



OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F20-47

BRITISH COLUMBIA HOUSING MANAGEMENT COMMISSION

Laylí Antinuk
Adjudicator

October 29, 2020

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Summary: The applicant requested information related to the Brenhill land swap from BC Housing. BC Housing provided responsive records with some information withheld under ss. 13 (advice and recommendations), 14 (solicitor client privilege), 17 (harm to financial or economic interests), 21 (harm to third party business interests) and 22 (unreasonable invasion of third party privacy). A third party disputed BC Housing's decision about s. 21, asserting that BC Housing must withhold more information under it. The applicant disputed BC Housing's decision regarding all the exceptions applied and argued that BC Housing should release all the information under s. 25 (public interest disclosure). The adjudicator found that ss. 13, 14 and 22 applied to some, but not all, of the information withheld under those sections. However, the adjudicator was not satisfied that ss. 17, 21 or 25 applied to any of the information in dispute. The adjudicator ordered BC Housing to disclose the information that she found no FIPPA exceptions applied to.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13, 14, 17(1), 17(1)(d), 17(1)(e), 21(1)(a), 21(1)(b), 21(1)(c)(i), 21(1)(c)(iii), 22(1), 22(3)(f), and 25.

INTRODUCTION

[1] A journalist working for the Vancouver Sun asked the British Columbia Housing Management Commission (BC Housing) for information related to the Brenhill land swap. BC Housing responded by preparing two packages of responsive records, both of which had information withheld under ss. 13 (advice and recommendations), 14 (solicitor client privilege), 17 (harm to financial or economic interests), 21 (harm to third party business interests) and 22 (unreasonable invasion of third party privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). BC Housing released the first package to the applicant journalist, but has not released the second package yet because a third party, Brenhill Developments Ltd. (Brenhill), asserts that s. 21 applies to more

information in the second package than BC Housing decided to withhold under it. Brenhill did not dispute BC Housing's decision regarding the first package.

[2] Both the applicant and Brenhill requested that the Office of the Information and Privacy Commissioner (OIPC) review BC Housing's decisions. The applicant seeks a review of BC Housing's decision to withhold information under all cited exceptions and asserts that BC Housing should release all the requested information under s. 25 (public interest disclosure). Brenhill seeks a review of BC Housing's decision to disclose certain information in the second package instead of withholding it under s. 21.

[3] Mediation at the OIPC did not resolve the issues between the parties and the matter proceeded to inquiry. All parties provided inquiry submissions.

Preliminary matters

The Vancouver Sun's standing

[4] The Vancouver Sun made the journalist's submissions in this inquiry. In its reply submission, Brenhill appears to object to this, asserting that the Vancouver Sun is not a "person" within the meaning of FIPPA, so it cannot be an access applicant under FIPPA.¹

[5] As described in the notice of inquiry (notice) received by both parties, the OIPC investigator's fact report (fact report) sets out the issues for the inquiry and OIPC adjudicators will not generally consider issues that do not appear in the fact report. If a party wants to add a new inquiry issue, it must request and receive permission to do so.² The OIPC grants such permission in exceptional circumstances only. To allow otherwise would undermine the effectiveness of the mediation process which exists, in part, to assist the parties in identifying, defining and crystallizing the issues prior to inquiry.³

[6] The notice and the fact report do not identify the issue of whether the Vancouver Sun is an "applicant" as an inquiry issue.⁴ Brenhill did not request permission to add this new issue or identify any exceptional circumstances that would justify doing so at this late stage. In my view, there are no exceptional circumstances here.

¹ Brenhill's reply submission at paras. 4-17.

² Order F12-07, 2012 BCIPC 10 at para. 6; see Order F12-07, 2012 BCIPC 10 at para. 6; Order F10-37, 2010 BCIPC 55 at para. 10; Decision F07-03, 2007 CanLII 30393 (BC IPC) at paras. 6-11, and Decision F08-02, 2008 CanLII 1647 (BC IPC).

³ Order 15-15, 2015 BCIPC 16 at para. 10; Order F08-02, 2008 CanLII 1647 (BC IPC) at paras. 28-30.

⁴ The applicant raised objections in an email to the OIPC Registrar of Inquiries sent on April 29, 2020.

[7] Additionally, deciding whether the Vancouver Sun is a person or an applicant would be merely an academic exercise in this case. Brenhill does not dispute that the access request was made by a journalist. Brenhill does not argue that a journalist is not a “person” or an “applicant”. I have no concerns with the journalist’s employer providing his inquiry submissions. A party to an inquiry is entitled to be represented by counsel or an agent of their choice.⁵

Addition of section 13

[8] I also note that neither the notice nor the fact report identifies s. 13 as an inquiry issue. However, in reviewing the responsive records, I see that BC Housing withheld certain information under s. 13. Additionally, both BC Housing and the applicant made submissions about s. 13 and no one has objected to, or even questioned, its consideration as an inquiry issue. Furthermore, according to both BC Housing and the applicant’s submissions, s. 13 appears to have always been an issue between the parties. For example, both parties say that BC Housing released the first package to the applicant in October of 2017 with redactions under s. 13.⁶ Both parties also say that the second package contains redactions under s. 13.⁷ Given this, I have decided to consider s. 13 in this inquiry despite the fact that it is not listed in the notice or the fact report. I have no concerns about procedural fairness since the applicant and the public body both made submissions about s. 13.⁸

ISSUES

[9] This inquiry raises the following issues:

- Does s. 25 require BC Housing to disclose the information in dispute?
- Do ss. 13, 14 or 17 authorize BC Housing to withhold the information in dispute?
- Do ss. 21 or 22 require BC Housing to withhold the information in dispute?

[10] BC Housing bears the burden of proving that the applicant has no right to access the information it withheld under ss. 13, 14, 17 and 21.⁹ Brenhill, however, has the burden of proving that s. 21 applies to the information BC

⁵ Section 56(5). Whenever I refer to section numbers throughout this order, I am referring to a section of FIPPA.

⁶ Applicant’s submission at para. 6(a); BC Housing’s initial submission at paras. 5 and 8.

⁷ Applicant’s submission at para. 7; BC Housing’s initial submission at para. 9.

⁸ Brenhill did not make submissions about s. 13, but this raises no procedural fairness issues because Brenhill’s only interests in this inquiry relate to ss. 21 and 25.

⁹ Section 57(1).

Housing decided s. 21 did not apply to.¹⁰ BC Housing must also prove that the information it withheld under s. 22 is personal information.¹¹

[11] The applicant bears the burden of proving that disclosing any personal information at issue would not constitute an unreasonable invasion of third party personal privacy.¹²

[12] When it comes to s. 25, former Commissioner Loukidelis has said that applicants and public bodies both have an interest in providing evidence:

... where an applicant argues that s. 25(1) applies, it will be in the applicant's interest, as a practical matter, to provide whatever evidence the applicant can that s. 25(1) applies. While there is no statutory burden on the public body to establish that s. 25(1) does *not* apply, it is obliged to respond to the commissioner's inquiry into the issue and it also has a practical incentive to assist with the s. 25(1) determination to the extent it can.¹³

DISCUSSION

Background

[13] In 2012, Brenhill and the City of Vancouver (City) entered into discussions about a land swap arrangement (land swap).¹⁴ Brenhill proposed to trade its property at 1099 Richards Street (Brenhill lot), for a larger City-owned property at 508 Helmcken Street (City lot). At the time, the 127 Housing Society (Society) managed 87 housing units in a building (the old building) on the City lot with supports for a homeless and hard-to-house population. In exchange for the larger City lot and an increase in density, Brenhill agreed to replace the old building with a new 13 storey social housing complex (the new building) on the Brenhill lot.

[14] BC Housing provided a \$39 million loan (loan) to Brenhill to construct the new building as part of this affordable housing development project (project). When the new building and land exchange were completed, the City leased the new building to the Society. The Society manages the 162 rental units in the new building under an operating agreement with BC Housing.

¹⁰ Section 57(3)(b).

¹¹ Order 03-41, 2003 CanLII 49220 (BC IPC) at paras. 10-11. See also Order F19-38, 2019 BCIPC 43 at para. 143.

¹² Section 57(2).

¹³ Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 38. Emphasis in original.

¹⁴ The information summarized under the *Background* heading comes from p. 11 of the first package (BC Housing already disclosed this information to the applicant); BC Housing's initial submission at paras. 15-19; the BC Housing CEO's Affidavit at paras. 3-6; and Brenhill's initial submission at paras. 6-9.

Records

[15] As described above, BC Housing split the responsive records into two packages. The first package comprises 129 pages and consists primarily of internal BC Housing documents. It also contains some emails. The second package comprises 290 pages and consists primarily of emails and other correspondence. It also contains some internal BC Housing documents and a variety of invoices.

[16] BC Housing provided an unredacted copy of all the records for my review.

[17] I will begin with a discussion of s. 25.

PUBLIC INTEREST DISCLOSURE – SECTION 25

[18] Section 25 requires a public body to disclose information in certain circumstances without delay despite any other provision of FIPPA. This section overrides all FIPPA's discretionary and mandatory exceptions to disclosure.¹⁵ Previous orders have found that s. 25 sets a high threshold such that it applies in only the clearest and most serious situations.¹⁶ The relevant parts of s. 25 state:

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.

