFC and the remaining (unsold) units in the Village from the City.[9]

Records in dispute

[16] The records in dispute are specified portions of the agreements, assignments and other documents associated with the sale of Olympic Village units to Aquilini. The third parties argued that only one record is actually responsive to the journalists' requests and that the rest of the records relate to transactions between "private entities and individuals related to Millennium and Aquilini.[10] The City did not comment on this issue and there is no indication that the parties formally disagreed on the scope of the request. I have therefore considered all of the records before me. The City said that, because the third parties objected to the disclosure of "the overwhelming majority of the records", the journalists have not yet received any records.

Harm to third-party business interests

[17] The third parties argued that some information and records should be withheld under s. 21(1). The City takes the position that s. 21 does not apply[11] but did not provide a submission on this issue.

[18] The relevant parts of s. 21(1) of FIPPA read as follows:

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

[9] Third parties' initial submission, pp. 1-3, paras. 1-11.
[10] Third parties' initial submission, pp. 4-5, paras. 1-8.
[11] City's initial submissions, para. 6.

> (iii) result in undue financial loss or gain to any person or organization, or…

[19] Previous orders and court decisions have established the principles for determining whether s. 21(1) applies.[12] All three parts of the s. 21(1) test must be met in order for the information in dispute to be properly withheld.

[20] As the third parties have the burden of proof regarding s. 21(1), they must first demonstrate that disclosing the information in issue would reveal commercial, financial, labour relations, scientific or technical information of, or about, a third party. Next, they must demonstrate that the information was supplied to the public body, implicitly or explicitly, in confidence. Finally, they must demonstrate that disclosure of the information could reasonably be expected to cause one of the harms in s. 21(1)(c).

[21] In assessing the parties' arguments on s. 21(1), I have taken the approach set out in previous orders and court decisions, as discussed below, bearing in mind that the burden of proof is on the third parties.

Is the information "financial or commercial information"?

[22] FIPPA does not define "commercial" or "financial information". However, previous orders have said that "commercial information" relates to commerce, or the buying, selling or exchange of goods and services, and that the information does not need to be proprietary in nature or have an actual or potential independent market or monetary value.[13] Previous orders have also held that hourly rates, global contract amounts, breakdowns of these figures, prices, expenses and other fees payable under contract are both "commercial" and "financial" information of or about third parties.[14]

[23] The third parties argued that the information and records of concern to them "relate to commercial arrangements between private commercial parties". They said the records and information "contain significant details of the corporate structures, private obligations, holdings, and financial information of the Third Parties", such as "purchase and assignment agreements relating to private

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[12] See, for example, Order 03-02, 2003 CanLII 49166 (BC IPC), Order 03-15**,** 2003 CanLII 49185 (BC IPC), and Order 01-39, 2001 CanLII 21593 (BC IPC).

[13] See Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17, and Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 62.

[14] For example, Order 03-15, 2003 CanLII 49185 (BC IPC) at para. 41, Order 00-22, 2000 CanLII 14389 (BC IPC) at p. 4, Order F05-05, 2005 CanLII 14303 (BC IPC) at para. 46, Order F13-06, 2013 BCIPC 6 (CanLII) at para. 16, Order F13-07, 2013 BCIPC 8 (CanLII) at para. 36, Order F15-53, 2015 BCIPC 56 (CanLII), at para. 11. In Order 04-06, 2004 CanLII 34260 (BC IPC), at para. 36, former Commissioner Loukidelis found that such information was also "about" the public body.

loans and obligations".[15] The journalists agree that the contracts contain commercial or financial information of a third party.[16]

[24] The records and information in dispute contain the terms and conditions under which the parties to the various agreements would do certain things, including their obligations and any financial considerations or payments that formed part of the agreements. I am satisfied that the information in dispute is financial and commercial information, of or about, the third parties, as past orders have interpreted these terms. I find that s. 21(1)(a)(ii) applies to the information in dispute.

Was the information "supplied in confidence"?

