Order F20-52

# CITY OF VANCOUVER

Celia Francis
Adjudicator

November 16, 2020

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**Summary:** An applicant requested access to correspondence between a named employee of the City of Vancouver (City) and three other individuals. The City disclosed 31 pages of emails, withholding some information under ss. 21(1) (harm to third-party business interests) and 22(1) (unreasonable invasion of third-party privacy). The adjudicator found that s. 21(1) did not apply and ordered the City to disclose this information. The adjudicator also found that s. 22(1) applied to some information and ordered the City to disclose the information to which she found s. 22(1) does not apply. The applicant argued that s. 25(1)(b) requires disclosure of the withheld information but the adjudicator found that it does not.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 21(1)(a)(ii), 21(1)(b), 21(1)(c)(i), (ii) and (iii), 22(1), 22(2), 22(3)(a), 22(4), 25(1)(b).

## INTRODUCTION

[1] This order flows from an applicant's request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the City of Vancouver (City) for correspondence between one named individual (City employee) and three other named individuals.[1] The City gave notice of the request under s. 23 of FIPPA to a third-party business, Brenhill Developments Limited (Brenhill).

[2] Brenhill asked the City to withhold some of the information in the responsive records under s. 21(1) (harm to third-party business interests) and s. 22(1) (unreasonable invasion of third-party personal privacy). The City decided to disclose the records in full. Brenhill then asked that the Office of the Information and Privacy Commissioner (OIPC) review the City's decision not to apply ss. 21(1) and 22(1).

[1] The request covered the period from January 1, 2011 to December 1, 2012.

[3] During mediation of Brenhill's third-party request for review, the City disclosed the responsive records to the applicant, withholding some of the information under ss. 13(1) (advice or recommendations), 15(1) (harm to law enforcement), 17(1) (harm to financial or economic interests of public body), 21(1) and 22(1). The applicant requested a review by the OIPC of the s. 22(1) severing. She also said that s. 25(1)(b) of FIPPA (public interest override) required the City to disclose the severed information.

[4] During mediation by the OIPC, the City disclosed the information it had withheld under ss. 13(1), 15(1) and 17(1). Mediation did not otherwise resolve the two requests for review and they proceeded jointly to inquiry regarding ss. 21(1), 22(1) and 25(1)(b).[2] The OIPC received submissions on ss. 21(1), 22(1) and 25(1)(b) from the City and Brenhill. The applicant made a submission addressing only s. 25(1)(b).

## ISSUES

[5] The issues to be decided in this inquiry are these:

1. Whether ss. 21(1) and 22(1) require the City to withhold information.
2. Whether s. 25(1)(b) requires the City to disclose information.

[6] Section 57 of FIPPA sets out the burden of proof in inquiries. Under s. 57(2), the applicant has the burden regarding s. 22(1). Under s. 57(3)(b), Brenhill has the burden of proof regarding s. 21(1).

[7] Section 57 does not specify a burden regarding s. 25(1)(b). However, past orders have said that, in the absence of a statutory burden of proof regarding a given issue, as a practical matter, all the parties should provide evidence and argument to support their respective positions.[3] I agree.

## DISCUSSION

### *Background*

[8] The records at issue relate to a real estate transaction between Brenhill and the City, known as the Brenhill Land Swap. Order F20-04[4] also dealt with the Brenhill Land Swap and provided the following background information:

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[2] Although the applicant did not initially request a review of the s. 21(1) severing, I gather that this exception was added during mediation. It also appears that the City decided to apply s. 22(1) to some information during this time.
[3] See, for example, Order F07-23, 2007 CanLII 52748 (BC IPC), Order 02-38, 2002 CanLII 42472 (BC IPC), and Order F17-20, 2017 BCIPC 21 (CanLII).
[4] Order F20-04, 2020 BCIPC 04 (CanLII).