(2) Subsection (1) applies despite any other provision of this Act.

[19] The applicant argues that s. 25(1)(b) may apply here.¹⁷ Disclosure under s. 25(1)(b) requires that the information at issue be “of clear gravity and present significance to the public interest.”¹⁸ Previous orders have determined that the duty to disclose under s. 25(1)(b) “only exists in the clearest and most serious of situations where the disclosure is *clearly* (i.e. unmistakably) in the public interest.”¹⁹ Former Commissioner Denham clarified that “clearly means

¹⁵ *Tromp v. Privacy Commissioner*, 2000 BCSC 598 at paras. 16 and 19.

¹⁶ For example, see Order 02-38, 2002 CanLII 42472 (BC IPC) at paras. 45-46, citing Order No. 165-1997, [1997] BCIPD No. 22 at p. 3; and Order F15-27, 2015 BCIPC 29 at para. 29.

¹⁷ Applicant's response submission at para. 60.

¹⁸ Order 02-38, *supra* note 16 at para. 65.

¹⁹ *Ibid* at paras. 45-46, citing Order No. 165-1997, [1997] BCIPD No. 22 at p. 3. Emphasis in original. See also Order F18-26, 2018 BCIPC 29 at para. 14.

something more than a ‘possibility’ or ‘likelihood’ that disclosure is in the public interest.”²⁰

[20] Additionally, “public interest” does not mean merely that the public would find the information interesting, but rather that the disclosure of the information itself is in the public interest. The British Columbia Supreme Court put it this way:

The term “public interest” in s. 25(1)(b) cannot be so broad as to encompass anything that the public may be interested in learning. The term is not defined by the various levels of public curiosity.²¹

[21] To determine whether disclosure is clearly in the public interest, I must consider whether “a disinterested and reasonable observer, knowing the information and knowing all the circumstances, would conclude that disclosure is plainly and obviously in the public interest.”²² To answer this question, I must first decide whether the information at issue relates to a matter that engages the public interest.²³ Questions to consider at this stage include:

- Is the matter the subject of widespread debate or discussion by the media, the Legislature, Officers of the Legislature or other oversight bodies?²⁴
- Does the matter relate to a systemic problem instead of an isolated situation?

[22] If the information relates to a matter that engages the public interest, I must next decide whether the nature of the information meets the high threshold for disclosure.²⁵ Factors to consider at this stage include whether the disclosure would:

- contribute to educating the public about the matter;
- contribute in a substantive way to the body of information already available;
- facilitate the expression of public opinion or allow the public to make informed political decisions; or
- contribute in a meaningful way to holding a public body accountable for its actions or decisions?

²⁰ Investigation Report F15-02 at p. 28. Available on the OIPC website at <https://www.oipc.bc.ca/investigation-reports/1814>.

²¹ *Clubb v. Saanich (Corporation of The District)*, 1996 CanLII 8417 (BC SC) at para. 33.

²² Investigation Report F16-02, 2016 BCIPC No. 36 at p. 26. Available on the OIPC website at <https://www.oipc.bc.ca/investigation-reports/1972>.

²³ Order F18-26, 2018 BCIPC 29 at paras. 15-16, 24-29; Order F20-42, 2020 BCIPC 51 at para. 38.

²⁴ Previous orders have said that a matter does not need to be the subject of widespread public debate in order to engage the public interest. See Order F20-42, *ibid* at para. 39. However, this factor remains a useful consideration.

²⁵ Order F20-42, 2020 BCIPC 51 at para. 40.

Parties' positions

[23] The applicant argues that s. 25(1)(b) applies to the information in dispute.²⁶ The applicant says that the records relate to a “significant” proposal for the development of affordable housing in the City and the terms by which the City disposed of a “significant” piece of public property. Therefore, the applicant contends that this is a matter of significant public interest in the City. The applicant says that without knowing the substance of the withheld information, it is impossible to make arguments about whether the specific information at issue would contribute in a substantive way to the body of information already available about the land swap.

[24] BC Housing argues that s. 25(1)(b) has a very high threshold and says that the section is not meant to be used as an investigative tool.²⁷ BC Housing submits that the information in dispute is not of sufficient gravity or significance to the public interest to trigger the application of s. 25(1)(b). While BC Housing acknowledges that the media reported on the land swap in 2017, it contends that the matter “is not currently the subject of widespread debate, and the information is not related to a systemic issue. A disinterested and reasonable observer would not conclude that disclosure is plainly and obviously in the public interest.”²⁸

[25] Like BC Housing, Brenhill also says that s. 25 does not apply but provides no detailed submissions beyond this statement.²⁹

Analysis and findings

[26] The information at issue here relates to the land swap, the project and the loan. I accept that some of the information in dispute relates in a general sense to the terms by which the City disposed of a piece of City-owned property. However, I am not satisfied that this passes the high threshold for disclosure under s. 25(1)(b) and the applicant has not explained. Nothing in the parties' evidence or submissions indicates that the information at issue relates to a subject that currently involves (or ever involved) widespread debate or discussion by the media, the Legislature, Officers of the Legislature or other oversight bodies. BC Housing says the media did report on the land swap, but none of the parties provided evidence about the nature of this reporting or how widespread or consistent it was.

[27] Additionally, nothing in the evidence or arguments before me indicates that the information at issue relates to a systemic problem. Instead, it relates to a

²⁶ The information summarized in this paragraph comes from the applicant's submission at paras. 60-63.

²⁷ BC Housing's initial submission at para. 59.

²⁸ *Ibid* at para. 63.

²⁹ Brenhill's reply submission at para. 25.

one-time land swap arrangement between the City and Brenhill. Nothing in the evidence suggests that this is a common occurrence or a systemic problem. While I have no hesitation in concluding that the need for affordable housing clearly relates to a systemic problem, the specific subject matter at issue – the land swap, the project and the loan – relates to an isolated, one-off situation. In short, I am not satisfied that the subject matter of the information at issue clearly engages the public interest.

[28] I have also considered whether the nature of information meets the high threshold for disclosure under s. 25(1)(b). None of the parties have argued or shown that the information in dispute would contribute to educating the public about the land swap in any significant way or contribute substantively to the body of information already available about the land swap. Having reviewed the information in dispute, I also do not see how it would facilitate the expression of public opinion or allow the public to make informed political decisions or contribute meaningfully to holding BC Housing (or the City) accountable for their actions in relation to the land swap, the project, or the loan.

[29] To summarize, I am not satisfied that the disinterested and reasonable observer, knowing the information and knowing all the circumstances, would conclude that disclosure is plainly and obviously in the public interest. As a result, I find that s. 25(1)(b) does not apply.

ADVICE AND RECOMMENDATIONS – SECTION 13

[30] Section 13 serves to protect a public body's internal decision-making and policy-making processes by encouraging the free and frank flow of advice and recommendations.³⁰ In doing so, s. 13 preserves an effective and neutral public service.³¹ To this end, s. 13 allows a public body to refuse to disclose information that would reveal advice or recommendations developed by or for it. Section 13 applies both to information that explicitly contains advice and recommendations and to information that would enable an individual to make accurate inferences about underlying advice or recommendations.³²

[31] The s. 13 analysis involves two steps.³³ First, I must determine if disclosure of the information in dispute would reveal advice or recommendations developed by or for the public body. If it would, then I must determine whether the information falls into any of the categories listed in ss. 13(2) or 13(3). If it does, the public body cannot refuse to disclose it. Section 13(2) lists categories

³⁰ *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at para. 65 [*Automotive Retailers*].

³¹ *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 43.

³² Order 02-38, *supra* note 16 at para. 135; Order F15-12, 2015 BCIPC 12 at para. 42; and Order F16-28, 2016 BCIPC 30 at para. 22.

³³ For example, see Order F07-17, 2007 CanLII 35478 (BC IPC) at para. 18 and Order F17-01, 2017 BCIPC 01 at para. 14.

of information that public bodies cannot withhold under s. 13(1). Section 13(3) says that public bodies cannot use s. 13(1) to withhold information in a record that has been in existence for 10 or more years.

Parties' positions

[32] BC Housing submits that the information it withheld under s. 13 relates to its internal decision-making process connected to the land swap and the new building.³⁴ If disclosed, BC Housing says this information would reveal advice or recommendations developed by or for BC Housing regarding:

- budget and financial analysis;
- options for lease payments respecting certain housing units;
- options for mortgage structures; and
- development plans with Brenhill.

[33] BC Housing argues that nothing in ss. 13(2) or 13(3) applies here.

[34] The applicant contends that BC Housing has provided little evidence to support its claim that s. 13 applies and notes that BC Housing's affidavit evidence does not address whether the information in dispute constitutes policy advice.³⁵

Analysis and findings

[35] Having reviewed the information withheld under s. 13, I find that some of it comprises advice and recommendations related to BC Housing's involvement with the land swap and its loan to Brenhill.³⁶ This information includes options and recommendations to deal with certain issues that arose in relation to the project as well as the opinions of experts obtained to provide analysis necessary for the deliberative process.³⁷ In my view, this information fits within the meaning of advice or recommendations under s. 13(1).