[25] The next step is to determine whether the information in issue was "supplied in confidence". The information must be both "supplied" and supplied "in confidence".[17] For the reasons that follow, it was unnecessary in this case to decide if the information was "supplied" for the purposes of s. 21(1)(b). That is because, even if it had been, the supply was not "in confidence."

[26] A number of orders have discussed the test for determining if third-party information was supplied, implicitly or explicitly, "in confidence" under s. 21(1)(b), for example, Order 01-36:[18]

> [24] An easy example of a confidential supply of information is where a business supplies sensitive confidential financial data to a public body on the public body's express agreement or promise that the information is received in confidence and will be kept confidential. A contrasting example is where a public body tells a business that information supplied to the public body will not be received or treated as confidential. The business cannot supply the information and later claim that it was supplied in confidence within the meaning of s. 21(1)(b). The supplier cannot purport to override the public body's express rejection of confidentiality.
> …
>
> [26] The cases in which confidentiality of supply is alleged to be implicit are more difficult. This is because there is, in such instances, no express promise of, or agreement to, confidentiality or any explicit rejection of confidentiality. All of the circumstances must be considered in such cases in determining if there was a reasonable expectation of confidentiality. The circumstances to be considered include whether the information was:

[15] Third parties' initial submission, paras. 22-29.
[16] Journalists' reply submission, paras. 41, 55.
[17] See Order 01-39, 2001 CanLII 21593 (BC IPC), at para. 26, for example. See also Order F14-28, 2014 BCIPC 31 (CanLII), at paras. 17-18.
[18] Order 01-36, 2001 CanLII 21590 (BC IPC).

1. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
2. treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the public body;
3. not otherwise disclosed or available from sources to which the public has access;
4. prepared for a purpose which would not entail disclosure.

[27] The third parties argued that all of the records were supplied in confidence to the escrow agent, for exchange among the parties, to facilitate the transaction in question.[19] The third parties also said that the records contain "various confidentiality and non-disclosure provisions" regarding the "sensitive business and commercial information" in the records.[20] The journalists disputed the third parties' arguments on this point.[21]

[28] The third parties did not point me to specific provisions in the records in support of their argument on confidentiality. While I identified a few provisions dealing with confidentiality, they concern or govern the actions of the third parties under the terms of the completed agreements. They do not relate to whether the information contained in those completed agreements was supplied in confidence.[22] Further, I could identify no provisions on confidentiality regarding the exchange of documents among the parties to the escrow agreement.[23] Moreover, in the principal agreement between the City and Aquilini, there are certain acknowledgements that Aquilini made[24] which, in my view, undermine the third parties' position on confidentiality.

[29] The third parties said the records were provided to the escrow agent in confidence, "with reasonable assurances that such documents would remain confidential and exempt from disclosure".[25] Beyond what I have set out above, however, they provided no support for their position, for example, affidavit evidence from a knowledgeable employee. The City made no submission on this point.

[30] There is no basis on which I may conclude that the information in issue was supplied, implicitly or explicitly, "in confidence" to the City. As noted above,

[19] I understand that this is how the City came into possession of the records, *i.e.*, both the agreements to which the City was a party and the agreements among the other parties.
[20] Third parties' initial submission, paras. 23-24.
[21] Journalists' reply submission, paras. 56-58.
[22] For example, para. 3, record at Tab 41.
[23] At Tab 3 of the records.
[24] Paras. 12.1, 12.2 and 12.21 of agreement in Tab 2.
[25] Third parties' initial submission, para. 34.

the information in dispute must meet both parts of the s. 21(1)(b) test. I find that s. 21(1)(b) does not apply to the information and records in dispute.

Reasonable expectation of harm

[31] I found above that s. 21(1)(b) does not apply to the information in issue. Since this means that s. 21(1) does not apply, technically I need take the matter no further. However, for completeness, I will deal with the third parties' arguments on the s. 21(1)(c) harm issue.