> The City describes the Brenhill Land Swap as a strategic land swap agreement where a development company called Brenhill Developments Limited (Brenhill) agreed to construct an affordable housing development at 1099 Richards Street. In exchange for constructing the housing development, the City would then give Brenhill a property at 508 Helmcken Street. Brenhill planned to build at [*sic*] 36 story tower on the Helmcken property.
>
> The City says that the Brenhill Land Swap has been the subject of intense media scrutiny and litigation.[5]

### *Information at issue*

[9] The 31 pages of responsive records consist of emails between the named City of Vancouver employee and three other named individuals. Two of the three other individuals are principals of Brenhill. It is not clear who the third is.

[10] The information at issue, all of which remains withheld, is the following:

1. Information that the City and Brenhill agree should be withheld under s. 22(1), as well as additional information that Brenhill wants withheld under s. 22(1). This information consists of partial email addresses, phone numbers and some narrative information.

2. Information relating to the real estate transaction, which the City decided to disclose but which Brenhill says should be withheld under s. 21(1).

### *Public interest override – s. 25(1)(b)*

[11] Section 25(1)(b) reads as follows:

> 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.

[12] Section 25(1)(b) overrides all of FIPPA's discretionary and mandatory exceptions to disclosure.[6] Consequently, there is a high threshold before it can properly come into play.[7] Previous orders have explained this concept as follows: "... the duty under section 25 only exists in the clearest and most serious of

[5] Order F20-04, at paras. 9-10.
[6] Section 25(2).
[7] See Investigation Report F15-02, 2015 BCIPC 30 (CanLII), pp. 28-29.

situations. A disclosure must be, not just arguably in the public interest, but clearly (i.e., unmistakably) in the public interest ...".[8]

[13] Former Commissioner Denham expressed the view that "clearly means something more than a "possibility" or "likelihood" that disclosure is in the public interest." She added that s. 25(1)(b) "requires disclosure where a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that disclosure is plainly and obviously in the public interest." The Commissioner provided a non-exhaustive list of factors public bodies should consider in determining whether s. 25(1)(b) applies to information. These factors include whether the information would: contribute to educating the public about the matter; contribute in a substantive way to the body of information already available about the matter; or contribute in a meaningful way to holding the public body accountable for its actions or decisions.[9]

Discussion and finding

[14] The City said that s. 25(1)(b) does not apply.[10] Brenhill agrees.[11]

[15] The applicant said that the parties to the Brenhill land swap "could potentially be involved in a pattern of non-transparency with regards to records also in possession of the City of Vancouver ..." She believes that the City has "erroneously withheld a central document in this case" and expressed concern that other documents have been withheld, lost, misplaced or destroyed.[12]

[16] The applicant also quoted from a February 17, 2012 email on the project and asked:

> What records showing 'pro-forma' profit projections exist for this project, and what cost records exist, that were reviewed by city councilors and planners, to inform permitting and demolition and public benefit negotiation decisions, etc., in this development?
>
> Are there any records that would argue against the City's "good faith" in this project? Are the parties erroneously with-holding such records covered erroneously by arguments of solicitor-client privilege and public body discretion, that should be outweighed by the public's interest, in this case?[13]

[8] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 45, italics in original.
[9] Investigation Report F16-02, 2016 BCIPC 36 (CanLII), pp. 26-27.
[10] City's initial submission, paras. 26-27; City's reply submission, para. 4.
[11] Brenhill's reply submission.
[12] Applicant's response submission, page 1.
[13] Applicant's response submission, page 3.

[17] This inquiry is not about whether the City conducted an adequate search for the responsive records or whether records have gone missing.[14] It also does not concern solicitor-client privilege. Rather, this inquiry concerns whether ss. 21 and 22 apply to the withheld information.

[18] The applicant did not explain how disclosure of the withheld information is clearly in the public interest. There is also no indication that any of the factors listed above might apply here. I do not consider that this is a case in which the public interest outweighs and overrides all the exceptions to disclosure under FIPPA. It is not, in my view, clearly in the public interest for the withheld information to be disclosed. For these reasons, I find that s. 25(1)(b) does not apply.