[36] However, I am not satisfied that other information withheld under s. 13(1) qualifies as advice or recommendations. Specifically, I find that the following types of information do not reveal advice or recommendations:

- *Facts* – BC Housing applied s. 13(1) to basic factual information about the current state of the project and what has gone on between the parties.³⁸ Basic factual information does not fit within the meaning of advice or

³⁴ The information in this paragraph comes from BC Housing's initial submission at paras. 23-26.

³⁵ The information in this paragraph comes from the applicant's submission at paras. 16-17.

³⁶ For example, at pp. 38, 98-100 and 120 of the first package.

³⁷ *Automotive Retailers*, *supra* note 30 at para. 29.

³⁸ At pp. 96-97 of the second package.

recommendations under s. 13(1). Previous orders have made similar findings.³⁹

- *Next steps* – BC Housing applied s. 13(1) to a list of next steps that were decided in a meeting.⁴⁰ In my view, this information merely reflects decisions BC Housing made about what it needed to do next for an aspect of the project. Information that communicates a decision does not qualify as advice or recommendations.⁴¹

In my view, s. 13(1) does not apply to this information, so I will not consider it further.

Exceptions – section 13(2)

[37] I have considered whether the information that qualifies as advice or recommendations falls into any of the categories described in s. 13(2). In my view, nothing in s. 13(2) applies. I have also considered whether the records have been in existence for 10 or more years and find that they have not. Therefore, s. 13(3) does not apply. As a result, I find that s. 13(1) authorizes BC Housing to withhold the information that I have found qualifies as advice or recommendations.

SOLICITOR CLIENT PRIVILEGE – SECTION 14

[38] Section 14 allows public bodies to refuse to disclose information protected by solicitor client privilege. Section 14 encompasses two kinds of privilege recognized at common law: legal advice privilege and litigation privilege.⁴² BC Housing claims legal advice privilege over the information in dispute.⁴³

[39] Legal advice privilege protects confidential communications between a solicitor and client made for the purpose of seeking, formulating and giving legal advice. In order for legal advice privilege to apply to a communication (and records related to it),⁴⁴ the communication must:

³⁹ Order F17-08, 2017 BCIPC 9 at para. 23; Order F17-03, 2017 BCIPC 3 at para. 29; Order F15-60, 2015 BCIPC 64 at para. 16; and Order F15-59, 2015 BCIPC 62 at para. 32.

⁴⁰ At p. 106 of the second package.

⁴¹ Order F15-33, 2015 BCIPC 36 at para. 25. For similar reasoning, see also Order F18-04, 2018 BCIPC 04 at para. 83. In that Order, Adjudicator Lott found that an insurance adjuster's assessment and decision about an individual's injuries did not qualify as advice or recommendations. See also Order F15-37, 2015 BCIPC 40 at para. 22 in which Adjudicator Alexander found that information related to decisions already made by a public body's staff did not qualify as advice provided by those staff members.

⁴² *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26 [*College of Physicians*].

⁴³ BC Housing's initial submission at para. 31.

⁴⁴ *R. v. B.*, 1995 CanLII 2007 (BC SC) at para. 22.

- 1) be between a solicitor and client;
- 2) entail the seeking or giving of legal advice; and
- 3) the parties must have intended it to be confidential.⁴⁵

[40] The scope of legal advice privilege extends beyond the explicit seeking and giving of legal advice to include communications that make up “part of the continuum of information exchanged [between solicitor and client], provided the object is the seeking or giving of legal advice.”⁴⁶ Legal advice privilege also extends to internal client communications that discuss legal advice and its implications.⁴⁷

[41] For the reasons that follow, I find that legal advice privilege applies to some, but not all, of the information withheld under s. 14.

Parties’ positions

[42] BC Housing argues that legal advice privilege applies to the information it withheld under s. 14.⁴⁸ BC Housing says this information comprises:

- emails between BC Housing and its lawyer sent for the purpose of seeking, giving, or discussing legal advice;
- information that explicitly refers to legal advice BC Housing sought on various matters;
- information that refers to legal fees incurred by BC Housing; and
- a memorandum from BC Housing’s lawyer that provides legal advice.

[43] BC Housing asserts that the legal fees referred to in the information in dispute constitute “billing information” and says a presumption of privilege applies to this information. BC Housing provides an affidavit from its Chief Executive Officer (CEO) who says that communications between BC Housing and its legal counsel “are generally for the purpose of seeking or giving legal advice, and are intended to be confidential.”⁴⁹ While BC Housing argues that legal advice privilege applies to all the information withheld under s. 14, it also acknowledges that some of this information consists of emails between the City, BC Housing and Brenhill and, “having been disclosed among the parties, may not fall within the scope of legal advice privilege.”⁵⁰

⁴⁵ *Solosky v. The Queen*, 1979 CanLII 9 (SCC) at p. 837.

⁴⁶ *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 at para. 83.

⁴⁷ *Bank of Montreal v. Tortora*, 2010 BCSC 1430 at para. 12 [*Tortora*]; *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 1893 at paras. 22-24 [*Bilfinger Berger*].

⁴⁸ The information summarized in this paragraph and the one that follows comes from BC Housing’s initial submission at paras. 31-36.

⁴⁹ BC Housing CEO’s Affidavit at para. 6.

⁵⁰ BC Housing’s initial submission at para. 36.

[44] The applicant submits that BC Housing has not provided sufficient evidence to prove that privilege applies to the information in dispute.⁵¹ The applicant argues that the CEO's statement about privilege is too general, noting that the affiant does not swear that *these* specific records were for the purpose of seeking or giving legal advice, or were intended to be confidential. Instead, the applicant notes that the CEO merely says that communications between BC Housing and its lawyers are "generally" for the purpose of legal advice. The applicant also argues that BC Housing has not provided adequate evidence to prove that privilege applies to the communications involving third parties. The applicant further contends that if these communications do disclose privileged information, BC Housing waived privilege by sharing the information with third parties.

Analysis and findings

[45] The information in dispute under s. 14 includes correspondence involving a variety of named individuals. Based on email addresses visible in several records, I can see that some of the individuals work for Brenhill, BC Housing, the City, or other organizations. Other individuals are merely identified by their first and last names in the emails, so it is impossible to tell where they work or why they were involved in the communications. BC Housing did not initially provide me with any information to explain or confirm who the individuals in the emails are, where they work, or why they were involved in the communications. BC Housing also did not say who it had retained as its lawyer(s) or what firm that/those lawyer(s) worked at.

[46] Given the vital importance of legal advice privilege to our legal system, I wrote to BC Housing to offer it an opportunity to provide further evidence.⁵² In my letter, I told BC Housing that I needed to know about every individual involved in each communication so that I could understand their role or function in the communication and make a determination respecting confidentiality. BC Housing responded by providing a table that lists some of the individuals involved in some of the communications withheld under s. 14, but not others. BC Housing did not explain why it chose not to identify all the individuals involved in all the communications it claims privilege over despite my request that it do so.

[47] For the reasons that follow, I find that privilege applies to some, but not all, of the information withheld under s. 14. I find that privilege applies to communications between BC Housing and its lawyer, and statements in internal BC Housing documents. The information that I find privilege does not apply to consists of:

⁵¹ The information summarized in this paragraph comes from the applicant's submission at paras. 24-25 and 28.

⁵² September 30, 2020 letter to BC Housing.

- information BC Housing refers to as “legal fee” information;
- communications involving third parties; and
- the name of a third party’s lawyer.

[48] I will begin by discussing the information that I find privilege applies to.

Communications between BC Housing and its lawyer⁵³

[49] BC Housing applied s. 14 to an email chain and a letter that involve BC Housing and its lawyer. In these communications, BC Housing and its lawyer discuss matters related to the land swap and BC Housing’s lawyer provides legal advice.

[50] In my view, these communications clearly meet the three criteria required for legal advice privilege to apply. The evidence satisfies me that these records are written communications between BC Housing and its lawyer that entail the seeking and giving of legal advice. The communications exclusively involve BC Housing and the lawyer retained by BC Housing.⁵⁴ This fact, paired with the sensitive nature of the matters discussed in the communications, leads me to find that they were intended to be confidential. As a result, I find that privilege protects these communications, so s. 14 applies.

Statements in internal BC Housing documents⁵⁵

[51] BC housing also withheld statements in Executive Committee Summaries under s. 14. BC Housing says these Summaries are internal documents that it does not share with third parties.⁵⁶ Having reviewed the statements in these internal documents, I find that they:

- summarize recommendations from BC Housing’s lawyer;
- describe details about the legal work BC Housing’s lawyers were doing; or
- identify topics BC Housing planned to ask its lawyers to give advice about or work BC Housing planned to instruct its lawyer to perform.

[52] I find that privilege clearly applies to summaries of legal advice contained in confidential internal documents.⁵⁷ I find it equally clear that privilege applies to descriptions of the legal work a lawyer performed for BC Housing. I make this finding because I find it reasonable to infer that BC Housing must have instructed

⁵³ For example, at pp. 5-7 of the first package and 194-195 of the second package.

⁵⁴ BC Housing’s October 5, 2020 letter to the OIPC.