Standard of proof for s. 21(1)(c)

[32] Numerous previous orders have set out the standard of proof for showing a reasonable expectation of harm to a third party's interests for the purposes of s. 21(1)(c), for example, Order 01-36.[26] More recently, the Supreme Court of Canada confirmed the applicable standard of proof for harms-based exceptions:

> [54] 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: paras. 197 and 199. 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".[27]

[33] Past orders have said that s. 21(1)(c)(ii) does not apply where there is a financial incentive for providing the information.[28] Previous orders have said that the ordinary meaning of "undue" financial loss or gain under s. 21(1)(c)(iii) includes excessive, disproportionate, unwarranted, inappropriate, unfair or improper, having regard for the circumstances of each case. For example, if disclosure would give a competitor an advantage – usually by acquiring competitively valuable information – effectively for nothing, the gain to a competitor will be "undue".[29]

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[26] Order 01-36, 2001 CanLII 21590 (BC IPC), at paras. 38-39.

[27] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, citing *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3, at para. 94. See also Order F13-22, 2014 BCIPC 31 (CanLII), at para. 13, and Order F14-58, 2014 BCIPC 62 (CanLII), at para. 40, on this point.

[28] See, for example, Order 03-05, 2003 CanLII 49169 (CanLII); Order F13-22, 2013 BCIPC 29 (CanLII).

[29] See, for example, Order 00-10, 2000 CanLII 11042 (BC IPC) at pp. 17-19. See also Order F14-04, 2014 BCIPC 31 (CanLII) at paras. 60-63, for a discussion of undue financial loss or gain in the context of a request for a bid proposal.

Harm under s. 21(1)(c)

[34] The third parties argued that disclosure of the information and records in dispute would result in harm to their competitive positions and interfere significantly with their future negotiating positions with other third parties (*e.g.*, potential purchasers of Village assets) and creditors. They also argued that disclosure of the records would result in significant prejudice to their ability to amicably resolve potential legal claims and "unreasonable hardship and financial loss" to them. They added that, if they had known the records could be disclosed, they would not have agreed to the exchange of documents among the parties, as provided for in the escrow agreement. They said disclosure of the records in dispute will likely result in similar information no longer being supplied to the City in future transactions.[30]

[35] The journalists argued that the Olympic Village is a "unique asset" and the City will not be building or selling another such "luxury property". They said that "a large quantity of information" is already available on the City's website and that of the receiver, Ernst & Young. They argued there is no evidence that Millennium has been "irreparably harmed" by these disclosures, that it "continues to exist and prosper" and that it has successfully completed developments elsewhere in the City.[31]

[36] Beyond what I have set out above, the third parties did not provide details in support of their position on harm. They did not, for example, explain how disclosure of the information in issue could harm their competitive position. They also did not explain the nature of any current or future negotiations they may be engaged in, nor how disclosure of the information could harm those negotiations. They also did not show how disclosure could prejudice the settlement of any legal claims they are concerned with. They also did not explain what financial losses they might suffer as a result of disclosure, still less how any such losses would be "undue".

[37] It seems trite to say that market conditions and other circumstances will be different in any future negotiations the third parties engage in. I am also mindful of the journalists' arguments on the unique nature of the Olympic Village development. It is precisely because relevant factors would likely be different in future bidding processes that previous orders have found that harm could not be reasonably expected to occur due to disclosure of contracts and agreements.[32] Indeed, the third parties admitted as much when they said that the City's possession of the records arose "as a result of extraordinary circumstances

[30] Third parties' initial submission, paras. 26-30, 31, 35.
[31] Journalists' reply submission, paras 38-41.
[32] See Order F14-58, 2014 BCIPC 62 (CanLII), at para. 46, and Order F15-04, 2015 BCIPC 4 (CanLII), at para. 33, where I made similar findings in response to such arguments.

whereby it was granted ordinarily *ultra vires* and prohibited commercial powers" to act as the lender in a "significant private real estate development".[33]

[38] I also do not accept the argument that the escrow agreement would have been structured differently, had the third parties known the records could be disclosed. Aquilini, at least, was aware of certain clauses in the principal agreement (those I mention above in my discussion of "confidentiality") and could have raised concerns about potential disclosure during the negotiation of the escrow agreement.