***Unreasonable invasion of third-party personal privacy – s. 22(1)***

[19] The City and Brenhill agree that s. 22(1) applies to some information. However, Brenhill argued that s. 22(1) applies to other information as well.

[20] The approach to applying s. 22(1) of FIPPA has long been established. See, for example, Order F15-03, where the adjudicator said this:

> 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.[15]

*Is it personal information?*

[21] FIPPA defines "personal information" as recorded information about an identifiable individual, other than contact information. "Contact information" is defined in Schedule 1 of FIPPA 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." Past orders have said "[w]hether information will be

[14] If the applicant believes other responsive records exist, she may submit a complaint to the OIPC. She is also free to submit a new request under FIPPA to the City.
[15] Order F15-03, 2015 BCIPC 3 (CanLII), at para. 58.

considered 'contact information' will depend on the context in which the information is sought or disclosed".[16]

Email addresses and phone numbers

[22] **Partial email address and phone number of Brenhill's principals –** The City said that the partial email address of one Brenhill principal was "used for business purposes and should be disclosed". The City also said that the cell phone number of the other principal is "business contact information and should be disclosed."[17] I take this to mean that the City considers both types of information are "contact information" and thus not "personal information".

[23] In Brenhill's view, the email address and cell phone number in question are not "contact information" but rather are the "personal information" of Brenhill's principals.[18] Brenhill said that the information at issue includes the "private email address" of Brenhill's president, who gave the following evidence:

> My personal email address is not part of the contact information which is posted on the website of Brenhill Developments Ltd. To my knowledge, it is not listed in any public directory. I use that email facility to send and receive personal emails and to send and receive emails relating to my work responsibilities with Brenhill. I estimate that the division between personal and business-related emails is about 50/50.[19]

[24] Brenhill added that the information at issue also includes the "private cellular telephone phone number" of Brenhill's vice president, who gave this evidence:

> My personal cellular telephone number is not part of the contact information which is posted on the website of Brenhill Developments Ltd. To my knowledge, that cellular telephone number is not listed in any public directory. I use that cellular telephone to make and receive personal telephone calls and to make and receive calls relating to my work responsibilities with Brenhill. My rough estimate is that the split between work and personal calls is about 50/50. …[20]

[25] The information in question appears in emails between Brenhill's principals and the City employee in which they are principally conducting business related to the real estate transaction. In some places, they also exchange personal greetings or compliments, as well as information about their personal activities, such as holidays. Despite the mix of personal and business matters in the emails, I conclude that the main purpose of the emails was for the

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[16] See, for example, Order F08-03, 2008 CanLII 13321 (BC IPC), at para. 82.
[17] City's index of records.
[18] Brenhill's initial submission, paras. 69, 76-79, 81.
[19] Affidavit of Brenhill's president, para. 9.
[20] Affidavit of Brenhill's vice president, para. 8.

City and Brenhill to conduct business related to the real estate transaction.

[26] It follows that, in my view, Brenhill principals' email address and cell number appear in the emails to enable the individuals in question to be contacted in their business capacity. Indeed, the so-called "personal" cell phone number forms part Brenhill's vice president's official signature block in his emails.

[27] I find, therefore, that the partial email address and the cell phone number at issue are "contact information" and not "personal information". I find that s. 22(1) does not apply to this information.[21]

[28] **Brenhill's business telephone number –** Brenhill said that a business telephone number, which it cited in its submission and which appears in some emails, is "contact information" and may be disclosed.[22] I agree. Section 22(1) does not, therefore, apply to this information.

[29] **Other individuals' email addresses –**The City said that two other email addresses relate to business purposes.[23] This information is the email addresses of two individuals who are, in my view, acting in a business capacity in their emails.[24] I find that these email addresses are "contact information" and not "personal information". Section 22(1) does not, therefore, apply.

Other information

[30] The remaining information at issue consists of the following: comments by Brenhill's principals and the City employee about their personal activities, such as holidays; exchanges of greetings and compliments between Brenhill's principals and the City employee; and a comment about another individual. This information is about identifiable individuals and is thus their "personal information".