⁵⁵ For example, at pp. 22, 126 and 128 of the first package.

⁵⁶ BC Housing’s October 5, 2020 letter to the OIPC.

⁵⁷ For similar reasoning, see *Tortora*, *supra* note 47 at para. 12; *Bilfinger Berger*, *supra* note 47 at paras. 22-24.

its lawyer to do this work. Privilege applies to a client's instructions to their lawyer.⁵⁸

[53] When it comes to the statements that identify topics BC Housing planned to ask its lawyers to give advice about or work BC Housing planned to instruct its lawyer to perform, I note that previous orders have held that a statement in a record about the intent or need to seek legal advice at some point in the future does not, on its own, suffice to establish that a confidential communication between a client and solicitor actually occurred. In order to establish that legal advice privilege applies, there must be evidence that disclosure of the statement would reveal actual confidential communications between solicitor and client.⁵⁹

[54] In this case, a thorough review of the totality of the records leads me to conclude that disclosing these statements would reveal confidential communications BC Housing had with its lawyer. I make this finding because other information in the records indicates that BC Housing actually sought legal advice or provided instructions as intended. Given this, I find that disclosing these statements would reveal privileged communications between BC Housing and its lawyer. Therefore, s. 14 applies.

[55] I will now discuss the information that I find privilege does not apply to.

Legal fee information⁶⁰

[56] BC Housing also claims that s. 14 applies to information it describes as "legal fee" information. This information appears in emails sent between BC Housing and Brenhill. BC Housing says a presumption of privilege applies to this information since it relates to legal fees.

[57] Legal advice privilege extends to a lawyer's fee accounts and billing information. A rebuttable presumption of privilege applies to this type of information because the courts have found it intrinsically connected to the solicitor client relationship and the communications inherent in it.⁶¹ A party that wants access to a lawyer's fee information can rebut the presumption by establishing that there is no reasonable possibility that production will permit the deduction or acquisition of communications protected by solicitor client privilege.⁶²

[58] In this case, I am not satisfied that the presumption of privilege applies to the information BC Housing describes as legal fee information. As the Supreme

⁵⁸ *Burnett v. Canada (Minister of National Revenue)*, 1998 CanLII 8800 (FC) at para. 18.

⁵⁹ Order F17-23, 2017 BCIPC 24 at paras. 46-50; Order F16-26, 2016 BCIPC 28 at para. 32.

⁶⁰ At pp. 1, 48-49, 51, 59 and 60-62 of the second package.

⁶¹ *Maranda v. Richer*, 2003 SCC 67 at para. 33; *Donell v. GJB Enterprises Inc.*, 2012 BCCA 135 at para. 49 [*Donell*].

⁶² *Donell*, *ibid* at para. 59.

Court of Canada made clear, the presumption applies to information contained in a lawyer's bill of account. The BC Supreme Court further clarified that the presumption applies where either the context of the information or a review of the records shows that the document does, in fact, contain actual legal billing information.⁶³ Based on the evidence and arguments before me, I am not satisfied that the information at issue comprises legal billing information. Instead, this information consists of:

- a BC Housing employee's estimate of how much its lawyer will probably charge during a specific time period;⁶⁴
- two dollar amounts Brenhill claimed it paid to third parties. These amounts appear in an email exchange between BC Housing and Brenhill about a statement of adjustments.⁶⁵
- a name and dollar amount listed in a Brenhill accounts payable document,⁶⁶ and
- the total amount of funds Brenhill claimed for the project for a one-month period.⁶⁷

[59] I will begin by discussing BC Housing's decision to withhold an employee's estimate of how much its lawyer would probably charge. This estimate appears in an email BC Housing sent to Brenhill. After providing the estimate, the employee states that the amount "maybe more or less we can settle that later."⁶⁸ BC Housing has not explained how an employee's estimate about what he thinks BC Housing's lawyer will probably charge qualifies as, or is akin to, legal billing information. Nothing in the evidence explains the basis for this employee's belief about how much he thought BC Housing's lawyer would probably charge. Nor has BC Housing provided any evidence to show that this employee was correct in his estimation. Indeed, the employee himself clearly indicates that his estimate may be incorrect and that the amount could be more or less. BC Housing has not satisfactorily explained how this information is actual legal fee information. I am not satisfied that it is, so I find that the presumption does not apply.

[60] I now turn to the dollar amounts in the email exchange about the statement of adjustments. One of these amounts is associated with what appears to be a billing code that includes the word "legal". The other amount does not include this same billing code or any other descriptors like "legal", "lawyer", or "law firm". Nothing in the evidence or the records themselves explains why an

⁶³ (*Central Coast*) v. *British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427 at para. 122.

⁶⁴ At p. 1 of the second package.

⁶⁵ At pp. 48-49 and 51 of the second package.

⁶⁶ At pp. 59 and 62 of the second package.

⁶⁷ At pp. 60-61 of the second package.

⁶⁸ At p. 1 of the second package. BC Housing did not apply s. 14 (or any other FIPPA exception) to this sentence and Brenhill does not object to its disclosure.

amount that is not associated with the “legal” billing code or anything similar represents legal fee information and I am not satisfied that it does. When it comes to the amount that is associated with the billing code “legal” – BC Housing has not provided me with any information about its billing codes (or Brenhill’s billing codes, if these codes came from Brenhill). As a result, I am not satisfied that a billing code, on its own, establishes that the information associated with that billing code arose out of the solicitor client relationship Brenhill has with its lawyers.

[61] Additionally, as noted, these amounts appear in an email sent by BC Housing to Brenhill. While BC Housing has not explained this, from the content and context of this record, I can tell that the dollar amounts discussed in the email represent some of Brenhill’s expenses for the project. In other words, BC Housing is claiming that the presumption of privilege applies to Brenhill’s expenses. However, BC Housing provided no evidence whatsoever about who Brenhill’s lawyer(s) were or what firm(s) they worked for. Additionally, in its submissions, BC Housing explicitly states that the legal fees it claims the presumption applies to “are billing information arising out the solicitor-client relationship of BC Housing and its lawyers.”⁶⁹ I find it clear from the content and context of this email that the two dollar amounts withheld under s. 14 represent Brenhill’s expenses, not BC Housing’s. Accordingly, I find that they do not arise out of the solicitor client relationship BC Housing has with its lawyers. Without more, I am not satisfied that the presumption of privilege applies to this information.

[62] In addition, I am not satisfied that the presumption applies to a name and dollar amount withheld from a Brenhill accounts payable document. Brenhill sent this document to BC Housing as an email attachment. BC Housing provided no evidence or explanation about who or what the name refers to and how it relates to legal services. Accordingly, I am not satisfied that this information arose out of a solicitor client relationship or reveals information about legal fees.

[63] Lastly and for similar reasons, I am not satisfied that the presumption applies to the total amount Brenhill claimed for a one-month period. BC Housing has not even asserted, let alone established through evidence, that this amount represents legal fees arising out a solicitor client relationship between Brenhill or BC Housing and their respective lawyers. BC Housing bears the burden of proof and it has not provided evidence to support its claim that the presumption of privilege applies to this sum. Additionally, given the time frame involved (i.e. a one-month period) and the sizeable amount of the sum, I find it highly unlikely that the amount relates solely to Brenhill’s legal expenses.

[64] Taking all this into account, I find that the presumption of privilege does not apply to any of the information BC Housing has described as legal fee

⁶⁹ BC Housing’s initial submission at para. 33.

information. Furthermore, even if the presumption of privilege did apply, I would have found that the party that held the privilege waived it by sending this information to someone outside the solicitor client relationship. I say this because, if this information actually does represent legal fees generated in the course of a solicitor client relationship – whether between BC Housing and its lawyer or Brenhill and its lawyer – BC Housing and Brenhill chose to share that information with one another, thereby waiving privilege.

[65] For all these reasons, I find that s. 14 does not authorize BC Housing to withhold this information.

Communications involving third parties⁷⁰

[66] BC Housing also applied s. 14 to emails that involve a variety of third parties.⁷¹ As described above, I specifically offered BC Housing the opportunity to identify each person involved in the communications withheld under s. 14. Despite this, BC Housing chose not to provide any information about several of the individuals involved in some of the emails in dispute. While BC Housing elected not to explain who these individuals are, I can tell from some of the email addresses that some of these individuals work for Brenhill and some appear to work for the City. Brenhill and the City are third parties when it comes to the solicitor client relationship between BC Housing and its lawyers.

[67] Legal advice privilege only extends to communications involving third parties in limited circumstances.⁷² Briefly, legal advice privilege will apply if the communication meets the criteria for legal advice privilege and the third party either:

- 1) serves as a channel of communication between client and solicitor; or
- 2) performs a function integral to the solicitor client relationship.⁷³

[68] A third party serves as a channel of communication if it acts as an “agent of transmission,” carrying information between the solicitor and client, or if its expertise is required to interpret information provided by the client so that the solicitor can understand it.⁷⁴

[69] A third party’s function is integral to the solicitor client relationship if the third party has the client’s authorization to direct the solicitor to act on the client’s

⁷⁰ At pp. 120-124, 171-174 and 190-193 of the second package.

⁷¹ At pp. 120-124, 171-174 and 190-193 of the second package.