[39] The third parties argued that this case is similar to that in Order 04-08,[34] in which former Commissioner Loukidelis found that s. 21(1) applied to a report that a ministry-owned corporation had commissioned.[35] Order 04-08, which dealt with different circumstances, does not, in my view, assist the third parties. In that case, the Commissioner found that the contract for the report explicitly imposed confidentiality on the parties and there was evidence to conclude that the report was supplied in confidence to the Ministry. The Commissioner also had evidence supporting the claims of harm under s. 21(1)(c) and found that it applied. The same type of evidence was not provided here.

[40] The third parties' arguments on harm are little more than assertions and do not persuade me that any of the harms under s. 21(1)(c)(i), (ii) or (iii) could reasonably be expected to result from disclosure. A party resisting disclosure must provide "cogent, case specific evidence of harm" and "detailed and convincing evidence".[36] The third parties have provided no such evidence to support their submission. As previous orders have noted more than once, a contractor's resistance to disclosure does not amount to harm. It is necessary to show an obstruction to actual negotiations.[37] The third parties have not done so. In summary, they have not persuaded me that disclosure of the information in dispute could reasonably be expected to cause it harm under s. 21(1)(c). I find that s. 21(1)(c) does not apply here.

Conclusion on s. 21(1)

[41] I found above that the information in issue here is financial and commercial information under s. 21(1)(a)(ii). However, I also found that the information was not implicitly or explicitly supplied "in confidence" for the purposes of s. 21(1)(b) and that the third parties have not demonstrated that

[33] Third parties' initial submission, para. 34.
[34] 2004 CanLII 34262 (BC IPC).
[35] Third parties' initial submission, paras. 15-16.
[36] See Order 02-50, 2002 CanLII 42486 (BC IPC), at paras. 124-137, which discussed the standard of proof in this type of case and summarized leading decisions on the reasonable expectation of harm.
[37] See See Order 01-20, 2001 CanLII 21574 (BC IPC), at para. 112, and Order F05-05, 2005 CanLII 14303 (BC IPC), at para. 96, citing para. 61 of Order 04-06, 2004 CanLII 4260 (BC IPC).

harm under s. 21(1)(c) could reasonably be expected to result from disclosure of the information. The third parties have not met their burden of proof regarding s. 21(1). I find that s. 21(1) does not apply to the information in dispute in this case.

Harm to third-party privacy

[42] The City argued that s. 22(1) applies to a small amount of information.[38] The third parties agreed and argued that it applies to other information as well.[39]

Approach to applying s. 22(1)

[43] The approach to applying s. 22(1) of FIPPA has long been established. See, for example, Order F15-03:

> Numerous orders have considered the approach to s. 22 of FIPPA, which states that a "public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy." This section only applies to "personal information" as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.[40]

[44] I have taken the same approach in considering the s. 22 issues here.

Is the information "personal information"?

[45] FIPPA defines "personal information" as recorded information about an identifiable individual, other than contact information.[41] Some of the information in issue consists of the names of individuals who rent units at the Olympic Village development, the unit numbers they rent, the terms of their leases and the amounts of their rent and any security deposits.[42] This information relates to identifiable individuals and I find that it is "personal information".

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[38] Highlighted information in Schedules C and D, record at Tab 54.
[39] Information in records at Tabs 2, 3, 29, 37-41, 43, 44, 54.
[40] 2015 BCIPC 3 (CanLII), at para. 58.
[41] Contact information is defined as **"**information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual." See Schedule 1 of FIPPA for this definition.
[42] Both the City and the third parties want this information withheld.