[31] I also find that the subject line of an email on page 2 of the records is personal information, as it forms part of the withheld personal information in the email itself.

*Does s. 22(4) apply?*

[32] The City and Brenhill both said that s. 22(4) does not apply.[25] I agree that there is no basis for finding that s. 22(4) applies here. The personal information

[21] This finding applies to the partial "personal" email address withheld on pages 1, 2, 5, 6, 7, 8, 14, 15, 16, 17, 27, 28, 30 and 31 of the records and to the "personal" telephone number withheld on pages 9, 21, 24, 26 and 29.
[22] Brenhill's initial submission, para. 80.
[23] City's index of records.
[24] Pages 3 and 17.
[25] City's initial submission, para. 36. Brenhill's initial submission, para. 83.

at issue does not, for example, relate to any third party's position, functions or remuneration as an officer, employee or member of a public body (s. 22(4)(e)).

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

[33] **Medical information –** The City said that s. 22(3)(a) applies to the withheld personal information on pages 5 and 7 of the records, as it is the medical information of the individuals named on those pages.[26] Section 22(3)(a) reads as follows:

> 22 (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,
>
> …

[34] I agree that the personal information at issue on pages 5 and 7 is the medical information of individuals named in the emails. Its disclosure is, therefore, presumed to be an unreasonable invasion of their privacy.

[35] **Other information –** The remaining personal information is greetings, compliments, references to personal activities and a comment about one individual's characteristics. I find that personal information does not fall into any of the s. 22(3) categories.[27]

*Relevant Circumstances*

[36] The City said that the factors in s. 22(2) do not favour disclosure of the withheld personal information.[28] I agree to some extent. There is no evidence, for example, that disclosure is desirable for subjecting a public body's activities to public scrutiny (s. 22(2)(a)) or is likely to promote public health or safety (s. 22(2)(b)).

[37] However, the sensitivity of the medical information is a circumstance that favours its non-disclosure, in my view. Although the other personal information (holidays, greetings, compliments or personal characteristics of the individuals named in the emails) is not particularly sensitive, it pertains to people's private

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[26] City's initial submission, para. 36.
[27] Past orders have said that, even if personal information does not fall under s. 22(3), this does not mean that, under s. 22(1), the information can be disclosed without unreasonably invading third-party privacy. See, for example, Order F05-08, 2005 CanLII 11959 (BC IPC), and F05-28, 2005 CanLII 30678 (BC IPC).
[28] City's initial submission, para. 37.

lives, a factor which I consider favours non-disclosure.[29]

[38] I have also considered the fact that the applicant did not make a submission on s. 22(1) or explain why she should have access to the personal information in the records.

*Conclusion on s. 22(1)*

[39] I found above that some of the information at issue is "contact information" and that s. 22(1) does not apply to it. I also found that some of the information is personal information and that s. 22(4) does not apply to it.

[40] I found that the s. 22(3)(a) presumption applies to two small amounts of personal information about medical matters and that the sensitivity of that information only bolsters the presumption.

[41] I found that that no s. 22(3) presumptions apply to the rest of the personal information. I found that the personal nature of this information is a circumstance that weighs in favour of non-disclosure.

[42] The applicant has failed to meet her burden of proof. I find, therefore, that s. 22(1) applies to the medical information and to the information on holidays, greetings, compliments and personal characteristics of the individuals named in the emails.

***Harm to third-party business interests – s. 21(1)***

[43] The relevant parts of s. 21(1) of FIPPA in this case 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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> …
>
> (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,

[29] Brenhill provided a submission on s. 22(2) but it concerned the information I found above is "contact information". I did not, therefore, need to consider it.

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

[44] Previous orders and court decisions have established the principles for determining whether s. 21(1) applies.[30] All three parts of the s. 21(1) test must be met in order for the information in dispute to be properly withheld. First, Brenhill must demonstrate that disclosing the information at issue would reveal one or more of types of information listed in s. 21(1)(a). Next, it must demonstrate that the information was supplied, implicitly or explicitly, in confidence. Finally, it must demonstrate that disclosure of the information could reasonably be expected to cause one or more of the harms set out in s. 21(1)(c).