⁷² *College of Physicians*, *supra* note 42 at para. 32.

⁷³ *College of Physicians*, *supra* note 42 at para. 47-50.

⁷⁴ *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 532 at para. 27, item (b) [*Bilfinger Berger 2*].

behalf, or to seek legal advice from the solicitor on the client's behalf.⁷⁵ Conversely, a third party's function is not integral to the solicitor client relationship if the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor.⁷⁶

[70] I have considered whether any of the third parties involved here acted as a channel of communications between BC Housing and its lawyer. BC Housing has not claimed that any third parties acted in this way and I see no evidence of this in the records themselves. Nothing in the evidence or submissions indicates that any of the third parties' services were necessary to enable BC Housing and its lawyer to understand and communicate with one another. Furthermore, in the records I do not see any third parties acting as an "agent of transmission" by carrying information between BC Housing and its lawyer. Therefore, I am not satisfied that any third party involved in the emails acted as a channel of communication.

[71] I have also considered whether any of the third parties performed a function integral to the relationship between the client and solicitor. Based on the content of the records in dispute, I am not satisfied that BC Housing authorized any third party to seek legal advice from, or direct, its lawyer. Nothing in the communications themselves or BC Housing's submissions indicates that it authorized any third party to do either of these things. There is also nothing to indicate that any third parties were retained to act on legal instructions from BC Housing's lawyer. Therefore, I am not satisfied that privilege applies to these emails.

[72] In its initial submission, BC Housing appears to concede that privilege may not apply to these emails.⁷⁷ Given the totality of the evidence before me, I find that BC Housing has failed to discharge its burden of proving that s. 14 applies to the emails that involve third parties.

The name of a third party's lawyer⁷⁸

[73] BC Housing also withheld the name of a third party's lawyer in an email sent from the third party to Brenhill and the City. BC Housing did not explain how this passes the test for legal advice privilege and I am not satisfied it does. This information is not a confidential communication between a solicitor and client that entails the seeking or giving of legal advice. I find that s. 14 does not apply.

⁷⁵ *College of Physicians*, *supra* note 42 at para. 48 quoting with approval from *General Accident Assurance Company v. Chrusz*, 1999 CanLII 7320 (ON CA) at para. 121.

⁷⁶ *Ibid*; *Bilfinger Berger 2*, *supra* note 74 at para. 27, item (c); *Potash Corporation of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, 2010 SKQB 460 at paras. 24 and 27.

⁷⁷ BC Housing's initial submission at para. 36.

⁷⁸ At p. 101 of the second package.

HARM TO FINANCIAL OR ECONOMIC INTERESTS – SECTION 17

[74] Section 17 serves to protect the financial interests of public bodies from harm.⁷⁹ The relevant portions of s. 17 state:

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

...

(d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;

(e) information about negotiations carried on by or for a public body or the government of British Columbia;

[75] Previous orders describe subsections 17(1)(a) to (f) as examples of information that may result in harm under s. 17.⁸⁰ Past orders have also stated that the subsections do not function as stand-alone provisions. Therefore, even if information falls into one of the subsections, a public body must still prove the harm described in the opening words of s. 17.⁸¹ In this case, BC Housing says ss. 17(1)(d) and (e) apply.

[76] Section 17 contains the “could reasonably be expected to” language. The Supreme Court of Canada has characterized the standard of proof imposed by this language as “a middle ground between that which is probable and that which is merely possible.”⁸² To meet this standard, BC Housing must prove that disclosure of the specific information at issue will result in a risk of harm that goes “well beyond the merely possible or speculative, but it need not be proved on the balance of probabilities that disclosure will in fact result in such harm.”⁸³

[77] The evidence BC Housing provides must demonstrate “a direct link between the disclosure and the apprehended harm and that the harm could reasonably be expected to ensue from disclosure.”⁸⁴ In discussing the evidence

⁷⁹ *Architectural Institute of B.C. v. Information and Privacy Commissioner for B.C.*, 2004 BCSC 217 at para. 14.

⁸⁰ For examples, see Order F08-22, 2008 CanLII 70316 (BC IPC) at para. 43 and Order F09-13, 2009 CanLII 42409 (BC IPC) at para. 38.

⁸¹ For examples, see Order F19-03, 2019 BCIPC 4 at para. 22; Order F18-49, 2018 BCIPC 53 at para. 46; and Order F05-06, 2005 CanLII 11957 (BC IPC) at para 36.

⁸² *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54 [*Correctional Services*].

⁸³ *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 206 [*Merck Frosst*].

⁸⁴ *Ibid* at para. 219.

needed to establish harm under s. 17, former Commissioner Loukidelis explained:

General, speculative or subjective evidence is not adequate to establish that disclosure could reasonably be expected to result in harm under s. 17(1). That exception must be applied on the basis of real grounds that are connected to the specific case... The evidence must be detailed and convincing enough to establish specific circumstances for the contemplated harm... There must be cogent, case-specific evidence of the financial or economic harm that could be expected to result.⁸⁵

Parties' positions

[78] BC Housing submits that “there is a presumption that the disclosure of information in the categories listed in Section 17(1)(a) to (f) would harm the financial or economic interests of a public body”.⁸⁶ BC Housing says that the information it withheld under s. 17 fits into the categories listed in ss. 17(1)(d) (undue financial loss to third party) and 17(1)(e) (information about negotiations).

[79] BC Housing’s submission regarding s. 17(1)(d) is that it relied, “in good faith”, on Brenhill’s responses when BC Housing sent Brenhill s. 23 notices about BC Housing’s s. 21 decision.⁸⁷ However, BC Housing did not include any evidence or submissions explaining what Brenhill’s responses actually were. In discussing s. 17(1)(e), BC Housing says that it withheld information that relates to negotiations carried on by BC Housing involving Brenhill, the City and the Society. This includes information about the negotiation of change orders and holding periods related to the new building and the land swap, as well as information about Brenhill’s corporate structure, construction budgets, operating costs, development timelines, tendering process and subcontractors.

[80] BC Housing also says it withheld some information under s. 17 because the information contains sensitive commercial and financial information about the Society, such as rental information, lease negotiations and other operating terms. BC Housing contends that the disclosure of this information “could reasonably cause issues with tenants or interfere with rent and lease terms” that the Society has with other properties it manages.

[81] The applicant submits that BC Housing did not provide any evidence that disclosure of the information withheld under s. 17 could reasonably be expected to cause any specific harm. The applicant also says BC Housing’s s. 17(1)(d)

⁸⁵ Order 02-50, 2002 CanLII 42486 (BC IPC) at para. 137.

⁸⁶ BC Housing’s initial submission at para. 38. The information summarized in the remainder of this paragraph and the two that follow come from this submission at paras. 42-45.

⁸⁷ Section 23 specifies when and how a public body may or must give notice to third parties when the public body believes a requested record contains the third party’s information and s. 21 might apply.

argument relies on Brenhill, but Brenhill did not provide any evidence that harm under s. 17 could reasonably be expected to result from disclosure of the information withheld under s. 17.⁸⁸

[82] Brenhill did not make submissions about s. 17.

Analysis and findings

[83] As stated above, previous orders have made clear that the various subsections of s. 17 do not function as stand-alone provisions. Consequently, even if information falls into one of the subsections, BC Housing must still prove the harm described in the opening words of s. 17. In other words, even if the information in dispute is about negotiations carried on by or for a public body (as in s. 17(1)(e)) or if the disclosure of the information could reasonably be expected to result in undue financial loss to a third party (as in s. 17(1)(d)), BC Housing must still prove that disclosure could reasonably be expected to harm *its own* financial or economic interests.⁸⁹ Given the weight of past authorities, I reject BC Housing's argument that there is a "presumption" that the disclosure of information in the categories listed in subsections 17(1)(a) to (f) would harm the financial or economic interests of a public body. There is no such presumption.

[84] In this case, BC Housing claims that ss. 17(1)(d) and (e) apply, but it has provided no evidence whatsoever about harm to its own financial or economic interests. Former Commissioner Loukidelis has said that general, speculative and subjective evidence will not suffice to establish that disclosure could reasonably be expected to result in harm under s. 17(1). In this case, I have no evidence about s. 17 harms at all. As a result, I find that disclosure cannot reasonably be expected to harm BC Housing's financial or economic interests.

[85] When it comes to BC Housing's submission respecting the Society, I do not understand – and BC Housing has not explained – how the *Society* having issues with tenants, or its rent or lease terms could reasonably be expected to harm *BC Housing's* financial or economic interests. Accordingly, I am not satisfied that disclosure of the information that relates to the Society could reasonably be expected to harm BC Housing's financial or economic interests.⁹⁰

[86] Taking all this into account, I find that s. 17 does not apply to the information in dispute.

⁸⁸ The information summarized in this paragraph comes from the applicant's submission at paras. 46-49.

⁸⁹ Or the financial and economic interests of the government, or the government's ability to manage the economy. This latter part of the opening words of s. 17(1) has no bearing in this case, so I will not discuss it again.

⁹⁰ I note that BC Housing made no arguments respecting harm to the Society under s. 21.