[46] The third parties raised concerns about other information which they want withheld under s. 22(1).[43] It appears the third parties consider this information to be the financial information of the two brothers who were principals of SEFC and Millennium,[44] although they did not explain why they think this. The information concerns strata fees related to various properties within the Olympic Village development. No identifiable individuals are associated with this information. I find that it is not "personal information".

[47] The third parties described the remaining information of concern as being related to the private financial and commercial interests of the two brothers mentioned above, including "consideration" they received and other matters of importance to the brothers.[45] The records in issue consist of agreements, releases, acknowledgements and assignments among the parties to the Olympic Village transaction, or portions of these records. The third parties appear to believe that all of this information is the brothers' personal information. However, most of the information in issue concerns agreements among the corporate entities that were parties to various aspects of the transaction. In a few cases, the two brothers are mentioned by name as parties, along with associated payments to them. Where the information in issue relates to the brothers as identifiable individuals, I find that it is "personal information".

Does section 22(4) apply?

[48] Section 22(4) of FIPPA sets out a number of situations in which disclosure of personal information is not an unreasonable invasion of third-party privacy. The City argued that this section does not apply.[46] The third parties did not address this issue. The journalists cited a number of provisions in s. 22(4) but did not explain how they believe these sections apply.[47] There is no indication in the material before me that s. 22(4) has any relevance in this case. I find that it does not apply.

*Presumed unreasonable invasion of third-party privac*y – s. 22(3)

[49] The next step is to consider whether disclosure of the information in issue is presumed to be an unreasonable invasion of a third party's personal privacy. Both the City and the third parties argued that s. 22(3)(f) applies to the personal information in issue. The journalists did not address this issue. Section 22(3)(f) reads as follows:

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[43] Highlighted information in Schedules E-J, record at Tab 54. The City proposes to disclose this information.
[44] Para. 32, p. 12, third parties' initial submission.
[45] Information highlighted in records at Tabs 2, 3, 29, 37-41, 43, 44. The City proposes to disclose this information.
[46] City's initial submission, para. 22.
[47] Journalists' initial submission, para. 67.

> 22(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
> …
> (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness,
> …

[50] Some of the information in issue concerns rents and deposits that Village tenants paid and their lease terms. Other information concerns the brothers' agreement to various terms and payments made to them as a result of the Olympic Village transaction. I am satisfied that these types of information relate to the third parties' finances, financial history and activities. I find that it falls under s. 22(3)(f). Its disclosure is therefore presumed to be an unreasonable invasion of third-party privacy.

Relevant circumstances – s. 22(2)

[51] The presumption that disclosure of the withheld information would be an unreasonable invasion of personal privacy can be rebutted. Public bodies must consider all relevant circumstances in determining whether disclosure of personal information is an unreasonable invasion of privacy. The City and the journalists did not explicitly refer to provisions in s. 22(2). The third parties argued that the information was supplied in confidence and that its disclosure "may unfairly damage the reputation" of the two brothers. In my view, public scrutiny of the public body is also relevant in this case. The relevant provisions read as follows:

> 22(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
> …
> (f) the personal information has been supplied in confidence,
> …
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, …

[52] Public scrutiny - s. 22(2)(a) — The third parties argued that the brothers "have not by their actions forfeited their rights as individuals to some reasonable measure of privacy in relation to these matters".[48] The journalists countered by

[48] Third parties' initial submission, para. 33.

arguing that Millennium became involved with the City in building a public asset and that the brothers chose to "bid for land in a public process and to build a showcase venue for the 2010 Winter Olympics". The journalists argued that the brothers received certain benefits, such as tickets to events and the use of the Olympic logo on their marketing material. The journalists also referred to receivership proceedings involving Millennium and a 2009 KPMG report which raised "serious concerns" about Millennium's ability to complete the development. In the journalists' view, the public has a right to know the "intimate details" of this project, regardless of its success or failure.[49]

[53] I agree with the journalists that public scrutiny of this project is desirable. By the third parties' own admission, the records in issue arose out of "extraordinary circumstances".[50] The parties' submissions also indicate that the Olympic Village development experienced considerable financial difficulties and, among other things, led to legislative amendments to allow the City to take over financing of the development.