[45] I find below that ss. 21(1)(a) and (b) apply to some information but that Brenhill has not established a reasonable expectation of harm under s. 21(1)(c).

*Type of information – s. 21(1)(a)(ii)*

[46] Brenhill said that the information in dispute is its financial and commercial information.[31] The City said it is Brenhill's financial information.[32]

[47] FIPPA does not define financial and commercial information. However, previous orders have held the following:

- "Commercial information" relates to commerce, or the buying, selling, exchanging or providing of goods and services. The information does not need to be proprietary in nature or have an actual or potential independent market or monetary value.[33]
- "Commercial" and "financial" information of or about third parties includes hourly rates, global contract amounts, breakdowns of these figures, prices, expenses and other fees payable under contract.[34]

[30] See, for example, Order 03-02, 2003 CanLII 49166 (BCIPC), Order 03-15, 2003 CanLII 49185 (BCIPC), and Order 01-39, 2001 CanLII 21593 (BCIPC).
[31] Brenhill's initial submission, paras. 26-32.
[32] City's initial submission, para. 31.
[33] See Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17, and Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 62.
[34] For example, Order F19-11, 2019 BCIPC 13 (CanLII) at para. 14, 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, and Order F16-17, 2016 BCIPC 19 (CanLII) at para. 24.

[48] My findings on this issue are as follows:

- **Page 20** – The withheld information on this page is a table setting out the 2012/2013 budget for Brooklyn (or Brookland) Court, a property at 540 Helmcken Street, which appears to be part of the City's social housing complex at 508 Helmcken Street. I am satisfied that this information is financial. However, I find that this information is not financial information of or about Brenhill. That is because the table appears, from its context, to pre-date the land swap and, thus, relates to the property when the City owned it and leased it to a housing society. Brenhill did not explain how the table consists of financial information of or about it and this is not clear from the record itself. Rather, the information appears to be of or about the society, as a third party. In Order F20-47,[35] the adjudicator also considered budget information of the society leasing 508 Helmcken Street and found that it was financial information of or about the society.

- **Page 24** – The withheld information on this page concerns Brenhill's proposal for meeting height requirements for a condominium tower that Brenhill planned to build at 508 Helmcken Street. I am satisfied that it is commercial and financial information of or about Brenhill.

- **Pages 5, 14, 17, 22, 23 and 29** – The remaining information in dispute relates to the proposed land swap, such as updates on or implications of the deal, as well as suggestions and proposals to or by Brenhill on how to advance or position the land swap with the City. With some exceptions, I am satisfied that it is commercial information of or about Brenhill. The exceptions are on pages 5 and 14 and consist of contact information, message subject lines, dates and times of the emails and a website address.[36] I find that this latter category of information is not financial or commercial information of or about Brenhill.

*Supply in confidence – s. 21(1)(b)*

[49] The next step is to determine whether the information I found is financial or commercial information of or about Brenhill was "supplied, implicitly or explicitly, in confidence." The information must be both "supplied" and supplied "in confidence."[37]

[35] Order F20-47, 2020 BCIPC 56 (CanLII).
[36] No one argued that this category of information fell under s. 22(1).
[37] See, for example, Order F17-14, 2017 BCIPC 15 (CanLII) at paras. 13-21, Order 01-39, 2001 CanLII 21593 (BC IPC) at para. 26, and Order F14-28, 2014 BCIPC 31 (CanLII) at paras. 17-18.

[50] Brenhill argued that the information in dispute was supplied implicitly in confidence.[38] The City said the information was supplied in confidence.[39]

[51] "**Supplied**" – Brenhill said that it "supplied" some of the information and that intermediaries "supplied" other information they obtained from Brenhill.[40] I agree, as this is clear from the emails themselves. I am satisfied that the financial and commercial information of or about Brenhill was "supplied" for the purposes of s. 21(1)(b).