HARM TO THIRD PARTY BUSINESS INTERESTS – SECTION 21

[87] Section 21(1) requires a public body to withhold information if its disclosure could reasonably be expected to harm the business interests of a third party. The relevant portions of s. 21(1) state:

21(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

...

(ii) commercial, financial, labour relations, scientific or technical information of or about a third party,

(b) that is supplied, implicitly or explicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

...

(iii) result in undue financial loss or gain to any person or organization...

[88] The party that bears the burden of proof – in this case either BC Housing or Brenhill, depending on the specific information at issue – must prove all three parts of the following test in order to establish that s. 21(1) applies:

- 1) The information at issue qualifies as the type of information described in s. 21(1)(a).
- 2) Brenhill supplied the information to BC Housing in confidence (s. 21(1)(b)).
- 3) The disclosure of the information could reasonably be expected to cause one of the harms listed in s. 21(1)(c).

[89] As noted, the holder of the burden of proof when it comes to s. 21 in this case depends on the specific information at issue. In the first package, BC Housing withheld some information under s. 21. Brenhill does not take issue with that decision. BC Housing also decided that s. 21 applies to some information in the second package. Brenhill agrees that s. 21 applies to all this information and *also* says that s. 21 applies to additional information in the second package.⁹¹ I will call this additional information the “Brenhill information”. Brenhill bears the burden of proving that s. 21 applies to the Brenhill information. BC Housing bears

⁹¹ For clarity, this specific information is identified in para. 13 of Brenhill’s initial submission.

the burden of showing that s. 21 applies to all the information it decided to withhold under s. 21 in both packages of records. I will call this the “BC Housing information”.

Parties’ positions

[90] BC Housing’s submission on s. 21(1) consists of two brief sentences that say:

- It has relied “in good faith” on Brenhill’s response to the s. 23 notices BC Housing sent regarding its s. 21 decision; and
- It “will adopt the evidence and argument of Brenhill which is in a better position to provide evidence of the harms associated with the release of the severed information.”⁹²

[91] Brenhill argues that the Brenhill information constitutes its commercial and financial information.⁹³ Brenhill says that it implicitly or explicitly supplied the Brenhill information to BC Housing in confidence with an expectation that BC Housing would not disclose it to others. Brenhill also asserts that the harms captured in ss. 21(1)(c)(i) (significant harm to competitive position) and 21(1)(c)(iii) (undue financial loss or gain) could reasonably be expected to arise if BC Housing discloses the Brenhill information.

[92] Brenhill also makes arguments about what it calls “serious defamatory injury to reputation” that would lead to undue financial loss if BC Housing discloses the Brenhill information.⁹⁴ Brenhill claims that it was “the subject of a campaign of deliberate vilification” in 2017.⁹⁵ Consequently, Brenhill asserts that, if disclosed, it is reasonable to expect that the Brenhill information:

would be employed in deliberately defamatory publications on the Internet, on Twitter, Facebook, websites, blogs and other media, in which the released information would be presented in a false light, or distorted, manipulated, and taken out of context, thereby causing severe injury to the reputation and hence competitiveness of Brenhill.⁹⁶

[93] Brenhill says it has chosen not provide evidence about its claim that it was defamed in 2017 because doing so would “be self-publishing the defamatory expression.”⁹⁷ According to Brenhill, others could then exploit the “self-published” defamation by re-publishing it online or in print and then, if sued by Brenhill for

⁹² BC Housing’s initial submission at paras. 46-47.

⁹³ The information summarized in this paragraph comes from Brenhill’s initial submission at paras. 13-14, 23, 28, 30 and 38.

⁹⁴ *Ibid* at para. 43.

⁹⁵ *Ibid* at para. 41.

⁹⁶ *Ibid* at para. 40.

⁹⁷ Brenhill’s reply submission at para. 22(a).

defamation, they could plead defences such as consent, qualified privilege, or reportage.⁹⁸

[94] The applicant contends that Brenhill has not provided any evidence to support the assertion that s. 21(1) applies.⁹⁹ The applicant says Brenhill's submission simply repeats the statutory language of s. 21(1). In addition, the applicant submits that the only particularized harm Brenhill refers to is the risk that unspecified persons might use the information in deliberately defamatory publications, but Brenhill provided no evidence or particulars of the alleged 2017 defamation to support this claim. Additionally, the applicant submits that the risk that information might be misinterpreted by the public is not a basis for claiming that s. 21(1) applies.

Approach to the evidence

[95] Before turning to my s. 21 analysis, I pause to note two issues with the s. 21 evidence and arguments in this case.

[96] First, BC Housing has not provided any of its own evidence or argument to explain why it decided to withhold information under s. 21(1). As stated above, BC Housing simply says it adopts Brenhill's submissions. Brenhill's submissions respecting s. 21(1) focus specifically on the information "objected to by Brenhill"¹⁰⁰ – i.e. the Brenhill information. This means that I have no evidence or argument before me respecting the information that BC Housing *did* decide to withhold under s. 21(1) – i.e. the BC Housing information.

[97] Second, none of the parties made any submissions about the Society when discussing s. 21(1). However, as I outline in further detail below, I find it clear that some of the information withheld under s. 21 is "of or about" the Society. As discussed above, BC Housing provided some brief arguments under s. 17 respecting the Society, but did not relate these arguments to s. 21(1). As a result, I conclude that BC Housing did not withhold information under s. 21(1) because it decided that the disclosure of that information could reasonably be expected to harm the Society in the manner captured by s. 21(1). Despite this and given the mandatory nature of s. 21(1), I have considered whether this section requires BC Housing to withhold the information that relates to the Society.

⁹⁸ *Ibid* at para. 22(c).

⁹⁹ The information in this paragraph comes from the applicant's submission at paras. 51-52 and 54-56.

¹⁰⁰ Brenhill's initial submission at paras. 13-14 and 23.

Type of information under s. 21(1)(a)

[98] As noted, either BC Housing or Brenhill must establish that all the information in dispute under s. 21(1) qualifies as a third party's trade secrets or its commercial, financial, labour relations, scientific or technical information in order to satisfy the first part of the test.

[99] BC Housing and Brenhill provide no specific evidence or argument to establish that the BC Housing information and the Brenhill information are the types of information captured by s. 21(1)(a). Nevertheless, I have carefully reviewed the information in dispute to determine whether it constitutes the type of information captured by s. 21(1)(a).

[100] FIPPA does not define the terms "commercial" or "financial". However, previous orders have found that commercial information relates to the buying, selling or exchanging of goods and services.¹⁰¹ For example, a contractor's fees or the commission rate for a contractor's services qualifies as commercial information.¹⁰² Past orders have said that financial information includes hourly rates, prices, expenses and fees payable under contract.¹⁰³

[101] In my view, much of the information in dispute constitutes financial or commercial information of or about Brenhill because it relates to Brenhill's role in the project. This information relates to services provided by Brenhill in exchange for the land swap. I also find it clear that some information constitutes Brenhill's financial information, such as Brenhill's monetary expenses at various stages of the project and details about the loan BC Housing provided to Brenhill, including information about security and Brenhill's previous mortgage on the Brenhill lot. Speaking in broad terms, this information includes:

- information about Brenhill's costs, cash flow, and accounts payable;¹⁰⁴
- invoices from third parties to Brenhill for work done on the project;¹⁰⁵
- information sent between Brenhill and BC Housing respecting interim progress claim amounts;¹⁰⁶ and
- proposed budget and cost amounts for the project.¹⁰⁷

I am satisfied that all this information passes the first part of the s. 21(1) test.

¹⁰¹ For example, see Order F16-39, 2016 BCIPC 43 at para. 17; and Order F08-03, 2008 CanLII 13321 (BC IPC) at paras. 62-63.

¹⁰² Order F18-40, 2018 BCIPC 43 at para. 8.

¹⁰³ For example, see Order F19-29, 2019 BCIPC 31 at para. 16.

¹⁰⁴ For example, pp. 13, 15-16, 50, 59 and 62 of the second package.

¹⁰⁵ For example, pp. 63 and 65 of the second package.

¹⁰⁶ For example, pp. 48-49, 53-54 and 58 of the second package.

¹⁰⁷ For example, pp. 8-9 of the second package.

[102] Additionally, I find that some of the information is commercial and financial information “of or about” the Society. This information (the Society information) includes:

- rental and revenue information for the old and new buildings, such as rental prices per unit;¹⁰⁸
- details about a BC Housing loan to the Society;¹⁰⁹ and
- the Society’s operating budget.¹¹⁰

[103] FIPPA defines a third party as any person, group of persons or organization other than the applicant and any public body. The Society fits within the definition of third party under FIPPA since it is not a public body and did not make the access request at issue. Therefore, I find it clear that the Society information constitutes commercial and financial information of or about a third party. Accordingly, the Society information fits within the meaning of s. 21(1)(a).

[104] However, I find that other information withheld under s. 21(1) is not information of or about a third party. Instead, this information relates exclusively to the City or BC Housing, which are both public bodies. For example, some of the information in dispute under s. 21(1) consists of information about BC Housing’s benchmark budget guidelines.¹¹¹ This type of information does not pass the first part of the s. 21(1) test because it is not “of or about” a third party. Therefore, s. 21(1) does not apply to it and I will not consider it further.