[54] Considerable information on the Olympic Village development may well already be publicly available. However, disclosure of information on the terms of the brothers' participation in the Olympic Village transaction, including the payments they received, would, in my view, add meaningfully to the public's understanding of the outcome of this development and the City's role in it. I find that s. 22(2)(a) applies to the brothers' personal information in this case.

[55] I do not consider that the same considerations apply to the information about the tenants of the rental units. The journalists did not specifically address this information. There is also no indication in the material before me that disclosure of the tenants' names, lease dates, rents, deposits and unit numbers would add to the public's understanding of the Olympic Village transaction. I find that s. 22(2)(a) does not apply to this information.[51]

[56] Supplied in confidence – s. 22(2)(f) — The third parties did not elaborate on their argument that the personal information in issue was supplied in confidence. However, I take them to rely on the arguments they gave regarding s. 21(1)(b). For reasons I gave above in my discussion of that issue, I find that the personal information was not supplied in confidence.

[57] Unfair damage to reputation - s. 22(2)(h) — The third parties said that the Olympic Village transaction represents "a successful and final resolution to an extremely difficult chapter of [the brothers'] professional lives" and that their "desire for finality and the modest protection of their legacy and reputation is

[49] Journalists' submission, paras. 23-33.
[50] Third parties' initial submission, para. 34.
[51] Highlighted information in Schedules C and D, record at Tab 54.

legitimate".[52] The third parties did not otherwise explain how disclosure of the information in issue might cause unfair damage to the brothers' reputation.

[58] The third parties admitted that there was, and continues to be, "significant media interest" in the Olympic Village transaction.[53] The journalists' submission also indicates that much information about the transaction is already publicly available,[54] which the third parties do not dispute. The information in issue is straightforward and objective. It deals primarily with corporate entities and only occasionally refers to the two brothers by name. There is no qualitative assessment of the brothers or their actions. In such a case, I do not consider that disclosure of the information might damage the brothers' reputation, unfairly or otherwise.

Is the presumption rebutted?

[59] I found above that s. 22(3)(f) applies to the personal information in this case and that ss. 22(2)(f) and (h) do not apply. I also found that s. 22(2)(a) does not apply to information about the tenants.

[60] However, I found that s. 22(2)(a) does apply to the brothers' personal information. In my view, the relevant circumstance in s. 22(2)(a), which favours disclosure, outweighs the presumed unreasonable invasion of the brothers' privacy in s. 22(3)(f).

Conclusion on s. 22(1)

[61] For reasons given above, I find that the journalists have not met their burden of proof respecting the tenants' personal information. I find that s. 22(1) applies to this information.

[62] I also find, for reasons given above, that the journalists have met their burden of proof respecting the personal information of the brothers. I find that s. 22(1) does not apply to it.

[63] I noted above that the third parties appear to consider all of the information in dispute to be the brothers' personal information. Even if I agreed with them on this point (which I do not), I would find that (except for the tenants' information) s. 22(2)(a) outweighs any presumed invasion of their privacy on disclosure and that s. 22(1) does not apply to the withheld information.

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[52] Third parties' initial submission, para. 33.
[53] Third parties' initial submission, p. 4, para. 3.
[54] Journalists' submission, paras. 25-32.

CONCLUSION

[64] For reasons given above, I make the following orders:

1. Under s. 58(2)(c), I require the City of Vancouver to withhold, under s. 22(1), the information that the City highlighted in Schedules C and D of the record at Tab 54.

2. Under s. 58(2)(a), subject to item 1 above, I require the City of Vancouver to disclose the remaining information in dispute to the journalists. I require the City to give the journalists access to this information by May 12, 2016. The City must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the journalists, together with a copy of the records.

March 31, 2016

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File Nos.: F14-59050
F14-59052
F14-59112
F14-59120