[52] "**In confidence**" – A number of orders have discussed examples of how to determine if third-party information was supplied, explicitly or implicitly, "in confidence" under s. 21(1)(b), for example, Order 01-36:

> 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.
> …
>
> 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:
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> 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.[41]

[38] Brenhill's initial submission, paras. 33-41.
[39] City's initial submission, para. 31.
[40] Brenhill's initial submission, paras. 33-36, 41.
[41] Order 01-36, 2001 CanLII 21590 (BC IPC) at paras. 24-26.

[53] Brenhill argued that the information in dispute was submitted expressly or implicitly "in confidence", with the expectation that the City would not disclose it to others.[42] Brenhill went on to say this:

> It is implicit that the information was provided in confidence. All of the circumstances demonstrate that there was a reasonable expectation of confidentiality. The question of whether the intention to keep information confidential is shared by both parties is relevant, but not necessarily determinative.[43]

[54] Brenhill did not explain what "all of the circumstances" were nor how they demonstrate that the information in dispute was supplied "in confidence". There are also no markers of confidentiality on the emails themselves. Brenhill's affidavit evidence also did not address this issue.

[55] However, the emails concern business dealings between Brenhill and the City, involving several complicated steps over time. I accept that, at the time, the parties would have wanted to keep their discussions confidential. While Brenhill's submission on this issue was scanty, I accept from the contents of the emails that the information in dispute was supplied implicitly "in confidence". Therefore, I find that the information in dispute was supplied implicitly "in confidence" for the purposes of s. 21(1)(b).

*Reasonable expectation of harm – s. 21(1)(c)*

[56] I found above that s. 21(1)(a) and (b) apply to some of the information in dispute. I will now consider whether disclosure of that information could reasonably be expected to result in harm under s. 21(1)(c). For completeness, I have also considered the information on pages 5, 14 and 20 that I found was not financial or commercial information of or about Brenhill.

[57] Brenhill argued that ss. 21(1)(c)(i), (ii) and (iii) all apply to the information in dispute, in an intertwined way.[44] The City said that it takes no position on the withheld information on pages 20 and 24 but that s. 21(1)(c) does not apply to the rest of the information in dispute.[45]

Standard of proof for harms-based exceptions

[58] Numerous orders have set out the standard of proof for showing that disclosure could reasonably be expected to cause harm.[46] The Supreme Court of

[42] Brenhill's initial submission, para. 38.
[43] Brenhill's initial submission, para. 39.
[44] Brenhill's initial submission, paras. 47, 58.
[45] City's initial submission, para. 31.
[46] For example, Order 01-36, 2001 CanLII 21590 (BCIPC) at paras. 38-39.

Canada confirmed that the applicable standard of proof for harms-based exceptions is as follows:

> [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".[47]

[59] Moreover, in *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*,[48] Bracken J. confirmed that it is the release of the information itself that must give rise to a reasonable expectation of harm.

[60] I have applied these principles in considering the arguments on harm under s. 21(1)(c).

Discussion and findings

[61] Brenhill's overarching argument on s. 21(1)(c) was that disclosure could result in it being defamed and libelled on the internet. Brenhill expressed concern that it did not know the applicant's identity and said:

> If the Applicant is an individual or organization which has in the past defamed Brenhill on the Internet, that would significantly enhance Brenhill's concern that new distorted and malicious attacks on Brenhill would follow disclosure of the information to which Brenhill objects.[49]

[62] Brenhill added that, in 2017, it had been "the subject of a campaign of deliberate vilification employing outright falsehoods, distortion, manipulation of data, and words taken out of context." It said that this "campaign … caused, and

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[47] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* [*Community Safety*], 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.
[48] *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875 at para. 43.
[49] Brenhill's initial submission, para. 53.

had the further potential to cause, significant injury and substantial loss, damage and expense to Brenhill."[50]

[63] Brenhill did not otherwise describe the "campaign of deliberate vilification" or explain how it arose. Brenhill also did not explain how this supposed "campaign" had caused, or could cause, the cited harms to Brenhill.