Supplied in confidence – section 21(1)(b)

[105] The analysis under s. 21(1)(b) involves a two-part query.

- 1) Did the third party *supply* the information to the public body?
- 2) If so, did the third party supply the information *in confidence*?

[106] The test for whether a third party supplied information “explicitly or implicitly, in confidence” involves an objective question of fact. Evidence of the third party’s subjective intentions with respect to confidentiality will not suffice.¹¹² The party resisting disclosure (i.e. BC Housing or Brenhill) must show that the third party had an “objectively reasonable expectation of confidentiality” at the time it supplied the information to BC Housing and that it maintained that expectation.¹¹³

¹⁰⁸ For example, at pp. 33, 38, 100-101 and 123 of the first package.

¹⁰⁹ For example, at p. 35 of the first package.

¹¹⁰ For example, at pp. 92-93 of the first package.

¹¹¹ For example, at pp. 31, 38 and 57 of the first package.

¹¹² Order F16-39, 2016 BCIPC 43 at para. 27.

¹¹³ Order F18-28, 2018 BCIPC 31 at para. 41; Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 23.

Supplied

[107] Having reviewed the parties' submissions carefully, I find that Brenhill provides assertions without any evidentiary support to prove that it supplied the Brenhill information. Additionally, since BC Housing elected not to provide its own submissions or evidence about s. 21(1), I have no evidence or argument to show who supplied the BC Housing information.

[108] Nevertheless, based on my review of the records, I find it clear that Brenhill supplied some of the information in dispute to BC Housing. For instance, the records contain information related to:

- a mortgage Brenhill had with a specific bank;
- Brenhill's tendering process;¹¹⁴
- consultants retained by Brenhill for various aspects of the project;¹¹⁵
- financing related to Brenhill's other real estate holdings;¹¹⁶ and
- Brenhill's projected net profit for the project.¹¹⁷

In the circumstances, it would not make sense for BC Housing to have this information unless Brenhill supplied it. Therefore, based on the context and content of the records themselves, I find that Brenhill supplied some of the information in dispute to BC Housing.

[109] However, I am not satisfied that Brenhill supplied the balance of the information in dispute. This information appears in emails between BC Housing and Brenhill or internal BC Housing documents and consists of details Brenhill and BC Housing agreed upon in respect of the loan, such as information respecting hold back periods, security and repayment.¹¹⁸ Without any evidence or sufficient argument from Brenhill or BC Housing, I am not satisfied that Brenhill supplied this information to BC Housing. Rather, I find it more likely that this information is the product of negotiations between Brenhill and BC Housing respecting the loan. As a result, I find that this information does not pass the second part of the s. 21(1) test, so I will not consider it further.

[110] For the same reasons, I am not satisfied that the Society information was supplied to BC Housing. Without evidence or submissions on this point, it is not clear to me that the Society supplied this information. It seems more likely to me that the Society information arose as a result of negotiations between the Society and BC Housing. For example, without any evidence to demonstrate otherwise, I find it reasonable to infer that BC Housing and the Society would have agreed

¹¹⁴ For example, at pp. 22, 29 and 30 of the first package.

¹¹⁵ For example, at p. 63 of the first package.

¹¹⁶ For example, at p. 64 of the first package.

¹¹⁷ For example, at p. 63 of the first package.

¹¹⁸ For example, at pp. 21, 60, 67 and 73 of the first package.

upon the details about the BC Housing loan to the Society. Similarly, given the operating agreement between BC Housing and the Society, I find it likely that the rental and revenue information for the old and new buildings and the Society's operating budget would also have been the result of negotiations in relation to the operating agreement. In short, the Society information does not pass the first part of the s. 21(1)(b) test, so I will not consider it further.

In confidence

[111] BC Housing does not say anything directly about whether any of the information was supplied in confidence. It only says that it adopts Brenhill's submissions. For its part, Brenhill provides no evidence or argument to support its assertion that it supplied the Brenhill information (or the BC Housing information) in confidence.

[112] In reviewing the information in dispute, I looked for markers of confidentiality, such as statements in email subject lines or notations in documents. A very small number of records have clear markers of confidentiality.¹¹⁹ I am satisfied that Brenhill supplied the information in documents with clear markers of confidentiality in confidence.

[113] I also carefully considered the context and content of the records to determine whether the information in dispute was the type of information that Brenhill would have reasonably expected BC Housing to keep confidential. In my opinion, some of the information in dispute is sensitive and is not the type of information that would be common knowledge. For example, some of the information relates to a corporate restructuring.¹²⁰ Other information relates to Brenhill's demand loan budget.¹²¹ Given the nature of this information, I am satisfied that Brenhill had an objectively reasonable expectation of confidentiality when it supplied the information.

[114] However, I am not satisfied that Brenhill supplied all the information in dispute in confidence. For example, some of the information in dispute identifies Brenhill's various development projects in the lower mainland.¹²² In my view, Brenhill's involvement in various large developments in the lower mainland is common knowledge, so I am not satisfied that Brenhill had an objectively

¹¹⁹ For example, see the report at pp. 8-12 of the second package. I note that the information contained in this report was supplied to BC Housing by the BTY Group, not Brenhill. That said, the author of the report states that all the costs contained in the report were provided to BTY by Brenhill. Therefore, I am satisfied that Brenhill's cost information contained in this report was supplied in confidence. See also the email at p. 138 of the second package. I note that the author of this email works for BC Housing, but in the email he relays information that I find would have been supplied to him by Brenhill.

¹²⁰ For example, at pp. 107 and 123-125 of the second package.

¹²¹ For example, at p. 30 of the first package.

¹²² At p. 13 of the first package.

reasonable expectation of confidence in respect of this information. Without any evidence or sufficient argument from Brenhill or BC Housing, I am not satisfied that this information passes the second part of the s. 21(1)(b) test. Accordingly, I will not discuss this information again.

Reasonable expectation of harm – section 21(1)(c)

[115] The final part of the s. 21(1) test requires the party with the burden of proof to establish that disclosure of Brenhill’s confidentially supplied commercial or financial information could reasonably be expected to cause one of the harms listed in s. 21(1)(c). To pass this part of the test, BC Housing and/or Brenhill must prove that disclosure will result in a risk of harm that goes “well beyond the merely possible or speculative.”¹²³ The Supreme Court of Canada has described this standard as “a middle ground between that which is probable and that which is merely possible.”¹²⁴ The evidence must demonstrate “a clear and direct connection between the disclosure of specific information and the harm” alleged.¹²⁵

[116] BC Housing provides no evidence or argument to explain how disclosing the BC Housing information could reasonably be expected to cause any of the harms listed in s. 21(1)(c). Brenhill asserts that disclosure of the Brenhill information could reasonably be expected to significantly harm its competitive position and result in undue financial loss.

Significant harm to competitive position – section 21(1)(c)(i)

[117] Brenhill says that disclosure could reasonably be expected to lead to defamation which would cause “severe injury” to its competitive position. However, Brenhill provides no evidence to support this contention. Neither Brenhill nor BC Housing explain, and I fail to see, how or why the specific information at issue could be used to defame Brenhill. For example, I do not understand how someone could or would attempt to defame Brenhill if they knew how much certain aspects of the project cost – such as how much an interior design or land surveying company billed Brenhill in a single invoice.¹²⁶ Nor do I understand how or why disclosure of the names of certain consultants used by Brenhill could be used to defame Brenhill.¹²⁷

[118] Even if disclosure could reasonably be expected to lead to defamation – which I do not accept – Brenhill provides no evidence to show that this would

¹²³ *Merck Frosst*, *supra* note 83 at para. 206.

¹²⁴ *Correctional Services*, *supra* note 82 at para. 54.

¹²⁵ Order 04-06, 2004 CanLII 34260 (BC IPC) at para. 58.

¹²⁶ This is part of the BC Housing information, at pp. 75 and 86 of the second package.

¹²⁷ This is part of the Brenhill information as identified in Brenhill’s initial submission at para. 13 and on p. 49 of the second package.

harm its competitive position, let alone significantly. As stated by former Commissioner Loukidelis:

By adding the word “significantly” in s. 21(1)(c)(i), the Legislature clearly indicated that something more than “harm” is needed... by choosing a standard of significant harm, the Legislature clearly contemplated situations where disclosure could simply harm the interests of a private business, but still be permitted.¹²⁸

[119] In this case, nothing in the evidence before me shows how the release of the remaining information could reasonably be expected to significantly harm Brenhill’s competitive position. As a result, I conclude that BC Housing and Brenhill have failed to establish that the release of the information in dispute could reasonably be expected to significantly harm Brenhill’s competitive position.

[120] In coming to this conclusion, I recognize that Brenhill says it chose not to provide evidence respecting the past defamation it claims to have suffered because doing so would be “self-publishing” the defamation. However, as the notice received by all parties states, the OIPC accepts *in camera* evidence and submissions in appropriate cases and all parties have the option to request permission to provide evidence and/or submissions on an *in camera* basis. Therefore, in my view, Brenhill had the option to provide evidence to prove its case without “self-publishing” defamatory statements. Brenhill knew it had the burden of proof,¹²⁹ but decided not to provide any evidence to support its claim.