[64] **Harm to competitive position – s. 21(1)(c)(i) –** In Brenhill's view, the disclosure of the information in dispute here

> … 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.[51]

[65] Brenhill did not explain how, or why, disclosure of the information in dispute in this case could reasonably be expected to result in "defamatory publications" or the other harms it fears could result. The information in dispute dates back at least eight years and concerns a transaction long since concluded. It is not clear, and Brenhill did not explain, how its disclosure now could reasonably be expected to harm Brenhill's competitive position at all, let alone significantly.

[66] **No longer supplied – s. 21(1)(c)(ii)** – Although Brenhill referred to this provision, it provided no separate argument or evidence on it. It is not clear from the records themselves how this provision might apply.

[67] **Undue financial loss – s. 21(1)(c)(iii) –** 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." [52]

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[50] Brenhill's initial submission, para. 50.
[51] Brenhill's initial submission, para. 49. Brenhill also referred to s. 21(1)(c)(i) at paras. 58-62 of its initial submission.
[52] 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.

[68] Brenhill had this to say about its concern that disclosure could cause it "undue financial loss":

> It is respectfully submitted that serious defamatory injury to reputation would constitute undue financial loss to Brenhill. It is a reasonable inference that Brenhill will probably be subjected again to the publication of defamatory falsehoods on the Internet, by individuals or organizations in blogs, on social media including Twitter, Facebook, Reddit and Instagram, on websites, and in articles and broadcasts in the news media.[53]

[69] Brenhill did not explain how disclosure could reasonably be expected to result in "defamatory injury" to its reputation, nor how this could in turn cause it "undue financial loss". Brenhill also did not say if, or how, the dated information in dispute is competitively valuable nor how a competitor (who is unspecified) could use the information to Brenhill's detriment and to the competitor's own financial advantage. This is also not clear from the records.

*Conclusion on s. 21(1)(c)*

[70] Brenhill's submissions on harm amount to little more than assertions and do not persuade me that harm under s. 21(1)(c) could reasonably be expected to result from disclosure. It is not clear, and Brenhill did not explain, how disclosure of the information at issue, which is now many years old, concerns a long-completed transaction and is similar in character to the disclosed information, could reasonably be expected to cause the harm Brenhill fears. The adjudicator in Order F20-47[54] rejected similar arguments from Brenhill on much the same grounds.

[71] I also note that some of the withheld information appears in the applicant's response submission. There was no indication of how the applicant obtained this information.

[72] Moreover, other withheld information was disclosed elsewhere in the records, for example:

- some of the budget information on page 20;
- some of the withheld information on page 14; and
- information withheld in the second sentence on page 5.

[73] Brenhill has not, in my view, provided objective evidence that is well beyond or considerably above a mere possibility of harm, which is necessary to establish a reasonable expectation of harm under s. 21(1)(c).[55] It has not

[53] Brenhill's initial submission, para. 52.
[54] Order F20-47, 2020 BCIPC 56 (CanLII).
[55] *Community Safety*, at para. 54.

demonstrated a clear and direct connection between disclosing the information in dispute and a reasonable expectation of the alleged harms. Therefore, I find that Brenhill has not met its burden of proof and that s. 21(1)(c) does not apply to the information in dispute.

## CONCLUSION

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

1. Subject to item 2 below, under s, 58(2)(a) of FIPPA, I require the City to disclose to the applicant the information it withheld under ss. 21(1) and 22(1).
2. Under s. 58(2)(c) of FIPPA, I require the City to refuse the applicant access to some of the information under s. 22(1). For clarity, I have highlighted this information in yellow on the copies of the records attached to the City's copy of this order.

[75] Under s. 59 of FIPPA, I require the City to give the applicant access to the information specified in item 1 in the previous paragraph, by December 30, 2020. The City must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

November 16, 2020

**ORIGINAL SIGNED BY**

Celia Francis, Adjudicator

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