Undue financial loss or gain – section 21(1)(c)(iii)

[121] Brenhill says it will suffer undue financial loss if BC Housing discloses the Brenhill information. Brenhill’s submission respecting this particular harm consists only of its assertion that disclosure of the Brenhill information could reasonably be expected to result in loss to Brenhill or gain to other organizations that “would be monetary or have monetary value.”¹³⁰ Brenhill provides no further detail or explanation about what “undue loss” means or how it could reasonably be expected to result if BC Housing discloses any of the information in dispute.

BC Housing and Brenhill bear the burden of proof when it comes to s. 21(1), yet neither provided sufficient submissions or any evidence about undue financial loss or gain under s. 21(1)(c)(iii). Given the lack of evidence in this case, I am not satisfied that disclosure could reasonably be expected to cause undue financial loss or gain to any person or organization.

¹²⁸ Order 00-10, 2000 CanLII 11042 (BC IPC) at p. 11. Emphasis added.

¹²⁹ Brenhill’s initial submission at para. 17.

¹³⁰ Brenhill’s initial submission at para. 48.

Summary of findings on section 21(1)

[122] For the reasons outlined above, I find that some of the information in dispute comprises financial or commercial information of or about Brenhill or the Society. This information passes the first part of the s. 21(1) test. I find that Brenhill supplied some of this information to BC Housing in confidence, but the Society did not. The information Brenhill supplied in confidence passes the second part of the s. 21(1) test. However, none of the remaining information passes the last part of the test because neither BC Housing nor Brenhill have established that its disclosure could reasonably be expected to cause any of the s. 21(1)(c) harms.

[123] Brenhill and BC Housing bear the burden of proof when it comes to s. 21. Taken together, I find that their submissions contain assertions without satisfactory evidentiary support. Therefore, I am not satisfied that disclosure of any of the remaining information could reasonably be expected to cause any of the harms listed in s. 21(1)(c). A party's failure to provide evidence to establish the application of s. 21(1) can be fatal to its case.¹³¹ This is precisely what has occurred here.

[124] In short, I find that none of the information in dispute under s. 21(1) passes all three parts of the applicable test. Therefore, BC Housing cannot withhold this information under s. 21(1).

UNREASONABLE INVASION OF THIRD PARTY PRIVACY – SECTION 22(1)

[125] Section 22(1) requires public bodies to refuse to disclose personal information if disclosure would constitute an unreasonable invasion of a third party's personal privacy. This section does not guard against all invasions of personal privacy. Instead, it explicitly aims to prevent only those invasions of personal privacy that would be unreasonable in the circumstances of a given case.¹³²

Personal information

[126] Section 22 only applies to personal information. Therefore, the first step in any s. 22 analysis requires determining whether the information at issue qualifies as personal information.

¹³¹ For example, see Order F17-44, 2017 BCIPC 48 at para. 23; Order F17-17, 2017 BCIPC 18 (CanLII) at para. 64; and Order 03-02, 2003 CanLII 49166 (BC IPC) at paras. 119-120; see also *Jill Schmidt v. British Columbia (Information and Privacy Commissioner), et al.*, 2001 BCSC 101 (CanLII) at paras. 37-38.

¹³² Order 01-37, 2001 CanLII 21591 (BC IPC) at para. 14.

[127] FIPPA defines personal information as recorded information about an identifiable individual other than contact information.¹³³ Previous orders have held that information is about an identifiable individual when it is reasonably capable of identifying an individual alone or when combined with information from other available sources.¹³⁴

[128] FIPPA defines contact information as information to enable an individual at a place of business to be contacted. Contact information includes an individual's name, position or title, business telephone number, address, email or fax number.

[129] BC Housing says that the third party personal information withheld under s. 22 consists of personal email addresses, cell phone numbers and signatures. BC Housing submits that public bodies must withhold personal email addresses, telephone numbers and signatures under s. 22.¹³⁵ In response, the applicant says:

Assuming that the information redacted pursuant to section 22 is truly personal contact information and not business contact information, the Applicant requests the Adjudicator assess whether the disclosure of this information would be an unreasonable invasion of a third party's personal privacy.¹³⁶

[130] Based on my review, I find that some of the information withheld under s. 22(1) qualifies as personal information. This information consists of the names of a few third parties and details about the assets and living situation of identifiable individuals.¹³⁷

[131] However, some of the information withheld under s. 22(1) does not qualify as personal information. In particular, BC Housing repeatedly withheld cell phone numbers included in the signature lines of various business emails. In my view, these cell phone numbers clearly fit within the definition of contact information because they are being used for business purposes. Similarly, there are several email addresses that fit within the meaning of contact information because they are being used to send business-related emails. BC Housing cannot withhold this contact information under s. 22(1).

¹³³ Schedule 1 of FIPPA contains its definitions.

¹³⁴ For examples, see Order F16-38, 2016 BCIPC 42 at para. 112; and Order F13-04, 2013 BCIPC 4 at para. 23.

¹³⁵ BC Housing's initial submission at paras. 49-50.

¹³⁶ Applicant's submission at para. 59.

¹³⁷ For example, at pp. 23, 92 and 123 of the first package and 18, 20, 22-23, 276, 278 and 280-281 of the second package.

[132] Similarly, BC Housing withheld a signature.¹³⁸ I cannot read the signature and am not satisfied that it relates to an identifiable individual. Below the signature line, the text of the document says “authorized signatory” without including any individual person’s name. In my view, this signature does not qualify as personal information under FIPPA because I cannot determine whose signature it is.

[133] Section 22 only applies to personal information, so I will not discuss the information that does not constitute personal information again.

Not an unreasonable invasion of privacy – section 22(4)

[134] The next step in the s. 22 analysis requires a consideration of whether s. 22(4) applies to the personal information at issue. Section 22(4) lists situations in which disclosure of personal information is not an unreasonable invasion of personal privacy. BC Housing says that the personal information at issue does not fall into any of the categories listed in s. 22(4).¹³⁹ I have considered the various subsections of s. 22(4) and agree that none of them apply here.

Presumed unreasonable invasion of privacy – section 22(3)

[135] The third step in the s. 22 analysis requires determining whether any of the presumptions in s. 22(3) apply to the personal information at issue. Section 22(3) lists circumstances in which disclosure of personal information is presumed to constitute an unreasonable invasion of third party personal privacy.

[136] BC Housing and the applicant did not make submissions respecting the presumptions in s. 22(3). However, in my view, the presumption in s. 22(3)(f) applies to a small amount of the personal information at issue. This particular subsection says that disclosure of personal information that describes a third party’s finances, income, assets or liabilities is presumed to constitute an unreasonable invasion of third party personal privacy. A small amount of the information withheld under s. 22(1) relates to named individuals’ assets. I find that s. 22(3)(f) applies to this information, meaning that its disclosure is presumed to constitute an unreasonable invasion of third party personal privacy.

[137] I am not satisfied that any of the other presumptions in s. 22(3) apply to the personal information.

Relevant circumstances – section 22(2)

[138] The last step in the s. 22 analysis requires a consideration of all the relevant circumstances to determine whether disclosure of the personal

¹³⁸ At p. 225 of the second package.

¹³⁹ BC Housing’s initial submission at para. 52.

information at issue would constitute an unreasonable invasion of personal privacy. The relevant circumstances might rebut the s. 22(3)(f) presumption discussed immediately above.

[139] Section 22(2) lists some relevant circumstances to consider at this stage. BC Housing argues that disclosing the specific personal information at issue here will not foster public accountability and there are no relevant factors under s. 22(2) that would favour the disclosure of the personal information.

[140] The applicant made no arguments respecting any relevant circumstances that would support the disclosure of the personal information at issue.

[141] I have considered all the circumstances listed in s. 22(2) and I am not satisfied that any of them apply.

Conclusion – section 22

[142] I find that some of the information withheld under s. 22(1) is personal information.

[143] The presumption against releasing personal information that relates to a third party's finances applies to a small amount of the personal information in this case. I am not satisfied that any relevant circumstances weigh in favour of the disclosure of this personal information, therefore the presumption stands.

[144] When it comes to the remaining personal information withheld under s. 22(1), I do not see any relevant circumstances that would weigh in favour of the release of this personal information. Additionally, the applicant made no arguments to support the disclosure of the personal information at issue. Taking all this into account, I find that s. 22(1) applies.

[145] In short, s. 22(1) requires that BC Housing must withhold some, but not all, of the information in dispute.

CONCLUSION

[146] For the reasons given above, I make the following orders under s. 58 of FIPPA:

- 1) Subject to item 2 below, I confirm in part BC Housing's decision to refuse to disclose information to the applicant under ss. 13, 14 and 22(1).
- 2) BC Housing is not authorized or required under ss. 13, 14, 17, 21 or 22(1) to refuse to disclose the information highlighted in the copy of the records it receives with this order.

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- 3) BC Housing must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

In accordance with s. 59 of FIPPA, I require BC Housing to give the applicant access to the highlighted information by December 11, 2020.

October 29, 2020

ORIGINAL SIGNED BY

Laylí Antinuk, Adjudicator

OIPC Files: F17-72126 & F19-78847